[Legal Briefing]

[Criminal Law]

Reforming the Law of Murder

Simon Parsons asks: why is it needed and what are the Law Commission's proposals?

The Law Commission has issued Consultation Paper No 177 – A New Homicide Act for England and Wales (the Paper)[1]. The Paper follows the Commission's Final Report- Partial Defences to Murder[2] in which it was recognised that the law of murder is in "a mess" and that to fully reform the partial defences it will also be necessary to review the offence of murder itself. In July 2005 the Government asked the Commission to carry out that review. The Consultation Paper is the result.

Why is the law of murder in a mess?

The *actus reus* for all homicide offences is the unlawful killing of a human being caused by the act or omission of the defendant. The different offences are

[1] Published on 20th December 2005 and available at www.lawcom.gov.uk/current_consultations.htm

[2] Published on 20th August 2004 and available at www.lawcom.gov.uk/current_consultations.htm

distinguished by the applicable fault element which can be either subjective *mens rea* or negligence. The *mens rea* for murder is *malice aforethought*. This means that at the time of the act or omission which causes the *actus reus* of homicide the defendant must have had an intention to kill or an intention to cause serious bodily harm. This seems relatively straightforward. However, as the Consultation Paper points out, the law relating to the offence of murder[3] has a number of defects.

The most obvious problem is that the offence is very wide: it does not recognise that some murderers are more culpable than others. The mercy killer who kills on compassionate grounds and the sadistic killer who kills for pleasure are both guilty of murder. Differences in culpability or criminality cannot be dealt with in the substantive offence. Why should this be so? One answer is that in cases of murder where the defendant wants or desires to kill or to cause serious bodily harm (i.e. it is his purpose), motive is irrelevant. This is known as direct intent. In such cases if the *mens rea* for murder is present when the defendant killed then the jury *must* convict. A consensual mercy killer who gives in to the terminally ill victim's pleas to end their suffering is therefore as guilty of murder as the serial killer, unless one of the partial defences can be pleaded successfully. Many of the public would be confused by this. This in part arises from a misunderstanding of the meaning of *malice aforethought*. These are technical words: neither malice (bad motive) nor aforethought (planning) are necessary elements. In a consensual mercy killing the killer is acting out of (what he considers to be) a good motive so he has no 'malice' when he kills (in the usual sense of that word). Many cases of murder involve an intention to kill which was formed on the spur of the moment without any aforethought or planning.

[3] Overview Parts 1, 2 and 4.

The offence is also a wide because a murder conviction can be based on an intention to cause serious bodily harm. This breaks what is known as the correspondence principle which states that criminal liability should only be imposed where the *mens rea* corresponds with the *actus reus*, which means liability for murder should only be imposed where there is an intention to kill. In addition, harm can be "serious harm" even though it is not in itself life-threatening. This means that an intention to break an arm will be an intention to cause serious harm and if the victim then dies of medical complications flowing from the broken arm the defendant will be guilty of murder even though he did not foresee death as a possibility.

The majority of murders concern cases of direct intent; however these cases must be distinguished from cases of indirect intent. In *Woollin*[4] the House of Lords attempted to clarify the law of indirect intent by holding that if a consequence is a virtually certain result of a defendant's act and the defendant foresaw that consequence as a virtually certain result of his act then a jury is entitled to find that the consequence was intended even though it was not the defendant's purpose to cause it. Consider the case of a defendant who owns an aircraft. He plants a bomb aboard that aircraft which is timed to blow up in mid-flight. The bomb explodes, destroying the aircraft and killing the pilot. The defendant states that he wanted to claim the aircraft's insurance value and that he did not want to kill the pilot but foresaw that it was virtually certain that the pilot would be seriously injured or killed by the explosion. In such case a jury is entitled to find that the defendant had an intention to kill and to convict him of

[4] [1998] 4 All ER 103.

murder[5]. However, in the law of indirect intent, in contrast to that of direct intent, there is, to use Ashworth's phrase, "moral elbow-room"[6] where the law will recognise the existence of moral dilemmas (or good motives). For example, in the *Herald of Free Enterprise* disaster, a man was blocking an escape ladder and refused to move, thus preventing the escape of others. He was pushed off the ladder and thereby drowned[7]. The defence of duress of circumstances does not extend to murder. However, if the person who pushed him off had been charged with murder it is likely that he would be acquitted as a jury, following *Woollin*, would have exercised its entitlement *not to find* an intention to kill, thus recognising the moral dilemma between the person's primary purpose of saving others and his foresight of the man's virtually certain death by drowning. It should be noted that if the degree of foresight (or awareness) of death or serious injury is less than virtually certain then the law of indirect intent will not allow a conviction for murder. This means that in one respect the offence of murder is *under* inclusive. For example, consider the case of a bomber who plants a bomb with the purpose of causing property damage. Having planted his bomb, the bomber then gives a warning enabling the police to evacuate the area. Suppose then a bomb disposal officer is killed whilst trying to defuse the bomb. In the bomber's murder trial a jury would have to find that the bomber not guilty of murder if it decided he had not foreseen the death of the bomb disposal officer as virtually certain. It is likely that the bomber would be convicted of unlawful act manslaughter.

How are the differences in culpability in murder convictions dealt with?

[5] See the *Woollin* direction given in such cases. Ibid at 113.
[6] See commentary to *Weller* [2003] Crim L R 724.
[7] See JC Smith *Justification and Excuse in the Criminal Law* (1989) at pp 73-74.

All those convicted of murder receive the mandatory life sentence. However the 'life" in life sentence is often misunderstood. The Paper points out that a mandatory life sentence does not mean that a convicted murderer will necessarily spent the rest of his or her life in prison[8]. The sentence will include a minimum term (or tariff) to satisfy the public interest in punishment and deterrence. The minimum term is set by the trial judge. In the Criminal Justice Act (CJA) 2003[9] Parliament has set down starting points[10] for minimum terms to which the trial judge must "have regard"[11]. However, the ultimate decision remains with the judge so these starting points can be subject to mitigating and aggravating factors. Differences in culpability are reflected in the minimum term that the convicted murderer has to serve in prison. For exceptionally serious murders committed by an offender who was over 21 when the murder was committed the starting point is a "whole life order" (or 30 years if the offender was under 21), which means that the offender will spent the rest of their life in prison. Examples of such exceptionally serious murders are sadistic sexual murders and the crimes of serial killers. The scale then moves downwards in terms of seriousness. Some murders are regarded as particularly serious: for example, the murder of a police officer in the course of his duty; murder involving a firearm or explosive; or a racially or aggravated murder. The starting point for such murders, in the case of murderers over 18 years of age at the time of the murders, is 30 years. In all other cases of murder committed when an offender is over 18, the starting point for the minimum term is 15 years (or 12 years if the offender was under 18). This means that most convicted murderers, after they have served the minimum term, can apply to the Parole Board to be released on licence. The Parole Board will release an offender if it

[8] Overview Part 3.
[9] CJA Chapter 7 of Pt 12.
[10]CJA Schedule 21.

is satisfied that it is safe to do so (and the offender admits to the murder) which means the offender will be released on licence for the rest of his life. If the licence conditions are broken or if the offender commits another crime he or she may be recalled to prison. It should be emphasised that the trial judge has discretion to reduce or increase the starting point of the minimum term to take account of mitigating or aggravating factors. Guidance is given by the Court of Appeal but this is still an invariably difficult area. For example, by how much should the minimum term be reduced (from the maximum term of 15 years) to take into account the fact that the offender intended only to break the victim's arm and did not foresee the possibility of death?

Defences

The scheme set out by the CJA means that a mercy killer who killed a victim who gave informed consent will face a starting point of 15 years in prison if convicted of murder. However, there are the partial (or special) defences to murder contained in sections 2 to 4 of the Homicide Act 1957 (diminished responsibility, provocation and killing in pursuance of a suicide pact). These defences only apply where the defendant is charged with murder (as a principal or as an accomplice); if successful, the defendant will be convicted of manslaughter thus giving the trial judge discretion as to sentence, as there will be no obligation to impose the mandatory life sentence. There have been cases of consensual mercy killings where a long-term carer has agreed to a request by the (terminally ill) victim to kill them. Such persons have been able to rely on diminished responsibility, either because the prosecution have accepted the defence without a trial or the jury have accepted it in the course of the trial. This

[11] CJA section 269 (5).

means such defendants can receive the sentence that reflects their culpability: for example, a suspended prison sentence. However the Paper points out that many mercy killers do not have a functional or organic mental illness which the causes in the parenthesis in section 2 (1) require as the aetiology of abnormality of mind needed in diminished responsibility.[12] Instead, as the Paper points out, "that problem is frequently "swept under the carpet" in order to ensure that the carer is convicted of manslaughter and not murder."[13]

The law relating to the partial defences is also in a mess. When the Homicide Act 1957 was enacted it was assumed that diminished responsibility was a defence which enabled those with a mental disability to be partially excused of murder on account of their disability. In contrast, the defence of provocation was for those who had full capacity but who would be partially excused because they had met the standard of self-control to be expected of them. The law has got into a mess because of the disagreement as to whether there should be a constant standard of self–control in the provocation defence applied against all defendants or whether the standard expected should be reduced to take into account particular characteristics of defendants including mental disabilities. For example, consider the case where a defendant suffers from schizophrenia (a condition which substantially impairs his powers of self-control) and who is provoked about that characteristic so that he loses his self-control and ends up killing his tormentor. Is the objective question in the provocation defence either: (i) "would an ordinary person (who does not have schizophrenia) upon being provoked in those circumstances have lost his self control and killed as the defendant did?" Or is it (ii) "would an ordinary person (who does have schizophrenia)

[12] *Sanderson* (1994) 98 Cr.App.R.325

upon being provoked in those circumstances have lost his self-control and killed as the defendant did?" In (i) a constant standard of self- control is being applied i.e. that of "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today"[14]. In (ii) the standard of self-control is reduced to take into account the particular characteristic of the defendant so that the question becomes: was his loss of self-control was a *reasonable* response for someone with his condition? In *Smith (Morgan James)*[15]the House of Lords held by majority of 3 to 2 that (ii) applied. The effect of the decision was an overlap between diminished responsibility and provocation because the latter became a defence of mental incapacity, as mental disability (which affected the defendant's ability to control himself) could be taken into account when setting the standard of self-control thus reducing the standard expected. In other words, the standard expected became variable. The result that followed was that a defendant who had failed to establish diminished responsibility might still be able to succeed on the defence of provocation on the exactly same evidence because the prosecution was unable to prove beyond reasonable doubt that the defendant was not suffering from a mental disability that affected his self-control. The decision in *Smith (Morgan James)* has been criticised as breaking the rationale for the defence of provocation: that if most of us as ordinary persons would have lost self-control under that provocation then the loss of self-control itself would be justified so giving a strong basis for excusing the defendant of

[13] Overview Part 4 point 4.19.
[14] JC Smith commentary to *Smith (Morgan James)* [2000] Crim L R 1004 at 1006.

[15] [2000] 3 WLR 654.

murder[16]. In contrast, however, there is now the high authority of *Att-Gen for Jersey* v *Holley*[17] a Privy Council decision where the majority of nine Law Lords (6 to 3) held that (i) represented the correct law relating to provocation[18] and *Smith (Morgan James)* was not followed. This means we now have eight Law Lords who have decided that (i) applies, and six Law Lords who have decided that (ii) applies. A trial judge may wonder how he is supposed to direct a jury on provocation! Strictly speaking, *Smith (Morgan James)* should apply in England and Wales as *Holley* concerns a separate jurisdiction, that of Jersey. Guidance must come from the Court of Appeal. In *Van Dongen* [19] the Court of Appeal proceeded on the basis that *Holley* should be followed in this jurisdiction. If the Court of Appeal continues with this view of the law it will mean that the standard of self-control in provocation will be raised to the constant standard of the ordinary person and those suffering from mental disability will have to rely on diminished responsibility.[20] The overlap between the two defences will be reversed.

Addressing the problems.

The Paper's starting point for reforming the law of homicide is that a defendant's culpability should go toward not merely how he or she is sentenced but also how he or

[16] Gardner and Macklem's "Compassion without Respect" [2001] Crim.L.R. 623,
[17] [2005] UKPC 23, [2005] 2 Cr App R 36.
[18] Thus applying *Camplin* [1978] AC 705 HL and *Luc Thiet Thuan* v *R* [1997] AC 131 PC.
[19] [2005] EWCA Crim 1728.
[20] It may be that women who suffer persistent domestic violence will be disadvantaged in provocation because any mental disability resulting from the violence such as ''battered woman syndrome' will not be taken into account when applying the standard of self-control. The Law Commission needs to take this into account.

she is labelled[21]. In other words, different degrees or levels of culpability in homicide should be recognised in the offences (of homicide) themselves. To achieve this, the Paper proposes that there should be three degrees of homicide. Most serious of all would be the offence of "First degree murder" in which a defendant's culpability would be based on his intention to kill because "the victim's death was integral to what the defendant wanted to achieve, even though it was not the motive for his or her conduct"[22]. Thus this offence would cover a defendant who wanted to kill and one who did not but foresaw that consequence as virtually certain. This is to be welcomed because it will mean that this offence will comply with the correspondence principle. But any degree of awareness which is less than virtually certain would not be covered by this offence.[23] This means that the bomber who gives the warning would not be guilty of First degree murder because he would not foresee the death of the bomb disposal officer as virtually certain. First degree murder would be the most serious form of homicide and those convicted of it would continue to receive the mandatory life sentence.

Second would be the offence of "Second degree murder". This offence would cover those defendants who had an intention to cause serious harm when he or she killed even though there was no foresight of the possibility of death. The Paper maintains it would be overly complex to distinguish cases where there is foresight of death from those where there was not as that issue can be dealt with in the sentence.[24] This means that the defendant who intends to break an arm would still be guilty of murder albeit this would be a matter of Second degree murder. The offence would also introduce a

[21] Overview Part 1 and Part 5.
[22] Overview Part 5 point 5.10.
[23] Ibid point 5.14.

new type of *mens rea* for murder: that of "reckless indifference" which would be defined as "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 the attitude of "too bad" if death results"[25]. This offence would catch the bomber who gives a warning, and is to be welcomed as it would bring such cases into the law of murder. For Second degree murder the judge would have discretion as to sentence, which would depend on the circumstances of the case.

Second degree murder would cover crimes which would presently be manslaughter. If the ambit of the law of murder is expanded it will mean that of manslaughter will be reduced. This is reflected in the Paper's proposals for the third homicide offence. This is the offence of manslaughter with the defendant's culpability based on his intending to cause some harm *but not serious* physical harm or being aware that his act involved a risk of some physical harm. Both of these states of mind would involve subjective *mens rea,* but there is also a third basis of culpability: that of gross negligence which closely follows the existing common law offence of killing by gross negligence. This form of the offence has the welcomed qualification that the defendant must have the capacity to recognise his conduct involved a risk of death.[26] For manslaughter the judge would have discretion as to sentence.

The Paper proposes that the special defences of provocation and diminished responsibility be retained and if successful would reduce First degree murder to

[24] Ibid point 5.29.
[25] Ibid point 5.31.
[26] Ibid points 5.41 and 5.44.

Second degree murder.[27] This is a change from the current law where the defences reduce murder to manslaughter. In respect of provocation the Paper takes a step back from the Commission's earlier proposal that it was enough that provocation caused the defendant to have a justifiable sense of being wronged. Instead the new proposal is that provocation must always cause a fear of serious violence towards the defendant or another. The reason given for this change is that provocation would only be a defence to First degree murder, and that a justifiable sense of being wronged is not a compelling reason for reducing the most serious of homicide offences to Second degree murder.[28] This proposal, if it became law, would amount to a considerable narrowing of the defence of provocation as many examples of provocation under the current law would be ruled out, including the classic example of a husband killing his wife after finding her *in flagrante delicto* with another man. Any case of provocation where the underlying emotion is anger will be excluded as the only emotion applicable is fear. In addition, the standard of self-control expected would be that of "a person of the defendant's age and of ordinary temperament" which follows the Privy Council interpretation of the existing law in *Holley.* The upshot is that under the Paper's proposals provocation would be become a defence of excessive self-defence. This would a radical change from the current law as it would involve a reversal of the liberalisation of the defence which reached its high point in the decision in *Smith (Morgan James).* It would also mean there would be no overlap between provocation and diminished responsibility.

[27] Ibid point 5.51.
[28] Ibid point 5.58.

In respect of diminished responsibility the Paper proposes that "abnormality of mind" be replaced by "abnormality of mental functioning[29] which should arise from an "underlying condition" which was more than merely transitory and would be recognisable as medically diagnosable. This is to be welcomed as it would avoid the practice in many cases under the current law of "sweeping under the carpet" the issue of aetiology of abnormality of mind. Thus the severe depression of a mercy killer would clearly fall within the description of an abnormality of mental functioning. However, even if the mercy killing was consensual with informed consent the conviction would still be Second degree murder. There would be no moral elbow room to permit an acquittal. The abnormality would have to substantially impair the defendant's capacity to: (a) understand events; (b) judge whether his or her actions were right or wrong; or (c) control him or herself.[30] This is hard to follow as the definitions in (a) and (b) seem involve a denial of *mens rea* which should result in an acquittal. If the defendant has volitional problems as in (c) resulting from, for example, schizophrenia but he or she knows the consequences of his act then the conviction should be manslaughter as that would represent his culpability in those circumstances of irresistible impulse.

Conclusion

The proposals in the Paper represent an improvement on the existing law as they enable degrees of culpability to be properly represented in homicide, especially in the offence of murder. Under the current law this is only achievable in the minimum sentence. The Law Commission wants to hear people's views on the proposals. For

[29] Ibid point 5.60.

example, some may think that the restriction of the provocation defence is going too far. There is also the controversial proposal that duress be a defence to First degree murder where under the existing law duress is not a defence to murder even to attempted murder. Comments should be sent to the Law Commission before 13th April 2006. The contact details are available at the Commission's website www.lawcom.gov.uk

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[30] Ibid point 5.65.