



The Bar Council

Bar Council response to the Law Commission consultation on Homicide Offences

30 September 2026

About us

The Bar Council is the voice of the barrister profession in England and Wales. Our 18,000+ members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential.

As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers

- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we're the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Introduction

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation on Homicide Offences.¹ The Bar Council welcomes the latest proposals from the Law Commission to reform, in particular, the offences of murder and manslaughter. Reform is overdue.

2. The labelling of homicide offences is emotive and different stakeholders are likely to have strong views concerning both the dilution of the offence of murder by

¹ [The Law Commission consultation on Homicide Offences](#)

the creation of a perceived second-class offence and the reclassification as murderers of those intentional killers whose culpability is reduced by proof of a partial defence. It is to be expected that on that ground alone, the proposed, or any, substantive reform will meet resistance.

Specific Questions

Consultation Question 1

We invite consultees' views on a new structure of homicide law. We ask specific questions in the following chapters about which offences would sit in each tier, the fault elements of homicide offences, and the operation of the partial defences. Here we welcome views that focus on the proposed three-tier structure itself.

We provisionally propose that the structure of the general homicide offences should have three tiers, to reflect different levels of culpability.

Do consultees agree?

3. The faults with the present structure of homicide offences are well-known and are set out in the Consultation. The Bar Council agrees that the determining factor in any new system of categorisation should be the differing levels of culpability, as opposed to gradations in the seriousness of the offence; no loss of life should *per se* be deemed to be less serious than another.

4. Further, it is generally agreed that any reform should result in a hierarchy of seriousness which clearly distinguishes between deliberate unlawful killing with intent to kill and other homicide offences. Forming an intention to kill someone represents a uniquely serious breach of society's norms. Beyond that, however, opinion is divided as to whether any new model should contain two or three levels of offence. In any event, the terms "first degree" and "second degree" murder are not

considered to be meaningful descriptions, and may cause more problems than they resolve.

5. Some reform of the present system is clearly needed, not least because of the problems for sentencers, offenders and the public (including victims²) posed by the mandatory life sentence being required in all cases of murder, regardless of the precise intent. Furthermore, criticism of the fairness of labelling those who kill with intent to cause GBH has been made at the highest judicial level: see in this regard the observations of Lord Mustill in *AG's reference (no.3 of 1994)* [1998] AC 245, at 250, and of Lord Steyn in *R. v. Powell and English* [1999] 1 AC 1, at 15. However, those interrelated issues can be solved in a number of ways.

6. For example, if the mandatory life sentence were to be reserved for cases of unlawful killing with intent to kill, then there is no reason why that could not be made unique (as being the only offence that bore the term "murder"). "Unlawful killing with intent to cause GBH" could then be called what it is. And "murderer" would mean what (on the balance of the research set out in the Consultation Paper) people today generally understand it to mean - someone who killed, intending to do so, and received a life sentence as a result. The language would retain its force.

7. The Consultation acknowledges that the proposed wording of the labels is yet to be finalised; in terms of clarity and comprehension much will turn on the precise terminology.

² By which term we – like the Law Commission – mean to include the family of the deceased.

8. The format of the proposed structure is a matter of considerable debate and the Bar Council recognises competing arguments as to whether there should be two or three tiers of classification.

In favour of two categories of unlawful killing

9. The Law Commission concludes at para. 4.3 that “a rational, principled law of homicide cannot be achieved with two tiers”. However, the only distinction proposed in the Consultation Paper between what would be tiers 2 & 3 is one of description: the maximum sentence for each is proposed to be a discretionary life sentence. That being so, the sole rational justification for the division between tiers 2 & 3 becomes one of terminology. So the precise terms deployed carry real weight.

10. The principles invoked by the Law Commission – which we commend – are fivefold: coherence, consistency, clarity, fairness and proportionality (including “fair labelling”), and practicality. The present proposals arguably fall down on several of these heads:

- Coherence: the Law Commission proposes including offences of unlawful killing with intent to cause GBH (which it terms “second degree murder”) and unlawful killing with intent to kill where a partial defence succeeds (which it terms “murder with a partial defence”) in the same tier. It is not clear why, if these offences are to be called by different names, and to bear the same maximum sentence as “tier 3” offences, they should be both (a) grouped together and (b) separated from the “tier 3” offences.

- Consistency: no particular problem is presented by the Law Commission's proposals in this regard.
- Clarity: neither of the proposed terms – either “second degree murder” or “murder with a partial defence” are clear. Each would require further exegesis in order for a lay person to understand what is meant by the term. There is no common definition of second degree murder in, for example, the USA (where the stratification of homicide offences vary to a considerable degree between States) or, to our understanding, worldwide. And “murder with a partial defence” is a very confusing formulation. While the Law Commission notes that the terminology is only provisional at this stage (see para. 7.47) this is not a particularly helpful working definition. A clearer model would simply describe the conduct and mental state as admitted or found proven: for example “unlawful killing with intent to cause GBH”, or “unlawful killing by loss of control”.
- Fairness and proportionality: the main advantage from a proportionality perspective of the Law Commission's proposed structure is the removal of unlawful killing with intent to cause GBH from the mandatory life sentence regime. Beyond that, as the sentencing structure is not affected by the division into three rather than two tiers of homicide offences, there is no advantage of one over the other. Sentencing guidelines will, it is anticipated, remain a matter for the independent Sentencing Council. As to fair labelling, however, it is hard to see any advantage in declassifying unlawful killing with intent to cause GBH while retaining the term murder, in whatever form (see the points made above re: clarity).

- Practicality: there is no obvious distinction between a two and three tier system from the perspective of practicality.

In favour of three categories of unlawful killing

11. The description of the offence itself should demonstrably contrast the different levels of culpability, rather than, in cases of non-intentional killing, by the application of sentencing guidelines. The accumulation of numerous other levels of culpability in one catch-all offence results in too broad a category, which will not provide the necessary clarity.

12. A dividing line between the second and third categories of unlawful killing centring on the defendant's intent would be of value in recording the seriousness of the offending. So for example:

- Unlawful killing with intent to cause GBH is typically likely to reflect higher culpability than unlawful killing through an unlawful dangerous act. (Thought there will be cases of the latter which are extremely serious and they can indeed be met by a life sentence.)
- Similarly, unlawful killing by loss of control (one type of what the Law Commission presently terms "murder with a partial defence") may be thought to reflect higher culpability than the other current manslaughter offences because the defendant has killed with murderous intent.

13. Accordingly, there is value in distinguishing between the different categories through the use of terminology such as:

- (1) "murder" (for intentional unlawful killing with intent to kill);

- (2) “intentional unlawful killing” (capturing unlawful killing with intent to cause GBH, by loss of control, by diminished responsibility or pursuant to a suicide pact); and
- (3) “non-intentional unlawful killing” (capturing unlawful killing by gross negligence, by an unlawful dangerous act, or by a reckless act).

As to further stratification

14. A multi-tiered approach should not be overcomplicated. Any re-structuring must have regard to its practical application by juries. All juries are now given a written ‘Route to Verdict’ document by the trial judge which articulates a series of sequential questions to which the jury (in deliberation) answers ‘yes’ or ‘no’ to determine the ultimate verdict of guilty or not guilty. Many homicide indictments contain alternative offences – murder/manslaughter – and alternative bases in law for those offences. If juries fail to understand the structure and, because of its complexity, reach a compromise verdict or one which does not accord with their findings of fact, then clearly the interests of justice have not been served by the reform. Since no modelling of the proposal can be undertaken, a cautious approach should be adopted. The structure also has to carry the trust and confidence of the public that it will produce just outcomes. The fair-labelling principle and the need for rational consistency within the structure are important but can be self-defeating if taken to their logical extremes.

15. The Law Commission has acknowledged these issues and has sensibly calibrated the structure accordingly³. Partial defences to murder apply equally to the fault element of intent to kill (Tier 1) and intent to seriously injure (Tier 2). In theory therefore, there could be a separate subsidiary tier for each, respectively lessening the culpability. Since murder and manslaughter cannot feature in the same tier, that

³ See Consultation at §7.54

would mean a fourth tier. The Bar Council agrees that such would result in added and unwarranted complexity. Any reduction in culpability following a conviction for murder with an intent to seriously injury subject to a partial defence (i.e. currently voluntary manslaughter) can be reflected in sentencing.

Consultation Question 2

We provisionally propose that there should be an offence of first-degree murder where the defendant unlawfully killed another person with the intention to kill.

Do consultees agree?

16. Yes.

17. Firstly, we agree that reform should not be driven by arguments of moral equivalence between different factual scenarios about which there will never be consensus. It is currently recognised in the Paragraph 10(a) of Schedule 21 to the Sentencing Code that an intention to cause serious bodily harm is a factor which mitigates the culpability of the offender – one of a prescribed number of factors which can affect the length of the minimum term by increasing or decreasing the moral censure of the killing as reflected in the sentence. Whilst the figures for the increase in length of the starting points for the minimum terms can be contentious, the sentencing regime works in practice and can readily be understood. Under the proposed reform the most egregious cases of the lesser intention can still result in a (discretionary) life sentence. We consider that the most compelling argument for reform is indeed the unfairness and rigidity of the current mandatory life sentence for all murders, regardless of whether the higher or lesser intent has been proved. Nevertheless, we agree with the Consultation's analysis of the fault element of the offence of murder.

18. Secondly, the principles of clarity, certainty and fair labelling all point to limiting the most serious offence to an intention to kill. The Law Commission's 2006 recommendation that both first- and second-degree murder should incorporate a fault element of an intent to cause serious harm, however they are distinguished, would only serve to confuse both juries and the public.

19. However, as practitioners we foresee that there are some consequences which can be anticipated, which the Consultation identifies but perhaps underestimates. Given the importance rightly afforded to fair labelling in this field, there is a real risk that the reformed structure will not be seen as 'fair'.

(1) First degree murder (whatever it is called) as proposed will *inevitably* be more difficult to prove and there will be fewer convictions for what will become the most serious offence. That fact needs to be acknowledged.

(2) Families of the victims of murder are likely to regard "second degree murder" as downgrading the seriousness of crime and the State's value of life of the victim. We respectfully disagree with the Consultation's assumption that that perception will be offset by the families knowing with certainty whether the offender intended to kill or cause serious injury. Our anecdotal experience is that currently such is seldom, if ever, raised after a murder conviction.

(3) It follows, that, the labels "first" and "second" degree murder risk creating fresh problems of perception and understanding. Accordingly, whether two or three categories of homicide are to be preferred, our firm view is that the terminology of "first" and "second" degree murder is unhelpful. Retaining the term "murder" for the most serious form of

homicide offence, and using simple, precise language which properly describes the conduct and fault elements of other homicide offences would avoid the problems identified above.

- (4) The above reservations apply in a mirrored way when applied to the proposal that voluntary manslaughter offences are re-described as “murder with a partial defence”, which results in an aggravated label being applied to those who are not presently categorised as murderers.

Consultation Question 3.

We provisionally propose that there should be an offence of second-degree murder where the defendant unlawfully killed another person with the intention to cause serious injury. This offence would have a maximum sentence of life imprisonment (discretionary life sentence).

Do consultees agree?

20. No. While we agree that unlawful killing with intent to cause GBH (meaning “really serious harm” – a term commonly understood by law persons and unproblematically applied by the courts for over 150 years) should be identified as a different form of offence from unlawful killing with intent to kill, as explained above, we do not consider the term “second degree murder” to be helpful.

21. As reflected in §6.34, ‘grievous’ has traditionally been treated as equivalent to really serious harm. The use of the adjective does not necessarily add substantively to the meaning of ‘serious’, but as the footnoted reference to the Law Commission’s 2014 Consultation Paper on Reform of Offences Against the Person helpfully points out, it does avoid the risk of a jury concluding that ‘serious’ means no more than, say, ‘significant’ or more than trivial. Clearly the extent of the intended injury must be greater than ‘actual’ (the level of harm required pursuant to Section 47 OAPA 1861).

22. In *R v Janjua* [1999] 1 Cr App R 91 the CACD held that “the proposition that [‘really’] is required in every single case is not a correct representation of the law. It is a matter for the judge in the light of the factual situations with which he is confronted to make the decision whether or not to use the word “really” before the word “serious.”” The sample legal directions in the Crown Court Compendium Part I for murder at 19- 2 still refer to ‘really serious’ harm/bodily injury. Although the Schedule 21 to the Sentencing Code refers to a mitigating feature for murder being a finding of ‘serious’ bodily harm, a trial judge will need no assistance in determining the *mens rea* for murder. A fault element which is prescribed in statute should be clear and unambiguous and should not need further elaboration for the jury.

Consultation Question 4

We provisionally propose that when the defendant is charged with first-degree murder and a partial defence is successful, the defendant should be convicted of “murder with a partial defence” in the second tier of the homicide structure, for which the maximum sentence would be life imprisonment (discretionary life sentence).

Do consultees agree?

23. As to the tier in which such an offence should sit, as explained above, if the maximum sentence available for offences in the proposed second and third tiers are identical, there is no obvious advantage to a three-tier system. Either way, whether there were to be a two- or three-tier system, the question really becomes one of terminology.

24. The labelling issue will be controversial. However, since the most serious state of mind for murder – whether under the existing law or the proposed three-tier structure – is an intent to kill, there is a logic to the finding of a partial defence, which

requires proof of that fault element, still being categorised as a murder. Such is not just a consequence of the revised structure, and the need not to overcomplicate it, but rather it is arguable that the current law mislabels the offence (the term ‘voluntary’ in contrast to ‘involuntary’ manslaughter may be understood by lawyers but is otherwise not in common usage). The most important aspect of the new offence is that the discretionary life sentence is retained.

25. However, this will of course result in reclassifying as murderers those whose culpability for the killing is significantly reduced. That consequence does not sit easily where, for example, the qualifying trigger for a loss of control is long-standing domestic abuse, or where D’s responsibility was found to be diminished due to their suffering from an undiagnosed mental disorder which had not been appropriately treated by the State.

26. We endorse the suggestion at paragraphs 7.46 and 7.47 of the Consultation that the provisional description of ‘murder with partial defence’ should be revised once potential reform of the partial defences of loss of control and diminished responsibility have been addressed. The basis of any conviction due to proof of a partial defence should be apparent from the jury’s verdict (as sometimes currently is the case – see below) and not for the trial judge at the sentence hearing.

27. Diminished responsibility is an outmoded label which does not describe why culpability for murder is diminished/reduced.

28. Our experience is that the occasions on which both partial defences are left to the jury are not rare⁴ and query whether there is a statistical basis for the contrary

⁴ Cf. Consultation fn 64

assertion. For loss of control, Section 54(1)(c) and (3) allow the jury to consider how a person in the circumstances of D would react to the qualifying trigger, and that may include a relevant mental disorder which in turn may justify advancing a defence of diminished responsibility.

29. It is correct (paragraph 7.48) that trial judges are not obliged to ask the jury for the basis of an alternate conviction for manslaughter (lack of intent or partial defence), but our experience is that there is no consistent practice. Juries are frequently able to answer the question because the Route to Verdict document provided to them will determine the basis for the verdict because it is structured in a way that the jury will address (lack of, as now, murderous intent and) one partial defence before the other and therefore they will know at which point they convicted of manslaughter and on which basis. Although it follows that if, say, the jury acquit on the basis of loss of control, they will not go on to consider diminished responsibility (or visa versa).

Consultation Question 5

We provisionally propose that when the defendant is charged with second-degree murder, partial defences should not be available. When the defendant had the intention required for second-degree murder (intention to cause serious injury), circumstances akin to loss of control or diminished responsibility would be considered in mitigation at sentencing.

Do consultees agree?

30. On balance, yes (whatever the terminology applied to this offending).

31. If the principal rationale for findings of partial defences to be reclassified as second-degree murder (or “unlawful killing with intent to cause GBH”) is to avoid a mandatory life sentence due to the jury’s finding of reduced culpability, then there is

no basis for applying the partial defence to this offence as the maximum sentence is already a discretionary life sentence, as currently is the case with reduced culpability amounting to offence of manslaughter.

32. Whilst, as is pointed out, there is logic to applying the partial defences to “second degree murder” too (as currently is the case with the murderous intent of causing GBH), the fair-labelling objection is the same as for first-degree murder: that currently an offender is guilty only of manslaughter. It could only be resolved by creating a lesser offence, presumably “third-degree murder” or manslaughter. The former would be unduly complicated both for the general public and juries to comprehend. The latter would give rise to the countervailing logic that any killer whose culpability is significantly reduced should not be classified as a murderer at all, for the same reasons as addressed at Question 4.

33. The summary at Footnote 69 does not in our experience reflect current indicting practice. Whilst ‘voluntary manslaughter’ is not of itself an offence, in cases where there is plainly an issue as to whether D has a partial defence, the prosecution, whether from the outset or at the invitation of the trial judge, will usually indict manslaughter as an alternative to clarify the issues for the jury and the drafting of the Route to Verdict⁵. There is a marked difference as to how the jury should approach the alternate offence depending on whether it is indicted. If it is indicted, the jury can convict of manslaughter where they have not agreed on an acquittal for murder. If it is not indicted, subject to the permissible intervention of the trial judge, the jury can only convict of manslaughter where they have agreed on a verdict of not guilty on the

⁵ The CACD has recently described an obiter comment in *Saunders* (below) that there was a ‘long established practice of not indicting manslaughter’ as outdated (*R v ANL* [2025] EWCA Crim 969).

murder count (*R v Saunders* [1988] AC 148); that is another reason why current indicting practice is to include a manslaughter count.

Ch 8 – MANSLAUGHTER

Overview

34. The Law Commission's proposals to reform the law of manslaughter are intended to make this diffuse and sometimes confusing area of law more compatible with rule of law principles of consistency and coherence [§3.3]. The Commission acknowledges its previous proposals for reform (which were intended to create a clear hierarchy of homicide offences) have not met with approval from government and some academics. The wide variety of conduct which can give rise to prosecutions for manslaughter is not easily confined within a logical scheme.

35. The criticisms of the current law in §8.4 are long-standing and valid. The overarching proposal is to amend the law to create statutory offences in a clear and distinct hierarchy. In ascending order of gravity (and while recognising that categories can overlap) these are – (1) unlawful dangerous act manslaughter; (2) gross negligence manslaughter and (3) reckless manslaughter with (4) corporate manslaughter as a separate category. No draft statute is included in the consultation paper, so this response consists of comments on the proposals in principle. In general, we agree with the suggestions, as is indicated in our responses to the specific questions posed in chapter 8 of the consultation paper.

36. One of the criticisms of gross negligence manslaughter is that of circularity in the test propounded in *R. v. Adomako* [1995] 1 AC 171 [§8.121 and 122], namely that the jury must decide whether the defendant's conduct deserves to be described as "so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction". However, leaving it to a jury to determine whether conduct falls sufficiently outside acceptable behaviour is not confined to manslaughter; it is also part of the decision process for dishonesty following *Ivey v*

Genting Casinos [2017] UKSC 67. The view of the Bar Council is that juries can be trusted.

37. The Law Commission regards reckless manslaughter as appropriate to encapsulate the most serious homicides short of murder [§8.159-162]. It proposes definitions which make clear the distinctions between reckless, gross negligence and unlawful dangerous act manslaughter. This graduated differentiation should make it easier for the CPS, judges and juries to determine the most appropriate charges and verdicts for conduct resulting in death which falls short of an intention to kill or seriously injure.

38. There will inevitably be cases which might, depending on the jury's view of the evidence, span more than one category of homicide. Concern has been expressed by the CBA about how juries determine the different tests for manslaughter in a case where a company is prosecuted for corporate manslaughter and individuals within the company are jointly tried for offences of unlawful dangerous act or gross negligence manslaughter where the tests for criminal liability differ [§8.140]. We understand that concern but we agree with the Law Commission that the distinct offence of corporate manslaughter requires a distinct test, separate from that of individual criminal liability.

39. The Law Commission queries whether the term "manslaughter" remains appropriate for modern trials [8.167-171]. It concludes that it does and that the term remains sufficiently familiar to be preserved. We are not entirely persuaded by this. Given that the concerns underpinning the proposals for wider reform of the structure of homicide offences include clarity and fair labelling, we consider that there would be some advantage to describing offences in plain language, using terms that properly reflect the underlying conduct and fault elements. For example, unlawful killing by gross negligence, or unlawful killing by an unlawful dangerous act.

40. The Law Commission does not address how the criminal justice system should deal with a case where it would be open to the jury to reach verdicts of guilty of different types of manslaughter depending on their view of the evidence and, in particular, of the defendant's knowledge and foresight of consequences. In such cases, especially in a trial with several defendants (possibly including a corporate body), there is a risk of the indictment becoming overloaded with alternatives. We suggest that unlawful dangerous act manslaughter and/or gross negligence manslaughter should be statutory alternative verdicts available to a jury in a trial for reckless manslaughter (whatever these offences are to be termed). We suggest that it should be open to the jury either to acquit or to reach no verdict on the more serious form of manslaughter and then consider guilt of an alternative. It would be for the judge to determine whether, and if so which, alternative verdict is available to the jury on the evidence. This will avoid unnecessary retrials where a jury is undecided on the more serious offence but decided on the lesser.

41. As is customary in Law Commission consultation papers, a series of questions are posed for respondents to answer. The questions in chapter 8 and our responses are as follows –

Consultation Question 6

We provisionally propose that it should be unlawful dangerous act manslaughter where:

- (1) The defendant did an act which constituted a criminal offence.**
- (2) The defendant's conduct was dangerous, in that a reasonable person would have recognised that it must subject another person to the risk of some injury.**
- (3) The defendant intended to cause some injury or was reckless as to whether some injury was caused.**
- (4) The defendant's conduct caused the death of another.**

Do consultees agree?

42. The proposal is that unlawful dangerous act manslaughter would not apply where the underlying offence was one of strict liability and the offender was not subjectively at fault – §8-104 & §8-105.

43. Response – we agree.

Consultation Question 7.

We provisionally propose that strict liability offences should not be capable of forming the basis for a conviction for unlawful dangerous act manslaughter.

Do consultees agree?

44. Response – we agree, on the basis that such offences, if accompanied by the requisite *mens rea*, could be caught under the proposed head of reckless manslaughter (whatever so called, see below).

Consultation Question 8.

We provisionally propose that gross negligence manslaughter should apply where:

- (1) The defendant owed an existing duty of care to the victim.**
- (2) The defendant negligently breached that duty.**
- (3) At the time of the breach there was a serious and obvious risk of death.**
- (4) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death.**
- (5) The breach of the duty caused or made a significant contribution to the death of the victim.**
- (6) The defendant's conduct was truly exceptionally bad, falling far below what could reasonably be expected of them in the circumstances.**

Do consultees agree?

45. Response – We note that the only proposed revision to the existing definition is to (6) above, in which the Law Commission seeks to avoid circularity by aligning this

aspect of the fault element with the test for dangerous driving. While – as explained above – we are of the view that juries can be trusted to properly apply the “circular” test from *Adomako*, we can equally see some force in expressing the test in the way proposed or similar. We would not expect a jury properly applying the test suggested above to criminalise conduct that they would not have found criminal under the *Adomako* test, and *vice versa*.

Consultation Question 9

We invite consultees’ views on whether our provisional proposal for reform of gross negligence manslaughter would have any consequential impact on the statutory offence of corporate manslaughter under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007.

46. Response – As explained above, we do not consider that the proposed reform would have any consequential impact on corporate manslaughter. Suitable directions to any jury charged with determining offences against both individuals and a corporate body should enable justice to be done in each case.

Consultation Question 10.

We provisionally propose that there should be a separate category of reckless manslaughter which applies where:

- (1) The defendant’s conduct caused the death of another.**
- (2) The defendant was aware of a risk that their conduct would cause death or serious injury.**
- (3) It was unreasonable for the defendant to take that risk, having regard to the circumstances as they knew or believed them to be.**

Do consultees agree?

47. Response – we agree, noting that conduct that would not be captured under unlawful dangerous act manslaughter if strict liability offences could not act as the

trigger for liability could – assuming the appropriate fault element was made out – fall within this category.

Consultation Question 11.

We invite consultees' views on the use of the term “manslaughter” to describe this tier of the general homicide offence structure.

48. Response – we are not sure that this term justifies retention. It covers an extremely broad range of offending, lacks clarity and (understandably given its breadth) is not capable of being correctly understood in any given case without clarification. If reform is contemplated, we consider that describing conduct and fault using plain English has real advantages, as explained above.

Consultation Question 12.

We provisionally propose that both the offence and defence of infanticide should be retained. Do consultees agree?

49. We agree that the offence/defence structure remains justified in principle for the reasons the Commission has set out, recognising that detailed analysis concerning the substantive elements of the doctrine will be addressed in the subsequent consultation paper on defences.

Consultation Question 13.

We invite consultees' views on the need and justifications for a bespoke offence to criminalise the supply of unlawful drugs resulting in the death of a person.

50. We do not consider that there is a need or justification for a bespoke offence of this nature. At paragraph 10.79 reference is made to the case of *Broughton*, but in that case the culpability of the appellant hinged upon his refusal to seek help or medical attention, and his conviction for supplying a class A drug stood notwithstanding the quashing of his manslaughter conviction.

51. Supply of a class A drug is already a very serious offence punishable by a maximum of life imprisonment (14 years in the case of class B or C drugs), and this reflects the serious danger that is inherent in such supply. This appears to have been overlooked by those suggesting a bespoke offence with a maximum of ten years imprisonment (paragraph 10.82).

52. The Sentencing Council may, however, wish to consider in due course that the sentencing guidelines for the supply of a controlled drug assess harm purely in relation to the type and quantity of drug supplied. This is no doubt because in the vast majority of cases there is no evidence of direct harm to any particular individual. There may therefore be scope for harm to be viewed in a different way in circumstances where the supply of the drug has caused serious harm or death to the recipient. This may be as simple as it being added as a Category 1 or 2 factor, in the same way that supply of drugs in a custodial institution or directly to users already elevates the supply of even very small quantities to category 3. That said, as noted in respect of Question 21 below in a different context, issues of proof of causation would need to be grappled with, not least because the relevant evidence may well not have been adduced in respect of the index offence.

Consultation Question 14.

We invite consultees' views on the need and justifications for a bespoke offence in cases in which there has been a culpable failure to seek medical assistance or intervention and death results.

53. As noted in relation to Question 13, the case of *Broughton* (referenced at paragraph 10.79) principally concerned the appellant's refusal to obtain medical assistance, and the lack of criminal liability in these circumstances does appear to be a genuine cause of concern. We can see the argument in favour of a bespoke offence

relating to a culpable failure to seek medical assistance or intervention when death results.

54. However, the creation of such an offence would represent a considerable departure from the longstanding approach of the law in this jurisdiction, and would require careful consideration of the considerable legal, moral and practical obstacles against such a change. For that reason, we would suggest that a freestanding consultation would be justified if further investigation of this proposal were thought appropriate.

Consultation Question 15.

We provisionally conclude that the specific homicide offences (including offences in which death is a distinct element that must be proved by the prosecution, but which fall outside the general homicide offences) should not be incorporated into the three-tier homicide structure. Do consultees agree?

55. Yes, regardless of whether a two- or three- tier structure is to prevail, we agree that these offences fall outside the scope of the general homicide offences and their inclusion may only serve to complicate the tiered structure.

Consultation Question 16.

We invite consultees views on whether the substantive elements of any of the specific homicide offences require reform.

56. We do not independently propose reform in relation to any of the specific homicide offences.

Consultation Question 17.

We provisionally conclude that a separate homicide offence for mercy or consensual killings is not justified. Do consultees agree?

57. We agree that there should certainly be detailed consideration in due course of a partial defence in relation to mercy killings, but that a separate offence is not justified. In particular we agree with the contention at paragraph 11.24 that the lower culpability in mercy and consensual killing cases is more appropriately addressed through prosecutorial discretion, sentencing and partial defences where applicable.

58. On that basis, the principal difficulty that arises in mercy killing cases is that it is often clear that a conviction for manslaughter rather than murder would be a more just and proportionate outcome, and provide a sentencing judge with more appropriate flexibility, but that this is currently only achievable where the strict criteria are met for diminished responsibility. There is a very clear need for an alternative route, and we welcome the indication that the Law Commission will consider this further within the defences and sentencing strands of the homicide project.

Consultation Question 18

We provisionally propose that attempt liability under our proposed homicide offences should apply to first-degree murder. The defendant would be liable for this offence where: (1) they do an act that is more than merely preparatory to the commission of the offence of first-degree murder; and (2) they have the intention to kill. 13.27

Do consultees agree?

59. Yes. (Subject to the points made above about the use of the term “first-degree” murder.)

Consultation Question 19.

Under our proposals, a defendant who unlawfully kills another person with the intention to cause serious injury would be guilty of second-degree murder.

Currently, where the defendant acts with the intention to cause grievous bodily harm and takes steps that are more than merely preparatory towards doing so, the defendant may be guilty of causing grievous bodily harm with intent or attempting to cause grievous bodily harm. We provisionally propose that this approach be retained, with the consequence that there would not be an offence of attempted second-degree murder.

Do consultees agree?

60. Yes. (Whether or not “second-degree” murder were to be adopted, and even more so if it were not.)

Consultation Question 20.

We seek consultees’ views on the need and justifications for a bespoke offence to criminalise controlling or coercive behaviour in an intimate or family relationship where that abusive conduct contributes to the death by suicide of the victim.

Do consultees agree?

61. In light of the research assembled by the Law Commission, we can see the argument for a bespoke offence focusing on such conduct where that is a more than minimal cause of death. However, we can also see that such an offence is likely to be rather more difficult to prove as a matter of practice than, say, whether dangerous driving was a cause of another's death. That is at least in part because of the centrality of evidence from the victim in a prosecution for controlling and coercive behaviour, and the obvious difficulties that would arise from prosecuting such a case where the victim had died. The risk therefore is that any offence of this nature would likely be extremely difficult to prove.

62. However, if a bespoke offence were considered to be required, an *actus reus* borne out the existing offence of coercive or controlling behaviour would be a sensible starting point, given the range of relevant conduct that could be encompassed in such

a charge. Whether any causal link should be drawn as openly as that for driving offences (“more than minimal”) or something more focused would require careful consideration, not least due to the likely difficulty in establishing causation with any degree of certainty. It might be thought that, rather than relying on an overly broad criterion of contribution to the death, the *mens rea* could be that which already exists for complicity in another’s suicide contrary to the Suicide Act 1961, s.2, i.e. that the defendant’s act (in this case, their controlling or coercive behaviour) was intended to encourage or assist suicide or an attempt at suicide. On the other hand, given that this conduct is (self-evidently) already covered by the 1961 Act, it is hard to see what a new offence modelled in those terms would add to the existing law. We endorse the Law Commission’s consideration of this topic and would welcome further related investigation and discussion.

Consultation Question 21.

We seek consultees’ views on the need and justifications for an aggravating factor at sentencing for criminal offences commonly charged in domestic abuse cases, where that abuse contributes to the death by suicide of the victim.

Do consultees agree?

63. If a bespoke offence were to be created, the proper approach would be to prosecute rather than to rely on aggravating any sentence for an “index” offence. However, in the absence of such an offence at present we can see some merit in this proposal. There is nothing within the current guidelines which makes allowance for such a degree of harm and culpability (beyond, for example, descriptors such as “substantial impact upon victim” as a higher harm factor in the various assault guidelines).

64. However, as a matter of practice, in the absence of anything that could be characterised as a Victim Personal Statement (necessarily, of course, written prior to

the death of the victim), a sentencing court may be wary of making findings in this regard. A clear regime governing how a sentencing court could safely reach a conclusion on domestic abuse offences ‘contributing’ to death so as to justify an uplift would need to be established. Such an issue could be expected to be contested and would therefore likely require to be proved to the criminal standard as with any other factual issue at sentencing, requiring a *Newton* hearing. But we can see the force in the suggestion that, where established, this should be an aggravating factor at sentence.

65. Finally, we would make the point that this might more properly be a matter considered by the Sentencing Council, unless it were to be proposed that this would be a statutory aggravating factor (in which case legislation would be appropriate).

Author: The Law Reform Committee

Contact

Contact name: Eleanore Lamarque, Policy Manager, Regulation, Law Reform & Ethics

Email address: elamarque@barcouncil.org.uk