

The Law Commission
Consultation Paper No 177

**A NEW HOMICIDE ACT FOR ENGLAND
AND WALES?**

A Consultation Paper

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 28 November 2005, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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THE LAW COMMISSION
A NEW HOMICIDE ACT FOR ENGLAND AND WALES?
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PART 1

WHY IS A NEW HOMICIDE ACT NEEDED?

THE TERMS OF REFERENCE FOR THE REVIEW OF MURDER

- 1.1 In July 2005, the Government announced a review of the law of murder in England and Wales, with the following terms of reference:
- (1) To review the various elements of murder, including the defences and partial defences to it, and the relationship between the law of murder and the law relating to homicide (in particular manslaughter). The review will make recommendations that:
 - (a) take account of the continuing existence of the mandatory life sentence for murder;
 - (b) provide coherent and clear offences which protect individuals and society;
 - (c) enable those convicted to be appropriately punished; and
 - (d) be fair and non-discriminatory in accordance with the European Convention of Human Rights and the Human Rights Act 1998.
 - (2) The process used will be open, inclusive and evidence-based and will involve:
 - (a) a review structure that will look to include key stakeholders;
 - (b) consultation with the public, criminal justice practitioners, academics, those who work with victims' families, parliamentarians, faith groups;
 - (c) looking at evidence from research and from the experiences of other countries in reforming their law.
 - (3) The review structure will include consideration of areas such as culpability, intention, secondary participation etc inasmuch as they apply to murder. The review will only consider the areas of euthanasia and suicide inasmuch as they form part of the law of murder, not the more fundamental issues involved which would need separate debate. For the same reason abortion will not be part of the review.

How is the Law Commission taking forward these terms of reference?

- 1.2 We will not be reviewing every issue that could, in theory, be regarded as falling within the scope of the review. The areas of law that seem to us to give rise to real difficulty or anomalies have guided us in our focus. Even within those areas, we will not be addressing issues best left to a wider review of other areas of the law, issues that cannot be adequately considered and consulted on in the time available or issues that are too close to one falling outside the scope of the review (child destruction, for example, being too close to abortion).

1.3 Issues we will not be addressing include:

- (1) Justifications for killing: abortion, necessity and self-defence.
- (2) The prohibited conduct element: causation, the legal criteria governing when life begins and when life ends and child destruction (the offence of killing a child in the womb capable of being born alive).
- (3) The defences of insanity and intoxication.
- (4) Aggravating features of a murder, such as an especially evil motive or the fact that a child or law officer on duty was intentionally targeted. We have also left these out of consideration as we regard them as having been adequately addressed by Parliament through the guidance that it has recently given on sentencing in murder cases (see paragraphs 1.27-1.29 and 1.104-1.123 below).

THE EXISTING LAW AND THE PROBLEMS WITH IT: A BRIEF GUIDE

1.4 The law governing homicide in England and Wales is a rickety structure set upon shaky foundations. Some of its rules have been unaltered since the seventeenth century, even though it has long been acknowledged that they are in dire need of reform. Other rules are of uncertain content or have been constantly changed, so that the law cannot be stated with certainty or clarity. Certain reforms effected by Parliament that were valuable at the time are beginning to show their age or have been overtaken by other legal changes and yet left unreformed.

1.5 This state of affairs should not continue. The sentencing guidelines that Parliament has recently issued for cases where someone has been convicted of murder¹ presuppose that murder has a rational structure, a structure that properly reflects degrees of fault and provides defences of the right kind and with the right scope. Unfortunately, the law does not have, and never has had, such a structure. Putting that right is an essential task for criminal law reform.

1.6 We will propose that, for the first time, the general law of homicide be rationalised through legislation. Offences and defences must take their place within a readily comprehensible and fair legal structure. That structure must be set out with clarity, in a way that will promote certainty in the future and in a way that non-lawyers can understand and accept.

1.7 We will be going into these matters in much greater depth but, in brief, what is the existing law and what are its problems?

Offences

1.8 Two general offences of homicide, murder and manslaughter, are employed to accommodate the majority of ways in which someone might be at fault in killing. We say “the majority” because there are a number of specific homicide offences, for example, infanticide and causing death by dangerous driving.

¹ Criminal Justice Act 2003, s 269, sched 21.

- 1.9 Murder, which carries a mandatory life sentence, is committed when someone unlawfully kills another person ('V') with an intention to kill V or an intention to do V serious harm.
- 1.10 Manslaughter can be committed in one of four ways:
- (1) Conduct that the defendant knew involved a risk of killing, and did kill, is manslaughter ("reckless manslaughter");
 - (2) Conduct that was grossly negligent given the risk of killing, and did kill, is manslaughter ("gross negligence manslaughter");
 - (3) Conduct, taking the form of an unlawful act involving a danger of some harm, that killed, is manslaughter ("unlawful and dangerous act manslaughter");
 - (4) Killing with the intent for murder but where a partial defence applies.

The term "involuntary manslaughter" is used to describe a manslaughter falling within (1) – (3) while (4) is referred to as "voluntary manslaughter".

Problems with these offences

- 1.11 The current definitions of these offences are largely the product of judicial law making in individual cases over hundreds of years. They are not the products of legislation enacted after wide consultation and research into alternative possibilities. Moreover, from time to time the definitions have been altered by the courts,² each new case sometimes generating further case law to resolve ambiguities left behind by the last one.
- 1.12 The inclusion within murder of cases in which the defendant killed, but intended only harm that the jury regards as serious, is highly controversial.³ On this basis, even someone who positively believed both that no one would be killed by their conduct and that the harm they were inflicting was not serious, can find themselves bracketed with the "contract" or serial killer as a "murderer".
- 1.13 If murder can be too broad, so can manslaughter. It probably covers as large a range of forms of culpability as any crime in English law.
- 1.14 At the most serious end of the involuntary manslaughter spectrum, the law may be too generous to defendants who kill by reckless conduct. The worst kinds of reckless killer may deserve to be convicted of murder.⁴
- 1.15 At the less serious end of the involuntary manslaughter spectrum, the law may be too harsh on defendants who kill as a result of an unlawful and dangerous act. The risk of harshness arises when defendants do not realise that the act may cause harm:

² Eg, on murder see, *Woollin* [1999] 1 AC 82 (HL); and on manslaughter see, *Adomako* [1995] 1 AC 171 (HL); (*Morgan*) *Smith* [2001] 1 AC 290 (HL).

³ See Part 3.

⁴ See Part 3.

EXAMPLE 1: D is seeking to steal a large book from the fourth floor of a library whose windows face on to a busy street. Seeing the librarian coming towards him, D quickly drops the book out of the window. It lands on V's head as she walks underneath the window, killing her.

- 1.16 D's theft of the book should not be sufficient to convict D of the manslaughter of V even though, in the circumstances, there was an obvious risk of some harm arising from D's action. The need to narrow the crime of involuntary manslaughter has already been accepted by Government.⁵
- 1.17 In paragraphs 1.30-1.48, and in more detail in Part 2, we set out some possible solutions to these problems. These solutions include a distinction between "first degree murder" and "second degree murder" that, amongst other things reflects the distinction in degrees of fault between intending to kill and intending to do serious harm.
- 1.18 Further, we provisionally propose that the worst kinds of reckless killing become "second degree murder", thereby restricting the scope of involuntary manslaughter at the serious end. At the less serious end of involuntary manslaughter, we adopt, with some minor amendments, the Government's previous proposals to restrict the scope of unlawful and dangerous act manslaughter to cases where the defendant killed the victim through an criminal act intended to cause injury or involving recklessness as to causing injury.
- 1.19 These changes would provide a proper structure for the law of homicide, with offences on an ascending ladder of seriousness according to the degree of fault, from manslaughter through "second degree murder" to "first degree murder".

Partial defences

- 1.20 In this review, we are mainly concerned with partial defences, for example provocation, rather than with complete defences, for example self-defence. Currently, there are generally acknowledged to be three partial defences to murder: provocation, diminished responsibility and killing in pursuance of a suicide pact. If successfully pleaded, they do not result in a complete acquittal but in a conviction of manslaughter rather than murder.
- 1.21 However, there are also what might be called "concealed" partial defences, created by legislation as specific offences. Examples are the offences of infanticide (Infanticide Act 1938), when a mother whose mind is disturbed kills her baby who is less than 12 months old, and complicity in suicide (Suicide Act 1961) where someone assists or encourages another person to commit suicide.

⁵ Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000). Example 1 is not discussed in those proposals. It is based on *Franklin* (1883) 15 Cox CC 163.

Problems with these partial defences

- 1.22 The partial defence of provocation is a confusing mixture of judge-made law and legislative provision. The basic rule has been clear enough for a long time: it is manslaughter, not murder, if the defendant, having been provoked, lost his or her self-control and killed in circumstances in which a reasonable person might also have done so. However, the highest courts have disagreed with one another on a number of occasions about the scope of the defence. Consequently, not only has its scope been left unclear, but there is no end in sight to the disagreement. In 2004 we recommended reform of the partial defence of provocation and we set out how we thought the defence should be reformed.⁶ We return to this topic in Part 6.
- 1.23 The diminished responsibility defence was a welcome reform when it was introduced in 1957. However, medical science has moved on considerably since then and the definition is now badly outdated. The same is true of infanticide. Further, the statutory provision that makes the survivor of a suicide pact guilty of manslaughter was meant to reflect pity on those desperate enough to seek to take their own lives along with that of another person. Unfortunately, the relationship between manslaughter by virtue of killing pursuant to a suicide pact and the offence of complicity in suicide - created a few years later and in theory a less serious offence than manslaughter - was not fully thought through. Moreover, the scope of the partial defence, exclusively concerned with death occurring through suicide pacts, is unduly narrow.

Missing defences

- 1.24 Whereas there has recently been controversy over whether provocation should continue to be a partial defence to murder, other strong claims for mitigation of the offence of murder have failed to gain legal recognition. Judges have decided that they would prefer Parliament to decide whether there should be new defences to murder but Parliament has not had the time to consider the matter.
- 1.25 One such claim arises when the defendant, fearing serious violence from an aggressor, goes too far in deliberately killing the aggressor in order to repel the feared attack. We have already recommended that the defendant's fear of serious violence should be the basis for a partial defence to murder, through reform of the provocation defence.⁷
- 1.26 Another such claim is "duress". This is where the defendant becomes involved in the killing of an innocent person but only because the defendant is being threatened him or herself with death or with a life-threatening injury if he or she does not participate in the killing. At the very least, a claim of duress should reduce what would under our proposals otherwise be "first degree murder" to a lesser homicide offence.

⁶ Partial Defences to Murder (2004) Law Com No 290, para 3.168.

⁷ *Ibid.* See Part 6.