



Scottish Law Commission
promoting law reform

**DISCUSSION PAPER ON THE MENTAL ELEMENT IN
HOMICIDE**

EXECUTIVE SUMMARY

Discussion Paper on the Mental Element in Homicide – Executive Summary

Introduction

1. The Scottish Law Commission is an independent statutory body, whose role is to recommend reforms to improve, simplify and update the law of Scotland. As part of the Tenth Programme of Law Reform announced in 2018,¹ the Commission is currently conducting a review of Scots homicide law, and the mental element in particular. We are examining the law of homicide to consider whether, and if so, how, any necessary proposals for modernising the law in this important and sensitive area should be made. A Discussion Paper on the Mental Element of Homicide was published on 27 May 2021.²

Background to the review

2. By way of context we note that in the case of *Petto v HM Advocate*,³ the Criminal Appeal Court stated that a comprehensive re-examination of the mental element in homicide was overdue. The Court observed that the definitional structure in Scots law was antiquated and that “we remain burdened by legal principles that were shaped largely in the days of the death penalty, that are inconsistent and confused and are not yet wholly free of doctrines of constructive malice”.⁴ We examine these issues with reference to the principles underlying, and the boundaries between, the crimes of murder and culpable homicide; and consider whether (and, if so, how) the law might best be developed and reformulated to address the difficulties identified by the Court.

3. Some years earlier in the case of *Drury v HM Advocate*,⁵ the same Court had commented that the law of provocation should be reformed and restated in statutory form. We will explore this suggestion, provocation being an area of the law that often arises in homicide cases. We also consider the various other defences available to someone accused of homicide in Scots law, with a particular focus on comparative analysis. We discuss whether Scots homicide law should be reformed to address the difficulties faced by victims of domestic abuse, for whom the current homicide defences may be inadequate.

¹ Scottish Law Commission, *Tenth Programme of Law Reform*, Scot Law Com No 250 (2018) available at: <https://www.scotlawcom.gov.uk/law-reform/tenth-programme-of-law-reform-consultation/>.

² Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, 2021).

³ 2011 SCCR 519.

⁴ *Ibid*, at para [21] (Lord Justice Clerk Gill).

⁵ 2001 SCCR 583.

4. We are seeking views from all interested parties on the questions we pose in the Discussion Paper. Details of how to respond are set out on the inside cover of our Discussion Paper and on the Homicide project page on the Scottish Law Commission website.⁶

Responses should be submitted by 27 August 2021

Issues for consideration

5. The Discussion Paper is divided into 14 chapters. In addition to the Discussion Paper and this Executive Summary, we have also published several standalone papers intended to complement the Discussion Paper. The first, entitled “Homicide Laws in Other Jurisdictions”, provides consultees with information further to the comparative material which is noted throughout the Discussion Paper. The second is a paper on culpable homicide authored by Professor Claire McDiarmid, Head of the School of Law at the University of Strathclyde. Lastly, we have also published a paper looking at statistics for homicide appeals in Scotland between 2010 and 2019. All of these papers can be found on the Homicide project page on the Scottish Law Commission website.⁷

6. Following the introductory chapter, Chapters 2 to 5 discuss the substantive Scots law of homicide. Chapters 6 to 11 relate to defences relevant to Scots homicide law. Chapter 12 considers homicide in relation to domestic abuse; Chapter 13 is a short “overview” relating to putting Scots homicide law on a statutory footing; and Chapter 14 provides a list of the questions we are consulting on.

7. The main issues considered in Chapters 2 to 14 are summarised below:

Chapter 2 – The structure of Scots homicide law

8. In Chapter 2 we discuss the bipartite structure of Scots homicide law, which consists of murder (carrying a mandatory life sentence) and culpable homicide (for which sentences range from admonition to effectively life imprisonment). We note a number of criticisms, including the potential conflict between, on the one hand, the sometimes fine distinction between murder and culpable homicide, and, on the other hand, the principle of fair labelling of offenders. We discuss and evaluate potential alternative approaches with reference to academic opinion, the multi-tier approach recommended by the Law Commission of England and Wales in 2006,⁸ and selected other jurisdictions.

9. We then seek views from consultees as to whether the bipartite structure in Scots homicide law should be retained; and whether certain specific offences should be defined by statute as murder, depending on elements of the *actus reus* (ie the “guilty act” of the offence).

Chapter 3 – The language of Scots homicide law

10. As noted above, the language of Scots homicide law has been judicially criticised.⁹ Additionally, the terminology “wicked intent” and “wicked recklessness” (the *mens rea* or the

⁶ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>. Also see our “current consultations” page - <https://www.scotlawcom.gov.uk/law-reform/consultations/>.

⁷ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>.

⁸ Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006).

⁹ *Petto v HM Advocate* 2011 SCCR 519.

“guilty mind” of murder)¹⁰ has been described as “circular”,¹¹ archaic and morally-loaded.¹² In Chapter 3, we consider the redefinitions advanced by the authors of the Draft Criminal Code for Scotland (2003), before conducting a brief comparative study of the language used in other jurisdictions including the USA, Australia, New Zealand, South Africa, England and Wales, and Ireland. Following this, we note the views of the legal practitioners in our focus groups, generally to the effect that the current language of Scots homicide law is working well and is well understood by juries. We conclude the chapter with a discussion of the potential advantages and disadvantages of adopting other jurisdictions’ language; and explaining the development of the language used by the Scottish courts.

11. We then seek views from consultees as to whether there should be different terminology or definitions in Scots homicide law, and if so, what alternative language, and why.

Chapter 4 – Murder

12. In Chapter 4 we consider whether the offence of murder would benefit from redefinition. The classic Macdonald definition of murder¹³ was amended in 2001 by a five-judge bench in *Drury v HM Advocate*,¹⁴ when the word “wickedly” was inserted before the words “intended to kill”. This attracted much academic criticism, yet does not appear to have caused difficulties in practice. Subsequently, the second leg of the *mens rea* of murder – “wicked recklessness” – was considered in *HM Advocate v Purcell*,¹⁵ when the court stated that an intention to injure was required for wicked recklessness to be established. We use an address given by Lord Goff in 1987 to illustrate how *Purcell* may have narrowed the scope of the *mens rea* of murder,¹⁶ before noting the difficulties which arose from the *Purcell* definition in the subsequent case of *Petto* in 2011.¹⁷ Next, we discuss the doctrine of constructive malice (which attributes liability for murder where a killing occurs in the course of another crime, such as robbery). Lastly, we note and evaluate the suggestions for reform in the Draft Criminal Code for Scotland (2003).

13. In this chapter we ask consultees for their views on whether the terminology “wicked intention to kill” should be reformed, whether “wicked recklessness” should require an intention to injure, and, if reform is necessary, how the *mens rea* of murder should be defined. We also seek views on whether the doctrine of constructive malice should be abolished, and whether Scots law would benefit from adopting the reforms proposed in the Draft Code.

Chapter 5 – Culpable homicide

14. In Chapter 5 we discuss the offence of culpable homicide, bearing in mind the importance of social policy when considering re-framing this wide-ranging offence. Culpable homicide currently includes killings ranging from the morally reprehensible (but falling just short of murder) to those which merit only an admonition on conviction. We note the mixed

¹⁰ Macdonald, *Criminal Law of Scotland* (5th edn, 1948); *Drury v HM Advocate* 2001 SCCR 583.

¹¹ G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) para 30.21.

¹² 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.

¹³ Macdonald, *Criminal Law of Scotland* (5th edn, 1948).

¹⁴ 2001 SCCR 583.

¹⁵ 2007 SCCR 520.

¹⁶ Published in (1988) 104 *LQR* 30.

¹⁷ 2011 SCCR 519.

views concerning the current law: while the breadth and flexibility of the offence can be seen as a strength and our practitioner focus groups generally considered it to be working well, some academics have expressed concerns relating to, amongst other things, the principle of fair labelling of offenders. We evaluate the possible advantages and disadvantages of legislative reform with reference to case law, before conducting a comparative analysis of the approaches in other jurisdictions.

15. We seek views on whether there should be a statutory sub-division of culpable homicide which reflect specific levels of gravity and how this might be achieved (for example, by specifying elements of the *actus reus* which render the crime more or less serious). We also ask consultees whether juries should be invited to add a rider where a defence of provocation or diminished responsibility is successful; whether Scots law would benefit from having a new crime of “assault causing death”; and if so, how such a crime should be framed.

Chapter 6 – Defences – an introduction

16. This brief chapter provides consultees with an overview of the defences available in Scottish homicide trials; defines terms such as “complete”, “partial”, “specific” and “general” defences; sets out the scope of the defences considered in the remaining chapters (namely self-defence, necessity, coercion, provocation and diminished responsibility); and states the rationale for including these defences to the exclusion of others.

17. We ask consultees whether they agree with our proposed scope, and whether any other specific issues ought to be explored in our consideration of defences to a charge of homicide.

Chapter 7 – Self-defence

18. Chapter 7 is a general overview of the current operation of the defence of self-defence in Scots law. We briefly discuss the defence’s three requirements (i) of an imminent danger to life or limb, (ii) that the accused must take any reasonable opportunity to escape, and (iii) of proportionality of any response. We also note that the defence of self-defence extends to the defence of others, and that the initiator of the physical violence is not necessarily precluded from relying on the defence of self-defence.

19. We seek views on whether these three essential requirements of self-defence are in need of reform, what any suggested reform should be, and why.

Chapter 8 – Specific issues in relation to self-defence

20. Chapter 8 discusses three specific issues concerning self-defence in the context of homicide.

21. First, we consider whether Scots law should have a partial defence of excessive force in self-defence, noting that the moral culpability of someone who kills with excessive force in the mistaken but reasonably held belief that the amount of force used was necessary to repel the attack, is less than that of a person who kills in cold blood; and that some jurisdictions have adopted this approach. We also discuss the alternative view that the current defence of provocation adequately covers the majority of situations envisaged in the context of excessive force in self-defence.

22. Secondly, we consider (from both a theoretical and a comparative perspective) whether the defence of self-defence should extend to those who kill in defence of property.

23. Thirdly, we examine whether self-defence should extend to those who kill where they are faced with rape. We consider the current position in Scots law whereby self-defence to avoid rape does not extend to rape of anyone other than a female. We contrast that position with the updated definition of rape in section 1 of the Sexual Offences (Scotland) Act 2009, which provides that anyone - including males - can be the victim of rape. Next, we discuss some theoretical justifications for allowing self-defence to be pled in this context, note the proposals in the Draft Criminal Code for Scotland, conduct a comparative analysis of the approaches in other jurisdictions, discuss some further issues raised by practitioners, and consider some potential unintended consequences of extending the defence in the context of the new statutory definition of rape.

24. We seek consultees' views on whether Scots law should adopt a partial defence of excessive force in self-defence or whether the current defence of provocation is adequate. We also ask whether self-defence should extend to defence of property to give special recognition to a householder faced with an intruder in their home, and if so, how this should be framed. Finally, we ask whether self-defence should be retained in its current form, extended, or abolished, where someone is faced with rape and/or sexual assault by penetration.

Chapter 9 – Necessity and coercion

25. Chapter 9 discusses the closely related but separate defences of necessity and coercion in the specific context of homicide. We first consider the requirements of necessity and the associated academic commentary before discussing the views of other law reform bodies and the moral arguments for and against allowing necessity to be pled by someone accused of murder. In the second half of this chapter we consider the historical and modern requirements of the defence of coercion, before discussing the views of other law reform bodies, conducting a comparative analysis, and noting the ethical arguments relating to coercion in the context of homicide.

26. We ask consultees whether the defences of necessity and coercion should be recognised as defences to murder in Scots law, and if so, whether they should operate as complete or partial defences, and how they should be framed.

Chapter 10 – Provocation

27. Chapter 10 discusses the partial defence of provocation, which reduces murder to culpable homicide. We trace the development of the defence in Scots law, noting that verbal abuse does not currently constitute a recognised provocation, and also that the issue of third party provocation is unclear. Next, we discuss the rationale for the defence's current operation, and the question whether provocation by sexual infidelity should continue to constitute a valid partial defence to murder in today's society. We provide a comparative survey of provocation in other jurisdictions, and note arguments for and against abolishing the defence of provocation entirely.

28. We seek consultees' views on whether the existing defence of provocation should extend to verbal provocation and/or third party provocation, and what form such a defence should take. We also ask whether provocation should continue to operate in the context of the

discovery of an intimate partner's sexual infidelity, or whether that particular limb of the defence should be abolished. Finally, we ask whether provocation should be abolished entirely, and if so, whether it should be replaced by another defence, such as one of "loss of control" as adopted in English law.

Chapter 11 – Diminished responsibility

29. In Chapter 11 we focus on the statutory partial defence of diminished responsibility, which, like provocation, reduces murder to culpable homicide.¹⁸ We discuss the various difficulties that the Scottish courts have encountered with this statutory defence, which requires the accused to prove on the balance of probabilities that at the time of the killing they were suffering from an "abnormality of mind". We consider psychopathic personality disorder and the effect of voluntary intoxication on the defence, and discuss the evidence required (for example, that of a psychiatrist, psychologist, or other evidence). We note the operation of diminished responsibility in New Zealand, South Africa, England and Wales, Ireland, the USA and Australia. Finally, we touch on the statutory complete defence of mental disorder¹⁹, and the common law complete defence of automatism.

30. We seeks views on whether more clarity is required as to what constitutes an "abnormality of mind", whether this should be defined as a "recognised abnormality", whether a psychologist's evidence alone ought to provide sufficient evidence of an abnormality, and whether psychiatric opinion should be capable of being contradicted and discounted by the evidence of a psychologist. We are also asking whether consultees have encountered any problems with the operation of the defence of mental disorder and automatism, what those problems are, and what reforms might be necessary.

Chapter 12 – Domestic abuse

31. In our final substantive chapter we consider domestic abuse in the specific context of homicide. After noting the background to the social developments and legal developments in response to domestic abuse in Scotland from the mid-1970s to the present day, we consider whether the current defences of self-defence, provocation and diminished responsibility provide a satisfactory framework for victims of prolonged domestic abuse who kill their abuser. We then discuss whether a new partial defence should be created for killings which occur in this context, with extensive reference to the approaches (and difficulties faced) in other jurisdictions. We conclude with a discussion of recent developments in the Scottish and UK Parliaments, including a UK bill which seeks, amongst other things, to remove the "rough sex" defence to a charge of murder in England and Wales.²⁰

32. We would welcome consultees' views on whether there should be a separate defence to a charge of homicide for domestic abuse victims, and if so, whether that defence should be a complete or a partial one, what evidence would be required, and what safeguards would be necessary to avoid its misuse. Alternatively, or as a procedure to accompany such a defence, we ask whether a judge should be able to give the jury directions outlining the social/psychological/behavioural context of, and possible effect on, an abused partner. Lastly,

¹⁸ Criminal Procedure (Scotland) Act 1995, s 51B.

¹⁹ *Ibid*, s 51A.

²⁰ Domestic Abuse Bill 2019-21, s 65.

we ask whether statute should expressly state that “rough sex” is not a valid defence in homicide.

Chapter 13 – Overview

33. Based on the preceding chapters, Chapter 13 is a short, final overview of the advantages and disadvantages of placing Scots homicide law on a statutory footing. We ask consultees whether statutory reform in this area of the law would be desirable.

Chapter 14 – List of questions

34. As noted above, Chapter 14 lists all the questions in the earlier chapters. Respondents are invited to answer any or all of these questions and to provide us with any other views or information which they consider relevant to our project. If respondents have any queries, please contact the Homicide project manager in the first instance at graham.mcglashan@scotlawcom.go.uk. Responses to the Discussion Paper should be submitted by **27 August 2021**.