Scottish Law Commission

promoting law reform

(SCOT LAW COM No. 269)

Report on the Mental Element in Homicide

report

Scottish Law Commission
promoting law reform

Report on the Mental Element in Homicide

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

September 2025

SCOT LAW COM No. 269
SG/2025/168

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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ISBN: 978-1-0686139-6-8

Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA.

SCOTTISH LAW COMMISSION

Item No 4 of our Eleventh Programme of Law Reform

Report on the Mental Element in Homicide

To: Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs

We have the honour to submit to the Scottish Ministers our Report on the Mental Element in Homicide

(Signed) ANN PATON, *Chair*
GILLIAN BLACK
FRANKIE McCARTHY
ANN STEWART

Rachel Rayner, *Chief Executive*
25 September 2025

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Abbreviations

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E Clive, P Ferguson, C Gane, and A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (published under the auspices of the Scottish Law Commission, 2003)

Report on *Insanity and Diminished Responsibility*, Scot Law Com No 195 (2004)

Law Commission of England and Wales Publications

Report on *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006)

Glossary

Accused: A person charged with committing a crime or offence. (See also: '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: '*mens rea*').

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

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

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

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".

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.

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').

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 a person who reports having been 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 whereby the accused is found guilty of criminal wrongdoing. (See also: 'acquittal'; 'verdict').

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 (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').

Defence: A legally recognised condition or circumstance which negates or reduces criminal liability on the part of an accused; or the lawyer(s) representing the interests of the accused in a criminal case.

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

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").

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

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.

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

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 before a jury.

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: 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 procedure').

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

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

Legislative competence: The parameters within which a parliament may lawfully enact statutes. The UK 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. In terms of that Act, all matters are within the Scottish Parliament's competence except (i) "reserved matters" set out in Schedule 5, and (ii) legislation incompatible with Convention rights or with European Community law.

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 UK 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*').

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

Necessity: A defence to a criminal charge whereby 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').

***Obiter dictum*:** A Latin phrase meaning "that which is said in passing". Used in the legal context to describe a remark in a judgment that is not essential to the decision and is therefore not legally binding.

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.

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").

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").

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 UK 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.

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 UK 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: '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).

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 common law definition of the *mens rea* of murder. Usually understood to be a state of mind whereby 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:

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E Keane and F Davidson (eds), *Raitt on Evidence: Principles, Policy and Practice* (3rd edn, W Green 2018);

E Clive, P Ferguson, C Gane, and A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (2003)

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R v Hyam [1975] AC 55

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Brown and Morley [1968] SASR 467 *(South Australia)*

McConnell [1977] 1 NSWLR (CCA) 714 *(New South Wales, Australia)*

R v Japaljarri (2002) 134 A Crim R 261 *(Victoria, Australia)*

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Mental Health (Care and Treatment) (Scotland) Act 2003 asp 13
Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 asp 9
Sexual Offences (Scotland) Act 2009 asp 9
United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 asp 1

Acts of the UK Parliament

Coroners and Justice Act 2009 c. 25
Criminal Justice and Immigration Act 2008 c. 4
Criminal Procedure (Scotland) Act 1995 c. 46
Domestic Abuse Act 2021 c. 17
Scotland Act 1998 c. 46

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Crimes Act 1961 *(New Zealand)*
Criminal Code Act 1899 *(Queensland, Australia)*
Evidence Act 1906 *(Western Australia)*
Family Violence Legislation Reform Act 2020 *(Western Australia)*

Conventions

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 2011
European Convention on Human Rights, 1950

United Nations Convention on the Rights of the Child, 1989

Bills

Assisted Dying for Terminally Ill Adults (Scotland) Bill

Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill

Chapter 1 Introduction

Introduction

1.1 This Report recommends a number of important reforms to the Scots law of homicide.

1.2 Homicide has been defined as "the act which, either directly, or by natural consequence, takes away the life of another".[1] 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, ie the physical element of the crime of homicide. In general, both *actus reus* and *mens rea* are required before a person can be found liable for an offence.

1.3 The Scots law of homicide has a bipartite structure, comprising two offences, namely "murder" and the lesser offence of "culpable homicide". Whilst the *actus reus* for both offences is the same (ie an act causing death) the *mens rea* for each offence is different. Thus the same actions might lead to a finding of either murder or culpable homicide depending on the state of mind of the accused at the time. The mental element carries significant consequences for both the accused and society's attitude to the offence. Murder is regarded as the most heinous crime, which attracts a mandatory sentence of life imprisonment. 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. Sentences for culpable homicide can range from an order for lifelong restriction to a simple admonition.

1.4 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. 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.

Background to the Report

1.5 The Scots law of homicide is largely common law, developed and refined by court decisions over centuries on the basis of institutional works.[2] Previous work by the Scottish Law Commission on the law of homicide in Scotland can be found in:

- Scot Law Com No 80: *The Mental Element in Crime* (1983); and
- Scot Law Com Consultative Memorandum No 61: *Attempted Homicide* (1984).

Further, in 2003, a Draft Criminal Code for Scotland was compiled by a group of Scottish academic lawyers[3] under the auspices of the Scottish Law Commission. In that work, the

[1] Alison, *Principles*, I, 1.
[2] Such as Alison, *Practice* and Hume, *Commentaries.*
[3] Professor Eric Clive, Professor Pamela Ferguson, Professor Christopher Gane, and Professor Alexander McCall Smith.

authors recommended developing the criminal law by statute rather than by case-to-case decisions of the courts.[4]

1.6 In the latter part of the 20th century, there was little criticism of the bipartite structure of the Scots law of homicide. On the contrary, judges and jurists commended it. In 1983, the Scottish Law Commission in their Report[5] 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",[6] in which he outlined certain problems that were troubling the courts in England and Wales. He commended the structure of Scots homicide law as offering a solution to those problems.[7]

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),[8] *HM Advocate v Purcell* (2007),[9] and *Petto v HM Advocate* (2011).[10] In the case of *Petto*, Lord Gill stated that, in his view, "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."[11]

1.8 In light of these cases, proposals that we should examine Scots homicide law attracted support in the responses to our consultations on the Seventh, Eighth and Tenth Programmes of Law Reform.[12] A homicide law project was included in the Tenth Programme and was approved by the Scottish Government. Work on the project began in 2018 and continued into the current Eleventh Programme.[13]

1.9 In May 2021 we published a consultative Discussion Paper,[14] outlining the existing law, and identifying aspects which might require modernisation, simplification, or clarification. We are grateful to all those who took time to respond to the consultation.

1.10 In 2022 we were further assisted by limited public opinion research carried out by BritainThinks in relation to key issues raised in the Discussion Paper. Participants were asked about their knowledge of and views on current Scots homicide law, and specifically in relation

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[4] See the Draft Criminal Code for Scotland (2003) at p 7, including the observation that "Effective modernisation of the law requires legislation …". See too Pamela R Ferguson, "Reforming the Scottish Law of Homicide: Lessons from the Draft Criminal Code for Scotland" [2023] Crim LR 173.
[5] Scottish Law Commission, *The Mental Element in Crime,* Scot Law Com No 80 (1983).
[6] The Lionel Cohen Lecture, delivered on 19 May 1987 and published in (1988) 104 LQR 30.
[7] 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).
[8] 2001 SCCR 583.
[9] 2007 SCCR 520.
[10] 2011 SCCR 519.
[11] 2011 SCCR 519, at para [22].
[12] Scot Law Com No 198 (2005), Scot Law Com No 220 (2010) and Scot Law Com No 250 (2018), available at: https://www.scotlawcom.gov.uk/law-reform/previous-programmes-of-law-reform/.
[13] Scot Law Com No 264 (2024), available at: https://www.scotlawcom.gov.uk/files/1816/8552/2957/Eleventh_Programme_of_Law_Reform_2023_-_2027.pdf.
[14] Discussion Paper on the Mental Element in Homicide, Scot Law Com No 172 (2021).

to the homicide offences and defences. This was done by presenting specific scenarios and asking (i) whether the offence should be murder, culpable homicide, or neither, or (ii) whether the accused should be able to plead a defence, and, if so, whether this should be a complete or partial defence. Six two-hour long focus groups each comprising five or six participants were conducted online via Zoom to discuss the issues put to them. In addition, four one-hour long telephone interviews were conducted with individuals who were digitally disengaged. Using these two methods a sample of 36 individuals was consulted as part of the research and those individuals were recruited to represent a broad cross-section of the Scottish public in terms of age, sex and location. As such, to set the references in this Report to "public opinion research by BritainThinks" in context, the sample size for the research was relatively small, although it was broadly representative of the Scottish population. The Report produced by BritainThinks, which sets out in more detail the methodology and make up of the participant sample, can be found on the Commission's website.[15] We are grateful to the Scottish Government Justice Department for funding this research, and to BritainThinks for their work.

1.11 Generally, we have found Scots homicide law to be working well in practice. Nevertheless some areas require clarification or modernisation. This Report sets out our findings and recommendations.

Scope of the Report

1.12 The scope of our project and consequently this Report was broadly set out in our Tenth Programme of Law Reform where it is stated that we will 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."[16]

1.13 There are limits to the scope of the project. Certain subjects are not included, namely abortion and related matters; infanticide and homicide of an unborn child; the age of criminal responsibility; assisted suicide and assisted dying; causation; concert or "art and part"; corporate homicide; inchoate liability; road traffic offences; and sentencing. The reasons for their exclusion are set out in detail in our Discussion Paper.[17]

1.14 Following the passage on "Scope" in our Discussion Paper, we highlighted at paragraph 1.32 that, depending on the responses to the Paper, we may undertake further more detailed research into particular areas as part of the project. Against that background, at paragraph 1.33 of the Discussion Paper we asked consultees 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?"

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[15] The BritainThinks Report is available on the homicide project page, available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[16] Scot Law Com No 250 (2018), paras 2.20 and 2.22.
[17] The Discussion Paper, paras 1.19 to 1.30.

1.15 There were relatively few responses to these questions[18] which might suggest that our initial assessment of scope for the project was realistic and manageable and that the exclusions from scope that we set out in the Discussion Paper are well founded.

1.16 Of the aspects suggested by consultees for inclusion in the project, the topic of assisted dying/mercy killing was mentioned by five respondents, concert or art and part liability for murder was mentioned by four and sentencing for murder and the mandatory life sentence was mentioned by two. We had initially indicated that each of those aspects would be excluded from the scope of the project in the Discussion Paper.

1.17 After carefully re-considering these suggestions we were still not minded to include them as part of the project for the same reasons we set out in the Discussion Paper.[19]

Structure of the Report

1.18 In this Report, we adopt the following structure. Chapter 2 discusses the question of statutory reform of a common law system. Chapter 3 focuses on the current bipartite structure of Scots homicide law, with two offences, namely murder and culpable homicide. Chapter 4 discusses the language and terminology of Scots homicide law compared with other English-speaking jurisdictions. Chapter 5 concerns the crime of murder and a doctrine known as "constructive malice". Chapter 6 is devoted to culpable homicide. Chapter 7 introduces defences to a homicide charge. Chapters 8 and 9 focus on self-defence. Chapter 10 discusses the defences of necessity and coercion. Chapters 11 and 12 focus on the partial defences of provocation and diminished responsibility. Chapter 13 deals with the effect of domestic abuse in the context of homicide. Chapter 14 lists our recommendations. Appendix A sets out our draft Homicide (Scotland) Bill. Appendix B lists those who responded to the Discussion Paper. Appendix C lists the members of our Advisory Group.

Legislative competence

1.19 In terms of section 29 of the Scotland Act 1998, a provision is outside the competence of the Scottish Parliament if, among other things, it relates to reserved matters as defined in Schedule 5 to that Act.[20] The recommendations in this Report relate to the law of homicide in Scotland. With the exception of certain "reserved" criminal offences, which are excluded from the scope of this project,[21] the Scots law of homicide is not a reserved matter. We do not consider that an order under section 104 of the Scotland Act 1998 is required.

1.20 A further aspect of the legislative competence of the Scottish Parliament is that each provision in an Act of the Scottish Parliament must be compatible with the rights set out in the European Convention on Human Rights.[22] We have considered Article 7 of the Convention (no punishment without law). Paragraph 1 of Article 7 states that:

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[18] 15 respondents answered Question 1 in total and there was an overlap with answers to Question 2.
[19] See paras 1.24 for assisted dying, para 1.26 for concert/art and part and para 1.30 for sentencing. Also, since the Discussion Paper was published in 2021, the Assisted Dying for Terminally Ill Adults (Scotland) Bill is currently under consideration in the Scottish Parliament.
[20] S 29(2)(b) of the 1998 Act.
[21] For example, the offences of causing death by dangerous or careless driving under UK Road Traffic legislation is reserved by s 29(2)(b), Schedule 5, E1 (Road Transport) of the 1998 Act.
[22] S 29(2)(d) of the 1998 Act.

> "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."

1.21 In our view, the recommendations in this Report and the draft Homicide (Scotland) Bill[23] would be compatible with the Convention rights contained in Article 7 of the ECHR.

1.22 In all the circumstances, we are satisfied that the recommendations in this Report and the draft Bill are within the legislative competence of the Scottish Parliament.

1.23 Lastly, in our view, the provisions enacting the recommendations would be compatible with the requirements of the United Nations Convention on the Rights of the Child.[24]

Commencement and transitional provisions

1.24 If the Scottish Government decides to implement any or all of the recommendations contained in this Report by introducing a draft Bill, appropriate commencement and transitional provisions will be required.

1.25 Section 11 of the draft Homicide (Scotland) Bill[25] provides that commencement will take place largely in accordance with dates appointed in regulations made by the Scottish Ministers.[26] Those regulations may include transitional, transitory or saving provision if necessary. There is also a separate regulation-making power at section 10 of the draft Bill for Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill.

Business and Regulatory Impact Assessment

1.26 The Scottish Government requires a Business and Regulatory Impact Assessment ("BRIA") to accompany any proposed legislation, to assess potential costs, benefits and risks associated with the new provisions. The Commission has prepared a BRIA to outline the potential implications of the proposed Homicide (Scotland) Bill, which is available on our website.[27] We are grateful to those who provided information that assisted in its preparation. Its principal conclusions are:

- Statutory redefinition of the common law may result in debate about the proper construction of the new statutory provisions. There may therefore be an increased number of appeals in the High Court of Justiciary, with a concomitant increase in the costs and resources required to service the appeals. However, the new statutory provisions will generally improve the efficiency of criminal litigation, resulting in a reduction (or balancing) of overall litigation costs.

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[23] See Appendix A.
[24] As defined in section 1(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.
[25] See Appendix A for the draft Bill.
[26] Subject to certain limited exceptions – sections 10 to 12, which are to come into force on the day after Royal Assent.
[27] See Homicide project page, available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

- The statutory redefinition of murder is considered unlikely to lead to any significant increase in the number of convictions for murder.
- The statutory definition of culpable homicide does not change the law. No changes or additional costs are expected.
- The new definition of the partial defence of provocation narrows the grounds on which a person can establish the defence. This may result in a conviction for murder in a case which, under the existing law, the jury would have been entitled to bring in a verdict of culpable homicide. To that extent, there may be a minor increase in the number of those serving a life sentence, with a consequential impact on prison costs and resources.

Acknowledgments

1.27 Responses to the Discussion Paper came from practitioners, representative bodies of practitioners and the judiciary, academics, support groups, and members of the public. We are grateful to the individuals and organisations who responded to the Discussion Paper. A list of respondents is provided in Appendix B.[28]

1.28 We established an Advisory Group in 2018, at the beginning of the project. The Group met during the project, both in person and virtually. The advice and assistance of the Advisory Group has been invaluable, and we are grateful to the members for their contributions. Members of the Advisory Group are listed in Appendix C.

1.29 We wish to pay particular tribute to one member of the Advisory Group, Professor Gerry Maher KC, who passed away on 28 January 2023. Professor Maher provided invaluable assistance to the project. He was a full-time Commissioner at the Scottish Law Commission from 2000 to September 2008, where he was the lead Commissioner on many important law reform projects, including those on diligence, age of criminal responsibility, insanity and diminished responsibility, and rape and other sexual offences. He was an expert in the field of effective law reform. His knowledge of the law of homicide was encyclopaedic. He also brought humour and common sense to discussions concerning difficult and delicate topics. He is much missed.

[28] For the purposes of this Report, Professors James Chalmers and Fiona Leverick submitted a joint response and are therefore treated as one respondent. Lord Bracadale and the Sheriffs' Association submitted individual responses that endorsed the views of the Senators of the College of Justice. They are treated as three separate respondents.

Chapter 2 Statutory reform to the Scots law of homicide

Introduction

2.1 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. In the Discussion Paper, we set out a number of potential advantages and disadvantages of legislating to reform Scots homicide law and asked consultees for their views. The consequences of statutory reform are considered fully in this Chapter.

The current law

2.2 The law of homicide in Scotland is almost entirely common law,[1] developed and refined over centuries on the basis of institutional works[2] and case law. The Draft Criminal Code for Scotland,[3] 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. Indeed, ongoing support for the Draft Code as a reform model is evident in a number of the consultation responses to the Discussion Paper.

2.3 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*,[4] 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."

2.4 *Petto* was the last in a line of cases from the early 21st century – also including *Drury v HM Advocate*[5] and *HM Advocate v Purcell*[6] – which brought into sharp focus certain difficulties in Scots homicide law. Following these cases and the comments of the Lord Justice Clerk, the Scottish Law Commission undertook to conduct a review of

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[1] With the exception of the complete defence of mental disorder (section 51A of the Criminal Procedure (Scotland) Act 1995) and the partial defence of diminished responsibility (section 51B of the Criminal Procedure (Scotland) Act 1995). Jury directions are primarily a matter for the judiciary, although legislation does from time to time prescribe that certain directions will be mandatory (see eg Criminal Procedure (Scotland) Act 1995, ss 288DA and 288DB).
[2] Such as Alison and Hume.
[3] E Clive, P Ferguson, C Gane and A McCall Smith, "Draft Criminal Code for Scotland" (2003).
[4] 2011 SCCR 519.
[5] 2001 SCCR 583.
[6] 2007 SCCR 520.

the law governing the mental element in homicide, particularly (i) the boundary between murder and culpable homicide, (ii) the mental element in each offence, and (iii) the operation of partial defences to homicide. Our key findings and recommendations are covered in the following chapters of this Report.

2.5 To effectively address difficulties in the existing law we consider that the common law homicide offences and the partial defence of provocation should be placed on a statutory footing.[7] Our proposal that these select aspects of the law be codified prompts the question of whether Scots homicide law would in fact benefit from statutory reform and, if so, how wide the net should be cast. We appreciate the risk that a piecemeal approach to statutory reform could lead to an incoherent body of law. If the aim of our recommendations is to improve the law of homicide, then the chosen method of reform, and its ability to create a coherent body of law, is of the utmost importance.

Should Scots homicide law be placed on a statutory footing?

Background

2.6 In Chapter 13 of the Discussion Paper, we signposted readers to passages setting out both the advantages and disadvantages of statutory reform.[8] Potential advantages include increasing legal certainty and reducing "bad flexibility" (ie where there are unnoticed conflicts in the common law or where there are insufficiently precise definitions of crimes in the common law).[9] Importantly, replacing the common law offences with statutory offences also provides an opportunity to define a clear dividing line between murder and culpable homicide.[10] Potential disadvantages include reduced flexibility in the law to respond to different situations,[11] difficult and sensitive issues when defining offences,[12] and more complex directions for juries.[13] It is necessary to weigh up the possible consequences of statutory reform to assess the advisability and feasibility of any recommendation.

2.7 At paragraph 13.2 of the Discussion Paper we therefore asked consultees three questions in relation to the overarching issue of statutory reform:

> "43. Would Scots law relating to the mental element in homicide be improved by placing it (or parts of it) on a statutory footing?

[7] Murder is covered in Chapter 5 and culpable homicide in Chapter 6. The partial defence of provocation is covered in Chapter 11. We also recommend that diminished responsibility (Chapter 12) be included in the draft Homicide (Scotland) Bill, reproducing and replacing the partial defence as currently set out in s 51B of the Criminal Procedure (Scotland) Act 1995.
[8] Potential advantages are referred to in ch 1 at para 1.36, and in ch 5 at para 5.17 *et seq*. Potential disadvantages are referred to in ch 1 at para 1.37, and in chs 2, 3, 4 and 5.
[9] See E Clive, "Codification of the Criminal Law" in Chalmers and Leverick (eds), *Essays in Criminal Law*, pp 57 – 63.
[10] See para 5.17 of the Discussion Paper and chs 5 and 6 of the Report.
[11] 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.
[12] See para 5.26 of the Discussion Paper.
[13] See para 4.61 *et seq* of the Discussion Paper.

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?"

Responses to the Discussion Paper

2.8 In relation to Question 43, there were 10 responses in total. The vast majority agreed that Scots homicide law would be improved by placing it (or parts of it) on a statutory footing. Only two consultees were against statutory reform; the reasons they cited in response to Question 43 provided either specific or indirect answers to Question 45.

2.9 Question 44 asked if the entirety of Scots law relating to the mental element in homicide should be placed on a statutory footing, or only parts of it; and, if parts only, which parts should be selected. There were six responses in total. Four consultees were of the view that the whole of Scots homicide law should be placed on a statutory footing. The remaining two consultees felt that only parts of the law should be introduced into statute.

Discussion

2.10 At the outset, it is worth noting some main themes from our consultation on statutory reform of Scots law relating to the mental element in homicide. The majority of consultees (ie eight out of 10) were in favour of placing either the whole, or parts, of the law on a statutory footing. However, only a relatively small number of consultees actually answered the question at Question 43 (ie only 10 out of the total number of 34 respondents to the consultation overall). The low response rate to Questions 43 to 45 may be attributed to the fact that consultees considered they had already offered views on statutory reform elsewhere in the consultation, with the Senators of the College of Justice noting that they "do not consider that we can usefully add to what we have set out by way of answer to the preceding questions." It could also reflect a general lack of appetite for statutory reform.

2.11 Those consultees who were against statutory reform voiced no strong objections, but were simply "not persuaded" that placing the law on a statutory footing would make any real improvement. The Law Society of Scotland pointed out that "The Working Group have carried out an impressive amount of research into the law in many other jurisdictions and have not identified a definition of the mental element that works more effectively than the law in Scotland" and so "Though there are shortcomings in the common law, we do not consider that the common law of homicide in Scotland is in need of root and branch reform."

2.12 The majority supported statutory reform of Scots law relating to the mental element in homicide for the primary reason that it would make the law more accessible and understandable. Dr Andrew Cornford commented that "besides the substantive improvements that reform might bring, I agree that placing the law on a statutory

footing would improve its accessibility" and he sees "no reason why, in principle, the whole of such a central area of the criminal law should not be found in statute." Similarly, Professors James Chalmers and Fiona Leverick stated "Our view is that placing homicide law on a statutory footing would be beneficial in terms of it being more accessible to the public." We find this argument to be persuasive. It would be impossible to suggest that an area developed by means of the common law is as accessible as that which is placed on a statutory footing – it is undoubtedly easier for lay people to consult a single statute than it would be for them to find, navigate, read and interpret a series of court judgements. In this regard, we agree that placing the law on a statutory footing would greatly improve the accessibility of the law to the general public.

2.13 Others referred to the limited function of the courts when it comes to achieving a comprehensive review of Scots homicide law. Professor Gerry Maher KC noted that "There is little scope for developing this important issue by court decisions and the entire topic should be dealt with by statutory reform." Professor Antony Duff also commented that it is desirable to have "an authoritative, legislative articulation of the main elements of this central offence (which will still leave plenty of work for courts, and flexibility in applying a properly crafted statute)." Their responses echoed the remarks made by Lord Justice Clerk Gill (see paragraph 2.3) that helped to bring about our review of Scots homicide law.

2.14 Victim Support Scotland suggested that statutory reform would ensure Scots homicide law keeps pace with modern society. First, placing the law on a statutory footing "would update Scots law in recognition of the complexity of some crimes committed." They also stated that "there are many cases where a clearer and more defined legal footing would have had the potential to produce a fairer outcome. For example, in domestic abuse and rape cases where there has been a direct threat to life, being able to understand the state of mind of the person(s) involved as well as the wider context and background (eg long-term sustained abuse), can help the justice system to make informed decisions about appropriate sentencing." Finally, they noted that "Society is gradually moving on from binary definitions of what we mean by 'perpetrator' and 'victim' to give a more accurate representation of a complex picture. Any changes to Scots law need to represent this." We agree that a modern homicide statute would better ensure that the law is fit for 21st century Scotland. Our review has given careful consideration to topics, such as those highlighted by Victim Support Scotland, that reflect a more contemporary and nuanced understanding of homicide offending (eg Chapter 13 on Domestic Abuse[14]).

2.15 The Discussion Paper also raised arguments relating to the possible disadvantages of statutory reform, none of which were adopted by consultees and all of which were directly rejected by Dr Andrew Cornford. It is worth quoting his response in full:

> "The DP suggests a number of possible disadvantages of placing the law on a statutory footing [1.37]. I do not find any of these arguments convincing. Most of them are not disadvantages inherent to statutory criminal law, but rather

[14] However, for the reasons outlined in the Report, we are not minded to make any recommendations in this regard at the present time.

potential disadvantages of certain substantive reforms (eg more complex directions to juries, difficulties defining offences, or introducing new forms of strict liability). Even reduced flexibility and discretion will be contingent on how any statutory offences are defined: we could always write our preferred flexible standards into statute. Perhaps the thought is that the current law is so uncertain that even the act of putting it into statutory language would reduce its flexibility. If so, however, then it is difficult to see this as anything other than flexibility of the "bad" kind [1.36]."

2.16 Of the handful of consultees who answered Question 43, fewer still went on to respond to Question 44 concerning whether all or only parts of Scots law relating to the mental element of homicide should be placed on a statutory footing. The small majority supported statutory reform for the whole of Scots homicide law, for the same reasons outlined in paragraph 2.12 above. Two consultees were of the view that only parts of the law should be introduced into statute. Nicholas Burgess noted that "Only those parts of the law which are in need of reform ought to be placed on a statutory footing: "if it ain't broke, don't fix it"." Specifically, Professor Pamela Ferguson considered that "The crimes of murder and culpable homicide and the partial defence of provocation should all be redefined by statute".

2.17 One consultee, Professor Eric Clive, provided an especially detailed answer to Question 44 that spanned a variety of the topics discussed, and questions raised in, the Discussion Paper. He suggested that "To deal with only parts [of the Scots law of homicide] could result in a very incoherent law. A more coherent result would be achieved by restating the essentials of murder and culpable homicide and incorporating reforms of the mental elements in that restatement." The restatement could, he proposed, be drafted along similar lines to the Draft Criminal Code for Scotland in the form of a short Murder and Culpable Homicide (Scotland) Bill. He noted, however, that such a reform should be limited to (a) the essential elements of the crimes of murder and culpable homicide and (b) the partial defences which can reduce murder to culpable homicide (excluding complete defences, eg self-defence). These are indeed the particular aspects of the law which we have identified as demonstrating a clear and present need for reform. They are included in our proposed draft Homicide (Scotland) Bill in Appendix A.

Conclusion

2.18 It is clear that legislation will be required to implement our recommendations, and we see the merit in a number of the arguments presented in favour of statutory reform of either all, or some, of the Scots law of the mental element in homicide, especially in regard to increased accessibility. We also take seriously the risk of creating an incoherent law of homicide through the adoption of a piecemeal approach to implementing our recommended reforms. However, the arguments presented are tempered by the small number of responses to the questions posed in Chapter 13 of the Discussion Paper. We consider that the choice of over two thirds of consultees to refrain from responding to Questions 43 to 45 suggests an overall lack of appetite for *complete* statutory reform of Scots homicide law. Our conclusion is further supported by the absence of comment from consultees who otherwise responded to the consultation in full, such as the Faculty of Advocates and the Senators of the College of Justice.

2.19 We also recognise, in light of the proposals recommended in the Report, that there have been insufficient consultation responses highlighting significant inefficacy, or failures, in the Scots law of homicide which would necessitate the type of exercise in codification that would be required if the entire body of law were to be placed on a statutory footing. In this regard, we find ourselves convinced by the Law Society of Scotland's response to the consultation quoted in paragraph 2.11 above, in which they recognise that although there may be shortcomings in Scots homicide law, these do not necessitate a root and branch reform of the law. Instead, we consider that a short statute containing the select aspects of the law for which we are recommending reforms would be preferable to the codification of the entire Scots law of homicide.

2.20 We therefore recommend that:

1. Select aspects of the Scots law of homicide should be placed on a statutory footing by way of a short Homicide (Scotland) Bill. Those aspects should be restricted to implementing the reforms recommended in this Report.

The Draft Criminal Code for Scotland

2.21 Finally, in considering the issues around statutory reform, we have been indebted to the authors of the Draft Criminal Code for Scotland.[15] The Code, published in 2003, contains clear statements of principle, relevant authorities, suggested reforms, and examples of statutory wording. At paragraph 4.73 of the Discussion Paper we asked consultees 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?"

2.22 The eight consultees who answered Question 9 were evenly balanced, with four in favour (subject to certain qualifications) and four against. Importantly, two authors of the Code[16] suggested that an up-dated and more homicide-focused version would be of benefit to Scots homicide law, as the current Code was intended to provide a statutory basis for the whole criminal common law.

2.23 Having assessed the responses to Question 9, we are minded not to recommend incorporation of any part of the unrevised Draft Criminal Code for Scotland and instead recommend our own specific statutory provisions as set out in the draft Homicide (Scotland) Bill in Appendix A.

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[15] Eric Clive, Pamela Ferguson, Christopher Gane, and Alexander McCall Smith: see para 4.57 *et seq* in the Discussion Paper.
[16] Professors Eric Clive and Pamela Ferguson.

Chapter 3 The structure of Scots homicide law

Introduction

3.1 This Chapter focuses on the bipartite structure of Scots homicide law, namely the division of unlawful killings into two categories, either "murder" or "culpable homicide". Such a structure can be contrasted with the detailed ladder of homicide offences found in some other jurisdictions. In the USA, for example, statute provides for first, second, and third degree murder, felony murder, criminally negligent homicide, reckless manslaughter and misdemeanor manslaughter.

3.2 Some legal commentators have voiced concerns about the Scots bipartite structure. It has been suggested that the residual category of culpable homicide is so vague and broad that the principle of "fair labelling" is difficult to achieve.[1] It has also been suggested that the bipartite structure should be reformed with the aim of reducing the number of prisoners serving life sentences,[2] and that certain culpable homicide offences should be re-classified as "murder".[3] The questions at issue are therefore whether there would be benefit in having a different and/or more detailed grading of homicide offences.

Structural options considered

3.3 In Chapter 2 of our Discussion Paper, we set out two options for reform, namely:

- One single offence of "unlawful homicide" covering all unlawful killings, with differing degrees of gravity being reflected in sentencing, and
- A multi-tier structure with a more detailed graded "ladder" of killings: a possible structure might comprise first, second, and third degree murder; voluntary and involuntary culpable homicide; gross negligence culpable homicide; and assault causing death.

3.4 We also raised the question whether, if retaining the bipartite structure, the crime of murder should be redefined such that the nature of the offence depends more on the circumstances of the killing (known as the *actus reus*) with less emphasis on

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[1] It is argued that there is a need to ensure that an offender is not unfairly labelled, or the nature of their wrongdoing misrepresented; also a person's criminal record should accurately and clearly record the offence. See J Chalmers and F Leverick, "Fair Labelling in Criminal Law" (2008) 71(2) MLR 217; E Clive, P Ferguson, C Gane and A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (2003) at p 5; Professor (then Dr) C McDiarmid's address "*Mens rea* of Culpable Homicide" (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/); and see also C McDiarmid, "Between Accidental Killing and Murder: Culpable homicide" 2023 Jur Rev Issue 1 pp19-47.

[2] Professor Pamela Ferguson's response to the Discussion Paper; Professor Lindsay Farmer's address "Structuring Homicide: A Broad Perspective" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018, see fn 1 above); and Professor Dirk van Zyl Smit and Katrina Morrison, "The Paradox of Scottish Life Imprisonment", European Journal of Crime, Criminal Law and Criminal Justice 28 (2020).

[3] See Professor Gerry Maher KC, para 3.15 below.

the mental element (known as the *mens rea*), so that a killing in certain defined circumstances would automatically be labelled murder.[4] Such a reform would retain the bipartite structure, but would alter the dividing line between the two categories.

3.5 After discussion of the issues, at paragraph 2.73 of the Discussion Paper we asked consultees the following questions:

> "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?"

3.6 At paragraph 2.74 of the Discussion Paper, we noted that, on the basis of our research,[5] we had formed the provisional view that the structure of Scots homicide law should not be altered. We then asked consultees:

> "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?"

Summary of responses

3.7 There were fourteen responses to Question 3(a). The majority (10 out of 14 consultees) considered that the current bipartite structure of Scots homicide law is working well and should not be altered.[6] Almost all who responded to Question 4(a) (10 out of 13 consultees) agreed with our provisional view that we are not minded to propose any change to the overarching bipartite structure of Scots homicide law. Specifically, in Question 4(c), consultees were asked whether there should be an

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[4] See, for example, Canada, where a killing is automatically "first degree murder" if 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".

[5] Including informal consultations with practitioners and others, discussions with our Advisory Group, and the BritainThinks' sample of public opinion.

[6] A minority of consultees, namely Professor Antony Duff, Professor Pamela Ferguson, Dr Andrew Cornford, and Professor Gerry Maher KC, advocated some reform for the reasons discussed at paras 3.14 and 3.15.

automatic classification of an unlawful killing as "murder" solely on the basis of the circumstances of the killing (ie with the emphasis on the *actus reus* rather than the *mens rea* – for example, the killing of a police officer, prison officer, or ambulance worker acting in the course of their duties). Of the 10 consultees who responded, the majority (eight out of 10) answered in the negative.

Discussion

3.8 We agree with the majority view on both issues.

(i) No alteration to the current bipartite structure

3.9 In relation to the first issue (no alteration to the current bipartite structure), our reasons for agreeing with the majority are:

3.10 *A single offence of "unlawful killing" is neither possible nor desirable:* We reject the concept of a single offence of "unlawful killing", for two reasons. First, the mandatory life sentence for murder still applies. Sentencing does not form part of our remit, and so it is not open to us to recommend a single offence of "unlawful killing", "unlawful homicide", or "criminal homicide" where a judge could impose a range of sentences. Secondly, "murder" should in any event be restricted to the gravest of crimes. In our view, a vicious killing involving abduction and torture should not have the same label as a "single punch" killing. In the course of our consultation, there was no challenge to the above analysis, and no proposal that there should be one single offence of "unlawful homicide".

3.11 *A "ladder" of prescriptive homicide offences attracted little support*: The majority of consultees did not support the concept of a ladder of prescriptive homicide offences. Comments included:

- "The murder/culpable homicide structure of the Scottish law on homicide is uncomplicated, well understood and familiar." (Professor Eric Clive)
- "We are of the opinion that the bipartite structure of the law of homicide works well and there is no reason to change it." (Professors James Chalmers and Fiona Leverick)
- " … '*clarity, simplicity, and flexibility are desirable'* … It is the experience of the Faculty that, in practice, juries appear to have a good grasp of the current structure. To restructure murder and culpable homicide into degrees based on seriousness or blameworthiness would simply serve to over-complicate the law of homicide." (The Faculty of Advocates)
- "Any structure which distinguishes between different levels of homicide, and provides differing definitional components, requires to be capable of being explained by judges to members of the public in a manner which is clear, cogent, informative and suitable for application to the factual matrix presented. In this context, the bipartite structure of Scots homicide law appears to have certain advantages over the structures employed in some other jurisdictions …" (The Senators of the College of Justice)
- "Perhaps the current bipartite structure strikes the best possible balance between these two concerns [namely accurate labelling versus unwanted complexity]" (Dr Andrew Cornford)

3.12 The participants who responded to the BritainThinks public opinion survey appeared to be familiar with the bipartite structure, and to have no criticisms of it.

3.13 Thus the weight of opinion (from both consultees and the small sample of public opinion) did not support the concept of a ladder of prescriptive homicide offences. We agree. In our view, the bipartite structure is widely recognised, understood, and applied, by judges, juries, police officers, practitioners, academics, support groups, and members of the public. The evidence suggests that the bipartite structure leads to sensible and understandable verdicts in homicide trials, with a recognition that different degrees of fault or blameworthiness are reflected in the specific terms of the indictment,[7] the jury's discriminating verdict, and the judge's sentencing.

3.14 *Percentage of life prisoners may not be the best starting-point:* Professor Lindsay Farmer,[8] Professor Pamela Ferguson,[9] and the authors of an article "The Paradox of Scottish Life Imprisonment",[10] expressed concern that Scotland has too high a percentage of life prisoners per head of population. A suggested structural reform involved narrowing the definition of murder, or expanding pleas which reduce murder to culpable homicide, thus reserving the term "murderer" for the most heinous of killings. However we consider that calibration of modern-day Scottish society's standards by adhering to a certain percentage of lifers per head of population would be "letting the tail wag the dog" with a risk of undesirable outcomes. For example, challenging questions might arise, including what percentage should be regarded as an appropriate percentage of lifers per head of population. Comparative surveys involving other countries' percentage of lifers per head of population would be complex, as variations in sentencing structure and policy would have to be taken into account (for example, a particular jurisdiction's sentencing policy when fixing punishment parts; Parole Board policy concerning the release of life prisoners; any increase in the number of life prisoners being returned to prison following some post-release breach; and also the number of prisoners serving "orders for life long restriction"). It seems to us that a more principled starting-point than percentage of lifers per head of population is the identification of those killings which current 21st century Scottish society considers deserve condemnation as "murder" with all the consequences (including society's abhorrence and a life sentence). Moreover a policy-based sentencing reform,[11] rather than a root-and-branch redefinition of the structure of homicide law, might offer a more acceptable route to outcome.[12]

3.15 *Re-classification of voluntary culpable homicides as "murder" not advisable:* The classification of culpable homicide as "voluntary" or "involuntary" is not widely used

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[7] The formal document containing the charge against the accused.
[8] "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/.
[9] In a response to the Discussion Paper.
[10] European Journal of Crime, Criminal Law and Criminal Justice 28 (2020), Dirk van Zyl Smit, Professor of Comparative and International Penal Law, University of Nottingham, and Katrina Morrison, Lecturer in Criminology, Edinburgh Napier University.
[11] Possibly involving the Scottish Sentencing Council.
[12] Cf Professor Pamela Ferguson's observations in her response to the Discussion Paper, noting the limitations to the scope of the current remit to the Scottish Law Commission; and the observations by Professor Dirk van Zyl Smit and Katrina Morrison.

amongst practitioners or in homicide trials.[13] However, one consultee using that classification[14] recommended a structural change involving transferring into the category of "murder" the entire class of "voluntary culpable homicides" (ie killings which were intentional but which were reduced to culpable homicide as a result of the partial defences of provocation or diminished responsibility). The transferred class would be exempt from the mandatory life sentence to reflect the lesser gravity due to the excuse of provocation or diminished responsibility, and accordingly the reform suggested would in effect result in a "first degree, second degree" murder structure.

3.16 We do not accept this minority proposal as necessary or beneficial for Scots homicide law. As mentioned in our Discussion Paper, paragraph 2.58, we consider that a "first degree, second degree murder" approach might dilute and devalue the most heinous crime of murder. In addition, the clear majority of responses to the Discussion Paper rejected a multi-tier structure and supported keeping the current bipartite structure of Scots homicide law.

3.17 In the result, we are not minded to make any recommendation to Scottish Ministers about changing the current bipartite structure of Scots homicide law.

(ii) The actus reus as the basis for murder

3.18 As noted in paragraph 3.7 above, the majority of consultees (eight out of 10) disagreed with the suggestion that there should be an automatic classification of an unlawful killing as "murder" solely on the basis of the circumstances of the killing (ie with the emphasis on the *actus reus* rather than the *mens rea* – for example, the killing of a police officer, prison officer, or ambulance worker acting in the course of their duties). Reasons given by consultees included the following:

- "This is unnecessary and could get too complicated. Every distinction can give rise to arguments." (Professor Eric Clive)
- "Doing so would widen the net for 'murder'; would (re)-introduce constructive malice. It would be extremely difficult to produce an exhaustive list of *actus reus* elements." (Nicholas Burgess)
- "This could cause unnecessary and continuing arguments about what to include in any such list of offences. If the mental element is adequately defined, there would be no need for such a move." (Professor Antony Duff)
- "The focus should be on the *mens rea.*" (Professor Pamela Ferguson)
- "We do not support the suggestion of specific inclusion of particular offences depending on the *actus reus* … In our view, the enhanced gravity of killing occurring within the sort of circumstances canvassed … can easily be accommodated within the sentencing process (whether for murder or culpable homicide). A blanket requirement that particular conduct (eg killing a police officer in the course of duty) should always be classed as murder imposes an unnecessarily tight straightjacket on both the labelling and the sentencing process." (The Senators of the College of Justice)

[13] See the Discussion Paper, para 2.3 fn12.
[14] Professor Gerry Maher KC.

- " … developing a statutory definition … would add little by way of clarity … there would be a significant loss of flexibility. Situations might arise where the quality of the act is such that a verdict of culpable homicide would be appropriate (eg the accused punches a police officer)." (Law Society of Scotland).

3.19 The weight of opinion was very much against the classification of a killing as "murder" on the sole basis of the factual circumstances of the killing (the *actus reus).* We agree, for all the reasons given by the consultees.

3.20 In the circumstances, we are not minded to make a recommendation to Scottish Ministers to define certain killings automatically as "murder" on the basis of the *actus reus*.

Chapter 4 The language of Scots homicide law

Introduction

4.1 This Chapter examines the language of Scots homicide law. Can the current terminology be clearly understood, analysed and applied? Would a change of language necessarily be beneficial for Scots homicide law? Or should the language and terminology be changed only when substantive reforms of concepts and definitions are being undertaken?

4.2 These questions are explored in detail in Chapter 3 of the Discussion Paper. The criticisms of the current language, particularly in relation to the concept of "wickedness" that has long defined the crime of murder, are more briefly covered here.

Criticisms of the language of Scots homicide law

4.3 The language of Scots homicide law has been variously described as old-fashioned, moralistic, emotive, and vague, leading to ill-defined concepts and difficulty and confusion in analysis and application. This concern was integral to the comments made by Lord Gill on the need for reform:

> "… [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 …"[1]

4.4 In his criticism, 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.[2] We acknowledge that comparative jurisdictions (eg England and Wales, Ireland, Australia, New Zealand and South Africa) do not use terminology such as "wicked", "evil", "felonious" or "depraved" in their homicide law.[3]

The concept of "wickedness"

4.5 Much of the criticism has focused on the concept of "wickedness" used in the Scots law definition for murder.[4] Lord Goff of Chievely, in his address "The mental element in the crime of murder",[5] 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:

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[1] *Petto v HM Advocate* 2011 SCCR 519, para [21].
[2] *Ibid.*
[3] However, the terminology used in the United States includes words like "felonious" and "depraved".
[4] The use of wickedness in the Scots law definition for murder is further discussed in Chapter 5 on Murder.
[5] (1988) 104 LQR 30.

> " … 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 …"[6]

4.6 Similarly, in Gordon, *Criminal Law*,[7] the terminology of Scots homicide law is described as "circular", dependent upon "a moral judgement … [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 judgement which, so far as capital murder was concerned, and the law grew up when all murder 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 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 [emphasis added]."[8]

4.7 Further, in his commentary on the case of *Elsherkisi v HM Advocate*,[9] 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 which, however eminent and indeed brilliant, was written over two centuries ago: cf the Lord Justice Clerk's comments in the recent case of Petto v HM Advocate

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[6] *Ibid*, at p 58.
[7] Gordon, *Criminal Law Vol 2*, para 30.21.
[8] *Ibid.*
[9] 2011 SCCR 583.

[2011] HCJAC 79; 2011 SCCR 519, and Gordon's Criminal Law (3rd edn), para 7.05."

4.8 Finally, 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 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."[10]

4.9 There appears to be consensus amongst commentators that the language of "wickedness" is vague, old-fashioned and emotive, and so, at least in a purely academic sense, is not conducive to a modern and clear legal definition for murder. However, those practitioners who participated in our informal consultations[11] were generally of the view that the current definition has not had a detrimental effect in practice. In their collective experience of homicide trials, juries seem to have little difficulty understanding and applying concepts such as "wicked", "wicked intent" and "wicked recklessness".[12] Certainly, homicide cases do not turn on the terminology of "wickedness". One interviewee commented that the language conveys a moral judgement on the degree of "badness" inherent in murder that the public can easily grasp. Another interviewee noted that juries tend to regard the killing of a human being as obviously "wicked".

4.10 The experience of practitioners could be said to allay the concern that, in the words of Lord Gill, the current language of Scots homicide law "may impede rather than conduce to analytical accuracy …".[13] This raises the question of whether the criticisms outlined above are of sufficient weight to justify statutory reform.

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[10] 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.
[11] Comprising three High Court judges, two Advocate Deputes, three defences QCs, and one solicitor-advocate QC.
[12] While juries cannot be asked about their verdicts (Contempt of Court Act 1981, s 8 as amended by the Criminal Justice and Courts Act 2015), practitioners infer their understanding from (a) the lack of questions from juries about the meaning of these words; and (b) the generally sensible and apparently evidence-based verdicts which juries deliver.
[13] *Petto v HM Advocate* 2011 SCCR 519, para [21].

4.11 To gather views on the current language of Scots homicide law and whether there is a need for reform, at paragraph 3.52 of the Discussion Paper we asked consultees:

> "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?"

Analysis of responses

4.12 In relation to Question 5(a)**,** consultees agreed that there are valid criticisms of the language of Scots homicide law. Old-fashioned, archaic, antiquated, moralistic, vague, inaccurate, misleading and emotive, were some of the adjectives used in responses. The terms "wicked" and "wickedly" were also the focus of criticism by consultees.

4.13 The participants who responded to the BritainThinks public opinion survey were strongly critical of the language of "wickedness". There were concerns that the term "wicked" was old-fashioned, subjective, open to various interpretations, and that it did not clarify the two elements comprising murder (namely intent to kill, and what interviewees termed "extreme" recklessness). The small sample of public opinion considered that the adjective "wicked" did not add to the understanding of "intention", as having an intention to kill was, in their view, always wicked. As for "wicked recklessness", the small sample of public opinion preferred the phrase "extreme recklessness", explained as occurring where an individual commits an act "where it cannot reasonably be assumed that someone would not be seriously harmed or killed by their actions."[14]

4.14 The key issue, posed in Question 5(b),[15] attracted a mixed response from 13 consultees. Only two consultees answered in the affirmative[16] and were outnumbered by the majority of consultees who either answered in the negative,[17] or in a qualified manner, using phrases such as "it depends", "perhaps", and "there are mixed views".[18]

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[14] BritainThinks Report para 8.2.
[15] Question 5(b) was not put to the members of the public participating in the BritainThinks survey.
[16] Professor Pamela Ferguson and the Centre for Scots Law at the University of Aberdeen.
[17] Nicholas Burgess, Dr Rachel McPherson, Faculty of Advocates, Professors James Chalmers and Fiona Leverick, Law Society of Scotland.
[18] Professor Eric Clive, Dr Andrew Cornford, Professor Antony Duff, the Senators of the College of Justice (with whom Lord Bracadale and the Sheriffs' Association agreed).

4.15 Consultees' responses to Question 5(b) to (e) can be summarised as follows:

4.16 Question 5(b) and (c): The majority of consultees considered that the criticisms were not of sufficient weight to justify replacing all or some of the existing common law of homicide with new statutory provisions. The following reasons are representative of the majority's views: there appear to be no difficulties in practice; the language has stood the test of time and appears to be well-understood by juries; a homicide-trial jury can and should be invited to apply a degree of moral judgement when determining whether a killing is sufficiently serious to constitute "murder"; the terms "wicked" and "wickedly" provide a helpful degree of flexibility in determining whether or not a conviction for murder is merited; even with a statutory definition, there will be inevitable unforeseen difficulties requiring judges to assist with statutory interpretation; difficulties may arise if terminology from other jurisdictions was adopted; a change in language could potentially interfere with public confidence in the judicial system, and create issues for judges charging juries.

4.17 The judges who preside over homicide trials fell into the "mixed views" category. In their response to the Discussion Paper, they explained:

> " … Some [judges] see no value in the adjective 'wicked' (in relation to wicked recklessness) and consider it to be an unhelpful attempt to measure blameworthiness by the use of an unfamiliar, morally charged and ill-defined yardstick. By way of contrast, others consider that it is the very moral content present in the term 'wicked' which brings a positive advantage to the assessment of how to label criminal conduct resulting in death. That same moral content is seen as permitting the application of a flexible approach such as can accommodate varying sets of circumstances …
>
> The various parts of question 5 meet with different answers amongst the members of the judiciary. Some consider that such criticisms as have been advanced are of little moment and that any dated aspects of the language used is easily explained, as suggested in the extract from the current version of the Jury Manual [set out in the Response]. Others consider that there is as little value in an application of the concept of wickedness as there is in an evaluation of the extent to which the attacker displays a disposition which is depraved. Those of this view would suggest avoiding language which seeks to introduce a moral evaluation."

4.18 Question 5(d) and (e): Many consultees, whilst recommending a cautious approach (with one expressly advising that a change of language should only be attempted if "some other changes are being made anyway"),[19] suggested removing the superfluous and unnecessary word "wickedly" where it had been inserted before the words "intended to kill" in the classic Macdonald definition of murder by the five-judge bench in *Drury*.[20] Some consultees provided new definitions of the crime of "murder". For example:

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[19] Professor Eric Clive.
[20] *Drury v HM Advocate* 2001 SCCR 583.

- "Murder is committed by the unlawful and intentional killing of another person, or, by an assault which results in death and where the attacker acted with complete indifference to whether death might result."[21]
- " … [a] redefinition of the *mens rea* of murder as requiring an "intent to kill" or "callous recklessness", the latter to be defined as a "callous disregard of the risk of causing death" … [and in relation to the callous disregard] there should be no requirement that the accused intended to cause personal injury."[22]

4.19 One consultee suggested reform of the language of the defences to homicide.[23] For example, where someone acted to defend a third party (rather than to defend themselves), instead of the recognised defence of "self-defence" there should be a defence of "acting in defence of another person".

4.20 Two consultees suggested the need for empirical research.

- Professor Antony Duff suggested that it would be worth commissioning more empirical research into lay people's understanding of language such as "wicked recklessness" and "callous indifference", observing that some such language, given proper form, would be appropriate to make clear the normative basis of the law of murder, and that it was important that citizens should be able to discover the law simply by consulting a statute.
- Nicholas Burgess also commented that "some empirical research on how juries really do interpret language is, in my view essential to this law reform project."

4.21 The BritainThinks public opinion survey may give some indication of the general public's views about the language of homicide law: but it may be that a much wider survey would be of assistance.

Discussion

4.22 Consultees agreed that it would be inadvisable to undertake statutory reform of the language used in Scots homicide law for the sole purpose of improving or up-dating the terminology. Potential disadvantages of such an approach are outlined in Chapter 3 of our Discussion Paper, and were echoed by consultees' responses. However, the opportunity may be taken to recommend the use of less archaic and clearer language if and when we recommend reform of parts of the law, for example, to reflect changes in social and moral standards.[24] Relevant areas might include:

- The definition of murder**,** in particular (i) clarification of the second limb of the classic definition of murder ("wicked recklessness") and whether or not an element of "intention to injure" is required, and (ii) removal of the words

[21] The Senators of the College of Justice.
[22] Professor Pamela Ferguson.
[23] Professor Pamela Ferguson.
[24] Such an approach was suggested by several consultees, including Professor Eric Clive, and we agree with them.

of “wickedly” and “wicked”, substituting, where necessary, an appropriate alternative (all discussed in Chapter 5 below);

- The partial defence of provocation, in particular whether the defence should continue to be available in the context of discovery of a partner’s sexual infidelity (discussed in Chapter 11 below).

4.23 We therefore recommend that:

2. Where parts of Scots homicide law are to be reformed the opportunity should be taken to clarify the law, using more modern terminology if appropriate.

Chapter 5 Murder

Introduction

5.1 In this Chapter, we consider consultees' responses on the topic of the crime of murder. We discuss possible changes to the law, and ultimately recommend a new statutory definition.

5.2 In the following chapter, Chapter 6, we carry out a similar exercise in the context of culpable homicide, and again recommend a new statutory definition.

Developments in the 21st Century

5.3 In Scotland, the common law crime of murder was defined in the 19th century by an influential writer, JHA Macdonald, as follows:

> "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."[1]

Murder was considered to have a two-limbed definition. The first limb required that the accused act with an intention to kill. The second limb required that the accused act with wicked recklessness.[2] That definition was adopted in all murder trials in Scotland from the 19th Century onwards. It caused few difficulties.

5.4 However in the early 21st Century, matters became less settled:

- In 2001 a five-judge bench[3] inserted the word "wickedly" before the words "intended to kill".
- In 2007 a three-judge bench[4] ruled that "intention to injure" was a necessary prerequisite of the "wicked recklessness" second limb of the definition of murder, although many lawyers had thought that no such intention was required.
- In 2011 a three-judge bench chaired by Lord Justice Clerk Gill[5] referred to both *Drury* and *Purcell*, and suggested that Scots homicide law required reform.

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[1] Macdonald, *Treatise* (1st edn, 1867; 5th edn, 1948) at p 89.
[2] These limbs are alternative, not cumulative. Only one limb needs to be satisfied to commit the offence of murder.
[3] *Drury v HM Advocate* 2001 SCCR 583.
[4] *HM Advocate v Purcell* 2007 SCCR 520.
[5] *Petto v HM Advocate* 2011 SCCR 519.

- The court in *Purcell* and *Petto*[6] also noted that it was not clear whether a doctrine of "constructive malice"[7] existed in Scots homicide law.

As a result, difficulties and uncertainties arose.

Is legislation needed to address issues with the offence of murder?

5.5 Initially, it was not clear whether any legislation would be required to resolve these difficulties and uncertainties. Despite Lord Justice Clerk Gill's observations in *Petto*,[8] Scots homicide law appeared to be working well in practice, assisted by the Jury Manual[9] which is produced by the Judicial Institute and used as a guide by all homicide trial judges. The judge's charge to the jury, and the Written Directions given to the jury, include issues such as rape myths and domestic abuse, thus providing informed and contemporary guidance for juries.[10]

5.6 Against that background, at paragraph 4.15 of the Discussion Paper we asked consultees 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?
>
> (b) If so, should the qualification of "wickedly" be removed, or do you propose some other reform?"

5.7 There were 15 responses to Question 6. The weight of opinion amongst consultees was that the word "wickedly" was unnecessary and superfluous in the first limb of the classic definition of murder. Seven consultees[11] therefore considered statutory reform to be necessary. However, four consultees[12] disagreed since the word "wickedly" appears to be causing little difficulty in practice. Another four consultees[13] suggested that if a Homicide (Scotland) Bill were to be introduced for some other reason, the opportunity should be taken to remove that superfluous word from the first limb of the definition of murder.

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[6] At paras [15] and [7] respectively.
[7] Whereby someone committing an offence not intended to result in a death (for example, robbery or fire-raising) could be convicted of murder if an unintended death occurred during the commission of that offence.
[8] 2011 SCCR 519 (see para 1.4 of the Discussion Paper).
[9] Available to all on the web, available at: jury-manual-pdf-version-3-september-2024.pdf. A committee of practising judges regularly update the Manual to reflect socio-legal developments.
[10] Written Directions include "Addressing rape and sexual offence myths and stereotypes" and "Background of domestic abuse".
[11] Professor Eric Clive, Professor Antony Duff, Professor Pamela Ferguson, Professor Gerry Maher KC, Dr Andrew Cornford, the Centre for Scots Law at the University of Aberdeen, and the University of Strathclyde Law School.
[12] Dr Rachel McPherson, the Faculty of Advocates, the Law Society of Scotland and Nicholas Burgess.
[13] The Senators of the College of Justice (with whom Lord Bracadale and the Sheriffs' Association agreed) and Professors James Chalmers and Fiona Leverick.

5.8 In relation to the second limb of the definition ("wicked recklessness"), an important issue for consultees was whether the second limb required the element of "intention to injure" as set out in *Purcell.* At paragraph 4.35 of the Discussion Paper we asked consultees the following questions:

> "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? *[Possible definitions were then set out, including the definition "demonstrating complete indifference to human life".]*[14]
>
> (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?"

5.9 These questions have important practical consequences for homicide law. Should a jury be entitled to convict a person of murder where the accused's actions demonstrated complete indifference to human life (currently "wicked recklessness"), although the accused maintains that they had no intention to injure anyone? In other words, does the mental element in the crime of murder always require "intention to injure",[15] or should a jury in Scotland be entitled to return a verdict of murder where intention to injure is difficult to prove or is denied outright, but the accused's actions nevertheless demonstrated complete indifference to human life? When responding to such a question, it is arguable that a person should not be permitted to act in a way which endangers others, and yet escape punishment by claiming "I didn't think" or "I didn't mean to injure".[16] But our research demonstrated that, following the case of *Purcell*, there was doubt and disagreement amongst consultees as detailed below.

5.10 In *HM Advocate v Purcell*[17] a ten-year-old boy was run over and killed when crossing the road in obedience to traffic lights showing the "green man". The car-driver had been trying to escape from the police. In his sentencing statement, the trial judge described his driving as "wild and reckless … wholly atrocious in nature and [placing] the lives of everyone in [his] wake in serious danger".[18] When on trial for murder, his defence team argued that he had not intended to injure anyone, he was simply trying to escape from the police. The trial judge convened a bench of three, and the defence

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[14] Para 5.30 below sets out the first three definitions.
[15] As is required in England and Wales, and the Republic of Ireland.
[16] This may ultimately be a policy decision: cf the decision in *Brennan v HM Advocate* 1977 JC 38 (inebriation is no defence) which was acknowledged to be "public policy" by Lord Justice General Hope in *Ross v HM Advocate* 1991 JC 210.
[17] 2007 SCCR 520.
[18] Available at: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_10_07_purcell.pdf.

argument succeeded. The possible option of a verdict of murder was withdrawn from the jury, leaving them with lesser possible verdicts including culpable homicide. The accused then pled guilty to culpable homicide. The three-judge court later issued a written judgment, stating that the second limb of the common law definition of murder (ie "displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences") required – and had always required – *intention to injure*, which was considered to be absent in that case.

5.11 As noted in our Discussion Paper at paragraph 4.23 *et seq*, many legal observers regarded *Purcell* as a change in the law, restricting the scope of the common law crime of murder. To illustrate the perceived restriction in scope, the examples below would, pre-*Purcell,* have allowed a jury to convict of murder (if so minded), but post-*Purcell* might not:

- A car-driver tries to escape from the police, driving wildly in a built-up area and contrary to all road rules, and in so doing fatally injures a pedestrian.
- A person taking strike action pushes a massive block of concrete from a motorway fly-over bridge just as a cortege of non-striking buses and police cars pass below, his intention being to draw attention to the strike and to protest against non-strikers; the concrete block hits and kills a bus-driver.
- An activist plants a bomb in a department store and gives advance warning intending that all personnel should be evacuated; a shop assistant is killed in the explosion, despite the advance warning.
- A man tries to destroy incriminating evidence by setting fire to material in a ground floor flat in a four-storey tenement; an upstairs neighbour in the tenement dies as a result of smoke inhalation.

Following upon the decision in *Purcell,* the Crown Office took the decision to libel the offence of "assault" in every murder indictment issued thereafter. This formulation in the indictment meant that the Crown was offering to prove, beyond reasonable doubt, that there had been a "deliberate attack with evil intent" on the victim,[19] and thus (assuming the Crown proves that case) it would not be open to the defence to make a submission of "no case to answer" in respect of the crime of "murder" by arguing, as had been done in *Purcell,* that the accused had not intended to injure anyone.

5.12 In the course of our research, we asked consultees in Question 7 (quoted above) whether there should be clarification by statute either (a) returning to what some regarded as the pre-*Purcell* position, so that a verdict of murder would be open to a jury in cases such as those in the bullet points above, or alternatively (b) declaring that intention to injure is indeed an essential prerequisite of the second limb of the Scots law definition of murder. The question put to consultees was whether the "wicked recklessness" second limb of the crime of murder should include the element of "intention to injure" as explained in *HM Advocate v Purcell* (see Question 7 above).

[19] See the more detailed discussion of "assault" defined as a deliberate attack with evil intent, in paras 5.35 *et seq* below.

5.13 There were 15 responses to Question 7(a). When analysing consultees' responses, we found that there was a sharp division of views. Two-thirds (10 consultees)[20] answered in the negative, stating that prior to the decision in *Purcell,* "wicked recklessness" could be established without proof of intention to injure. Their position was supported by:

- earlier decisions of senior judges;[21]
- the *dicta* of Lord Justice Clerk Dorrian in 2019;[22]
- the views of the Scottish Law Commission in 1989;[23]
- a lecture delivered by Lord Goff of Chievely.[24]

By contrast, one-third (four consultees)[25] stated that the second limb of the definition *must* include the element of "intention to injure". Some added that the element of "assault" is usually included in a murder indictment.

5.14 Excerpts from two consultees' responses illustrate the conflicting views:

> *"Intention to injure" not a required element:*
>
> " … prior to the decision in Purcell, there had never been a requirement in the definition of 'wicked recklessness' for an intention to injure (see, for example, Scott v HM Advocate 1996 JC 1, per Lord Justice Clerk Ross at 5; and Parr v HM Advocate 1991 JC 39)."[26]
>
> *"Intention to injure" – a required element:*
>
> "The *Purcell* approach should be retained. The common, but mistaken, understanding of wicked recklessness pre-*Purcell* had the undesirable effect that murder could be committed without any element of intentional conduct on the part of the accused."[27]

5.15 This divergence of views is important. Where there is no requirement of intention to injure, certain cases would qualify as "murder", whereas they might not so

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[20] Professor Eric Clive, Professor Pamela Ferguson, Professors James Chalmers and Fiona Leverick, Dr Antony Cornford, Nicholas Burgess, the University of Strathclyde Law School, the Centre for Scots Law at the University of Aberdeen, the Faculty of Advocates, the Law Society of Scotland, and We Can't Consent To This.

[21] *Cawthorne v HM Advocate* 1968 JC 32 at p 34 (Lord Clyde); *Brennan v HM Advocate* 1977 JC 38 (Lord Emslie, quoting Lord Clyde); *Scott v HM Advocate* 1996 JC 1 (Lord Ross).

[22] *HM Advocate v Gilmour* [2019] HCJAC 74, para [33].

[23] Memorandum to a Select Committee 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) at p 385, at para 4 of the Memorandum.

[24] "The mental element in the crime of murder" (1988) 104 LQR 30.

[25] Professor Gerry Maher KC; the Senators of the College of Justice (with whom Lord Bracadale and the Sheriffs' Association agreed).

[26] Faculty of Advocates.

[27] Professor Gerry Maher KC. Some commentators might respond by pointing out that it is quite possible to have "intentional conduct" in the sense of deliberate actions by the accused – such as setting a property on fire – but not necessarily accompanied by an intention to injure anyone.

qualify if intention to injure is a prerequisite of the second limb of the classic common law definition of murder.[28]

5.16 Members of the public appeared in general to support the pre-*Purcell* position. In the public opinion survey carried out by BritainThinks, members of the public were asked about killings caused by (i) a desperate attempt to escape from the police (scenario A); (ii) a fire being started in an empty ground floor flat in order to frighten someone (scenario B); and (iii) a large concrete block being pushed off a flyover onto a busy motorway in order to make a political point (scenario C). At paragraph 6.3 of the BritainThinks Report, the researchers note:

> "In instances of killing without specific intention to injure, the public feel the accused should be charged with murder in cases where the act is premeditated, the accused displays extremely reckless behaviour, or where the accused's actions suggest that they intend to cause a person harm."

In relation to the particular scenarios A, B, and C, the participants' views were as follows: scenario A: mixed views, with some in favour of murder, and some in favour of culpable homicide; scenario B: murder; scenario C: murder.

5.17 A Homicide (Scotland) Bill could assist in clarifying whether or not an element of "intention to injure" is – or is not – a necessary element in the second limb of the definition of murder. The Bill might also assist in other areas. For example:

- Providing readable definitions of murder and culpable homicide which are accessible to the public.[29]
- Giving a clearer dividing line between murder and culpable homicide.[30]
- Removing the concept of "wickedness" (including "wicked intent" and "wicked recklessness") if it is concluded that wickedness is too archaic, vague and emotive a concept for the 21st century.[31]

5.18 Having considered the above points, and the arguments for and against replacing and amending the common law with a statute, we recommend that:

3. The Homicide (Scotland) Bill should define the offence of murder.

(Draft Bill, section 1)

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[28] See for example Lord Goff's illustrations in his address "The mental element in the crime of murder" (1988) 104 LQR 30, referred to in para 4.24 in the Discussion Paper. And see too the examples in para 5.11 above.

[29] Instead of having to research legal textbooks and case reports – often a difficult enough task for lawyers, let alone members of the public. Members of the public would be able to read an easily accessible definition comprised in one statute.

[30] As Kate Wallace of Victim Support Scotland commented during the project, it is often very difficult to explain to bereaved families why a jury might have opted for a verdict of culpable homicide rather than a verdict of murder: an easily accessible statutory provision might provide a clearer and more understandable dividing line between these two crimes.

[31] See the discussion in para 5.19 below.

Should the concept of "wickedness" be used in the statutory definition of the offence of murder?

5.19 A fundamental issue which emerged in the course of the project, particularly at the stage of drafting proposed legislation, was whether or not the language and concept of "wickedness" should be used in a 21st century statute in the definition of murder.

5.20 Some consultees criticised the continuing use of the concept of "wickedness" in the current common law definition of murder, pointing out that such a concept is out-dated, archaic, vague and emotive. Importantly, members of the public involved in the BritainThinks survey considered that "wicked" had no place in a modern definition of murder.

5.21 Against that background, we debated whether or not to keep the concept of "wickedness" or "wicked recklessness" in a 21st century homicide bill. We recognised that there are cogent arguments against such an approach. First, there are many criticisms that the concept is too vague, moralistic, old-fashioned and unsuited to modern times. Secondly, no other jurisdiction currently uses the concept of wickedness in their homicide law. Thirdly, as noted above, members of the public who participated in the BritainThinks survey did not favour the continued use of wickedness as a defining element in modern Scots homicide law. Fourthly, Lord Goff, otherwise a staunch supporter of the Scots common law concept of "wicked recklessness", commented:

> " … we may not be too happy about the use of the word 'wicked', which is perhaps rather emotive; but the concept is clear enough – it is the fact that the accused did not care whether the victim lived or died – which can be epitomised as indifference to death …
>
> … I must confess … 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."[32]

5.22 We ultimately concluded that a 21st century homicide statute should not contain the concept of "wickedness", but should define murder using language and concepts appropriate for 21st century society.

5.23 We recommend that:

> **4. The Homicide (Scotland) Bill should not contain the concept of "wickedness", but should define murder using language and concepts appropriate for 21st century society.**

How should the offence of murder be dealt with in the Homicide (Scotland) Bill?

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[32] "The mental element in the crime of murder" (1988) 104 LQR 30.

5.24 The next question that arises is, should there be an amendment of elements of the common law offence or a complete new, standalone statutory definition of the offence?

5.25 Question 7(d) asked consultees whether it should be provided by statute that "intention to injure" is not a necessary element of the second limb of the common law offence of murder. There were 13 responses. Three consultees agreed, although one questioned whether statutory reform was actually required.[33] Five consultees disagreed.[34] A further five consultees (although agreeing that "intention to injure" is not an essential prerequisite for the crime of murder) did not support the formulation suggested, and offered alternative formulations, such as redefining the *mens rea* as "callous recklessness".[35]

5.26 The consultees who supported this approach suggested that the common law should remain as untouched as possible. For example, the Faculty of Advocates said:

> " …We respectfully submit that the crime of murder should remain a common law offence so far as possible. A single statutory provision confirming that intention to injure is not an essential, necessary or prerequisite element of the 'wicked recklessness' strand of the legal definition of murder would enable the law of homicide to continue to operate at common law, albeit with that important statutory elucidation. This approach would have the benefit of clarifying the post-*Purcell* uncertainty surrounding the meaning of 'wicked recklessness'. It would ultimately confirm the pre-*Purcell* position, namely that 'wicked recklessness' does ***not*** require an intention to cause physical injury."

Similarly Professors James Chalmers and Fiona Leverick commented:

> "On balance, we would prefer option (d) [of Question 7 above]. Given that the standard definition of wicked recklessness emphasises the very high level of culpability required for that standard to be met, we believe it is sufficiently narrow to avoid the law of murder being overly broad following the removal of the requirement of an intention to injure. Option (d) should, moreover, be simple to implement in practice: as the *Jury Manual* definition demonstrates, it is possible simply to remove the reference to an intention to cause injury without in any way damaging the coherence of the remainder of the definition."

5.27 We considered adopting the above approach, namely option (d) of Question 7 "to provide by statute that 'intention to injure' is [or is not, depending on our conclusion on this issue] a necessary element of the wicked recklessness which constitutes the crime of murder". Ultimately however we rejected that approach, for the following reasons:

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[33] See comments by the Faculty of Advocates and Professors James Chalmers and Fiona Leverick below. The Law Society of Scotland tentatively agreed.
[34] Professor Gerry Maher KC; the Senators of the College of Justice (with whom Lord Bracadale and the Sheriffs' Association agreed); and Dr Andrew Cornford.
[35] Professor Eric Clive, Professor Antony Duff, Professor Pamela Ferguson, the Centre for Scots Law at the University of Aberdeen, and the University of Strathclyde Law School.

- Such an approach would not assist in making homicide law accessible and transparent (an important goal in law reform). While the provision would clarify whether or not intention to injure is an essential element in the second limb of the definition of murder, anyone seeking to ascertain and identify the crime of murder in Scots law would have to research at least one textbook and possibly further sources such as reported caselaw, in addition to reading the statutory provision.
- In any event, we have concluded that the concept of "wickedness" should not feature in 21st century legislation": see paragraph 5.22 *et seq* above.

Accordingly we consider that the statutory definition of murder should be complete in itself, and not a gloss on (or a piecemeal amendment to) the common law.

5.28 We therefore recommend that:

5. The statutory definition of murder should be complete in itself, and not a gloss on or amendment to the common law definition.

(Draft Bill, section 1(1))

A complete statutory definition of murder

The first limb of the definition: intention to kill

5.29 For the statutory definition of murder, consultees were agreed that the word "wickedly" is not required. Intent to kill is sufficient. In any event, we have concluded that the concept of "wickedness" should not feature in 21st century legislation.[36]

The second limb of the definition: currently "wicked recklessness"

5.30 As already noted, we do not recommend using concepts such as "wicked" or "wicked recklessness" in 21st century legislation. At paragraph 4.35 of the Discussion Paper, consultees were asked:

> "7 (b) … how should "wicked recklessness" be defined? Options might include the following:
>
> - demonstrating complete indifference to human life
> - acting "in such a way as to show that you don't care whether a person lives or dies"
> - being "totally regardless of the consequences, whether the victim lived or died… "

Of the 14 consultees who answered Question 7(b), the majority accepted all three options.

5.31 We agree with the majority of consultees. In our view, the three options listed above accurately reflect the grave and heinous nature of the crime of murder, with the

[36] See para 5.22 *et seq* above.

essence of the second limb of that crime being a complete or utter disregard for human life, not caring whether a human being lived or died.

5.32 We therefore recommend:

> **6. The statutory definition of the crime of murder should contain two limbs: in the first limb, intention to kill; in the second limb, behaving with an utter disregard for whether a person lives or dies.**
>
> (Draft Bill, section 1(1))

Should the second limb require an element of "intention to injure"?

5.33 As noted,[37] there was a divergence of views concerning the question whether the second limb of the definition of murder should contain the element of "intention to injure". Two-thirds of the relevant consultees considered that no such element is required. By contrast, one third stated that the element of intention to injure is required.

5.34 The minority included Professor Gerry Maher KC, who explained:

> "The *Purcell* approach should be retained. The common, but mistaken, understanding of wicked recklessness pre-*Purcell* had the undesirable effect that murder could be committed without any element of intentional conduct on the part of the accused. The term 'wicked' recklessness should be avoided and replaced with the criterion of 'totally regardless of the consequences, whether the victim lived or died."

5.35 The minority also included the Senators of the College of Justice,[38] who confirmed that the element of "intention to injure" as explained in *Purcell* was necessary, subject to considering whether it might more appropriately be phrased as requiring the element of "assault". They observed:

> " … To contemplate removing the requirement for intention to injure (or assault) from the definition of the crime would therefore involve a fundamental departure from the concept of the crime as it has been applied over many years. The effect would be to allow an extension of the currently understood crime of murder and the possibility of an increase in the number of persons convicted of that crime.
>
> The principal concern about the suggested removal of the 'intention to injure' element (or the element of assault) is the consequential difficulty in distinguishing between murder and culpable homicide committed recklessly … This was the conundrum which the Crown were unable to explain in *Purcell* and which led the court to conclude that it was the inclusion of the intention to

[37] See para 5.13 *et seq.*
[38] With whom Lord Bracadale and the Sheriffs' Association agreed. The senators preside over all homicide trials and appeals in Scotland.

injure requirement which served to distinguish between the two crimes (see the opinion of the court delivered by Lord Eassie at para [12]).”

5.36 In the course of preparing a draft Homicide (Scotland) Bill, it became apparent that the Senators’ point was a good one. When using the concept of “utter disregard” (for human life, or for consequences), it proved difficult to differentiate between murder and some forms of culpable homicide involving recklessness. Faced with this difficulty, inclusion of an element of “assault” (traditionally defined as requiring “evil intent”, which for many lawyers means “acting with intention to injure”) appeared to be necessary, to differentiate the crime of murder from the crime of culpable homicide committed recklessly. As has been noted,[39] following upon the decision in *Purcell,* the Crown Office took the step of including the offence of “assault” in every murder indictment.

5.37 Such an approach is supported by passages in the works of Macdonald and more contemporary commentators such as Sir Gerald Gordon.[40] On one view, there has always been a long-established link between wicked recklessness and assault. Macdonald’s traditional definition of murder considers “wicked recklessness” in the context of an assault or act intended to cause injury:

> "The amount of recklessness which may constitute murder varies with circumstances. Conduct which would not indicate total recklessness in the case of an attack upon a strong full-grown person might do so in the case of an infant or aged person. One blow even with the hand might be sufficient to infer murder in the case of a child. As regards frail and aged people, it has been well said that violence to them is doubly reprehensible, and that the weak are entitled to protection against the degree of violence that will injure them. If in attempting or perpetrating another crime 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."[41]

5.38 Similarly, contradicting any suggestion that including assault or intention to injure in the second limb of murder would amount to a major innovation in the law, the High Court in *HM Advocate v Purcell*[42] argued:

> “[16] [The] modern law is… set out by *Gordon*… - ‘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 for the consequences’ …
>
> And in talking of the modern law we would comment, importantly, that it should be noted that the views expressed in regard to this domain in the 3rd edition of *Gordon* are those expressed in the 1st edition, published some 40

[39] Para 5.11 above.
[40] Macdonald, *Treatise*; Gordon, *Criminal Law Vol 1.*
[41] Macdonald, *Treatise* at p 89, cited by Lord Eassie in *Purcell* at para [9].
[42] 2007 SCCR 520.

years ago in 1967. Since that time, they have represented the accepted views among jurists which have not been the subject of any subsequent challenge."

5.39 The views expressed by Macdonald and Gordon suggest that the *mens rea* for murder should be more narrowly construed than has been the case in recent times when construing the phrase "wicked recklessness". Intention to kill clearly suffices. In the absence of such an intention, one view of the authorities suggests that there must be an intention to assault or cause injury in circumstances that exhibit wicked recklessness. It is perhaps arguable that recent practice strayed from this stricter definition, approaching wicked recklessness rather loosely, as embodying an objective assessment of the accused's conduct. On this approach, *Purcell* restored the law to the earlier, albeit more restricted, understanding of the test.

5.40 One concern about a statutory definition that restricts the scope of the second limb of murder to only those killings where there is an intention to injure or assault, is that there might be cases that do not fall within the definition, even although some consider "murder" to be the most appropriate label. This concern may be illustrated by Lord Goff's examples.[43] As explained in our Discussion Paper at paragraph 4.24, a jury might not be entitled to return a verdict of murder (despite their wish to do so) where, for example:

- a car-driver tries to escape from the police, driving wildly and contrary to all road rules, and in so doing fatally injures a pedestrian or a police officer;
- an activist plants a bomb in a department store, and a shop assistant is killed despite the activist's advance warning;
- a man sets fire to a ground floor flat with the sole purpose of destroying incriminating evidence, and an upstairs neighbour is killed.

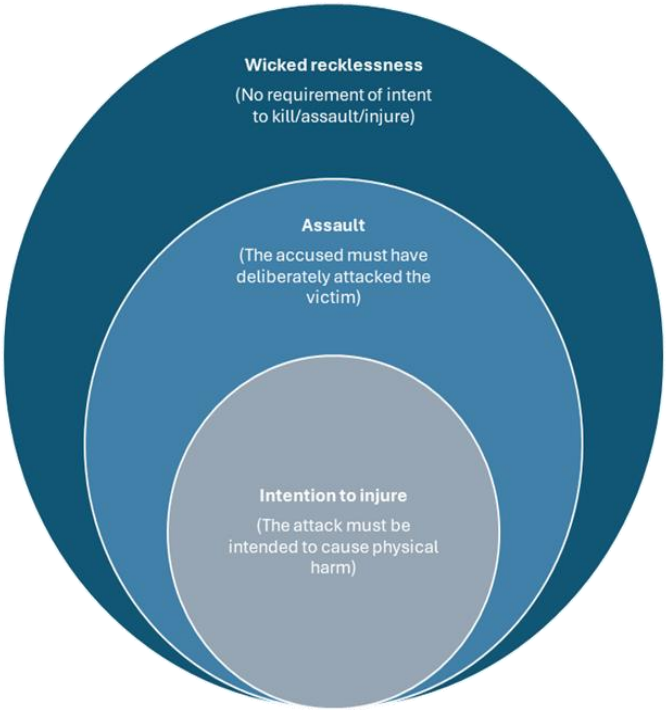
5.41 However this concern may be answered to some extent by a recent appeal court decision *Kirkup v HM Advocate.*[44] In that case, the appeal court clarified that "assault with evil intent" simply means (and has always meant) "a deliberate assault". Intention to injure is not an essential element: the *mens rea* of assault is simply a *deliberate* attack on another person, a *deliberate* interference with the person of another. Any previous assertions made by the courts that "assault with evil intent" means that the accused must have intended "evil consequences", ie harm or injury, were incorrect. The motive for the deliberate attack is irrelevant.

5.42 The *Kirkup* ruling draws a distinction between assault and intention to injure. An attack made on another person to cause them injury or harm will almost always amount to an assault. However, an assault can be committed even if there is no specific intention to injure; it could be assault where, for example, the person only meant to frighten, disrupt, or even perform a practical joke.[45] On the basis of that decision, a statutory definition of the second limb of murder in Scots homicide law could take the form of an assault coupled with an utter disregard for human life, without

[43] See paras 4.23 *et seq* of the Discussion Paper, and para 5.11 above.
[44] 2025 SLT 234.
[45] *Lord Advocate's Reference (No. 2 of 1992)* 1993 JC 43.

overly restricting the scope of the crime of murder. Indeed, as already noted,[46] the inclusion of "assault" reflects current Crown Office practice post-*Purcell* when drafting murder indictments.

5.43 The diagram below illustrates the scope of possible tests (wicked recklessness, assault, and intention to injure) in the second limb of murder. Common law "wicked recklessness" catches the greatest number of offences. "Assault" catches a lesser number, as it will only be murder if the killing results from a deliberate attack. "Intention to injure" catches fewer offences still, only those where the accused acted with the specific intention to cause injury/harm. The introduction of an assault in the second limb of murder can therefore be considered a suitable middle route: it provides a modern and distinct definition for murder, absent the outdated language of "wickedness", without going so far as to uphold what some might consider to be an overly restrictive "intention to injure" requirement laid down by the court in *Purcell*.[47]



5.44 The introduction of an element of "assault" in the second limb of the definition of murder also aligns with our recommendation that any doctrine of constructive malice[48] thought to be in existence should be explicitly abolished by statute (see paragraph 5.58 *et seq* below). The doctrine has long had no material role in Scots modern law of murder, where it is clear that a person should not be held liable if they did not have the necessary *mens rea*. However, the idea that intention can be "constructed" or "construed" from the objective circumstances and the definitions of

[46] Para 5.11 above.
[47] Our conclusion concerning a "suitable middle route" is discussed further in the following section, entitled "Answers to concerns about restricting the scope of the crime of murder".
[48] Whereby someone committing an offence not intended to result in a death (for example, robbery or fire-raising) could be convicted of murder if an unintended death occurred during that offence.

other crimes such as robbery or fire-raising, may have shaped the approach to wicked recklessness that has often been adopted by the courts for many years.

Answers to concerns about restricting the scope of the crime of murder

5.45 In our Discussion Paper, published in May 2021, we raised the question whether a clear requirement for "intention to injure" in the second limb of the murder definition might restrict a jury's choice, in that a jury might no longer be able to choose to convict of murder, rather than culpable homicide, in most of the scenarios outlined in Lord Goff's lecture.[49] However as noted in paragraphs 5.41 to 5.43 above, the law has developed since then. In 2024-25 the decision in *Kirkup v HM Advocate*[50] in effect allayed many of those concerns, in that an "assault", as now authoritatively defined by the criminal appeal court, simply requires a deliberate attack on a person, not necessarily accompanied by intention to injure. Thus, a suitable "middle route" was identified.[51]

5.46 The *Kirkup* clarification of "assault"[52] is of major importance. The type of action which might amount to an assault at common law includes a wide range of behaviour, including kicking, punching, slapping, slashing, stabbing, hitting with a hammer or a baseball bat or other weapon, burning, or shooting another person. But "assault" also includes less well-recognised behaviours such as pouring poison down a sleeping man's throat, injecting someone with heroin,[53] continuing to drive knowing that someone is clinging on to the car, pulling away a chair on which someone is sitting, chasing someone over a cliff, and making threatening gestures.[54] There need not be substantial violence; there need not be physical contact; the attack may be indirect;[55] it is not necessary that the victim suffers injury.[56]

5.47 Prior to the criminal appeal court's decision in *Kirkup*, there was a well-established line of authority vouching the proposition that the words "with evil intent" (which appear in the common law definition of assault: "an attack on another person with evil intent") meant "intent to injure and do bodily harm".[57] However *Kirkup* authoritatively declared that this proposition is incorrect. *Kirkup* ruled that "intention to

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[49] "The mental element in the crime of murder" (1988) 104 LQR 30; the Discussion Paper at para 4.24; Lord Goff's scenarios at para 5.11.
[50] The criminal appeal court's judgment was dated 27 June 2024, but embargoed to allow the trial to take place. The judgment was issued in February 2025.
[51] Para 5.43 above.
[52] That particular case involved sexual activity with the relevant offences being indicted under the Sexual Offences (Scotland) Act 2009, the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, and the Domestic Abuse (Scotland) Act 2018.
[53] *Scott v HM Advocate* 2012 SCCR 45.
[54] Some of these examples are listed in Gordon, *Criminal Law Vol 2* at para 33.01.
[55] For example, setting a dog on someone; driving a car across the path of another car in which the victim is a passenger; driving on while someone is clinging on to the driver's car; pulling away someone's chair; pursuing someone over a precipice.
[56] See generally Gordon, *Criminal Law Vol 2* at para 33.01.
[57] See authorities such as *Smart v HM Advocate* 1975 JC 30 at p 33; *Sutherland v HM Advocate* 1994 JC 62; *McDonald v HM Advocate* 2004 SCCR 161; *Scott v HM Advocate* 2012 SCCR 45; textbooks such as Ferguson and McDiarmid, *Scots Criminal Law*, para 10.2.2; and the Jury Manual in earlier formulation: "The crime of assault consists of a deliberate attack on another person with evil intent. Proof of evil intention, in the sense of intending to cause physical injury or fear of physical injury, is essential. Injuries caused accidentally or carelessly aren't assaults …". The Manual currently defines assault as follows: "An assault is an attack on another person carried out with evil intent, which simply means that the attack was deliberate. Accidental or careless contacts are not assaults …" (taken from the Jury Manual online on 27 March 2025).

injure" is not an essential prerequisite of the crime of assault: what is required is a deliberate interference with the person of another.

5.48 As a consequence of *Kirkup,* any definition of murder which is dependent upon an "assault" having been committed is not so constrained or limited as it would have been if the crime of "assault" required the element of "intention to injure".[58]

5.49 Also it should be noted that the doctrine of "transferred intent", which applies in the Scots law of assault, would feature in the new definition of murder. Thus "if A intends to strike B, and in fact strikes C who is standing nearby, A is guilty of assaulting C".[59] Similarly if A intends to shoot B, but in fact fatally shoots C, A would be guilty of the murder of C.

5.50 There will arguably be a conceptual structural change if "murder" is defined as an assault coupled with utter disregard for whether a human being lives or dies:

> *Common law definition of murder: mens rea* (a guilty mind, evidenced by either (i) intention to kill; or (ii) wicked recklessness; both (i) and (ii) being *mental* elements), coupled with the *actus reus* (the physical act or acts causing the death).
>
> *New statutory definition of murder: mens rea* (a guilty mind, evidenced by either (i) intention to kill; or (ii) assault; (i) being a *mental* element; but (ii) comprising both a mental element (a deliberate intention to carry out the interference with the person of another) and a physical element (the physical act or acts causing the death). In short, the second limb of murder will no longer comprise a purely mental element.

That structural change is not expected to cause any difficulty.

5.51 In an endeavour to test concerns about the possible restriction of the "reach" or scope of the crime of murder as defined in a Homicide (Scotland) Bill, Lord Goff's examples were specifically drawn to the attention of the senator member of the Advisory Group,[60] resulting in the following response (what follows is a paraphrased version with emphasis added; full details of each case can be found at paragraph 4.24 of the Discussion Paper):

(1) *DPP v Smith* (a thief driving off with a police officer on his car): the driver's actions in continuing to drive in the knowledge of the presence of a police officer on top of his car is in Scots law an *assault*. It would be a jury question whether this was murder or culpable homicide.
(2) *R v Hyam* (a jealous ex-girlfriend setting fire to her ex-partner's house): this scenario is close enough to the circumstances of *Petto v HM Advocate* 2012 JC 105 to be confident that it would be open to the jury to convict of

[58] See the diagram at para 5.43 above.
[59] Gordon, *Criminal Law Vol 2* at para 33.29.
[60] Lord Beckett, Chair of the Judicial Institute, member of the Jury Manual Committee, preliminary hearing judge in *Kirkup,* and (since 4 February 2025) Lord Justice Clerk.

murder: LJG Gill at 12 and 13 – para 12 the appellant knew that people were living in the building (not that they were present); and LJC Carloway at 31 (*assault*).

(3) *R v Moloney* (a man shooting his step-father during a drinking session): It would be a question of fact for the jury whether there was an *assault* and therefore whether this could be murder. It could (and almost certainly would) amount to culpable homicide. (NB in this case the murder conviction was reduced to manslaughter on appeal.)

(4) *R v Hancock and Shankland* (a block thrown off a bridge onto a motorway): In Scotland this would undoubtedly be considered an *assault* on the occupants of the vehicle and therefore murder, although culpable homicide may be left to the jury as an option.

(5) *Fights with a knife or with broken glass*: There was an *assault* (a deliberate attack) and it caused death.

(6) *The bomb on an aircraft*: The placing of a bomb on an aircraft is an *assault* on any potential occupant.

(7) *Terrorists leaving a bomb in a dustbin in the street*: This would almost certainly be considered an *assault* on any potential passerby and therefore murder.

(8) *The reckless motorist* (overtaking on a blind corner): The driver in this scenario cannot be convicted of murder, as there is no assault in the circumstances described. There will be other driving cases where the jury could conclude that there was an assault, and therefore murder.

5.52 The views outlined above, together with the Crown Office's confirmation that only where the circumstances of the death include an assault which is libelled in the indictment, is an indictment for murder issued, persuade us that there should be few concerns about the statutory provision envisaged having an overly restrictive effect on the scope of the crime of murder in Scots law.

5.53 If under the new statutory provision there are cases that cannot be prosecuted as murder, although they could have been prior to the *Purcell* ruling or the very recent *Kirkup* decision, we consider this to be an appropriate outcome in a society that believes in fair-labelling and so reserves the label of "murderer" for those who cause death by the most grave and objectionable conduct. A murder conviction carries a mandatory life sentence and a permanent social stigma. We have therefore reached the view that the offence label should apply only to cases where the accused acted with intent to kill, or where the circumstances amounted to assault behaving with an utter disregard for whether a human being lived or died.

5.54 Taking this approach, the envisioned statutory provision should introduce greater certainty and fairness into the Scottish criminal justice system. We emphasise the following:

- The traditional understanding of "wicked recklessness" is widely accepted as vague and difficult to state in general terms. The new provision will introduce a clear test to be applied consistently in all murder cases, thereby making the law more accessible and transparent.

- The need for intentional conduct means that the law is less likely to result in a conviction and punishment that are disproportionate to the wrongdoing committed.
- The statutory definition would also make clear that there is no doctrine of constructive malice in Scots homicide law:[61] see the proposed provision in section 1(2) of the draft Bill in Appendix A.

5.55 Those homicides that do not satisfy the test for murder should be dealt with appropriately under the proposed statutory definition for culpable homicide (see Chapter 6). The full range of disposals are available to the courts following a culpable homicide conviction, and they may select a sentence that accurately reflects the degree of wrongdoing in the more serious and borderline cases.[62]

5.56 Our reform recommendations aim to modernise Scots homicide law so that it is no longer burdened by outdated or inconsistent legal principles.[63] We consider that introducing statutory provisions that emphasise the importance of intentional conduct in murder cases will assist in achieving a careful and consistent assessment of wrongdoing.

5.57 We therefore recommend that:

7. The second limb of the statutory definition of murder should include the element of "assault" coupled with behaving with an utter disregard for whether a person lives or dies.

(Draft Bill, section 1(1)(b))

The issue of "constructive malice" in Scots homicide law

5.58 As explained in our Discussion Paper at paragraph 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 upon the physical circumstances leading to the death, rather than on the accused's state of mind and guilty knowledge. A robber or a fire-raiser might subsequently be surprised and shocked to learn that a death had occurred as a result of the robbery or fire-raising, but despite the lack of the *mens rea* normally required for murder, would nevertheless be liable for murder.

5.59 As further explained at paragraph 4.43 *et seq* of the Discussion Paper, it is not clear whether such a doctrine exists in Scotland. Accordingly, at paragraph 4.56 of the Discussion Paper we asked consultees the following question:

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[61] And thus no automatic attribution of liability for the crime of murder where a killing occurs in the course of another crime, such as robbery or fire-raising: see para 5.58 *et seq* below.
[62] The dividing line between murder and culpable homicide is often a fine one: see para 2.14 *et seq* in the Discussion Paper.
[63] The remarks that were instrumental in bringing about the Homicide project: para 1.4 of the Discussion Paper.

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

5.60 There were 13 responses to this question. Nine consultees considered that legislation should clarify that no such doctrine exists in Scots homicide law.[64] The remaining four consultees thought that no legislation is required, as the law is sufficiently clear already (ie that the doctrine does not currently exist in Scots law).[65]

5.61 We agree with the majority view. An express statutory provision would remove any remaining doubt about the existence or otherwise of a doctrine of constructive malice in Scots homicide law. We therefore make the following recommendation:

8. The Homicide (Scotland) Bill should contain a provision clarifying that there is no doctrine of constructive malice in Scots homicide law.

(Draft Bill, section 1(2))

[64] Professor Eric Clive, Professor Antony Duff, Professor Pamela Ferguson, Professor Gerry Maher KC, the Faculty of Advocates, the Centre for Scots Law at the University of Aberdeen, Dr Andrew Cornford, the Law Society of Scotland, and Nicholas Burgess.

[65] The Senators of the College of Justice (with whom Lord Bracadale and the Sheriffs' Association agreed); and Professors James Chalmers and Fiona Leverick.

Chapter 6 Culpable homicide

Introduction

6.1 In Scotland, the common law crime of culpable homicide does not have a classic definition.[1] The law tends to describe rather than define it, and various formulations have been given. 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."[2]

6.2 It can be seen, therefore, that culpable homicide is a residual category. The crime captures a broad range of circumstances where death results from conduct that may be blameworthy (ie not accidental or justified[3]), but does not amount to murder. A person may have been manhandled out of a car,[4] or left exposed to the elements.[5] A gas installer may have carried out a defective installation.[6] 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.[7] A drug-dealer may have supplied illegal drugs to a customer who voluntarily ingested them and died as a result.[8] A car-driver may have caused a fatal road traffic accident.[9] A single punch thrown in the course of a dispute may have caused the victim to fall and suffer a fatal head injury.[10] The partial defences of provocation (Chapter 11) and diminished responsibility (Chapter 12) may also reduce what would otherwise be "murder" to the lesser offence of "culpable homicide".[11]

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[1] Contrast with the classic definition of the common law crime of murder: see ch 5 above, and chs 4 and 5 of the Discussion Paper.
[2] *Drury v HM Advocate* 2001 SCCR 583, para [13].
[3] For example, if a person accidentally falls off a roof on to a pedestrian who dies as a result, or if a doctor switches off a patient's life-support machine in medically justified circumstances, then there would be no criminal responsibility.
[4] *Bird v HM Advocate* 1952 JC 23.
[5] *HM Advocate v McPhee* 1935 JC 46.
[6] 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.
[7] Cf the circumstances in the English case of *R v Adomako* [1995] 1 AC 171.
[8] As in *MacAngus and Kane v HM Advocate* 2009 SCCR 238.
[9] As in *HM Advocate v Purcell* 2007 SCCR 520.
[10] Such a situation may involve the "thin skull" rule, namely taking your victim as you find them. 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; *Bird v HM Advocate* 1952 JC 23.
[11] Despite the doubts expressed by Lord Justice General Rodger in *Drury,* 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. However, the voluntary/involuntary classification does not emanate from the institutional writers, and the classification is infrequently referred to in day-to-day practice in Scottish murder trials and appeals.

6.3 Whether a particular set of circumstances should result in the perpetrator being subjected to a criminal prosecution and, if convicted, labelled a "killer",[12] often presents difficult questions of morality, contemporary values, and social policy, in addition to legal principle and precedent.[13] These matters can be highly contentious and there are widely differing views about which approach should be adopted.

6.4 In most cases, the question at issue is whether the perpetrator has committed murder or culpable homicide. This question is of major importance for both fair labelling[14] and sentencing.[15] However, the dividing line between the two common law crimes can be a fine one, as illustrated by the following cases:

> *Ferguson v HM Advocate*:[16] A single stab wound delivered to the victim's 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.
>
> *Anderson v HM Advocate*:[17] A single stab wound delivered to the victim's abdomen, directed upwards towards the heart, entitled the trial judge to withdraw the option of culpable homicide from the jury.

6.5 For this reason, the choice between murder and culpable homicide is often considered to be a "jury question".[18] It is ultimately for the jury to decide, depending upon the evidence they accept and the inferences they draw, whether a killing should be treated as murder, or whether it warrants the less grave conviction of culpable homicide.

6.6 Suggestions for potential reform of the law focus on the interaction between the two homicide offences and the broad construction of the crime of culpable homicide itself.[19] Several questions were raised in the Discussion Paper, including whether the law of culpable homicide should recognise different grades of blameworthy killing conduct, whether it would be useful to know why a jury had opted to convict of culpable homicide and not murder, and whether "assault causing death" would be a useful further category of crime.

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[12] The consequence of a conviction for culpable homicide: see, for example, R Shiels, "Culpable homicide by one punch", Criminal Law, Issue 175, February 2022, p 6.
[13] See the Discussion Paper, paras 5.3 to 5.8.
[14] The principle contends that an offender should not be unfairly labelled or have the nature of his or her wrongdoing misrepresented.
[15] While a conviction for murder carries a mandatory sentence of life imprisonment, there is no such rule for culpable homicide. The full range of disposals are available to the courts, and it is possible that the accused may not be given any prison time.
[16] 2009 SLT 67.
[17] 2010 SCCR 270.
[18] See G Gordon, *Criminal Law Vol 2* at para 30.18 for evidence given by Lord Cooper in the *Report of the Royal Commission on Capital Punishment 1949-1953* (1953), and para 30.21 for comments made by Sir Gerald Gordon. See also commentary by Gordon on the case of *Elsherkisi v HM Advocate* 2011 SCCR 735.
[19] See the Discussion Paper, para 5.9 *et seq.*

Possible sub-division of culpable homicide into specific crimes

6.7 Some commentators criticise the common law definition of culpable homicide as being too wide, too vague, and too all-embracing.[20] In the light of those criticisms, at paragraph 5.55 of the Discussion Paper we asked consultees 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*?"

6.8 Fourteen consultees responded to all or most of these three questions. The overwhelming majority of consultees answered in the negative. In other words, there was no appetite for an attempt to divide the common law offence of culpable homicide into specific statutory offences graded in any particular way: for example, by blameworthiness, or type of killing, or a combination of *mens rea* (the guilty mind) and *actus reus* (the guilty act).

6.9 Comments from the majority included the following:

> *Professors James Chalmers and Fiona Leverick:* "[This] would add unnecessary complexity to the law and graduations in seriousness can be reflected in sentencing."
>
> *Professor Gerry Maher KC:* "I do not favour prescriptive gradations of culpable homicide based on different levels of gravity. There are formidable difficulties in marking out these different gradations."
>
> *Senators of the College of Justice (with whom Lord Bracadale and the Sheriffs' Association agreed)*: "… The benefit [of the current common law] broad and flexible definition might be thought to be illustrated by the breadth of circumstances to which the crime has been applied, as set out in paragraph 5.3 and 5.18 of the Discussion Paper. The same paragraphs demonstrate the resilience of the definition, despite changing societal needs and circumstances. Our experience tallies with that of the practitioners interviewed, who expressed the view that the Scots law of culpable homicide is working well in practice."

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[20] See the Discussion Paper, para 5.14 *et seq.*

6.10 We agree with the majority of consultees, for the reasons they provide. Consequently, we make no recommendation that the definition of "culpable homicide" in Scots homicide law should be (a) sub-divided into prescriptive gradations reflecting specific levels of gravity, or (b) sub-divided into categories 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, or (c) refined to create a "ladder" or "grid" of particular offences defined by reliance upon both the *mens rea* and the *actus reus*.

A verdict of guilty of culpable homicide with the addition of "under provocation" or "with diminished responsibility"

6.11 As explained in paragraph 5.12 of the Discussion Paper, one practitioner in an informal consultation held prior to the publication of the Discussion Paper suggested that it would be useful to know why a jury had opted for culpable homicide rather than murder. A verdict with a rider such as "under provocation" or "with diminished responsibility" would assist both in sentencing and in any subsequent appeal. Accordingly, at paragraph 5.55 of the Discussion Paper we asked consultees:

> "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?"

6.12 Thirteen consultees responded to Question 13. The majority of consultees (nine in number) were in favour of inviting a jury to add a rider of "under provocation" or "with diminished responsibility", reflecting the particular circumstances of the case. Reasons given included assisting with understanding the basis of the conviction, under reference to Article 6 of the ECHR and the case of *Taxquet v Belgium;*[21] allowing the sentencing judge to understand what facts the jury found proved; adding clarity and providing some explanation for the verdict;[22] addressing any concerns relating to "fair labelling" in the context of murder and culpable homicide; usefulness where there might be several reasons for a verdict of culpable homicide (as distinct from murder) and the judge wishes the jury to adjudicate on an issue such as provocation.[23]

6.13 However while considering that there was some merit in the proposal,[24] Professors James Chalmers and Fiona Leverick foresaw some practical difficulties, outlined as follows:

> " … First, juries would need assistance in understanding the two different routes to a culpable homicide verdict.[25] The use of a written route to verdict document would be of considerable assistance here. Second, the issue of what

[21] (2012) 54 EHRR 26 (Grand Chamber) para [92]: the accused must be able to understand the reasons for his conviction.
[22] In particular, whether the jury was persuaded by the mitigating plea.
[23] Lord Justice General Carloway in *McAulay v HM Advocate* 2018 SCCR 338.
[24] Referring to *Taxquet* and the need for the accused to be able to "understand the reasons for his conviction": para [92] of *Taxquet.*
[25] (i) A murder reduced to culpable homicide because of provocation or diminished responsibility; and (ii) a homicide where the *mens rea* did not come up to what is required for murder.

to do where there is a majority for culpable homicide, but not a majority for the *route* to culpable homicide, would need to be addressed. What verdict would be returned, for example, if 7 jurors supported a murder conviction, 4 supported culpable homicide via *mens rea* and 4 supported culpable homicide via provocation, but all of those 7 jurors who voted for murder thought that the most appropriate route to culpable homicide was via provocation?"

6.14 We sent this excerpt, together with Question 13 and an outline suggested policy approach, to the Senator member of the Advisory Group.[26] His response on behalf of the Senators was in the following terms:

> "**Riders to verdict – Note for Scottish Law Commission**
> … at present … judges *generally do invite juries to specify a provocation rider, particularly in murder cases.* Some judges already take the same approach with diminished responsibility, which in its statutory form only features for murder …
> [There follows a review of appeal cases concerning jury voting.]
> … Legislative proposals would be very difficult to formulate and could deprive judges of the opportunity to problem-solve in a practical way in the rare situation where such an issue [as outlined by Professors Chalmers and Leverick] arises. The very small collection of cases on voting in verdicts suggests that problems are not common. When such issues arise, judges will decide upon them and appeal courts may have an opportunity to examine what occurs at first instance. I would respectfully suggest that it would be better to allow the courts to find pragmatic solutions in the knowledge that appellate guidance can be provided if required."

6.15 As Lord Beckett notes, judges do in fact currently invite juries to add a rider of "under provocation" where appropriate. Some judges also invite a rider of "with diminished responsibility" where appropriate. Provided that such an approach remains one for the discretion for the trial judge (rather than being made prescriptive by statute), it would seem that few problems arise. The Jury Manual Committee may wish to remind judges that such riders may be helpful in certain cases, and that a trial judge may currently invite a jury to specify such a rider.

6.16 On balance we consider that a statutory provision, whether mandatory or otherwise, would not benefit the practical application of homicide law. Accordingly, we make no recommendation that there should be a statutory provision concerning an invitation to the jury to add a rider of "under provocation" or "with diminished responsibility" (as the case may be) to their verdict.

Possible creation of a new offence of "assault causing death"

6.17 In the course of our research, there appeared to be some support for a new offence of "assault causing death" (similar to the offence created in several Australian

[26] Lord Beckett, Chair of the Judicial Institute, member of the Jury Manual Committee, and (since 4 February 2025) Lord Justice Clerk.

jurisdictions).[27] Such an offence was created primarily to deal with "single punch" cases. For example, legislation in the Australian state of 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.[28]

6.18 Accordingly, at paragraph 5.55 of the Discussion Paper we asked consultees the following question:

> "14. Would Scots law benefit from having a new crime of "assault causing death"? If so, why, and what should the essential elements be?"

6.19 Fourteen consultees responded to Question 14. A clear majority (11 in number) was opposed to the creation of a new offence of assault causing death. Reasons given by the majority focused on the fact that the crime of culpable homicide already covers such an assault. Professors James Chalmers and Fiona Leverick commented:

> "Unless it is considered that it is *wrong* for the law of culpable homicide to encompass all assaults which cause death – and that is not a position we would support – a reform of this nature is unnecessary."

6.20 Dr Rachel McPherson was of the same view. Similarly, Professor Gerry Maher KC favoured "retaining this conduct as a form of culpable homicide", and Professor Eric Clive stated:

> "This is just one form of culpable homicide and would be adequately covered by a restatement of the law on culpable homicide."

6.21 The Law Society of Scotland observed:

> "… 'Assault causing death' devalues the loss of life and downgrades the severity of the outcome for the next of kin … We have an entirely serviceable common law crime for such cases with the offence of culpable homicide."

6.22 The Faculty of Advocates suggested that, given the various other types of culpable homicide discussed in the Discussion Paper, it would be arbitrary to:

> "isolate one… involving the specific crime of assault causing death… Scots law of culpable homicide is perhaps the most capable of embracing this particular factual scenario."

6.23 Senators of the College of Justice[29] commended the current broad and flexible definition of culpable homicide, and the fact that the law works well in practice. They did not see any advantage in the creation of a new offence.

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[27] See the Discussion Paper, para 5.44.
[28] Crimes Act 1958 (Vic) s 4A(4).
[29] With whom Lord Bracadale and the Sheriffs' Association agreed.

6.24 By contrast, the public opinion survey carried out by BritainThinks supported the minority consultee view. When faced with a scenario of a single punch knocking a participant to the ground such that his head hit the pavement and he died of the head injury, BritainThinks participants did not regard the offence as "murder" or even as "culpable homicide". They commented that fighting was a common occurrence, and any resulting death (being neither expected nor intended) was more bad luck than murder. Their view was that a label of "assault causing death" was more appropriate.

6.25 While noting the view held by those who participated in the BritainThinks survey, we are not persuaded that a new offence of "assault causing death" should be created, for the following reasons:

- There is no suggestion that juries in Scotland are failing to return guilty verdicts of an appropriate nature.
- There are many situations where death may seem "bad luck" to some people: for example, death occurring where a person was manhandled out of a car,[30] or where a person was left exposed to the elements.[31] But currently the law tends to take the view that a person should be responsible for their actions, and that one has to take one's victim as one finds them. In our view, the subtleties and nuances of each situation are best dealt with by the existing broad offence of culpable homicide, with appropriate adjustments in sentencing, and not by a circumstances-specific new offence.
- As was pointed out by the Faculty of Advocates, if there is to be no "grid" or "ladder" of culpable homicide offences, it seems arbitrary to select this one type of conduct for a special label.
- Depending upon the circumstances of the case, it is already open to a judge when charging a jury to give the option of convicting of a lesser offence such as assault.
- There is a serious danger that the introduction of a new offence of "assault causing death" might dilute the gravity of the offence: it must not be forgotten that a life has been taken.

6.26 Accordingly, we do not recommend the creation of a new offence of "assault causing death".

A final question (not included in the Discussion Paper): should the common law crime of culpable homicide be defined in the proposed Homicide (Scotland) Bill?

6.27 At the outset of this project on The Mental Element in Homicide, it was not clear whether any legislation would be required. On one view, Scots homicide law was working well, and no major reform was necessary. In particular, the law relating to culpable homicide provoked few criticisms. Partly for that reason, consultees were not asked for their views about translating the common law crime of culpable homicide into a statutory provision.

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[30] *Bird v HM Advocate* 1952 JC 23.
[31] *HM Advocate v McPhee* 1935 JC 46.

6.28 However, responses to the Discussion Paper suggested that some clarifications, changes, and redefinitions were required for certain aspects of Scots homicide law. For example, in particular, there were disputes about the definition and extent of the common law crime of murder; there was doubt as to whether a doctrine of "constructive malice" existed in Scots law; and there was general agreement that the partial defence of provocation should not be available in circumstances where someone killed on discovery of the sexual infidelity of an intimate partner. Thus a need for a Homicide (Scotland) Bill was recognised.

6.29 During the drafting of the Bill, a question arose concerning culpable homicide.[32] Should there be a statutory provision defining culpable homicide in addition to one defining murder? Some argued that a statute which defines "murder" but not "culpable homicide" would be asymmetrical, incomplete, and unsatisfactory, lacking the transparency and clarity which are the goals of modern legislation. However, the Discussion Paper had focused on (i) the possible sub-division of culpable homicide into specific crimes, creating a "ladder" or "grid"; (ii) verdicts of guilty of culpable homicide with riders of "under provocation" or "with diminished responsibility"; and (iii) the possibility of a new offence of "assault causing death". Consultees had not been asked whether the common law crime could or should be translated into a statutory provision.

6.30 We accept that a Homicide (Scotland) Bill which defines "murder" but not "culpable homicide" would be unsatisfactory. In particular:

- Such an approach would not assist in making homicide law clear, accessible, and transparent (important goals in law reform). Anyone seeking to ascertain and identify the two homicide crimes in Scots law would have to consult the statute for the crime of murder, and textbooks and caselaw for the crime of culpable homicide.
- There would be no clear definition of the dividing line (or "liability line") between the two crimes; one crime would be defined by statute, the other by the common law.
- The statute might have the appearance of incompleteness and lack of symmetry.

6.31 In early 2025, using suggested draft statutory definitions of both murder and culpable homicide as texts for discussion, we engaged with our Advisory Group to discuss the question of statutory provisions for both crimes. A final version of an acceptable definition of culpable homicide, as set out in paragraph 6.32 below, emerged from these discussions. We consider that this final version captures the elements contained in the current common law offence of culpable homicide, always bearing in mind that there is no classic definition of culpable homicide at common law.[33]

6.32 The final version of an acceptable statutory definition of culpable homicide was as follows:

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[32] As noted above, a question which had not been put to consultees in the Discussion Paper.
[33] See paras 6.1 and 6.2 above.

"**2 Culpable homicide**

A person ("person A") commits the offence of culpable homicide if person A causes the death of another person ("person B") by –

(a) assaulting person B, or

(b) behaving –

(i) in a manner which endangers another person (whether or not that person is person B), and

(ii) with an utter disregard for the consequences."

6.33 The definition in section 2(a) is intended to cover cases where, in common law terms, there is an intentional assault, but the mental element in the offence does not come up to the test for murder. Thus the manhandling of someone out of a car,[34] or a single punch in a pub brawl, might fall within section 2(a).

6.34 The definition in section 2(b) is intended to cover cases involving a certain level of blameworthiness in disregarding others' safety, captured in the combined concepts of "endangering" another or others, and "an utter disregard for the consequences". Section 2(b) is intended to cover cases such as the blameworthy abandonment of an incapacitated person exposed to the elements; or the supplying of drugs to an inexperienced customer.

6.35 In a murder trial, the jury would be expected to assess the evidence and, after speeches and the judge's charge, to decide whether the homicide fell within section 1 or section 2. Key differences between the two sections would be:

Section 1: Murder	Section 2: Culpable homicide
The accused intended to cause death; **OR**	The accused did not intend to cause death, but did assault the person; **OR**
The accused assaulted another person and behaved with an utter disregard for *whether that person (or any other person) lives or dies*	The accused behaved in a manner which endangered another person, with an utter disregard *for the consequences*

6.36 We consider that the provision outlined above would provide a realistic and workable definition of the offence of culpable homicide. As such, we recommend that:

9. The Homicide (Scotland) Bill should contain a provision defining the offence of culpable homicide as being committed where a death is caused by an assault or by behaving in a manner which endangers another person and with an utter disregard for the consequences.

(Draft Bill, section 2)

[34] *Bird v HM Advocate* 1952 JC 23.

Chapter 7 Defences: an introduction

Introduction

7.1 Chapter 6 of the Discussion Paper was a very short introductory chapter on defences to preface the more detailed discussion of particular defences in Chapters 7 to 12 that followed. It set out a definition of what a "defence" is in criminal law and very briefly set out the different ways in which defences may be classified and distinguished. It then discussed our broad exclusion of general defences (ie those which apply to all offences, not just homicide offences) from the scope of the Discussion Paper.

7.2 At the end of the introductory chapter on defences, at paragraph 6.11 of the Discussion Paper, we asked consultees:

> "15. Do you consider that there are other aspects of the law of defences to homicide in need of reform, and if so, what?"

Summary of responses

7.3 There were nine responses to Question 15. Of those responses that indicated some reform may be needed, how the existing defences relate to scenarios involving domestic abuse preceding an intimate partner homicide is mentioned in five responses. However, as these are dealt with in later chapters of this Report they are not covered here. In a similar vein, the response of the Senators of the College of Justice referred to what they said in answer to the questions in the following chapters.

7.4 Four respondents answered in the negative, indicating that there were no other aspects of the law of defences to homicide in need of reform. In terms of comments, Professor Pamela Ferguson responded, "No, the Discussion Paper identifies the key defences that require reform in the context of murder and culpable homicide." Professor Eric Clive remarked:

> "There is a problem in deciding how to deal with general defences which can apply to various crimes. The Commission has decided, in general, to exclude them but with a few exceptions. This is wise in a limited exercise of this nature. I would go further and exclude general defences completely from any recommendations except in so far as they can operate as partial defences reducing murder to culpable homicide."

Discussion and conclusion

7.5 Given the small number of responses to Question 15 there are no discernible main themes emerging. This suggests that the Commission has broadly identified correctly the scope of the defences that required investigation in the project. The application of the existing defences scenarios where there has been an intimate partner homicide following domestic abuse is a key theme that runs through many of

the responses to questions posed in the chapters that follow and will be discussed in more detail in later chapters, particularly Chapter 13.

7.6 Given the small number and balance of responses to Question 15 we are not minded to make any recommendations to Ministers in relation to any other aspects of the law of defences relevant to homicide that are not already covered in the Discussion Paper.

Chapter 8 Self-defence

Introduction

8.1 Chapter 7 of the Discussion Paper discusses the complete defence of self-defence, which, if pled successfully, results in the acquittal of an accused charged with either murder or culpable homicide. It can also be classified as a "general" defence in that it is not restricted to homicide offences and can be pled in cases of, for example, assault and breach of the peace. The Discussion Paper describes, by reference to case law, the classic test for a successful plea of self-defence as involving three requirements – which can be very broadly labelled as a need for imminent danger, the retreat rule and proportionality.

8.2 Chapter 8 of the Discussion Paper goes on to discuss in more detail some specific issues in relation to the defence of self-defence as it applies to homicide offences. There is also a discussion in Chapter 12 of the Discussion Paper as to how self-defence operates in cases where there has been a killing of an abusive partner following a period of domestic abuse. Aside from those issues, paragraph 7.19 of the Discussion Paper states that 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 asked consultees for 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?"

Summary of responses

8.3 There were 14 responses to Question 16. Eleven respondents said that there was no need to reform the essential requirements for a successful plea of self-defence. Of those who elaborated on their answer, the general thrust was that the current law was working well, was settled and mostly unproblematic in practice. Of those who said there was generally no need for reform, three respondents mentioned self-defence may not be operating as it should for women who kill abusive partners (Dr Rachel McPherson, and reiterated by Professors James Chalmers and Fiona Leverick and a similar point made by Victim Support Scotland). However, this issue is covered in more detail in Chapter 13 (Domestic abuse).

8.4 Of the three respondents who suggest reform is needed, Professor Pamela Ferguson cited the retreat and imminence rules and terminology as needing changing, Dr Andrew Cornford mentioned that the imminence rule may need relaxing (and may assist in cases involving victims of domestic abuse) and the British Psychological Society mentioned the retreat rule as potentially needing reform, taking into account the impact of a "freeze" response in such a situation.

Discussion

8.5 The main theme in the responses to Question 16 was that the majority of respondents were of the view that there was no need to reform the essential requirements for a successful plea of self-defence (11 out of 14).

8.6 For example, in terms of practitioner views, the Faculty of Advocates stated, in reaching the conclusion that no reform is required, that "It is the experience of members of Faculty that a plea of self-defence, in the context of the law of homicide, is properly understood and applied." In noting their view that no reform is required, the Senators of the College of Justice mentioned that they "are not aware of any difficulty in applying the defence. In our experience juries do not often require further direction on this subject, no doubt because of its simplicity and clear logic." The Law Society of Scotland simply answered "No" to the question.

8.7 In terms of legal academic views, Professor Eric Clive commented that, "I would keep the law on the complete defence of self-defence as it is. It seems to be well-understood and, as noted already, it applies more generally than to homicide." Whilst endorsing Dr Rachel McPherson's view that the defence may not be operating as it should in relation to women who kill in response to domestic abuse, Professors James Chalmers and Fiona Leverick thought that "for the most part, the law is presently working well." Although Victim Support Scotland did not necessarily find a need for reform of the three essential requirements, they added the caveat that it might not work well in all cases where self-defence occurs. They pointed out that:

> "For example, where there is long-term, ongoing domestic violence, it can have detrimental effects on the abused person's mental state, and so expecting 'reasonable opportunity to escape' for the retreat rule and no more than 'reasonable amount of force' to protect oneself for the proportionality rule suggests that those who defend themselves are of sound mental state. This ignores the role trauma plays and disregards the compounding nature of long-term abuse."

Lastly, Professor Gerry Maher KC submitted the view that "The general principles of the defence are satisfactory."

8.8 In terms of main themes, of the three respondents who said reform of self-defence is necessary, the imminence and retreat rules were picked out as the elements which may be in need of reform.

8.9 Professor Pamela Ferguson said, "It may be preferable if the 'retreat if reasonable to do so' rule, and the imminence of the attack posed by the ultimate victim, were each treated as tests for the jury to employ in determining whether the accused should be acquitted on the basis of self-defence, rather than being mandatory criteria." She also mentions that "The terminology should also be changed: where an accused person kills to save himself/herself from an imminent attack, this should be termed "self-defence". Where the accused acts in defence of another person then "acting in defence of another person" is the preferable term, since the requirements differ (eg there is no duty to retreat when defending someone else)." Whilst Dr Andrew Cornford agreed with us that the requirements of the defence are mostly unproblematic, he

mentioned that, in his view, “there is a strong case for considering reform of the imminence requirement in at least some cases. It is strongly arguable that this requirement is not independently significant, but rather acts as a proxy for, or reinforcement of, the necessity / ‘duty to retreat’ requirement.” The British Psychological Society mentioned that there is arguably potential to consider reform of the retreat rule, taking into account the impact a “freeze” response can have in such a situation.

Conclusion

8.10 Given that the balance of responses to Question 16 (11 out of 14 respondents) was that there was no need to reform the essential requirements for a successful plea of self-defence generally, it appears to us that there is a clear majority view that the existing requirements for the defence are satisfactory and working well in practice.

8.11 As such, we are not minded to make any recommendations to Scottish Ministers to change the existing requirements for a successful plea of self-defence in the context of the homicide offences. However, questions of how well the defence applies in the situation of those who kill in response to domestic abuse, mentioned by a number of the respondents in their responses to Question 16, will be discussed further in Chapter 13.

Chapter 9 Specific issues in relation to self-defence

Introduction

9.1 Chapter 8 of our Discussion Paper discussed in more detail three particular issues concerning the complete defence of self-defence in the context of homicide. Those issues were:

(a) homicide caused by excessive force in self-defence;[1]

(b) homicide in self-defence of property;[2] and

(c) homicide in self-defence in rape attacks.[3]

9.2 In relation to the first issue, the Discussion Paper set out the arguments for and against the creation of a new partial defence to cover the circumstances where an accused uses excessive force in self-defence. The main argument against the creation of such a new partial defence was that the existing partial defence of provocation already covers these types of situations. In relation to the second issue, the Paper looked at the experience of other jurisdictions such as South Australia and England and Wales in creating specific rules to allow a defence of self-defence to householders who kill intruders when trying to protect their home. The Paper asked consultees whether the defence of self-defence should be extended in this way in Scots law. Lastly, the Discussion Paper examined the existing common law plea which allows a woman to kill in order to prevent being raped and asked consultees whether this should continue to be recognised and, if so, should it be extended to any victim faced with that threat, regardless of gender.

9.3 This Chapter takes each of those issues in turn, giving a summary of the consultation responses, the main themes emerging from them, with a discussion and a conclusion on each issue.

Excessive force in self-defence

Summary of responses

9.4 After the discussion at paragraphs 8.3 to 8.13, the Discussion Paper asked two questions in relation to this issue. At paragraph 8.14 we asked consultees:

> "17. Do consultees consider that Scots law should recognise a new partial defence of excessive force in self-defence"?

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[1] The Discussion Paper, paras 8.3 to 8.14.
[2] *Ibid*, paras 8.15 to 8.25.
[3] *Ibid*, paras 8.26 to 8.58.

18. Alternatively, do consultees consider that the existing partial defence of "provocation" is sufficient?"

9.5 In relation to Question 17 there were 14 responses in total. Of those, four respondents, mainly from the academic community, were in favour of a new partial defence of "excessive force in self-defence". Eight respondents were against the creation of a new partial defence along these lines.[4] One respondent, Dr Andrew Cornford of the University of Edinburgh, was in favour of the creation of the new defence in principle. However, he concluded that, in practice, there may be little to choose between that and a provocation defence from which the "sexual infidelity" limb has been removed (as we provisionally proposed in Chapter 10 of the Discussion Paper). There was one response to Question 17 where it was unclear whether the respondent was in favour of a new defence or not.[5]

9.6 In relation to Question 18 there were 14 responses in total. Of those, eight answered yes (ie that the defence of provocation is sufficient) and four answered no (ie that it is not).[6] Amongst those answering in the negative, the division was similar to Question 17 (ie mainly practitioners and some academics arguing that provocation is sufficient as opposed to mainly academics saying that provocation on its own is not sufficient to cover the circumstances of these types of killings).

Main themes

9.7 The main theme emerging from the responses to Questions 17 and 18 was that respondents were divided in terms of those for and those against the creation of a new partial defence of "excessive force in self-defence", with more against the proposal than those for. Those against the proposal tended to say, in response to Question 18, that the existing defence of provocation was sufficient and therefore a new defence was unnecessary.

9.8 Another noticeable theme in the responses to these questions was that those who were against the creation of the new partial defence were more detailed in their answers as to why that was the view they reached. On the other hand, those who were in favour of the new defence tended to be less expansive in their reasoning for supporting its creation (with some not elaborating much beyond a simple "Yes").

Discussion

Those in favour of a new defence

9.9 Looking at the four respondents (out of a total of 14 answering Question 17) who were in favour of a new defence, Professor Eric Clive commented that it "seems a good idea" but that it might need to be extended beyond just excessive force. He suggested it might be swept up in a more general partial defence provision.

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[4] Including the Faculty of Advocates, the Senators of the College of Justice, the Law Society of Scotland and some academics.
[5] The British Psychological Society.
[6] With Dr Andrew Cornford and the British Psychological Society unsure as in their responses to Question 17.

9.10 Professor Antony Duff was also in favour of a new defence, "for the reasons given in the Discussion Paper: the wrong is qualitatively different from that of paradigm cases of murder (so long as the force is not so grossly disproportionate as to display utter indifference to the victim's life)". He was of the view that similar considerations would justify allowing an additional partial defence to an accused who acts on an unreasonable belief that they are being attacked. As with Professor Clive, Professor Duff noted that these would be kinds of "emotion-based" defences.

9.11 Nicholas Burgess favoured a new defence and gave his justification in his answer to Question 18 when he said:

> "it is not difficult to envisage a situation [although some empirical research here would be extremely helpful to determine whether this actually happens] where someone uses more force in self-defence than is necessary, but has not lost their self-control (ie the second requirement for provocation to operate). Although the current law states that the use of force in self-defence should not be weighed in 'too fine scales', there ought to be a halfway house between an acquittal and a conviction for murder where someone has used excessive force in self-defence. A conviction for culpable homicide (and the wide sentencing discretion) would enable this."

9.12 Lastly, Professor Pamela Ferguson simply said "Yes" to the creation of the new defence and adds that it should reduce murder to culpable homicide.

Those against a new defence

9.13 Eight out of the 14 respondents answering Question 17 were against the creation of a new partial defence of "excessive force in self-defence". These respondents tended to be more expansive in their reasoning for rejecting it, with the main reason being that the existing defence of provocation was already sufficient to deal with these sorts of circumstances and so the creation of a new defence was unnecessary.

9.14 For example, the Faculty of Advocates said it was the experience of their members that:

> "the partial defence of provocation properly deals with circumstances where a jury consider an accused has used excessive force in self-defence. In such circumstances, it is open to a jury to accept the partial defence of provocation, to a charge of murder, and thus return a verdict of culpable homicide."

They also noted that such a result properly deals with any concerns about "fair labelling" and moral culpability in that a conviction for culpable homicide "results in the label of being a 'killer' and not a 'murderer'". The Faculty also noted that several other jurisdictions have opted not to introduce a partial defence of excessive force in self-

defence.[7] The Faculty considered that the existence of the defence of provocation in Scots law also means a new partial defence is unnecessary.

9.15 The Senators of the College of Justice started their response to Question 17 by noting that while they can see the logic behind the proposal to enact a partial defence of "excessive force in self-defence", they "are not persuaded that such a step is necessary or desirable". They offered three reasons in support of that conclusion.

9.16 First, they highlighted that the withdrawal of a plea of self-defence from the jury by a trial judge is a strong step and that, in cases of doubt, the judge must leave the special defence to the jury.[8] Secondly, they pointed out that directions to juries in self-defence cases emphasise that:

> "they should not judge the accused's actions too finely, and that it is only a cruel excess of violence which defeats the plea... They should allow for the heat of the moment and take a broad and reasonable approach to the type and degree of violence faced and the scale of force in response."

Accordingly, they noted that "it is possible that an acquittal will result even where, looking at the evidence objectively in the cold light of day, the response to the attack went too far but the jury take the view that it was nevertheless acceptable allowing for the fear and heat of the moment." Thirdly, they said that where there is a plea of self-defence the trial judge will frequently direct the jury to consider whether the accused was provoked. Although the jury will be directed that one of the four circumstances that has to be made out for provocation to succeed is that the violence of the accused's retaliation must be broadly equivalent to the violence they faced, they are again told that they should not judge these things too finely.

9.17 The Senators concluded their response to Question 17 by noting that at the end of the day it is the jury's decision. Their experience was that a jury will take a balanced and pragmatic approach to the evidence. In these circumstances the Senators' preference would be to rely on the well-established pleas of self-defence and provocation.

9.18 The Law Society of Scotland said that, on balance, they are against the creation of a new defence. They agreed that the jury can be faced with a stark choice in self-defence cases, in that they either find it is self-defence or not and, if not, the verdict is likely to be murder. However, they pointed out that the issue of provocation is also likely to be put to the jury and that still provides them with scope to convict of culpable homicide rather than murder.

9.19 In addition to these professional bodies, three academic respondents came out against the creation of a new defence. Professors James Chalmers and Fiona Leverick[9] stated that "assuming that the provocation defence is retained (and that provocation by violence continues to be a recognised form of provocation) then we do not see the need for this." Professor Gerry Maher KC said, "I favour using the plea of

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[7] Citing England and Wales, where it was considered unnecessary following a reformulation of their defence of provocation.
[8] *Crawford v HM Advocate* 1950 JC 67.
[9] In a single joint response.

provocation, where it is otherwise applicable, to deal with the scenario of use of excessive force in response to an attack." Dr Rachel McPherson of Glasgow University also disagreed with the creation of a new defence of "excessive force in self-defence".

Conclusion

9.20 Looking at the arguments for and against the creation of a new defence of "excessive force in self-defence", on balance, we think that such a defence is probably unnecessary and that the application of the existing defences of provocation and self-defence gives juries enough scope to return a verdict of culpable homicide, or indeed an acquittal, where they deem it merited. We do not think that a clear case has been made out for the creation of a new defence and the balance of respondents were against it, on the basis that the existing defence of provocation was sufficient (eight out of 14 answering Question 17 were against it, with only four clearly in favour of it and two unsure).

9.21 As such, we do not make any recommendation to Scottish Ministers in relation to the creation of a new partial defence of excessive force in self-defence.

Self-defence of property

Summary of responses

9.22 After discussion of this issue at paragraphs 8.15 to 8.24 of the Discussion Paper, at paragraph 8.25 we stated that we were not minded to recommend the extension of self-defence to permit the use of lethal force to defend property in any circumstances, even where the property is a home. That said, we asked consultees the following:

> "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?"

9.23 There were 12 responses to Question 19 in total. Ten respondents were against some form of special recognition of householders who kill in defence of their property. Two respondents made suggestions as to a different way to deal with this situation rather than focussing specifically on householders. Professor Pamela Ferguson indicated that she was in favour of some limited recognition of this situation but not limited to householders – she proposed a wider solution of culpable homicide due to excessive force. Professor Eric Clive, in line with his answer to Question 17, proposed that a partial defence of excessive force in self-defence or a more general provision on a partial defence should cover this situation and that a special householder provision would be "undesirable and dangerous".

Main themes

9.24 The clear majority of respondents to Question 19 (ie 10 out of 12) were against some form of special recognition of householders who kill in defence of their property. The main themes emerging were that those respondents generally felt that the current Scots law on self-defence was satisfactory and some were worried that a change in the law to this effect might be seen as sanctioning "revenge killings" in defence of property.

Discussion

9.25 As the clear majority of responses to Question 19 were against the creation of some form of special recognition of the situation of householders who kill an intruder in defence of their property, there is no real appetite amongst respondents for this change. This confirms the provisional view that we had reached in the Discussion Paper, namely, that we were not minded to recommend the extension of self-defence to permit the use of lethal force to defend property in any circumstance, even where that property is a home.[10] Given the priority that Scots law places on the sanctity of human life,[11] the criticism of the England and Wales "householder" provisions in the 2008 Act as potentially authorising "state-sponsored revenge" and the potential human rights concerns with such a defence (a possible contravention of Article 2(1) ECHR in particular)[12] we continue to be unpersuaded by the need to change Scots law in a similar fashion**.**

Conclusion

9.26 In conclusion, we do not make any recommendation to Scottish Ministers in relation to making special provision for the circumstances surrounding killing in self-defence of property.

Self-defence in rape attacks

Questions

9.27 After discussion of the plea of self-defence in the context of killing to prevent rape at paragraphs 8.26 to 8.57 of the Discussion Paper, paragraph 8.58 asked consultees 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?

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[10] See para 8.25 of the Discussion Paper.
[11] Discussed at para 8.15 of the Discussion Paper.
[12] For criticisms see S Miller, "'Grossly Disproportionate': Home Owners' Legal Licence to Kill", (2013) 77(4) J Crim L 299-309; 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); Frances Gibb, "Lawyers fight 'licence to kill burglars'" The Times (25 January 2010) p.3; 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).

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)?"

Summary of responses

9.28 The main question in this area was Question 20, which was in split into two parts – (a) should Scots law continue to recognise an exceptional plea of self-defence in the context of killing to prevent rape? and (b) if so, should that plea be extended to any victim faced with that threat, regardless of the gender of the victim? There were 16 specific responses to Question 20(a) and 12 specific responses to Question 20(b). The Senators of the College of Justice,[13] were undecided on the answers to both legs of Question 20, and took the view that, ultimately, they were policy questions.

9.29 Of the 16 specific responses to Question 20(a), seven respondents said yes, the exceptional plea should continue to be recognised, and four respondents said it should not.[14] Of the 12 specific responses to Question 20(b), eight respondents said that, if kept, the exceptional plea should be made available to both men and women (ie regardless of gender) with only one respondent saying that it should not.[15]

9.30 Questions 21 to 23 then go on to ask more in relation to the exceptional plea.

9.31 Question 21 asked, should the plea also extend to a third party who kills to prevent rape. There were 13 responses to Question 21 in total. Of those, 10 respondents said yes, the plea should be extended to third parties, and three said it should not.

9.32 Question 22 asks whether, alternatively, the exceptional plea should be abolished and replaced with (a) a more general plea of self-defence (like England and

[13] And therefore also Lord Bracadale and the Sheriffs' Association, who agreed with them.
[14] Of the remaining five responses, the Senators of the College of Justice (with whom Lord Bracadale and the Sheriff's Association agreed) took the view that this was a policy issue for the Scottish Parliament to decide and declined to give a view themselves; the British Psychological Society and Scottish Women's Aid gave no concluded view but instead set out what they perceived as contextual issues with the exceptional plea.
[15] Professor Eric Clive – linking back to his answer in the negative to Question 20(a) and his suggestion that the "exceptional plea" could be a partial defence instead.

Wales, South Africa, and New Zealand) or (b) a more general plea of "excessive force in self-defence", if recognised. There were 14 responses to Question 22 in total. Of those, five respondents were clearly against the abolition of the exceptional plea in the first place and three respondents were in favour of replacing it with option (b) ("excessive force in self-defence") rather than option (a) (a more general plea of self-defence along the lines of the law of England and Wales, South Africa and New Zealand). One respondent was in favour of the scenario being covered by the general law of self-defence instead (Professor Gerry Maher KC). Professor Eric Clive was in favour of replacing the plea with a more general partial defence, with this being one of the situations covered. Four respondents were undecided (the Senators of the College of Justice, with whom Lord Bracadale and the Sheriffs' Association agreed, and Dr Andrew Cornford). They were unsure what the exceptional plea should be replaced with if abolished, and said more work would have to be done to identify that.

9.33 Lastly, in this series of questions, Question 23 asked if the plea should be extended to cover killings to prevent "sexual assault by penetration" as defined in section 2 of the Sexual Offences (Scotland) Act 2009 (penetration, without consent, of a person's vagina or anus with any part of the accused's body or with an object). There were 13 responses to Question 23 in total. Of those, six respondents said yes, it should be so extended and four said no, it should not. Three respondents (the Senators of the College of Justice, with whom Lord Bracadale and the Sheriffs' Association agreed) took the view that this was a policy question but after briefly setting out what they saw as both sides of the argument, concluded that they tended to the view that extending the plea in this way was unnecessary.

9.34 In addition to the consultation responses, the public opinion research carried out by BritainThinks asked participants whether the exceptional plea of self-defence when killing to prevent rape should be available to an accused. The participants felt strongly that the defence should be available to the accused whether they were the intended victim of the sexual assault or a third party witness to it.[16] They also strongly believed that the plea should be made available to men accused in the same way that it is to women.[17]

Main themes

9.35 In preparing the Discussion Paper, this appeared to us to be the most sensitive of the three issues discussed in Chapter 8; this is acknowledged and borne out in many of the consultation responses to Questions 20 through to 23. Indeed, at paragraph 8.34 of the Discussion Paper we state that "We consider this issue to be an important matter of social policy ultimately for the decision of Parliament", before setting out in more detail the discussion of the exceptional plea and suggesting some factors that might be taken into account, if a policy decision is to be taken. At paragraph 8.58 of the Discussion Paper, we introduced Questions 20 through to 23 "in light of the discussion above, and with a view to assisting in any debate on this issue."

9.36 Given the sensitivity around these questions, it is perhaps unsurprising that the main theme emerging was that consultees were divided in their responses to all of

[16] See para 7.3 of the BritainThinks Report.
[17] See para 7.5 of the BritainThinks Report.

these questions. However, despite this, generally more respondents who tackled these questions (but certainly no overwhelming majority) were of the view that (a) the exceptional plea should be retained; (b) it should be extended to men as well as women; (c) it should also extend to any third party who kills to prevent rape; and (d) it should also extend to cover killings to prevent "sexual assault by penetration" as defined in section 2 of the Sexual Offences (Scotland) Act 2009.

9.37 As mentioned above, participants in the public opinion research carried out by BritainThinks felt strongly that the exceptional plea should be available both to the intended victim of the assault and to any third party witness to it. The public interviewed also strongly believed that the plea should be made available to men in the same way that it is to women.

Discussion

9.38 As highlighted above, the main question in relation to this issue was Question 20, and in particular 20(a), which asked the fundamental question of principle (ie should Scots law continue to recognise an exceptional plea of self-defence in the context of killing to prevent rape) from which the remainder of the questions on this issue flowed (ie Question 20(b) through to Question 23 on whether to extend it or replace it in particular ways). Respondents to this main question were arguably more split on this than in relation to the follow-up questions and so it makes sense to start the discussion of the issue here.

Q20(a) – Should the exceptional plea continue to be recognised?

9.39 Of the 16 specific responses to Question 20(a), seven respondents said yes, the exceptional plea should continue to be recognised and four respondents said it should not.[18]

9.40 Of those seven who said it should continue to be recognised, respondents gave a variety of reasons for taking that view. Both Rape Crisis Scotland and Victim Support Scotland made reference in their responses to the severe long-term or even lifelong impact that the crime of rape can have on the victim (eg the violation of bodily integrity, the physical and psychological impact that can often lead to, for example, life-long trauma, poor physical and mental health, and disruptions to personal relationships) as sufficient justification for the existence of the exceptional plea to allow victims to defend themselves using force, even if it is lethal.[19] Dr Rachel McPherson and the Law Society of Scotland made a similar point that, at the time of the attack, the victim of a rape may have reasonable grounds to believe that their life is at risk. In that situation, if they kill in defending themselves, they should be afforded the opportunity of a defence. Dr Andrew Cornford made the point that "If such a plea were not recognised, the law would effectively be taking the position that persons have an obligation to allow themselves to be raped, if a potentially lethal response is the only sure way of repelling the attack. That seems an unattractive position for the law to take." Two respondents

[18] See fn 14 above for the detail of the remaining five responses.
[19] See also the discussion of Professor Fiona Leverick's views on the theoretical justifications for the exceptional plea at paras 8.36 to 8.39 of the Discussion Paper.

answered with a simple “Yes” with no further elaboration (Nicholas Burgess, and Professors James Chalmers and Fiona Leverick).

9.41 The four respondents who said the exceptional plea should not continue to be recognised were academics (Professors Eric Clive, Antony Duff, Pamela Ferguson and Gerry Maher KC). Professors Clive, Duff and Ferguson all argued that instead of the plea affording a complete defence, this sort of scenario should be dealt with by a new partial defence of excessive force in self-defence of some kind (as they all were in favour of when answering Question 17 – see the earlier discussion). Professor Maher had strong reservations about whether the exceptional plea should continue to exist.

Q20(b) – If kept, should the plea be available to everyone, regardless of gender?

9.42 Of the 12 specific responses to Question 20(b), eight respondents said that, if kept, the exceptional plea should be made available to men and women on an equal basis (ie regardless of gender) with only one respondent saying that it should not (Professor Eric Clive - referring back to his answer in the negative to Question 20(a) and his suggestion that the “exceptional plea” could be a partial defence instead). The main justification for extending the plea, if it is to be kept, was to ensure equal treatment and non-discrimination between genders. The participants in the public opinion research carried out by BritainThinks also strongly believed that the plea should be available to men in the same way that it is to women.

General/undecided responses to Q20 as a whole

9.43 In addition to the specific responses to Questions 20(a) and (b) there were five responses to Question 20 (ie not differentiating between parts (a) and (b)) that were either more general comments in nature or were undecided on the answers to both parts of Question 20.

9.44 Of these, both Scottish Women’s Aid and the British Psychological Society raised issues about the conceptualisation of the defence.

9.45 Scottish Women’s Aid pointed out that “The defence has never once been successful which suggests there are problems with the way it is framed, understood, and/or interpreted.” This is a point also made by Dr Rachel McPherson who, whilst in favour of retaining the plea, highlighted that given it has not yet been successful in any case “it perhaps has to be considered why no such claims are being accepted in practice.” That sort of issue would likely take more investigation to find an answer and we do not think that the Commission would necessarily be in the best position to do that.

9.46 The British Psychological Society referred to potential abuse of the plea and point out that “The difficulty for the courts, imaginably, is differentiating cases against those who attempt to abuse the plea/or where there are difficulties proving the rape was attempted or threatened in the first place.” Scottish Women’s Aid made a similar point and said, “There is a risk that should it be extended to men, it could be used as a “gay panic” defence – when someone who has committed a homophobic murder claims that he thought the victim was going to rape him.” The Senators of the College of Justice, whilst ultimately leaving it as a policy question for Parliament, also pointed

out that “there would be a risk of it being relied upon more frequently in cases of men accused of murdering other men.” On the other hand, Dr Andrew Cornford, in favour of retaining the plea, pointed out that:

> “concerns about ‘false defences' are frequently over-stated in other contexts. They tend to ignore that the accused still bears the evidential burden of raising the defence: they must satisfy the court that there is sufficient evidence to support a reasonable doubt about their guilt. Moreover, it is not obvious that this plea is inherently any more vulnerable to abuse than one based on a threat of ordinary physical assault.”

9.47 The Senators of the College of Justice[20] gave a fairly lengthy response to Questions 20(a) and (b) and outlined what they saw as the main arguments on either side. Ultimately, though, they took the view that the issue of whether or not the exceptional plea should continue to be recognised (and extended) is a policy question for Parliament and they declined to take a view on it themselves. This only goes to emphasise the sensitivities around this important matter of social policy which is perhaps more appropriately decided by elected members of the Scottish Parliament.

Q21 – Should the plea extend to third parties who kill to prevent someone being raped?

9.48 Question 21 asked should the plea also extend to any third party who kills a person in seeking to prevent someone being raped. There were 13 responses to Question 21 in total. Of those, 10 respondents said, yes, the plea should be extended to third parties and three said it should not.

In favour of extending

9.49 Of the 10 respondents in favour of extending the plea to third parties, four (ie the Law Society of Scotland, Rape Crisis Scotland, Professors Chalmers and Leverick (a joint response) and Nicholas Burgess) answered with a simple “Yes” with no further elaboration. The remaining six in favour offered more elaboration in their responses. Dr Rachel McPherson and Dr Andrew Cornford made essentially the same point that as the plea of self-defence more generally is available to third parties, it should also logically be made available to third parties in the exceptional plea scenario. Dr McPherson said:

> “If we accept the justifications for making the plea available in the first place, then my view would be that this would mean such a position should be extended to a third party. To not, would be to essentially communicate that a non-sexual attack is considered more serious/worthy of intervention than a sexual attack.”

The Senators of the College of Justice[21] pointed to institutional authority and case law to say that the exceptional plea already extends to third parties in Scots law. They said in their response:

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[20] With whom Lord Bracadale and the Sheriffs’ Association agreed.
[21] With whom Lord Bracadale and the Sheriffs’ Association agreed.

> "Alison's Criminal Law (vol I, p132) states, 'A private individual will be justified in killing in defence of his life… or a woman or her friends in resisting an attempt at rape.' (See also Clyde LJG in *McCluskey v HMA* 1959 JC 39 at p 42.) We see no reason to depart from the proposition that a third party can use such force as is necessary to prevent the rape of another."

Lastly, Professor Pamela Ferguson answered "Yes" but made clear that, rather than extending the exceptional plea, she thought that her suggestion of a new partial defence of excessive force in self–defence could be extended to cover third parties using excessive force in defence of another person (see her answer to Question 20).

9.50 The participants in the public opinion research carried out by BritainThinks were also asked about this issue. They felt that the plea should also be available to third parties witnessing an attempted rape.[22] Although most believed that the use of the plea by a third party is generally less acceptable due to the perception that there would be more time to think rationally, the seriousness of rape means that the public are more likely to accept the use of a defence in this case. The public were also more likely to suggest a third party defence should be partial, leading to a conviction of culpable homicide rather than complete, leading to an acquittal.[23]

Against extending

9.51 Of the three respondents against extending the exceptional plea to third parties, Professor Antony Duff related back to his answer to Question 20, when he came out against the continued recognition of the plea and instead favoured a new partial defence of excessive force in self-defence of some kind (like Professors Eric Clive and Pamela Ferguson). Professor Clive answered "no" but acknowledged that "there could be a partial defence, either specific or general, reducing murder to culpable homicide." Professor Gerry Maher KC referred to his answer to Question 20, in which he suggested that the plea should be removed entirely.

Q22 – Should the exceptional plea be abolished and reliance placed upon (a) a more general plea of self-defence or (b) a more general plea of "excessive force in self-defence"?

9.52 Question 22 asked whether, alternatively, the exceptional plea should be abolished and replaced with (a) a more general plea of self-defence (like England and Wales, South Africa and New Zealand) or (b) a more general plea of "excessive force in self-defence", if recognised. There were 14 responses to Question 22 in total.

Against abolition of exceptional plea

9.53 Of the 14 responses, five respondents were clearly against the abolition of the exceptional plea in the first place (Nicholas Burgess, Dr Rachel McPherson, Professors James Chalmers and Fiona Leverick, Rape Crisis Scotland and the Law Society of Scotland) and did not elaborate further in their answers.

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[22] See para 7.3 of the BritainThinks Report.
[23] See para 7.6 of the BritainThinks Report.

In favour of replacing plea with something else

9.54 Three respondents were in favour of replacing the exceptional plea with option (b) as set out in Question 22 (ie a more general plea of "excessive force in self-defence"). In line with their earlier responses to Question 20, Professor Antony Duff and Professor Pamela Ferguson favoured replacing the exceptional plea with one of "excessive force in self-defence".

9.55 Professor Duff also elaborated in his response that "A suitably broadened 'excessive force' partial defence (see answer to Question 17 above) cover cases of this kind: the accused would have acted on an unreasonable but understandable belief that such force was legitimate."

9.56 In addition to those two academic respondents, the British Psychological Society stated that "The introduction of the 'excessive force in self-defence' could potentially encompass the exceptional plea of self-defence in the context of killing to prevent rape, providing the context was available to the jurors and it was clear as to the life-long impact of rape."

9.57 None of the respondents to Question 22 were in favour of option (a) (ie a more general plea of self-defence along the lines of the law of England and Wales, South Africa and New Zealand).

9.58 One respondent favoured the scenario being covered by the general law of self-defence instead (Professor Gerry Maher KC).

9.59 Professor Eric Clive favoured instead creating a more general partial defence. He elaborated further in his response that:

> "It would be useful to recognise a more general partial defence, reducing murder to culpable homicide, for cases where the accused either (a) used excessive force in self-defence or (b) acted to prevent rape or sexual penetration (of herself or himself or another) in a situation where the normal plea of self-defence would not be available. The reason for the second leg is that in some cases of killing to prevent rape etc there may not be excessive force at all. The force used may be required to prevent the rape or other sexual penetration. It is the reason for using the force which is the problem not necessarily the degree of force used."

He also highlights that "another approach would be to have a more generalised partial defence which could cover all similar situations" which he goes on to discuss further in his answers to the questions in Chapter 11 (Provocation).

Undecided

9.60 Five respondents were undecided as to what should replace the exceptional plea should it be abolished.

9.61 The Senators of the College of Justice[24] (who were undecided on whether the plea should be abolished at Question 20, considering it a matter of policy) stated that "If it is considered that the exceptional plea of self-defence to prevent rape should be abolished then the question is what, if anything, should replace it." They go on to comment that they:

> "doubt that it would be seen as acceptable not to allow a woman to defend herself up to and including lethal force in all circumstances. The law must allow for at least some circumstances in which a woman or man faced with the prospect of rape is justified in killing her or his assailant. For the reasons stated above, we are not in favour of the "excessive force in self-defence" plea and question how it would work in resisting a sexual assault. In general we are more inclined to a reasonableness approach. We consider that more work is required to describe how that might work in practice and what effect it might have on the law of self-defence more generally."

9.62 Dr Andrew Cornford (who was in favour of retaining the exceptional plea at Question 20) stated that he has "no strong opinion on these questions".

Q23 – Should the plea be extended to cover killings to prevent a "sexual assault by penetration"

9.63 Lastly, in this series of questions on the exceptional plea, Question 23 asked if the plea should be extended to cover killings to prevent a "sexual assault by penetration" as defined in section 2 of the Sexual Offences (Scotland) Act 2009 (ie sexual penetration with any part of the accused's body or any object). There were 13 responses to Question 23 in total.

In favour of extending

9.64 Of those 13 responses, six respondents said, yes, it should be extended to cover the "sexual assault by penetration" offence. Those respondents were Nicholas Burgess (who answered "Yes (probably)"), Dr Rachel McPherson, Dr Andrew Cornford, Professors James Chalmers and Fiona Leverick, Rape Crisis Scotland and the Law Society of Scotland.

9.65 Several different reasons in support of their view can be identified from the responses.

9.66 First, Professors Chalmers and Leverick and Rape Crisis Scotland essentially made a similar point that not to extend the plea to such cases would place an unreasonable onus on a person who is the subject of a sexual attack to work out precisely the type of penetration that is taking place in order to know if they are entitled to respond with lethal defensive force. Dr McPherson similarly commented that "any potential confusion about the nature of the sexual attack should not impact upon an accused's claim to self-defence."

[24] With whom Lord Bracadale and the Sheriffs' Association agreed.

9.67 Secondly, Dr Cornford and the Law Society of Scotland made a similar point that the harm caused by sexual assault by penetration can be just as great (if not potentially greater, as the Law Society of Scotland point out) as the harm caused by rape. As the Law Society of Scotland pointed out, "The victim who kills while defending themselves from some penetrative sexual assaults may have felt or in fact have been in as much risk as a victim of rape."

9.68 Lastly, Dr McPherson and the Law Society of Scotland pointed out, for the reasons outlined above, that it would seem illogical to retain the defence in rape cases but not in cases of sexual assault by penetration.

Against extending

9.69 Four respondents out of the 13 said, no, it should not be extended in this way. Professors Eric Clive, Antony Duff and Pamela Ferguson, in line with their earlier answers (that the exceptional plea should be abolished entirely), instead thought that, rather than extending the exceptional plea, it should be replaced with one of "excessive force in self-defence" and that this element could potentially be covered in that.[25]

Undecided

9.70 Three respondents (the Senators of the College of Justice, with whom Lord Bracadale and the Sheriffs' Association agreed) took the view that this was a policy question but briefly set out what they saw as both sides of the argument. They said that:

> "On the one hand it might be argued that if the justification for the plea is preventing the objectification of the victim as a sexual object then killing the assailant to prevent penetration with fingers or an object might be justified. On the other hand unlawful sexual penetration with a penis has been given a particular significance by society, which deems it a particularly humiliating and dehumanising act."

They then pointed out that "In many cases where penetration by an object or by fingers takes place it might well be anticipated that rape will follow shortly after" before concluding therefore that they tended to the view that extending the plea in this way was unnecessary.

Conclusion

9.71 As mentioned earlier, in preparing the Discussion Paper this appeared to us to be the most sensitive of the three issues discussed in Chapter 8 and this is acknowledged and borne out in many of the consultation responses to Questions 20 to 23. At paragraph 8.34 of the Discussion Paper we stated that "We consider this issue to be an important matter of social policy ultimately for the decision of Parliament", before setting out in more detail the discussion of the exceptional plea and suggesting some factors which might be taken into account if such a social policy decision is to be discussed at a later stage. Questions 20 to 23 are then posed at

[25] Professor Gerry Maher KC was the fourth respondent against extending the defence.

paragraph 8.58 of the Discussion Paper "with a view to assisting in any debate on this issue."

9.72 There was a divide in the consultation responses to the main question of principle (Question 20(a)) – with seven respondents saying that the exceptional plea should continue to be recognised and four saying it should not. Of the four saying it should not, three respondents (Professors Eric Clive, Antony Duff and Pamela Ferguson) all argued that instead of the plea affording a complete defence in this sort of scenario, it should instead be dealt with by a new partial defence of excessive force in self-defence of some kind (consistent with their answers to Question 17).

9.73 Given the divide in responses to the main question of principle, we do not propose to make a specific recommendation to Scottish Ministers on the exceptional plea. We still consider this issue to be a highly sensitive and important matter of social policy more appropriately decided by elected members of the Scottish Parliament. The Senators of the College of Justice took a similar view: that whether or not the exceptional plea should continue to be recognised (and extended) is a policy question and they declined to take a view on it themselves.

9.74 That said, the research set out in our Discussion Paper, the consultation responses we have attracted and the limited public opinion research we have carried out should hopefully assist Scottish Ministers in considering and making their own policy decision on these important and sensitive issues.

9.75 It appears to us that there are several options open to Scottish Ministers to consider:

(a) Abolish the exceptional plea and consider what, if anything, should replace it;

(b) Retain the exceptional plea and consider whether to:

(i) Extend its application to all, regardless of gender;

(ii) Extend its application to third parties who kill to prevent someone being raped;

(iii) Extend its application to cover killings to prevent a "sexual assault by penetration", as well as rape.

9.76 We hope that Scottish Ministers will find the work we have undertaken in this project useful as a starting point to consider these options and develop policy in this area further.

Chapter 10 Necessity and coercion

Introduction

10.1 Necessity and coercion are similar, but distinct, defences in Scots law.[1] Both involve a plea that the accused, though committing a crime, only acted in order to prevent harm. The defence of necessity arises where the accused claims that acting unlawfully was the least harmful of two or more alternative options;[2] coercion arises where the accused claims they acted in response to a threat made by a third party.[3] Both are complete defences that, if established, result in the acquittal of the accused.

10.2 While the defences are discussed in institutional writings, they were not confirmed by the appeal court until the latter part of the 20th century: coercion in *Thomson v HM Advocate* in 1983,[4] necessity in *Moss v Howdle* in 1997;[5] the court stating, in the latter case, that the same principles should underpin both defences.[6] Whether either defence can be pled to a charge of murder has not been tested.[7]

10.3 In our Discussion Paper, we asked consultees (i) if necessity and/or coercion should be a defence to murder; and, if so, (ii) whether such a defence should be complete or partial;[8] and (iii) what the essential elements of such a defence should be.[9]

Necessity

10.4 For the defence of necessity to be made out, the accused must prove, on the balance of probabilities, that:

> (a) the accused acted in the face of immediate danger of death or serious bodily harm or a reasonable belief of such a danger;[10]

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[1] Whereas both are classed under duress in English law, necessity being "duress of circumstances" and coercion "duress by threats".
[2] For example, where the accused, in order to prevent a collision, takes control of a car while under the influence of excess alcohol.
[3] For example, where the accused is compelled, by threats from their co-accused, to participate in a robbery.
[4] 1983 JC 69. See also *HM Advocate v Docherty* 1976 SCCR Supp 146, in which the trial judge directed the jury that coercion was a defence in Scots law.
[5] 1997 JC 123. Necessity was also successfully pled in *Tudhope v Grubb* 1983 SCCR 350 – the sheriff relying on authorities relating to coercion.
[6] 1997 JC 123, p 128.
[7] In the unreported case *HM Advocate v Anderson* (2006), the trial judge directed the jury that necessity was a defence to murder but, as the Crown did not lodge an appeal, the position is unclear. See further discussion at para 10.6 below. In *Collins v HM Advocate* 1991 SCCR 898, the trial judge directed the jury that coercion was *not* a defence to murder (at p 902), but these remarks were *obiter* as none of the accused relied on the defence. The appeal bench did not comment upon this part of the judge's direction. See further discussion at para 10.35 below.
[8] In other words, whether the defence should result in the acquittal of the accused, or whether it should reduce what would otherwise be the crime of murder to that of culpable homicide.
[9] See paras 9.50 and 9.98 of the Discussion Paper.
[10] *Moss v Howdle* 1997 JC 123, p 126; *Lord Advocate's Reference (No 1 of 2000)* 2001 JC 143, paras 37 and 42. It need not be the accused who is in danger – *Moss v Howdle*, p 128; *Lord Advocate's Reference (No 1 of 2000)*, para [44].

(b) there was no reasonable alternative course of action;[11]

(c) the act undertaken by the accused had at least a reasonable prospect of removing the danger;[12] and

(d) the danger dominated the mind of the accused when they carried out the unlawful act.[13]

10.5 It is unclear whether an accused would be denied the defence where they have placed themselves in, or contributed to, the dangerous situation.[14]

Necessity as a defence to murder: Scotland and other jurisdictions

10.6 There is no reported Scottish case where the accused pled necessity to a charge of murder, and the issue has never been considered by the appeal court. In the unreported case of *HM Advocate v Anderson* (2006), the trial judge 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."[15]

The accused was acquitted but, as the Crown did not lodge an appeal on this point of law, the position remains unclear.

10.7 However, the issue has been considered in English law. In *R v Dudley and Stephens*,[16] the English High Court held that necessity was no defence to murder. In that case, three sailors and a cabin boy were shipwrecked and forced to take refuge in an open boat, with very little food or water, some 1000 miles from land. On the 20th day, Dudley and Stephens killed and ate the cabin boy, the weakest of the group, so that they might survive.

10.8 Dudley and Stephens's pleas of necessity were rejected, and they were found guilty of murder. Lord Coleridge, giving the opinion of the court, referred to Greco-Roman and Christian morals of self-sacrifice. He said that:

> "To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it … It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life."[17]

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[11] *Lord Advocate's Reference (No 1 of 2000)*, para [39], citing with approval *Moss v Howdle*, pp 129–30.
[12] *Lord Advocate's Reference (No 1 of 2000)*, para [46].
[13] *Dawson v Dickson* 1999 JC 315, p 318. For fuller exposition of the requirements of the defence, see paras 9.13–9.25 of the Discussion Paper.
[14] See *obiter* remarks in *McNab v Guild* 1989 JC 72, pp 75–76.
[15] Ferguson and McDiarmid, *Scots Criminal Law*, para 21.4.6. The words in quotation appear in correspondence between one of the authors and the lawyer who represented Mr Anderson at trial.
[16] (1884) 14 QBD 273.
[17] *Ibid*, p 287.

10.9 Lord Coleridge was particularly critical of the fact that it was the cabin boy, the weakest and most junior member of the company, who had been chosen for sacrifice:

> "It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No'."[18]

10.10 The court sentenced Dudley and Stephens to death, as was required on a charge of murder, but the Crown exercised its prerogative to commute the sentence to six months' imprisonment.

10.11 The precedent set down by *Dudley and Stephens* was, however, doubted in *Re: A (Children)*.[19] In that case, the Court of Appeal was asked to rule on whether separating conjoined twins would be lawful. Medical opinion was that only the stronger twin would survive the procedure, but that if the surgery did not take place, then both twins would eventually die.[20] The court held that it was lawful to carry out the procedure, although the reasoning of the three judges differed.

10.12 Brooke LJ found that the killing of the weaker twin was justified on the grounds of necessity in order to save the life of the stronger twin.[21] But Ward LJ took the view that the weaker twin threatened the life of the stronger twin, and that medical intervention was an act of self-defence.[22]

10.13 Professors Chalmers and Leverick take the view that Ward LJ's analysis of self-defence is more convincing; and, in any case, it should not be inferred that *Dudley and Stephens* is now overruled and that necessity is a valid defence to murder in any circumstances other than the limited and specific ones encountered in *Re: A (Children)*.[23]

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[18] *Ibid*, pp 287–88.
[19] [2001] 2 WLR 480.
[20] The circumstances were that the twins each had her own vital organs, but the weaker twin's were not functional. The stronger twin sustained the life of the weaker twin by circulating oxygenated blood through her body via a shared artery. Medical opinion was clear that if the twins were not separated soon, the strain on the stronger twin would eventually cause her heart to fail.
[21] [2001] 2 WLR 480, pp 572–73.
[22] *Ibid*, p 536. The third judge, Robert Walker LJ, concluded that the proposed operation did not amount to murder as death was not the purpose nor intention of the surgery. *Ibid*, p 592.
[23] Chalmers and Leverick, *Criminal Defences*, para 4.24. See also their response to the Discussion Paper, quoted at para 10.19 below.

10.14 Chalmers and Leverick also consider that, while there is no direct authority, *dicta*[24] from Canadian and Australian cases suggest that it is unlikely either of those jurisdictions would recognise necessity as a defence to murder.[25]

Analysis of responses to Discussion Paper

10.15 Following discussion of the defence of necessity at paragraphs 9.1 to 9.49 of our Discussion Paper, at paragraph 9.50 we asked consultees the following questions:

> "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?"

Should necessity be recognised as a defence to murder?

10.16 There were 13 respondents to Question 24, 12 of whom said necessity should be recognised as a defence to murder.[26] One respondent – Professors James Chalmers and Fiona Leverick – were of the view that there was no convincing case for legislation in this area.

10.17 A number of the respondents in favour of recognising necessity as a defence to murder said that there was no principled reason why the necessity defence should not apply to murder as it does to other offences. Dr Andrew Cornford noted that "the arguments for recognising [the defence] as such do not seem to differ in relation to murder than in relation to any other offence"; the Law Society of Scotland offered that, while circumstances would rarely arise that would mean necessity was an appropriate plea to a murder charge, "it would be unjust not to make it available if the circumstances so indicated". The Senators of the College of Justice said that there was no "issue of principle which would prevent the defence being available to a charge of murder. The impediment, formidable as it may be, is based on a moral consideration."

10.18 In her response, Dr Rachel McPherson emphasised that "regardless of the position adopted, there must be clarity regarding whether necessity can act as a defence to homicide or not." Highlighting this uncertainty, Dr McPherson referred to the unreported case of *HM Advocate v Anderson* (2006).[27]

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[24] From '*obiter dictum*' – a Latin phrase meaning "that which is said in passing". Used in the legal context to describe a remark in a judgment that is not legally binding.
[25] Chalmers and Leverick, *Criminal Defences*, para 4.24. See *R v Latimer* 2001 SCC 1, para [40] (Canadian Supreme Court) and *R v Japaljarri* (2002) 134 A Crim R 261, p 270 (Supreme Court of Victoria, Court of Appeal).
[26] Nicholas Burgess, Professor Eric Clive, Dr Andrew Cornford, Professor Antony Duff, Professor Pamela Ferguson, Professor Gerry Maher KC, Dr Rachel McPherson, the Faculty of Advocates, the Law Society of Scotland, the Senators of the College of Justice, Lord Bracadale, and the Sheriffs' Association.
[27] Discussed at para 10.6 above.

10.19 However, Professors Chalmers and Leverick offered a different view which, as it is the only dissenting opinion, we set out in full:

> "Whether necessity should ever be a defence to murder is not an easy question to answer. We run through the various arguments in our work *Criminal Defences*, which is quoted in the Discussion Paper, but do not reach a firm conclusion. Our tentative view is that there *might* be some very exceptional cases in which there is a case for it to be recognised. However, no case has ever arisen in the Scottish courts where injustice has been done by the uncertainty over this issue. It is also worth noting that across all the major common law jurisdictions, there has not yet been a case in which it has been thought appropriate to recognise necessity as a defence to murder.[28] With that in mind, we do not see that there is a convincing case to legislate to establish necessity as a defence to murder in Scots law. In the *extremely* unlikely event that a case ever arises in which it is appropriate to recognise it as such, this can be dealt with by the courts on the facts (or by prosecutorial discretion)."

If recognised, should the defence be complete or partial?

10.20 Question 25(a) asked consultees who were in favour of recognising necessity as a defence to murder whether the defence should be complete or partial. That is, should the defence result in the acquittal of the accused or should it reduce what would otherwise be the crime of murder to that of culpable homicide. There were 12 respondents to this question, seven of whom said it should be a complete defence,[29] two said it should be a partial defence,[30] and three said it could operate as either a complete or partial defence,[31] depending on the circumstances.

If recognised, what should the essential elements of the defence be?

10.21 Question 25(b) asked consultees who were in favour of recognising necessity as a defence to murder what the essential elements of that defence should be. Ten consultees answered this question, eight of whom said that the current legal test, as set out at paragraph 10.4,[32] should apply.[33] Two respondents, Professors Eric Clive and Pamela Ferguson, offered their own suggestions for essential elements of the defence, although neither suggestion is a significant departure from the current common law requirements. Professor Clive said that the essential element of the defence as it applies to murder "should be that the accused believed on reasonable grounds that the taking of the victim's life was necessary to avoid a greater loss of human life"; although he acknowledges that "a more general provision might be better and would avoid the need to get a specific provision exactly right". Professor Ferguson proposed that "the accused must have acted in a way which was the least harmful

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[28] In their footnote, Professors Chalmers and Leverick qualify that the English case *Re: A (Children)* may be an example of necessity as a defence to murder, but that the case is better regarded as one of self-defence. For discussion of this case, see paras 10.11–10.13 above.
[29] Nicholas Burgess, Dr Andrew Cornford, Dr Rachel McPherson, the Faculty of Advocates, the Senators of the College of Justice, Lord Bracadale, and the Sheriffs' Association.
[30] Professor Gerry Maher KC and the Law Society of Scotland.
[31] Professor Eric Clive, Professor Antony Duff and Professor Pamela Ferguson.
[32] For a fuller exposition of the requirements of the defence, see paras 9.11–9.25 of the Discussion Paper.
[33] Nicholas Burgess, Dr Andrew Cornford, Professor Gerry Maher KC, the Faculty of Advocates, the Law Society of Scotland, the Senators of the College of Justice, Lord Bracadale, and the Sheriffs' Association.

option. This would require there to have been an immediate risk of death or serious bodily injury."

Discussion

10.22 As noted by the Senators in their response, this issue raises complex moral questions about the value and sanctity of human life and in what circumstances (if any) it is excusable to kill in order to preserve one's own life.[34] We note that, while the Law Commission of England and Wales has recommended that duress be a complete defence to murder,[35] the Law Reform Commission of Canada recommended that the defence of necessity should not be available to the accused charged with murder because "no one may put his own well-being before the life and bodily integrity of another innocent person".[36] These are complex issues, and there is no clear way forward.

10.23 While we have had regard to the views of the majority of consultees, who were in favour of recognising necessity as a defence to murder, we are not satisfied that a convincing case has been made for statutory intervention.

10.24 Many consultees, in support of their view, said that there was no issue of legal principle that prevents necessity from being pled to a charge of murder and that it would be illogical to deny the defence. However, there is merit in the view expressed by the Senators of the College of Justice, in response to Question 26 (admittedly relating to coercion, but nevertheless relevant):

> "We share Lord Bingham's view that the logic of the Law Commission [of England and Wales]'s argument that coercion should be a defence to all offences appears irresistible, whilst noting that he immediately recognised the policy considerations which lay behind the government's disinclination to follow the Law Commission's recommendation … *The law does not always follow logic to the exclusion of all other considerations.*" (Emphasis added; footnotes omitted.)

10.25 We note that none of the consultees referred us to any homicide case – in Scotland or any other jurisdiction – where injustice has been done because the accused was unable to plead necessity. No positive case has been made that legislation in this area would improve the law, and we are concerned that statutory intervention may do more harm than good.

10.26 If we were to recommend the creation of a statutory defence of necessity that applies to murder, the legislation would have to grapple with a number of difficult issues, such as:

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[34] For a summary of some of the arguments in this area, see Chalmers and Leverick, *Criminal Defences*, paras 4.25–4.31.

[35] On the basis that "the law should not stigmatise a person who … killed in fear of death or life-threatening injury in circumstances where … an ordinary person of reasonable fortitude might have acted in the same way", Law Commission of England and Wales, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006), para 6.43.

[36] Law Reform Commission of Canada, *Recodifying Criminal Law* (1987), pp 35–36.

- whether there should be a proportionality test (ie the accused must have acted in a way which was broadly proportionate to the danger);

- whether the standard against which the accused's conduct should be judged should be objective (ie whether an ordinary sober person of reasonable firmness would have responded as the accused did) or subjective (ie whether the response of the accused, taking account of their particular characteristics, was reasonable); and

- whether the defence should be denied to those accused who have shown prior fault in creating the dangerous situation.

10.27 These are complex questions for the legislature to address in an indefinite, abstract exercise, without the benefit of any real case before it; whereas, if this matter were left to the appeal court, it would have the benefit of particular facts and circumstances to sharpen the issues and the common law could develop incrementally.

10.28 Considering that no homicide case has ever arisen in Scotland where the plea was considered appropriate, we do not think legislation is necessary or desirable. As Professors James Chalmers and Fiona Leverick pointed out, in the unlikely event that a case ever arises, the issue can be dealt with by the courts on the specific facts.[37]

10.29 We do not recommend any statutory intervention concerning the defence of necessity in the context of homicide. In our view, any development of the plea of necessity, and whether it could apply to murder, should be left to the common law.

10.30 As we are not recommending reform to the law of necessity, we have not given detailed treatment to the responses to Question 25(a) and (b) on whether a statutory defence should be complete or partial and what the essential elements of the defence should be.

Coercion

10.31 The requirements of the defence of coercion are set out by Hume as:

(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 of the offence; and

(d) a disclosure of the fact of the offence, as well as restitution of any profit, on the first safe and convenient occasion.[38]

10.32 This test was considered in *Thomson v HM Advocate*,[39] the first time the appeal court had addressed the defence of coercion. The court held that only the first two

[37] Or, as Professors Chalmers and Leverick also mention, by prosecutorial discretion.
[38] Hume, i, 53. For more detail, see Chalmers and Leverick, *Criminal Defences*, paras 5.07–5.09.
[39] 1983 JC 69.

conditions identified by Hume – that the accused was threatened with immediate danger of death or serious injury and was unable to resist the danger – are substantive parts of the test. The latter two conditions – that the accused played an inferior part in the commission of the offence and disclosed the facts of the offence at the earliest opportunity – are rather "measures of the accused's credibility and reliability on the issue of the defence".[40]

10.33 The courts in Scotland, and other jurisdictions, approach the defence of coercion with a great deal of caution; as Lord Morris of Borth-y-Gest said in *DPP for Northern Ireland v Lynch*, "duress must never be allowed to be the easy answer of those who can devise no other explanation of their conduct".[41] Echoing this, the Scottish Jury Manual provides judges with a sample 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 is the sort of claim that is easy to make, and it could be an easy way out for someone charged to say s/he was coerced into doing what he did. It would make life simple for criminals, and very difficult for those who enforce the law. It cannot 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."[42]

10.34 In particular, there are concerns that the defence may operate as a "terrorist's charter", allowing criminal and terrorist organisations to confer immunity on their members by issuing death threats. Concerns of this nature are canvassed in the House of Lords judgments in *R v Howe* and *R v Hasan*,[43] which both found that coercion was not a defence to murder in English law.

Coercion as a defence to murder: Scotland and other jurisdictions

10.35 The appeal court in Scotland has never discussed whether coercion could be a defence to murder. However, the trial judge in *Collins v HM Advocate* did consider the issue and directed the jury that coercion was no defence to murder:

> "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."[44]

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[40] *Ibid*, p 78.
[41] [1975] AC 653, p 670.
[42] e-Jury Manual (updated 24 April 2023), p 16.3.
[43] *R v Howe* [1987] AC 417, p 441 per Lord Griffiths; *R v Hasan* [2005] UKHL 22, [2005] 2 AC 467, para [71] per Baroness Hale of Richmond.
[44] *Collins v HM Advocate* 1991 SCCR 898, p 902 per Lord Allanbridge.

10.36 However, as neither accused did rely on the defence of coercion these remarks are *obiter*,[45] and the appeal bench did not comment on this part of the trial judge's direction.

10.37 Appeal courts in England & Wales[46] and some Australian states[47] have confirmed that coercion is no defence to murder, and, in New Zealand, it is ruled out by statute.[48] The Law Reform Commission of Canada has been clear that coercion should not be recognised as a defence to murder.[49]

10.38 South Africa is a rare example of a jurisdiction where the courts have allowed coercion to operate as a defence to murder,[50] and it is now a complete defence in Victoria, Australia, following amendments made in 2005 to the Crimes Act 1958.[51]

Analysis of responses to Discussion Paper

10.39 Following discussion of the defence of coercion at paragraphs 9.51 to 9.97 of our Discussion Paper, at paragraph 9.98 we asked consultees the following questions:

> "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?"

Should coercion be recognised as a defence to murder?

10.40 There were 13 respondents to Question 26, nine of whom said coercion should be recognised as a defence to murder.[52] The Senators of the College of Justice[53] ran through the arguments but offered no firm conclusion, taking the view that the issue raised policy questions "pre-eminently suited for resolution by Parliament rather than the judiciary". Professors James Chalmers and Fiona Leverick's response was the same as that on Question 24 on necessity: that no convincing case had been made for legislation and the question should be left to the development of the common law. It is clear that the topic of coercion as a possible defence to murder produces polarised opinions.

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[45] From '*obiter dictum*' – a Latin phrase meaning "that which is said in passing". Used in the legal context to describe a remark in a judgment that is not legally binding.
[46] *R v Howe*; *R v Hasan*.
[47] *McConnell* [1977] 1 NSWLR (CCA) 714 (New South Wales); *Brown and Morley* [1968] SASR 467 (South Australia).
[48] Crimes Act 1961, s 24(2)(e).
[49] Law Reform Commission of Canada, *Recodifying Criminal Law* (1987), pp 35–36.
[50] *S v Goliath* 1972 (3) SA 1 (AD).
[51] See s 9AG, inserted by the Crimes (Homicide) Act 2005, s 6.
[52] Nicholas Burgess, Professor Eric Clive, Dr Andrew Cornford, Professor Antony Duff, Professor Pamela Ferguson, Professor Gerry Maher KC, Dr Rachel McPherson, the Faculty of Advocates and the Law Society of Scotland.
[53] With whom Lord Bracadale and the Sheriffs' Association agreed.

10.41 A number of the respondents in favour of recognising coercion referred back to their reasoning on the question of necessity:[54] that there was no principled reason for denying the defence to those charged with murder when it is available for other crimes. Other respondents answered "Yes" but without further elaboration. Dr Andrew Cornford addressed fears that the defence would be open to abuse (by, for example, organised criminal or terrorist organisations):

> "I think it is worth emphasising again how restrictive the elements of the defence are, and how strictly juries are encouraged to interpret them. Besides the limitations that the [Discussion Paper] mentions, I would highlight another one imposed by *Thomson*: that 'if the accused has joined an association where such threats from associates and the dangers arising from them are reasonably to be expected a defence of coercion by such associates will not avail him': 1983 JC 69 at 73. The possibility that, if extended, the defence could operate as a 'terrorist's charter' thus seems remote."

10.42 The Senators of the College of Justice, while declining to take a final view, ran through the arguments for and against recognising coercion as a defence to murder:

> "We share Lord Bingham's view that the logic of the Law Commission [of England and Wales]'s argument that coercion should be a defence to all offences appears irresistible, whilst noting that he immediately recognised the policy considerations which lay behind the government's disinclination to follow the Law Commission's recommendation[55] … *We also note that the law does not always follow logic to the exclusion of all other considerations.* We can identify situations where the court itself has operated considerations of legal policy in stating the law[56] … Accordingly, there remains a live policy question as to whether the taking of an innocent life can ever be excused by a defence of coercion. The implications for public confidence that the law can protect public safety may be considerable if a person is coerced to commit a murder and then acquitted. We consider that these are assessments pre-eminently suited for resolution by Parliament rather than the judiciary."[57] (Emphasis added)

10.43 Professors Chalmers and Leverick reached the same conclusion as they did on the question of necessity: that there may be rare instances where it would be just to allow the defence to a murder charge, but that there was not a convincing case for legislative intervention and the matter should be left to the courts (or to prosecutorial discretion) should a case ever arise.

10.44 In addition to the consultation responses, public opinion was sought on this question in the survey carried out for us by BritainThinks. The majority of respondents

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[54] Dr Andrew Cornford, Professor Antony Duff, Professor Gerry Maher KC and the Law Society of Scotland.
[55] See *R v Hasan*, para [21].
[56] The Senators refer to *Brennan v HM Advocate* 1977 JC 38, pp 42–43 per the Lord Justice General (Emslie) on the defence of insanity; and *Drury v HM Advocate* 2001 SLT 1013, para [25] per the Lord Justice General (Rodger), and *Gillon v HM Advocate* [2006] HCJAC 61, 2007 JC 24, para [27] per Lord Osborne, on the defence of provocation.
[57] We also refer to the Senators' view in our discussion on necessity, at para 10.24 above.

to that survey said that a defence of coercion should not be available where the accused is charged with murder. Respondents took the view that if the accused was worried for their safety, they should have sought help from police; whether or not the accused was part of a criminal organisation made no difference to respondents' views.[58]

If recognised, should the defence be complete or partial?

10.45 Question 27(a) asked consultees who were in favour of recognising coercion as a defence to murder whether the defence should be complete or partial. That is, should the defence result in the acquittal of the accused or should it reduce what would otherwise be the crime of murder to that of culpable homicide. There were 12 respondents to this question, six of whom said it should be a complete defence[59] and six said it should be a partial defence.[60]

If recognised, what should the essential elements of the defence be?

10.46 Question 27(b) asked consultees who were in favour of recognising coercion as a defence to murder what the essential elements of that defence should be. Eleven respondents answered this question. Nine said that the current legal test, as set out at paragraph 10.31,[61] should apply.[62]

10.47 Two respondents, Professors Eric Clive and Pamela Ferguson, offered their own formulation. Professor Clive endorsed the test as set out in section 29 of the Draft Criminal Code for Scotland. Professor Ferguson said that, in addition to there being an immediate danger of death or serious bodily injury, "the accused must have acted in a way which was the least harmful option", but that "IQ and 'compliance level' should be taken into account, similarly to the role currently played by age and gender".

Discussion

10.48 As with necessity, we are not satisfied that a convincing case has been made to legislate that coercion should be recognised as a defence to murder.

10.49 All the issues that we identified in relation to necessity apply equally to the case of coercion:[63] no consultee has referred us to any homicide case where injustice has been done because the accused was not able to plead the defence; Parliament would have to grapple with complex issues in the abstract, with no case before it to guide decision-making; and, ultimately, whether the plea should be available to murder is a difficult moral question, provoking considerable disagreement.

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[58] See para 7.30 of the BritainThinks Report.
[59] Dr Andrew Cornford, Dr Rachel McPherson, the Faculty of Advocates, the Senators of the College of Justice, Lord Bracadale, and the Sheriffs' Association.
[60] Nicholas Burgess, Professor Eric Clive, Professor Antony Duff, Professor Pamela Ferguson, Professor Gerry Maher KC and the Law Society of Scotland.
[61] For a fuller exposition of the requirements of the defence, see paras 9.53–9.58 and 9.61–9.75 of the Discussion Paper.
[62] Nicholas Burgess, Dr Andrew Cornford, Professor Gerry Maher KC, Dr Rachel McPherson, the Faculty of Advocates, the Law Society of Scotland, the Senators of the College of Justice, Lord Bracadale and the Sheriffs' Association.
[63] See paras 10.22–10.27 above.

10.50 Over and above these issues, there is the added concern that to allow coercion to be pled to a murder charge could operate as a "terrorist's charter", allowing criminal and terrorist organisations to confer immunity on their members by issuing death threats. While the court in *Thomson v HM Advocate* was clear that the defence should not be available in such circumstances,[64] we note the concern of the Senators that "there may be difficulty in delineating the circumstances" where denying the defence on these grounds is appropriate; it may be very difficult for the jury to determine whether the accused was a voluntary member of the criminal organisation or was truly coerced into following their commands. In the absence of any evidence that reform is necessary, we are of the same view as that expressed by Lord Hunter in *Thomson*: that "the door of the defence of coercion should not be opened too wide".[65]

10.51 Considering there has never been a case where the plea was deemed appropriate, we are not convinced that there is a case for statutory intervention. In the unlikely event that a case ever arises where it is thought appropriate to recognise coercion as a defence to murder, the issue can be dealt with by the courts on the specific facts.[66]

10.52 We do not recommend any statutory intervention concerning the defence of coercion in the context of homicide. In our view, any development of the plea of coercion, and whether it could apply to murder, should be left to the common law.

10.53 As we are not recommending reform to the law of coercion, we have not given detailed treatment to the responses to Question 27(a) and (b) on whether a statutory defence should be complete or partial and what the essential elements of the defence should be.

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[64] 1983 JC 69, p 73. Dr Andrew Cornford considers that the limitation imposed in *Thomson* would make the "terrorist's charter" possibility remote (para 10.41). It is also ruled out by the authors of the Draft Criminal Code – see s 29(2)(b).

[65] 1983 JC 69, p 73.

[66] Or by prosecutorial discretion.

Chapter 11 Provocation

Introduction

11.1 Provocation is one of two partial defences in Scots law capable of reducing what would otherwise be murder to culpable homicide.[1] In present-day practice, the plea is often used as an alternative to self-defence,[2] and may also feature where the accused is charged not with murder, but with a lesser offence such as assault.

11.2 There are four requirements for a successful plea of provocation, which are:

(a) Provocative conduct by the victim, in the form of either physical violence or sexual infidelity;[3] 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";[4]

(b) The accused must have lost their temper and self-control as a consequence;[5]

(c) The accused must have retaliated instantly in hot blood, without having time to think;[6]

(d) Resulting in either:

(i) In the case of physical violence, a responding violence which is not grossly disproportionate to the provoking act;[7] or

(ii) In the case of sexual infidelity, a reaction which might have been expected from an ordinary person in the circumstances.[8]

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[1] The other being diminished responsibility – see ch 12, Diminished Responsibility, below. For how these partial defences operate in the context of domestic abuse see Ch 13.
[2] See the standard directions given to a jury, set out in ch 8 at para 8.11 of the Discussion Paper, and recent illustrations in *McAulay v HM Advocate* 2018 SCCR 338; *Lawson v HM Advocate* 2018 SCCR 76.
[3] In the context of sexual infidelity, an accused may seek to rely on provocation where he or she has killed (i) the person with whom they were in a relationship; and/or (ii) that person's lover.
[4] *Copolo v HM Advocate* 2017 SCCR 45 at para [25] (Lord Turnbull).
[5] Macdonald, *Treatise* at 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 *Low v HM Advocate* 1993 SCCR 493 at p 506.
[6] 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* 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).
[7] *Copolo v HM Advocate* 2017 SCCR 45 at para [25] (Lord Turnbull); *Gillon v HM Advocate* 2006 SCCR 561 at para [30] (Lord Osborne).
[8] *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.

11.3 As was emphasised in *Robertson v HM Advocate*, in response to physical violence:[9]

> "[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."[10]

11.4 This Chapter discusses the partial defence of provocation. In particular, it focuses on the potential extension of the plea to verbal provocation and third party provocation; the operation of the plea in today's society with particular reference to the discovery of sexual infidelity; and the advisability (or otherwise) of abolishing or redefining the Scots law of provocation.

Verbal provocation

11.5 As was noted in the Discussion Paper, in Scots law, verbal abuse is insufficient for the plea of provocation.[11] This exclusion can be contrasted with other jurisdictions, such as England and Wales, where it is accepted that the concept of "loss of control" may be caused by verbal abuse and more emphasis is placed on the accused's loss of control than on the nature of the provoking act.[12]

11.6 Some commentators in Scotland have criticised the continued exclusion of verbal abuse from the defence of provocation. Some have focussed in particular on verbal provocation in the context of prolonged abuse, such as domestic abuse.[13] Others have noted that on occasion, verbal remarks can be more wounding, and more infuriating, than physical violence, creating "overwhelming" grounds for admitting verbal provocation.[14]

11.7 In light of these criticisms, at paragraph 10.11 of our Discussion Paper we asked consultees for their views on the following questions:

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[9] 1994 SCCR 589 at pp 593-594.

[10] 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].

[11] As Hume stated, "[N]o provocation of words, the most foul and abusive, or of signs and gestures, how contemptuous or derisive soever, is of sufficient weight in the scale, materially to alleviate the guilt…", *Commentaries,* i, 241, confirmed in *Donnelly v HM Advocate* 2017 SCCR 571. See also Macdonald: "Words of insult, however strong, or any mere insulting or disgusting conduct, such as jostling, tossing filth in the face, do not serve to reduce the crime from murder to culpable homicide", at p 93.

[12] Introduced by the Coroners and Justice Act 2009 s 55(4): "…if [the defendant's] loss of self-control was attributable to a thing or things done or said (or both)."

[13] Cairns suggests that "the continued exclusion of words perpetuates a somewhat outdated notion of what counts as abuse." See I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma" (2014) 4 Jur Rev 237 at p 260.

[14] A McCall Smith, "Homicide", 7 *The Laws of Scotland (Stair Memorial Encyclopaedia)*, para 273. See full quote: "…the acceptance of the possibility of verbal provocation in [*Berry v HM Advocate* (1976) SCCR (Supp) 156] and [*Stobbs v HM Advocate* 1983 SCCR 190] suggests that the question is a live issue. The grounds 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."

"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?"

Analysis of responses to Discussion Paper

11.8 An equal split emerged out of the responses to the Discussion Paper's question on whether the defence of provocation should be extended to include verbal provocation. Seven consultees were in favour of extending in this way, seven were opposed to extending the defence to include verbal provocation and one expressed no clear view.

11.9 Of those in favour of extending provocation, some consultees touched on the fact that verbal taunts could be, as Professor Gerry Maher KC put it, "insensitive and insulting." The Law Society of Scotland noted that while there are sound public policy reasons for excluding words and insults, they agreed that a wounding remark can, in some cases, provoke greater anger than physical assault. They went on to note that to exclude verbal provocation would be to risk ignoring "the realities of prolonged domestic abuse". Similarly, medical professionals responding to the Discussion Paper considered that extending provocation to include verbal provocation might have utility as a basis for defence in cases of longstanding domestic abuse. Interestingly, one other consultee – namely, the Centre for Scots Law at the University of Aberdeen, also expressed support for the inclusion of verbal provocation, but cautioned that consideration "should be given to the implication of recognising verbal provocation in domestic abuse cases", in which the context of words and gestures are significant. They provided the example of a perpetrator of domestic abuse claiming to have been verbally provoked by the victim. While expressing her view that further consultation is necessary prior to reform, Dr Rachel McPherson also noted that based on her own research into domestic abuse, most women who killed their abuser seemed to be able to access the provocation defence without undue difficulty.[15]

11.10 Lastly, Professor Pamela Ferguson expressed her support for extending provocation to include not only verbal triggers, but all forms of provocation, with all circumstances of the offence being considered in the round.

11.11 Consultees opposed to the extension of provocation to include verbal provocation were generally of the view that anger arising from verbal taunts should not suffice to partially exculpate a killer. One such consultee – namely, Nicholas Burgess – felt that Scots law should "[a]bsolutely not" recognise verbal provocation, since to excuse murder even partially, on that basis, would be "entirely at odds with principles of proportionality and of the law encouraging non-violence." Similarly, the Senators of the College of Justice, though accepting that "a wounding remark may be infuriating and provoke anger", argued that "the law expects persons who are subjected to verbal abuse to exercise self-control and not allow themselves to be provoked. In doing so they escalate a non-violent confrontation into a violent one. While the law seeks to prevent both violent and non-violent confrontation, it is the violent confrontation that

[15] Although Dr McPherson qualified this by reference to *Graham v HM Advocate* 2018 SCCR 347, where the outcome of a murder conviction did not appear appropriate in the circumstances.

risks serious injury and death."[16] Results from the public opinion research carried out by BritainThinks also suggested that the public do not believe that the defence of provocation should extend to cases of verbal provocation.[17]

11.12 The response of Professors James Chalmers and Fiona Leverick to this question is worth discussing in full. As part of their opposition to the extension of provocation in this manner, they noted that recognition of verbal provocation would represent a major change to Scots law, and one which they did not see a case for. They considered that such a move would risk opening up the defence to "unmeritorious claims". Additionally, they considered that if the "sexual infidelity" limb of provocation were to be abolished (which they noted their support for), an extension of the defence to include verbal provocation had the potential to create difficulties of interpretation as to exactly what forms of words might or might not indicate "infidelity" (and therefore be included or not as a qualifying trigger).

11.13 With regard to the second part of the question on verbal provocation, which asked consultees what the essential elements of the defence of provocation should be *if* it were to be extended to include verbal provocation, a range of suggestions were made.

11.14 Two consultees – namely Professor Gerry Maher KC and the Faculty of Advocates – suggested that a model may be found in section 55(4) of the Coroners and Justice Act 2009.[18] Section 55(4) provides that one of the "qualifying triggers" for the "loss of control" defence is:

> "…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 bring seriously wronged."

11.15 Professor Eric Clive recommended that a cue be taken instead from section 38(3) and (4) of the Draft Criminal Code for Scotland. Section 38(4)(a) provides that provocation may be founded on "acts or words or both (whether by the deceased or another person)".

11.16 Professor Pamela Ferguson – whose preference was for a "general" provocation defence, which would cover not only verbal triggers but all forms of provocation – suggested that the elements of the provocation defence should be:

- provocative conduct (including speech/things said) by the other party/deceased;
- loss of self-control caused by the provocative conduct;

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[16] The Senators cited *Drury v HM Advocate* 2001 SCCR 583, para [25] (Lord Justice-General (Rodger)).
[17] BritainThinks Report at 7.18.
[18] Ss 54 to 56 of the 2009 Act abolished the common law provocation defence in England and Wales and replaced it with a statutory plea of "loss of control."

- the accused having killed the deceased while suffering from the loss of control;

- the provocative behaviour having been such that an ordinary person in the circumstances would have been likely to lose self-control and to have responded as did the accused.

11.17 More generally, Dr Andrew Cornford cautioned that "strict limitations" would be necessary on any "verbal provocation" defence.[19] He argued that it may be difficult to avoid creating "a situation in which just about any killing can be partially excused if the jury judges it a 'reasonable' response to some perceived slight", citing the experience of many American states. In that connection, the Centre for Scots Law at the University of Aberdeen suggested that only verbal provocation which is "roughly equivalent in seriousness to violent assault" should qualify. This could include, it said, revelations of violent or sexual criminal conduct against a third party with whom the accused enjoyed a "very close relationship",[20] or a threat to seriously undermine a legally protected fundamental right of the accused (such as unjustifiably taking control of the accused's finances or preventing the accused from seeing close family members). It would be important in any case to consider "the full context of the relationship between the accused and the victim" when assessing whether such a threat could reasonably be believed to exist.

11.18 Two consultees – Dr Rachel McPherson and the Law Society of Scotland – suggested that the elements of a "verbal provocation" limb might benefit from additional consultation. The Law Society noted further that care would need to be taken "to avoid giving the accused carte blanche to claim that they or someone close to them was insulted by the deceased".

Discussion

11.19 The Discussion Paper sought the views of consultees on the extension of the Scots defence of provocation to include verbal provocation as a trigger of the defence. We set out the criticisms that the exclusion of verbal provocation has attracted, and the approach adopted in other jurisdictions to verbal provocation.

11.20 On the basis of the responses our Discussion Paper attracted, we are not persuaded that a case has been made out for the recognition of verbal provocation. Whilst there is merit in the argument that some verbal taunts can be highly inflammatory, it is less clear that the law should ever countenance the use of lethal force in response. Further, although consultees were almost evenly divided on this issue, we are persuaded that to recognise verbal provocation as a "qualifying trigger" would render provocation a springboard for unmeritorious claims. We are therefore not minded to recommend expanding the defence of provocation to include verbal provocative acts.

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[19] By way of example, he submitted that if the verbal provocation limb was envisaged primarily as a means of addressing "provocation by non-physical abuse" then it should be drafted so as to be triggered only by "words" of this kind. See the Discussion Paper, para 10.10 and para 11.9 above.

[20] "[s]uch that it would be reasonable to expect an extreme emotional reaction on the part of the accused".

Third party provocation

11.21 We wrote in our Discussion Paper that whether or not the partial defence of provocation extends to circumstances where the provocative conduct is directed at another person is unclear.[21] The issue of third party provocation by violence arose in *Donnelly v HM Advocate*,[22] where 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."[23]

11.22 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.

11.23 We noted that the practitioners we consulted had been 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. Concern was expressed by these practitioners that to permit such an extension of the defence might introduce uncertainty in the law, potentially resulting in vigilantism where, for example, a parent discovered someone sexually abusing their child.

11.24 In light of the discussion outlined above, at paragraph 10.17 of our Discussion Paper we asked consultees 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?"

Analysis of responses to Discussion Paper

11.25 A clear majority of consultees expressed their belief that a partial defence of third party provocation should be recognised (10 out of 14 consultees responding were in favour of this). Amongst academic respondents, Professors James Chalmers and Fiona Leverick argued that "[t]he situation where, for example, a person loses self-control as a result of violence being directed towards their child does not seem any less deserving of a (partial) defence compared to a person who faced the same threat to themselves." Similarly, Dr Rachel McPherson submitted that "if there is some type of attack ongoing, the distinction between self-defence and provocation will be meaningless to a third party." Professor Eric Clive expressed his support of the

[21] Discussion Paper at para 10.12.
[22] 2017 SCCR 571.
[23] *Ibid*, para [40].

recognition of third party provocation but noted that this support is likely to be "largely theoretical", as he considered it difficult to foresee many cases arising in this context.

11.26 Amongst the medical respondents to the Discussion Paper, the British Psychological Society qualified their support for the recognition of third party provocation by recognising that the inclusion of this form of provocation risked generating legal uncertainty. They stressed the importance of any such doctrine in the context of close relationships between the accused and the third party under attack. Finally, results from our limited public opinion research indicated strong support for the availability of the defence of third party provocation. The public in this survey considered that an accused who had been provoked by an attempted assault on another individual likely "did not have an intention to kill, and their actions were clearly not premeditated."[24]

11.27 Only one consultee – Professor Antony Duff – was of the view that no such partial defence should be recognised. He adopted the potential arguments set out in the Discussion Paper – namely, that to recognise third party provocation might introduce considerable uncertainty, and risked encouraging vigilantism.[25] Further, while the Senators of the College of Justice, with whom Lord Bracadale and the Sheriffs' Association agreed, did not express a clear view, they considered that the issue required to be given further thought, and referred to the risk of vigilantism as well as the difficulties that are likely to arise in defining the circumstances in which a plea of third party provocation should be allowed. Referring to *Donnelly v HM Advocate,*[26] they highlighted that provocation, unlike self-defence, was a concession to human frailty which, for policy reasons, had been kept under strict control.[27]

11.28 In relation to Question 29(b), which asked consultees what the elements of a third party provocation defence should be, a range of suggestions were made. Several consultees emphasised the necessary proximity of the relationship between the (provoked) accused and the third party under attack. The Centre for Scots Law at the University of Aberdeen, for example, was of the view that third party provocation should be recognised only where there was "a very close relationship between the accused and the third party such that it would be reasonable to expect an extreme emotional reaction on the part of the accused if the third party was threatened." They considered that this was "necessary to ensure that the net of the provocation defence is not cast too widely."[28]

11.29 Other suggestions included: that a model for reform was to be found in section 55(3) of the Coroners and Justice Act 2009;[29] that the conduct of a third party which simply "meets the criteria for the application of the defence" should be recognised as

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[24] BritainThinks Report 7.17.
[25] The Discussion Paper, para 10.14.
[26] 2017 SCCR 571.
[27] *Ibid*, para [40] (Lord Justice Clerk (Dorrian)).
[28] The Centre also felt that consideration should be given to further limitations, such as restricting the scope of third party provocation to physical threats.
[29] Professors James Chalmers and Fiona Leverick. The provision provides that "fear of serious violence from V against D or *another identified person* [emphasis added]" may be a qualifying trigger for the "loss of control" defence.

a qualifying trigger[30] and that the provocative conduct should require to have been "towards or affecting the accused" as in New South Wales.[31]

11.30 Finally, the Faculty of Advocates proposed that the essential elements of third party provocation should be:

- provocative conduct by the victim;
- the accused having lost their temper and self-control as a result;
- instant or otherwise justifiable retaliation;
- the violence having been not disproportionate; and
- a proximate relationship between accused and third party, such that the conduct of the accused was reasonable in the circumstances.

Discussion

11.31 Strong support could be identified amongst consultees (10 of 14) for the recognition of third party provocation. An argument that was frequently put forward was that circumstances where third party provocation may apply – for example, where a mother loses self-control in response to violence directed towards her child – do not seem any less deserving of (partial) exculpation than where the threat is directed towards the killer personally. There was similar support for a defence of third party provocation from those who answered our public opinion survey. As previously stated, members of the public considered that an accused who had been provoked by an attempted assault on another individual likely "did not have an intention to kill, and their actions were clearly not premeditated."[32]

11.32 However, we recognise and place weight on the concerns expressed by consultees about the defence perhaps being extended too widely, possibly introducing considerable uncertainty and in turn potentially being misused. Some consultees, including ones who agreed in principle with the recognition of third party provocation, considered that the introduction of third party provocation would risk creating considerable legal uncertainty and potentially increase the risk of vigilantism. One common suggestion to prevent the misuse of the defence was that third party provocation should only be recognised where there was a very close relationship between the accused and the third party threatened.[33] However, others were of the view that it would be difficult to define the circumstances in which such a plea might be allowed[34] and that more thought should be given to the possible consequences of extending the defence to third party situations.

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[30] Professor Gerry Maher KC.
[31] Professor Eric Clive.
[32] BritainThinks Report, para 7.17.
[33] The relationship would have to be close, such that it would be reasonable to expect an extreme emotional reaction on the part of the accused. For example, a parent and their child.
[34] For example, a particular individual might be more closely connected to friends than to members of their family.

11.33 The danger of unintended consequences was further stressed by the practitioner members of our Advisory Group.[35] They emphasised the need to consider any potential extension of the provocation defence within the specific context of criminal trials, which frequently involve irrational violence, street fights, and the like. The prevalence of such cases means there is a real risk that introducing third party provocation in statute will give those who wish to engage in gratuitous violence, hooliganism, or vigilantism a "hook to hang something on" in order to escape a murder conviction. In comparison, those cases that we envisage should be captured by the defence (eg where a mother kills a person who is attempting to assault her child) are somewhat exceptional in Scotland.[36] From a practitioner perspective, their view was that it is fundamentally important to discourage people from taking human life.

11.34 In those rare instances where a sympathetic case does arise, we understand and share the reluctance to label, for example, a protective mother a murderer. In the first instance, the question of what offence might be prosecuted, and whether it would be in the public interest to prosecute, are matters for Crown Office discretion. If there is a prosecution, we would hope that juries will approach such cases with sensitivity and take account of the emotionally provocative circumstances in their decision-making. It is also of importance that the accused would be entitled to advance the special defence of self-defence for the jury's consideration and determination.[37]

11.35 Taking account of the above, and especially the views of those practitioners who have worked on the "front line" in criminal cases, we are not minded to recommend that the defence be extended to third parties.

Sexual infidelity provocation

11.36 As mentioned in the Discussion Paper,[38] the plea of provocation also applies in the context of the discovery of sexual infidelity on the part of an intimate partner. It was suggested, there, that the defence of provocation may not be fit for purpose in today's society.

11.37 In Scots law, the discovery of an intimate partner's sexual infidelity is a recognised provocative act, which provides a basis for reducing a murder conviction to one of culpable homicide. This has formed a part of Scots law for centuries. However, in the Discussion Paper we suggested that social attitudes have arguably changed,[39] and considered that it is doubtful whether "[t]he reasons for the existence, and continuation, of the infidelity exception" are acceptable to today's society.[40]

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[35] See Appendix C for list of members.
[36] Representatives from Crown Office and Procurator Fiscal Service on our Advisory Group confirmed that there is not a significant issue with cases of this nature in practice.
[37] Chalmers and Leverick, *Criminal Defences*, para 3.27. This explains that the defence of self-defence can also apply in the defence of others.
[38] See paras 10.3 and 10.20 *et seq* for discussion of provocation by sexual infidelity.
[39] See Discussion Paper, para 10.20 *et seq*.
[40] *Donnelly v HM Advocate* 2017 SCCR 571 at para [40]; J Casey, "Commentary on *Drury v HM Advocate*", in S Cowan, C Kenedy and VE Munro (eds), *Scottish Feminist Judgments: (Re)Creating the Law from the Outside In* (2019) at p 122; I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma", (2014) 4 Jur Rev 237 at p 239.

11.38 Further, we note in our Discussion Paper that the majority of practitioners in our informal consultations[41] criticised the current law as an unacceptable and archaic approach arising from out-dated concepts of male honour and sexual possession. Some also commented that such cases rarely arise. One practitioner further noted that his only experience with the defence was the case of a female accused who murdered her female partner.

11.39 In light of the discussion outlined above, we were initially minded to recommend abolition of the partial defence of sexual infidelity provocation in homicide cases. At paragraph 10.30 of our Discussion Paper we asked consultees 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?"

Analysis of responses to Discussion Paper

Question 30(a) – Abolition of provocation by sexual infidelity?

11.40 The vast majority of consultees who responded to Question 30(a) were in favour of abolition of the partial defence of provocation by sexual infidelity (17 out of 18 consultees). Most agreed that the sexual infidelity trigger was out of step with contemporary standards.

11.41 Amongst academic respondents, opinions were largely based on the incompatibility of the defence with modern societal values. The Centre for Scots Law at the University of Aberdeen submitted that the trigger had "no place in contemporary Scots law", and that "any potential benefits to allowing the discovery of sexual infidelity to form the basis of a defence are outweighed by potential risks." Dr Rachel McPherson contended that the sexual infidelity variant of the plea was "highly gendered in its operation". She had identified 11 reported cases in which provocation by infidelity had been pled and eight in which it had been accepted. Seven of the successful accused had been male. Dr McPherson's view was that the plea endorsed "jealousy and possessiveness", risk factors which were thought to be closely associated with femicide,[42] and was, as other consultees noted, "incompatible with modern values". Dr Andrew Cornford was in favour of abolition, for all of the reasons given in the Discussion Paper. These include, in addition to the sexual infidelity limb's societal incompatibility, conceptual difficulties with the "ordinary man" comparator it employs, the fact that the value attached to sexual fidelity varies between relationships, and the defence's inherent gender-bias (in that, although men and women commit adultery at broadly comparable rates, men are far more likely to kill upon its discovery).[43]

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[41] Prior to the publication of the Discussion Paper.
[42] J Monckton Smith, *Murder, Gender and the Media: Narratives of Dangerous Love* (2012). This point was reiterated by the Equality and Human Rights Commission.
[43] See Discussion Paper, paras 10.24 to 10.29.

11.42 Amongst public bodies, the Equality and Human Rights Commission felt that abolition of the sexual infidelity trigger was necessary "to challenge damaging and outdated historical gender biases which perpetuate violence against women and girls". The provocation defence in this mode was used disproportionately by men, and its removal would be consistent both with the Scottish Government's Equally Safe strategy (to end violence against women and girls) and the UK's international treaty obligations.[44]

11.43 Amongst campaign groups, Rape Crisis Scotland echoed the sentiment that the sexual infidelity limb of the provocation defence was unacceptable in a modern society, since it was "predicated on ideas of male possession over women". Scottish Women's Aid likewise regarded it as being "rooted in archaic notions of women as belonging to their husband", and as having "no place in a Scotland committed to gender equality, human rights protection, and the eradication of crimes justified by so-called 'honour'". It recommended swift action be taken to abolish it.

11.44 Amongst legal professionals, the Law Society of Scotland opined that the sexual infidelity trigger was "out of step with the current Scots law's approach to domestic violence". It also generated considerable uncertainty: at what stage in a relationship was an accused entitled to an expectation of fidelity? What sort of reaction would an ordinary person think acceptable upon discovering adultery? With this said, the Law Society cautioned that the details of any proposed reform should be consulted on.

11.45 In our limited research into public opinion, there was a belief that an accused who killed immediately after the discovery of their partner in the act of having sex with another person should have an available defence. Some found it difficult to describe why they thought such a defence should be available. It was noted that support may be rooted in the fact that the accused was taken not to have displayed any premeditation in such a situation, or that the circumstances were considered by the public to be relevant in such a situation, which is characterised by "very difficult dynamics".[45]

11.46 However, it is worth noting that the public's stance on the defence of provocation by sexual infidelity is not absolute. Further discussion of the defence in focus groups found that support for the defence only extends to situations where the accused immediately kills following the discovery of the infidelity. Support did not extend to situations where the accused commits the act after discovering an affair via text message. Across the focus groups, the public felt the latter was indefensible, as it displayed "a clear premeditation and intent to kill".[46] Further, many of the focus group participants were hopeful, and expected, that in all but the rarest of cases the defence would be unsuccessful. The exception to this was a small group of the public who believed that such a defence should be successful where it can be proved that the discovery of their partner in the act of infidelity significantly impacted the accused's mental state. This group noted that the behaviour "being out of character for the

[44] Namely, Article 42 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention") and para 31(b) of the Committee on the Elimination of Discrimination against Women's general recommendation No. 35.
[45] BritainThinks Report, para 7.24.
[46] *Ibid*, para 7.25.

accused" was an additional important metric in judging whether a defence should be successful. The strongest support for retaining the defence is concentrated in one demographic (ie men aged 50+)[47] rather than being spread across the sample size. This gives us reason to doubt the true extent of support for retaining the defence across the entire Scottish population.

Question 30(b) – Replacement defence?

11.47 Of all the consultees, only one – namely, Professor Pamela Ferguson – was in favour of retaining the sexual infidelity limb of provocation. She submitted that the problem with the existing law of provocation was not that the discovery of sexual infidelity operated as a mitigating factor in intentional killings, but rather that it had been *singled out* as such a factor. That it was the only "non-violent" form of provocation recognised by the law was an anomaly. Instead, Professor Ferguson suggested that the definition of provocation should be broadened such that it permitted consideration in the round of all the circumstances of the offence.[48] The defence, she felt, should encompass such cases as the parent who discovers that her child has been the victim of a serious sexual assault, the person who has been the victim of prolonged domestic violence, or the victim of prolonged racist or religious victimisation. To "snap" under such circumstances did not warrant outright excusal, nor did it warrant condemnation as a murderer and a life sentence. This approach reflected Professor Ferguson's view that "murder should be confined to the most heinous of killings". It had to be borne in mind that the provoked killer was not acquitted, but rather convicted of culpable homicide, a very serious crime which could attract a severe penalty.[49] Whilst killings carried out under provocation – including by infidelity – were "clearly blameworthy" and warranted punishment, their circumstances rendered them relatively *less* blameworthy than murder.

11.48 The Centre for Scots Law at the University of Aberdeen, although agreeing that the sexual infidelity defence should be abolished at common law, were in favour of a new defence, which should be available to an accused who killed upon discovering an intimate partner's sexual infidelity. The Centre felt that the only context in which it might be appropriate to regard the discovery of infidelity as an exculpatory factor was that of domestic abuse. In this connection, it advised that consideration be given to the (English) case of *R v Challen*,[50] in which revelations of sexual infidelity had been employed "as a technique of abuse and as a means of controlling the defendant". The Centre felt that infidelity in the context of domestic abuse could usefully be covered by a standalone domestic abuse defence. The issue of a standalone defence of killing in response to domestic abuse is discussed further in Chapter 13.

11.49 The remaining consultees were in favour of getting rid of the sexual infidelity provocation defence outright. Two consultees[51] responded to Question 30(b) to say

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[47] *Ibid*, para 7.26.
[48] An approach arguably similar to that adopted in England and Wales with "loss of control", see para 11.55 *et seq*.
[49] Whilst murder attracts a mandatory life sentence, the sentencing regime for culpable homicide is entirely discretionary. In appropriate cases, however, this distinction can mean little: see eg *Kirkwood v HM Advocate* 1939 JC 36, where the accused escaped a murder conviction on grounds of diminished responsibility but was nevertheless sentenced to penal servitude for life.
[50] [2019] EWCA Crim 916.
[51] We Can't Consent To This and Dr Rachel McPherson.

that abolition was appropriate, but nevertheless went on to answer Question 30(b), in effect repeating their response to Question 30(a), ie that there should be abolition. Two consultees were of the view that the discovery of infidelity should not be grounds for a defence under any circumstances. We Can't Consent To This argued that lethal violence was "no longer reasonable (if it ever was)" in this context. It noted that, in England and Wales, the provocation defence ("widely used by men who killed female partners or ex-partners") had been abolished. Similarly, Rape Crisis Scotland were of the view that the defence should be abolished due to its predication on "ideas of male possession over women", which, in their view, is unacceptable in a modern society.

Discussion

11.50 In our Discussion Paper, we expressed our doubts as to whether "[t]he reasons for the existence, and continuation, of the infidelity exception" are acceptable to today's society.[52] We noted commentators' views that the justification underlying the infidelity limb of the defence is based, historically, upon the concept of possession, with infidelity being seen as an insult to a man's honour.[53] The defence may, therefore, be thought to sit uneasily with modern society's disapproval of "honour killings"[54] and the Scottish Government's policies against domestic abuse.[55] We further stated that the changing social attitudes towards this defence have been reflected in 21st century judicial commentary. We cited in particular the English case of *R v Smith*, in which Lord Hoffman observed that "male possessiveness should not today be an acceptable reason for loss of self-control leading to homicide".[56]

11.51 On this basis, we came to the provisional view that we were minded to recommend abolition of the partial defence of sexual infidelity provocation in homicide cases, and sought the views of consultees on provocation by sexual infidelity. Consultees were almost unanimously (17 of 18) in favour of abolishing the sexual infidelity limb of the defence.

11.52 Across stakeholder groups, consultees echoed unequivocally the Discussion Paper's suggestion that this "trigger" is out of step with modern societal values, and that it has no place in contemporary Scots law. The opposition of the public to the abolition of the limb was a notable deviation from the vast majority of consultees. That said, it was noted that the public expressed their hope that in most cases, the defence would be unsuccessful. Of interest, too, is the fact that the strongest advocates for the

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[52] See para 10.20 of the Discussion Paper. Quote is from *Donnelly v HM Advocate* 2017 SCCR 571 at para [40].
[53] 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 Chalmers and Leverick (eds), *Essays in Criminal Law* at p 204.
[54] 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.
[55] 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: available at: https://www.gov.scot/Resource/0054/00542535.pdf.
[56] *R v Smith* [2000] 1 AC 146 at p 169.

defence came from a specific subgroup of the public – particularly, men aged 50+ – suggesting that the extent of support for the retention of the defence may be limited to a particular demographic.[57]

11.53 The near unanimity with which consultees approached the abolition of the sexual infidelity limb of provocation suggests to us that there is a clear way forward – removing the sexual infidelity limb from the defence of provocation.

11.54 We therefore recommend that:

10. The defence of provocation should be reformed so as to exclude provocation by sexual infidelity.

(Draft Bill, sections 5 and 6)

Outright abolition of provocation and "loss of control" in English law

11.55 In our Discussion Paper, we noted that some commentators have called for the abolition of the Scots law partial defence of provocation altogether.[58] One of the arguments in favour of its abolition is that the defence privileges anger over other emotional states such as fear. Professor Claire McDiarmid is of the view that "anger, even if justified, should be neutral in relation to criminal liability" and that individuals should be expected to control their anger. Professor McDiarmid ultimately argues that if that proposition is accepted, the defence of provocation ought to be abolished.[59] Others argue that the defence should be abolished as it suffers from an inherent gender bias,[60] with women being less likely to satisfy the defence's restrictive criteria of "loss of self-control" and "immediacy".[61]

11.56 Notably, England and Wales abolished the provocation defence in 2009,[62] replacing 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

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[57] BritainThinks Report, para 7.26.
[58] 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: Chalmers and Leverick, *Criminal Defences* at para 10.01.
[59] C McDiarmid, "Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law" in Chalmers and Leverick (eds), *Essays in Criminal Law*.
[60] I Cairns, "'Feminising' Provocation in Scotland: The Expansion Dilemma" (2014) 4 Jur Rev 237.
[61] New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence Who Offend* (Preliminary Paper 41) para 94.
[62] 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 purpose 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 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."

11.57 As noted in our Discussion Paper, significant features of the new statutory defence of loss of control included the recognition of a fear of serious violence;[63] the removal of the "immediacy" requirement;[64] the exclusion of sexual infidelity as a thing done or said qualifying as an excusing trigger;[65] the use of the calibration of "normal" characteristics of a person;[66] the express exclusion of revenge as an excusing trigger;[67] 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 their account of the incident.

11.58 We considered initially that the abolition of the partial defence of provocation without any replacement defence – such as a statutory "loss of control" defence - might cause difficulties. The Senators of the College of Justice commented that if juries were to lack the guidance provided by a partial defence,[68] and had to choose between murder and culpable homicide without such guidance, there might be a serious risk of miscarriages of justice. They mentioned an additional risk, namely, as seen in New Zealand, a disjunction 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", whereas their own view was that culpable homicide caused by provocation would be the proper verdict.

11.59 Against this background, at paragraph 10.47 of our Discussion Paper we asked consultees the following questions:

"31. (a) Should the partial defence of provocation to a charge of murder be abolished entirely?"

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[63] S 55(3).
[64] S 54(2).
[65] S 55(6)(c). However in *R v Clinton* [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. It is to be left out of account only where it constitutes the *sole* qualifying triggering factor.
[66] S 54(1)(c).
[67] S 54(4).
[68] See current requirements in Scots common law, set out in para 10.2 above, and the specific statutory provisions in England (Coroners and Justice Act 2009, ss 54-55).

(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?"

Analysis of responses to Discussion Paper

11.60 Question 31 asked consultees whether the partial defence of provocation should be abolished entirely and, if so, whether it should be replaced by a statutory defence.

11.61 Of the 16 consultees who responded to Question 31, five were in favour of abolishing provocation at common law and replacing it with a statutory defence.[69] Several of the five consultees expressed their support for the abolition and replacement of the defence by expressing concern that the defence privileged anger over other emotions such as fear. Echoing this statement, the Centre for Scots Law at the University of Aberdeen considered that this privileging of anger was "inherently problematic from an equality perspective",[70] and that, whilst a defence of some kind was necessary to ward off miscarriages of justice, it would be better to "re-think the area based on first principles rather than try to modify a fundamentally flawed defence." Similarly, Professor Antony Duff felt that the existing defence privileged anger unjustifiably – specifically, the "expression of anger in physical violence, as if violence is a reasonable response to provocation", which was not something the law should countenance (as distinct from defensive violence). Professor Duff was in favour of replacing provocation with something similar to the English "loss of control" defence. Further, amongst medical professionals, the British Psychological Society was of the view that the common law provocation defence could be replaced by a statutory defence of "loss of control".

11.62 Ten consultees were opposed to abolishing provocation at common law. Some consultees considered that the existing plea worked well in practice. The Senators of the College of Justice, for example, felt that the existing plea worked well and that its abolition risked injustice. Self-defence and provocation are often pled together and, where the jury are not convinced that the accused responded proportionately to the threat (and so the self-defence plea is unsuccessful[71]), it is still open to the jury to find that the accused was provoked and return a verdict of culpable homicide. Were provocation to be abolished, the accused who responds (albeit disproportionately) with lethal force to a violent threat against them would be guilty of murder. Alternatively – as has apparently happened in New Zealand – juries might simply ignore judicial directions and deliver the lesser verdict where it was called for by the "justice of the

[69] This figure includes a number of consultees who were ostensibly opposed to abolishing the plea, but whose answers indicated that they had understood this to mean abolition "outright" (with no replacement) and that they were in fact in favour of replacing the common law plea with a statutory version.
[70] We understand the Centre to be referring to the fact that women are less likely to be provoked to violence than men, and therefore privileging anger and no other emotions is inequitable. See I Cairns, "'Feminising Provocation' in Scotland".
[71] For discussion of the legal test in self-defence, see paras 7.5-7.16 of the Discussion Paper.

circumstances". This view was supported by Lord Bracadale and the Sheriffs' Association.

11.63 Also opposing the abolition of provocation at common law, Professors James Chalmers and Fiona Leverick considered that, given the mandatory life sentence for murder, the provocation defence has "some value in providing a safety net for killings which do not reach the level of seriousness appropriate for a life sentence to be merited." They noted, though, that this did not necessarily mean that the defence, as it currently stands, is satisfactory. They stated that in their view, sexual infidelity should *not* be a qualifying trigger, and that the proportionality test is in need of reform.

11.64 Others suggested that outright abolition is unnecessary, but that there is a benefit to reforming certain aspects of the defence and placing them on statutory footing. Professor Eric Clive was of the view that the relevant defence could be expressed as in the Draft Criminal Code for Scotland. Professor Gerry Maher KC was of a similar view, considering that the provocation defence "has a role in murder cases which no other defence captures", but that it should nevertheless be reformed and put on a statutory basis. Similarly, while noting that the defence is "inherently gendered", Dr Rachel McPherson posited that outright abolition, with no replacement, carried the risk of unwanted consequences for female accused. She noted, citing her own research, that women rely on this defence "more commonly than on any other position, particularly when they kill against a background of domestic abuse", and that a new statutory defence might therefore be required if significant changes are made. Finally, and analogously, the Faculty of Advocates did not consider that abolition was required, but instead that the defence was in need of "review and expansion in terms of the timing of retaliation; third-party provocation; and verbal provocation, in order to reflect attitudes and behaviours of modern society (with particular reference to those accused persons who have been the subject of domestic abuse)." They too mentioned that if the defence were to be abolished, an alternative would need to be put in place, to which end the English "loss of control" suggested itself as a model.

11.65 Finally, the Law Society of Scotland expressed a view that did not expressly advocate for, nor oppose, the abolition of the defence. Rather, they suggested that provocation *may* need to be abolished and replaced by a new partial defence in statute. They contended that this would likely be a "neater" solution than to amend the defence slightly. However, they recommended further consultation on the matter.

11.66 Question 32(a) asked consultees whether, if provocation were to be abolished and replaced, any new statutory defence should be similar to the "loss of control" defence recognised in England and Wales, as defined in sections 54 and 55 of the Coroners and Justice Act 2009.[72] If consultees were not of the view that the English "loss of control" defence should be used, consultees were asked at Question 32(b) what the essential elements of the defence should be.

11.67 Of the 11 consultees who responded to Question 32(a), seven were in favour of adopting at least some elements of the English "loss of control" defence. However,

[72] This replaced the common law provocation defence in England and Wales.

views differed on which particular elements these should be and what changes could be made to the English model.

11.68 Only one consultee expressed unreserved support for creating a new partial defence to broadly mirror "loss of control". The British Psychological Society felt that this would allow for consideration of a wider range of factors, such as fear of violence, remove the need for "immediacy" of response, and focus attention on the accused rather than the provoking act.

11.69 Two further consultees expressed support for adopting the English defence as a model for reform, but with some amendments. Professor Antony Duff described his position in depth, proposing that something similar to "loss of control" should be recognised, as an "emotion-based defence". He felt, however, that "loss of control" implied "something more dramatic than should be needed", and that "qualifying trigger" suggested "an overly mechanistic picture". The key elements of the defence, in Professor Duff's view, should be:

- that D was motivated by a powerful emotion that it was in the circumstances reasonable to feel;
- that such an emotion is liable to destabilise the practical rationality of even a person of reasonable fortitude and strength of character;
- that it would at least tempt, if not actually motivate, even a person of reasonable fortitude and strength of character to act in a way similar to the accused; and
- that in giving in to that temptation, D displayed weakness, but not the kind of indifference to human life that marks a murderer.

11.70 The qualifying emotions, he felt, should be fear (as in cases of coercion and excessive self-defence) and compassion (as in at least some cases of mercy killing), but not anger.

11.71 Further, the Law Society of Scotland was of the view that, whilst "loss of control" in its present guise was "quite wordy and unwieldy", the key elements which presently gave rise to concern in Scotland nevertheless appeared to have been addressed south of the border. It noted, however, that attempts had been made in the courts to circumvent the provisions of sections 54 and 55 of the Coroners and Justice Act 2009,[73] and that there might be benefit in inserting a reference to "domestic abuse and coercive and controlling behaviour" as additional triggering elements.

11.72 Four consultees had reservations about adopting the English defence as a model, but nevertheless expressed support for adopting at least some aspect of it. The Centre for Scots Law at the University of Aberdeen and Professors James Chalmers and Fiona Leverick both saw merit in the English defence's eschewing of any requirement that a loss of control be an *immediate* response to a qualifying trigger. Furthermore, both the Centre and Dr Andrew Cornford expressed support for the

[73] *R v Clinton* [2012] EWCA Crim 2; *R v Goodwin* [2018] EWCA Crim 2287.

inclusion of fear as a qualifying trigger. Finally, Professor Gerry Maher KC singled out the label "loss of control" as better capturing "the core of the defence".

11.73 Four consultees opposed the introduction of any new statutory defence bearing similarity to the English "loss of control" defence. Of those, Professor Eric Clive was reluctant to "over-emphasise" the "loss of control" aspect, feeling that the law should "expect people with normal mental capacities not to lose control". Dr Rachel McPherson suggested that the loss of control defence appeared harder to plead successfully than provocation,[74] and that it was therefore not widely available in practice. Given the problems that women had in accessing other criminal defences, this would "potentially create additional problems for female accused". Similarly touching on the gendered aspects of the defence, We Can't Consent To This noted that the replacement of provocation in England and Wales with "loss of control" had simply resulted in men who had killed their female partners or ex-partners relying on the new plea instead, though in smaller numbers than before. Any new Scottish defence modelled on loss of control, it stressed, must not become the "defence of choice for abusive men who commit femicide". Lastly, Professor Pamela Ferguson was opposed to adopting something similar to the English "loss of control" defence. Instead, in response to Question 32(b), she reiterated her proposal to extend the provocation defence to include not only verbal triggers, but all forms of provocation, with all circumstances of the offence being considered in the round.[75]

Discussion

11.74 In 2006, the authors of the leading text on Scottish criminal defences could confidently state that the provocation plea in this jurisdiction had "been the subject of relatively little academic writing", and that "no decision on the law of provocation ha[d] provoked any significant controversy".[76] In the intervening period, however, that picture appears to have changed. On the basis of the consultation responses outlined above, a clear case can be made for significant reform in this area.

11.75 We sought the views of consultees on three discrete aspects of the law of provocation: provocation by sexual infidelity, third party provocation, and verbal provocation.

11.76 Consultees were almost unanimously (17 of 18) in favour of abolishing the sexual infidelity limb of the defence. Across stakeholder groups, consultees echoed unequivocally the Discussion Paper's suggestion that this "trigger" is out of step with modern societal values, and that it has no place in contemporary Scots law. The opposition of the representative sample of the public to the abolition of the limb was a notable deviation from the vast majority of consultees. That said, it was noted that the public expressed their hope that in most cases, the defence would be unsuccessful. Of interest, too, is the fact that the strongest advocates for the defence came from a specific subgroup of the public – particularly, men aged 50+ – suggesting that the extent of support for the retention of the defence may be limited to a particular

[74] Citing S Parsons, 'The loss of control defence – fit for purpose?' (2015) 79 J Crim L 94.
[75] See Professor Ferguson's answer to Question 28(b), at para 11.10.
[76] Chalmers and Leverick, *Criminal Defences*, para 10.01.

demographic.[77] We are content therefore that the case for abolishing the provocation by sexual infidelity aspect of the defence has been made out.

11.77 Whilst there was strong support amongst consultees (10 of 14) for the recognition of third party provocation, we think that there is a justifiable concern that this would be extending the defence too widely. There is a risk that it would potentially introduce considerable legal uncertainty, and be misused by those wishing to engage in gratuitous violence, hooliganism or vigilantism as a "hook to hang something on" in order to escape a murder conviction. It is also of importance that the accused would be entitled to advance the special defence of self-defence for the jury's consideration and determination.[78] Ultimately, we are not persuaded that the case for extending the defence to include third party provocation has been made out.

11.78 We are also not persuaded that a case has been made out for the recognition of verbal provocation. Whilst there is obvious merit in the argument that some verbal taunts can be highly inflammatory, it is less clear that the law should ever countenance the use of lethal force in response. Whilst consultees were almost evenly divided on this issue, we are persuaded that to recognise verbal provocation as a "qualifying trigger" would render provocation a springboard for unmeritorious claims. We are not minded to recommend the expansion of the defence in this respect.

11.79 Given that we are minded to recommend the abolition of the sexual infidelity limb of provocation, we think that a legislative solution would appear the appropriate way forward. We are of the view that this should be taken as an opportunity not merely to implement this discrete reform, but rather to fundamentally reconsider the proper purpose and scope of the provocation defence in a contemporary legal system. While most consultees opposed the outright abolition of the common law provocation defence (10 of 16), we note that some included in the opposition expressed support for reforming elements of the defence and placing said reforms on a statutory footing. Aside from the issues in respect of which views were sought by the Discussion Paper, a number of potentially problematic features of the existing defence were highlighted. These included, for instance, the unduly restrictive requirements for *immediate* loss of self-control and retaliation, the gendered nature of the defence, and the privileging of anger as an emotion-based response to the trigger.

11.80 With all of this in mind, we are of the view that the existing common law defence of provocation should be abolished, reconsidered, and replaced with a statutory defence. To this end, the English "loss of control" defence under sections 54 and 55 of the Coroners and Justice Act 2009 is a potential model for reform. The operation of the English defence has not, however, been free from criticism. Further, while consultees were generally supportive of the "loss of control" defence – especially removing the need for "immediacy" of response – there was not sufficient consensus on which particular elements should be taken forward. Several consultees, even those tentatively in agreement, also expressed serious reservations about adopting the English model. Taken together, the responses did not provide a clear enough steer for reform. It is therefore likely that the elements of any new Scottish defence (besides

[77] BritainThinks Report, para 7.26.
[78] Chalmers and Leverick, *Criminal Defences*, para 3.27. This explains that the defence of self-defence can also apply in the defence of others.

those already canvassed in the Discussion Paper) would require to be founded on further consultation, as part of which the Scottish Ministers may consider conducting further research into public opinion. They may also wish to use our preliminary research as a departure point for their own further research and consultation.

11.81 In the meantime, we have included in the draft Homicide (Scotland) Bill attached to this Report[79] an attempt at a statutory defence of provocation as a starting point for such further research and consultation. The statutory defence is restricted to provocation by physical attack and therefore excludes provocation by discovery of sexual infidelity. It also does not extend to verbal provocation or third party provocation as discussed above. Currently at common law, the existing partial defence of provocation can also operate in relation to a charge of "attempted murder" and, if successfully established, can reduce what would otherwise be a conviction for attempted murder to one for assault (with aggravations (if any)). Thus in the context of attempted murder, no reform is recommended. Accordingly, the relevant provision in the proposed Homicide (Scotland) Bill[80] simply places the common law on a statutory footing.

11.82 We therefore recommend that:

11. The common law defence of provocation should be abolished and replaced with a new statutory defence.

(Draft Bill, sections 5 and 6)

12. A new statutory defence should not extend to verbal provocation, provocation by sexual infidelity or third party provocation.

(Draft Bill, sections 5 and 6)

13. Scottish Ministers may want to undertake further research and consultation in relation to a potential new statutory defence of provocation.

[79] See s 5 of the Bill in Appendix A.
[80] See s 6 of the Bill in Appendix A.

Chapter 12 Diminished responsibility

Introduction

12.1 This Chapter focusses on the partial defence of diminished responsibility which, if successfully pled, reduces what would otherwise be murder to culpable homicide.[1] This Chapter also examines the two remaining recognised "mental condition" defences – mental disorder and automatism – in the context of homicide.

12.2 At the outset, we wish to state that through the discussion of the responses to this Chapter, it became evident that diminished responsibility continues to be a difficult and complex area of law. Little consensus emerges from the responses to the questions that follow, and even where a majority arises from responses, common themes proved difficult to detect. In part, this was a result of the wide variety of consultees responding to this question, who comprised legal practitioners, legal academics, medical practitioners, clinical forensic psychologists, psychiatrists, and campaign groups. It is with this consideration in mind that we lay out our conclusions below.

Abnormality of mind and s 51B of the Criminal Procedure (Scotland) Act 1995

12.3 Diminished responsibility is one of the two Scots law partial defences to a charge of murder. Originally a common law plea,[2] the defence is now statutory, and is found in section 51B of the Criminal Procedure (Scotland) Act 1995.[3]

12.4 Section 51B provides that:

> "(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.[4]

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[1] The impact of domestic abuse on that defence is discussed in Ch 13.
[2] Authoritatively defined in *Galbraith v HM Advocate (No. 2)* 2001 SCCR 551. The defence of diminished responsibility can be traced back to the mid-19th century: *Alexander Dingwall* 1867 5 Irv 466.
[3] 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).
[4] "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.

(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

(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."

12.5 While the burden of proof normally rests on the Crown in a criminal trial, the partial defence of diminished responsibility is an exception to that rule. The burden of proof in the case of diminished responsibility is on the accused, on the balance of probabilities.[5] Thus, at the outset of a case, the Crown has to prove that the accused is liable for murder and that the requirements of the *actus reus* and *mens rea* for the offence of murder are satisfied, following which the accused has to prove not that they are "innocent", but rather that their responsibility for the killing was diminished by an abnormality of mind.

12.6 "Abnormality of mind", in turn, reflects the wider concept developed by the criminal appeal court in *Galbraith v HM Advocate (No. 2)*,[6] 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.[7] 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 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

[5] A lesser standard of proof than "beyond reasonable doubt": cf *Lilburn v HM Advocate* 2012 JC 150.
[6] 2001 SCCR 551.
[7] *HM Advocate v Savage* 1923 JC 49, at p 51.

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 …"

12.7 In para [53] the Lord Justice General also referred to a "recognised abnormality caused by sexual or other abuse inflicted on the accused."

12.8 A multitude of questions have arisen regarding the term "abnormality of mind", including what conditions may qualify, whether the abnormality must be "recognised", whether by professionals or by textbooks and journals, and whether more should be done to align the law with policy aims combatting domestic abuse. At paragraph 11.37 of the Discussion Paper we asked consultees:

> "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 the established texts on psychiatry or psychology?"

Analysis of responses to Discussion Paper

12.9 Twenty-one consultees provided their views on whether more clarity is required as to what constitutes an "abnormality of mind" in terms of section 51B of the Criminal Procedure (Scotland) Act 1995.[8] A nearly even split in responses emerged, providing the first indication of the lack of consensus that emerges throughout this Chapter.

12.10 Ten consultees considered that greater clarity is required, or that the language of "abnormality of mind" is otherwise deficient.

12.11 Within these 10, two consultees were of the view that an abnormality of mind in this context should be a recognised one. Dr Rachel McPherson, for example, expressed her support for relying on appropriate sciences in order to prevent abuses of the defence. She noted the gendered aspect of the defence, highlighting that approximately one third of all male accused seeking to rely on diminished responsibility had done so in the context of intimate partner violence; it is these abuses of power that Dr McPherson contends can be addressed through restricting the definition to only recognised abnormalities.

12.12 A further five consultees were of the view that greater clarity is needed but expressed their opposition to any requirement that the abnormality be a "recognised" one. Amongst legal professionals, the Faculty of Advocates was of the view that some

[8] By way of reminder, s 51B(1) of the 1995 Act sets out the general conditions for a plea of diminished responsibility in the following terms: 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.

confusion had arisen from the court's apparent view in *Graham v HM Advocate*[9] that section 51B(1) was to be read as if the words "a recognised" appeared before the word "abnormality" – a reading which was not consistent with a strict interpretation of the statute, but which may have been legitimate on the basis of its historical development (following *Galbraith v HM Advocate (No. 2)*[10]). This confusion was "unsatisfactory for the practitioner", who could not be certain as to the defences potentially available to an accused. Nevertheless, the Faculty's view was that flexibility was key, such that courts might retain the ability to tailor the legal concept of abnormality to the complex evidence presented in any given case. Abnormality could "arise in a variety of guises in an evolving medical and non-medical landscape", including in the form of low intelligence or depression.

12.13 Amongst medical professionals, the British Psychological Society (largely echoed by the Heads of Clinical Forensic Psychology Services (NHS Scotland)) suggested that there was "a need for greater clarity on what constitutes abnormality of mind and indeed a recognised abnormality of mind". It noted that "[m]ental health research and services rarely use the term 'the mind' and this reflects the way in which scientific research has developed our understanding of the brain and mental health." Forensic and clinical psychologists try "to understand why *this person* commits *this offence* at *this time* in *this way* against *this person*".[11]

12.14 Finally, three consultees considered that the language of "abnormality of mind" is itself deficient and should be dropped altogether. The Association of Clinical Psychologists UK, for example, considered that "abnormality of mind" is not a "valid" concept – rather, it is a phrase which could be understood in a variety of ways. In legal settings, an "abnormality of mind" usually means an identifiable ICD-10[12] psychiatric diagnosis and so psychiatrists, clinical psychologists and courts felt obliged to "diagnose" an abnormality of mind. However, psychological/psychiatric phenomena tended to occur "on a population continuum of severity or other indices", as opposed to in the form of "discrete dichotomous entities". There were multiple common definitions of abnormality, each of which had their limitations; to arbitrarily define "abnormality" on a purely diagnostic basis would be to the likely exclusion of other relevant factors and therefore to the detriment of a proper assessment. They noted, too, that scientific evidence underpinning our understanding of the mind is constantly developing, as are the cultural factors which, at all times, provide a basis for defining "abnormality." In addition, both the Equality and Human Rights Commission and Scottish Women's Aid were of the view that the language of "abnormality of mind" is "stigmatising".

12.15 Eleven consultees were of the view that the existing definition is sufficiently clear. Professors James Chalmers and Fiona Leverick, for example, expressed the tentative view that there was not a clear case for reform in this area. The current definition of diminished responsibility, as originally developed in *Galbraith*, was "designed to avoid problems of undue rigidity". This allowed the courts to approach the

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[9] 2018 SCCR 347. Discussed in further depth below, at paras 12.41-12.43.
[10] 2001 SCCR 551.
[11] Emphasis in original.
[12] ICD-10 (World Health Organisation, *International Classification of Diseases*, 10th Revision) is a standardised system used to code and classify diseases and medical conditions.

matter in a "pragmatic fashion", "responding to the circumstances of individual cases and future scientific developments". Professor Gerry Maher KC, too, was of the view that the concept of "abnormality of mind", as set out in section 51B, had "a relatively settled meaning". Moreover, addition of the term "'recognised" seemed inappropriate: any proposed abnormality should simply be "one which is relevant to the definition of the plea".

12.16 Four of the 11 consultees were likewise of the view that what constituted an "abnormality of mind" under section 51B was already sufficiently clear, though this was not because of any opposition to a "recognition" requirement. Instead, they suggested that such a requirement was already an established aspect of the law. Nicholas Burgess stated that "[i]t seems … sensible that the abnormality be a recognised one. The speeches of Lord Rodger in *Galbraith* and Lord Carloway in *Graham*, however, seem to adequately address what constitutes an 'abnormality' so I'm not sure that any statutory redefinition is necessary." Amongst legal professionals, the Senators of the College of Justice[13] noted, citing *Graham*, that "[t]his is assumed to be the position… which we consider provides sufficient clarity as the law stands."

How should a "recognised abnormality" be defined?

12.17 Fourteen consultees went on to share their suggestions for the potential re-definition of what constitutes a "recognised abnormality".

12.18 One consultee[14] was of the view that "recognised" abnormalities should be confined to those contained in established texts. They also noted that the definition of "abnormality" should include substance abuse disorder.

12.19 Thirteen consultees were of the view that "recognised" abnormalities should not be so restricted. Despite this clear majority opposing the restriction of recognised abnormalities, little consensus emerged as to how, without restriction, recognised abnormalities should be defined.

12.20 In their response, the University of Strathclyde Law School pointed out that "[e]stablished texts take time to absorb new and valid advances in the field", and that "a legal reliance on textbooks would therefore disadvantage an accused person by sheer dint of time." Moreover, there would inevitably arise abnormalities recognised by either psychiatry or psychology but not the other, as well as "definitional differences" across the two disciplines. The Law School also pointed to the past exclusion of psychopathic personality disorder from diminished responsibility as an example of where "deliberately and explicitly limiting the scope of what might constitute an abnormality of the mind creates unnecessary obstacles to justice": "[t]he fact that other jurisdictions did not exclude psychopathic personality disorders from the defence of diminished responsibility is instructive here and reinforces our view that abnormalities of the mind should not be restricted, and certainly not on the basis of inclusion in recognised textbooks in psychiatry or psychology." Similarly, the Law Society of Scotland pointed out that established texts on psychiatry or psychology were "not definitive – they evolve[d] over time, they [were] not identical, and they reflect[ed] a

[13] With whom Lord Bracadale and the Sheriffs' Association agreed.
[14] Dr Rachel McPherson.

broad clinical consensus at the time rather than any absolute classification of 'true' mental disorders." The Law Society suggested, therefore, that the established texts be treated as important evidence as to what constituted a recognised abnormality, but not to the exclusion of other potentially relevant evidence.

12.21 Interestingly, some medical professionals agreed with the premise that recognised textbooks in psychiatry or psychology should not be the basis on which the definition of abnormality of mind is contained. The Association of Clinical Psychologists – UK pointed out that ICD-10[15] and DSM-5[16] were diagnostic manuals: "although practically useful, psychiatric diagnosis has its flaws and is open to criticism on a range of fronts", including "poor reliability… and validity" and "a limited scientific basis and utility". They also highlighted that "[t]he development of diagnostic manuals may be driven by factors other than the scientific literature, such as corporate financial interests and the insurance-based US healthcare system." Both the British Psychological Society and the Heads of Clinical Forensic Psychology Services (NHS Scotland) similarly pointed to "an inherent difficulty related to relying on published texts (in particular the diagnostic manuals DSM and ICD) as clinical practice often precedes and informs re-drafts/updated versions rather than the other way around." They noted the example of personality disorder, in respect of which there was a divergence of opinion amongst experts across the world which had resulted in the two diagnostic manuals describing the same observed phenomenon in different ways.

12.22 Finally, the Area Psychology Committee for NHS Greater Glasgow and Clyde pointed to organic and neurodegenerative conditions as some that have a role to play, after stating the importance of including definitions contained within established texts on psychiatry and psychology. This response highlights, importantly, the divergence of views regarding the definition of a "recognised abnormality" amongst medical professionals, and the sensitivity with which this definition, as well as the handling of diagnostic manuals, requires to be treated.

Discussion

12.23 If consultee responses to this question indicate anything, it is that there is a significant divergence in views in this area of law. No consensus emerged regarding whether more clarity is required as to what constitutes an abnormality of mind. Within the nearly even split into which these responses fell, no one underlying theme could be identified as to the reasoning behind opinions.

12.24 Consultees who believed that further clarity is necessary considered, amongst other reasons, the gendered aspect of the defence[17] and the deficiency of the language of "abnormality of mind" as requiring review. Others in favour of clarifying the term registered their opposition to making the abnormality a "recognised" one. Notably, this group of consultees came from varied occupational backgrounds, including medical professionals. The other half of consultees considered the existing definition to be

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[15] The ICD-10 (World Health Organisation, *International Classification of Diseases*, 10th Revision) is a standardised system used to code and classify diseases and medical conditions.
[16] The DSM-5 (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn)) is a reference book on mental health and brain-related conditions. In the United States, the DSM-5 serves as the principal authority for psychiatric diagnoses.
[17] See discussion at para 12.11 above.

sufficiently clear, with a relatively settled meaning. As such, reform would not be necessary. This group also considered that the requirement for "recognition" is already an existing part of settled law.

12.25 Although a large majority were of the view that an abnormality of mind should not be confined to those established in textbooks, little consensus emerged otherwise and there was no clear route forward for reform.

12.26 Respondents across a variety of disciplines agreed that established texts take time to reflect and absorb new advances in the medical field, meaning that some accused persons will be disadvantaged if such a reform is made merely by, as the University of Strathclyde Law School put it, the "sheer dint of time". This sentiment was supported by the statements of the Law Society of Scotland and medical professionals. Further, other than one response by the Area Psychology Committee for NHS Greater Glasgow and Clyde, pointing to organic and neurodegenerative conditions as some that have a role to play in abnormality of mind, no real feedback was provided by the remaining consultees as to how a "recognised abnormality" should ultimately be defined if reform were to be recommended.

12.27 The split in responses discussed above, alongside the lack of consensus found both within and across disciplines, convinces us that this is not a question that should be answered by the Commission at this time. Without a majority opinion, significant support for reform, or robust research, we do not consider making a suggestion to be appropriate, especially in light of the wide-ranging and serious consequences that reform in this area would have. Instead, we are of the view that any conclusions in this highly specialised area should include full and proper consultation with all implicated groups.

Admissibility and sufficiency of evidence concerning the mental state of an accused

12.28 In *Galbraith v HM Advocate (No. 2)*,[18] decided in 2001, Lord Justice General Rodger made the following observations regarding the evidence that is necessary to prove the condition/state of mind of an accused pleading the partial defence of diminished responsibility:

> "[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."

12.29 Having set out different forms and causes of abnormality, 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

[18] 2001 SCCR 551.

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."

12.30 Many who participated in our informal consultations prior to the release of our Discussion Paper agreed with the propositions made by the Lord Justice General. In particular, we noted that counsel experienced in homicide trials, and representatives of support groups, 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.

12.31 As mentioned in the Discussion Paper, 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.[19] Where circumstances arise in which the court rules evidence inadmissible, trial judges are provided guidance by the Supreme Court in *Kennedy v Cordia*.[20] In *Kennedy*, the Court 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.[21]

12.32 Against this contextual background, at paragraph 11.37 of the Discussion Paper we asked consultees:

> "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 guidance in *Kennedy v Cordia*?"

Analysis of responses to Discussion Paper

12.33 Sixteen consultees responded to Question 34. A near-even split emerged again in response to this question, with nine consultees considering that it should be decided by each individual trial judge, and seven consultees expressing no clear view. Most consultees did not offer detailed reasoning for their views.

12.34 Amongst respondents who laid out their reasoning, Professors James Chalmers and Fiona Leverick were unequivocal in their position that admissibility and sufficiency should be decided by each individual trial judge, submitting that "[i]t would

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[19] 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.
[20] 2016 SC (UKSC) 59; 2016 SCLR 203.
[21] *Ibid*, para [44].

be unsatisfactory if the general rules relating to skilled evidence did *not* apply in this context".[22] The University of Strathclyde Law School argued that alternative options – including statutorily prescribed lists of acceptable experts/disciplines/qualifications – fell "very obviously short of being able to deal with the plethora of factual circumstances and expert evidence that could be relevant in cases of homicide". Although developments in medicine and other professions were "inevitable and plentiful", thus presenting a challenge to trial judges, and although the kinds of admissibility and sufficiency debates this necessitated created practical difficulties,[23] no better alternative had yet been proposed in any jurisdiction. Inquisitorial legal systems that keep a register of state-approved experts suffer from some of the same problems, and even adversarial systems which rely heavily on techniques like "hot-tubbing", where opposing experts are required to meet and agree on common findings and irreconcilable differences prior to trial, are imperfect.

12.35 Amongst medical professionals, both the British Psychological Society and the Heads of Clinical Forensic Psychology Services (NHS Scotland) recognised that it could be difficult for courts to ascertain whether they had the "right" expert or not and, whilst noting that ideally the experts called should be able to clarify this, appreciated that courts may wish to have tools to support their decision-making in this regard. Ultimately, courts should be able to decide on a case-by-case basis which experts they need.

12.36 None of the respondents were decidedly opposed to the *Kennedy* guidance being used in cases of diminished responsibility.

Discussion

12.37 The case of *Kennedy v Cordia* provides trial judges with guidance in cases of diminished responsibility where the admissibility of skilled evidence is under consideration. As aforementioned, in *Kennedy*, the Court 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.[24] We asked consultees whether the admissibility and sufficiency of evidence concerning the mental state of an accused pleading diminished responsibility should be matters to be decided by each individual trial judge using, for example, this guidance.

12.38 Consultee responses once again demonstrate how divided viewpoints are in this area of the law. A nearly even split of responses arose here, with nine consultees considering that it should be decided by each individual trial judge, and seven consultees expressing no clear view. Regarding the latter, no consultees were

[22] Emphasis in original.
[23] Being time-consuming and confusing for judges and juries, often resulting in inconsistencies between cases, and being prone to allowing in evidence which in hindsight turns out to be of dubious validity and reliability.
[24] 2016 SC (UKSC) 59; 2016 SCLR 203 para [44].

decidedly in favour of a departure from the *Kennedy* guidance when ruling on the admissibility and sufficiency of expert evidence in diminished responsibility cases.

12.39 Very little reasoning was offered by consultees regarding why they held and expressed the views they did. As such, it was challenging to discern the thinking behind responses, and in turn difficult to come to conclusions concerning what reform may be useful in this instance.

12.40 Considering the lack of support from consultees to depart from the guidance in *Kennedy v Cordia,* alongside the lack of reasoning provided by consultees in general, we are not convinced that recommending reform in this area is appropriate. Rather, we suggest that any conclusions regarding reform in this area should be reached following a standalone project, which would include full and proper consultation with all implicated groups.

Guidance for trial judges after *Graham v HM Advocate*

12.41 In *Graham v HM Advocate*, Lord Carloway pointed out that Lord Rodger's comments in *Galbraith v HM Advocate (No. 2),* quoted in paragraphs 12.6 and 12.7 above, were *obiter*. Lord Carloway 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*) created 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 has been diminished. However, at least in relation to opinion evidence from whatever discipline, it remains important that the court ensures 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] …"

12.42 Lord Carloway went on to review the law relating to diminished responsibility in several jurisdictions, ultimately concluding that:

> "[123] In some jurisdictions … 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)* 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 having 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 homicide (see Tenth Programme of Law Reform (February 2018)), can given 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."

12.43 Lord Carloway's comments make clear that this area of homicide law is complex and disputed both in Scotland and in other jurisdictions. This complexity, alongside Lord Carloway's explicit reference to the SLC, prompted us in the Discussion Paper to consider these issues in detail. Thus, at paragraph 11.37 of the Discussion Paper we asked consultees the following question:

> "35. Are the questions raised by Lord Carloway in *Graham v HM Advocate*[25] so fundamental that some guidance (whether by statute or practice note) is required to assist trial judges?"

Analysis of responses to Discussion Paper

12.44 Eighteen consultees responded to this question. Of these, eight were of the view that guidance to assist trial judges is required, five were of the view that it is not, and five expressed no clear view.

12.45 Amongst consultees who were of the view that guidance was necessary, the University of Strathclyde Law School noted that guidance might usefully emphasise the importance of judges (and advocates) remaining vigilant about ensuring that

[25] For questions see 2018 SCCR 347, at para [114], quoted at paras 11.20 and 11.21 of the Discussion Paper and in the present text at paras 12.41 and 12.42

experts confine themselves to their field of expertise, which would, in turn, address some of the concerns arising from Lord Carloway's questions concerning the evidence of psychiatrists and psychologists. Of the medical professionals who responded in the affirmative, the Area Psychology Committee contended that guidance would be "essential". The Royal College of Psychiatrists supported the provision of guidance but stressed that it would need to be "credible and not overly prescriptive". Guidance, they argued, would "help address stigma around potential presumptions among non-clinicians of an assumed link between… mental disorder and… actions." It also stated that whether evidence was admissible "played a critical role in the options eventually available to the trial judge at sentencing", and that "[m]aking this explicit would be helpful to ensuring that these options are available, as well as more clearly explaining why it is important for an expert voice to inform that decision around diminished responsibility."

12.46 Amongst those who considered that guidance is not required, Professor Gerry Maher KC observed that the matters in question were governed by rules of evidence. Other academic respondents who did not consider guidance to be required included Professor Eric Clive, who did not think that statutory guidance was necessary or appropriate, and Professors James Chalmers and Fiona Leverick, who did not initially see a case for reform on the basis of the material set out in the Discussion Paper. The latter stressed, however, that they did not have a firm view on the issue, and that any reform would require much more extensive work on this specific topic. Finally, the Faculty of Advocates argued that the system currently in place allows for "the different specialities to be considered by the decision-makers (ie the jury). We consider that, due to the range of abnormalities that can arise, and the range of circumstances and medical factors that could legitimately be the subject of skilled evidence, our current system is flexible enough and adequately addresses this complex area. The test laid down in *Kennedy* works well in practice, provides the framework for the application of the statute, and can account for a variety of abnormalities in line with the obiter views of Lord Rodger in *Galbraith*." The Faculty of Advocates also pointed out that the other jurisdictions considered by Lord Carloway in his assessment of the law seemed to feature a similar debate concerning the evidence of psychiatrists and psychologists.

Discussion

12.47 It is in the responses to Question 35, which asked consultees whether the questions raised by Lord Carloway in *Graham v HM Advocate* are so fundamental that some guidance (whether by statute or practice note) is required to assist trial judges, that the broadest support for reform in this Chapter can be found. Eight of the 18 consultees were of the view that Lord Carloway's questions were, in fact, so fundamental that guidance is required.

12.48 We recognise consultee responses stating that guidance would usefully emphasise the importance of remaining vigilant about ensuring that experts confine themselves to their field of expertise. We note as well that some medical professionals responding to this question contended that guidance would be "essential", whereas other medical professionals expressed their support for the provision of guidance so long as it is "credible and not overly prescriptive" and helps to "address stigma around potential presumptions among non-clinicians of an assumed link between … mental disorder … and actions." While there is therefore evident support amongst medical

professionals and practitioners for the introduction of guidance, we found it interesting that the level of support varied – some considered it to be essential, whereas others were more reserved in their views.

12.49 Of those consultees of the view that guidance is not required, some observed that the matters in question were governed by rules of evidence, and therefore did not require guidance, and others too thought it to be neither necessary nor appropriate. Finally, among consultees who did not consider guidance to be appropriate or necessary, Professors James Chalmers and Fiona Leverick stressed that any reform would require much more extensive work. We are inclined to agree.

12.50 As with previous considerations surrounding reform to the partial defence of diminished responsibility, our opinion remains that there is insufficient consultee support to justify reform, and that setting out any recommendations on the introduction of guidance (be it by statute or practice note) to assist trial judges would be inappropriate and perhaps unwise. Although a number of consultees responded to this question in favour of reform, we believe this would require further research and investigation with consultation by external groups and stakeholders.

Redefinition of the partial defence of diminished responsibility and medical evidence

12.51 Following our discussion of, and inquiry into, how a "recognised abnormality" should be defined, whether such a definition should be confined to abnormalities contained in established texts, and the use of medical evidence, at paragraph 11.37 of the Discussion Paper we asked consultees:

> "36. Should the partial defence of diminished responsibility be redefined to reflect the need for medical evidence?"

Analysis of responses to Discussion Paper

12.52 Eighteen consultees responded to this question, outlining their perspectives on whether diminished responsibility should be redefined to reflect the need for medical evidence. Of these, three were of the view that diminished responsibility *should* be so redefined, 10 were of the view that it should not be so redefined, and five expressed no clear view.

12.53 Of the three consultees expressing their support for redefining diminished responsibility to reflect the need for medical evidence, two were medical professionals. The Area Psychology Committee supported redefinition along medical lines but noted that redefinition should also reflect "psychological and neuropsychological data/evidence, when required to clearly define impact of condition on behaviour". The Committee further suggested that those providing evidence should be registered with their respective regulatory body. The Royal College of Psychiatrists considered that definition along medical lines "would ensure these decisions better reflected up to date medical expertise on the specifics of the case, the situation the person found themselves in, and whether it directly links to the disorder cited." Expert input could be "required to ensure the link between the disorder and the act is established, with consideration to [the accused's] mental state at the time". Finally, Dr Rachel McPherson was of the view that redefinition would be necessary if the requisite mental

abnormality had to be recognised by the appropriate science. She noted that in practice, medical evidence was already required to meet the relevant evidential standard.

12.54 The 10 consultees opposed to redefining diminished responsibility along medical lines provided a variety of reasons for their perspectives. Amongst academic respondents, Professor Eric Clive was of the view that it would be "odd and unsatisfactory" to include an evidential provision in a substantive rule. The University of Strathclyde Law School posited that diminished responsibility "should not be redefined to *require* medical evidence".[26] Such specification would, they thought, be unnecessary and introduce additional potential heads of dispute. Given the "multitude of factual scenarios in which homicide may arise (including mercy killings and domestic abuse)", the defence "should not be limited in a way that is both unnecessary and which is likely to be thwarted in practice". Importantly, while stating that they did not see a case for reform on the basis of the material set out in the Discussion Paper, Professors James Chalmers and Fiona Leverick considered that any reform would require much more extensive work on this specific topic.

12.55 Notably, several medical professionals were opposed to redefining diminished responsibility as discussed. The Association of Clinical Psychologists – UK were of the view that there is a "real risk of overvaluing medicine as a discipline", with medical conditions being misdiagnosed frequently. Experts, regardless of their credentials (and profession) will not always get it right. The ACP–UK was of the view that "[m]ost medics would not have the expertise to provide evidence in cases involving questions of diminished responsibility", and nor would all psychiatrists. The relevant issues may be beyond a clinician's area of specialist expertise, or the clinician may lack the requisite clinical experience. Further, the British Psychological Society (largely echoed by the Heads of Clinical Forensic Psychology Services (NHS Scotland)) argued that restricting legal proceedings to consideration of "recognised" conditions would "unfairly and unethically limit access to other scientific psychological evidence which may impartially support or refute partial defences such as diminished responsibility at the material time." The considerations attaching to diminished responsibility are potentially far broader, and it should therefore be defined to reflect the need for "scientific/expert evidence. This would "explicitly include psychological and psychiatric evidence (but perhaps not limit the evidence to this as emerging disciplines could be of value to the court in future)."

Discussion

12.56 It is in the responses to this question that the first majority arises – of the 18 consultees who provided their views on this matter, only three considered that diminished responsibility *should* be redefined to reflect the need for medical evidence, with a further 10 expressly stating that it should not be so redefined.

12.57 Amongst the majority of consultees, who were of the view that diminished responsibility should not be redefined along medical lines, many worried that the availability of the diminished responsibility defence would be unduly and unfairly curtailed, and that its coverage would become quickly outdated. Legal academics

[26] Emphasis in original.

noted their concern that requiring medical evidence in any redefinition of diminished responsibility would introduce additional potential heads of dispute. Further, they worried that given the multitude of factual scenarios in which homicide may rise, redefining the defence may limit it in a way which is unnecessary and may make it more difficult for the accused to successfully plead diminished responsibility.

12.58 Medical practitioners, too, voiced their opposition to such a redefinition, indicating that concerns regarding the explicit necessitation of medical evidence for a defence of diminished responsibility can be found across disciplines. The Association of Clinical Psychologists – UK were of the view that such a definition would create a "real risk of overvaluing medicine as a discipline", especially bearing in mind the (not infrequent) risk of misdiagnosis. Other medical practitioners – namely the British Psychological Society, echoed by the Heads of Clinical Forensic Psychology Services (NHS Scotland) – considered that restricting legal proceedings to "recognised" conditions would "unfairly and unethically" limit access to other scientific evidence capable of supporting or refuting partial defences such as diminished responsibility.

12.59 We find these reasons, in addition to the lack of widespread support for redefining diminished responsibility along medical lines, sufficient to convince us not to pursue any such reform. We are of the view that any conclusions in this highly specialised, complex, and interdisciplinary area of law should be thoroughly researched and reached as part of a standalone project, including full and proper consultation with a variety of stakeholders and implicated groups.

Mental disorder

12.60 We noted at paragraph 11.38 of the Discussion Paper that two related defences, namely mental disorder[27] and automatism (each of which is a complete defence, leading to acquittal)[28], 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. In our Discussion Paper, we sought responses to questions confined to basic definitions and clarified that any future steps taken would depend on the responses we received.

12.61 Two questions[29] were concerned with mental disorder. Mental disorder is a complete defence to a charge of homicide, meaning an accused is acquitted and held not to be criminally liable. The verdict in such a case is "not guilty by reason of mental disorder". This may lead to an order being made under section 58 of the Criminal Procedure (Scotland) Act 1995.[30]

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[27] See our statement in the Report on *Insanity and Diminished Responsibility* at para 3.18 that "[i]n 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."

[28] See ch 7, Defences: an introduction.

[29] Questions 37 and 38.

[30] Eg a compulsion order, which authorises that a person be detained in hospital.

12.62 The relevant definition of the defence is to be found in section 51A of the Criminal Procedure (Scotland) Act 1995,[31] 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[32] 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.[33]
>
> (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."

12.63 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.

12.64 Against this background, at paragraph 11.42 of the Discussion Paper we asked consultees 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?"

Analysis of responses to Discussion Paper

12.65 Fourteen consultees responded to Questions 37 and 38, which addressed problems arising in the context of "mental disorder", as defined in section 51A of the Criminal Procedure (Scotland) Act 1995. Of those consultees, three were aware of

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[31] 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.

[32] "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 another person; or acting as no prudent person would act.

[33] A "special defence" is a procedural requirement: Criminal Procedure (Scotland) Act 1995, s 278(1). The accused must give both the court and the prosecution advance written notice of the intention to plead the defence.

problems which had arisen, 10 were unaware of any such problems, and one expressed no clear view on the matter.

12.66 Included in the three consultees who were aware of problems arising in this context was the Centre for Scots Law at the University of Aberdeen, who considered that there existed "problems in principle in terms of how this defence relates to the automatism defence". Certain medical conditions – such as epilepsy, arteriosclerosis, and sleepwalking – do not fit the definition of "mental disorder" yet can cause the incapacities specified by the mental disorder defence (the inability to "appreciate the nature or wrongfulness" of one's conduct). Nor are these conditions covered by the automatism defence since they are not "external". There was a risk that certain conditions would fall unjustifiably into the gap between these two defences. Furthermore, the Centre doubted whether individuals suffering from such conditions could be acquitted on the basis that they lacked *mens rea*. Professor Eric Clive, who also presented a problem in this context, was of the view that the functional test in section 51A (inability to appreciate) was less satisfactory than the functional test in section 51B (diminished ability to determine or control behaviour). He suggested in this context that some reference in section 51A to the ability to control behaviour would be useful.

12.67 Most of the 10 consultees who were unaware of any such problems having arisen did not offer detailed reasoning for this view. One consultee who did offer reasoning was Dr Rachel McPherson who, whilst being unaware of any problems having arisen, noted that none of the cases which had been considered since the introduction of section 51A appeared to have considered its operation in the context of homicide.[34]

12.68 Furthermore, the Royal College of Psychiatrists thought that the section 51A definition remained valid. They noted that "the definitions around psychopathy meant varying sentencing guidance depending on whether the individual 'completed' the act of homicide, but this was not… an issue in and of itself, with potentially good reasons for why the gap exists."

Discussion

12.69 We note that of the 14 consultees who responded to this question, only three were aware of issues arising in the context of "mental disorder" as in section 51A, representing a small minority. Included in those three consultees was the Centre for Scots Law at the University of Aberdeen, who stated that problems arising in this context relate to automatism – they mentioned medical conditions such as epilepsy, arteriosclerosis, and sleepwalking as some that do *not* fit the definition of mental

[34] Historically, the mental disorder defence (formerly "insanity") has been relied upon disproportionately in murder cases. This is unsurprising, since only when faced with the prospect of the mandatory life sentence (or, before 1965, the death penalty) is the prospect of indefinite confinement in hospital likely to be reliably considered an attractive alternative. As noted by the Lord Justice General (Rodger) in *Galbraith v HM Advocate (No. 2)* 2001 SLT 953 at para [47], however, it is now comparatively unusual for a special defence of mental disorder (obtaining at the time of the offence) to be put before a jury. Instead, mental disorder is more likely to operate as a plea in bar of trial (under s 53F of the Criminal Procedure (Scotland) Act 1995).

disorder, while also not being covered by automatism, yet carrying the ability to cause incapacities specified by the defence.

12.70 We are aware of, and do not wish to undermine, the importance of this suggestion. We do not doubt that this is an issue in practice and are of the view that it should be investigated further. However, we are not convinced that this is the correct time to do so. We consider that there is insufficient support from, or concern by, consultees to make any adjustments to the law at present – rather, as with other suggestions in this Chapter, we believe that consideration of any future reform should take place in the context of a standalone project focussing explicitly on diminished responsibility, which investigates and researches the area in further depth and consults with all relevant stakeholders.

Automatism

12.71 As with "mental disorder", we stated in paragraph 11.38 of the Discussion Paper that research into, and discussion of, problems in the context of automatism may require a separate project. However, we sought opinions regarding any problems arising in the context of automatism of which consultees may be aware.

12.72 We noted that 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.[35] The defence has developed entirely at common law. The leading case is *Ross v HM Advocate*.[36]

12.73 In *Ross,* Lord Justice General Hope set out three requirements for a successful defence. 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.[37]

12.74 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,[38] whereas mental disorder is simply a "recognised mental disorder".[39] Total alienation of reason caused by an internal factor[40] is neither a mental disorder, nor can it be said to satisfy the definition in *Ross*. This may, in turn, lead to difficulties.

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[35] 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.
[36] 1991 SCCR 823.
[37] *Ibid*, at p 837.
[38] For example, drugs or toxic fumes.
[39] 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.
[40] For example, hypoglycaemia, epilepsy, or a predisposition to blackouts.

12.75 With these considerations in mind, at paragraph 11.46 of the Discussion Paper, we asked consultees 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?"

Analysis of responses to Discussion Paper

12.76 Fourteen consultees responded to Questions 39 and 40, which asked consultees whether they were aware of any problems which had arisen in the context of automatism. Of those 14, five consultees were aware of, and discussed, problems which had arisen in the context of automatism. The remaining nine consultees were unaware of such problems.

12.77 The Centre for Scots Law at the University of Aberdeen noted that "there are problems in principle in terms of the wording of [the automatism defence] and its relationship to the mental disorder defence." They pointed out that the terminology of "a total alienation of reason", in which terms the defence is defined, had previously featured in the common law definition of insanity but had been "rightly criticised by the SLC as old-fashioned".[41] "Alienation of reason" has been replaced in the mental disorder defence by the "appreciation test", which uses "clear, modern terminology". The Centre suggested that, since "the defences are so closely related, a helpful reform would be to use the 'appreciation test' for both defences or to merge the two defences." Dr Rachel McPherson, who was aware of problems having arisen outwith the homicide context, agreed that it may be helpful to revisit this terminology. Moreover, whether a cause is internal or external is not always obvious, despite this being a crucial distinction for the accused. Dr McPherson also contended that there should be a need for diagnostic testing, and that the accused should be required to prove the defence on the balance of probabilities – as with mental disorder and diminished responsibility.

12.78 The Law Society of Scotland, in a detailed submission, agreed that "automatism may need to be looked at again as to what constitutes total alienation of reason", and that this would require "more detailed consultation to look at issues such as medical and psychological evidence." They noted that the problems which had arisen came to light most clearly in "unconscious driver cases", though pointed to an overall "lack of clarity" which might be of relevance in homicide cases. That Scots law does not recognise automatism as a defence in "internal factor" cases (where, for example, the alienation of reason is caused by epilepsy or diabetes, as opposed to a spiked drink) was inconsistent and unsatisfactory.

12.79 Finally, the Association of Clinical Psychologists – UK were likewise of the view that automatism would benefit from a separate review, noting that it was "doubtful whether the concept of total alienation of reason would be recognised in the medical literature."

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[41] Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004), para 2.9.

12.80 Of the nine consultees who were unaware of any problems arising, only one offered reasoning for this view – the Royal College of Psychiatrists (medical professionals) simply described automatism as "a relative non-issue", which is "rarely ever evoked".

Discussion

12.81 A small minority of consultees were aware of problems having arisen in relation to the automatism defence. Of those consultees, a few pointed to the terminology of the defence. The Centre for Scots Law at the University of Aberdeen pointed to a "total alienation of reason", which had previously been criticised by the SLC as old-fashioned.[42] They noted that the "alienation of reason" test had been replaced by the "appreciation test" in the mental disorder defence, and suggested, given that the defences are closely related, that the appreciation test should be used for both defences. Dr Rachel McPherson and the Law Society of Scotland, too, agreed that total alienation of reason, and more broadly the terminology of the defence, should be examined. One medical consultee, namely the Association of Clinical Psychologists – UK, likewise raised the concept of "total alienation of reason" as one that would merit review, stating that it was doubtful whether the concept would be recognised in medical literature.

12.82 Only one of the consultees who were unaware of any problems in relation to automatism provided further detail. The Royal College of Psychiatrists described automatism as a relative non-issue. Given the majority of consultees were unaware of problems having arisen in relation to the defence, we are inclined to agree at this stage. There is an insufficient amount of support here for any sort of reform – rather, responses that shared concerns with the defence identified areas that merited further research. We are persuaded by these responses that there are certainly grounds for further research in this area. However, as with all previous topics discussed in this Chapter, we do not consider this to be the correct forum in which to do so. In our view, reform in this area, as with the rest of diminished responsibility, ought to follow from a more detailed standalone review.

Conclusion

12.83 It is clear, both from the composition of the above respondents and from the content of their responses, that diminished responsibility and other "mental condition" defences occupy an unusual point of confluence between the substantive criminal law, criminal evidence, and criminal procedure. More broadly, these topics straddle the boundary between legal and scientific disciplines, and indeed several of the responses dealt with in the preceding text were received from non-legal actors.

12.84 Both within and across the principal professional groups from which consultees were drawn, there is little evidence of consensus in favour of substantive reform. Whilst nearly half of respondents were of the view that the meaning of "abnormality of mind" under section 51B of the Criminal Procedure (Scotland) Act 1995 would benefit from clarification, only two of 16 were in favour of inserting a requirement that the

[42] Scottish Law Commission, Report on *Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004), para 2.9.

abnormality be a "recognised" one. Only one expressed support for confining "recognised abnormalities" to those contained in established texts on psychiatry or psychology. Indeed, a great many consultees expressed considerable reservations over these suggested amendments. Primarily, consultees worried that the availability of the diminished responsibility defence would be unduly and unfairly curtailed, and that its coverage would become quickly outdated. Similarly, only three of 15 consultees were in favour of redefining the defence to reflect the need for medical evidence, with many cautioning that such a move would exclude much valuable expert testimony.

12.85 In respect of the defence of mental disorder, few consultees were aware of problems having arisen. And, whilst some consultees were aware of problems having arisen in relation to the automatism defence, we are persuaded by the view of several that any reform in this area ought to follow from a more detailed standalone review.

12.86 In terms of procedural and evidential matters, no consultees were decidedly in favour of a departure from the *Kennedy v Cordia* guidance when ruling on the admissibility and sufficiency of expert evidence in diminished responsibility cases.

12.87 The broadest support for reform can be identified in the responses to Question 35, wherein eight of 18 consultees were of the mind that the questions raised by Lord Carloway in *Graham v HM Advocate* were so fundamental that some guidance was required to assist trial judges. Again, however, we are persuaded by the view (expressed in this case by Professors James Chalmers and Fiona Leverick) that "any reform would require much more extensive work on this specific topic".

12.88 In conclusion, we are not persuaded that the "mental condition" defences recognised in Scots law, including the partial defence of diminished responsibility, are in urgent need of reform. Moreover, we share the view of several consultees that any conclusions in respect of this highly specialised area of law should be reached on the basis of a standalone project and following full and proper consultation with all implicated groups. As such, we are not minded to make any substantive recommendations in relation to diminished responsibility or any other "mental condition" defences at this stage.

12.89 Whilst we are not making any substantive recommendations in relation to diminished responsibility in this Report, our draft Homicide (Scotland) Bill[43] restates and replaces the existing statutory defence of diminished responsibility (currently found in section 51B of the Criminal Procedure (Scotland) Act 1995) without any changes.[44] We think it would be helpful for users of any new legislation to have both the partial defences to murder (ie diminished responsibility and provocation) and the effect of successfully establishing them (ie "reduction" from a murder conviction to one for culpable homicide) co-located and set out in one piece of legislation for ease of reference for homicide specific provisions.[45]

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[43] See Appendix A.
[44] See ss 4 and 9 of the draft Bill.
[45] See ss 3 to 5 of the draft Bill.

Chapter 13 Domestic abuse

Introduction

13.1 This Chapter considers homicide in the specific context of domestic abuse and whether the existing legal framework provides adequate protection for victims of intimate partner violence. It covers the material discussed in Chapter 12 of the Discussion Paper, including the potential introduction of a new domestic abuse defence, jury directions in cases concerning victims of domestic abuse who kill, and the "rough sex defence".

A separate defence for domestic abuse victims to a charge of homicide

13.2 Homicide is inherently gendered. In homicide cases, women are overwhelmingly more likely to be the victim of homicide than the perpetrator and are often killed at the hands of abusive partners or ex-partners. It has been estimated that female-perpetrated homicides only account for about 10% of all homicides internationally.[1] Domestic abuse is also highly prevalent in those few instances where women do kill.[2] The research (albeit limited) suggests that killing following domestic abuse is the most common context in which women commit homicide in Scotland.[3] Therefore, although these cases may appear rare in the overall homicide landscape, they are significant in terms of understanding the motive and the suitability of the law to adequately address female-perpetrated homicide in this country.

13.3 It was noted in the Discussion Paper that significant social and legal developments have occurred in the area of domestic abuse since the mid-1970s.[4] Attitudes of individuals and public bodies have changed, with domestic abuse no longer being viewed as a private matter between spouses, but rather being understood as a serious and pervasive problem in society. Cases of domestic abuse, which had previously been trivialised by law enforcement bodies, are increasingly treated as an issue requiring the state's intervention. This growing appreciation of the nature and effect of domestic abuse is reflected in legal changes. These notably include the Domestic Abuse (Scotland) Act 2018, which created a new criminal offence of domestic abuse, and the Abusive Behaviour and Sexual Harm (Scotland) Act 2016,

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[1] UNODC, *Global Study on Homicide: Gender- Related Killings of Women and Girls* (2018); J Monckton Smith, *In Control: Dangerous Relationships and How They End in Murder* (2021); E Moen, L Nygren and K Edin, "Volatile and violent relationships among women sentenced for homicide in Sweden between 1986 and 2005" (2016) Victims & Offenders 11(3) at pp 373-391.

[2] A Browne, *When Battered Women Kill* (1989); S Caman, K Howner, M Kristiansson and J Sturup, "Differentiating male and female intimate partner homicide perpetrators: A study of criminological and clinical factors" (2016) International Journal of Forensic Mental Health 15(1) at pp 26-34; W Chan, *Women, Murder and Justice* (2001); C Gillespie, *Justifiable Homicide: Battered Women, Self-Defence and the Law* (1989); M.L. Swatt and N Phil He, "Exploring the differences between male and female intimate partner homicides: Revisiting the concept of situated transactions" (2006) Homicide Studies 10(4) at pp 279-292.

[3] R McPherson, "Legal change and legal inertia: Understanding and contextualising Scottish cases in which women kill their abusers" (2021) *Journal of Gender-Based Violence*, 5(2) at pp 289-306.

[4] See para 12.4 *et seq* of the Discussion Paper.

which created a domestic abuse aggravation and a statutory offence of disclosing, or threatening to disclose, an intimate photograph or film.

13.4 With these developments came the recognition of the profound impact that a course of abusive behaviour can have upon an abused person – who, in extreme cases, may reach a breaking point and kill their abuser.[5] Critics of the current state of the law contend that the traditionally recognised homicide defences of self-defence, provocation, and diminished responsibility, which are shaped by the culture and values of a past era, are inadequate in the context of domestic abuse.[6]

Current law: self-defence

13.5 The complete defence of self-defence is often of little assistance to an accused who has suffered a prolonged course of abusive behaviour. 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 many abused persons' circumstances. An accused who has experienced abuse is more likely to select a time when their abuser is passive and poses little threat to commit the fatal attack; they might otherwise struggle to overpower their abuser and suffer further violence as a consequence of their actions.[7] Similarly, the requirement that there should be no reasonable option of escape or other solution does not allow for some abused persons' perception of reality. It is a well-documented abuse tactic to make the victim feel trapped in the abusive relationship. The ability to leave is often hampered by psychological or economic or family reasons, or by a fear that the abuser will simply follow and that the abusive behaviour will continue or escalate.[8] Difficulty arises, too, regarding the requirement that the accused must have used no more than a reasonable amount of force for self-protection.[9] These requirements characterise self-defence as a "reactive" defence.

13.6 In her address to the United Kingdom Association of Women Judges seminar "Women who Kill" in November 2019, Lady Scott posed the question of whether there is scope to develop self-defence to expand the concept of "imminence" or assess "reasonableness" by having regard to the subjective characteristics of the abused person's experience. However, after noting that any objective test which attaches subjective characteristics is often complex and generally resisted in Scots law, she concluded that it is "difficult to envisage adaption of the existing defence" to fit the particular needs of the situation where an abuse victim kills following a prolonged period of abuse.

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[5] 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. The latter cases are the primary focus of this Chapter.

[6] The homicide defences are considered to be the products of a patriarchal society and so reflect male experiences and interests. The defences are modelled on concepts of male honour, "hot blooded" impulsive reactions, and male possession over women.

[7] Address by Lady Scott (High Court Judge) at the UKAWJ seminar "Women who Kill", Court of Session, Edinburgh, 20 November 2019. A printed version of the address is available from the Supreme Courts Library, Court of Session, Edinburgh.

[8] *Ibid.*

[9] Again, as the accused may have chosen a time to attack when their abuser was offering no threat.

Current law: provocation

13.7 The partial defence of provocation, which on the face of it appears to be applicable in domestic abuse cases, also contains certain aspects that would likely affect its success as a plea. One shortcoming of the defence is its limitation to violent provocation only. This is inconsistent with contemporary understandings of domestic abuse as a crime that may extend beyond physical violence into emotional, economic, or psychological abuse; the definition of domestic abuse provided in the Domestic Abuse (Scotland) Act 2018 includes behaviours such as isolating the victim from sources of support, controlling the victim's day-to-day activities, depriving the victim of freedom of action, and frightening, humiliating, and degrading the victim.[10] Related to this is the requirement that the accused's violent response is not grossly disproportionate to the provoking act.[11] The requirement of proportionality could prove to be an impassable hurdle where the accused did not face a violent provoking act before the commission of the attack. Similarly, the immediacy requirement – the accused must have suffered an *immediate* loss of self-control – does not fit with the "slow-burn" nature of domestic abuse.[12] Provocation, like self-defence, can therefore be considered a "reactive" defence and is unlikely to apply in the majority of the domestic abuse cases considered in this Chapter.

13.8 Many critics have also raised the concern that even in those few cases where a plea of provocation is successful, the accused will still be considered guilty of culpable homicide. Those critics advocate a complete acquittal.[13]

Current law: diminished responsibility

13.9 Finally, unlike the other defences, the partial defence of diminished responsibility *may* be open to an accused who has been abused, proved by its successful use in past cases concerning domestic abuse. It has been noted that "post *Galbraith*, diminished responsibility has become the vehicle for women who kill their abusers to avoid murder convictions in Scotland."[14] This does not mean, however, that challenges do not arise – especially as diminished responsibility has already proved to be a difficult and complex area of the law.[15]

13.10 The defence of diminished responsibility places a significant amount of emphasis on "abnormality of mind", rather than on the abusive conduct itself. In this

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[10] Ss 2(3)(a)-(e).
[11] *Gillon v HM Advocate* 2006 SCCR 561.
[12] The cases of June Greig, Kim Galbraith, and Wendy Graham were referred to in the Discussion Paper. In these cases, the abused person was driven to kill their abusive partner at a time when their partner was in a passive state or asleep. Under these circumstances, a measure of time may have passed between the accused suffering from an abusive act and their fatal response, having waited for an opportunity to kill their abuser without fear of a violent confrontation. In these cases, then, the immediacy requirement would not have been fulfilled and the defence of provocation would not be open to the accused.
[13] See for example R McPherson, "Legal change and legal inertia: Understanding and contextualising Scottish cases in which women kill their abusers" (2021) *Journal of Gender-Based Violence*, 5(2) at pp 289-306.
[14] C Connelly, "Women Who Kill Violent Men" (Sir Gerald Gordon Seminar on Criminal Law, University of Glasgow, 2001) 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. Connelly refers to the case of *Galbraith v HM Advocate (No. 2)* 2001 SCRR 55, which is discussed further at paras 12.6 to 12.7 of the Report.
[15] See Chapter 12 above.

way, the defence has become more medicalised over time (often requiring expert and medical evidence),[16] and in turn runs the risk of characterising the killing as resulting from the accused's mental state instead of the victim's abusive conduct. This fits with a wider – and much criticised – pattern of using medical models of criminal responsibility to explain female offending.[17] It is therefore questionable whether diminished responsibility would be an appropriate defence for dealing with such killings, or whether it is nothing more than the "least bad" option available to the accused in terms of defences. Although the defence takes account of the abuse-induced mental suffering that the accused experienced at the time of the killing, it does so at the cost of reinforcing harmful gender stereotypes concerning women's mental capacity and instability.[18]

Background

13.11 The criticisms outlined above suggest that the traditional homicide defences can be of limited assistance in the domestic abuse context, in terms of taking account of the abuse that contributed to the killing. This raises the question of how the law might work better to protect victims of domestic abuse on trial for murder.

13.12 Other jurisdictions have undergone law reform – either by introducing new defences or amending existing defences – to advance domestic abuse as a mitigating factor in homicide.[19] For example, in 2010 a partial defence of "killing for preservation in the context of an abusive relationship" was introduced in Queensland, Australia.[20] The main advantages of a bespoke domestic abuse defence are that it could reflect up-to-date psychiatric and psychological knowledge about the issue of long-term domestic abuse, and shift the focus of the court's inquiry onto the nature and effect of any abusive conduct (rather than the accused's conduct and mental state).[21] However, there are potential disadvantages. One concern is that juries may habitually choose the tailor-made domestic abuse partial defence even where the circumstances would justify a plea of self-defence resulting in total acquittal. It is also possible that a domestic abuse defence may be exploited by abusers, who could see the defence as an opportunity to kill their partners and then create a narrative in which they claim to be the victim of abuse.[22] The experience in Queensland, where legislative efforts attracted considerable criticism from legal stakeholders and academics,[23] makes clear that any separate domestic abuse defence must be carefully constructed.

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[16] Chalmers and Leverick 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"; see Chalmers and Leverick, *Criminal Defences* at para 11.5.
[17] R McPherson, "An empirical study of criminal defences" (2022) *Criminal Law Review* at pp 307-318.
[18] S Weare, "Labelling her mad: Diminished responsibility and medicalised responses to women who kill their abuser" in R McPherson (ed), *Women Who Kill, Criminal Law and Domestic Abuse* (2024) at p 40.
[19] 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.
[20] S 304B of the Criminal Code Act 1899.
[21] The Discussion Paper outlines further advantages; see paras 12.72 to 12.73.
[22] See paras 12.74 to 12.75 of the Discussion Paper.
[23] 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

13.13 It was against this background that the Commission consulted on the potential introduction of a separate, specific domestic abuse defence to homicide in Scotland. At paragraph 12.80 of the Discussion Paper we asked consultees:

> "41. (a) Do you think 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?"[24]

Analysis of responses to Discussion Paper

Q41 (a) Should there be a separate defence to homicide for domestic abuse victims?

13.14 Responses discussing the potential introduction of a new domestic abuse defence to homicide were divided and many consultees did not express any definitive view.[25] Overall, there was no clear majority indicating an appropriate way forward.

13.15 Of those in favour of a separate defence, several consultees focussed on the adequacy (or lack thereof) of the existing homicide defences. It was proposed by some that for the existing defences to function in the context of homicide following domestic abuse, the defences would need to be severely distorted.[26] Similarly, while ultimately of the tentative view that a new defence is likely unnecessary, Professors James Chalmers and Fiona Leverick noted that a killing under conditions of domestic abuse may fall through the cracks of the existing defences despite the fact that it should "not necessarily be treated as a case of murder". Lady Scott concluded that the creation of a new defence, rather than the reform of those already in operation, may be "the most effective means of enabling a defence which truly comprehends and addresses the situation of the abused woman who kills her abuser."

13.16 Findings from the public opinion survey produced by BritainThinks indicated sympathy for an accused who had killed after suffering domestic abuse. Participants considered longstanding abuse to be a contributing factor to the commission of the fatal act, and expressed their belief that this abuse should be considered as part of a homicide trial. Nevertheless, these participants expressed some discomfort at the idea

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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.

[24] This question is dealt with later in this Chapter under the heading "Specific directions to the jury" (see para 13.39 *et seq*).

[25] Six consultees were in favour of a new defence of killing in response to domestic abuse, six were opposed, and eight expressed no clear view.

[26] Professor Eric Clive.

of a specific defence of domestic abuse applying in the same manner to every case. This was made apparent when select participants expressed their hope that, in some instances, the defence would be unsuccessful.

13.17 Consultees opposed to a separate defence made several arguments. The most common view was that a new defence is unnecessary, since any killing carried out under conditions of domestic abuse would, almost certainly, fall within the ambit of at least one of the existing defences.[27]

13.18 Nicholas Burgess and Professors James Chalmers and Fiona Leverick noted (drawing on Dr Rachel McPherson's research) that many such killings would be dealt with most appropriately under self-defence.[28] Accordingly, they raised the concern that were a new (partial) defence to be created, these cases would simply be "channelled" into the new defence, thereby depriving a victim of abuse of an outright acquittal. Notably, in her own response, Dr McPherson conditioned her support for a new defence upon its being capable of absolving the accused of all criminal liability. Some consultees similarly suggested that a more appropriate approach would be to amend the existing defences so as to better accommodate domestic abuse killings. Professors Chalmers and Leverick offered provocation as a defence that could be amended in such a way, whereas Dr Andrew Cornford suggested the extension of "reactive" defences – self-defence and provocation – to encapsulate cases of domestic abuse killings.

13.19 A few consultees referred to the experience of other jurisdictions where a domestic abuse defence had already been implemented and resulted in "serious undesirable consequences", such as that of Victoria, Australia.[29] Others were of the view that further consultation and research on a separate defence is required.[30] On this latter point, Dr McPherson warned that there are limits to what any new defence can realistically achieve if broader issues in the criminal justice system – for example, misconceptions about domestic abuse – are not addressed.

13.20 In summary, consultee responses in favour of a new defence (or responses more mixed in nature that identified potential advantages of such a defence) largely focussed on the inadequacies in the existing law to address cases of homicide following domestic abuse. They considered that the current defences of self-defence, provocation and diminished responsibility do not accommodate the nuanced and subtle nature of abuse. Consultee responses opposing the creation of a new defence stated that the existing defences *do* in fact suffice for these cases and expressed concerns that should a new defence be created, it would potentially deprive the accused of outright acquittal. Some consultees, not falling into either category,

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[27] Though the Senators of the College of Justice were uniquely of the view that it is diminished responsibility which provides the most appropriate solution, and that "self-defence and provocation are unlikely to provide a defence in the kind of scenario envisaged although they may do in some cases".

[28] Dr McPherson's research suggests that the majority of cases where women kill their abusive partners occur during a confrontation, where the accused was facing a high level of violence that would satisfy the test for self-defence or provocation.

[29] Nicholas Burgess; Senators of the College of Justice. The experience of Victoria is discussed at para 13.29 and related fn 34.

[30] Dr Rachel McPherson; Law Society of Scotland, Equality and Human Rights Commission; Scottish Women's Aid; Rape Crisis Scotland.

consider that further research is required before a decision can be made on whether to introduce a new statutory defence.

Q41 (b) Should the defence be complete or partial?

13.21 Consultees were asked whether any new defence should be partial or complete. All but one consultee agreed that the new defence should be partial. It is worth noting that several consultees who opposed the creation of a new defence responded to this question, stating that their views were being given in case a new defence were to be introduced contrary to their opposition.

13.22 Lady Scott favoured a complete defence, suggesting a formulation similar to self-defence. In other words, with adjustments made to take account of the fact that, in the context of prolonged domestic abuse, "immediate self-defence is foolhardy and unrealistic" due to the killer's knowledge that further attacks are likely to arise from her situation.

13.23 While the majority of consultees were in favour of a partial defence (if a domestic abuse defence were to be introduced), only two elaborated on their reasoning. Professor Eric Clive considered a partial defence more appropriate as, even though there is a "greatly reduced culpability", there remains a calculated element to this taking of human life, which is a "very serious matter and would generally be regarded as involving some culpability." He considered that this degree of culpability would be best taken into account through the reduction of a charge of murder to a culpable homicide conviction, rather than acquittal. The Law Society of Scotland also pointed to the deliberate element of killing in this context.

13.24 Finally, several consultees favoured either a complete defence or a defence capable of operating both partially and completely. Most felt that a partial defence would likely cause further problems for women who kill. As Dr Rachel McPherson suggested, "it would become the 'go to' defence position with claims of self-defence being explored even less often than they are now." While using different reasoning, the participants in BritainThinks' research felt that a defence could not be "confidently applied" in the same manner in every case.[31] The participants considered a partial defence to be more appropriate where the accused was not under immediate threat, but had experienced physical abuse in the past, which could lead the accused to assume that their life was under threat, and act accordingly.[32]

Q41 (c) and (d) What evidence and safeguards would be necessary?

13.25 Finally, consultees were asked what evidence, in their view, should be required to be led by those pleading a domestic abuse defence. They were also asked what safeguards they considered necessary to avoid the misuse of such a defence. Various suggestions were made in relation to these questions, though no clear themes emerged.

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[31] BritainThinks Report at para 7.11.
[32] BritainThinks Report at paras 7.13-7.14.

13.26 Some consultees mentioned a need to present evidence as to the nature, duration, and extent of abuse. Victim Support Scotland suggested a requirement for evidence to be presented on the long-term sustained impact caused by the abuse. Similarly, Professor Eric Clive recommended that the required evidence should include proof of prolonged serious abuse "of a type which nobody could reasonably be expected to tolerate." Some consultees, including the Association of Clinical Psychologists-UK and the Area Psychology Committee for NHS Greater Glasgow and Clyde, touched on the need for such evidence to be supported by expert testimony. Lady Scott, too, advocated for the provision of opinion evidence from social scientists, psychologists, and medics, in addition to ensuring that focus is placed on the conduct of the deceased so as to provide an explanation for the state of mind of the accused.

13.27 The Association of Clinical Psychologists-UK also suggested the inclusion of third party evidence of domestic abuse, such as police call-outs or medical records detailing hospital presentations or treatment of physical injuries. Similarly, the Senators of the College of Justice supported an explicit requirement for some medical evidence. However, other consultees, including the British Psychological Society and the Centre for Scots Law at the University of Aberdeen, cautioned against this approach. The former highlighted difficulty in this area, in that many cases would not have been preceded by extensive police call-outs. The latter warned that a requirement for medical evidence has the potential to medicalise and stigmatise victims of domestic abuse.

13.28 Procedurally, a number of consultees were in favour of the burden of proof for establishing the defence being placed on the accused, on the balance of probabilities. In contrast, Dr Andrew Cornford saw "no reason" for applying a reverse burden to such a defence, given that the burden of proof is not reversed in relation to the similarly "reactive" defences of self-defence and provocation. Dr Rachel McPherson also disagreed with the use of a reverse burden, stating that the defence should bear merely an evidential burden, as anything beyond such a burden would be unfair.

13.29 Finally, if a defence were to be introduced, the Centre for Scots Law at the University of Aberdeen suggested the introduction of regular reviews into how the defence is operating in practice. In our Discussion Paper, we noted that – although generally in favour of a domestic abuse defence – support groups for victims of domestic violence expressed concern that such a defence could be exploited by perpetrators of domestic abuse who may, upon killing their partner in the course of their abuse, concoct or manipulate evidence to paint themselves as the victim.[33] We also referred to the "defensive homicide" law of Victoria, Australia, which was repealed following analysis of convictions showing that the defence was most commonly invoked by men who killed other men outwith a domestic setting.[34]

Discussion

13.30 The lack of consensus arising from consultee responses makes it clear that this area of the law of homicide remains one of little agreement. No clear majority view

[33] Discussion Paper, para 12.74.
[34] Discussion Paper, para 12.67. See also Criminal Law Review, *Defensive Homicide: Proposals for Legislative Reform: Consultation Paper* (2013), p 27.

emerged from these responses, and notably even amongst those consultees with specialist expertise there was an evident hesitancy to commit to a fixed position.

13.31 The starting point appears to be the question of whether the existing defences of self-defence, provocation and diminished responsibility are sufficient to capture all cases of killing under conditions of domestic abuse, and separately that of whether the appropriate degree of exculpation (partial or complete) is likely to be achieved in individual cases. If these questions cannot confidently be answered in the affirmative, consideration must be given to the question of how this state of affairs ought to be remedied: by way of amending the existing defences, or by legislating for something brand new?

13.32 Consultee responses that discussed the adequacy of the existing defences, and especially the "reactive" defences, were divided. No clear majority emerged as to whether the defences could be perceived as adequate or appropriate. Some consultees were staunchly of the view that for the existing defences to work in the context of domestic abuse, they would need to be severely distorted beyond their present form. Other consultees disagreed with this perspective. In addition to opposing the introduction of a new defence, they suggested that if one were to be introduced then it might deprive abused women of the ability to resort to any other defence, even where other defences are perhaps more appropriate.

13.33 Perhaps the only clear theme that could be discerned was that, were any new defence to be created, it should not be *exclusively* framed as a means to a complete acquittal. A partial defence – or, at least, a defence capable of operating as such – appears to be more palatable to consultees. This position does, however, run contrary to the evidence that, at present, most domestic abuse killings ought properly to fall within the ambit of self-defence.

13.34 The views of consultees on these questions do not provide a clear path forward. It is of interest that several consultees (one of whom – Dr Rachel McPherson – has conducted extensive research into this area in the Scottish context) recommended that further work be undertaken before any final conclusions are drawn. Given that domestic abuse has given rise to considerations quite separate from those raised in response to other aspects of the current project, taken with the evident lack of consensus amongst consultees, this appears a sensible suggestion. At the very least, the present consultation, including any preliminary understandings that have been gleaned as a result of our limited public opinion research, has provided a useful steer as to where any future work ought to be directed.

13.35 A number of consultees emphasised the need for a full and comprehensive review of domestic abuse homicides in Scotland before there is any further consultation on the introduction of a new defence.[35] The current methods of data recording in Scotland make it difficult to ascertain how many cases of this nature exist. Although the Scottish Government collects data on homicide and on the prevalence of domestic violence separately, there is no specific dataset for homicides preceded by

[35] Many of whom referenced the research of Dr Rachel McPherson. See R McPherson, "Legal change and legal inertia: Understanding and contextualising Scottish cases in which women kill their abusers" (2021) *Journal of Gender-Based Violence*, 5(2) at pp 289-306.

abuse.[36] There is also a lack of reliable or centralised data on how the existing defences are currently operating in practice in the Scottish courts. The Scottish Government does not include details relating to defences/pleadings in its annual publication on criminal statistics and the Scottish Courts and Tribunals Service does not record usable data on special defences or defence statements.[37] We agree that a more robust system should be established through collaboration between the relevant bodies to collect information on deaths related to domestic abuse and the operation of the criminal defences in these cases.[38] This would ensure that any future reform efforts are well-informed.

13.36 It is therefore our view that the option of recommending the introduction of a new domestic abuse defence is not one that should be pursued at present. We recognise and share the concerns of several consultees that the introduction of a new defence may result in unwanted consequences; the attempts made to legislate in other jurisdictions demonstrate that this is a difficult area of the law to tackle. However, we are not convinced that there is no merit whatsoever in such a defence. On this basis, we agree with those consultees who suggest that further work and consultation would need to be done before any final conclusions are drawn.

13.37 We therefore recommend that:

14. Scottish Ministers should consider undertaking further work and consultation to explore the possibility of pursuing a specific new defence to homicide for victims of domestic abuse in Scotland.

13.38 We consider it sensible that any further consultation should also explore the potential role of jury directions to operate alongside a possible specific new defence. Such work could benefit from public opinion research, which may draw on themes similar to those which the Scottish Law Commission has explored in its own limited research. It might also benefit from a full review of domestic abuse homicide cases in Scotland, to collect data on how the existing defences are operating in practice.

Specific directions to the jury

13.39 Specific directions in the trial judge's charge that outline the social, psychological and behavioural effects of domestic abuse on an abused partner, and therefore provide context for how the abuse may have impacted on the accused, were proposed in the Discussion Paper as either a potential alternative or an accompaniment to a defence of domestic abuse to homicide.

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[36] It is worth mentioning that the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill was introduced in Parliament on 24 September 2024, which, if successful, will establish a process for reviewing deaths preceded by domestic abuse. The reviews may provide additional information for research purposes (eg the number of deaths connected to domestic violence and trends in demographic features). The Bill would bring Scotland in line with England and Wales, where Domestic Homicide Reviews have been in place since 2011.

[37] The publications referred to are available at: Criminal proceedings in Scotland statistics - gov.scot (Scottish Government) and Courts Data Scotland: Criminal (CDSC) | Scottish Courts (Scottish Courts and Tribunals Service).

[38] For example, the Scottish Government, the Scottish Courts and Tribunals Service, the Crown Office and Procurator Fiscal Service and Police Scotland.

Background

13.40 Other jurisdictions have legislated for special jury directions on family and sexual violence. In Western Australia, the law provides that in criminal proceedings in which self-defence in response to family violence is an issue, defence counsel (or, if unrepresented, the accused) may request that the trial judge direct the jury on family violence.[39] Relevant existing law around jury directions in Scotland, which apply only to sexual offences, can be found in sections 288DA and 288DB of the Criminal Procedure (Scotland) Act 1995.[40] The Discussion Paper mentioned these examples as possible models for a statutory power for judges to issue specific directions on domestic abuse.

13.41 The policy behind, and operation of, the Scottish provisions have been summarised by Thomas Ross KC:

> "… In the case of *Donegan*[41] 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 s. 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 a 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."[42]

13.42 We noted the research which suggests that these provisions – albeit in the context of addressing "rape myths" in sexual offence trials – are unnecessary and ineffective. Ross, as above, 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."[43] There was therefore some debate as to whether the section 288 provisions would provide a good model for

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[39] Ss 38 and 39 of the Evidence Act 1906 (as amended by the Family Violence Legislation Reform Act 2020) deal with evidence of family violence, including the matter of jury direction.

[40] Inserted by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 6. While not mentioned in the Discussion Paper due to its recency, in August 2023 new jury directions were added to the Jury Manual by members of the Jury Manual Committee. These directions, to be provided in cases of sexual offences, are comprised of seven specimen directions, some of which include potentially case-specific material which a judge "may need to remove or augment according to the circumstances of the particular case", see "Addressing Rape Myths and Stereotypes" at pp 10.1/132–10.12/132 of the e-Jury Manual. These directions have been introduced to address misconceptions as to the nature of the crime of rape – or, "rape myths" – amongst members of the jury. While the directions are to be applied primarily in cases involving rape and other sexual offences, Lord Beckett and Lady Drummond write that many of the principles and directions will also be relevant in cases involving domestic abuse – see eg Direction 6, 'Background of domestic abuse.'

[41] *Donegan v HM Advocate* 2019 SCCR 106 at para [56].

[42] 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: New research finds jurors do not subscribe to rape myths and casts doubt on mock jury studies | Scottish Legal News.

[43] *Ibid.*

homicide law reform. This gave rise to the question in our Discussion Paper exploring consultee views on the introduction of jury directions in cases of homicide in the context of domestic abuse.

13.43 As part of our consultation on a new domestic abuse defence, at paragraph 12.80 of the Discussion Paper we asked consultees:

> "41. (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?"

Analysis of responses to Discussion Paper

13.44 The majority of consultees who responded to Question 41(e) were in favour of the introduction of judicial directions. A disagreement arose, however, about whether to introduce the directions regardless of, in addition to, or as an alternative to, a new defence.

13.45 A very small minority was in favour of jury directions *regardless of* the creation of a new defence. Dr Andrew Cornford noted that the directions may be "ineffective, given the evidence on judicial directions and jurors' prejudicial beliefs", but that this is "not necessarily a reason to avoid trying this approach".

13.46 A number of consultees were in favour of the introduction of jury directions *in addition to* a new defence. Victim Support Scotland, for example, suggested that jury directions would be used to "explain the impact of sustained long-term abuse". Others, who were in favour of jury directions, were clear that these should not be regarded as a substitute for a new defence (but said so without necessarily favouring the creation of a new defence). The Centre for Scots Law at the University of Aberdeen considered that jury directions would be "better than nothing", since there is some evidence that these may be effective.[44] They noted, however, that "their potential effectiveness should not be over-estimated", and that the level of protection offered by jury directions to a victim of domestic abuse is "marginal when compared with a specific concrete defence".

13.47 Another group of consultees expressed their support for jury directions but did not specify whether these should be an alternative, or in addition, to a new defence. One such consultee, Dr Rachel McPherson, noted that "care should be given not to pathologise a female accused and place her mental state at the heart of proceedings." The Law Society of Scotland similarly touched on the care required in the formulation of jury directions and noted that these directions should avoid pathologising the female accused.

13.48 Finally, while not expressing a clear view, We Can't Consent To This commented that "[w]omen who kill after lengthy domestic abuse often use significant violence, and a weapon, to kill the men who abuse them. As such, the nature of these

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[44] See J Chalmers and F Leverick, *Methods of Conveying Information to Jurors: An Evidence Review* (2018) p 23 *et seq*.

killings may differ from traditional self-defence homicides. It would be important that judges' direction provide this context."

13.49 The only consultee who completely opposed the introduction of jury directions did so on the grounds that they would "not be enough".[45]

Discussion

13.50 The lack of a clear path forward regarding the creation of a new, special defence of domestic abuse gave rise to the question of what, if anything, can be done to offer adequate protection to victims of domestic abuse who kill their abusers.

13.51 As noted in the Discussion Paper, other jurisdictions, and most notably Western Australia, have legislated to allow courts to direct juries on the impacts of domestic abuse in cases of self-defence.[46] When asked about the introduction of similar jury directions in Scotland, the majority of consultees – all but one – appeared to be in favour. However, responses supporting such a step expressed reservations revolving, for the most part, around the view that jury directions should be introduced *in addition* to a new defence of domestic abuse, rather than as an alternative. Consultees acknowledged that such an approach would be "better than nothing" but remained concerned regarding the marginal effect these directions would have in comparison to a concrete defence.

13.52 Overall, it appears that the caveats in consultee responses in favour of the introduction of jury directions is another representation of the lack of consensus in this area of law. This, in turn, casts doubt on whether it is advisable to recommend the introduction and implementation of jury directions at all.

A statutory power?

13.53 We are mindful of consultees' reservations and the general attitude that a standalone power to issue jury directions may be viewed as doing too little. However, in the absence of a new defence of domestic abuse, an option to request that the judge direct the jury on the context of the killing may be the most appropriate (albeit minor) safeguard for victims of domestic abuse who commit homicide. We considered that carefully and sensitively constructed jury directions might have the potential to improve juror understandings of the nature of domestic abuse and counter prejudicial juror beliefs, while avoiding the pathologising of abuse victims.

13.54 To explore this possibility further, we instructed a draft statutory power for judges (on their own initiative or on request by the defence) to direct the jury as they consider appropriate about the nature and effect of domestic abuse in homicide trials where evidence is given which suggests, by way of defence, that domestic abuse contributed to the killing.

13.55 We explored several options for a draft statutory provision, each with varying degrees of judicial discretion and flexibility, to illustrate how a statutory power for

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[45] Professor Eric Clive.
[46] Ss 39C and 39F of the Evidence Act 1906.

judges might operate.[47] These illustrative draft provisions helped us to reflect on what the purpose of the jury directions would be and whether a statutory power is actually necessary to allow judges to issue directions on domestic abuse in the first place. Standard drafting practice is to avoid making legal provision that is not strictly necessary, due to the risk that any benefit might be outweighed by unintended consequences. Specifically, a suggestion that a statutory power is necessary for judges to issue directions on domestic abuse might draw into doubt the existing (non-statutory) powers of the judiciary to direct the jury as they see fit. The illustrative provisions and our related initial concerns were shared with our expert Advisory Group[48] for further discussion.

13.56 We also noted a relevant update made to the "Written Directions for Jurors in the Scottish Courts" in the time since our Discussion Paper consultation. The latest Jury Manual Update, circulated on 20 September 2024, includes a new section in the Written Directions on "Background of domestic abuse" which shares the judiciary's learned experience of how domestic abuse might impact on an abused person.[49] For example, the section provides that there are many reasons why a victim of abuse may have found it difficult to leave the relationship, such as a lack of resources, cultural or societal pressures, or conflicting emotions towards their abuser. This is a welcome development and one that provided additional context for the Advisory Group when reviewing the illustrative provisions.

Advisory Group views

13.57 Our Advisory Group members shared our initial concerns as to the purpose and possible consequences of the proposed jury directions and questioned whether a statutory power for judges to issue jury directions was actually necessary. The crux of their feedback was that the illustrative provisions were not clear on what the result of the new jury directions would actually be – ie how the jury would take account of the domestic abuse context when reaching their verdict.

13.58 The background for a killing is only relevant insofar as it feeds into an element of an offence, a defence or sentencing.[50] Our engagement with the Advisory Group explored the matter of jury directions in relation to a new defence of domestic abuse to homicide, as part of a broader effort to better protect victims of abuse on trial. The Western Australian provisions were mentioned as a possible model to follow. However, the background of domestic violence is directly relevant in that example as the provisions state that, in relation to self-defence, evidence of family violence can alter matters such as what it is reasonable for a person to believe.[51] The jury directions are allied to a specific change in their law on self-defence. We are not presently making

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[47] For example, one draft provision specified that in cases where a judge chooses to give a jury direction on this topic, that direction must comply with certain requirements. Another version required the Lord Justice General to give general advice/guidance to judges on what could be said when directing a jury on domestic violence, but without imposing any firm requirement to use certain wording.
[48] See Appendix C for the list of members of our Advisory Group.
[49] See section on "Background of domestic abuse" at page 7.12/133 of the Jury Manual.
[50] For our purposes, providing the background on domestic abuse would be relevant to defences as (i) there is no suggestion in Scots law that domestic abuse can go to whether an accused has the necessary *mens rea* for murder (interestingly, this matter is included in the terms of reference for the homicide law review underway at the Law Commission of England and Wales) and (ii) sentencing is not a jury matter.
[51] S 39B of the Evidence Act 1906.

any express provision for a Scottish defence into which the background information of domestic abuse would feed,[52] which raises the question of how providing that context would be relevant to criminal proceedings.

13.59 Our initial view was that issuing jury directions about the nature of domestic abuse and its effect on the accused would be relevant to the jury in establishing whether a defence is made out, and therefore how it affects their verdict. For example, if the accused is pleading diminished responsibility as a result of the abuse they suffered, then the special instruction would help the jury to understand the nature of domestic abuse with a view to seeing how it could lead to a recognised mental abnormality. It is more difficult to speak to how providing special instruction would be relevant for pleas of self-defence or provocation; as discussed at paragraph 13.5 *et seq*, the criteria for these defences are unlikely to be met in the majority of cases considered in this Chapter. Therefore, from the outset there is a limited function for the directions in domestic homicide trials.

13.60 There is also a risk that the jury directions, if their purpose is indeed to help the jury establish whether the accused has a defence, *may* go beyond evaluation of evidence and enlarge the scope of the defence for the accused. The role of jury directions is to use judicial and ordinary human experience to help a jury understand how a complainer or an accused may behave, so that they can make a fair and balanced assessment of the evidence. In sexual assault cases, the "rape myths" directions encourage jurors to set aside any existing assumptions regarding the circumstances of an assault (for example, that there are certain ways a victim "should" act during or after an assault) when they consider the evidence of a witness. The directions do not change the scope of the crime or the defences to it.

13.61 Unlike the existing "myths" directions, those proposed in our Advisory Group engagement could, on one view, be seen as going further, with the potential to operate as a kind of alternative to a separate domestic abuse defence. The implication here is that, like a criminal defence, the directions might be capable of introducing domestic abuse as a mitigating factor that will somehow bear on the jury's final verdict. It is one thing if the directions are simply intended to combat stereotypical thinking – perhaps along the lines of "the evidence cannot be true because no one would put up with the abusive behaviour and stay in the relationship" – when the jury is assessing the evidence presented in support of a defence. It is quite another if the directions are, in and of themselves, seen to be justifying the accused's actions and thereby suggesting a lesser degree of criminal responsibility. They would no doubt then become the focus of a ground of appeal that could only be solved by legislation or a full bench; however, the courts have not been enthusiastic about enlarging the scope of defences.[53] There might also be a problem with the principle that some propositions require an evidential basis, such as a skilled witness (for example, a psychologist), if the directions were to go into detail beyond ordinary human experience.[54]

13.62 If, then, their purpose is only to help the jury assess the accused's evidence in a fair and balanced way, the Advisory Group questioned whether it is necessary to

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[52] For the reasons provided at para 13.30 *et seq*.
[53] *Donnelly v HM Advocate* 2017 SCCR 571.
[54] *Graham v HM Advocate* 2018 SCCR 347.

legislate for new jury directions in addition to those already included in the Written Directions section of the Jury Manual. The Crown Office and Procurator Fiscal Service representatives on our Advisory Group confirmed that if domestic abuse is part of the accused's evidence, the judge would have a duty to deal with this context and tailored directions would be considered appropriate. It is likely that written directions on domestic abuse would be issued to jurors in such cases.[55] Judges may also consider issuing and developing directions of the kind used to address rape myths and stereotypes in trials involving allegations of domestic abuse where similar considerations may arise.[56] Taking account of current judicial practice, members generally agreed that any further jury directions would not incorporate the accused's experience of domestic abuse to any greater extent than is currently the case in criminal proceedings. A new statutory power to allow judges to issue directions to juries on the effects of domestic abuse is therefore unlikely to add any substantial value.

Conclusion

13.63 There has been progress in how society approaches domestic abuse. A greater appreciation of its insidious nature and complex impact on victims is reflected in modern legal developments.[57] However, in the context of homicide offending, the current law appears unfit to adequately address those cases where an abused person snaps and kills their partner. Having decided not to recommend a new defence of domestic abuse at the present time, and acknowledging the need to better safeguard domestic abuse victims, we were initially minded to introduce a statutory power for judges to issue special direction on domestic abuse in homicide trials.

13.64 Following engagement with our Advisory Group, we are not convinced that a new statutory power to issue jury directions would better protect victims of domestic abuse beyond the special instructions to juries that are already available in homicide trials. The recent addition of a section concerning Domestic Abuse in the Written Directions which are given to jurors ensures that in cases where domestic abuse is part of the evidence for either the complainer or the accused, and where the judge deems it appropriate, the jury will receive specific direction on how the abuse may have affected the victim. Providing this background in trials where the accused is the abuse victim should encourage jurors to set aside any false assumptions and assess the circumstances that contributed to the killing with greater sensitivity and understanding.

13.65 In light of the above, the concern shared by consultees and our Advisory Group as to the lack of a clear purpose for a new statutory power is a valid one. To make a standalone recommendation to legislate for a power to issue jury directions on domestic abuse, which have limited relevance to criminal proceedings in the absence of a new specific domestic abuse defence, would likely be perceived as an empty gesture. There is clear agreement that the merit of a statutory power to direct the jury

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[55] The courts have traditionally been concerned with directing jurors on domestic abuse in cases where the complainer is the abuse victim. However, similar principles would apply where the accused is the one who suffered the abuse.
[56] See section on "Addressing rape and sexual offence myths and stereotypes" at pages 12.1/132 to 12.15/133 of the Jury Manual.
[57] See para 13.3.

on domestic abuse is interlinked with the introduction of a new domestic abuse defence.

13.66 We therefore consider that the role of jury directions in these types of cases might be better explored in more detail by Scottish Ministers in the round alongside the possibility of pursuing a bespoke domestic abuse defence for victims that kill their abuser.[58] As such, we are not minded to make any recommendation in relation to jury directions at this stage.

The "rough sex defence"

13.67 This Chapter has so far explored how the Scots law homicide defences can be reformed to better protect victims of domestic abuse. We now consider how the law may be exploited by violent partners to provide a defence where they committed homicide within the context of an intimate encounter. It focuses on a specific line of defence, sometimes described as a "rough sex defence", which involves a claim by an accused that the victim of a killing died accidentally, as a result of either a consensual "sex game gone wrong" or consensual rough sex.[59]

Background

13.68 An increasing number of claims of accidental death during consensual sex gave rise to growing criticism and calls in England and Wales to ban the use of the line of defence. The death of Grace Millane, a British backpacker who was murdered in New Zealand, brought the issue to the forefront of media attention. During the trial of her killer, the accused, who under New Zealand law remained anonymous throughout the proceedings, claimed that he killed her accidentally while engaged in consensual rough sex.[60]

13.69 The campaign group We Can't Consent To This 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".[61] In the majority of cases included in this statistic, the accused was in fact convicted.

13.70 In light of the above, the UK Government committed to including a provision in the Domestic Abuse Act 2021 clarifying that consent to serious harm for sexual gratification is *not* a defence. Section 71 of this Act provides:

> **"71 Consent to serious harm for sexual gratification not a defence**

[58] See paras 13.37 and 13.38 above.
[59] As noted in the Discussion Paper, a "rough sex defence" is *not* a recognised criminal defence. Rather, it is a "failure of proof" defence. The accused offers an alternative version of events which does not involve the *mens rea* required for murder.
[60] "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.
[61] 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/.

(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

(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."

13.71 This provision in effect placed the existing common law (as established in *R v Brown*[62]) on a statutory footing.

13.72 It remains too early to evaluate the impact of this provision, although we refer below to a letter from Harriet Harman KC MP, suggesting that, despite statutory intervention, the problem remains.[63] In particular in England and Wales it remains open to the accused, when charged with murder, to show that they did not have the

[62] [1993] 2 WLR 556.

[63] In a letter to the Crown Prosecution Service, Harriet Harman QC MP presented two cases – *R v Warren Coulton* (sentenced 5 May 2021) and *R v Sam Pybus* (plea entered 9 July 2021) – where the "rough sex gone wrong" defence was accepted and both offenders were convicted of manslaughter. For the text of the letter see: https://x.com/HarrietHarman/status/1415272590785003523.

necessary *mens rea*. Some commentators argue that section 71 does not alter this, and others point out that the provision would not prevent an accused from giving or leading evidence that the victim did not consent to serious harm but did consent to a lower level of harm which accidentally developed into more serious harm.

13.73 Against that background, the Commission considered whether a similar statutory provision should be introduced in Scotland. The concern here is with cases in which the accused claims that the victim's death resulted from injuries sustained in the course of "rough" sexual practices to which the victim consented.[64] At present, the settled common law position is that consent is not a valid defence to assault,[65] and by extension to a homicide charge. The question is therefore purely one of codification, as opposed to reform.

13.74 At paragraph 12.88 of the Discussion Paper, we therefore asked consultees:

> "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?"

Analysis of responses to Discussion Paper

13.75 The majority of consultees who responded to this question were in favour of statutory expression. Of these, several considered that codification would usefully clarify the law. Some, including Dr Rachel McPherson and Scottish Women's Aid, were clear that statutory provision to this effect would simply reassert the settled common law position. Other consultees, however, suggested (explicitly or implicitly) that there may be some room for doubt as to the existing law, which codification would rectify. Whilst it is unclear that this would in fact be the case, the underlying point remains the same: that codification would signal in clear terms that consent is not a defence to homicide. A similar assertion was made by We Can't Consent To This, who opined that a statutory provision would "send a message to perpetrators and practitioners in the criminal justice system that this violence will not be excused; to women that violence done against them will be taken seriously; and to settle the matter of consent to violence being a defence in [Scots] law."

13.76 It is worth noting, too, the response of Rape Crisis Scotland, who stated that evidence of "rough sex" (both in murder and in rape trials) "is used as an explanation for any injuries sustained by the victim and plays into rape myths that women are 'asking for it' or are somehow responsible for the harm caused to them." Its use "feeds into misconceptions held by the general public that a woman's alleged sexual behaviours can be used as a justification for violence and harm". Moreover, "[t]he leading of evidence about alleged sexual history of someone who is dead and unable to refute what is being claimed can be extremely distressing for the family and friends of the deceased and is highly prejudicial. It should not be allowed in evidence." However, as pointed out by Professors James Chalmers and Fiona Leverick, the "Scottish courts have in recent years taken a robust approach to the common law rules

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[64] In their responses, Dr Rachel McPherson and the campaign group We Can't Consent To This noted several Scottish murder cases in which such claims have been made. In two of these, the accused was ultimately convicted of culpable homicide.

[65] *Smart v HM Advocate* 1975 JC 30 (assault); *HM Advocate v Rutherford* 1947 JC 1 (murder); *Kirkup v HM Advocate* [2025] HCJAC 9 (assault).

governing the admissibility of collateral evidence" which would likely result in the exclusion of such evidence, where and when appropriate.

13.77 The minority of consultees opposed to statutory expression were of the view that codification is unnecessary, as it is sufficiently clear under the existing common law that consent is not a defence to a homicide charge. As Professor Gerry Maher KC put it, "there is no need to state the obvious in a statute". Similarly, Professor Eric Clive suggested that – within the context of an otherwise well-understood framework – to single out a specific factual scenario for "special treatment" might only result in unnecessary confusion.

13.78 In a similar vein, some consultees considered that codification would confer no real benefit, since it would remain open to the accused to argue that the *mens rea* for murder (wicked intent to kill or wicked recklessness, as it currently stands) was not present. Dr Hannah Bows and Professor Jonathan Herring agreed. They outlined in their response the typical claim in England and Wales that the accused did not *intend* to kill or cause serious bodily harm (the *mens rea* for murder in that jurisdiction), but rather to engage in an (allegedly) consensual activity for the purposes of sexual gratification.[66] Evidence of this kind, which operates to refute the presence of *mens rea*, cannot be prevented from being raised by statute: as Bows and Herring note, to do so would "interfere with [the accused's] human rights as well as undermining the purpose and principles of criminal law and, significantly, would fundamentally alter the boundaries of the offence of murder".

13.79 Finally, while favouring statutory expression in principle, the Law Society of Scotland noted that some difficulty might occur in producing a suitable definition of "rough sex", and that expert evidence would be required for that purpose.

Discussion

13.80 In the context of rough sex, our view – shared by several consultees – is that giving statutory expression to the doctrine that "rough sex" is not a valid line of defence to murder would be no more than an exercise in codification. The existing law on this point is clear.

13.81 We support the intention behind codification and appreciate its symbolic value. Statutory expression of the common law position would signal in clear terms that consent is not a defence to homicide, and that violence against women is taken seriously in this country.

13.82 However, as outlined above, there are limits to what codification can achieve. We recognise that, for most, it is unlikely to provide a satisfactory solution to the existing problems with the rough sex line of defence. From the responses to our Discussion Paper, it is apparent that there continue to be misconceptions about what

[66] In this sense, the "rough sex defence" is best conceived of in this context as a "failure of proof" defence, since its rationale is that the prosecution is unable to prove all of the required elements of the offence. Given the distinction which has traditionally been drawn between offences and defences, strictly speaking these are not substantive defences at all: see Chalmers and Leverick, *Criminal Defences* at para 1.06.

a statutory provision could actually deliver. This only emphasises the challenge of fairly balancing competing interests and rights in such cases.

13.83 There is also the possibility that a statutory provision might result in unintended, and potentially quite perverse, outcomes. In addition to the concerns raised by consultees,[67] we have identified two serious consequences:

- The public could be misled into thinking that the provision will change the law and lead to increased murder convictions in homicide cases. Although it is too early to fully determine the impact of section 71 of the Domestic Abuse Act 2021, use of the "rough sex defence" continues to be a problem;[68] this has led one commentator to say of the English and Welsh law, "Ultimately, all that has happened is that the law has been written down somewhere else. It won't make a difference…nothing has changed. Not a thing…it's window dressing…"[69] A Scottish provision to a similar effect would undoubtedly receive the same criticism.

- Defendants may be encouraged to rely on the "rough sex" narrative. Such was the unfortunate outcome of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which, contrary to the drafter's intentions, resulted in more, rather than fewer, cases where evidence was led on the sexual history and character of victims in sexual assault cases.[70] So far as we are aware, there are very few instances where the "rough sex" line of defence has been presented in Scotland, and statutory expression might inadvertently draw attention to this line of argument.

13.84 Further, it is important to consider the potential positive and negative consequences of a statutory provision in the context of how the law is currently working in cases of this nature. The High Court recently dealt with the question of whether consent could be a defence to assault in *Kirkup v HM Advocate*,[71] where the appellant claimed that his violent treatment of the complainer was part of a consensual sexual activity. In their opinion, delivered by Lord Justice General Carloway, the court reiterated that consent is not a defence to assault and rejected the idea that assault requires an intention to injure or cause bodily harm. Referring to an earlier homicide case where this argument was accepted by the court, the following comment was made:

> "[24] *McDonald v HM Advocate* 2004 SCCR 161, which involved a death during sexual activities to which, according to the appellant, the deceased had consented, proceeded upon a Crown concession that assault required an intent

[67] See, for example, paras 13.77 to 13.79.
[68] Letter to the Crown Prosecution Service from Harriet Harman QC MP – see fn 63.
[69] Available at: https://twitter.com/BarristerSecret/status/1278411380836708353?t=IYU4R5Zt8dnjKpdNULEjjA&s=09.
[70] Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study, paras 10.22 and 10.23, available at: https://www.sccjr.ac.uk/.
[71] [2025] HCJAC 9.

to injure, not merely one to cause pain. That concession was erroneous… The requisite intention is to do the act deliberately."

13.85 The High Court makes clear that assault committed during a consensual sexual activity remains a crime. The motive for the assault – which in cases where the "rough sex defence" is presented, is alleged to be the achievement of mutual sexual pleasure – is irrelevant.

Conclusion

13.86 It is therefore our view that the risk of adverse unintended consequences outweighs the perceived benefits of codifying the common law position on the "rough sex" line of defence. We respect the efforts made to tackle violence against women in England and Wales and follow progress in this area with much interest. However, given that the particular line of defence appears to be rarely presented in Scottish homicide cases and that the Scottish courts have been unpersuaded by the "rough sex" argument, we are not convinced there is any substantial merit in introducing a statutory provision at present.

13.87 Ultimately, we have concluded that it would be unhelpful and possibly harmful to put the existing common law on the statute book and are not minded to make any such recommendation.

Chapter 14 Summary of recommendations

1. Select aspects of the Scots law of homicide should be placed on a statutory footing by way of a short Homicide (Scotland) Bill. Those aspects should be restricted to implementing the reforms recommended in this Report.

(Paragraph 2.20)

2. Where parts of Scots homicide law are to be reformed the opportunity should be taken to clarify the law, using more modern terminology if appropriate.

(Paragraph 4.23)

3. The Homicide (Scotland) Bill should define the offence of murder.

(Paragraph 5.18; Draft Bill, section 1)

4. The Homicide (Scotland) Bill should not contain the concept of "wickedness", but should define murder using language and concepts appropriate for 21st century society.

(Paragraph 5.23)

5. The statutory definition of murder should be complete in itself, and not a gloss on or amendment to the common law definition.

(Paragraph 5.28; Draft Bill, section 1(1))

6. The statutory definition of the crime of murder should contain two limbs: in the first limb, intention to kill; in the second limb, behaving with an utter disregard for whether a person lives or dies.

(Paragraph 5.32; Draft Bill, section 1(1))

7. The second limb of the statutory definition of murder should include the element of "assault" coupled with behaving with an utter disregard for whether a person lives or dies.

(Paragraph 5.57; Draft Bill, section 1(1)(b))

8. The Homicide (Scotland) Bill should contain a provision clarifying that there is no doctrine of constructive malice in Scots homicide law.

(Paragraph 5.61; Draft Bill, section 1(2))

9. The Homicide (Scotland) Bill should contain a provision defining the offence of culpable homicide as being committed where a death is caused by an assault or by behaving in a manner which endangers another person and with an utter disregard for the consequences.

(Paragraph 6.36; Draft Bill, section 2)

10. The defence of provocation should be reformed so as to exclude provocation by sexual infidelity.

(Paragraph 11.54; Draft Bill, sections 5 and 6)

11. The common law defence of provocation should be abolished and replaced with a new statutory defence.

(Paragraph 11.82; Draft Bill, sections 5 and 6)

12. A new statutory defence should not extend to verbal provocation, provocation by sexual infidelity or third party provocation.

(Paragraph 11.82; Draft Bill, sections 5 and 6)

13. Scottish Ministers may want to undertake further research and consultation in relation to a potential new statutory defence of provocation.

(Paragraph 11.82)

14. Scottish Ministers should consider undertaking further work and consultation to explore the possibility of pursuing a specific new defence to homicide for victims of domestic abuse in Scotland.

(Paragraph 13.37)

Appendix A – Homicide (Scotland) Bill

[PRE-INTRODUCTION]

CONTENTS

Section

THE FOLLOWING ACCOMPANYING DOCUMENTS ARE ALSO PUBLISHED: Explanatory Notes (SP Bill X-EN), a Financial Memorandum (SP Bill X-FM), a Policy Memorandum (SP Bill X-PM), a Delegated Powers Memorandum (SP Bill X-DPM) and statements on legislative competence (SP Bill X-LC).

Homicide (Scotland) Bill

[PRE-INTRODUCTION]

An Act of the Scottish Parliament to make provision about the offences of murder and culpable homicide; and for connected purposes.

Offences of homicide

1 Murder

(1) A person ("person A") commits the offence of murder if person A causes the death of another person ("person B") and—

(a) person A intends to cause the death of another person, whether or not that person is person B, or

(b) person A—

(i) assaults person B, and

(ii) behaves with an utter disregard for whether person B, or any other person, lives or dies.

(2) Person A does not commit an offence under subsection (1)(b) only because person A causes the death in the course of committing another offence.

NOTE

Section 1 implements recommendations 3 to 8 of the Report by replacing the common law offence of murder with a statutory offence of murder.

Subsection (1) provides that an individual will commit the offence of murder if they cause the death of another person and satisfy one of the limbs of the mental element of the offence. The first limb requires that the individual intended to cause death (either to the deceased or another). The second limb requires that the individual (i) assaulted the deceased and (ii) behaved with an utter disregard for whether the deceased (or any other person) lived or died.

Subsection (2) provides that an individual does not commit the offence of murder only because they caused death in the course of committing another offence, if neither of the limbs set out in subsection (1) are satisfied. It makes clear that there is no doctrine of constructive malice in Scots homicide law (recommendation 8 of the Report).

2 Culpable homicide

A person ("person A") commits the offence of culpable homicide if person A causes the death of another person ("person B") by—

(a) assaulting person B, or

(b) behaving—

(i) in a manner which endangers another person (whether or not that person is person B), and

(ii) with an utter disregard for the consequences.

NOTE

Section 2 implements recommendation 9 of the Report by replacing the common law offence of culpable homicide with a statutory offence of culpable homicide.

Subsection (1) provides that an individual will commit the offence of culpable homicide if they cause the death of another person, either by (a) an assault or (b) behaving in a manner which endangers another person, with an utter disregard for the consequences.

Murder: partial defences

3 Partial defences to charge of murder

(1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide if the person has a partial defence to the charge of murder.

(2) A partial defence to a charge of murder is the defence of—

(a) diminished responsibility (see section 4),

(b) provocation (see section 5).

NOTE

Section 3 introduces the partial defences to murder, which negate the necessary mental element required to establish the offence (see subsection (1) of section 1). It provides that where an individual charged with murder successfully pleads a partial defence of (a) diminished responsibility or (b) provocation, they will not be convicted of murder but instead of culpable homicide. The partial defences are set out in sections 4 and 5.

4 Diminished responsibility

(1) A person has the defence 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) The reference in subsection (1) to abnormality of mind includes mental disorder.

(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

(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 person has the defence of diminished responsibility.

(5) In this section, "conduct" includes acts and omissions.

NOTE

Section 4 restates and replaces the partial defence of diminished responsibility as set out in section 51B of the Criminal Procedure (Scotland) Act 1995 (which is repealed by section 9).

Subsection (1) provides that an individual will have the defence of diminished responsibility if their ability to determine or control conduct that would otherwise result in a murder conviction was, at the time of the conduct, substantially impaired due to abnormality of mind. Subsection (2) confirms that abnormality of mind includes mental disorder. Subsection (5) confirms that "conduct" includes acts and omissions.

Subsection (3) makes clear that, when establishing whether the individual suffered from an abnormality of mind at the time of the conduct, the fact that the individual was under the influence of alcohol, drugs, or any other substance will not, of itself, determine that question.

Subsection (4) places the onus on the individual charged with murder to prove, on the balance of probabilities, that they have the defence of diminished responsibility.

5 Provocation

A person ("person A") has the defence of provocation to a charge of the murder of another person ("person B") if—

(a) person A carried out an act which caused person B's death,

(b) immediately before person A carried out the act—

(i) person B physically attacked person A, or

(ii) person A formed a reasonable belief that person B was about to physically attack person A,

(c) as a result of that attack or (as the case may be) forming that belief, person A lost self-control and carried out the act which caused person B's death, and

(d) that act was reasonably proportionate to the attack carried out by person B or (as the case may be) that person A believed person B was about to carry out.

NOTE

Section 5 implements recommendations 10-12 of the Report, which include the removal of sexual infidelity as a provocative act capable of reducing what would otherwise be murder to culpable homicide, by redefining the common law partial defence of provocation in statute. Subsections (a) to (d) set out the requirements that must be satisfied for an individual charged with murder to successfully plead a defence of provocation.

The new subsections provide that an individual will have the defence of provocation if immediately prior to the killing act, the deceased either (i) physically attacked the individual or (ii) behaved in such a way that the individual held a reasonable belief that the deceased was about to commit a physical attack on the individual. It was this provocative physical attack (or prospect of such an attack) that resulted in the

individual losing control and causing the deceased's death. The killing act must have been reasonably proportionate to the physical attack carried out (or threatened) by the deceased.

Section 5 makes clear that only physical violence qualifies as a provocative act, implicitly abolishing the sexual infidelity limb of provocation (implementing recommendation 10 of the Report).

Attempted murder: partial defence of provocation

6 Partial defence of provocation to charge of attempted murder

(1) A person ("person A") who would otherwise be convicted of attempted murder is, if person A has the defence of provocation to the charge of attempted murder, instead to be convicted of assault.

(2) Person A has the defence of provocation to a charge of attempted murder of another person ("person B") if—

(a) person A carried out an act which amounted to the attempted murder of person B,

(b) immediately before person A carried out the act—

(i) person B physically attacked person A, or

(ii) person A formed a reasonable belief that person B was about to physically attack person A,

(c) as a result of that attack or (as the case may be) forming that belief, person A lost self-control and carried out the act which amounted to the attempted murder of person B, and

(d) that act was reasonably proportionate to the attack carried out by person B or (as the case may be) that person A believed person B was about to carry out.

(3) Nothing in subsection (1) prevents the court from finding that the offence of assault committed by person A is an offence with aggravations (if any).

NOTE

Section 6 concerns the application of the provocation defence in cases of attempted murder. Subsection (1) provides that an individual who has the defence of provocation to the charge of attempted murder may instead be convicted of assault. The requirements that must be satisfied to establish the defence are set out in subsection (2) and are the same as those that apply in any murder case (see section 5).

Subsection (3) clarifies that the court may find that the offence of assault is an assault with aggravations (for example, assault to severe injury and permanent disfigurement).

Power to convict of alternative offence

7 Culpable homicide as alternative to charge of murder

(1) In proceedings for the offence of murder under section 1(1), person A may be convicted of culpable homicide if the facts proved against that person—

(a) do not amount to the offence of murder, but

(b) do amount to the offence of culpable homicide.

(2) But nothing in subsection (1) prevents the court from directing the jury that person A may not be convicted of culpable homicide.

NOTE

In section 7, subsection (1) provides that a jury may convict of culpable homicide if the facts proved against the individual do not amount to the offence of murder, but do satisfy the offence of culpable homicide. Subsection (2) provides that this entitlement does not interfere with any direction made by the court that instructs the jury not to convict of culpable homicide.

Section 7 does not interfere with a jury's entitlement to convict for alternative offences, such as assault, if the facts proved against the individual do not amount to the offence of murder or the offence of culpable homicide. Schedule 3 to the Criminal Procedure (Scotland) Act 1995 provides that a jury may convict of common law assault (or other injurious act) instead of murder or culpable homicide (paragraph 10(3)).

Abolition of common law offences

8 Abolition of common law offences of murder and culpable homicide

(1) The following common law offences are abolished—

(a) murder,

(b) culpable homicide.

(2) Any rule of law providing for the plea of provocation in relation to a charge of murder or attempted murder is abolished.

(3) Any other rule of law which, immediately before the coming into force of this section, applied to—

(a) the common law offence of murder applies to the offence under section 1(1) as it applied to that common law offence,

(b) the common law offence of culpable homicide applies to the offence under section 2 as it applied to that common law offence.

(4) The other rules of law referred to in subsection (3) include, in particular, any rule of law providing for circumstances in which homicide is justifiable.

NOTE

Section 8 abolishes those homicide offences and the partial defence of provocation that were previously provided for in the common law, now placed on a statutory basis by sections 1, 2, 5 and 6.

Subsection (1) abolishes the common law offences of (a) murder and (b) culpable homicide. Subsection (2) abolishes any rule in the common law providing for the partial defence of provocation in relation to a charge of murder or attempted murder.

Subsection (3) clarifies that any legal rule which applied to the previous common law homicide offences must now apply to the statutory offences of murder and culpable homicide. This ensures that existing common law rules and defences such as for example self-defence, apply to the new statutory offences.

Subsection (4) specifies that those legal rules referred to in subsection (3) include rules that provide for circumstances in which homicide is justifiable. For example, where a soldier kills in the exercise of duty.

Consequential provision

9 Modification of other enactments

Section 51B of the Criminal Procedure (Scotland) Act 1995 (diminished responsibility) is repealed.

NOTE

Section 9 repeals section 51B of the Criminal Procedure (Scotland) Act 1995 on the partial defence of diminished responsibility. Diminished responsibility is now provided for in section 4.

Final provisions

10 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.

(2) Regulations under this section may—

(a) make different provision for different purposes,

(b) modify any enactment (including this Act).

(3) Regulations under this section—

(a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act,

(b) otherwise, are subject to the negative procedure.

11 Commencement

(1) This section and sections 10 and 12 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under this section may—

(a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

12 Short title

The short title of this Act is the Homicide (Scotland) Act 2025.

Appendix B

List of respondents to the Discussion Paper on the Mental Element in Homicide

Association of Clinical Psychologists - UK	Representative body for clinical psychologists in the UK
Neil Benyon	Advocate
Dr Hannah Bows	Associate Professor in Criminal Law, Durham Law School
Professor Jonathan Herring	Professor of Law, University of Oxford
Lord Bracadale [1]	Senator of the College of Justice (retired)
British Psychological Society	Representative body for psychologists and psychology in the UK
Nicholas Burgess	Former legal assistant at the Scottish Law Commission
Centre for Women's Justice	Lawyer-led charity (England and Wales)
Professor James Chalmers [2]	Regius Professor of Law, University of Glasgow
Professor Fiona Leverick	Professor of Criminal Law and Criminal Justice, University of Glasgow
Dr Andrew Cornford	Senior Lecturer in Criminal Law, University of Edinburgh
Professor Eric Clive	Former Scottish Law Commissioner
Douglas J Cusine	Sheriff (retired)
Professor R Antony Duff	Professor Emeritus in Philosophy, University of Stirling
Equality and Human Rights Commission	Non-departmental government body (UK)

[1] Lord Bracadale submitted a separate response that endorsed the views of the Senators of the College of Justice.
[2] Professors Chalmers and Leverick submitted a joint response and were therefore treated as one respondent.

Faculty of Advocates	Representative body for advocates in Scotland
Professor Pamela Ferguson	Professor of Scots Law, University of Dundee
Dr Khuram Khan; Dr Alasdair Forrest	Medical Advisory Committee, State Hospital Carstairs
Law Society of Scotland	Representative body for Scottish solicitors
Professor Gerry Maher KC	Professor of Criminal Law, University of Edinburgh
Dr John J Marshall	Consultant Clinical Forensic Psychologist and Head of Clinical Forensic Psychology Services, State Hospital Carstairs
Dr Rachel McPherson	Lecturer in Criminal Law, University of Glasgow
NHS Greater Glasgow and Clyde	Area Psychology Committee
NHS Scotland	Heads of Clinical Forensic Psychology Services
Rape Crisis Scotland	Sexual violence charity
Royal College of Psychiatrists	Representative body for psychiatrists in the UK
Lady Scott	Senator of the College of Justice
Scottish Sentencing Council	Advisory non-departmental public body (Scotland)
Scottish Women's Aid	Domestic abuse charity
Senators of the College of Justice	Supreme Courts of Scotland
Sheriffs' Association [3]	Representative body for sheriffs in Scotland
Dr Robert Shiels	Solicitor
University of Aberdeen	Centre for Scots Law
University of Strathclyde	Law School
Victim Support Scotland	Victims' charity
We Can't Consent To This	Campaign group

[3] The Sheriffs' Association submitted a separate response that endorsed the views of the Senators of the College of Justice.

Appendix C

List of Advisory Group members

The composition of the Advisory Group has fluctuated but the following individuals have been members for at least some of the lifetime of the project:

Lord Beckett	Lord Justice Clerk
Laura Buchan	Procurator Fiscal, Head of Policy and Engagement, COPFS
Professor James Chalmers	University of Glasgow
Professor Pamela Ferguson	University of Dundee
Professor Fiona Leverick	University of Glasgow
Professor Gerry Maher KC	University of Edinburgh
Gordon Martin	Society of Solicitor Advocates representative
Lindsey Miller	Deputy Crown Agent, COPFS
Michael Meehan KC	(in his former capacity as an Advocate Depute at COPFS)
Professor Claire McDiarmid	University of Glasgow
Alex Prentice KC	Principal Crown Counsel, COPFS
Thomas Leonard Ross KC	Defence Counsel
Lord Scott	(before elevation to the bench, in his capacity as the Society of Solicitor Advocates representative)
Laura Sharp	Law Society of Scotland representative
Lord Turnbull	Senator of the College of Justice
Kate Wallace	Chief Executive, Victim Support Scotland
Various Police Scotland representatives	

Published on behalf of the Scottish Law Commission by APS Group Scotland

This Document is also available for download from:
www.scotlawcom.gov.uk/

ISBN 978-1-0686139-6-8

PPDAS1638146 (09/25)