The Law Commission
Consultation Paper No 177 (Overview)

A NEW HOMICIDE ACT FOR ENGLAND AND WALES?

An Overview

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.

The Law Commissioners are:

The Honourable Mr Justice Toulson, *Chairman*
Professor Hugh Beale QC, FBA
Mr Stuart Bridge
Dr Jeremy Horder
Professor Martin Partington CBE

The Chief Executive of the Law Commission is Steve Humphreys and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

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

For those who are interested in a fuller discussion of the law and the Law Commission's proposals, our formal consultation paper is accessible from http://www.lawcom.gov.uk/murder.htm, or you can order a hard copy from TSO (www.tso.co.uk).

The Law Commission would be grateful for comments on its proposals before 13 April 2006. Comments may be sent either –

By post to:

David Hughes
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London
WC1N 2BQ
Tel: 020-7453-1212
Fax: 020-7453-1297

By email to:

david.hughes@lawcommission.gsi.gov.uk

It would be helpful if, where possible, comments sent by post could also be sent on disk, or by email to the above address, in any commonly used format.

All responses will be treated as public documents in accordance with the Freedom of Information Act 2000, and may be made available to third parties.

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http://www.lawcom.gov.uk/murder.htm

THE LAW COMMISSION

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AN OVERVIEW

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PART 1
INTRODUCTION

TERMS OF REFERENCE

1.1 In August 2004 we published a report on Partial Defences to Murder. We said that the law of murder in England and Wales is "a mess". In July 2005 the Government invited the Law Commission to review the law of murder.

1.2 Our terms of reference are as follows:

(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) are fair and non-discriminatory in accordance with the European Convention on 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; and

(c) looking at evidence from research and from the experiences of other countries in reforming their law.

(3) The review 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.

1.3 We said that we would publish a consultation paper by the end of 2005 to be followed by a report in autumn 2006. Our recommendations will feed into a wider Government consultation on public policy.

ISSUES NOT COVERED

1.4 This overview is an important part of our consultation process. In it we concentrate on the issues that we believe are central to the reform of the law of murder. Published simultaneously, a longer paper examines those issues in more detail and, in addition, considers aspects of the law of murder that are ancillary to the core issues.

1.5 One aspect of the law of murder that this overview does not consider, despite its great importance in practice, is the criminal liability of accessories to murder, that is those who encourage or assist others to commit murder. The relevant law is technical, complex and difficult. Any examination of the topic would need to be detailed and lengthy. To consider it here would defeat our purpose in publishing an overview. Those interested in the law on accessories to murder should refer to Part 5 of our full Consultation Paper.

1.6 In addition, this paper does not consider infanticide. Infanticide is committed when a mother intentionally kills her child when the child is under one year old and the balance of the mother's mind is disturbed either by her failure to recover from the effects of the birth or from the effects of lactation consequent upon the birth of the child. If convicted, the mother can be sentenced for anything up to and including life imprisonment.

1.7 The law on infanticide is not complex or difficult. However, how the offence might be reshaped raises difficult policy and psychiatric issues that cannot be adequately addressed in a paper of this nature. Those interested in the subject should refer to Part 9 of our full Consultation Paper.

1.8 There are some issues that neither this overview nor the longer paper considers, although they could be regarded as falling within the scope of the review. They include:

(1) the conduct element of murder and other homicide offences. Accordingly, we do not consider the principles of causation or the legal criteria governing when life begins and when life ends;

(2) justifications for intentionally killing, for example acting out of necessity or self-defence;

(3) insanity and intoxication; and

(4) the offence of child destruction, that is the intentional killing of a child in the womb capable of being born alive.

1.9 In some instances, we are not considering an issue because it is too close to one that falls outside the scope of our terms of reference. For example, we do not consider who can be a victim of murder (currently, someone "born alive") or the offence of child destruction because they are both too close to the issue of abortion.

1.10 Justifications for intentional killing merit separate and detailed consideration because of their complexity, their controversial character and their inextricable links with other areas of the criminal law. The same is true of causation, insanity and intoxication. They are all issues that are best left to a wider review of the General Principles of the criminal law.

A PRELIMINARY POINT – THE MEANING OF "HOMICIDE"

1.11 The terms of reference refer to "the relationship between the law of murder and the law relating to homicide (in particular manslaughter)". In this paper, homicide means the unlawful killing of a human being by another human being. Murder is the most serious of the homicide offences but its reform cannot be considered in isolation from other homicide offences.

HOW HAS THE LAW COME TO BE "A MESS"?[1]

1.12 In this section, we identify some of the factors that have led to the law being in such an unsatisfactory state.

"Malice aforethought" and the public perception of murder

1.13 The problems begin with the foundation of the law of murder. It is not an Act of Parliament but a judicial description of the offence dating from the early seventeenth century. The essence of the description is that, for a person to be convicted of murder, he or she must have killed with "malice aforethought". Even if the description was accurate at the time, it is now seriously misleading.

1.14 In particular, the expression "malice aforethought" continues erroneously to exercise great influence over the public perception of murder. Most people believe that murder is either a deliberate premeditated killing or, at least, a deliberate killing. In fact, its scope is much wider. There does not have to be an intention to kill, still less a premeditated intention to kill. A person is guilty of murder if death results from an act intended to cause really serious harm even if there was no intention to kill. This is so even if nobody could have foreseen that the intentionally inflicted serious harm would cause death, for example because the victim was unfortunate enough to receive inadequate medical treatment.

Parliament's fundamental misunderstanding

1.15 The next problem is that the present law does not represent what Parliament understood and intended the law to be when it last took a detailed look at the law of murder and enacted the Homicide Act 1957 ("the 1957 Act").

1.16 The 1957 Act had been preceded by the report of the Royal Commission on Capital Punishment 1949-1953 ("the Royal Commission"). In evidence to the Royal Commission, the Lord Chief Justice said that the law of England and Wales was that persons were not guilty of murder merely because they intended to cause serious harm. Persons intending to cause serious harm also had to know that they were endangering life.

[1] For a more detailed discussion see Part 1 of our full Consultation Paper.

1.17 As a result the Royal Commission explicitly declined to recommend that the mental element of murder should be changed. It took the view that the law as stated by the Lord Chief Justice was satisfactory. Parliament adopted the same position when it enacted the 1957 Act.

1.18 Not long after the 1957 Act was passed, a decision of the Court of Criminal Appeal proved Parliament's understanding of the law to have been wrong. The Court, presided over by the Lord Chief Justice, held that the law of England and Wales had always been that persons who intended to cause serious harm, without realising that they were endangering life, were guilty of murder if the victim died. That continues to be the law.

The haphazard development of the law

1.19 Over the centuries the law of homicide, including the law of murder, has developed in a higgledy-piggledy fashion. The present law is a product of judge made law supplemented by Parliament's sporadic intervention. The outcome is a body of law characterised by a lack of clarity and coherence.

Judicial development of the law

1.20 Over the last fifty years the fault element of murder and the defences to it have caused the courts great difficulties.

THE FAULT ELEMENT

1.21 The fault element of an offence is, generally speaking, the part that refers to the offender's state of mind. There are different states of mind:

(1) a person may want to kill another person;

(2) without wanting to kill, a person may believe that the death of another person will be the inevitable consequence of his or her actions;

(3) a person may know that there is a risk that his or her actions will cause death or serious injury; or

(4) a person who causes death may not have realised that there was a risk that his actions would cause death or serious injury even though this would have been obvious to any reasonable person.

These are just examples.

1.22 On several occasions the House of Lords has considered the fault element of murder, in particular the meaning of "malice aforethought". After a period of uncertainty, the House of Lords held that in order to be guilty of murder a person must have "intended" to kill or cause serious harm. However, there remains some uncertainty as to the meanings of both "intention" and "serious" harm.

DEFENCES

1.23 Theoretically, judges can create new defences to offences. Indeed, it was the judges who long ago created the partial defence of provocation. This allows a person to be convicted of manslaughter, rather than murder, if:

(1) he or she intentionally killed another person as a result of losing self-control through being provoked; and

(2) a reasonable person would have reacted in the same way.

1.24 Recently, however, the judges have been reluctant to create new defences, instead confining themselves to making revisions to existing defences. Today judges believe that significant reform of the criminal law is a matter for Parliament. There are legitimate reasons for adopting this cautious approach. The development of the criminal law usually involves policy issues that cannot be addressed properly without extensive consultation and broad ranging public debate.

1.25 The downside of this approach is that it is reliant on Parliament acting. In fact, Parliament has shown little enthusiasm for creating new defences to murder, whether full or partial. During the last 50 years Parliament has barely touched the law of murder.

1.26 The result is a scheme of defences to murder that reflects some very odd values. For example, the partial defence of provocation may enable a person to be convicted of manslaughter rather than murder if he or she kills as a result of losing his or her temper when insulted. By contrast, a person who kills in response to a threat of serious unlawful violence is guilty of murder if he or she uses what is considered to be unreasonable force. No partial defence is available. This is just one example.

Parliament's contribution to the development of the law

1.27 On several occasions Parliament has legislated to change different aspects of the law of murder but in a piecemeal fashion. The 1957 Act is an example. It made some valuable reforms to the law of homicide, for example the introduction of the partial defence of diminished responsibility. However, it did not rationalise the structure of the law of homicide.

THE FUNDAMENTAL PROBLEM WITH THE CURRENT LAW OF HOMICIDE[2]

1.28 The law of England and Wales categorises homicide offences in a very blunt, rudimentary fashion. There are only two general homicide offences: murder and manslaughter. The majority of unlawful homicides have to be slotted into one or the other offence. As a result, each offence has much work to do, accommodating a wide range of behaviour displaying very different levels of criminality.

1.29 Thus, murder encompasses both the 'contract' killer who commits a premeditated killing for gain and the person who, suddenly involved in an argument, instinctively picks up a knife and inflicts a wound that he or she did not intend to be, but which proves, fatal. Each is guilty of murder and subject to the mandatory life sentence. The difference in the respective culpability can only be reflected in the period that each must spend in prison before he or she can be *considered* for release on licence.

[2] For a more detailed discussion see Parts 1 and 2 our full Consultation Paper.

1.30 Manslaughter is of even wider scope than murder. In 1992 Lord Chief Justice Geoffrey Lane said of the offence, "it ranges in gravity from the borders of murder right down to those of accidental death":

Example 1A

D sets fire to a house knowing that it is occupied by V. The house burns down, killing V. D says that he merely wanted to frighten V and thought that V would probably be able to escape through an exit at the back of the property. D admits, however, that he realised that it was quite possible that V would die in the blaze. The jury accepts D's testimony that he merely intended to frighten V.

Example 1B

D and V are neighbours who are always arguing about the fence that divides their gardens. One day they are in the middle of an argument when D loses his temper and punches V. Normally the force of the punch would have caused no more than a minor bruise. However, it causes V to lose his balance and fall over. V's hits his head on the ground and dies from an injury to his skull.

The culpability of D in example 1A far exceeds that of D in example 1B. Yet, each is guilty of manslaughter. Admittedly, unlike murder, the trial judge can reflect the difference in culpability by means of sentences that ensure D in example 1A will actually serve a much longer prison sentence than D in example 1B. However, the fact that each is convicted of the same offence, despite the difference in their culpability, is unsatisfactory. In Part 5, we set out a provisional proposal that would result in D in example 1A being convicted of "second degree murder" rather than manslaughter.

1.31 All of this points to a law of homicide that is seriously flawed. It lacks a proper structure, including defences of the right kind and of the right scope. In addition, the rules governing the partial defences of provocation and diminished responsibility are complex and, in the case of provocation, uncertain.

ADDRESSING THE FUNDAMENTAL PROBLEM

1.32 What is required is a new structure that is clear, promotes certainty and attracts public support because it is fair. It must, therefore, ensure that:

(1) homicide offences are graded in a way that accurately reflects different levels of criminality;

(2) each offence is clearly defined;

(3) once graded, different offences are properly and fairly labelled;

(4) there are clearly defined defences of the right kind and of the right scope; and

(5) sentences appropriate for the different levels of criminality are available without at the same time *compelling* the imposition of a sentence that is inappropriate to a particular level of criminality.

We believe that the framework that we are proposing in this paper achieves this and is a substantial improvement on the current law.

1.33 We emphasise, however, that the grading and labelling of offences is not a science. People of reasonable opinions can and do take a different view as to whether one form of killing should be placed in the same or a different category from other forms of killing. Where the lines are to be drawn between the different categories is only in part a matter of legal reasoning. Ultimately, it is a matter of political judgment informed by public debate.

1.34 Accordingly, although in this paper we set out what at this stage is our preferred framework, we are keen to know what others think. In particular, if readers believe that there are other frameworks that are fairer, we would like to know what they are.

1.35 We summarise the framework that we are proposing. Then we consider two options for reform that we do not believe would solve the fundamental problem.

THE FRAMEWORK THAT WE ARE PROPOSING FOR A REFORMED LAW OF HOMICIDE[3]

1.36 The framework that we are provisionally proposing consists of three general homicide offences supplemented by specific offences:

(1) "first degree murder";

(2) "second degree murder";

(3) manslaughter; and

(4) specific homicide offences, such as assisting suicide.

"First degree murder"

1.37 "First degree murder" is confined to what we consider to be the most serious homicides: killings committed with an intention to kill. It would be irrelevant whether the killing was premeditated.

"Second degree murder"

1.38 "Second degree murder" encompasses the most serious homicides other than "first degree murder":

(1) unlawful killings where the offender's intention was to cause serious harm;

[3] For a more detailed discussion see Parts 1 and 2 of our full Consultation Paper.

(2) unlawful killings where the offender realised that his or her conduct involved an unjustified risk of causing death but went ahead anyway ("reckless indifference"); and

(3) unlawful killings that, because they are committed with an intention to kill, would ordinarily be murder but are instead "second degree murder" because the offender has a partial defence, namely provocation, diminished responsibility or duress.

Manslaughter

1.39 Manslaughter comprises unlawful killings where the offender:

(1) kills another person through conduct that was grossly negligent; or

(2) kills another person by doing an act intending to cause, or realising that it might cause, harm provided that the act itself constitutes a criminal offence.

OPTIONS FOR REFORM THAT WE ARE NOT PURSUING

Creating one homicide offence[4]

1.40 There have been calls for abolition of the offence of murder. Advocates of abolition would replace murder and all forms of manslaughter with a single offence of "criminal homicide" or "unlawful homicide", the sentence for which would depend on the circumstances of each case. All those who killed unlawfully would be guilty of the same offence and would bear the same label.

1.41 Supporters of this proposal can point to certain advantages. One is that the extremely complex and unsatisfactory body of law surrounding the partial defences of provocation and diminished responsibility would disappear.

1.42 Further, introducing a single offence of criminal homicide, while simultaneously abolishing the partial defence of provocation, would go some way to eliminating the "victim blaming" strategy encouraged by some aspects of the current structure. An accused's natural desire to secure a conviction for manslaughter on the grounds that the victim provoked him or her to kill can only serve to encourage the accused to blame the victim in part for what occurred. This can be extremely distressing for the victim's family.

1.43 Because we are required to assume the continued existence of the mandatory life sentence, our terms of reference do not permit us to propose the creation of a single offence of criminal homicide, the sentence for which would depend on the seriousness of the particular homicide. However, even if it were open to us to do so, we would not make such a proposal for the following reasons.

[4] For a more detailed discussion see Part 2 of our full Consultation Paper.

1.44 First, the proponents of a single offence of criminal homicide accept that causing death is sufficient justification for the creation of a distinct homicide offence worthy of special categorisation in order to distinguish it from other offences against the person that do not result in death.

1.45 However, the circumstances in which people are killed unlawfully vary enormously, not least the state of mind of the killer. We believe that there is a need for different offences to reflect the different circumstances in which killings are perpetrated and, in particular, the fact that the culpability of those who kill unlawfully is not uniform. For example, the "contract" killer and the grossly negligent surgeon both kill unlawfully but with different levels of culpability. In other words, a person's culpability should go towards not merely how he or she is sentenced but also to how he or she is labelled.

1.46 Secondly, murder is a crime that is centred on intentional or deliberate killing, although it has never been confined to such cases. As such, it is connected with the core ideal that is at the heart of the view that life is sacrosanct. There is not universal agreement as to what is meant by the expression "sanctity of life". However, the underlying belief is that intentionally to kill another person is wrong. A person who intentionally kills another has committed a wrong that is qualitatively different from a person who unintentionally but culpably kills another person.

1.47 Thirdly, the advantages of a single offence, while real, should not be exaggerated. Issues that currently surface at the trial stage would emerge at the sentencing stage with the accused seeking to persuade the judge that a lower sentence should be passed because, for example, of provocation by the victim.

Re-aligning murder and manslaughter

1.48 It might be thought that the fundamental problem could be resolved by re-aligning the divide between murder and manslaughter. In other words, the least serious cases of murder would become manslaughter while the worst cases of manslaughter would become murder.

1.49 We do not believe that re-alignment alone would be a solution. The two offences between them would still have to accommodate almost all the unlawful conduct that causes the death of a human being. It would not be conducive to accurate grading and labelling.

1.50 That is not to say that the labels murder and manslaughter should be discarded. We have already observed that the label "murder" performs a valuable and essential function to the extent that it designates the deliberate killing of innocent victims. However, a law of homicide that remained wedded solely to the two existing general homicide offences would represent at best a marginal improvement.

THE STRUCTURE OF THIS PAPER

1.51 In Part 2 we summarise the current law of murder, including the defences to murder. In Part 3 we set out the current sentencing regimes for murder and manslaughter. We do so, in part, because we believe that there is considerable public misunderstanding of how those convicted of murder or manslaughter are sentenced. In Part 4 we highlight the major defects of the current law and in Part 5 we set out and explain our proposals for reform. In Part 6 we set out our provisional proposals along with questions for consultees.

PART 2
THE CURRENT LAW OF HOMICIDE

INTRODUCTION

2.1 The structure of the law of homicide in England and Wales centres on two broad ranging homicide offences: murder and manslaughter.

2.2 There are a number of other specific homicide offences including infanticide; causing the non-accidental death of a child or vulnerable adult; assisting or encouraging another person to commit suicide; causing death by dangerous driving; and causing death by careless driving when under the influence of drink or drugs. Other than the offence of assisting or encouraging another person to commit suicide, we will not be addressing these offences in this paper.

MURDER

2.3 As we explained in Part 1, a person can commit murder without intending to kill. Murder requires proof of an intention to kill or an intention to cause grievous (serious) bodily harm. Accordingly, subject to any available defences, a person is guilty of murder if he or she unlawfully causes the death of another person intending to kill or to cause serious bodily harm.

2.4 A person does not unlawfully cause death if he or she has a justification for doing so. The killing of another person, even if intentional, in defence of one's self or another is justified provided that:

(1) there was an honest, even if mistaken, belief that there was a need to resort to force; and

(2) the degree of force used was reasonable in the circumstances as the defendant believed them to be.

Whether the degree of force was reasonable is for the jury to decide. A jury can conclude that the force employed was unreasonable even though the defendant honestly believed that it was proportionate to the threat he or she faced.

The meaning of "intention"[1]

2.5 A person intends a consequence if he or she acts in order to bring it about. The "contract" killer who kills for gain intends the death of the victim. So too does the devoted husband who kills his terminally ill wife in order to end her suffering. The motives of the "contract" killer and the husband are very different but each acts with the purpose of bringing about the victim's death.

2.6 Sometimes, however, a person does something not in order to cause death or serious harm but nonetheless realising that death or serious harm will or might occur:

[1] For a more detailed discussion see Part 4 of our full Consultation Paper.

Example 2A

D owns a vessel. D plants a bomb on board intending that it should explode in mid ocean. The bomb explodes killing all the crew. D says that he or she acted not with the purpose of causing death but in order to claim the vessel's insurance value.

If the jury concludes, as it almost certainly would, that D foresaw that death or serious injury was a "virtually certain" consequence of planting the bomb, they are *entitled* to find that D "intended" to cause death or serious harm.

2.7 However, the courts have held that while a finding by the jury that D foresaw death or serious harm as a "virtual certainty" entitles them to find that D "intended" to kill or cause serious harm, it does not compel them to do so. The advantage of this approach is said to be that it gives the jury "moral elbow room". It enables them to avoid convicting D of murder, as opposed to manslaughter, in cases where they believe that it would be morally repugnant to do so despite D having foreseen that death or serious injury was a virtual certainty:

Example 2B

D works with chemicals on a site. D is aware that anybody coming into direct contact with the chemicals will inevitably suffer serious burns. Before finishing work each day, D ensures that the chemicals are secured. D does so because D knows that children play on the site after D finishes work. One day D's employer telephones and orders D to leave the site immediately and go to another site where there is an emergency. D says that the chemicals will need to be secured but D's employer says that D must leave the site at once. Reluctantly, D leaves the chemicals exposed knowing that it is virtually certain that a child will touch the chemicals and suffer serious burns. V, a child aged 15, touches the chemicals and suffers serious burns from which he dies.

As the law stands, it is open to the jury to decline to find that D "intended" to cause serious harm even if they find that D believed that it was "virtually certain" that serious harm would result.

The meaning of "grievous" (serious) bodily harm[2]

2.8 The House of Lords has held that "grievous" bodily harm should be given its "ordinary and natural meaning" namely "really serious harm". What amounts to "really serious harm" is a question of fact for the jury to determine. Crucially, harm can be "really serious harm" even if it is harm that is not obviously life-threatening.

[2] For a more detailed discussion see Part 3 of our full Consultation Paper

2.9 Therefore, if the jury find that the defendant intended to break the victim's arm and they also find, as they are entitled to, that a broken arm is "really serious harm", then it follows that the defendant intended to inflict grievous bodily harm regardless of whether or not he or she viewed the harm as "really serious". If the broken arm "caused" the victim's death, perhaps due to medical complications during the operation to set the fracture or due to the operation being performed negligently, the defendant is guilty of murder.

2.10 What is "really serious harm" is also a contextual question. Harm inflicted on a child or a frail elderly person could be really serious harm even if it would not be considered really serious if inflicted on a healthy adult.

"Causing" death

2.11 In order to be guilty of murder, the defendant must have "caused" the victim's death. A person can "cause" the death of another even if his or her conduct is not the sole or even the main cause of the death provided that it is not an insignificant cause.

2.12 The fact that the defendant's act need not be the sole or main cause of the victim's death is particularly important in cases where the victim dies through a combination of harm inflicted by the defendant followed by inadequate medical treatment:

Example 2C

D, intending to cause V serious harm, stabs V. The injury is serious but, if properly treated, is unlikely to prove fatal. However, the medical treatment that V receives exacerbates the injury and V dies.

The courts have been reluctant to hold that an unusual and unexpected turn of events, including negligent medical treatment of the victim, is capable of breaking the chain of causation between the defendant's infliction of harm and the victim's death. Only in cases where there the third party's act is deliberate and needless will the courts hold that the act is capable of breaking the chain of causation between the defendant's act and the death of the victim.

Killing a third party to preserve one's own or another's life (duress)[3]

2.13 Self-defence is where D kills T in response to a threat of serious violence from T towards either D or a third party for whose safety D reasonably feels responsible. By contrast, duress is where T threatens serious violence to D or members of D's family unless D kills or seriously injures V:

Example 2D

T, armed with a shotgun, bursts into D's home. He threatens to kill D's wife and children unless D kills V. D, terrified for the safety of his wife and children, kills V.

[3] For a more detailed discussion see Part 7 of our full Consultation Paper.

D is guilty of murder. The law does not recognise duress as a defence to murder (or attempted murder) although it is capable of being a defence to all other offences.

MANSLAUGHTER

2.14 At one time all unlawful homicides that were not murder were manslaughter. Nowadays some unlawful homicides that are not murder are classified as particular homicide offences on account of the manner or the circumstances in which they are committed, for example causing death by dangerous driving. Nonetheless, manslaughter still encompasses the majority of unlawful homicides that are not murder. It is customary to divide manslaughter into two main types: "involuntary" and "voluntary".

2.15 Voluntary manslaughter refers to those killings committed with an intention to kill or to cause serious harm but where there is a legally recognised partial excuse that reduces what would otherwise be murder to manslaughter. By contrast, involuntary manslaughter refers to killings committed without an intention to kill or to cause serious harm but where the perpetrator has nevertheless acted in a manner that the law considers sufficiently blameworthy to merit a conviction for manslaughter.

Involuntary manslaughter

2.16 This type of manslaughter can take one of three forms depending on the nature of the blameworthy conduct.

Reckless manslaughter

2.17 A person who, without intending to kill or cause grievous bodily harm, does something which he or she knows or believes involves a significant and unjustified risk of causing death or *serious* harm, is guilty of involuntary manslaughter if death ensues:

Example 2E

D lifts a large piece of concrete on to the parapet of a bridge over a busy road. D waits until a car is approaching the bridge and then pushes the piece of concrete off the parapet. It crushes to death one of the occupants of the car. D says that his purpose was simply to cause the occupants of the car a severe fright. He admits, however, that he foresaw the risk that someone might die as a result of his or her action.

D is guilty of involuntary manslaughter because D foresaw the risk of death (or serious harm). As we have seen, if D had foreseen that it was "virtually certain" that someone would suffer death or serious harm, a jury would be entitled to find that D "intended" death or serious harm and to convict D of murder.

2.18 Reckless manslaughter is the most serious form of involuntary manslaughter. This is because the offender, although not intending to cause death or serious harm, is aware that there is an unjustified risk of death or serious harm and is prepared to and does take that risk.

Unlawful and dangerous act manslaughter

2.19 A person is guilty of involuntary manslaughter if he or she commits a crime and in the course of committing the crime causes the death of another person by an act that was objectively dangerous. An act is objectively dangerous if a reasonable person would realise that there was a risk of *some* harm resulting from it. However, the harm need not be serious:

Example 2F

D and V are neighbours who are constantly arguing about the fence that divides their front gardens. One Sunday they start arguing and D punches V. The punch would normally have caused a bruise but no more. However, as a result of the punch V suffers a fine fissure fracture of the skull, which tears an artery causing a fatal haemorrhage. The post mortem reveals that V's skull was extremely thin.

D has committed a crime by assaulting V; the act is dangerous because there is always a risk of some harm occurring as a result of a punch to the face; and the act "caused" V's death because the defendant has to take the victim as he or she finds the victim. D is guilty of manslaughter even though D did not foresee, and no reasonable person could have foreseen, that V would die from the punch.

Gross negligence manslaughter

2.20 A person is guilty of involuntary manslaughter if he or she causes death by an act of "gross negligence". A person causes death by an act of gross negligence if he or she breaches a duty of care owed to the deceased, the breach causes the deceased's death and the breach came about through gross negligence. Examples of a duty of care include the duty parents have to protect their children, the duty of doctors and surgeons to care for their patients and the duty police officers have to ensure the safety of persons they have arrested.

2.21 Importantly, the gross negligence must relate to the risk of death occurring, not just to the risk of harm, even serious harm, occurring. The question that the jury must ask is whether, having regard to the risk of death involved, the conduct of the accused was in all the circumstances so bad as to amount to a criminal act.

Voluntary manslaughter

2.22 "Voluntary manslaughter" is conceptually very different from involuntary manslaughter. It is committed when a person commits murder but has mitigating reasons for doing so which to some extent excuse the killing, making a conviction for murder inappropriate. The law recognises three types of mitigating circumstances. They are provocation, diminished responsibility and killing after entering into a suicide pact. These partial defences reduce what would otherwise be murder to manslaughter. It is not uncommon for a defendant to plead both provocation and diminished responsibility together.

Provocation[4]

2.23 Provocation is a partial defence that originated in medieval times. It is a prerequisite of this partial defence that the accused killed having been provoked, not necessarily by the victim, to suddenly and temporarily lose his or her self-control. However, loss of self-control is not in itself sufficient. The jury must also be satisfied that the provocation was such that a reasonable person might have acted as the accused did:

Example 2G

V, an alcoholic and drug addict, is released from prison. As he is homeless, he asks his brother, D, if he can stay with D and D's family for a few weeks. D agrees. V starts to drink heavily and to take drugs. V's drug-dealing friends start coming to D's home and both they and V offer drugs to D's children. D becomes fearful of V's presence and begs V to leave. V laughs and says that he has no intention of leaving. D picks up a knife from the kitchen and inflicts a stab wound from which V dies.

If the jury find that, in response to V's behaviour, D suddenly and temporarily lost self-control and that a reasonable person might have reacted as D did, D is guilty of manslaughter by reason of provocation.

Diminished responsibility[5]

2.24 The defence of diminished responsibility was created by Parliament in 1957. It is meant to provide a means whereby those suffering from a serious mental disorder or disability, falling short of insanity, can be convicted of manslaughter rather than murder. In recent years the number pleading the defence has declined. Research undertaken by Professor Barry Mitchell suggests that the public broadly support humane treatment for those who kill while labouring under serious mental abnormality provided that the public is adequately protected from serious harm from the offender in the future.

2.25 In order to establish the defence, the accused must prove on a balance of probabilities that at the time of committing the offence, he or she was suffering from an abnormality of mind, arising from certain stipulated causes, which substantially impaired his or her mental responsibility for the killing. Whether the abnormality of mind did substantially impair the defendant's mental responsibility for the killing is a question solely for the jury. In practice, however, psychiatrists, giving expert evidence, frequently "tell" the jury the answer to this question.

2.26 In order to discharge the burden of proving diminished responsibility, the defendant must provide medical evidence of mental abnormality. In practice, the prosecution accepts many pleas of diminished responsibility once medical evidence has been provided.

[4] For a more detailed discussion see Part 6 of our full Consultation Paper.

[5] For a more detailed discussion see Part 6 of our full Consultation Paper.

2.27 "Abnormality of mind" is not a psychiatric concept. The courts have developed its meaning and it includes schizophrenia, psychosis, psychopathy, depression and post-traumatic stress disorder. Accordingly, persons who might plead the defence include:

(1) a mentally sub-normal boy cajoled by a dominating elder brother into taking part in a murder;

(2) a woman physically and mentally abused by her partner over many years;

(3) a severely depressed husband who after many years finally gives in to his terminally ill wife's demands that he put her out of her misery; and

(4) a highly dangerous psychopath who finds it difficult, if not impossible, to control perverted sexual desires.

2.28 Following a successful plea, a judge has a full range of sentences at his or her disposal ranging from imprisonment for life, an order that the offender be detained in hospital without limit of time, a determinate custodial sentence or a non-custodial sentence.

2.29 In many cases the judge will want to pass a sentence that will enable the offender to receive appropriate treatment while ensuring that the public are protected from serious harm from the offender in the future. This can be achieved by making a hospital order without limitation of time. The offender will receive treatment in a secure hospital and will be discharged only if a Mental Health Review Tribunal is satisfied that it is safe to do so.

2.30 Research conducted by Professor Ronnie Mackay found that in 126 cases of diminished responsibility between 1997 and 2001 a hospital order without limitation of time was made in 49.2% of the cases.

Suicide pacts[6]

2.31 A suicide pact is an agreement between two or more persons which has as its object the death of both or all of them, irrespective of whether each is to take their own life.

2.32 A party to the pact who kills another party to it is guilty of manslaughter and not murder provided he or she proves that, at the time of entering into the pact, it was his or her intention to die pursuant to the pact. The reason why the defendant subsequently fails to kill him or herself is not relevant, so long as he or she proves that at the time of entering into the pact it was his or her *genuine* intention to commit suicide.

2.33 The defence is unique in that it relies for its legitimacy, in part, on the fact that the victim consents to dying. It is the only instance of intentional killing where the victim's consent is a relevant consideration.

[6] For a more detailed discussion see Part 8 of our full Consultation Paper.

ASSISTING SUICIDE[7]

2.34 It is not an offence to attempt to commit suicide. However, section 2 of the Suicide Act 1961 created a specific offence of assisting or encouraging another person to commit suicide punishable by a maximum term of imprisonment of 14 years. The motive for assisting a person to commit suicide is irrelevant.

2.35 In the context of suicide pacts, the difference between killing a person on the one hand and assisting another person to die is important:

Example 2H

V and D are both seriously ill and both want to die. They enter into a suicide pact. D hands a gun to V and V shoots herself dying instantly. D takes the gun and fires at himself but the gun jams. D is arrested before he can make a further attempt to kill himself.

D is guilty of the offence of assisting V to commit suicide punishable by a maximum term of imprisonment of 14 years.

2.36 However, if D, instead of handing the gun to V, had shot V, he would be guilty of manslaughter punishable by a term of imprisonment for life. In that instance, D is guilty of manslaughter because, by firing the gun at V, he actually killed V. By contrast, in example 2H, it is V who, with D's assistance, kills herself.

[7] For a more detailed discussion see Part 8 of our full Consultation Paper.

PART 3
THE SENTENCING REGIMES FOR MURDER AND MANSLAUGHTER[1]

INTRODUCTION

3.1 In our review, we are not considering the sentencing of those who commit homicide. However, it is important to understand the principles that presently govern how those convicted of murder or manslaughter are sentenced.

3.2 Murder is the most serious of the homicide offences. A conviction for murder always attracts a mandatory life sentence. By contrast, a conviction for manslaughter only attracts a mandatory life sentence in very limited circumstances. If those circumstances are not present, the sentence for manslaughter can range from life imprisonment to a non-custodial sentence depending on the seriousness of the offence.

MURDER

3.3 Before 1957 the death penalty was the mandatory sentence for murder although it was quite common for it to be commuted to life imprisonment. The Homicide Act 1957 substantially narrowed the scope of the death penalty for murder and in 1965 Parliament abolished it entirely for murder. Instead, there was to be a mandatory life sentence.

Structure of the mandatory life sentence

3.4 The "life" in life sentence is frequently misunderstood. A mandatory life sentence does not mean that a convicted murderer will necessarily spend the rest of his or her life in prison. The sentence comprises three periods:

(1) the minimum term (or "tariff") is the period of imprisonment that the offender must serve without any prospect of release. In setting its length, the court focuses on the "seriousness" of the murder in order to fix a period that is adequate for the punishment of the offender and the deterrence of others;

(2) upon the expiry of the minimum term the second period begins. In contrast to the minimum term, the purpose of the second period is not to punish the offender but to ensure that the public is protected. The period runs until the Parole Board is satisfied that that the offender can safely be released on licence. There is no guarantee, therefore, that the offender will be released, either immediately or at all, following the expiry of the minimum term;

[1] See also Part 1 of our full Consultation Paper.

(3) if the offender is released, the licence period begins. It runs until the offender's death. The licence is conditional and revocable. This means that the offender is liable to be recalled by administrative act to prison. This may happen if he or she commits another offence or if he or she fails to comply with the conditions of his or her release.

3.5 It is the combination of the minimum term and, upon release, the never-ending threat of recall to custody that sets the life sentence apart from other sentences. The offender whilst released from prison never completely regains his or her lost liberty and is never completely "freed".

Fixing the minimum term

3.6 Before December 2002 the Home Secretary fixed the minimum term. Following successful legal challenges, the practice changed. Instead, the Lord Chief Justice fixed the minimum term after considering the recommendation of the trial judge. In doing so, the Lord Chief Justice was guided by a Practice Direction that provided two starting points. In those cases where culpability was exceptionally high or the victim was particularly vulnerable the starting point was 15/16 years. In all other cases the starting point was 12 years.

3.7 This changed with the Criminal Justice Act 2003. Now the trial judge, in open court, fixes the minimum term, guided by a set of provisions that came into effect in December 2003. The provisions require the judge to adopt a two-stage approach.

"STARTING POINTS"

3.8 In cases where the offender was aged 18 or over when committing the offence, the judge begins by identifying the "starting point". This is done by reference to one of three starting points set down by Parliament. They are considerably higher than used to be the case:

(1) "whole life" is the starting point for murders of "exceptionally high seriousness" provided the offender was 21 or over when he or she committed the offence. Murders of a child with a sexual motive; murders to advance a political, religious or ideological cause; or premeditated multiple murders are examples of murders that will normally fall within this category;

(2) 30 years is the starting point for murders of "particularly high seriousness". The murder of a police or prison officer in the course of their duty; a murder involving a firearm or explosives; a murder committed for gain; or a "whole life" murder committed by someone under 21 but over 17 are examples of murders that will normally fall within this category;

(3) for all other murders, the starting point is 15 years, unless the offender was under 18 at the time of the offence, in which case the starting point is always 12 years.

AGGRAVATING AND MITIGATING FACTORS

3.9 Having chosen a starting point, the judge must consider whether there are any aggravating or mitigating features. Again, Parliament has provided examples of both aggravating and mitigating features. The Court of Appeal has emphasised that they are examples and that a judge is not rigidly bound by or restricted to them:

(1) aggravating features may include: a significant degree of planning or premeditation; the fact that the victim was particularly vulnerable; mental or physical suffering inflicted on the victim before death; the use of duress or threats against another person to facilitate the commission of the offence; and abuse of a position of trust;

(2) mitigating features may include: an intention to cause grievous bodily harm rather than to kill; lack of premeditation; the fact that the offender suffered from mental disorder or mental disability that lowered his or her culpability although not so as to amount to diminished responsibility; the fact that the offender was provoked although not amounting to a defence of provocation; acting to any extent in self-defence; a belief by the offender that the murder was an act of mercy; and the age of the offender. In addition, it is a general rule that a guilty plea provides mitigation, the earlier that it is indicated the more powerful the mitigation.

3.10 Where, as is often the case, there are both aggravating and mitigating features, the task of the judge is to balance all the relevant features and then adjust the starting point. It follows that the starting point can be adjusted upwards or downwards.

3.11 The minimum term set by the trial judge is open to challenge. Defendants can appeal on the basis that the term fixed is manifestly excessive or wrong in principle. The prosecution can refer a case to the Court of Appeal if it believes that the term fixed is unduly lenient.

MANSLAUGHTER

Introduction

3.12 Whereas life imprisonment is the mandatory sentence for murder, it is a discretionary maximum sentence in most cases of manslaughter. Since manslaughter can be committed with very different degrees of culpability, it is no surprise that it does not, subject to one important qualification, attract a mandatory life sentence. The sentence can be a discretionary life sentence, a hospital order, a determinate custodial sentence or even a non-custodial sentence.

The difference between a discretionary life sentence and a determinate custodial sentence

3.13 A determinate custodial sentence is one where the defendant is sentenced to a term of imprisonment the length of which is fixed at the time of sentence, for example 10 years. The length of the term of imprisonment depends on the seriousness of the offence taking into account any aggravating and mitigating factors.

3.14 Subject to good behaviour in prison, the offender must be released after serving one half of the sentence. Once released the offender is on licence. The licence is conditional and revocable but the licence period will not extend beyond the period of the original determinate sentence:

Example 3A

D pleads guilty to manslaughter. The sentence imposed is eight years' imprisonment.

D will be released after serving four years and the period of licence will end after a further four years.

3.15 A discretionary life sentence, like a mandatory life sentence, consists of three periods. As with a mandatory life sentence, the offender must serve a minimum term before he or she is eligible for release. At the conclusion of the minimum term, the offender will be released only if the Parole Board is satisfied that it is safe to do so. If released, the offender will remain on licence until he or she dies.

Deciding whether to impose a discretionary life sentence or a determinate custodial sentence

3.16 Assuming that the offender does not qualify for a hospital order, in the most serious cases of manslaughter the judge would appear to have a choice: impose a discretionary life sentence or impose a lengthy determinate custodial sentence. However, the Court of Appeal has held that a discretionary life sentence may only be imposed if certain criteria are satisfied, namely:

(1) the offence must be sufficiently grave to justify a very long custodial sentence; and

(2) there must be grounds for believing that the offender will remain a serious danger to the public for a period that cannot be estimated reliably at the date of sentence.

At the same time, the Court of Appeal has never held that a discretionary life sentence *must* be imposed if the criteria are satisfied.

3.17 Parliament, however, has said that there are two situations where the court must impose an indeterminate sentence for manslaughter (although in only one instance is the sentence referred to as a life sentence).

3.18 First, in cases where the offender is 18 or over, the court must impose a sentence of life imprisonment if the manslaughter is so serious that it merits a sentence of life imprisonment and the court believes that the defendant will pose a significant risk of serious harm to the public in the future.

3.19 Secondly, if the court believes that the manslaughter in itself is not serious enough to justify a sentence of life imprisonment but that nonetheless the defendant in the future will pose a significant risk of serious harm to the public, it must impose a sentence of imprisonment "for public protection". This sentence is, subject to one qualification that relates to the licence period, equivalent to a sentence of imprisonment for life.

3.20 Parliament's intention is clear. Persons convicted of manslaughter are not to be sentenced to a determinate sentence of imprisonment if they pose a significant risk of serious harm to the public in the future. This is because, were they to receive such a sentence, they would be *entitled* to be released after serving half the sentence even though they still posed a significant risk of serious harm to the public.

The difference between a life sentence for manslaughter and a life sentence for murder

3.21 The difference between a life sentence imposed for manslaughter and a life sentence imposed for murder is the length of the minimum term. There are no starting points of whole life, 30 or 15 years for those sentenced to life imprisonment for manslaughter. Instead, the court determines what the sentence would have been had a determinate term of imprisonment been imposed. However, the court recognises that were a determinate sentence being imposed, the defendant would be released after serving one half of the sentence. The court, therefore, fixes the minimum term by reducing what would have been the determinate sentence by one half:

Example 3B

D, a psychotic, kills V. D pleads guilty to manslaughter on the grounds of diminished responsibility. The judge is of the view that the offence is so serious that it merits a life sentence. In addition, the material before the judge is to the effect that, for the foreseeable future, D is likely to pose a significant risk of serious harm to the public. The defendant does not qualify for a hospital order because treatment will not alleviate or prevent a deterioration of his condition. The judge decides that were a determinate sentence being passed it would have been 14 years' imprisonment.

The Judge will fix the minimum term at seven years because that is the maximum period that would be served under a sentence of imprisonment of 14 years. This is the period that D must serve as punishment for the offence. After D has served seven years, the Parole Board will decide whether it is safe to release D into the community on licence. If released, D will remain on licence until he or she dies.

3.22 As a result, the minimum term of a life sentence imposed for murder is likely to be far greater than the minimum term of a life sentence imposed for manslaughter. Those convicted of murder will wait much longer before they are eligible for release compared to those sentenced to life imprisonment for manslaughter. This is right because the purpose of the minimum term is not the protection of the public but to punish the offender. Those guilty of murder generally merit greater punishment than those convicted of manslaughter.

3.23 However, a person convicted of manslaughter may pose a greater risk of serious harm to the public in the future than a person convicted of murder. It is for this reason that some offenders who are sentenced to life imprisonment for manslaughter may spend a longer period in prison than some offenders convicted of murder. Their release will depend on the Parole Board being satisfied that they no longer pose a serious risk to the public. It is perfectly conceivable that the dangerous psychopath in example 3B will spend a far longer period in prison than a person who is convicted of a murder that attracts a starting point of 15 years and has no aggravating features.

Mentally disordered offenders

Hospital Orders

3.24 A mentally disordered person who commits manslaughter may qualify for a hospital order. A court may make a hospital order if it is satisfied that:

(1) the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment;

(2) it is appropriate for the offender to be detained in a hospital for medical treatment;

(3) in the case of psychopathic disorder or mental impairment, treatment is likely to alleviate or prevent the deterioration of the condition; and

(4) the most suitable way of dealing with the defendant is by way of a hospital order.

The power to make hospital orders is particularly important in cases where the defendant has been convicted of manslaughter by reason of diminished responsibility.

3.25 In cases where the court is satisfied that it is necessary to do so in order to protect the public from serious harm, it may attach a restriction order to the hospital order. The terms of the restriction order will nearly always be that the offender be detained in the hospital without any limit of time. This means that the defendant will not be released until a Mental Health Review Tribunal is satisfied that he or she can safely be released.

3.26 The Court of Appeal has held that if the court has the power to make a hospital order with a restriction order and a hospital bed is available, it should as a general rule make such an order in preference to a discretionary sentence of life imprisonment.

3.27 We noted above (paragraphs 3.18-3.19) that Parliament has said that in two situations the court must impose a sentence of life imprisonment or a sentence of imprisonment for public protection. However, the relevant provisions do not prevent the court from making a hospital order with a restriction order attached provided the conditions for making the order are satisfied.

PART 4
THE DEFECTS OF THE CURRENT LAW

INTRODUCTION

4.1 In this Part we identify what we consider to be the major defects of the current law. As we explained in Part 1 we are not considering certain issues such as causation and justifications for killing. Accordingly, we do not in this Part consider the defects of those particular aspects of the law.

MURDER

The fault element of murder

4.2 A person who causes another's death is guilty of murder even though he or she intended to cause no more than serious harm. "Serious" harm as presently defined does not have to be life-threatening.

4.3 Accordingly, under the current law, a person can be guilty of murder although they did not and could not foresee, never mind intend, that their act would endanger life.

4.4 The current law does not represent what Parliament intended in 1957 when it passed the Homicide Act and it does not accord with what murder is popularly understood to mean.

4.5 We believe that the current law is unsatisfactory. It results in a conviction for murder, and the imposition of the mandatory sentence of life imprisonment, in cases where a person intended to cause serious harm but did not foresee and could not have foreseen that his or her actions threatened the life of the victim. In Part 5 we propose that there should be two grades of murder. The more serious, and the only one that would attract the mandatory sentence of life imprisonment, would be confined to those killings where the offender intended to kill.

The meaning of "serious" harm[1]

4.6 English law currently wavers between a "wide" view which holds that harm is "serious" if it seriously interferes with the health or comfort of the victim and the "ordinary meaning" view which holds that harm is "serious" if it is "really serious".

4.7 On either view, it is clear that harm does not have to be life-threatening in order to be "serious". However, other than that, the meaning of "serious" harm is both uncertain and ambiguous.

Defences to murder

4.8 Currently, the defences are a hotchpotch of uncertain and ever changing judge made law together with ageing statutory provision. There is little sense of purpose in the design.

[1] For a more detailed discussion see Part 3 of our full Consultation Paper.

The partial defences[2]

PROVOCATION

4.9 The defence has given rise to many difficulties. One example is the requirement that there must have been a sudden and temporary loss of self-control. This favours persons who have quick tempers over others with a slow-burning temperament. The problem becomes acute in cases where the defendant kills the victim after suffering serious physical, sexual and emotional abuse from the victim over a period of time, sometimes years.

4.10 In these cases it may be difficult for the defendant to maintain that he or she killed as the result of a sudden and temporary loss of self-control. Rather, the killing may be a considered response to the "cumulative provocation". The defendant kills not out of revenge but because of fear of suffering further abuse. The courts have responded by extending the concept of sudden and temporary loss of self-control to include "slow-burn" cases but at the cost of making the concept of loss of self-control less clear.

4.11 Provocation is also an example of the continuing uncertainty in the law of murder. Although the essential ingredients of the offence of murder were settled by the end of the seventeenth century, the exact scope of the partial defence is a matter of controversy. The two highest judicial bodies in the land, the House of Lords and the Privy Council, have disagreed over a key element of the defence.

4.12 The key element is whether all, or only some, of an individual's characteristics should be taken into account when judging whether his or her reaction to provocation might have been the reaction of a reasonable person. For example, is the fact that the defendant is obsessively jealous a characteristic to be taken into account when deciding how the reasonable person might have reacted on learning that their partner had been unfaithful? That such a fundamental issue is still a source of disagreement reflects badly on the current law.

4.13 Further, defendants can avail themselves of the partial defence in unmeritorious circumstances. A judge is obliged to leave the partial defence for the jury to consider even when the evidence that the defendant was provoked is unpersuasive and even if the defendant has not sought to run the partial defence.

DIMINISHED RESPONSIBILITY

4.14 The partial defence of diminished responsibility was considered a welcome reform when Parliament introduced it in 1957. However, from the outset there were concerns about the way this partial defence was defined and recent advances in medical science have increased those concerns. It is questionable whether the current definition reflects current medical thinking.

4.15 A particular problem is that for the plea to succeed the offender's abnormality of mind has to be attributable to a specified cause:

(1) a condition of arrested or retarded development of mind;

[2] For a more detailed discussion see Part 6 of our full Consultation Paper.

(2) inherent causes; or

(3) induced by disease or injury.

4.16 Parliament's reason for imposing this limitation on the defence was a belief that it was necessary to do so in order to ensure that offenders should not be able to successfully plead this partial defence on the basis of temporary emotional stresses and strains such as grief, jealousy, frustration or anger.

4.17 If strictly applied, this stipulation might prevent deserving defendants relying on the partial defence because they have the wrong sort of mental disorder. Moreover, the causes stipulated by Parliament have no defined or agreed psychiatric meaning and so doctors may disagree on the cause of an abnormality of mind. This may confuse a jury at trial.

4.18 One study found that it was not uncommon for medical reports to make no reference to the cause of the abnormality of mind. We find this understandable. If the offender was suffering from an abnormality of mind, it can be argued that it ought not to matter exactly what the cause was so long as the medical evidence establishes that it was an abnormality that substantially impaired "responsibility" for his or her actions.

4.19 A particular problem relates to long term carers who accede to the request of their terminally ill partners to kill them. If a carer kills a terminally ill partner in pursuance of a suicide pact, the carer is able to secure a conviction of manslaughter by virtue of the defence of killing after entering into a suicide pact. Where there is no suicide pact, what in practice happens is that the carer pleads diminished responsibility on the basis of reactive depression arising from the strain of looking after their partner. The difficulty is that reactive depression does not easily fit with the requirement that an abnormality of mind must stem from one of the stipulated causes. However, that problem is frequently "swept under the carpet" in order to ensure that the carer is convicted of manslaughter and not murder.

Diminished responsibility and children

4.20 Those aged under 18 are responsible for, on average, around 30 of the 850 or so homicides committed in any given year. At present the vast majority of children convicted of murder serve a minimum of 10 years in prison before being released on licence.

4.21 The defence of diminished responsibility is designed with adults in mind. It makes no allowance for "normal" developmental immaturity of a child or young person.

4.22 It can be hard to distinguish normal developmental immaturity from an abnormality of mental functioning. It is quite possible for both to be factors in a killing committed by a child. If this is so, then it is arguable that an important omission from the current definition of diminished responsibility is any reference to "developmental immaturity".

KILLING AFTER ENTERING INTO A SUICIDE PACT[3]

4.23 In introducing this defence in 1957, Parliament was reflecting the pity felt for those desperate enough to seek to take their own life along with that of another person. Instead of being convicted of murder, they would be convicted of manslaughter.

4.24 There are problems with the defence. First, it relies for its legitimacy, in part, on an understanding by the victim that the offender will commit suicide. That understanding, however, has no moral force. It rests on a promise by the offender to commit suicide: a promise and an act with no intrinsic moral value. The pact's existence cannot change the murderous nature of D's act in killing V. Therefore, the defence is really a limited exception to the rule that the consent of the victim is no defence to murder.

4.25 Secondly, the defence is arbitrary:

Example 4A

For many months D has cared for V, his terminally ill wife. V constantly begs D to kill her. Finally, in a state of mental turmoil, D succumbs and does so. D knows that life will be unbearable without V and he intends to kill himself after he has killed V. However, D does not tell V of his intention because he knows that V wants him to have some sort of life after she has gone. Having killed her, D tries to commit suicide but fails. D is charged with V's murder.

The partial defence is not available to D because the defence is confined to those who agree in advance, rather than just decide in advance, to end their own lives after ending the life of their consenting partner.

4.26 In fact, it is unlikely that D will be convicted of murder. D will plead diminished responsibility and thereby secure a conviction for manslaughter. However, as we observed at paragraph 4.19, this is only achieved by sweeping awkward legal issues under the carpet.

4.27 Thirdly, the partial defence covers cases that it ought not to:

Example 4B

D and V are terrorists involved in a shoot-out with the police. Eventually they realise that capture is inevitable. D and V agree that D will shoot V and then detonate a bomb killing him or herself and as many police officers as possible. D kills V but the bomb fails to detonate. D is arrested.

We do not believe that Parliament envisaged that the partial defence should apply in this situation. The example demonstrates that the consent of the victim is a very "thin" basis for reducing murder to manslaughter.

[3] For a more detailed discussion see Part 8 of our full Consultation Paper.

Defences to murder that are not available

4.28 In this section we consider excuses for committing murder that the law currently refuses to recognise as either complete or partial defences to murder. As we explained in Part 1, the judiciary has been reluctant to create new defences preferring to leave it to Parliament to act.

Duress[4]

4.29 Duress is a defence to all offences other than murder and attempted murder (and possibly treason). There are two forms of the defence: duress by threats and duress of circumstances.

4.30 Duress by threats is by far the more common form. It is where a person is threatened with death or serious harm if he or she does not commit an offence. The threat of death or serious harm can relate to a person for whom the threatened person has responsibility, for example his or her spouse and children.

4.31 The main argument advanced for not extending the defence of duress to murder and attempted murder is that the law should not recognise that any one person has the right to choose that one innocent person should die at the expense of another. It is thought that the person who is threatened with death should make a heroic sacrifice.

4.32 The contrary argument is that, while heroism is a quality to be praised, it does not follow that its absence should be deemed inexcusable. In relation to other offences, duress operates as a complete defence. The courts have not been prepared to countenance duress as a defence to murder possibly because it is thought that a person who intentionally kills under duress should not be completely excused. This overlooks the fact that, in the context of homicide, duress could, like provocation and diminished responsibility, operate as a partial defence reducing murder to manslaughter.

4.33 The current law is too rigid, potentially unfair and can result in anomalies:

Example 4C

T, a psychotic father, threatens his 15 year-old-son, D, with death unless D participates in the murder of V. D holds V down while T slits V's throat. V dies.

Example 4D

T threatens to kill D's wife and children unless D "kneecaps" V. D does so. D is charged with causing grievous bodily harm with intent, an offence punishable by a maximum term of life imprisonment.

[4] For a more detailed discussion see Part 7 of our full Consultation Paper.

In example 4C, D is guilty of murder even though T may be convicted of manslaughter on the grounds of diminished responsibility. Some might think that this is not right.

4.34 In example 4D, D is not guilty of causing grievous bodily harm with intent because duress is a complete defence to that offence. However, if V were to die because of a delay in receiving medical treatment, D would be guilty of murder. Again, some might think that this is not right.

The use of unreasonable force in self-defence[5]

4.35 The law governing the use of defensive force that is intended to kill or cause serious harm illustrates the lack of coherence in the overall design of defences to murder.

4.36 Self-defence if successfully pleaded is a defence to murder resulting in a complete acquittal. However, for the defendant successfully to raise the defence, he or she must have used no more than reasonable force. If a jury finds that the force used was unreasonable the defence fails and the defendant is guilty of murder. There is no legal "halfway house" for those who over-react, even if they do so in the face of serious unlawful violence.

4.37 This emphasises the lack of coherence in the law. If a plea of provocation can reduce murder to manslaughter, it ought to be possible to reach this result when a jury decides that there has been an excessive reaction to a threat of serious unlawful violence. In our report Partial Defences to Murder we recommended that the partial defence of provocation should be reshaped to include cases where the offender acted in response to fear of serious violence to him or herself or another.

MANSLAUGHTER

4.38 There are two reasons why the current law is unsatisfactory. First, the only feature common to both involuntary and voluntary manslaughter is that the offender causes the death of another person. The fault element of each could hardly be more different. In cases of involuntary manslaughter the offender does not intend to kill or cause serious harm. By contrast, in cases of voluntary manslaughter the defendant intends to kill or cause serious harm but seeks to rely on an excuse, for example provocation or diminished responsibility.

4.39 Secondly, involuntary manslaughter grades and labels together three forms of unlawful killing, each reflecting a level of criminality far removed from the other two forms.

4.40 For example, a person who commits reckless manslaughter because he or she foresaw a significant and unjustified risk of causing death or serious harm is highly culpable (example 1A, page 6). By contrast, a person can be guilty of unlawful and dangerous act manslaughter in circumstances where he or she only foresaw the causing of minor harm or even no harm at all (example 1B, page 6).

[5] For a more detailed discussion see Part 6 of our full Consultation Paper.

4.41 It is inappropriate that the same offence and the same label should apply to death resulting from behaviour that is little short of murder on the one hand and little more than an accident on the other hand. It presents problems both for judges who have difficulty in determining the appropriate sentence for an offence that is so widely defined and for the public in understanding why, in any given case, the judge imposed the particular sentence.

PART 5
A NEW FRAMEWORK FOR THE LAW OF HOMICIDE

INTRODUCTION

5.1 In Part 1 we said that the fundamental weakness of the law of homicide is that its structure is not designed to ensure that different levels of criminality are accurately graded and labelled. In this Part we set out and explain the framework that we are provisionally proposing for grading and labelling homicide offences.

Grading offences[1]

5.2 The process of grading offences is not easy. There are three factors that can influence the way that offences are graded:

(1) the offender's state of mind at the time of committing the offence ("the fault element");

(2) aggravating factors; and

(3) mitigating factors.

English law places particular emphasis on the fault element.

Aggravating factors

5.3 In some jurisdictions, what are considered to be aggravating features exert considerable influence over the way offences are graded. For example, in some States of the USA, the killing of a police officer on duty elevates the killing into a more serious category than other categories of homicide. By contrast, in England and Wales aggravating features go to sentence, in particular influencing the "starting point" of the minimum term that the offender must serve in prison following conviction for murder.

Fault element

5.4 Grading offences with reference to the fault element involves the application of two principles. The first is that, in determining different levels of criminality, it is the offender's state of mind when committing the offence that matters. The law has developed different concepts to assist in this process, for example intention, recklessness and gross negligence.

5.5 The second principle is that focusing on the offender's state of mind is important but not enough. It is necessary to relate the offender's state of mind to the harm done. In cases of homicide, the harm is the killing of a human being.

5.6 Applying both principles involves asking:

[1] For a more detailed discussion see Part 2 of our full Consultation Paper.

(1) whether an assault that was intended to kill represents a different level of criminality from an assault intended to cause serious but not fatal injury;

(2) whether acting recklessly, that is doing something that one foresees as involving a risk of death, is on a lesser or higher level of criminality than intending to cause serious but not fatal harm;

(3) whether *intending* to cause *minor* harm manifests the same level of criminality as acting in the belief that one's conduct *might* cause *serious* harm.

These are just examples.

THE PROPOSED FRAMEWORK[2]

5.7 The framework that we are provisionally proposing comprises three general homicide offences supplemented by specific offences:

(1) "first degree murder" (mandatory life sentence);

(2) "second degree murder" (discretionary life sentence);

(3) manslaughter; (fixed term of years sentence) and

(4) specific homicide offences, such as assisting suicide and infanticide (fixed term of years sentence).

5.8 Some people might prefer to see a greater number of general categories of homicide. However, the need to grade accurately different homicides must be balanced against the need to keep the options before the jury simple. Murder trials often involve a number of different defendants all running different, either inter-dependent or conflicting claims and defences in the alternative. There is also a danger that sub-dividing murder or manslaughter too many times will debase the currency of these terms.

"FIRST DEGREE MURDER"

5.9 The foundation on which our proposed framework rests is that the most serious offence within the framework, and the only one that should attract the mandatory life sentence, should be confined to cases where the offender intended to kill. We provisionally propose the label "first degree murder" for this offence in order to reflect the seriousness of the offence and the high level of criminality involved in its commission. (As will become apparent, we are provisionally proposing that other forms of killing that are currently classified as murder should be classified as "second degree murder").

[2] For more detailed discussion see generally Parts 1 – 3 of our full Consultation Paper, particularly Part 3.

The scope of "first degree murder"

Intentional killing[3]

5.10 In Part 1 we referred to the connection between murder and the view that life is sacrosanct. For two reasons, we believe that this connection is best expressed through the creation of an offence that is confined to homicides where it was the offender's intention to kill. (In referring to "intention to kill" we include cases where the victim's death was integral to what the defendant intended to achieve, even though it was not the motive for his or her conduct. An example is the person who plants a bomb on a vessel, timed to explode in mid ocean, in order to make an insurance claim. The "virtual certainty" test is a way of testing whether the victim's death was within what the defendant can be regarded as having intended).

5.11 First, as a general rule, the culpability of a person who intentionally kills is significantly greater than that of a person who kills without intending to kill. Killing in a state of mind that does not intend the consequence that marks out homicide should not attract a mandatory life sentence.

5.12 We are strengthened in this view by the guidance that Parliament has given in relation to the minimum term of the mandatory life sentence. Parliament has expressly stated that an intention merely to cause serious harm is a mitigating factor to be taken into account after arriving at the "starting point". In doing so, Parliament has acknowledged that as a general rule an intention to cause serious harm is less culpable than an intention to kill.

5.13 Secondly, research conducted by Professor Barry Mitchell indicates a very high level of agreement amongst the public that as a general rule the presence of an intention to kill renders a homicide especially serious in comparison to other homicides, including those where there is an intention to cause serious harm. This is a strong but not conclusive argument for creating an offence confined to intentional killing which, in terms of seriousness, is graded above all others and attracts a unique sentence.

5.14 We envisage two main objections to our provisional proposal. First, some may say that limiting "first degree murder" to intentional killings is too restrictive because it excludes cases where the defendant realised that it was "highly probable", but not "virtually certain", that his or her conduct would result in another's death.

5.15 In our provisional view, "first degree murder" should be confined to those cases where the victim's death was integral to what the offender set out to achieve and should not include cases where there was merely a risk of it happening. Taking a risk, even a high risk, of killing someone is recklessness and is very serious but it is not the same as the deliberate taking of life. Accordingly, we do not believe that "first degree murder" should encompass cases where the offender believes that it is "highly probable" that death will occur.

[3] For detailed discussion of the meaning of "intention" see Part 4 our full Consultation Paper.

5.16 The second objection that may be made to our provisional proposal is that in some cases it will be difficult to prove that there was an intention to kill. We do not accept, however, that this weakens the case for confining "first degree murder" to cases where there is an intention to kill. The moral case for confining "first degree murder" to killings where the defendant intended to kill, together with public support for treating such killings as more serious than others, outweighs any practical difficulties in proving an intention to kill.

5.17 Further, under the current law the prosecution has to prove an intention to kill where the offence charged is *attempted* murder. There are around 80 convictions each year for attempted murder. This suggests that it is far from impossible to prove such an intention.

Should "first degree murder" be further restricted?

CONFINING "FIRST DEGREE MURDER" TO PREMEDITATED INTENTIONAL KILLING

5.18 In some jurisdictions, murder is confined to premeditated killing. Under the scheme that we are proposing, the issue is not whether murder should be confined to premeditated killing but whether *"first degree murder"* should be so confined. We do not believe that it should be.

5.19 First, we believe that there will be cases where the jury will find it difficult to decide whether the murder was premeditated. In some cases, a killing will have been carefully planned. In others, the killing will be a spontaneous reaction. Between the two lies a grey area. Even leaving aside the grey area, in some cases there will be insuperable problems of proof for the prosecution to overcome if it has to prove that a killing was premeditated.

5.20 Secondly, it is better to treat premeditation as a potentially aggravating factor going towards the length of the minimum term of the life sentence. This is how it is currently regarded in English law. This is sensible not least because a factor that has the potential to aggravate the seriousness of an offence will not necessarily do so. It may or may not.

5.21 It will do so in the case of the "contract" killer but not in the case of a carer who, after careful consideration and out of compassion, kills a terminally ill spouse. So long as the relevance of premeditation is confined to setting the length of the minimum term, the law can distinguish fairly between different cases of premeditated killing. If it influences how offences should be graded, it is a blunt and inefficient instrument.

CONFINING "FIRST DEGREE MURDER" TO A RESTRICTED RANGE OF VICTIMS

5.22 In some jurisdictions, the grading of homicides is influenced by the status of the victim. If this approach were adopted, then "first degree murder" would be confined to, for example, cases where the victim was a child or a police officer on duty. We do not find this an attractive proposition.

5.23 It could lead to difficult issues for the jury to resolve, for example whether a policeman was "on duty" at the time he or she was killed. More importantly, grading offences according to the status of the victim implies that some victims' lives are intrinsically of more value than the lives of others.

5.24 It is better to acknowledge that some victims are, either on account of their age or because of the work that they do, more vulnerable. Their vulnerability should be recognised by ensuring that their killers receive a longer minimum term than would otherwise be the case. This is what the guidelines that Parliament has laid down are designed to ensure.

5.25 A further reason for not confining "first degree murder" to either premeditated killing or cases where the victim is of a particular status is that an over-elaborate process of grading would result in a large number of categories of offences resulting in complexity.

Provisional proposal

5.26 We provisionally propose that all unlawful killings committed with an intention to kill should be "first degree murder" unless the defendant has a partial defence, namely provocation, diminished responsibility or duress. The sentence for the offence should be imprisonment for life.

"SECOND DEGREE MURDER"

5.27 Under our provisional proposals, "second degree murder" would be the most serious offence after "first degree murder" and would attract a discretionary life sentence. The offence would accommodate those cases where the level of criminality is too high to be categorised as manslaughter but is not high enough to merit the mandatory life sentence. It would encompass:

(1) killing where the intention was to cause serious harm (currently murder);

(2) killing through reckless indifference to causing death (currently manslaughter);

(3) intentional killing where a partial defence applies, for example provocation or diminished responsibility (currently manslaughter) or duress (not recognised as a partial defence to murder under the current law).

In the next two sections we will address (1) and (2). We will then set out our provisional proposals for an offence of manslaughter before considering (3) above.

Killing where the intention was to cause serious harm

5.28 Although the culpability of the person who intends to cause serious harm is less than that of the person who intends to kill, it is nonetheless high. It is true that a person may intend to cause serious harm (for example, a broken nose) without intending to endanger life. It is arguable that any form of murder should require an intention to endanger life.

5.29 If Parliament were to keep the present two-tier structure of homicide – murder and manslaughter – there would be a strong argument that murder should as a minimum require an intention to endanger life. However, we are provisionally proposing a three-tier system. We think that the second tier should cover cases where the defendant intended to cause serious harm, which in fact results in death. We think that the third tier (which we consider below) should cover cases where the defendant intended to cause some, but not serious, harm, which in fact results in death. It is unnecessary and over complex to introduce an extra tier between "first degree murder" and "second degree murder" in order to differentiate cases where there was an intention to endanger life from cases where there was merely an intention to cause serious harm.

Provisional proposal

5.30 We provisionally propose that all unlawful killings committed with an intention to cause serious harm should be "second degree murder". The maximum sentence for the offence should be imprisonment for life.

Killing through reckless indifference to causing death

5.31 Reckless indifference to causing death refers to the state of mind of a person who does not intend to cause death but realises that his conduct involves an unjustifiable risk of causing death and goes ahead regardless. It is an attitude of "too bad" if death results. The offender is willing to tolerate the unjustified death of another. Under the current law, if death ensues, the offender is guilty of manslaughter.

5.32 We have provided examples of reckless manslaughter - example 1A (page 6) and example 2E (page 14). In each example the offender foresaw the risk of death resulting from his or her actions. In each example the culpability of the offender is very high.

5.33 We have explained why we believe that "first degree murder" should not encompass cases of reckless indifference to causing death, including cases where the offender believed that death was the "highly probable", but not the "virtually certain", consequence of his or her actions. At the same time, we believe that a death caused by reckless indifference to causing death is so serious that it ought to be classified as "second degree murder" and not merely manslaughter.

5.34 However, a person should only be guilty of "second degree murder" by virtue of reckless indifference if his or her indifference was to causing *death*. Under our provisional proposals, "second degree murder" would be the most serious homicide offence after "first degree murder". It should, therefore, require a very high level of culpability. Acting with the *intention* of causing serious harm constitutes a sufficiently high level of culpability and so does acting with reckless indifference to causing death. However, acting with reckless indifference to causing *serious harm*, while deplorable conduct, is not on the same level of criminality. It should be regarded as manslaughter.

5.35 Should a distinction be drawn between the defendant who foresaw another's death as the "highly probable" consequence of his or her actions and the defendant who foresaw another's death as a "possible" consequence? We think not. A distinction may admittedly be made in that the latter believed that he or she was exposing the victim to a much lower degree of risk and so is less culpable than the former. However, both defendants foresaw a risk of death occurring from their actions. If both are prepared to kill in pursuit of their objectives, they are morally indistinguishable. Each deserves to be convicted of "second degree murder".

5.36 Acting with reckless indifference is worse than acting with reckless *stupidity*. The latter is where a person realises that their conduct might result in death but stupidly believes that the risk is unlikely to turn into reality or genuinely believes that it is justified to run the risk or simply does not realise that there is any risk at all:

Example 5A

D, wanting to demonstrate his martial arts expertise to friends, executes a lethal kick as close as he can to one of the friends without making contact. He knows that death is likely to result if he makes contact but he believes he has eliminated the risk. Unfortunately, he misjudges and makes contact with the friend who dies.

This is reckless stupidity and is closer to gross negligence than to reckless indifference. D has made a miscalculation but he tried to calculate and eliminate the risk. He has not caused death because he took the view that it was "too bad" if the friend was killed. We do not believe that a person should be guilty of "second degree murder" by causing death through reckless stupidity. Rather, the appropriate conviction is one of manslaughter.

Provisional proposal

5.37 We provisionally propose that all unlawful killings committed with reckless indifference to causing death should be "second degree murder". The maximum sentence for the offence should be imprisonment for life.

MANSLAUGHTER

Introduction

5.38 In a previous report that we published in 1996, we recommended that the current offence of *involuntary* manslaughter should be replaced by two statutory offences: reckless killing and killing by gross carelessness. The offence of reckless killing would have replaced reckless manslaughter while killing by gross carelessness would have replaced gross negligence manslaughter. We did not recommend any offence to replace the third form of involuntary manslaughter, namely killing by an unlawful and dangerous act. We made our recommendations in the belief that the current offence of manslaughter, including voluntary manslaughter, is unsatisfactory because it covers such a wide range of criminal conduct.

5.39 Under our current provisional proposals, the most serious cases of reckless manslaughter would become "second degree murder" while cases that are currently voluntary manslaughter would also become "second degree murder". Accordingly, we now believe that, instead of having offences of reckless killing and killing by gross carelessness, it is better to retain manslaughter as a separate but more narrowly defined offence.

5.40 We are provisionally proposing an offence of manslaughter that covers blameworthy conduct that causes death but conduct that does not involve an intention to kill, an intention to cause serious harm or reckless indifference to causing death. The offence would encompass causing death:

(1) through gross negligence; or

(2) by an act *intended* to cause some, *but not serious*, physical harm; or

(3) by an act *foreseen* as involving a risk of causing physical harm, whether or not serious harm, provided the act is itself a criminal offence.

Gross negligence

5.41 We are provisionally proposing that a person is guilty of manslaughter through gross negligence if:

(1) that person's conduct causes death;

(2) it would have been obvious to a reasonable person in the defendant's position that the conduct involved a risk of death;

(3) the defendant had the capacity to appreciate that his or her conduct involved a risk of causing death; and

(4) the conduct fell far below what could reasonably be expected in the circumstances. We envisage that a person's reckless stupidity would be evidence that their conduct fell far below what could reasonably be expected in the circumstances.

5.42 As under the current law, under our provisional proposal a person can be guilty of gross negligence manslaughter although he or she did not realise that their conduct involved an unjustifiable risk of death. It suffices that a reasonable person in the defendant's position would have realised that there was a risk of death.

5.43 In our 1996 report referred to above, we recommended that killing by gross carelessness should cover cases where it would have been obvious to a reasonable person that the defendant's conduct involved not only a risk of death but also of serious injury. However, we believe that this would be too broad a basis on which to convict a person of manslaughter. Just as a conviction for "second degree murder" on the basis of reckless indifference should require reckless indifference to causing *death*, a conviction of manslaughter should require that the defendant's conduct involved an obvious risk of causing death.

5.44 A person's *capacity* to realise that his or her conduct involves a risk of death can be affected by, for example, age or disability. Under the current law it is irrelevant that a person lacks the capacity to realise that their conduct involves a risk of death. This is unjust. We are proposing, therefore, that in deciding whether a person has been grossly negligent, account should be taken of his or her capacity to appreciate that there was a risk of death.

Provisional proposal

5.45 We provisionally propose that conduct causing another's death should be manslaughter if: a risk that the conduct would cause death would have been obvious to a reasonable person in the defendant's position, the defendant had the capacity to appreciate the risk and the defendant's conduct fell far below what could reasonably be expected in the circumstances.

Death resulting from intentionally or recklessly causing harm

5.46 In Part 2 we explained that at present a person is guilty of manslaughter if he or she commits an unlawful and dangerous act that causes death. In Part 4 we criticised this form of involuntary manslaughter because a person can be convicted even if he or she did not foresee the risk of *any* harm occurring.

5.47 In 2000 the Government proposed that, instead of unlawful and dangerous act manslaughter, it should be an offence to cause the death of another person having intended to cause, or having foreseen the risk of causing, some injury provided that the infliction of the injury constituted an offence.

5.48 This proposal would produce a justified narrowing of unlawful and dangerous act manslaughter by focusing on whether the defendant intended to cause, or was reckless as to causing, injury. It is not acceptable that someone who accidentally causes death in the course of some minor act of, for example, criminal damage should be liable for manslaughter.

5.49 On the other hand, it is right that a person who embarks on a course of illegal violence intending to cause injury or foreseeing that it might cause injury, should have to accept responsibility for the consequences of the conduct even if he or she did not foresee those consequences.

Provisional proposal

5.50 We provisionally propose that it should be manslaughter to cause another person's death by a criminal act intended to cause physical harm or by a criminal act foreseen as involving a risk of causing physical harm.

THE PARTIAL DEFENCES OF PROVOCATION AND DIMINISHED RESPONSIBILITY[4]

Introduction

5.51 Under the current law, provocation and diminished responsibility reduce murder to manslaughter. Under our provisional proposals, each would reduce "first degree murder" to "second degree murder" but neither would reduce "second degree murder" to manslaughter.

5.52 We think it important that provocation and diminished responsibility should, if successfully pleaded, have exactly the same effect. This is because the two defences are frequently run together with the issues involved being inextricably linked. It would be unacceptable for two closely linked defences to have different legal effects, requiring the jury to decide which was decisive when there was no clear answer. There would be a danger of the jury being unable to agree on what defence applied, possibly necessitating a retrial, when the jury was in agreement that, on either view, the defendant was not guilty of "first degree murder".

Our provisional proposals for the principles that should govern the partial defences of provocation and diminished responsibility

Provocation

5.53 In our report Partial Defences to Murder, we recommended that the principles that should govern provocation as a partial defence were:

(1) the defendant must have acted in response to:

(a) gross provocation (meaning words or conduct, or a combination of both, which caused the defendant to have a justifiable sense of being seriously wronged); or

(b) fear of serious violence towards the defendant or another; or

(c) a combination of (1) and (2); and

(2) a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.

5.54 We said that that provocation as a partial defence ought to be available to those who acted in response to a fear of serious violence even if they killed at a time when they were not in imminent danger of serious violence. We also said that it ought to be available to those who could not successfully plead self-defence because, although they killed in response to a threat of imminent violence, they responded with a degree of force that was disproportionate to the threat of violence that they faced.

5.55 We emphasised that the defence ought not to be available:

[4] For more detailed discussion see Part 6 of our full Consultation Paper.

(1) if the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or

(2) if the defendant acted in considered desire for revenge. However, we also said that, if the defendant responded to fear of serious violence, he or she ought not to be treated as having out of a considered desire for revenge merely because he or she was also angry towards the deceased for the conduct that gave rise to the fear of serious violence.

5.56 Finally, we recommended that a judge should not have to leave the defence to the jury unless there was evidence on which a reasonable jury, properly directed, could conclude that it might apply.

5.57 Because we are now provisionally proposing that provocation should be a defence to "first degree murder" but not "second degree murder", we have reconsidered our previous recommendations. In particular, we have examined whether the partial defence of provocation should be restricted to cases in which a person responds to a fear of serious violence.

5.58 "First degree murder" requires an intention to kill, an especially heinous violation of the sanctity of life. There should be compelling reasons for reducing a killing committed with an intention to kill to "second degree murder". Arguably, a response to conduct that gives rise to a justifiable sense of being seriously wronged is not a compelling reason. By contrast, it might be thought that acting in response to a fear of serious violence is in principle a more plausible candidate for a partial excuse. It is only one step short of being a complete defence, in the form of self-defence, to a charge of murder.

5.59 Importantly, we are recommending that the judge should not be required to leave the defence to the jury unless he or she believes that there is evidence on which a jury could conclude that the defence might apply. We believe that, in most cases where the defendant acts in response to "gross provocation" which does not involve a fear of serious violence, a properly directed jury could not conclude that a person of ordinary tolerance and self-restraint might have killed with an intention to kill. In such cases, the judge will not leave the defence to the jury. However, we see no reason why, if the judge believes that on the evidence a properly directed jury could so conclude, the defence should not be left to the jury. Accordingly, we are proposing that the partial defence of provocation should be reformed in the way that we previous recommended.

Diminished responsibility

5.60 The current definition of diminished responsibility can be improved in a number of ways. We propose that the expression "abnormality of mind" should be replaced by "abnormality of mental functioning". The latter is preferable because it expressly requires experts to consider the way in which the offender's mental processes were affected by reason of a mental condition.

5.61 At present, the abnormality of mind has to arise from one or more of a limited number of stipulated causes that have no agreed psychiatric meaning. If the jury accepts that the defendant was suffering from paranoid psychosis at the time of the killing, should it really matter whether they are also persuaded, as in theory they have to be under the current law, that it is attributable either to inherent causes or to inducement by disease or injury? We think not.

5.62 In place of the current requirement, we are provisionally proposing that the "abnormality of mental functioning" must arise from an "underlying condition" by which we mean a pre-existing mental or physiological condition. We do not intend that it should encompass a transitory disturbance of the mind reflecting a temporary state of heightened emotions, for example extreme anger arising out of a typical case of "road rage". On the other hand, it would not be necessary to prove that the condition was permanent provided that it was more than transitory. Therefore, a severe depressive illness that was curable would come within the definition of "underlying condition".

5.63 The "underlying condition" must be one that is recognised by medical science as diagnosable. At the same time, it should not have to be one that exists internally and quite independently of the circumstances that gave rise to the commission of the killing. Post-traumatic stress disorder and severe depression may be the mental health consequences of cumulative provocation inflicted by one partner on another or of caring for a seriously ill loved one over a period of time. In such cases, the defence of diminished responsibility ought in principle to be available.

5.64 The present test whether the defendant's abnormality of mind "substantially impaired his or her mental responsibility" for the killing is unsatisfactory not least because it has led to experts giving evidence on what should be solely a matter for the jury to decide without the need for expert evidence.

5.65 Instead, the jury should have to decide whether the defendant's abnormality of mental functioning substantially impaired his or her capacity to:

(a) understand events;

(b) judge whether his or her actions were right or wrong; or

(c) control him or herself.

It should also be a requirement of the defence that the abnormality of mental functioning was a significant cause of the defendant committing the offence.

DIMINISHED RESPONSIBILITY AND CHILDREN

5.66 We are provisionally proposing that "developmental immaturity" should be capable of founding a plea of diminished responsibility. The number of children and young people who kill is mercifully small. Some of the cases raise very strong public emotions and can lead to a distorted picture.

5.67 Many (although not all) children and young people who kill come from dysfunctional families. They have often been victims of abuse or neglect and in their relationships with others are emotionally and morally immature. However, they may well not fit within the present definition of diminished responsibility.

5.68 The same may be true of someone who has reached the legal age of adulthood (18 years) and it can be argued that there should not be special rules which depend on a defendant's chronological age. Against that, it could be argued that the provision that we have in mind should be primarily intended for children and young people and that extending it to adults could provide too easy a partial defence to young aggressive adults who fail to control their emotions.

Provisional proposal

5.69 We are provisionally proposing that, in order to establish the partial defence of diminished responsibility, the defendant should have to prove that at the time of the killing:

(1) his or her capacity to

(a) understand events;

(b) judge whether his or her actions were right or wrong; or

(c) control him or herself

was substantially impaired by an abnormality of mental functioning arising from an underlying condition or developmental immaturity, or both, and

(2) the abnormality of mental functioning or developmental immaturity, or a combination of both, was a significant cause of the defendant's conduct in carrying out the killing.

(3) "Underlying condition" means a pre-existing mental or physiological condition.

We invite views as to whether the "developmental immaturity" part of the provisional proposal should be confined to persons under a particular age at the date of committing the offence and, if so what the age limit should be.

Should provocation and diminished responsibility be partial defences to "first degree murder"?

5.70 The argument for abolishing provocation and diminished responsibility as partial defences to murder is that each is an excuse and as such should influence how an offender is sentenced but not how a homicide is graded. The disappearance of the complex and sometimes out-dated and misguided rules that govern these partial defences would be a bonus.

5.71 We understand the attraction of this argument. However, the partial defences of provocation and diminished responsibility were originally designed to ensure that, where there are strong mitigating circumstances, a person is not convicted of murder and therefore liable to the death penalty (later the mandatory life sentence) despite having the intention to kill or cause serious harm. The rationale for provocation and diminished responsibility as partial defences applies with equal force to our new offence of "first degree murder" with its mandatory life sentence.

5.72 Further, consultees to our consultation paper on Partial Defences to Murder were nearly unanimous that the partial defences should not be abolished while the mandatory sentence remained. We know of no common law system where provocation has been abolished as a defence to murder but a mandatory sentence of life imprisonment retained, nor of any law reform body which has made such a recommendation. We believe that both provocation and diminished responsibility should be partial defences to "first degree murder".

Should provocation and diminished responsibility reduce "first degree murder" to "second degree murder" or to manslaughter?

5.73 We believe that the effect of provocation and diminished responsibility should be to reduce "first degree murder" to "second degree murder".

5.74 Although under the present law, provocation and diminished responsibility reduce murder to manslaughter, the offence of "first degree murder" that we are proposing would be confined, unlike the present offence of murder, to intentional killings. Intentional killings, even if committed under provocation or diminished responsibility, are very serious offences. We believe that such killings ought to be graded and labelled in a way that marks them out as more serious offences than those that we are proposing should be manslaughter.

5.75 Putting such cases into the category of "second degree murder" recognises that they are a form of murder but not in the top tier. Mitigated murder is still a type of murder.

Provisional proposal

5.76 We provisionally propose that provocation and diminished responsibility should be partial defences reducing what would otherwise be "first degree murder" to "second degree murder".

Should provocation and diminished responsibility be partial defences to "second degree murder"?

5.77 We do not propose that provocation and diminished responsibility should be partial defences to "second degree murder". The offence of "second degree murder" that we are provisionally proposing will attract a discretionary sentence and the judge can take account of any provocation and mental disorder in determining the appropriate sentence.

Provisional proposal

5.78 We provisionally propose that provocation and diminished responsibility should not be partial defences to "second degree murder".

DURESS AS A DEFENCE TO FIRST AND "SECOND DEGREE MURDER"[5]

Introduction

5.79 We explained in Part 2 that, although a complete defence to all other offences, duress is not a defence to murder or attempted murder. In Part 4 we suggested that this gave rise to unfairness and anomalies. Recently, the House of Lords has said that the logic of the argument that duress should be a defence to murder is "irrefutable".

Duress as a partial defence to "first degree murder"

5.80 We are provisionally proposing that duress be a partial defence reducing what would otherwise be "first degree murder" to "second degree murder". In proposing what is a very important change in the law, we emphasise that the defence of duress is confined within very narrowly defined limits:

(1) there must have been a threat of death or serious violence;

(2) the threat must have been directed against the defendant or his her immediate family or someone close to the defendant;

(3) the defendant must have good reason to believe that the threat will be carried out;

(4) the offence committed by the defendant must have been directly caused by the threat;

(5) the defendant may rely on the defence only if there was no evasive action that he or she could reasonably have been expected to take. The House of Lords has said that the defendant should be expected to take evasive action unless he or she expects the threat to be carried out "almost immediately";

(6) the defendant may not rely on duress to which he or she has voluntarily laid him or herself open, for example by voluntarily joining a criminal or terrorist gang;

(7) it must be the case that a person of ordinary courage sharing the characteristics of the defendant might have acted as the defendant did.

5.81 In proposing that duress if established should be a partial defence to "first degree murder", it is the requirement that a person of ordinary courage might have acted as the defendant did that is particularly important. This is because the law should not deprive a defendant of a defence if what he or she did, even if it is killing with an intention to kill, is what another person of ordinary courage might have done. A jury is ideally placed to assess the merits of any defence of duress.

[5] For more detailed discussion see Part 7 of our full Consultation Paper.

The effect of a successful plea of duress to "first degree murder"

5.82 We acknowledge that some people will think that since duress is a complete defence to all other offences, apart from attempted murder, it should be a complete defence to "first degree murder". In the past, we have said that it should be a complete defence to murder. However, our view was based on the present two-tier structure of homicide.

5.83 A theme of the structure that we are provisionally proposing is that conduct or circumstances that are excuses, but not justifications, for killing with an intention to kill should serve only to reduce first degree to "second degree murder". We do not believe that threats should justify a person in deliberately taking the life of another, although they may provide strong mitigation.

Provisional proposal

5.84 We provisionally propose that duress should be a partial defence reducing "first degree murder" to "second degree murder".

Duress as a defence to "second degree murder"

5.85 We are not making any provisional proposal as to whether duress should be a defence to "second degree murder". We are, however, inviting consultees to tell us whether they think it should be. On one view, it should not because, under our provisional proposals, "second degree murder" will not attract a mandatory life sentence. Any duress can, therefore, be taken into account as mitigation.

5.86 The other view is that it ought to lead to a complete acquittal:

Example 5B

T threatens to kill D's partner and children unless D "sorts out" V. Terrified for their safety, D, with the intention of causing serious harm, attacks V inflicting serious head injuries. V survives.

If D is charged with causing grievous bodily harm with intent, he or she can plead duress and, if the plea is successful, will be acquitted. If, however, V were to die, D, under our provisional proposals, would be charged with "second degree murder". It might be thought anomalous that D can be acquitted if V survives the attack but not if V dies. D's intention – to inflict serious harm but not to kill – is exactly the same whether or not V survives the attack

"MERCY"[6] AND CONSENSUAL KILLINGS[7]

Introduction

5.87 A "mercy" killing is a killing where the killer genuinely believes that it is in the best interests of the victim to die, for example, because the victim is terminally ill and in great pain. A "mercy" killing is a consensual killing only if the victim consents to being killed. Under the current law a "mercy" killing that is not a consensual killing is always murder, unless the defendant can prove diminished responsibility in which case he or she is guilty of manslaughter.

5.88 Under the current law a consensual killing, whether or not a "mercy" killing, is always murder unless the killing is committed after entering into a suicide pact in which case it is manslaughter.

5.89 Our proposals will not affect the fundamental principle that it is always a serious offence to kill another person intentionally even if the killer believes that it is in the best interests of the victim ("mercy" killing) and even if the victim consents ("consensual killing").

5.90 We believe that in the majority of cases of "mercy" killings and consensual killings committed after entering into a suicide pact, the person carrying out the killing is likely to be suffering from severe depression.

Focusing on depression and not on consent

5.91 Under the current law, the depressed killer who kills pursuant to a suicide pact is at an advantage. The law assumes that he or she is severely depressed. By contrast, the severely depressed killer who is not a part to a suicide pact has to prove diminished responsibility. This, at least in theory, should be difficult because reactive depression does not arise from a condition of "arrested or retarded development of mind or any inherent causes or induced by disease or injury". The problem has to some extent been overcome by pretending that the problem does not exist.

5.92 We believe that the current partial defence of killing after entering into a suicide pact is unsatisfactory for the reasons that we outlined in Part 4, paragraphs 4.24 - 4.27. We are provisionally proposing that it should be abolished.

5.93 Instead, we envisage that deserving cases that currently come within the suicide pact defence, and also deserving cases that the defence does not currently cater for, should be accommodated by the partial defence of diminished responsibility. Conversely, undeserving defendants (example 4B, page 28) who currently are able to take advantage of the suicide pact defence should in the future be guilty of "first degree murder".

[6] In this paper we use the term "mercy" killing with caution. Any "mercy" being shown is perceived as being shown as much by the victim to the carer, in relieving the carer of his or her caring duties and hence the cause of the continuing stress, as by the carer to the victim in killing him or her.

[7] For more detailed discussion see Part 8 of our full Consultation Paper.

5.94 Under our proposals, the defendant pleading diminished responsibility will no longer have to prove that his or her abnormality of mental functioning arose from a particular condition. Instead, the defendant will have to prove that it arose from an "underlying condition". An "underlying condition" does not have to be one that exists independently of the external circumstances that give rise to the killing. Consequently, the partial defence of diminished responsibility will be able to cater legitimately for cases of consensual or "mercy" killing where the abnormality of mental functioning, normally severe depression, was a significant cause of the killing.

5.95 It follows that under our provisional proposals a professional carer, for example a doctor or nurse who carries out a consensual or "mercy" killing is guilty of "first degree murder" since it is highly unlikely that either will satisfy the requirements of the diminished responsibility defence.

Provisional proposal

5.96 We provisionally propose that the partial defence of killing after entering into a suicide pact should be abolished.

5.97 Under our provisional proposals, the severely depressed "mercy" killer will be guilty of "second degree murder" if he or she successfully pleads diminished responsibility. We emphasise that whether or not the victim consented is irrelevant to the defence of diminished responsibility. However, in some cases where the plea of diminished responsibility is successful, the victim will have consented to being killed. We invite views as to whether in cases where the plea of diminished responsibility is successful and the victim consented to being killed, the defendant ought to be convicted of manslaughter rather than "second degree murder".

PART 6
LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

6.1 We set out below a summary of our main provisional proposals and questions on which we invite the views of consultees. We would be grateful for comments not only on the matters specifically listed below, but also on any other points raised by this overview. It would be very helpful if, when responding, consultees could indicate either the paragraph of the summary that follows to which their remarks relate, or the paragraph of this overview in which the issue was raised.

THE STRUCTURE OF HOMICIDE OFFENCES

Provisional proposal

6.2 We provisionally propose that the structure of a reformed law of homicide should comprise three general homicide offences supplemented by specific offences:

(1) "first degree murder" (mandatory life sentence);

(2) "second degree murder" (discretionary life sentence);

(3) manslaughter (fixed term of years maximum sentence); and

(4) specific homicide offences, such as assisting suicide and infanticide (fixed term of years maximum sentence). (Paragraph 5.7.)

Questions

6.3 Do consultees agree that the framework that we are proposing for grading and labelling offences would be an improvement on the existing structure of the law of homicide?

6.4 Whether the answer is "yes" or "no":

(1) do consultees believe that there is a better framework than the one that we are proposing?

(2) If so, what would that framework be?

THE HOMICIDE OFFENCES THAT WE ARE PROPOSING

"First degree murder"

Provisional proposal

6.5 We provisionally propose that all unlawful killings committed with an intention to kill should be "first degree murder" unless the defendant has a partial defence, namely provocation, diminished responsibility or duress. The sentence for the offence should be imprisonment for life. (Paragraph 5.26.)

Questions

6.6 We ask consultees whether they agree that:

(1) "first degree murder" (and the mandatory lie sentence) should be confined to unlawful killings committed with an intention to kill;

(2) an unlawful killing committed with an intention to kill should be "first degree murder" irrespective of whether the killing was premeditated;

(3) an unlawful killing committed with an intention to kill should be "first degree murder" irrespective of the status of the victim.

"Second degree murder"

Provisional proposals

6.7 We provisionally propose that:

(1) all unlawful killings committed with an intention to cause serious harm should be "second degree murder"; (Paragraph 5.30.)

(2) all unlawful killings committed with reckless indifference to causing death should be "second degree murder"; (Paragraph 5.37.)

(3) all unlawful killings committed with an intention to kill should be "second degree murder" if the defendant has a partial defence, namely provocation, diminished responsibility or duress. (Paragraphs 5.76 and 5.84.)

(4) the maximum sentence for the offence should be imprisonment for life.

(5) provocation and diminished responsibility should not be partial defences to "second degree murder". (Paragraph 5.78.)

Questions

6.8 We ask whether consultees agree that:

(1) the law should draw a distinction between "first degree murder" and "second degree murder";

(2) an unlawful killing committed with an intention to cause serious harm, but without an intention to endanger life, is sufficiently blameworthy to be "second degree murder";

(3) an unlawful killing committed with reckless indifference to causing death is sufficiently blameworthy to be "second degree murder";

(4) provocation and diminished responsibility should reduce "first degree murder" to "second degree murder" rather than manslaughter;

(5) provocation and diminished responsibility should not be partial defences to "second degree murder";

(6) duress should be:

(a) a defence to "first degree murder";

(b) if so, that it should be a partial but not a full defence;

(c) if so, that it should reduce "first degree murder" to "second degree murder" rather than manslaughter;

(7) if duress is to be a defence to "first degree murder", the threat must be one of death or life-threatening harm;

(8) the maximum sentence for "second degree murder" should be life imprisonment.

6.9 We invite views on whether:

(1) if provocation is a partial defence to "first degree murder" but not "second degree murder", it should be confined to cases where the accused killed because he or she acted in response to a fear of serious violence;

(2) duress should be a defence to "second degree murder" and attempted murder;

(3) if so, whether it should be a full or a partial defence;

(4) duress if successfully pleaded as a defence to "first degree murder" by a child or young person should result in more lenient treatment than it would for an adult;

(5) the "developmental immaturity" element of our proposed partial defence of diminished responsibility should be confined to persons under a particular age, and if so, what the age limit should be.

Manslaughter

Provisional proposals

6.10 We provisionally propose that conduct causing another's death should be manslaughter if: a risk that the conduct would cause death would have been obvious to a reasonable person in the defendant's position, the defendant had the capacity to appreciate the risk and the defendant's conduct fell far below what could reasonably be expected in the circumstances. (Paragraph 5. 45.)

6.11 We provisionally propose that it should be manslaughter to cause another person's death by a criminal intended to cause physical harm or by a criminal act foreseen as involving a risk of causing physical harm. (Paragraph 5.50.)

Questions

6.12 We ask whether consultees agree that:

(1) killing through gross negligence should result in a conviction of manslaughter;

(2) manslaughter through gross negligence should be confined to cases where the defendant's conduct involved an obvious risk of death (as opposed to serious harm);

(3) killing through "reckless stupidity" should result in a conviction of manslaughter rather than "second degree murder";

(4) it should be manslaughter to cause death by a criminal act intended to cause some, but not serious, physical harm;

(5) it should be manslaughter to cause death by a criminal act foreseen as involving the risk of causing some harm even if the harm foreseen was not serious and death was neither foreseen nor could have been foreseen.

"MERCY" AND CONSENSUAL KILLINGS

Provisional proposal

6.13 We provisionally propose that the partial defence of killing after entering into a suicide pact should be abolished. (Paragraph 5.96.)

Questions

6.14 We ask whether consultees agree that:

(1) the partial defence of killing after entering into a suicide pact should be abolished.

(2) all cases of "mercy" and consensual killing should be "first degree murder" unless the defendant can prove diminished responsibility.

6.15 We invite views on whether, if the defendant establishes the partial defence of diminished responsibility and the victim consented to being killed, the conviction should be one of manslaughter rather than "second degree murder"?