Law Commission

Reforming the law

Homicide Offences

Consultation Paper

Consultation Paper 277

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Topic of this consultation: We are consulting on reforms to the homicide offences.

Geographical scope: This consultation concerns the law of England and Wales.

Duration of the consultation: We invite responses from 17 June 2026 to 30 September 2026.

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Glossary

This is not a comprehensive glossary of terms relating to homicide. It includes legal terms that are used throughout this consultation paper and provides common legal definitions. We expand on these basic definitions in the main body of the paper.

Acquittal: a formal finding by a court that a person accused of a crime is not guilty.

Causation: a legal and factual concept that determines whether a defendant's act or omission is responsible for a result or *consequence*, for example, whether a defendant's act of violence is the cause of the victim's death.

Charge: the criminal *offence* that the defendant is formally accused of committing. Once the defendant has been charged, court proceedings can start.

Circumstance element of an offence: this is any fact other than the *conduct element* or a *consequence element* affecting whether the defendant is guilty of the offence or not (for example, in rape, that the victim does not consent). Together with the conduct and any consequence elements, these are referred to as the *external elements*, or actus reus.

Complicity: a legal doctrine that determines when a person (an "accessory" or "secondary party") can be held criminally responsible for encouraging or assisting the commission of a criminal offence by another person (the "principal"). It is also referred to as "secondary liability", "accessory liability" or "accessorial liability". Complicity is frequently called, albeit inaccurately, "joint enterprise liability".

Conduct element of an offence: what the defendant must do or fail to do to be guilty of the offence. Together with any *circumstance* and/or *consequence elements*, these are referred to as the *external elements*, or actus reus.

Consequence element of an offence: the result of the defendant's conduct (for example, in murder, that the victim dies). Together with the *conduct* and any *circumstance elements*, these are referred to as the *external elements*, or actus reus.

Constructive liability: an offence is one of constructive liability if the defendant can be found guilty despite only intending to cause, or being *reckless* about causing, a lesser degree of harm than the defendant caused. For example, to be guilty of murder, the defendant must bring about the victim's death but need only intend to cause grievous bodily harm.

Conviction: a formal finding made by a court that a person accused of a crime is guilty. This can take place after a jury trial in which the defendant is found guilty, or after the defendant enters a guilty plea.

Correspondence principle: the principle that the fault element must correspond (relate) to each and every *external element* of the offence, namely the conduct element and any consequence and/or circumstance elements.

Crown Court Compendium: the Compendium from the *Judicial College* provides guidance to judges on directing the jury and sentencing in Crown Court trials. It also contains some suggestions in relation to practical matters including jury management.

Crown Prosecution Service ("CPS"): the body which is generally responsible for prosecuting offences in England and Wales, after an investigation by the police.

Culpability: how blameworthy a person is for their conduct. Generally, the law will only impose criminal liability on a person if their level of culpability or blameworthiness justifies a criminal sanction.

Defence: a legal defence is a justification or excuse that extinguishes or reduces criminal liability. A successful full defence entitles a defendant to be acquitted, while a successful partial defence results in a conviction for a lesser offence. "The defence" can also refer to the lawyer(s) who represent the defendant in criminal proceedings.

Defendant: a person formally charged with committing a criminal offence. See also *offender* and *suspect*.

Determinate sentence: a sentence of imprisonment for a fixed term of months or years, rather than a life sentence. See *mandatory life sentence* and *discretionary life sentence*.

Directions: in a Crown Court trial, the judge gives directions to the jury on matters of law, which the jury must apply to their determination of the facts. These are also referred to as "jury directions".

Discretionary life sentence: a maximum sentence for some offences, such as manslaughter. The judge may sentence the defendant to life imprisonment but is not required to do so; instead, the judge may pass a lower, *determinate, sentence*. See also, *mandatory life sentence.*

European Convention on Human Rights ("ECHR"): an international treaty between the member states of the Council of Europe which protects the human rights of people in these countries. These rights were incorporated into UK law by the Human Rights Act 1998.

European Court of Human Rights ("ECtHR"): an international court which rules on individual or state applications regarding possible violations of the rights set out in the *ECHR*.

Expert evidence: an expert witness giving written or oral evidence on any admissible matter which calls for expertise and which they are qualified to provide.

External elements: the elements of an offence other than those relating to the defendant's state of mind or fault: they divide into *conduct elements*, *consequence elements* and *circumstance elements*. The external elements are also referred to as the actus reus.

Fault element: the mental state required for a defendant to be guilty of an offence. Different offences have different fault elements, ranging from *intention* to *recklessness* to *negligence*. A fault element is also referred to as a mental element or mens rea.

Homicide offence: a criminal offence where the result or *consequence* of the defendant's conduct is the death of the *victim*.

Inchoate liability: criminal liability arising when a person has taken steps towards the commission of an offence, but the offence is incomplete. Examples include attempted murder and encouraging or assisting an offence under the Serious Crime Act 2007.

Intention: a person “intends” a result if they act in order to bring it about (direct intent), or if they know that the result is virtually certain to occur if they succeed in achieving some other purpose (oblique intent).

Joint enterprise: see *complicity*.

Judicial College: the Judicial College provides training for judges and produces the *Crown Court Compendium*.

Jurisdiction: the extent of a court’s legal authority or power to hear a case. It also refers to the geographical area in which a legal system operates and its laws are enforced.

Law Commission: a statutory independent body that is required to keep the law in England and Wales under review and recommend reform where it is needed.

Mandatory life sentence: a sentence established by Parliament which requires judges to sentence anyone convicted of murder to life imprisonment. The sentencing judge will set a minimum term which must be served before an offender can be considered for release; if released by the Parole Board, the offender will remain under supervision by the Probation Service for the rest of their life. In the most serious cases, the sentencing judge may impose a “whole life order”, meaning that the offender cannot be considered for release.

Negligence: a person is negligent if they fail to exercise the level of care, skill or foresight that a reasonable person in their situation would exercise.

Offence: an act or omission which breaches the criminal law.

Offender: a person who has been convicted of a criminal offence.

Practitioner: A person who has a professional role and participates in the court process. This could include barristers, solicitors, court officials and other associated professionals.

Prosecution: the institution and conducting of legal proceedings, usually on behalf of the state, against the defendant in relation to a criminal charge. “The prosecution” can also refer to the team of lawyers and the prosecuting agency which institute and prosecute those proceedings. See also, *Crown Prosecution Service.*

Recklessness: the state of mind in which the defendant is aware of the risk of a particular result or *circumstance*, but unreasonably (given the facts as the defendant knows or believes them to be) takes that risk. This test is also known as “subjective recklessness”.

The Sentencing Council: a statutory independent body that issues *sentencing guidelines* for sentencing criminal offences (except murder).

Sentencing Guidelines: guidelines that judges must follow when determining the sentence to pass on an offender. They provide guidance on relevant “starting points” and on the factors judges should take into consideration when determining sentence type and length.

Stakeholder: the Law Commission uses this as an umbrella term to refer to any person or entity affected by, or simply interested in, a project. This includes, for example, individuals, charities, campaigning groups, think-tanks, academics, lawyers, and professional associations. It also includes bodies and individuals that are associated with the state, such as government departments, independent statutory bodies or appointees, police, prosecutors, parliamentarians, as well as courts, tribunals and the judiciary.

Subjectivity principle: the view that the *fault element* should be concerned with the defendant's state of mind at the time of their actions.

Suspect: a person suspected by the police of involvement in a criminal offence, who is not yet charged.

Verdict: the decision of the jury at the end of a prosecution as to whether the defendant is guilty or not guilty of the offence.

Victim: a person against whom an offence has been committed. In this project, we use the term "victim" to describe someone who has been killed when the cause of their death amounts to a criminal offence. We acknowledge that family and friends of the deceased person are also victims of homicide.

Chapter 1: Introduction

HOMICIDE IN ENGLAND AND WALES

1.1 Homicide offences are the most serious criminal offences since they involve the most serious harm, the loss of human life. The criminal justice response to homicide is a vital part of recognising the harm to individuals and society at large and protecting the public from those who kill. We have been asked to review that law, to ensure that it operates effectively for all of society.

1.2 Data published by the Office for National Statistics ("the ONS") shows that there were 522 homicide victims in a total of 508 "homicide incidents"[1] recorded in England and Wales in the year ending March 2025.[2] The ONS reports that this is a decrease from the year ending March 2024 (549 homicide incidents) and is the lowest number of homicide incidents since the year ending March 2015.[3]

1.3 In the year ending March 2025, 247 offenders were convicted of a homicide offence: 177 of these were convicted of murder; six of manslaughter through the partial defence of diminished responsibility; 64 of other forms of manslaughter; and none of infanticide.[4] Out of the 247 offenders convicted of a homicide offence, 91% were male and 9% were female.[5] The most common age group of male offenders convicted of a homicide offence was 16 to 24 years old (31%) and the second most common was 25 to 34 years old (26%).[6] For female offenders convicted of a homicide offence, the most common age group was 35 to 44 years old (32%), followed by 16 to 24 years old (23%).[7]

1.4 Data published by the Ministry of Justice shows that in the year ending September 2025, the vast majority (94.1%) of the 253 defendants sentenced for murder in England and Wales were sentenced to custody.[8] Of the 161 defendants convicted of manslaughter (including manslaughter due to diminished responsibility), 82% were sentenced to custody in the year ending September 2025, with the most common

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1 In the ONS data, a "homicide incident" is an occasion where one or more people were killed. If more than one person was killed in the same course of events, it is counted as one "incident".

2 Office of National Statistics, *Homicide in England and Wales: year ending March 2025* (February 2026).

3 Above.

4 Above.

5 Above.

6 Above. Percentages relating to ONS data are approximate, they are rounded to the nearest whole number.

7 Above.

8 Ministry of Justice, *Criminal Justice Statistics Quarterly* (December 2024). This 94.1% comprises of 218 defendants given a life sentence and 20 defendants given "custody - not known".

sentence length being 112.2 months (9.35 years).[9] Two defendants were convicted of infanticide in the year ending September 2025.[10]

1.5 According to data published by the ONS, in the year ending March 2025, 70% of all homicide victims in England and Wales were male, whilst 30% were female.[11] The most common suspect for male victims was a friend/acquaintance (20%), followed by a stranger (18%).[12] For female victims the most common suspect was their partner or ex-partner (40%), followed by another family member (16%).[13] The most common age group for homicide victims was 35 to 44 years old (17%), followed by 25 to 34 years old (14%).[14] The number of homicide victims aged 16 to 24 years old saw a 41% decrease compared to the year ending March 2024, when it was the most common age group for homicide victims.[15] The most common method of killing, for both male and female victims, was by a “sharp instrument” (39%), followed by “kicking or hitting” (21%).[16] Of the female victims, 17% were killed by “strangulation, asphyxiation” in contrast to only 4% of male victims.[17]

BACKGROUND TO THE PROJECT

1.6 Despite the vital role of the legal response to unlawful killing, the law governing homicide, as we concluded in 2006, is a:

> rickety structure set upon shaky foundations. Some of its rules have remained unaltered since the seventeenth century, even though it has long been acknowledged that they are in dire need of reform. Other rules are of uncertain content, often because they have been constantly changed to the point that they can no longer be stated with any certainty or clarity.[18]

1.7 The law of homicide was subject to a thorough review by the Law Commission in the early 2000s. Firstly, we published recommendations for reform of partial defences to murder in 2004.[19] Secondly, we published recommendations for the reform of homicide law in our 2006 report on murder, manslaughter and infanticide (“2006 Report”).[20] Our recommendations on the reform of partial defences to murder were implemented for the most part by the Coroners and Justice Act 2009, which replaced

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9 Ministry of Justice, *Criminal Justice Statistics Quarterly* (December 2024).

10 Above. The data is not clear as to what the sentencing outcomes were for these cases.

11 Office of National Statistics, *Homicide in England and Wales: year ending March 2025* (February 2026).

12 Above. According to the ONS, a suspect in a homicide case is defined as either: a person who has been charged with a homicide offence, including those who were subsequently convicted and those awaiting trial; or a person who is suspected by the police of having committed the offence but is known to have died.

13 Above.

14 Above.

15 Above.

16 Above.

17 Above.

18 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 1.8.

19 Partial Defences to Murder (2004) Law Com No 290.

20 Murder, Manslaughter and Infanticide (2006) Law Com No 304.

the partial defence of provocation with that of loss of control and reformulated the requirements of the partial defence of diminished responsibility.

1.8 The Government decided not to implement our recommendations on substantive homicide offences, stating that "the time [was] not right to take forward such a substantial reform of our criminal law".[21]

1.9 Since that report, the problems identified with the law remain largely unchanged, and new issues have emerged. These include the operation of the law of complicity and of the reformed partial defences to murder, as well as the extent to which the law reflects a modern understanding of the effects of domestic abuse.

1.10 Accordingly, in December 2024, the Ministry of Justice asked us to revisit homicide law. This is a new review which includes consideration of homicide offences (substance and structure), partial defences to murder and full defences as applicable to homicide and the sentencing framework for murder.

1.11 At the time we were asked to undertake this review of homicide law, we had recently started a related, smaller, project on the defences available to victims of domestic abuse who kill their abusers.[22] We had been asked to review this following Clare Wade KC's report on sentencing in domestic homicides.[23] We published a background paper[24] in December 2024, setting out the prevalence and profiles of victims of domestic abuse who kill, to inform future law reform. We have since incorporated that work into the wider homicide project.[25]

1.12 The Terms of Reference for this project (set out below) explain that part of this project is to update and revise the recommendations we made in 2006. Given the length of time that has passed and new issues that have arisen, we are looking at the relevant issues afresh. That means that we do not use the 2006 recommendations as our starting point for potential reform. However, our analysis and conclusions in the earlier project form an important part of the evidence base for this current review.

Call for Evidence

1.13 In August 2025, we published a Call for Evidence.[26] In that document we outlined the recommendations in our 2006 Report, and commentary on and developments in the law since then. We set out the scope of the new project and invited evidence on the range of issues that we may consider within the project. We received over 70 submissions to our Call for Evidence from a range of academics, practitioners, voluntary sector organisations, and individuals affected by homicide. We held three roundtables to gather initial evidence and views: for academics, practitioners, and

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21 Ministry of Justice, *Report on the implementation of Law Commission proposals* (2011), para 54.

22 Project webpage: Defences for victims of domestic abuse who kill their abusers – Law Commission.

23 Clare Wade KC, Independent Review of Domestic Homicide Sentencing (March 2023).

24 Law Commission, Defences for victims of domestic abuse who kill their abusers, Background Paper (10 December 2024).

25 The original Terms of Reference for the defences project are appended to the Terms of Reference for the homicide project, see: Terms of Reference, January 2025.

26 Law Commission, Homicide Law: Call for Evidence (14 August 2025).

victim support groups. We also held a number of one-on-one meetings with a wide range of stakeholders to discuss further the issues set out in the Call for Evidence.

1.14 The evidence gathered during this early stage has helped shape the direction and scope of the project. We did not make any provisional proposals for reform in our Call for Evidence, so we have not undertaken the analysis of responses typical of a Law Commission consultation. Instead, we sought: views, published work, reports, cases, and any other insight to help us work towards provisional proposals. We have used the evidence received, and our own further research, to develop the provisional policy we now set out in this consultation paper.

Terms of Reference

1.15 In January 2025, our Terms of Reference were agreed as follows:

> The Law Commission will review the law relating to homicide offences, including full and partial defences to those offences, and the existing sentencing framework for murder.
>
> ### Offences
>
> To review the various elements of homicide offences, and the relationship between those offences. In particular to update and revise the Law Commission's 2006 report *Murder, Manslaughter and Infanticide*.
>
> The review will consider the implications of the current law on joint enterprise (following the Supreme Court decision in *Jogee*[27]) for any reform of the law of homicide.
>
> ### Defences
>
> To review the defences and partial defences to homicide offences. This will include, but is not limited to:
>
> - consideration of defences for victims of abuse who kill their abuser in light of modern understanding of domestic abuse on victims;[28]
> - consideration of the role of the defence of duress; and
> - a review of the operation of the partial defences of loss of control and diminished responsibility.
>
> ### Sentencing framework
>
> To review the sentencing framework for murder, to ensure that it operates justly, and enables those convicted to be appropriately punished. This will include, but is not limited to:

27 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

28 See Terms of Reference for our earlier project on defences for victims of domestic abuse who kill their abusers: https://lawcom.gov.uk/publication/domestic-homicide-terms-of-reference/.

- a complete review of Schedule 21 to the Sentencing Code (Determination of minimum term in relation to mandatory life sentence for murder etc), and other relevant legislation where necessary to conduct that review;

- the operation of the statutory starting points and aggravating and mitigating factors, and the impact these have on the sentencing exercise;

- the extent to which the framework adequately reflects a modern understanding of culpability where murder is committed within a domestic context; and

- whether the framework is logically presented, easy to navigate and enables consistent sentencing outcomes.

The review will not consider the sentencing guidelines for manslaughter, which remain the responsibility of the Sentencing Council.

Assumptions

This review will assume the continuing existence of the mandatory life sentence for murder (or the most serious form of murder if a tiered structure for the offence is recommended).

This review will assume that the sentencing framework for the mandatory life sentence will continue to be set out in primary legislation.

Exclusions

The review will only consider the areas of euthanasia and involvement in suicide inasmuch as they form part of the law of homicide, not the issues associated with their possible legalisation and regulation which would need separate debate.

The review will not consider offences relating to harm caused to a fetus.

Mandatory life sentence

1.16 As set out in the Terms of Reference:

> This review will assume the continuing existence of the mandatory life sentence for murder (or the most serious form of murder if a tiered structure for the offence is recommended).

1.17 The mandatory life sentence was established by Parliament at the time of the abolition of the death penalty; it requires judges to sentence anyone convicted of murder to life imprisonment.[29] In practice, judges set the "minimum term" which the offender must serve before they can be considered for release.[30] If they are released at any stage after that minimum term has passed,[31] they remain subject to certain conditions

29 Murder (Abolition of Death Penalty) Act 1965, s 1.

30 Until 2002 the minimum term was set by the Home Secretary.

31 The decision to release an offender from prison to serve the rest of their sentence in the community is made by the Parole Board.

(known as their licence) and are managed by the probation service for the rest of their life. They can be recalled to serve the rest of their sentence in prison if they fail to comply with those requirements.

1.18 The mandatory life sentence is unique to murder. The Government has decisively provided for its retention for the most serious murder offence[s], leading to the assumption reflected in our Terms of Reference above. The fact that the most serious offence carries the most severe punishment is a long-established part of the criminal justice system in this jurisdiction. Although Parliament usually sets the maximum sentence for offences in statute, it is less common for it to prescribe sentencing ranges or aggravating or mitigating factors.

1.19 The effect of the mandatory life sentence for murder is that judges' discretion at sentencing is limited to setting the minimum term (or imposing a whole life order). The imposition of the mandatory life sentence reflects the will of Parliament that those who are convicted of murder should be sentenced to life imprisonment. This necessarily restricts the judge's flexibility to reflect different levels of culpability at sentencing and has led to some unique features of homicide law in this jurisdiction, namely the partial defences.

1.20 Currently, a successful partial defence results in a conviction for manslaughter rather than murder, meaning that the offender will not be subject to the mandatory life sentence. There are no analogous partial defences to any other offence. Yet a defendant's responsibility can be diminished by a mental health condition for any offence; similarly, a loss of control might feature in a prosecution for an offence against the person, for example. Such circumstances are considered as part of the trial of and sentencing for offences other than murder to ensure a just outcome. This suggests that partial defences to murder exist to allow greater sentencing flexibility than the mandatory life sentence permits.

1.21 We take a similar approach throughout this project: the mandatory life sentence has a mandate and purpose; it shapes the structure of homicide law. It reflects the will of Parliament to ensure that the most culpable homicide offenders receive the most severe sentences. To retain its legitimacy, it should be targeted and applied to those most deserving of such a sentence.

1.22 It does not follow that all offending that is not subject to the mandatory life sentence should receive a lower (determinate) sentence. The discretionary life sentence (currently the maximum penalty for manslaughter[32] as well as other serious offences) means judges may still sentence a defendant to life imprisonment in a deserving case, without it being mandatory. While Parliament has determined that certain cases will always warrant the imposition of life imprisonment, the availability of the discretionary

32 Offences Against the Person Act 1861, s 5. A discretionary life sentence means that the maximum sentence a judge can pass upon conviction is life imprisonment; such a sentence would then operate in the same way as a mandatory life sentence, described above. However, it is generally a discretionary or maximum sentence, so the judge may pass a lower (determinate) sentence. There are some circumstances where the sentencing judge is nonetheless required to pass a life sentence. This includes some cases of manslaughter (for example when the offender has already been convicted and sentenced for another serious offence before the manslaughter offence: Sentencing Code, s 273).

life sentence recognises that other cases may also warrant the most severe punishment.

Structure of the project

1.23 We have divided the project into three strands: homicide offences; full and partial defences; and sentencing for murder. We have begun with the homicide offences strand to identify the right structure and scope of the offences, before we consider how defences and sentencing should operate within that structure in the second and third strands.

1.24 This is therefore the first consultation paper of the homicide project, focussing on issues specific to homicide offences: the structure of homicide offences, and reform of the offences themselves. This will be followed by a consultation paper looking at defences, and sentencing for murder.

1.25 The law is not so neatly divisible, however. There are issues that span multiple strands. One clear example is the doctrine of infanticide: infanticide is currently both an offence and defence, with the same elements. Where such topics arise in this consultation paper, we have decided what to consider as part of a review of offences, and what is better considered in other strands. We explain these decisions throughout. We will publish consultation papers and consult on all three strands before we make our final recommendations, to ensure a holistic review.

SCOPE

1.26 The boundaries of this project are very wide. We focus in this paper on those specific to the law of homicide that would benefit from review as part of this project (rather than, for example, a separate piece of work or alongside other related issues not specific to homicide). This enables us to focus on recommending reform to address the most important issues in homicide law.

1.27 Throughout this paper we identify issues that we have decided to address only in a limited way or not at all. Some examples are:

(1) Attempted murder. The law of attempt applies to a wide range of criminal offences. We therefore consider only issues that are specific to attempted murder, rather than wholesale reform of the law of attempt.

(2) Complicity. The law of complicity (which is often referred to as “joint enterprise”) is complex, subject to high levels of scrutiny, and still evolving since a landmark Supreme Court judgment in 2016.[33] While many high profile cases involve complicity in the context of homicide (and particularly gang-related conduct), the same law applies whether it is a homicide offence, a non-fatal assault, or a robbery, for example. There have been calls for review of the operation of the law of complicity for many years, and ongoing work in this area. The Westminster Commission on Joint Enterprise, launched by Kim Johnson MP, Chair of the All-Party Parliamentary Group on Miscarriages of Justice is due to

[33] *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

report this year.[34] In this project we cannot review the law of complicity in the holistic, thorough way it requires. We therefore focus our attention on how our proposals for reform might impact and improve the application of the law of complicity to the law of homicide. We explain this in more detail in Chapter 11.

(3) In addition to the general homicide offences of murder, manslaughter and infanticide, there are a number of offences that address specific conduct that results in death; we refer to these as "specific homicide offences". Often these offences were created to respond to a narrow gap in the criminal law, and build on other non-fatal offences (for example, there are offences of dangerous driving and causing death by dangerous driving).[35] Where issues have been raised that warrant further review, we think these would be better dealt with when the underlying or connected non-fatal offences can be properly considered as well. To continue with the driving example, the offences of causing death by dangerous or careless driving would be better considered as part of a review of driving offences more generally. We also received suggestions for new specific homicide offences in response to our Call for Evidence. We explain in Chapter 10 and Chapter 14 our approach to those suggestions.

1.28 Some may disagree with decisions we have taken on the scope of our project. We encourage consultees to give their views, including whether they have concerns that a particular reform might adversely affect the wider criminal justice system. There is a question at the end of the consultation paper, and the online survey, with space for consultees to tell us anything they have not had a chance to raise in response to the specific questions throughout.

STRUCTURE OF THIS CONSULTATION PAPER

1.29 We begin this consultation paper with the foundations for reform. First, in Chapter 2, we explain the current homicide offences and the case for reform. In Chapter 3 we set out the principles we think the law of homicide should uphold: we make proposals where we think reform can better achieve a principled law of homicide. Chapter 4 summarises our provisional proposals for a new structure for general homicide offences, introducing three tiers of general homicide offences that better reflect variations in culpability.

1.30 The next section of this consultation paper provides a detailed review of the general homicide offences. In Chapters 5 and 6, we explain our proposals for first-degree and second-degree murder. In Chapter 7, we set out how we propose that partial defences should operate within this new structure, although we reserve consideration of the substance of the defences for a later consultation paper. In Chapter 8, we consider the offence of manslaughter and set out reform proposals for the individual categories of manslaughter. In Chapter 9, we examine the doctrine of infanticide. As mentioned above, infanticide is both an offence and defence; at this stage we restrict our consideration to the rationale for a separate doctrine of infanticide and explain our plans for further review in the defences strand. In Chapter 10, we discuss the specific

[34] See their webpage at https://appgmiscarriagesofjustice.wordpress.com/about/.

[35] Road Traffic Act 1988, ss 1 & 2.

homicide offences: those which address conduct that results in the death of another person, that does not always amount to murder, manslaughter or infanticide. In Chapter 11, we outline the relevant aspects of "mercy" and consensual killings.

1.31 The final section of this consultation paper considers the intersection between aspects of the general criminal law and the law of homicide. In Chapter 12, we consider the operation of the law of complicity in homicide and explain how it would operate under our proposed structure. In Chapter 13, we look at attempted murder. In Chapter 14 we review how the law of homicide does, and should, operate for victims of domestic abuse, including the question of criminal culpability for suicide following domestic abuse. Finally, in Chapter 15, we invite views on any potential impact of our proposals on groups with protected characteristics.[36]

1.32 These proposals are only provisional. The purpose of this consultation paper is to explain our initial thinking about how the law could be improved, and to gather views on that thinking. We have not yet publicly consulted on our provisional proposals, so we have not heard what many interested groups and individuals think about them and whether they agree or disagree. The recommendations that we will make to the Government in the final report will be informed by what we have heard during this consultation.

Terminology

1.33 We acknowledge that the words used to describe murder, homicide, and death more generally can be emotive. The terminology used throughout this consultation paper has been chosen to reflect and be consistent with the legal process.

1.34 We use "suspect" to refer to someone who is suspected of committing a homicide offence but has not yet been charged with an offence. We use "defendant" to refer to someone who has been charged with a homicide offence but has not been convicted. We use "offender" to refer to someone who has been convicted.

1.35 We occasionally use the term "person who has killed" to describe someone who has done an act that has killed another person, in circumstances that may not constitute an offence (for example when the defence of self-defence applies).

1.36 We use the term "victim" in the sense of "victim of crime", to describe someone who has been killed and the cause of their death amounts to a criminal offence. We acknowledge that family and friends of the deceased victim are also victims of homicide. We sometimes use the term "the deceased person" to describe someone who has died when it is not clear that the cause of their death amounts to a criminal offence.

1.37 We use the term "complicity" throughout this consultation paper when describing the legal doctrine that determines under which circumstances one person can be held criminally responsible for encouraging or assisting a criminal offence committed by another. In Chapter 12, we explain that "joint enterprise liability" has become a popular expression in calls for reform of the law of complicity. However, as we also explain in

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36 These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation: Equality Act 2010, s 4.

Chapter 12, the expression is inaccurate in legal language. In our Terms of Reference, we used “joint enterprise” as synonymous with “complicity”. However, throughout this consultation paper we use the more accurate term “complicity”.

1.38 Finally, we sometimes use specific terminology (for example “murder with a partial defence”) to describe our policy for the purposes of this consultation. We do not wish to presuppose that our terminology is the precise wording that would be used in any Bill.

References and sources

1.39 Citations for all published sources are provided in footnotes. Where major reports, codes of practice, guidance documents or similar are available from a reliable online source then we have generally provided a link. All links were last accessed 10 June 2026.

ACKNOWLEDGEMENTS

1.40 We are grateful to the many individuals and organisations who have kindly given their time to meet and discuss with us the issues that are addressed in this consultation paper, who have provided us with advance copies of research, commented on draft material, facilitated discussion with and engagement by other stakeholders, and provided us with opportunities to observe relevant trials. Their expertise and insight have been invaluable in informing our work. This includes the Crown Prosecution Service, Southall Black Sisters, Centre for Women’s Justice, Killed Women, the Scottish Law Commission, the Perinatal Legal Project, Sentencing Council, Sentencing Academy, Northumbria School of Law, HMP Manchester, the Howard League for Penal Reform, members of the Judiciary, Professor Julia Tolmie, Professor John Child, Professor Matt Dyson, Professor John Cooper KC, Anthony Orchard KC, William Davis KC, Louise Oakley KC, Benjamin Holt, David Osborne and Maddison Fisher.

1.41 We are particularly grateful to those with lived experience of homicide who have generously shared their own experiences with the aim of improving the justice system for the future.

1.42 The Commissioners would like to record their thanks to the following members of staff who worked on this consultation paper: David Connolly (team manager); Roseanna Peck (senior lawyer); Dr Andrea Preziosi and Grace Bowland (project lawyers); and Abigail Pope, Claire Paton, Grace Bussey, and Niamh Webb (research assistants).

Chapter 2: The current homicide offences and the case for reform

INTRODUCTION

2.1 In this chapter we outline the current offences of murder and manslaughter, and previous attempts at reform of the homicide offences.[1] We then outline the case for reform of the homicide offences, summarising the central criticisms which others have made of the current two-tier structure.

2.2 The case for reform of the homicide offences remains as strong as it was at the time of our 2006 report on murder, manslaughter and infanticide ("2006 Report").[2] The two-tier structure of murder and manslaughter is widely criticised as being unable to reflect the range of culpability in different killings accurately and fairly. As a result, homicide law is incoherent, uncertain and unfit for modern purposes.

THE CURRENT HOMICIDE OFFENCES

Murder and manslaughter

2.3 There are currently two general homicide offences: murder and manslaughter. These offences form the two-tier structure we consider in this chapter. Murder and manslaughter are both common law offences.

2.4 Murder is the most serious homicide offence. It is committed when a person (the defendant, or "D") unlawfully kills another person (the victim, or "V") with either the intention to kill V or the intention to cause grievous bodily harm ("GBH") to V.[3] As we explain in the introduction, murder carries a mandatory life sentence.[4]

2.5 It is important to note here that we use "the intention to cause GBH" in this consultation paper to refer to one of the fault elements of the current offence of murder.[5] We use "the intention to cause serious injury" to refer to the fault element of our provisionally proposed offences of second-degree murder and manslaughter. As we explain in detail in Chapter 6, in homicide law the injury intended by the defendant is conceptually separate from the harm suffered by the victim (death).

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1 The elements of partial defences to murder, full defences applicable to homicide offences and the sentencing framework for murder will be discussed in a future consultation paper.

2 Murder, Manslaughter and Infanticide (2006) Law Com No 304.

3 As we explain in more detail in Chapter 6, grievous bodily harm means harm that is really serious. It may be physical or psychiatric harm, but merely psychological harm does not suffice.

4 The mandatory life sentence requires judges to sentence anyone convicted of murder to life imprisonment. For further explanation see Chapter 1, paras 1.16 to 1.22.

5 While historically one of the fault elements of murder is referred to as "the intention to cause GBH", it is also common to use "the intention to cause harm" or "the intention to cause injury" under the existing law.

2.6 As with other criminal offences which require a specific result or consequence, causation is a necessary element of the offences of murder and manslaughter. The requirement to prove causation ensures that defendants with sufficient culpability are only held criminally responsible for the consequences caused by their actions.

2.7 It must be proved that the defendant, alongside having the requisite intention, caused the victim's death both factually and legally. For the defendant's action or omission to be a factual cause of the death it must be proved that but for the act of the defendant, the death would not have occurred.[6] For the defendant's action or omission to be a legal cause of the death it must be proved that the defendant committed a culpable act which was a substantial and operating cause of the death, albeit not necessarily the only operating cause of the death.[7] In *Wallace*, the Court of Appeal noted that:

> The authorities were broadly consistent in relation to the causation direction which would have to be given to a jury on the murder count: they would have to be sure that the defendant's act was a cause of death; it need not be the sole or principal cause, as long [as] it was a substantial cause, which meant a more than minimal cause.[8]

The chain of causation can be broken by an independent, intervening act: an act that causes the death and is so independent from the defendant's act that it would not be appropriate to hold them criminally responsible for murder.[9] Proving causation is a general requirement of criminal law and not restricted to homicide offences.

2.8 Manslaughter carries a discretionary life sentence[10] and can be committed in one of the following ways:

(1) killing by conduct or omission that D knew involved a risk of causing death or serious harm ("reckless manslaughter"), though we note that the existence of this category is debated;[11]

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6 We acknowledge that the approach taken by the court to "but for" causation is not strictly formulaic. In *R v Hughes* [2013] UKSC 56 at [23], the Supreme Court emphasised that "but for" causation alone is insufficient to prove that the defendant's conduct was a legally effective cause. The court also suggested that "it is wrong to place too much weight on the "but for" test to the exclusion of the "common sense" approach which the common law has always favoured".

7 *R v Smith (Thomas Joseph)* [1959] 2 Q.B. 35, 36 and *R v Wallace (Berlinah)* [2018] EWCA Crim 690, [2018] 3 WLUK 739. Also see *R v Mellor* [1996] 2 Cr App R 245; *R v Hughes* [2013] UKSC 56.

8 *R v Wallace (Berlinah)* [2018] EWCA Crim 690, [2018] 3 WLUK 739 at [25], by Lady Justice Sharp (as she then was).

9 See for example, Archbold Criminal Pleading Evidence and Practice 2026, 19-4.

10 Offences Against the Person Act 1861, s 5. A discretionary life sentence (sometimes referred to as a maximum sentence of life imprisonment) means the judge may sentence someone to life imprisonment in deserving cases, without it being mandatory. For further explanation see Chapter 1, para 1.22.

11 Reckless manslaughter and gross negligence manslaughter are sometimes described as forming one single category of manslaughter, with cases of reckless manslaughter falling within gross negligence manslaughter. We acknowledged this in our 2006 Report (see Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 1.14). We include reckless manslaughter here purely for comprehensiveness; we take no firm view on whether it exists as a separate category under the current law and focus instead on whether it should exist under our proposed structure of homicide offences. We explore this point further in Chapter 8.

(2) killing by conduct or omission that was in all the circumstances grossly negligent given the risk of death ("gross negligence manslaughter");[12]

(3) killing by conduct which constituted an unlawful act involving a danger of some harm ("unlawful act manslaughter");[13]

(4) killing with the intent required for the offence of murder but where a partial defence applies, namely loss of control, diminished responsibility or killing pursuant to a suicide pact.

2.9 Once more, causation must be proven. As with murder, for the defendant to be convicted of manslaughter their actions must also be proved to have been a substantial and operating cause of the death. Again, the chain of causation can be broken by an independent, intervening act.[14]

2.10 Manslaughter falling under (1) to (3) is commonly referred to as involuntary manslaughter, while the term voluntary manslaughter is commonly used to refer to (4).

2.11 Outside the two-tier structure of murder and manslaughter, there are other specific homicide offences which fall within the scope of this consultation paper. Infanticide is both a distinct offence and a defence to murder and manslaughter. It refers to the killing of a child aged under 12 months by their biological mother where the substantive elements of the offence/defence are satisfied. There are also various specific homicide offences which are set out across different pieces of legislation, for example, causing death by dangerous driving.[15] This chapter focuses on the offences of murder and manslaughter and the problems with these two offences; we discuss issues related to other specific homicide offences in the relevant chapters of this consultation paper.[16]

PREVIOUS ATTEMPTS AT REFORM

2.12 Reform of homicide law in England and Wales has often been piecemeal, with changes being made to particular aspects of the law or specific homicide offences being created. Parliament has never undertaken a wholesale reform of the structure of homicide offences and has never provided statutory definitions of murder and manslaughter. As we stated in the 2006 Report:

> Past attempts to introduce greater order, fairness and clarity to the law through statutory reform and codification have failed because Parliament has been faced

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12 The components of the test for gross negligence manslaughter are discussed in detail in Chapter 8.

13 The Court of Appeal has held that unlawful act manslaughter cannot arise from an omission: *R v Lowe* [1973] QB 702. If a case involves an omission, the prosecution may be able to charge gross negligence manslaughter (provided that D owed a duty of care to V).

14 Causation in the context of manslaughter is discussed in greater detail in Chapter 8.

15 Road Traffic Act 1988, s 1.

16 For discussion of infanticide see Chapter 9. For discussion of the specific homicide offences see Chapter 10.

with more pressing business at the time. Twentieth century reforms, whilst valuable, have been piecemeal.[17]

2.13 There have been several previous attempts at wholesale reform, both in the form of Bills laid before Parliament and recommendations from law reform bodies, including the Law Commission. Below is an outline of key previous attempts at wholesale reform of the homicide offences. Attempts to reform the two-tier structure of murder and manslaughter ultimately have not been successful.

Early attempts at reform

2.14 There were various attempts at reform throughout the nineteenth and twentieth centuries.

2.15 The Homicide Law Amendment Bill 1874 represented an early attempt to consolidate and amend homicide law, but was rejected by a Select Committee set up to consider the Bill.[18] This was followed by the Homicide Law Amendment Bill 1878.[19] Under this Bill, the fault element of murder would have included: the intention to kill; the intention to cause bodily injury which was known to the defendant as likely to cause death with recklessness as to whether or not death ensues; and the intention to cause GBH for the purpose of facilitating the commission of another offence.[20] During the same period, the Criminal Code (Indictable Offences) Bill 1878 was also introduced. This Bill sought to abolish felony murder[21] and clarify the (then) partial defence of provocation.[22] Both Bills ultimately failed to pass through Parliament.

2.16 Moving into the 20th century, in 1953 the Royal Commission published a report on capital punishment which also made some recommendations in relation to murder.[23] These recommendations included: limiting the application of the death penalty for murder; abolishing felony murder; and expanding the defence of (then) provocation to cover provocation by words (as well as by blows or the threat of violence).[24] These recommendations were broadly implemented by the Homicide Act 1957.[25] The Act also introduced the partial defences of diminished responsibility and killing pursuant to a suicide pact.

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17 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.4.

18 The Bill was drafted by Sir James Fitzjames Stephen and Russell Gurney MP. See, for example, *Hansard* (HC), 7 August 1872, vol 213 and *Hansard* (HC), 22 May 1874, vol 219 col 727. Also see J Horder, *Homicide and the Politics of Law Reform* (2012) p 12.

19 See for example, *Hansard* (HC), 13 February 1878, vol 237. Also see J Horder, *Homicide and the Politics of Law Reform* (2012) p 93.

20 J Horder, *Homicide and the Politics of Law Reform* (2012) p 93.

21 Under the previous felony murder rule, defendants could be convicted of murder if they caused a death during the commission of a dangerous criminal act (a felony), despite lacking the intention to kill or cause serious injury.

22 See for example, *Hansard* (HC), 14 May 1878, vol 239, col 1946.

23 Report of the British Royal Commission on Capital Punishment (1953) Cmnd 8932.

24 Above, pp 274 -275.

25 The Murder (Abolition of Death Penalty) Act 1965 then abolished the death penalty for murder.

2.17 In 1980, the Criminal Law Revision Committee published a report on offences against the person, which included consideration of the general homicide offences. The report recommended restricting the fault element of murder to the intention to kill and the intention to cause serious injury knowing there was a risk of causing death.[26] Manslaughter was to be confined to causing death with the intention to cause serious injury, and causing death through being reckless as to whether death or serious injury could result.[27] This recommendation would have removed unlawful act manslaughter and gross negligence manslaughter from the scope of manslaughter. The report specifically argued that unlawful act manslaughter should not be treated as manslaughter since "[the defendant's] fault falls far too short of the unlucky result".[28] It also recommended that defendants who used excessive self-defence be convicted of manslaughter rather than murder.[29]

2.18 A range of other reports were published in the 20th century which did not focus specifically on homicide law but reviewed some issues pertinent to homicide offences. These include the Law Commission's reports on the mental element in crime (1978)[30] and a new criminal code (1989)[31].

The Law Commission's 1996 and 2006 reports

2.19 In recent decades, the Law Commission has produced two key reports dealing specifically with homicide offences.

2.20 In 1996 the Law Commission published a report on involuntary manslaughter ("1996 Report").[32] This report examined the problems with involuntary manslaughter, including the breadth of the offence of manslaughter and issues specific to the different categories of involuntary manslaughter. It recommended the creation of two additional offences, "reckless killing" and "killing by gross carelessness", to "resolve the problems caused by the width of the present law".[33] These recommendations, had they been implemented, would have created an offence structure with "four degrees of general criminal homicide: murder, (voluntary) manslaughter, reckless killing and killing by gross carelessness".[34]

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26 Fourteenth Report of the Criminal Law Revision Committee on Offences Against the Person (1980) Cmnd 7844, para 28. For more detail see C Wells, "Criminal Law Revision Committee, 14th Report: Offences against the Person: Homicide" (1980) 43(6) *The Modern Law Review* 681.

27 Fourteenth Report of the Criminal Law Revision Committee on Offences Against the Person (1980) Cmnd 7844, para 28.

28 Fourteenth Report of the Criminal Law Revision Committee on Offences Against the Person (1980) Cmnd 7844, para 56.

29 Above, para 288.

30 Report on the Mental Element in Crime (1978) Law Com No 89.

31 A Criminal Code for England and Wales Volume 1 (1989) Law Com No 177.

32 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237. The report also examined the issues with corporate manslaughter and recommended a new offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness, see para 1.21.

33 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 1.8.

34 Above, para 1.9.

2.21 A Home Office report in 2000 set out the Government's response to the 1996 Report and consulted on proposals for reform of involuntary manslaughter ("2000 Report").[35] The 2000 Report agreed on the issues with involuntary manslaughter identified in the 1996 Report and stated that the new recommended offences "should make it easier for the courts to ensure that the penalty matches the crime and [for] the public to see that this is demonstrably so".[36] The Government also considered that there may be a need for a further homicide offence to cover deaths caused where the defendant intended or was reckless as to whether some injury was caused, and the conduct causing the injury constituted an offence.[37] However, neither the 1996 recommendations nor the proposals from the 2000 Report were ultimately implemented.[38]

2.22 In 2004, the Law Commission published a report on the partial defences to murder ("2004 Report"), in which we made a number of recommendations as to the substance and operation of the partial defences.[39] The 2004 Report fed into the 2006 Report which considered wholesale reform of homicide law, including offences and defences.[40] We recommended that the current two-tier structure of murder and manslaughter be replaced with a three-tier structure of first-degree murder, second-degree murder and manslaughter.[41] We also made a range of other recommendations concerning the categories of manslaughter, the law of complicity, partial and full defences to homicide, "mercy" and consensual killings, and infanticide.[42]

2.23 The 2006 recommendations on partial defences were implemented in part through the Coroners and Justice Act 2009,[43] however the Government chose not to implement our recommendations on the substantive homicide offences and the three-tier structure. The Government explained that "the time [was] not right to take forward such a substantial reform of our criminal law".[44]

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35 Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals*, (2000).

36 Above, para 5.2.

37 The 1996 Report's recommended offence of reckless killing only extended to defendants whose conduct involved an obvious risk of causing death or *serious* injury which they were capable of appreciating, even if they did not actually appreciate it. See Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237 para 1.8.

38 Only the 1996 recommendations on the introduction of an offence of corporate manslaughter were implemented in the Corporate Manslaughter and Corporate Homicide Act 2007.

39 Partial Defences to Murder (2004) Law Com No 290.

40 Murder, Manslaughter and Infanticide (2006) Law Com No 304.

41 Above, para 2.69.

42 The specific recommendations from the 2006 Report are discussed in greater detail in the relevant chapters throughout this consultation paper.

43 For example, our recommendations on the partial defences to murder were, for the most part, implemented by the Government. For further discussion of the implementation of the 2006 Report see Law Commission, Homicide Law: Call for Evidence (14 August 2025), paras 3.14 -3.19.

44 Ministry of Justice, Report on the implementation of Law Commission proposals (January 2011) HC 719, para 54.

More recent attempts

2.24 Since the 2006 Report, there has not been another attempt at wholesale reform of homicide offences in England and Wales,[45] however the Law Commission has published several reports which have relevance to aspects of homicide law. These include our 2007 report on participation in crime,[46] our 2015 report on offences against the person,[47] and our 2018 report on the Sentencing Code.[48] We refer to these reports, when relevant, throughout the consultation paper.

THE CURRENT CASE FOR REFORM

2.25 In the 2006 Report we described homicide law in England and Wales as "a rickety structure set upon shaky foundations" and centred much of our criticism of homicide law on the two-tier structure of murder and manslaughter.

2.26 In the 2006 Report we argued that:

> Over the centuries, the two categories of murder and manslaughter have had to bear the strain of accommodating changing and deepening understandings of the nature and degree of criminal fault and the emergence of new partial defences. They have also had to satisfy demands that labelling and sentencing should be based on rational and just principles.[49]

2.27 We added that:

> Offences must be made clearer and more intelligible, as well as being morally more defensible. Achieving this goal has not proved possible within a two-tier structure of general homicide offences.[50]

2.28 Below we outline current criticisms of the two-tier structure and the offences of murder and manslaughter.[51] Many of the criticisms identified in the 2006 Report persist today, along with some new criticisms that have emerged in the last twenty years. In our view, the criticisms make a strong case for reform of the homicide offences, although we do not adopt them all nor aim to remedy them all with our provisional proposals. We discuss the criticisms and our views on them in more detail in the relevant chapters throughout this consultation paper.[52]

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45 The Scottish Law Commission have recently published a report on homicide law in Scotland. See, Scottish Law Commission, A Report on the Mental Element in Homicide (2025) Scot Law Com No 269.

46 Participating in Crime (2007) Law Com No 305.

47 Reform of Offences against the Person (2015) Law Com No 361.

48 The Sentencing Code Volume I: Report (2018) Law Com No 382.

49 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 1.32.

50 Above, para 2.4.

51 Problems with partial defences to murder, full defences applicable to homicide offences and the sentencing framework for murder will be discussed in more detail in a future consultation paper. These problems further contribute to the need for wholesale reform of homicide law.

52 We also address criticisms of our recommendations from the 2006 Report in the chapters relevant to those recommendations throughout this consultation paper.

Criticisms of murder and manslaughter

General criticism of the two-tier structure

2.29 The two-tier structure of murder and manslaughter has been widely criticised on the grounds that it does not appropriately differentiate between the wide range of conduct and culpability that different killings involve. Accurate differentiation between various levels of conduct and culpability is essential across the criminal law, however it is particularly important in homicide law given the stigma[53] and strict sentences attached to homicide offences.

2.30 Professor Jeremy Horder, the Law Commissioner for Criminal Law at the time of the 2006 homicide review, has argued that the two-tier structure is "no longer able to meet the increasing demands being made of it" because of the breadth of conduct and culpability it covers.[54] Professors Barry Mitchell and William Wilson have both argued that the distinction between murder and manslaughter can be extremely fine and unclear.[55] Professor Mitchell has also warned against stretching the definition of the general homicide offences too far to cover too many types of killing.[56] In response to our Call for Evidence, the Criminal Bar Association was similarly critical of the two-tier structure and submitted that it:

> Conceals serious problems because each offence…comprises diverse forms of conduct that cause death with an extremely broad range of forms of culpability.

2.31 Many commentators specifically link their critique of the two-tier offence structure to fair labelling. As we explain in Chapter 3, fair labelling requires the criminal law to ensure that the structure and labelling of offences accurately and fairly reflects differences in the nature and gravity of offenders' wrongdoing.[57] This helps build trust in, and understanding of, the justice system for all affected and the public. The labels of murder and manslaughter have been described as unfair since they are "inadequate" reflections of different culpability[58] and "blind to moral variations" in killings.[59] Dr Jonathan Rogers has suggested that as well as being unfair labels, the labels of murder and manslaughter have "lost their core meaning on account of their

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53 We use "stigma" throughout this consultation paper to refer to the social shame and negative social consequences typically associated with a conviction for a criminal offence.

54 J Horder, *Homicide and the Politics of Law Reform* (2012) p 91.

55 B Mitchell, "Fundamental Issues in Homicide" (2016) 3(2) *Journal of International and Comparative Law* 175. W Wilson, "What's Wrong with Murder?" (2007) 1(2) *Criminal Law and Philosophy* 158.

56 B Mitchell, "Fundamental Issues in Homicide" (2016) 3(2) *Journal of International and Comparative Law* 139.

57 The principle of fair labelling is discussed in greater detail in Chapter 3.

58 B Mitchell, "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling" (2001) 64(3) *Modern Law Review*, 411.

59 A Lodge, "Domestic Abuse, suicide and liability for manslaughter: in pursuit of justice for victims" (2020) 84(4) *Journal of Criminal Law*, 290.

breadth".[60] Professor Christopher Clarkson has made a similar argument and has described manslaughter as a "morally uninformative" label to citizens.[61]

2.32 However, the criticism is not universal. In response to our Call for Evidence, Professor Nicola Padfield argued that there is "no convincing reason to change the existing structure" of offences and that introducing degrees of murder would be "costly and inappropriate". Likewise, Professor Dennis Baker argued that, from a pragmatic perspective, it would be best to leave the offence of murder alone given that previous attempts at reform have failed. Some respondents recognised the concerns regarding the breadth of conduct covered by murder and manslaughter but were generally neutral towards the two-tier structure and believed it works well enough in practice.[62]

2.33 Alongside the general criticism of the two-tier structure, there are some specific criticisms of the elements of murder and manslaughter, and the impact of the mandatory life sentence. Whilst these do relate to the general criticism of the two-tier structure, they are ultimately separate criticisms, to which we now turn.

The fault element of murder

2.34 A significant concern with the offence of murder is that the fault element covers significantly different levels of culpability under one single offence. We explore this criticism in greater detail in Chapter 5.

2.35 The intention to kill could generally be considered more culpable than the intention to cause GBH. This has led some to argue that the two intentions should not be grouped together under the most serious homicide offence (and thus receive the mandatory life sentence).[63] Professors Andrew Ashworth and Barry Mitchell have criticised the offence of murder on the basis that it includes cases which represent considerably different levels of heinousness.[64] Likewise, Professors Stefanie Bock, Stuart Green and Findlay Stark have argued that the intention to cause GBH alone is not culpable enough to "be lumped in with significantly more blameworthy mens rea states" like the intention to kill.[65] Greg Stewart, a legal practitioner, submitted to our Call for Evidence

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60 J Rogers, "The Law Commission's Proposed Restructuring of Homicide" (2006) 70(3) *Journal of Criminal Law*, 226.

61 C M V Clarkson, "Context and Culpability in Involuntary Manslaughter" in A Ashworth and B Mitchell, *Rethinking English Homicide Law* (2000) p 142. Also see J Horder, *Homicide and the Politics of Law Reform* (2012) p 96.

62 The CLRNN submitted that the two-tier structure works "tolerably well in practice" but recognised "sensible arguments" that the two general homicide offences are too broad. The Femicide Census submitted that the existing two-tier structure "works, to a degree" on the basis that men who kill women are overwhelmingly correctly convicted of murder. The Crown Prosecution Service ("the CPS") submitted that they are "broadly neutral at this early stage" towards a two- or three-tier structure.

63 It is worth noting that this argument does not always necessarily suggest that killings with the intention to cause GBH should not be labelled "murder" in any way, but may only suggest that these killings should not be grouped with killings with the intention to kill under a single homicide offence which receives the mandatory life sentence.

64 A Ashworth and B Mitchell "Introduction" in A Ashworth A and B Mitchell B (eds), *Rethinking English Homicide Law* (2000) p 5. Also see B Mitchell, "Fundamental Issues in Homicide" (2016) 3(2) *Journal of International and Comparative Law* 171.

65 S Bock, S Green and F Stark, "Grading Homicide" (forthcoming) p 19. See also F Stark, "Deconstructing Constructive Liability" [2023] 2 *Criminal Law Review* 115.

that the current definition of murder "fails to reflect culpability considerations" since the majority of those convicted of murder do not intend death.[66]

2.36 Professor Matthew Dyson, in response to our Call for Evidence, considered public understandings of culpability and argued that, in modern culture, the word murder is deeply associated with defendants who intended to kill a human being. He further argued that including the intention to cause GBH within the fault element of murder "relies too much on the stigma for murder for less stigmatic conduct". Dr Susie Hulley observed that research suggests that some offenders serving life sentences from a young age express confusion about the definition of murder and do not understand why the intention to cause GBH is included within the definition.

2.37 On several occasions the courts have criticised the fault element for murder on the basis that it is unjust to label someone who intended to cause GBH a murderer. In *Attorney-General's Reference (No 3 of 1994)*, when discussing the inclusion of the intention to cause GBH within the fault element of murder, the House of Lords said that "many would doubt the justice of this rule, which…no longer rests on any intellectual foundation".[67] In *Powell and English*, the House of Lords said that the inclusion of the intention to cause GBH within the fault element of murder results in defendants "being classified as murderers who are not in truth murderers".[68] These criticisms stem from the correspondence principle, which states that where an offence is defined by reference to a specific consequence or circumstance, the required fault element of an offence ought to correspond to the specified consequence or circumstance. In comparison, constructive criminal liability arises where the defendant's fault relates to a lesser consequence but they are then held liable for a more serious consequence.[69] For the offence of murder, for which the specific consequence is death, some believe, per the correspondence principle, that the intention to cause GBH should not suffice; others argue that defendants who intended to cause GBH should also be aware of a risk of death, otherwise a conviction for murder would not be justified.[70]

2.38 Not all commentators agree that the current fault element for murder is too broad. Professor Wilson has argued that killing with the intention to kill is *usually* the most serious kind of killing, but is not inherently morally worse than killing with the intention to cause GBH.[71] In response to our Call for Evidence, Professor Baker, argued that the "moral gap" between the intention to kill and the intention to cause GBH is not significant enough to warrant reforming the offence of murder.

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66 Some respondents to our Call for Evidence also expressed concern that the label of "murderer" is currently being applied to certain groups of defendants whose culpability is not high enough to deserve this label. For example, unpaid carers who kill the people they are caring for (Drs Siobhan O'Dwyer and Charlotte Bishop) and victims of domestic abuse who kill their abusers (Centre for Women's Justice).

67 *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245, 250, by Lord Mustill.

68 *R v Powell and English* [1999] 1 AC 1, 15, by Lord Steyn.

69 We discuss constructive criminal liability in the context of homicide in detail in Chapter 6.

70 We discuss the correspondence principle in detail in Chapter 6.

71 W Wilson, "The Structure of Criminal Homicide" [2006] *Criminal Law Review* 474. See also A Ashworth, "Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform" [2007] *Criminal Law Review* 336.

The breadth of manslaughter

2.39 The range of conduct and culpability captured under manslaughter is criticised for representing too vast a spectrum of wrongdoing to sit under a single offence. At the lower culpability end, manslaughter covers offenders who cause death through an unlawful and dangerous act without realising a risk of death. At the higher culpability end, manslaughter extends to offenders who intended to kill but have a partial defence. We explore this issue in greater detail in Chapters 7 and 8.

2.40 Professor Horder has argued that the range of wrongdoing captured by manslaughter results in the offence being an "all-encompassing jumble" and the offence label being "unable" to accurately reflect the nature of the wrongdoing.[72] In response to our Call for Evidence, manslaughter was described as a "very broad hodgepodge of homicides" by Professor Findlay Stark and a "vague catch-all" offence for killings falling short of murder by the Criminal Bar Association. Professor Clarkson has likewise argued that manslaughter currently represents a broad category of offending where "the relative seriousness of various killings…remains unmarked".[73] Similarly, Professor Mitchell has argued that whilst some cases of manslaughter are significantly less culpable than murder (such as a "one-punch" manslaughter), there is only a very fine distinction between reckless manslaughter and murder.[74] These views reflect the argument discussed in the 1996 Report that "it is inappropriate that types of conduct that vary so widely in terms of fault should all carry the same descriptive label" of manslaughter.[75] In spite of its breadth, however, some respondents to our Call for Evidence submitted that, manslaughter still fails to encompass other cases which they argued are culpable enough to be labelled as manslaughter, specifically cases of suicide following domestic abuse.[76]

2.41 Adding to the uncertainty surrounding the offence, some disagree as to whether reckless manslaughter exists as a distinct category of manslaughter or if it has been subsumed by gross negligence manslaughter.[77]

2.42 Others have expressed concerns that the breadth of manslaughter might also raise issues for public understanding. In 2000, the Government considered the breadth of manslaughter to be an issue which raised serious problems for sentencing judges and for public understanding of homicide law.[78] The public may not understand why a broad range of conduct and culpability are included within just one homicide offence, especially conduct which involved the intention to kill or cause GBH and a partial defence applies. Some stakeholders raised concerns regarding the label of

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72 J Horder, *Homicide and the Politics of Law Reform* (2012) p 93.

73 C M V Clarkson, "Context and Culpability in Involuntary Manslaughter" in A Ashworth and B Mitchell, *Rethinking English Homicide Law* (2000) p 142.

74 B Mitchell, "Fundamental Issues in Homicide" (2016) 3(2) *Journal of International and Comparative Law* 175.

75 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 3.4.

76 This argument was submitted by both AAFDA and SafeLives.

77 See, for example, F Stark, "*Reckless Manslaughter*" [2017] Criminal Law Review 767. We discuss this issue further in Chapter 8.

78 Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000), para 1.5.

manslaughter when the defendant intended to kill but has a partial defence of diminished responsibility. These stakeholders argued that this label is insufficiently serious in light of the defendant's intention, especially since the same label is also used for killings where there is no intention to kill or cause GBH. The 1996 Report also expressed concern that the range of culpability included under manslaughter may devalue the offence label in the eyes of the public and "the more serious forms of wrongdoing that it describes might come to be regarded as less serious, because it is also used to describe less heinous crimes".[79]

2.43 In *R v Walker,* the breadth of manslaughter also faced criticism from the Court of Appeal for creating "the greatest problem" for sentencing judges, since the gravity of the wrongdoing, which needs to be reflected in the sentence, can range from "the borders of murder right down to accidental death".[80]

2.44 We also received submissions to our Call for Evidence which suggested that the label of "manslaughter" itself is inappropriate given the root word "slaughter" which is arguably worse than "killing" or "murder".[81]

2.45 Directly linked to the general criticism of manslaughter is the criticism of how partial defences operate in the two-tier structure. Some commentators have described the role of partial defences in reducing murder to (voluntary) manslaughter as controversial and problematic. For example, Professor Horder has argued that whilst offenders with a partial defence may lack the culpability for the highest homicide offence, they are still significantly more culpable than those offenders who have committed involuntary manslaughter.[82] Others, like Professor Victor Tadros, have argued that the current range of partial defences is too narrow and does not do enough to create fairness in homicide law.[83] We discuss these criticisms in greater detail in Chapter 7.[84]

2.46 The specific categories of involuntary manslaughter also face a range of criticisms regarding their formulation and operation in practice, we discuss these criticisms in Chapter 8.

The mandatory life sentence

2.47 The two-tier structure is set against the background of the mandatory life sentence for murder. Criticisms of the two-tier structure also arise from the manner in which its development, operation, and the opportunity for its reform, are constrained by the mandatory life sentence. We discuss these criticisms in greater detail in Chapter 5.

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79 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 3.4.

80 *R v Walker* [1991] 11 WLUK 199, (1992) 13 Cr.App.R. (S.) 474, 476, by Lord Lane CJ.

81 This argument was submitted by Professor Matthew Dyson.

82 J Horder, *Homicide and the Politics of Law Reform* (2012) p 92.

83 V Tadros, "The Homicide Ladder" (2006) 69(4) *The Modern Law Review* 617.

84 Whilst our focus in this consultation paper remains on the role of the partial defences in the two-tier homicide offence structure, it is important to note that the substance of the specific partial defences are also widely criticised. We will address these criticisms and review the substantive elements of the partial defences in a future consultation paper.

2.48 Aside from the issue of whether the mandatory life sentence should exist,[85] some commentators have criticised the impact of the mandatory life sentence on the structure of homicide offences. Professor Wilson has argued that the mandatory life sentence has a "malign influence" on homicide law.[86] Similarly, Professor Dyson submitted to our Call for Evidence that the mandatory life sentence is "shaping choices about substantive law". Others, such as Professors Horder, Oliver Quick and Celia Wells have argued that opportunities for law reform, including the Law Commission's recommendations, are restricted by the existence of the mandatory life sentence and its impact on the two-tier structure.[87]

2.49 Professors Bock, Green and Stark have also recognised the influence of the mandatory life sentence on the two-tier structure, noting that the distinction between murder and manslaughter marks the line that is drawn between mandatory life sentences and lower sentences.[88] Dr Rogers argued a similar point in response to our Call for Evidence and suggested that the mandatory life sentence therefore necessitates the existence of partial defences.[89]

2.50 More specifically, Lord Bingham of Cornhill, former Lord Chief Justice and Senior Law Lord, has argued that the mandatory life sentence means that homicide law fails to reflect the varying degrees of culpability in different murder cases.[90] A similar argument was made by one respondent to our Call for Evidence, an offender convicted of murder, who argued that the mandatory life sentence "flattens…distinctions" between culpability in the structure of the homicide offences.

Other criticisms of homicide offences

2.51 Beyond the two-tier structure of murder and manslaughter, there are a range of further criticisms of homicide offences. These criticisms, and our views towards them, are addressed in detail in the corresponding chapters in this consultation paper, but are signposted here since they further strengthen the case for reform of the homicide offences.

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85 The question of whether the mandatory life sentence should exist is outside the scope of this project. See Law Commission, Reviewing the law of homicide: terms of reference (January 2025), para 1.7: "This review will assume the continuing existence of the mandatory life sentence for murder (or the most serious form of murder if a tiered structure for the offence is recommended)".

86 W Wilson, "What's Wrong with Murder?" (2007) 1(2) *Criminal Law and Philosophy* 175.

87 J Horder, *Homicide and the Politics of Law Reform* (2012) p 95. O Quick and C Wells, "Getting Tough with Defences" (2006) *Criminal Law Review* 525.

88 S Bock, S Green and F Stark, "Grading Homicide" (forthcoming) p 2.

89 Also see J Rogers, "The Law Commission's Proposed Restructuring of Homicide" (2006) 70(3) *Journal of Criminal Law* 2.

90 Lord Bingham, Newsam Memorial Lecture "The Mandatory Life Sentence for Murder" (1998). Similar arguments have been made by others: see C Appleton, "The Paradox of Reform: Life Imprisonment in England and Wales" in D van Zyl Smit and C Appleteon (eds), *Life Imprisonment and Human Rights* (2016) and K Fitz-Gibbon, "The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion in England" (2012) 13(5) *Criminology and Criminal Justice* 506.

2.52 There are a range of criticisms directed towards the offence/defence of infanticide. These include whether infanticide is justified as both a defence and a distinct offence, the scope of infanticide and its rationale. We consider this in Chapter 9.

2.53 There are other specific homicide offences. The rationale behind many of these offences has been questioned and some argue that these offences could be, or should be, included within manslaughter instead. Some respondents to our Call for Evidence also argued for the introduction of new homicide offences to cover specific scenarios such as suicide following domestic abuse.[91] We consider these issues in Chapters 10 and 14.

2.54 So-called "mercy" and consensual killings are types of killings which normally fall under murder or manslaughter, but the specific context in which these killings take place raises distinct issues. One particular issue is how the structure of homicide offences should reflect the culpability involved in such killings. We consider these issues in Chapter 11.

2.55 There have been significant developments in the law of complicity since the 2006 Report, particularly after the judgment of the Supreme Court and Privy Council in *R v Jogee*.[92] There are a range of problematic issues with the law of complicity which particularly affect its application in homicide cases. We consider these issues in Chapter 12.

91 This argument was submitted, for example, by AAFDA.

92 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

Chapter 3: Principles in homicide law

INTRODUCTION

3.1 The challenges in the law of homicide, outlined in Chapter 1 and Chapter 2, reflect an area of law that is incoherent, not fit for modern purposes, uncertain, unclear and to some extent unprincipled. Law reform should aim to address this. We begin with explaining core concepts of criminal responsibility in the context of homicide. We then outline the principles that we believe should guide law reform. Throughout this project, we consider how reform can ensure the law of homicide better upholds these principles.

3.2 Where we refer to “the law of homicide” below, we mean the substance of the homicide offences, defences, sentencing powers and framework, and the overall structure including the way the offences and defences fit together.

CRIMINAL RESPONSIBILITY

3.3 The criminal law is designed to punish behaviour that is serious, harmful, and sufficiently culpable to justify a criminal sanction. As conduct becomes more serious (whether more harmful or more culpable) and the defendant’s responsibility increases, the criminal response should also become more severe (for example, by imposing a longer prison sentence).

3.4 Although the terms “serious”, “harmful”, and “culpable” are sometimes used interchangeably, they each have distinct meanings. Here we explain how we use each of these terms.

Harmful

3.5 Harm in criminal law is generally understood to be an injury, loss or damage of some kind. Establishing the level of harm caused by an act or omission can be a useful way of identifying the wrongfulness of that act or omission. In all homicide offences, the harm caused is the most serious harm possible: the death of another person.

Culpability

3.6 Culpability is how blameworthy a particular person is for their conduct. Drawing from Professor David Brink’s theory of culpability,[1] we conceptualise criminal culpability as follows:

(1) First, narrow culpability: the fault element the defendant had at the time the offence was committed. Different fault elements include, from highest to lowest

[1] D Brink, *Fair Opportunity and Responsibility* (1st ed 2021). While our definition of culpability for this project is based on Brink’s theory, we depart from his view on the third category and instead describe our own concept of wider societal culpability.

culpability: intention, recklessness and negligence.[2] The extent of the defendant's fault, for example, whether they intended the outcome of their actions, or were reckless as to the possible outcome, or negligent, contributes to the inherent wrongfulness of criminal conduct.

(2) Second, broad culpability: the defendant's overall responsibility and blameworthiness. A person is broadly culpable when they have had a fair opportunity to engage in the reasons for not doing a wrongful act, and have demonstrated defective engagement with these reasons. Fair opportunity depends on:

(a) the defendant's internal capacities; and

(b) the defendant's situational control in the circumstances of the act.

Under (a), if the defendant has a mental health condition or developmental disorder that impacts their processing or decision-making capacity, they may have lower broad culpability. Under (b), a defendant's broad culpability may be lower if they are put in a circumstance that limits their ability to engage with the reasons for not doing the act; for example, if they are threatened into acting, or react without thinking in the face of immediate harm.

(3) Third, wider societal culpability: where society has generally favoured leniency towards certain groups or experiences, reflected in the way we collectively assess culpability. The clearest example of this is that society accepts that children as a group should be treated more leniently in the criminal justice system than adults.

3.7 As Professor Andrew Simester has argued, the criminal law "needs at least roughly to track variations in culpability".[3] This can be done through:

(1) offences (including whether the conduct constitutes an offence or not; where it does, different fault elements and different offence labels can identify different degrees of culpability);

(2) defences (which may extinguish criminal liability for the conduct completely, or reduce the seriousness of the offence or the sentence to reflect a lower level of culpability); and

(3) sentencing (allowing the sentence given to reflect the individual culpability within an offence).

3.8 Much of the criticism levelled at the law of homicide, discussed in Chapter 2, relates to its failure to reflect different levels of culpability accurately. For example, many argue that the current offence of manslaughter is too broad since it covers too wide a range

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2 See, for example, the discussion of fault elements in criminal law in Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, para 4.43.

3 A Simester, *Fundamentals of Criminal Law* (1st ed 2021), p 254.

of culpability, ranging from intentional killings with a partial defence to killings as a result of gross negligence.[4]

Seriousness

3.9 The term "serious" is sometimes used in criminal law, particularly sentencing, to distinguish cases with more aggravating features than others, whether these relate to the conduct, the offender or the harm caused. For example, in the context of sentencing, guidelines reflect whether one occasion of an offence is more or less serious than another, enabling proportionate sentences.[5] Seriousness is a combination of the harm caused by the conduct, the culpability of the offender, and any other wider societal factors that impact how we respond to the criminal conduct.

3.10 Murder is generally accepted to be the most serious of all criminal offences. The intentional taking of a life is the most serious and irreparable breach of a victim's rights. When done intentionally and without justification, it is the most serious affront to the values of society. Even when the act of killing another is not intentional, the harm caused, the death of another, means that all homicide offences sit amongst the most serious criminal offences.[6]

3.11 We therefore restrict our use of seriousness in this context to describing homicide offences in comparison to other, non-fatal, offences.

3.12 As seriousness reflects both harm and culpability, and as the harm caused (death) is the same in all cases of homicide,[7] we do not think seriousness is a useful concept when considering the comparative wrongfulness of different offending within homicide. The concept of culpability is the distinguishing factor and is therefore a more useful way of considering the relative wrongfulness of different homicides for the purpose of law reform.

PRINCIPLES

3.13 Homicide law should uphold the following principles.

Coherence

3.14 The law of homicide should be coherent; it should reflect a clear, logical rationale explaining how different conduct resulting in death is criminalised.

Consistency

3.15 The law of homicide should facilitate a consistent application of the law.

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4 See Chapters 2 and 8 (for more discussion on manslaughter specifically).

5 See, for example, Sentencing Council, "General guideline: overarching principles".

6 In Chapter 8 we explore the offences that operate when the death was not intended by the defendant.

7 See para 3.5 above.

Clarity

3.16 The law of homicide should be clear, so that it is understandable and accessible for those it affects. Both clarity and consistency will facilitate legal certainty.[8]

Fairness and proportionality

3.17 To be fair and proportionate, the law of homicide should reflect the fact that death resulted from the conduct, reflect the culpability of the offender, and be compliant with the human rights of all affected.[9] The law of homicide should be informed by "the norms prevailing in the society in which [we] live",[10] so that it is fair and proportionate in modern society.

3.18 Part of this principle is what is known as "fair labelling".[11] Criminal law should ensure that the structure and labelling of offences accurately and fairly reflect differences in the nature and gravity of offenders' wrongdoing. Fair labelling is linked to culpability; it is an important part of how the law reflects different degrees of culpability. For example, it would be obviously wrong to label someone a murderer if they have committed a robbery. It would also be wrong, say, to have just one offence of "causing harm", since this would mean that someone who committed an assault resulting in a bruise and someone who shot another causing life-changing injuries would both have the same label applied to their offending. Fair labelling is important to offenders (who face the effect of the label),[12] victims and their families (to reflect the moral weight of harm suffered),[13] and wider society (to communicate clearly different levels of wrongdoing, and to guide conduct accordingly).

3.19 Fair labelling is particularly relevant to homicide law given the high sentences and stigma that are attached to the labels of murder and manslaughter. Many have argued

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8 The European Court of Human Rights ("ECtHR") has suggested that the principle of legal certainty is implicit in all of the articles of the European Convention on Human Rights ("ECHR"): *Lupeni Greek Catholic Parish v Romania* App No 76943/11 (Grand Chamber decision) at [116].

9 This includes the human rights protected by the ECHR, such as: the right to life (article 2); prohibition of torture, inhuman or degrading treatment or punishment (article 3); and the right to a fair trial (article 6).

10 In *CR v UK*, the ECtHR held that article 7 of the ECHR (prohibiting punishment without law) requires the criminal law to enable individuals "to regulate their conduct with reference to the norms prevailing in the society in which they live": App No 20190/92 (Commission decision) at [45].

11 For more in-depth analysis of fair labelling in criminal law, see, for example, A Ashworth, "The Elasticity of Mens Rea", in C F H Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) p 53; G Williams, "Convictions and Fair Labelling" (1983) 42(1) *Criminal Law Journal* 85, 85; J Chalmers and F Leverick, "Fair Labelling in Criminal Law" (2008) 71(2) *Modern Law Review* 217, 224. M Gibson, "Three Justifications of Fair Labelling" (2024) 140 *Law Quarterly Review* 431, 452.

12 Effects include punishment and consequential restrictions, negative impact on future prospects, and stigma. The label also impacts the way an offender engages with their conviction and rehabilitation. We note here that while sentencing is linked to fair labelling, fair labelling has importance beyond the sentence attached to separate offence labels.

13 J Horder, "Rethinking Non-Fatal Offences Against the Person" (1994) 14 *Oxford Journal of Legal Studies* 335, 339.

that homicide law currently fails to comply with fair labelling given the breadth of conduct and fault elements encompassed by murder and manslaughter.[14]

3.20 In respect of proportionality, the criminal law should respond in a proportionate way to different levels of culpability. In short, the weightiest outcomes should be reserved for the most culpable offenders and most serious offences, and less severe outcomes should follow when culpability is lower. The need for proportionality most obviously arises in sentencing. The law of homicide should provide for fair and proportionate sentencing. As the Sentencing Council states, "the sentence imposed on an offender should reflect the crime they have committed and be proportionate to the seriousness of the offence".[15]

3.21 Proportionality is not limited to sentencing, however. Outcomes of criminal law include the consequences that follow from someone being labelled and convicted of a crime, quite apart from the sentence itself. The very act of criminalising conduct should be proportionate to the level of culpability and harm associated with that conduct: we do not criminalise every morally questionable act (for example, cheating on a spouse). As Professor Sarah Summers has argued:

> Proportionality acts as a constraint on the state's power to punish individuals by restricting the extent to which it is entitled to interfere with an individual's human rights and fundamental freedoms.[16]

3.22 The law of homicide, the scope and label of the offences, the availability of defences, and the sentencing regime should be proportionate to the conduct they intend to punish.

3.23 Finally, to be fair and proportionate, the law of homicide must be compliant with the human rights of all affected. It should reflect the fact that the act of killing is a violation of the victim's right to life protected by article 2 of the European Convention on Human Rights ("ECHR"). It must not contravene the prohibition of inhuman or degrading punishment under article 3[17] and the right to a fair trial under article 6.[18] There are other rights engaged by homicide law in less direct ways. For example, article 7 of the ECHR prohibits punishment without law. The European Court of Human Rights ("ECtHR") has held on multiple occasions that article 7 is only satisfied "where the individual can know from the wording of the relevant provision, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him

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14 See, for example, J Rogers, "The Law Commission's Proposed Restructuring of Homicide" (2006) 70(3) *Journal of Criminal Law* 223, 226; B Mitchell, "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling" (2001) 64(3) *Modern Law Review* 393, 411.

15 Sentencing Council, *How Sentencing Works* (2025).

16 S J Summers, *Sentencing and Human Rights: The Limits on Punishment* (2022) p 92.

17 For example, by providing for grossly disproportionate sentences: ECtHR, *Guide on Article 3 of the European Convention on Human Rights* (August 2025) para 72; *Babar Ahmad v the United Kingdom* App Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 at [237]; *Harkins and Edwards v the United Kingdom* App No 9146/07 at [133].

18 For example, by preventing the defendant from mounting an effective defence.

[criminally] liable".[19] This also relates to the principles of clarity, consistency and fair labelling.

Practicality

3.24 The law of homicide should operate effectively in practice. The law should facilitate and not hinder effective investigation and prosecution of homicide offences. It should ensure that the defendant receives a fair trial. The law would not operate effectively in practice, for example, if substantial overlap between offences were to frustrate charging decisions, or if the elements of a homicide offence were too complex for jurors to understand.

CONCLUSION

3.25 The law of homicide should seek to uphold all of these principles, although at times some may be in tension with others. For example, the clearest law could be just one simple offence of causing death. However, one single offence would not sufficiently reflect differing levels of culpability covered by conduct that caused death, so would not be fair. To increase compliance with the principle of proportionality and fairness, a legal framework could consist of multiple separate offences, each one reflecting a very specific level of culpability. But this could be challenging in practice, with inconsistent charging decisions and confusing alternative charges for juries to consider, thus would not be practical.

3.26 Throughout this consultation paper we refer to these principles as we consider the options for reforming the law. We make provisional proposals where we think reform can ensure the law of homicide better upholds these principles.

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19 *Kokkinakis v Greece* (1994) 17 EHRR 397 (App No 14307/88) at [52]. See also, *Kafkaris v Cyprus (*2009) 49 EHRR 35 (App No 21906/04) (Grand Chamber decision) at [140]; *Cantoni v France* App No 17862/91 at [29]; *GIEMSRL v Italy* App Nos 1828/06, 34163/07 and 19029/11 (Grand Chamber decision) at [242].

Chapter 4: A new homicide structure

INTRODUCTION

4.1 The law of homicide has historical roots and is shaped by a criminal justice system in which the death penalty still casts a shadow. The current offences lack a rational and clear underpinning. As we said in 2006, "whether or not a killer falls to be labelled as guilty of murder or of manslaughter reflects historical accident more than it does rational principles".[1] This review is a new opportunity to ensure the law reflects rational principles. For the purpose of this first consultation paper, we need to consider both the structure of the offences and their substance.

4.2 The case for reform, explained in Chapter 2, reveals that the main issue with the current two offences is their breadth – they each cover a wide range of conduct and fault (manslaughter more so than murder). The framework lacks nuance and clarity which therefore undermines its ability to label conduct fairly and sentence proportionately. Different conduct and culpability can be reflected in different ways in the criminal justice system: by different labels and offences, availability of defences, and at sentencing. A principled framework will facilitate culpability being reflected at different stages in a clear and coherent way.

4.3 In our view, a rational, principled law of homicide cannot be achieved with two tiers. We provisionally conclude that the concerns levied at the current law would be best remedied by the introduction of a three-tier structure for the general homicide offences, with clearer, distinct offences in each tier. The three tiers would reflect different culpability, clearly signifying the most culpable conduct at the top, and the less culpable conduct at the bottom. Outside of these three tiers would remain separate offences to address specific types of conduct where death was caused or resulted, as opposed to the broader, more flexible offences of murder and manslaughter which will sit within three tiers. This approach would give greater clarity and coherence to the law of homicide, and facilitate more proportionate and fairer labelling and sentencing. We are reassured by the fact that the majority of responses to our Call for Evidence were supportive of a three-tier structure.[2]

4.4 We considered whether it would be beneficial to have more than three tiers to reflect the wide range of culpability in conduct resulting in death. We provisionally conclude that further division would begin to undermine the coherence and clarity needed within such a structure. One could conceivably codify all known forms of homicidal conduct and compare their relative culpability. This would have the benefit of clear labelling and would facilitate proportionate sentencing. However, the offences would be unwieldy in number and pose endlessly challenging moral debates over theoretical

[1] Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.3.

[2] Including, for example, responses from the Crown Prosecution Service ("CPS"), Criminal Bar Association, and the Criminal Law Reform Now Network.

culpability.[3] We do not think that labelling every distinct type of culpability with a separate offence is necessary to provide a clearer structure and fairer labelling within the law. Instead, we have identified principled and practical lines to distinguish different tiers of culpability. We acknowledge there may be some factual scenarios in a lower tier that involve culpability very close to, or even slightly greater than, the culpability of some conduct in a higher tier. This is inevitable wherever lines are drawn in criminal law. In our view, this does not detract from the benefits of the three-tier structure we provisionally propose which would offer principled clarity and certainty. Further, our proposed structure would better facilitate a sentencing regime that can effectively reflect nuances in culpability when the facts of a case are before a judge rather than abstract elements of offences set out in the law. Under our proposals, more offences would be subject to a maximum life sentence that is discretionary rather than mandatory, meaning that judges would have greater flexibility to reflect relevant factors when sentencing.

4.5 Over the following chapters we explain our provisional proposals regarding each tier, and the offences within them.

MURDER: TIER 1 AND TIER 2

4.6 The problems with a broad offence manifest most keenly in murder. It is the most serious of all criminal offences with the strictest sentence regime: the mandatory life sentence. To maintain its legitimacy, only conduct that is sufficiently culpable should be subject to the mandatory life sentence. For such a serious offence,[4] with significant consequences for all affected and with the moral weight it carries in wider society, it is of the highest importance that the offence is clear, coherent and proportionate.

4.7 The current common law offence of murder includes the unlawful killing of another with intent to kill or with intent to cause grievous bodily harm. As we explain in the following chapters, we are of the view that the boundaries of the current offence of murder should remain; the offence label of murder should apply to unlawful killings where there is an intention to kill or to cause serious injury.[5] These two fault elements within the current offence are generally clear and well understood. They require a specific intent that corresponds directly or closely with the outcome of the act (the death of another).[6] As discussed in the previous chapter, the criminal law generally recognises intent as the most culpable type of fault element (compared to recklessness, negligence etc). It is appropriate therefore to use such intent to satisfy and define the boundaries of murder. It is a conceptually clear way of distinguishing conduct within a homicide structure.

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3 For example, Professor Chris Clarkson has argued that to comply with the principle of fair labelling, the structure of criminal offences must only reflect significant moral differences in offenders' conduct: C M V Clarkson, "Context and Culpability in Involuntary Manslaughter" in A Ashworth and B Mitchell*, Rethinking English Homicide Law* (2000) p 144.

4 In Chapter 3 we explain that the "seriousness" of an offence is a combination of the harm caused by the conduct, the culpability of the offender, and any other wider societal factors that impact how society respond to the criminal conduct.

5 We propose the use of "serious injury" instead of the current terminology "grievous bodily harm" to describe the level of injury that must be intended, as we explain in Chapter 6.

6 See Chapter 6 for further discussion of the correspondence principle.

4.8 It is accepted that the most serious type of offending warrants the most serious sentence. The mandatory life sentence reflects the seriousness with which society views those whose culpability is the highest when causing the greatest level of harm. Concerns about the breadth of the current offence of murder naturally lead to concerns about the breadth of the mandatory life sentence; that it is a barrier to the flexibility needed at sentencing for such a wide range of culpability and conduct. To create a fairer law of homicide that maintains the legitimacy of the mandatory life sentence for the most serious offending, we think it is appropriate to create two tiers of murder and limit the mandatory life sentence to the first tier.

(1) First-degree murder would sit in the first tier.[7] This would be the most serious form of offending and remain subject to the mandatory life sentence.

(2) Second-degree murder would sit in the second tier. This would include offending with suitably high culpability that necessitates the label of murder, but for which it is more appropriate for the sentence to be discretionary with a maximum sentence of life imprisonment.

This ensures that in deserving cases within the second tier, a judge may still pass a life sentence, but it will not be *mandatory* in cases that do not justify such a sentence. This will address one of the main concerns with the current structure and ensure the law of homicide is fair and proportionate.

4.9 In the following two chapters we explain the fault elements we provisionally propose as follows:

(1) For first-degree murder, the defendant must have intended to kill.

(2) For second-degree murder, the defendant must have intended to cause serious injury.

4.10 The introduction of two tiers of murder would provide greater flexibility for the law to label and sentence homicides appropriately. As explained above, we provisionally conclude that all those convicted of unlawful killing with an intent to kill or cause serious injury should be convicted of murder in tier one or tier two, respectively.

4.11 The partial defences to murder currently reduce a charge of murder to a conviction for manslaughter.[8] We agree with the rationale behind the current law; where a partial defence applies, the defendant deserves a different label and sentence. The mandatory life sentence should not apply in such cases, as it lacks the flexibility needed to reflect the difference the partial defence makes to the culpability of the defendant. However, we think it is irrational and confusing for a successful partial defence to result in a conviction for (voluntary) manslaughter. The offence of manslaughter is conceptually different from murder. In cases where a partial defence

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7 The terms “first-degree murder” and “second-degree murder” reflect our provisional policy of a tiered structure. They do not necessarily indicate the names of the offences if introduced.

8 The verdict of manslaughter in such cases (known as voluntary manslaughter) comes about either by virtue of a partial defence being successful at trial for murder, or by the prosecution accepting a plea of manslaughter after charging the defendant with murder. A defendant cannot be charged with voluntary manslaughter.

applies, the defendant still has the necessary fault element for murder; they intended either to kill or cause serious injury. The partial defences reflect the concept of broad culpability described in Chapter 3: the defendant is less blameworthy in the circumstances, despite their intent. In our view, it is more appropriate for such cases to remain within the boundaries of murder, but within the second tier, reflecting lower broad culpability.

4.12 As a result, we have reached the provisional conclusion that it is appropriate to include within tier two those who would now be convicted of murder when a partial defence applies. We explain this in more detail in Chapter 7.

MANSLAUGHTER: TIER 3

4.13 It is appropriate that the most serious offence dictates the structure. Having drawn the boundaries of murder, we turn to conduct that falls outside: unlawful killing where there is no intent to kill or cause serious injury. We provisionally conclude that offences of manslaughter and other specific homicide offences can address such conduct in a logical and coherent way within the structure of homicide offences.

4.14 In our view, the offence of manslaughter should be retained as a distinct homicide offence that is less serious than murder (in that it covers less culpable conduct and is subjected to a less serious label and sentencing regime) but is still one of the most serious offences in criminal law.

4.15 Historically, manslaughter has been seen as a “catch-all” offence; a mix of different conduct that falls outside murder but is still sufficiently serious enough to be treated as a homicide offence. In our view that has some value within a modern structure, but it lacks clarity, coherence and a principled underpinning.

4.16 In Chapter 8 we describe our proposals for the boundaries of manslaughter, comprising the categories of reckless manslaughter, unlawful dangerous act manslaughter (“UDAM”), and gross negligence manslaughter. As described above, the inclusion of the category of voluntary manslaughter within the current law makes the offence unprincipled and incoherent. Our provisional proposals (introduced above and described in Chapter 6) would recategorise voluntary manslaughter as a type of murder, narrowing the scope of manslaughter as a result. We also make provisional proposals that clarify the role of reckless manslaughter and refine the elements of unlawful dangerous act manslaughter and gross negligence manslaughter. The combination of these proposals helps ensure that manslaughter, while still sufficiently broad, has a specific purpose and is clearly delineated.

4.17 The fault elements for each category of manslaughter differ. However, there are notable similarities and sufficient cross-over between them that means they are best considered as one coherent group within a homicide structure. Firstly, as we explain in more detail in Chapter 8, there is significant overlap between the three offences meaning that in some cases, on the facts, more than one category could apply. Secondly, they have very similar approaches to the causation required between the culpable act and the death. Finally, they all respond to approximate levels of culpability. For example, while acts of reckless manslaughter are generally more culpable than acts amounting to UDAM, they may not always be so. Moreover, the difference in culpability may not be so great as to justify an entirely different approach to criminalisation. The culpability across the three categories of manslaughter is a spectrum rather than a ladder.

4.18 As such, we conclude that manslaughter, as refined, should occupy the third tier of the homicide structure. This would facilitate a more flexible sentencing regime, as well as fairer labelling. Our proposed manslaughter offence has some breadth and flexibility, allowing it to continue to cover suitably culpable conduct not otherwise defined as murder. However, it is not an open-ended safety net for all behaviour resulting in death that does not satisfy the elements of murder.

SPECIFIC HOMICIDE OFFENCES

4.19 Where both murder and manslaughter have appropriate boundaries, there will be conduct resulting in death that falls outside their scope. The "gaps" in the current law of murder and manslaughter are in part the reason that separate specific homicide offences have been introduced. Offences such as causing death by dangerous driving,[9] and causing or allowing the death of a child or vulnerable adult,[10] reflect the need to criminalise some conduct that results in death even if they do not amount to, or would not result in convictions for, murder or manslaughter.[11] We believe it is appropriate for the law of homicide to continue to include these specific offences.

4.20 Specific homicide offences have a distinct role within the homicide structure. We accept that some conduct that results in death should be criminalised even if it does not amount to murder or manslaughter. The fact that such conduct falls outside the scope of murder and manslaughter does not lead inevitably to the conclusion that murder and manslaughter should be expanded to include it. The specific homicide offences are conceptually different from the general homicide offences. They usually reflect conduct without the required intent for murder. In some cases, the causal link required for either murder or manslaughter is not established.[12] Many causing death offences are more serious versions of existing offences, aggravated by the fact that death resulted. There is therefore a coherent rationale for their creation as distinct offences with elements that can be tailored to the particular harm they seek to address. Retaining them in a separate group outside the general homicide offences means they can continue to be responsive to changing practice and social mores. As Dr Jonathan Rogers submitted to our Call for Evidence, some conduct-specific offences may better be suited to their tasks than the general offences. He also suggested that it "would be a mark of respect for human life that we might have a number of extra offences, if necessary and if appropriately differing in gravity". We agree.

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9 Road Traffic Act 1988, s 1.

10 Domestic Violence, Crime and Victims Act 2004, s 5.

11 In Chapter 10 we explore in more detail the rationale for the introduction of specific homicide offences.

12 For example, the offence of causing or allowing the death of a child or vulnerable adult (Domestic Violence, Crime and Victims Act 2004, s 5) where the basis for conviction can be "allowing" the death rather than "causing" it. As explained above and in Chapter 10, some "causing death" offences require a lesser causal connection between the defendant's conduct and the death than do murder and manslaughter. The requirement for causation is an appropriate feature of manslaughter and should not be watered down, see Chapter 8.

4.21 As explained above, and in Chapter 10, part of the rationale for specific homicide offences is that the conduct criminalised would not always amount to an offence of murder or manslaughter. However, some conduct could amount to both a specific homicide offence and a general homicide offence. For example, causing death by driving dangerously could be an offence under section 1 of the Road Traffic Act 1988. It could be manslaughter if the driving amounted to reckless conduct and directly caused the death. It could also be murder if the car was used as a weapon intentionally to kill the victim. While there may be such overlap between the general homicide offences and the specific homicide offences, this does not undermine the need for separate offences. Where conduct satisfies the elements of the general homicide offences, it is right that prosecutors may charge those offences even if the conduct also satisfies the elements of a specific homicide offence.

4.22 This suggests that, as murder and manslaughter are considered the most serious offences, offences that cover conduct that falls outside their scope are less serious in comparison. The specific homicide offences may have a lower maximum sentence[13] than the general homicide offences, and also a less serious label. We believe this is appropriate and should be maintained. However, because of the potential overlap explored above, it is not accurate to say that all conduct covered by the specific homicide offences is always less serious than conduct that fits within the three tiers of homicide offences we provisionally propose. We do not propose, therefore, that specific homicide offences should be in a fourth tier sitting below manslaughter. Instead, we are of the view that it is appropriate to retain them as a separate category within the structure of homicide offences. They do not sit in the tiered part of the structure, which is primarily to distinguish between categories of intent and related culpability in the broad general offences. As a group of offences much narrower in scope, yet collectively reflecting a range of fault, conduct and culpability, it is neither appropriate nor necessary to categorise each offence into a tier. Instead, they should sit separately alongside the general homicide offences, better reflecting their status as individual, conceptually distinct offences.

4.23 We now turn to infanticide. Infanticide is currently both a separate homicide offence, and a defence to murder and manslaughter. For the purposes of the overall structure, we provisionally conclude that it should remain outside the general homicide structure, in “specific homicide offences”. This best reflects its unique status as both an offence, and a defence that applies to both murder and manslaughter.[14] The purpose of infanticide law is to provide a “lower grade criminal charge”[15] for vulnerable defendants considered deserving of leniency. We explore and support this rationale in more detail in Chapter 9.

4.24 Under our proposals, the overall structure of homicide law would be as follows:

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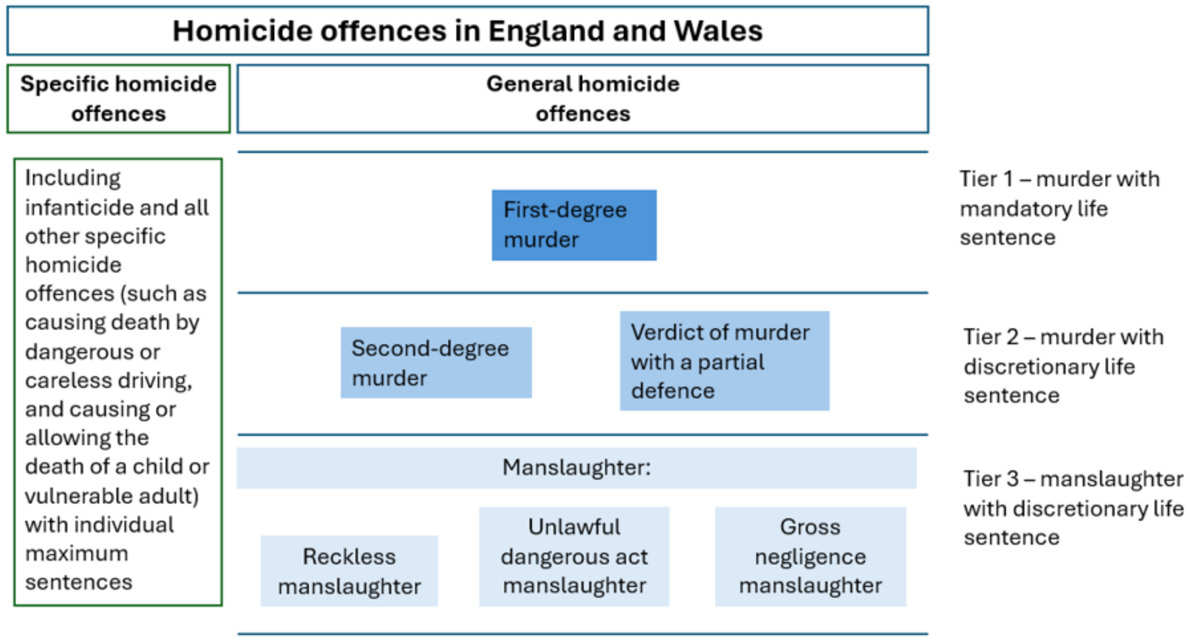
13 While some specific homicide offences (such as causing death by dangerous driving) now carry a maximum, discretionary, sentence of life imprisonment, most have lower maximum penalties.

14 Whereas the other partial defences of loss of control, diminished responsibility and killing pursuant to a suicide pact apply only to murder.

15 *R v Gore* [2007] EWCA Crim 2789 at [33].



Consultation Question 1.

4.25 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.

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

Do consultees agree?

CONCLUSION

4.27 In this chapter we have outlined our provisional proposals for a new homicide structure established from first principles, using descending levels of culpability reflected by the different fault elements of the offences within each tier of the structure. This promotes clarity, coherence and fair labelling, and facilitates proportionate sentencing. We have chosen to create tiers based on conventional and well understood fault elements. We acknowledge that culpability cannot always be so neatly divided; some individual cases falling in the third tier may well be as or more culpable than conduct in a higher tier. Our structure allows for this to be addressed at sentencing. Our proposed structure best balances the need for fairness and proportionality, clarity and consistency with practicality.

4.28 In the following chapters we explain what we propose should be the scope and elements of each tier and the offences within them and ask for consultees' views.

Chapter 5: First-degree murder

INTRODUCTION

5.1 In this chapter, we set out our provisional proposal for the offence of first-degree murder. In our proposed three-tier structure, outlined in Chapter 4, first-degree murder sits in the top tier. Since our proposed structure is based on degrees of fault, first-degree murder constitutes the most culpable homicide offence. It follows that this type of murder attracts the most severe punishment currently available for homicide offences (and indeed for any criminal offence): the mandatory life sentence. Indeed, our proposed new structure is designed to ensure that the most severe sentence applies to the most serious offending.

5.2 The Law Commission previously recommended a new offence of first-degree murder as part of our proposed reform of homicide law in 2006.[1] In this chapter, we start by explaining our previous provisional proposal and recommendation, and their rationale. We then explain our current provisional proposal for an offence of first-degree murder in line with the overarching principles guiding our reform of homicide outlined in Chapter 3.

5.3 The fault element we propose for first-degree murder naturally influences the fault element for second-degree murder within our recommended structure. We set out our provisional proposal for second-degree murder in Chapter 6.

THE LAW COMMISSION'S PREVIOUS HOMICIDE REVIEW

5.4 The recommendation we made in the report Murder, Manslaughter and Infanticide (the "2006 Report") differs significantly from what we proposed in our earlier consultation paper in that project (the "2005 Consultation Paper").[2] We set them out separately here as useful starting points for the discussion of our current provisional proposal for first-degree murder.

5.5 While we are not limited to choosing between the 2005 and the 2006 alternatives, arguments in favour of and against our previous positions are nonetheless useful to consider.[3] We have assessed the merits of possible reform options against the overarching principles discussed in detail in Chapter 3.

The 2005 provisional proposal

5.6 In the 2005 Consultation Paper, we provisionally proposed splitting murder into two offences sitting within two tiers. In the top tier was "first-degree murder". First-degree murder was confined to killing with the intention to kill and carried the mandatory life sentence. We proposed an offence of "second-degree murder" in the second tier.

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1 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 1.67.

2 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177.

3 We explain our approach to the relationship between our previous review of homicide and the present review in Chapter 1.

Second-degree murder included killings with the intention to cause serious harm, or with reckless indifference to causing death, or when a partial defence applies.[4]

5.7 We justified limiting first-degree murder to the intention to kill, consequently excluding the intention to cause serious harm from the most serious type of murder, as follows:

(a) It would "bring the law of murder into line with public opinion", on the basis that there was at that time a high level of agreement among the public that an intent to kill showed that the crime was especially serious.[5]

(b) It would "bring a number of welcome clarifications and simplifications" in the law, for example by bringing murder into line with attempted murder (which requires proof of an intention to kill). We argued that the number of convictions for attempted murder at that time demonstrated that there were no "insurmountable problems" in proving an intention to kill.[6]

(c) It would reflect the "sanctity of life" ideal, or the equivalent secular ideal that life is sacrosanct and must be morally protected from intentional and deliberate killing.[7]

5.8 We rejected the argument that first-degree murder should extend to intention to cause serious harm. We observed that the present law (which requires the intention to cause serious harm *without* foresight of death) has the potential to lead to unjust outcomes due to the vagueness of the concept of "serious harm".[8] We gave the example of a defendant who intentionally breaks the victim's arm, and then the victim unexpectedly dies due to complications with their treatment. We argued that, in such a case, it would be more appropriate to convict the defendant of second-degree murder or manslaughter, rather than first-degree murder.[9]

5.9 To address these issues, we provisionally proposed a middle-tier of second-degree murder, which we discuss in the next chapter.

The 2006 recommendation

5.10 In the 2006 Report, following public consultation, we changed our position and recommended instead that first-degree murder should encompass:

(1) killings with the intent to kill; and

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4 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 2.7. We discuss the 2005 proposal in Chapter 6.

5 Above, para 2.13. We relied on a public opinion survey conducted by Professor Barry Mitchell appended to the Consultation Paper (Appendix A).

6 Above, para 2.14 (noting that at that time there were 80-90 convictions annually for attempted murder).

7 Above, paras 2.20 - 2.31. We said that the prohibition on intentional or deliberate killing, as opposed to any other type of killing, such as accidental or careless killing, best expressed the ideal of sanctity of life.

8 We explain in Chapter 6 why we believe that "serious injury" is a better term than the current "grievous bodily harm".

9 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, paras 2.46 - 2.50.

(2) killings with the intent to do serious injury where the killer was aware that their conduct involved a serious risk of causing death.[10]

5.11 The fault element of first-degree murder was substantially very similar to that of the current offence of murder: both include intention to kill and intention to cause serious injury. However, there was one key difference: intention to cause serious injury, under our recommended first-degree murder included the additional requirement of "awareness of a serious risk of causing death". This was designed to make it more limited in scope than the current offence of murder.[11] As with our 2005 provisional proposal, we recommended that first-degree murder should attract the mandatory life sentence.

5.12 We noted that during consultation, "there was a good deal of support for our proposal" to confine first-degree murder to intention to kill.[12] Some consultees supported our provisional proposal only because it restricted the scope of the mandatory life sentence, rather than because they believed there was intrinsic merit in narrowing the scope of murder.[13]

5.13 Those who opposed our provisional proposal believed that first-degree murder was too narrow. They argued that there are some killings which, while not committed with intention to kill, should be regarded as morally indistinguishable from those which are. Therefore, they should be included within the definition of first-degree murder and attract the mandatory life sentence.[14] In our provisional proposal, we took the view that cases short of intention to kill could instead be dealt with through a more severe sentence for second-degree murder (which, under our proposal, attracted a discretionary life sentence).[15]

5.14 In light of consultees' responses, we concluded that our provisional proposal should be changed "to create a greater measure of consensus over the scope of first-degree murder".[16] We concluded that the expanded scope of first-degree murder would achieve "the broadest measure of support whilst maintaining clarity within the three-tier structure for the law".[17]

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[10] Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.50. The recommendation used "injury" instead of "harm", which was used in the 2005 provisional proposal. We explain why we prefer to use "injury" in the current provisional proposal for second-degree murder in Chapter 6.

[11] In contrast, intention to cause serious injury *without* an awareness of a serious risk of death was one of the fault elements in the recommended offence of second-degree murder. We discuss the additional requirement of awareness in Chapter 6 in relation to our provisional proposal for second-degree murder.

[12] Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.53. Among those in favour, there were: the resident judges of the Central Criminal Court; the Criminal sub-committee of the Council of HM Circuit Judges; Victims' Voice; JUSTICE; the CPS; the Law Society; the teachers of criminal law at the London School of Economics and Political Science; and the Criminal Bar Association.

[13] Above, para 2.54.

[14] Above, paras 2.54 - 2.62. Among those against, there were the Higher Court Judges' Homicide Working Party and Professor William Wilson.

[15] Above, para 2.56.

[16] Above, para 2.55.

[17] Above, para 2.57.

5.15 We accepted the argument that first-degree murder should accommodate the "moral equivalence" between intentional killings and some unintended killings. We said that:

> We do not believe that people would see any significant moral difference between someone who repeatedly shoots or stabs another in the chest intending to kill and someone who does these self-same actions both intending to cause serious injury and aware of a serious risk of causing death.[18]

5.16 Finally, we maintained that the additional requirement of the "awareness of a serious risk of causing death" to the intention to cause serious injury would close the existing large culpability gap between killing with intention and killing with intention to cause serious injury which does not require such an awareness.[19]

COMMENTARY

5.17 Our previous provisional proposal and recommendation for first-degree murder have generated a great deal of discussion about what the fault element of the most serious type of murder should be. We returned to this discussion in our Call for Evidence and received further useful views on the scope of the most serious type of murder.[20] We summarise those views here to provide helpful context for our new provisional proposal, explained below.[21]

5.18 Commenting on the 2005 provisional proposal to restrict first-degree murder to killing with the intention to kill, Professor William Wilson argued that:

> There is nothing in the concept of an intentional killing which makes it morally worse than a reckless killing. An intentional killing is simply a different wrong from a reckless killing. It will, of course, usually be more heinous because intentional killings are more difficult to excuse or justify. But not always. Some reckless killings attract far more revulsion and indignation than some intentional killings.[22]

5.19 He provided the example of a kidnapper who abandons a kidnapped infant, gagged and without food and water, and compared it to the example of a parent who suffocates their terminally ill child. He argued that the former case (where the defendant did not intend to kill) is more blameworthy than the latter (where the defendant intended to kill).

5.20 Dr Jonathan Rogers largely agreed with our 2005 provisional proposal, noting that the law of murder currently covers too broad a range of culpable conduct. He noted that the provisional proposal would remedy this problem by ensuring that defendants in

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18 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.61. See also paras 2.58 - 2.60. On the "awareness" requirement, see Chapter 6.

19 Above, paras 2.66 - 2.68.

20 Law Commission, Homicide Law: Call for Evidence (14 August 2025), para 2.15 to 2.23.

21 This section focuses on the commentary pertaining specifically to the previous homicide review. General criticism of homicide law is discussed in Chapter 2.

22 W Wilson, "The Structure of Criminal Homicide" [2006] *Criminal Law Review* 471, 474. Professor Wilson was a consultee in our earlier homicide review, and his article is cited in Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.60, 2.103 and 2.111.

different cases are guilty of distinct murder offences.[23] He concluded that the “three general offences of homicide reflect moral distinctions and ought to be workable”.[24]

5.21 Commenting on our 2006 recommendation, Professor Andrew Ashworth was not persuaded that first-degree murder should have a broader fault element than intention to kill. He called our 2005 proposal “more ambitious” and questioned the “moral equivalence” argument that some non-intentional killings are just as morally culpable as intentional killings.[25] He argued that “causing death with intent to kill is a paradigm case of murder” and questioned the rationale of splitting intention to cause serious injury across first-degree and second-degree murder, depending on whether an awareness of a serious risk of death was present.[26]

5.22 We received a number of submissions to our Call for Evidence regarding the structure of homicide offences.[27] While the majority of stakeholders expressed general support for a three-tier structure of homicide offences, with some generally in favour of the 2006 recommendations, only a small number of submissions dealt more specifically with the issue of the fault element of first-degree murder.

5.23 The Criminal Law Reform Now Network (“CLRNN”), Professor Matthew Dyson and Greg Stewart (a solicitor) supported our 2005 provisional proposal to confine first-degree murder to intention to kill. Dr Susie Hulley urged that the term “murder” be retained only for homicides involving intention to kill. As she observed:

> Research suggests that separating ‘intention to cause serious injury’ from ‘killing intentionally’, and applying a different label to each would support greater understanding of the conviction among defendants and would improve the legitimacy of both the conviction and sentence. Some participants in our longitudinal study of people serving long life sentences from a young age who admitted being responsible for the death of the victim but who stated that they only intended to injure the victim (not to kill them) expressed confusion about the definition of murder and its relevance to their actions at the time of the incident. This was often because they did not understand that intention to cause grievous bodily harm was incorporated into the definition of murder. Many had expected to be convicted of manslaughter – they felt that their murder conviction and long-life sentence was unfair, as it lacked ‘legal legitimacy’.[28]

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23 J Rogers, “The Law Commission’s Proposed Restructuring of Homicide” (2006) 70(3) *Journal of Criminal Law* 223, 225 - 226.

24 Above, p 245. Dr Rogers was a consultee in our earlier review, and his article is cited in Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.103 and 2.141.

25 A Ashworth, “Principles, Pragmatism and the Law Commission’s Recommendations on Homicide Law Reform” [2007] *Criminal Law Review* 333, 333 and 337. Professor Ashworth was a consultee in our earlier homicide review.

26 Above, p 337.

27 Law Commission, Homicide Law: Call for Evidence (14 August 2025).

28 The submission draws from findings contained in B Crewe, S Hulley, S Wright, *Life Imprisonment from Young Adulthood. Adaptation, Identity and Time* (2020).

PROVISIONAL PROPOSAL FOR FIRST-DEGREE MURDER

5.24 We now turn to explain our new provisional proposal. We provisionally conclude that the fault element of first-degree murder should be confined to intention to kill. We explain below the rationale underpinning our provisional view.

Life as a legally protected value

5.25 To explain the rationale for our provisional proposal, we begin by setting out the theoretical foundation for our view that only killing with the intention to kill belongs in first-degree murder.

5.26 The argument that life is sacred or its secular equivalent that "life is…morally secured against (certain kinds of) interference",[29] endorsed in our previous review, is not the appropriate framework through which the proposed offence of first-degree murder should be justified.[30] Life is "sacred" in the sense that each individual is unique and any life cut short by a killing is a tragic loss for the deceased, their family and friends, as well as society at large. However, this does not help to clarify which types of killings are more culpable than others. As the commentary above shows, the existence of a supposed "moral equivalence" of (at least certain) types of killings is contested, nor are there any empirical criteria to test the validity of the assumption and its generalisable application. Individuals' views as to the culpability of particular conduct may differ greatly, especially in cases which raise morally difficult issues.[31] A review of the law should be underpinned by clear legal principles, rather than being based on assumptions regarding "moral equivalence" and comparability.

5.27 Therefore, while it is certainly true and self-explanatory that human life is of the utmost importance (morally, individually, socially, religiously and for many other reasons), for the purpose of this review we believe that it is more useful to think about life as a *legally* protected value at common law and by article 2 of the European Convention on Human Rights ("ECHR"), which protects the right to life.[32] The European Court of Human Rights has reiterated several times that "article 2 ranks as one of the most fundamental provisions in the Convention" and "enshrines one of the basic values of the democratic societies".[33] States are under a legal obligation:

> To secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement

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29 The expression is of J Kleinig, *Valuing Life* (1991), p 18 (quoted in A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 2.21).

30 The reliance on sanctity of life arguments in our previous review was also criticised by A Norrie, "Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper" [2006] *Criminal Law Review* 486. Sir Louis Blom-Cooper QC and Professor Morris also pointed out that references to "sanctity of life" can be misleading and the issue in all homicide offences is the violation of the right to life: see Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.60.

31 Public opinion, albeit important to inform the review of the law, cannot constitute a means to determine "morally correct" solutions in criminal law. The relationship between public opinion and morality in law is complex and the latter cannot be inferred simply from majoritarian views on morally contested issues.

32 See also Human Rights Act 1998, sch 1, part I, art 2.

33 Among many: *Giuliani and Gaggio v Italy* App No 23458/02 (Grand Chamber decision), para 174; *McCann and Others v UK* App No 18984/91 (Grand Chamber decision), para 147.

machinery for the prevention, suppression and sanctioning of breaches of such provisions.[34]

5.28 International human rights law does not explicitly clarify that killing with the intention to kill is more serious than any other killing. However, debates about what amounts to "the most serious crimes" for which the death penalty can lawfully be imposed[35] have indicated that "the expression 'the most serious crimes' must be read restrictively and appertain only to crimes of extreme gravity involving intentionally killing".[36] Similarly, the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Professor Philip Alston, observed that death penalty should be restricted to the most serious crimes "in cases where it can be shown that there was an intention to kill which resulted in the loss of life".[37] Although the findings are limited to the imposition of the death penalty by states which retain it as a lawful punishment, they indirectly show some degree of agreement that, in international human rights law, killing with the intention to kill is to be treated as a more serious offence than any other types of killing.[38]

5.29 In addition, it is worth nothing that the existing law of murder already regards killing with the intention to cause serious harm as less culpable than killing with the intention to kill. "An intention to cause serious bodily harm rather than to kill" is a mitigating factor that the sentencing judge should take into account in determining the minimum term for a mandatory life sentence.[39]

5.30 The additional advantage of focusing on life as a legally protected value is methodological. The legal perspective allows us to shift the discourse away from contested "moral equivalence" arguments and towards the legal-normative concept of "narrow culpability" (expressed by the fault elements of the offence) which underpins the rationale of our proposed three-tier structure.[40] In turn, this shift allows us to ground our provisional proposal in the legal principles guiding our homicide review, which we discuss further in the following sections.

Fair labelling

5.31 As explained in Chapter 3, one of our overarching aims is to ensure that our proposed structure complies with the principle of fairness and proportionality, including fair labelling. Our provisional view is that it is fair to distinguish a killing with the intention to kill from a killing with the intention to cause serious injury by using two different

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34 *Osman v UK* App No 87/1997/871/1083 (Grand Chamber decision), para 115.

35 International Covenant on Civil and Political Rights, art 6(2): "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes…". The UK ratified the Covenant in 1976.

36 Human Rights Committee, *General Comment No 26, Article 6: Right to Life*, CCPR/C/GC/36, para 35.

37 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions* (January 2007), A/HRC/4/20, paras 53 and 65.

38 The death penalty was abolished in the UK by the Murder (Abolition of Death Penalty) Act 1965, which substituted it with the mandatory life sentence for murder.

39 Sentencing Code, sch 21, para 10(a).

40 On this distinction, see Chapter 3.

labels (respectively, first-degree murder and second-degree murder). We believe that arguments about “equivalence” or “comparability” between the two types of intention result in an inflexible and overinclusive offence of murder which fails to take into account the degree of defendants’ culpability in individual cases.[41]

5.32 An example will help illustrate the point. Let us consider the following scenarios where the victim (V) dies as a result of stabbing by the defendant (D):[42]

(a) D stabs V in the neck;

(b) D stabs V in the upper arm;

(c) D stabs V in the hand.

5.33 If one were to hypothesise, in all the above scenarios, that the defendant did not intend to kill, in scenario (a) the defendant may be roughly as culpable as another defendant who intended to kill.[43] Similarly, in scenario (c) the defendant is arguably less culpable than in scenario (a) and, if so, even less culpable in comparison to another defendant who intended to kill. Scenario (b) is likely to cause more disagreement as to whether it is closer to (a) or (c), and therefore it is more or less akin to a scenario where another defendant intended to kill.[44]

5.34 One may further complicate this exercise by asking how many stabs, and to which body parts, would be needed for a defendant in scenario (b) to be regarded as culpable as one in scenario (a), and therefore closer to the degree of culpability of a hypothetical defendant who intended to kill? Or, on the contrary, would (say) one stab to the arm instead of three move the defendant closer to scenario (c)?

5.35 The three scenarios show that the problem with the argument that intention to cause serious injury is by itself “morally comparable” to an intention to kill, is that it crystallises a comparability assessment in one offence (the wide version of first-degree murder). By equating intention to kill with intention to cause serious injury *in all circumstances*, the argument effectively precludes a jury from making an assessment of culpability in less clear-cut scenarios such as (b) and (c), and the sentencing judge from fine-tuning such an assessment at the sentencing stage. Instead, it puts the three defendants in (a), (b) and (c) *always* under the same label of first-degree murder and, as a result, subject to the mandatory life sentence.

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41 The labelling aspect must be understood in connection with the corresponding mandatory life sentence, as we explain below from para 5.41.

42 The scenarios do not take into account the separate fault element of “awareness of a serious risk of death” under the second head of first-degree murder recommended in 2006. We set out our provisional view on this fault element in Chapter 6.

43 On a similar point, see A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, paras 2.46 - 2.47.

44 For the sake of the discussion, we have not considered the possibility that a jury could also convict of involuntary manslaughter. In all three scenarios, involuntary manslaughter would also be a possible charge. It would also be possible for a jury to find either direct or indirect (oblique) intention in all three scenarios and return a verdict of (first-degree murder). Arguably, this would be more likely in scenario (a) than it would be in scenario (c).

5.36 One may reply that this is true also of intention to kill, and that not all defendants who intended to kill should be treated in the same way. Many would disagree, for example, as to whether a person who kills a stranger with intention to kill for no reason is more or less culpable than another who kills their friend with intention to kill for financial gain. We consider that there can be differences in the seriousness of intentional killing, reflecting higher or lower degrees of broader culpability. However, this does not undermine the argument that it is fair to label all murders where there is the intent to kill as first-degree murders.

5.37 Firstly, if one keeps the focus on "narrow culpability" expressed by the fault element, both cases above should be treated, from a legal perspective, in the same way. Both the person who kills a stranger and the person who kills a friend have the same intention to kill; they both desired the same consequence (the death of the victim). What may make some regard one as more or less culpable than the other is not the intention as such, but factors extraneous to the fault element and related to the circumstances of each case (for instance, their motive and their relationship to the victim). Whatever the view on these issues, they have no relevance to the *legal* issue of fault: both defendants share the same intention to kill.[45]

5.38 Secondly, the current law already does not treat all killings with the intention to kill as equally culpable. The sentencing framework for murder, currently provided in Schedule 21 to the Sentencing Code, identifies four degrees of seriousness which warrant the imposition of different starting points or, in the most serious cases, a whole life order.[46] While the resulting sentence for a murder conviction is in any case the mandatory life sentence, Schedule 21 permits a limited degree of discretion to take into account the specificities of each case. However, this does not mean, as Professor Norrie puts it, that "there is no longer officially one 'uniquely grave crime'" of murder. On the contrary, the current sentencing framework for murder shows that if one focuses on narrow culpability in the structure of offences, factors which are extraneous to the fault element but indicate different degrees of broad culpability could be considered at sentencing.

5.39 Thirdly, it would be possible to sub-differentiate killings with the intention to kill in greater detail to try to cater for the numerous scenarios with which homicide law is confronted in real life. This would result in additional labels and perhaps in a further restriction of the reach of the mandatory life sentence.[47] Commenting on our 2005

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45 This is not to say that contextual aspects of broader culpability should not be taken into account at sentencing for murder.

46 Referred to by Professor Alan Norrie as the "shadow law of murder": A Norrie, "Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper" [2006] *Criminal Law Review* 486, 489. Although Professor Norrie referred to the previous sentencing framework for murder (contained in Schedule 21 to the Criminal Justice Act 2003), the considerations remain valid in relation to the current Schedule 21.

47 This is the approach followed by some jurisdictions with aggravated forms of murder which include factors additional to an intention to kill within the offence definitions. See, for example: the offence of aggravated murder in the New York Penal Code, s 125.26 (the defendant intended to kill and caused the death of a state official or emergency worker); the offence of "assassinat" under the French Code Pénal, article 221-3 (the defendant commits murder, which requires an intention to kill, with premeditation); the offence of "Mord" under the Strafgesetzbuch, s 211 (particularly egregious intended killings, distinct from the basic offence of intentional killing generally; "totschlag").

provisional proposal, Professor Victor Tadros cautioned that “any reasonably precise and restricted criteria for distinguishing levels of homicide will involve inappropriate categorisation”. On his view, there are many factors that contribute to the badness of one’s conduct (in addition to fault elements), although he conceded that the moral weight of these factors is also bound to be controversial. Indeed the practical objection to a further distinction between killings with the intention to kill is that a too highly differentiated structure of homicide offences, while increasing compliance with the principle of fair labelling, would unavoidably create greater overlap between offences and result in an unworkable system (including by heightening the risk of confusion for a jury).[48] This would undermine the principles of practicality and clarity.[49]

5.40 In conclusion, we believe that a line should be drawn between intention to kill and intention to cause serious injury in the homicide structure. We accept that *some* killings committed with intention to cause serious injury are so heinous that they may be tantamount to killings committed with the intention to kill in culpability terms. However, this assumed equivalence is not true for *all* killings committed with the intention to cause serious injury. Therefore, it is our provisional view that different labels are warranted so that *all* killings with intention to cause serious injury are not grouped together and unfairly labelled under the same label of first-degree murder.

Proportionate and fair sentences

5.41 The second aspect to consider here is the principle that a conviction for a homicide offence should result in a proportionate and fair sentence.[50] As we noted in Chapter 3, there is an obvious correlation between offence labels and sentencing. In principle, a differentiated system of homicide offences allows a more tailored sentencing regime, which aims to reflect more accurately and fairly degrees of culpability and the seriousness of the offence.

5.42 The effect of our provisional proposal to restrict the label “first-degree murder” to killings with the intention to kill is that the mandatory life sentence would not apply to killings committed with the intention to cause serious injury. In practice, the reach of the mandatory life sentence may be more limited than it is under the current homicide law.

5.43 One of the aims of this review is to devise a structure of homicide offences which would result in a fairer and more proportionate sentencing regime. This includes consideration of the appropriate breadth of the mandatory life sentence. We acknowledge that the mandatory life sentence has been widely criticised in many quarters for a variety of reasons, ranging from its penological rationale to the way it distorts the architecture of homicide offences.[51] While our Terms of Reference prevent us from proposing alternatives to the mandatory life sentence for the most serious

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48 We discussed this aspect of fair labelling in more detail in Chapter 3. On a similar point, see also A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 2.53.

49 In Chapter 4 we made the similar point to justify limiting our provisional structure to three tiers, arguing that they strike the right balance between fair labelling and the principles of practicality and clarity.

50 In this Consultation Paper, our aim is pursued only in relation to the structure of homicide offences. We also consider this principle as part of our strand of work concerning the review of the sentencing framework for murder contained in Schedule 21 to the Sentencing Code.

51 See Chapter 2.

form of murder, the remit of our review allows us to reconsider its scope.[52] We believe that the provisionally proposed first-degree murder would allow a fair and proportionate sentencing regime. The more limited application of the mandatory life sentence is an ensuing implication of the principle, rather than a primary aim of our reform.

5.44 We think that any concern about a restriction of the application of life sentences should not be overstated. Following a conviction for second-degree murder, the sentencing judge would have the discretion to impose a life sentence to reflect a very high degree of culpability when appropriate.[53] Such a sentence would be likely to be imposed, in particular, in cases involving a defendant who intended to cause serious injury in circumstances which could be considered as culpable as cases where a defendant intended to kill (for example, a case where a defendant tortured the victim but did not intend to kill them).[54]

5.45 In practice, our proposed offence of first-degree murder, from the perspective of fair and proportionate sentencing, allows the sentencing judge to recognise different degrees of culpability. Such discretion is achieved by limiting first-degree murder to intent to kill, consequently, moving cases involving intent to cause serious injury out of the reach of the mandatory life sentence. This would temper the rigidity of the mandatory life sentence, which currently must be imposed not only for unintentional killings which could be regarded as "morally equivalent" to intentional killings (scenario (a) above), but also in cases which can be regarded as more "morally distant" from intentional killings (scenario (c) above).

5.46 Our provisional proposal may also contribute to increasing the legitimacy of the mandatory life sentence.[55] Confining its application to killings of the highest culpability may promote a better understanding of the rationale and punitive justification of the most severe form of punishment.[56]

Procedural aspects

5.47 Having explained how our proposal for first-degree murder aligns with the principle of fairness and proportionality of our homicide review, we now turn to explain the practical implications of our provisional proposal on the prosecution and trial of first-degree murder.

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52 Law Commission, Reviewing the law of homicide: terms of reference (January 2025), para 1.7: "This review will assume the continuing existence of the mandatory life sentence for murder (or the most serious form of murder if a tiered structure for the offence is recommended)".

53 We provisionally propose that second-degree murder should carry a discretionary life sentence: see Chapter 6 for more detail.

54 The same example was used, although in the context of the 2006 recommendations, by Professor David Ormerod (then Law Commissioner for Criminal Law) in his oral evidence before the Justice Committee: Law of Homicide: Oral Evidence, Justice Committee (2016) HC 622.

55 On this issue, see Chapter 4 and evidence submitted by Dr Hulley discussed at para 5.23 above.

56 We will also aim to do so through the strand of the homicide review concerning the sentencing framework for murder.

5.48 Firstly, under our provisional proposal a jury would be able to return a verdict of guilty of second-degree murder on a charge of first-degree murder.[57] We recognise that, in some cases, prosecutors may opt to charge first-degree and second-degree murder as alternative counts. We do not believe that this would pose disproportionate problems. The current law already allows for the prosecution to charge murder and manslaughter alternatively.[58] However, since we are proposing the introduction of an additional homicide offence, it would be for the prosecutors to decide whether it would be appropriate to charge in the alternative, for example, first-degree murder or second-degree murder, rather than second-degree murder or manslaughter.

5.49 Secondly, we accept that cases where a defendant would plead guilty to second-degree murder to avoid a conviction for first-degree murder and the mandatory life sentence may become frequent. This does not differ, in principle, from the current law where a defendant could plead guilty to manslaughter instead of murder. It would be the prosecutor's duty to indicate whether a plea of second-degree murder is acceptable or to take the case to trial on a charge of first-degree murder.[59]

5.50 Thirdly, our provisional proposal would bring clarity as to the legal basis for the verdict. Under the current law, it is not known whether a jury convicted a defendant of murder on the basis of a finding of the intention to kill or of the intention to cause serious harm.[60] Under the proposed offence, a jury would need to determine whether, on the evidence before them, the defendant had (direct or indirect) intention to kill in order to return a verdict of first-degree murder. We do not underestimate that there could be cases of jury disagreement leading to a mistrial. However, the risk is lessened by the availability of an alternative conviction for second-degree murder, on which a jury could agree. In addition, we stress that the possibility of jury disagreement is not unique to murder trials and therefore the mere existence of such a risk is not a compelling reason against the reform of the law of homicide.[61] We also take the provisional view that the proposed reform, rather than complicating the law, would make clearer to the jury that the two murder offences entail different degrees of culpability, thus facilitating their decision-making. A clearer basis for a murder conviction would also serve the purpose of communicating externally the culpability of

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57 Second-degree murder would be a lesser included offence on a charge of first-degree murder. This would not be different, in principle, from the current law, which allows a jury to find a defendant guilty of manslaughter on a charge of murder: see Criminal Law Act 1967, s 6(2)(a). Under the proposed three-tier structure, manslaughter would also be a lesser offence to both first-degree and second-degree murder.

58 On when it is appropriate for the prosecution to charge murder and manslaughter in the alternative, see CPS, *Prosecution guidance on homicide: murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult* (last updated March 2026).

59 This would involve consideration of whether there is a realistic prospect of a conviction for first-degree murder on the evidence and whether it is in the public interest to prosecute the defendant for first-degree murder. See CPS, *The Code for Crown Prosecutors* (2018).

60 The only indication can be found in the sentencing remarks. However, generally the sentencing judge is not obliged to specify the type of intention for murder that forms the basis for their decision on the minimum term, unless the judge takes into account the mitigating factor that the defendant had "an intention to cause serious bodily harm rather than to kill" under paragraph 10(a) of Schedule 21 to the Sentencing Code.

61 On a similar point, see A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 3.6.

a defendant in the interest of the defendant, the victim's family and society at large, in line with one of the purposes of fair labelling.[62]

5.51 Finally, we anticipate arguments that it may be generally more difficult for the prosecution to prove the intention to kill than it is under the existing law of murder, where the prosecution must prove either the intention to kill or to cause serious injury. If that is the case, one may expect a relatively low number of convictions for first-degree murder (and fewer mandatory life sentences than are imposed under the current definition of murder) as a result of our provisional proposal. This would be an inevitable consequence stemming from the rationale underpinning our provisional proposal that first-degree murder should be treated as the most culpable type of murder. In any homicide trial, the liberty of the defendant is at stake. The decision to impose the most severe sentence capable of depriving an individual of their liberty for the rest of their lives should not be taken lightly.[63] Given that the right to liberty protected by article 5 of the ECHR is "in the first rank of the fundamental rights that protect the physical security of an individual and as such its importance is paramount"[64] and is "of the highest importance in a democratic society",[65] it would not be unreasonable to expect that it would be more challenging for the prosecution to prove the intention to kill.

5.52 However, we are not convinced that proving the intention to kill is in itself difficult. As noted above, in a murder trial, it is not known whether a jury convicted a defendant on the basis of the intention to kill or the intention to cause serious harm. Therefore, it cannot be concluded that, under the current wide definition of murder, it is more difficult for the prosecution to persuade a jury that a defendant had the intention to kill, as opposed to the intention to cause serious harm.[66]

5.53 We are reassured by two observations. First, the fact that there are some jurisdictions which limit the fault element of murder to intention to kill demonstrates that such a limit is workable.[67] Second, at present in England and Wales, a jury can find a defendant guilty of attempted murder only if the defendant had the intention to kill.[68] There are successful prosecutions of attempted murder each year.[69] Therefore, if it is possible to

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62 Discussed in Chapter 3.

63 The fact that in most cases an offender is released on licence after serving the minimum term does not automatically imply that their liberty is not restricted. It is established in the ECtHR's case law that "to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question" (*De Tommaso v Italy* App No 43395/09 (Grand Chamber decision), para 80.

64 *McKay v UK* App No 543/03 (Grand Chamber decision), para 30.

65 *Medvedyev and Others v. France* App No 3394/03 (Grand Chamber decision), para 76.

66 As also noted in A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 3.7.

67 For example, in France ("meurtre"), Germany ("Totschlag"), Italy ("omicidio volontario") and New York (murder in the first degree, which requires an intention to kill along with one of the specific conduct elements set out in the New York Penal Code, s 125.27).

68 *R v Grimwood* [1962] 3 All ER 285.

69 Data published by the Ministry of Justice shows that for the year ending September 2025 there were 234 convictions for attempted murder out of 1,043 cases that were "proceeded against" during this period. See,

prove the intention to kill in attempted murder cases, it would also be possible in cases where a defendant is charged with first-degree murder.[70]

Attempted first-degree murder

5.54 Our provisional proposal would align the fault element of first-degree murder to the existing fault element of attempted murder.[71]

5.55 We remain of the view that the fault element of attempted murder should be limited to the intention to kill.[72] The advantage of our provisional proposal for first-degree murder is that it would be easy for a jury to understand (and to be directed by a judge) that they could convict of attempted first-degree murder in cases where, had the defendant succeeded in killing, they would have been convicted of first-degree murder on the basis of the same fault element.[73]

Complicity in murder

5.56 Our provisional proposal to limit the fault element of first-degree murder to killing with the intention to kill would also have positive repercussion for cases of complicity in murder.[74]

5.57 Under the current law of complicity, an accessory ("D") may be convicted of murder when the principal ("P") killed with the intention to kill, however D encouraged or assisted P intending that P would cause serious injury. This is an implication of the current broad scope of murder, which includes the intention to cause serious injury. In this case, D would be subject to the mandatory life sentence even though D could be regarded as less culpable than P (since D had a lesser intention than the intention to kill).

5.58 Our proposed offence of first-degree murder would mean that, for D to be convicted of first-degree murder in a case of complicity, it would not be sufficient that D intended that P would intend to cause serious injury. Instead, D would need to encourage or assist P intending that P would kill with the intention to kill. This would ensure that D's intention (that P would commit the offence with the required fault element) aligns with P's intention when carrying out the act.

Ministry of Justice Criminal Justice Statistics Quarterly, https://www.gov.uk/government/statistics/criminal-justice-statistics-quarterly-september-2025 (September 2025). See Chapter 13 for further discussion of the offence of attempted murder.

70 As we also noted in 2005 in relation to the provisionally proposed first-degree murder: see A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 3.8.

71 See para 5.7 above.

72 See Chapter 13 for further discussion on the fault element for attempted murder.

73 If first-degree murder were to include other forms of intention (as recommended in 2006), while attempted first-degree murder were to be restricted to the intention to kill, the fault elements of the complete offence would not fully align with the fault element of the inchoate offence (because the intention to cause serious injury would be sufficient for the former, but not for the latter). This would create additional difficulty for a jury. On attempted first-degree murder in our previous review, see Murder, Manslaughter and Infanticide (2006) Law Com No 304, para B18 to B22.

74 We explain the law of complicity in Chapter 12.

5.59 We discuss in detail the impact of our provisional proposals on the law of complicity in Chapter 12.

CONCLUSION

5.60 On the basis of the principles guiding our review, we make the following provisional proposal:

> There should be a new offence of first-degree murder which would be defined as unlawful killing with the intention to kill.

5.61 First-degree murder would be situated in the top tier of our proposed three-tier structure and would therefore carry the mandatory life sentence.

Consultation Question 2.

5.62 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?

Chapter 6: Second-degree murder

INTRODUCTION

6.1 In this chapter, we set out our provisional proposal for second-degree murder. In Chapters 4 and 5, we explain why we provisionally conclude that murder should be differentiated into first-degree and second-degree murder, sitting in two tiers within our proposed three-tier structure. The implication of our provisional proposal that first-degree murder should be confined to killing with the intention to kill is that, as a result, an intention to cause serious injury would fall under second-degree murder. In this chapter, we explain what would constitute the fault element of second-degree murder under our provisional proposal.

6.2 Under the current law, the fault element of murder includes the intention to cause grievous bodily harm.[1] There is no fault requirement that a defendant must be aware of a risk of death, or be reckless as to the deadly consequence of their intention to cause grievous bodily harm. In other words, provided that a defendant intended to cause grievous bodily harm, they may be convicted of murder. The absence of any additional fault requirement (such as awareness of a risk of death) is regarded by some as contrary to the so-called "correspondence principle". According to the correspondence principle, where an offence is defined by reference to a specific consequence or circumstance the required mental element of an offence ought to correspond to the specified consequence or circumstances. Without any requirement of awareness of death, a murder offence with intention to cause grievous bodily harm is instead based on "constructive criminal liability". Constructive criminal liability arises where a defendant's fault relates to a lesser consequence, but they are then held liable for a more serious consequence.[2]

THE LAW COMMISSION'S PREVIOUS HOMICIDE REVIEW

6.3 In our previous homicide review, we recommended a middle-tier of second-degree murder as part of the three-tier structure. Second-degree murder was the label we recommended be used both for a free-standing offence (killing with different types of intention short of an intention to kill) and for killing as a result of a successful partial defence (without which the defendant would be convicted of first-degree murder).[3] The discussion below is concerned with second-degree murder as a free-standing

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1 "Grievous bodily harm" is the expression traditionally used to refer to "serious bodily harm", in line with the Offences against the Person Act 1861. We explain below from para 6.33 that the terminology is outdated and should be replaced.

2 On the correspondence principle and constructive liability, see A Ashworth and Campbell, "Recklessness in Assault – And in General?" (1991) 107 *Law Quarterly Review* 187; J Horder, "A critique of the correspondence principle in criminal law" [1995] *Criminal Law Review* 759. For example, the defendant intended to cause serious injury, so their fault relates to the harm of serious injury. If they are held liable for the more serious consequence (death) that in fact eventuated, that liability would be considered constructive.

3 On the distinction, see J Horder, "The Changing Face of the Law of Homicide" in J Horder (ed), *Homicide Law in Comparative Perspective* (2007), p 24.

offence.[4] In Chapter 7, we explain why we provisionally propose that killing as a result of a successful partial defence should be in the second tier of the homicide structure, but as a distinct category from second-degree murder.

The 2005 provisional proposal

6.4 In the 2005 Consultation Paper, we provisionally proposed that second-degree murder should include:

(1) All unlawful killings committed with an intention to cause serious harm;

(2) All unlawful killings committed with reckless indifference to causing death.[5]

6.5 Second-degree murder would attract a discretionary sentence with a maximum of life imprisonment.

6.6 In explaining the rationale of our provisional proposal, we distinguished between:

(1) the correspondence principle: the fault element should relate to the harm done for which someone is being held liable (killing); and

(2) the subjectivity principle: the fault element should be concerned with the defendant's state of mind at the time of their actions.[6]

6.7 We said that:

> These principles are far from absolute, but they are a useful reference point in analysing the nature and use of fault terms within the criminal law. They tend to influence, rather than determine, the character of criminal offences with fault elements.[7]

6.8 Applying these principles, we noted that second-degree murder with intention to cause serious harm does not comply with the correspondence principle (because the intention does not relate to the causing of death) but complies with the subjectivity principle (because the defendant is at fault for intending to cause serious harm). In contrast, second-degree murder with reckless indifference to causing death complies with both principles (because reckless indifference relates to the risk of death and the defendant is aware of that risk). We concluded that, in both cases of fault under second-degree murder, a defendant is to be regarded as sufficiently culpable to be liable for a less serious murder offence, that is second-degree murder.[8]

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4 In Chapter 1, we explained the relationship between the previous homicide review and the current review.

5 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 10.7. For the sake of the discussion, we have removed the reference to the third category of second-degree murder as a result of a successful partial defence.

6 Above, para 2.101.

7 Above, para 2.102.

8 Above, paras 2.105 to 2.107. In the case of first-degree murder limited to the intention to kill, both principles are respected.

6.9 We argued that killing through "reckless indifference" belonged to second-degree murder because it involved a defendant's appreciation of a risk of causing death and an attitude of indifference towards that risk. Killing through "simple" recklessness instead would remain categorised as manslaughter. However, we did not recommend a specific category of reckless manslaughter, which we said cannot be distinguished from gross negligence manslaughter.[9] We argued that, where the defendant underestimated a risk, instead of being indifferent to it, that is a case of "reckless stupidity" which is closer to gross negligence than to reckless indifference.[10]

The 2006 recommendation

6.10 In our report on murder, manslaughter and infanticide in 2006, we made a final recommendation for second-degree murder that differed from the 2005 provisional proposal. For context, in 2006 we also recommended a wider version of first-degree murder which impacted our approach to second-degree murder.[11] We recommended that second-degree murder should encompass:

(1) killings intended to cause serious injury;[12] and

(2) killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death.[13]

6.11 We recommended that second-degree murder should attract a discretionary sentence with a maximum of life imprisonment.[14]

6.12 We explained that second-degree murder would capture cases that are traditionally treated as murder (intention to cause serious injury) and cases that are traditionally treated as manslaughter (intention to cause harm or fear or risk of harm with awareness of a serious risk of causing death). The former would perform a "mitigating role" in comparison to the current law, whereas the latter would perform an "aggravating role".[15]

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9 In Chapter 8, we consider whether reckless manslaughter still exists as a separate type of manslaughter and discuss our provisional proposal for reckless manslaughter.

10 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 3.24. We clarified that "there is no reason to distinguish between simple recklessness and gross negligence. One of the things that can make negligence gross is the fact that the defendant went ahead to pose the risk in question in spite of the fact that he or she knew it existed" (para 2.99).

11 As discussed in Chapter 5, first-degree murder encompassed intention to kill and intention to cause serious injury with an awareness of a serious risk of causing death. This was wider than our 2005 provisional proposal confining first-degree murder to intention to kill.

12 The 2006 recommendations use "injury" instead of "harm", which was used in the 2005 provisional proposals. We explain below from para 6.33 why we prefer "injury" for the current provisional proposals.

13 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.70. For the sake of the discussion, we have removed the reference to the third category of second-degree murder as a result of a successful partial defence. We discuss this separately in Chapter 7 on the role of partial defences.

14 We added that guidelines should be issued on appropriate periods in custody for different kinds of killing falling under second-degree murder: see Murder, Manslaughter and Infanticide (2006) Law Com No 304, Appendix A.

15 Above, paras 2.72 to 2.74.

6.13 Regarding the first recommended category of second-degree murder, we argued that "it is a mistake to suppose that the correspondence principle cannot be satisfied" in cases of killing with the intention to cause serious harm (without an additional requirement of foresight of death or similar).[16] This is because:

> Where someone kills having intended to do serious harm, in all but the most exceptional instances such a person will have made V's death a foreseeable consequence of his or her conduct. This provides sufficient connection or 'correspondence' in point of fault between what D intended and the killing, whether or not there was actual awareness that death might be caused.[17]

6.14 Regarding the second category of second-degree murder, following some consultees' responses objecting to the vagueness of "reckless indifference" in our provisional proposal,[18] we replaced it with "intention to cause injury or fear or risk of injury" coupled with an awareness of a serious risk of death. We argued that such reformulation expressed the essence of "reckless indifference" while being more readily comprehensible to judges and juries.[19] We maintained our position that this reformulated "reckless indifference" belonged within second-degree murder, rather than to manslaughter. We clarified that, when a defendant acted with "simple carelessness or disregard" but without the intention to cause injury or fear or risk of injury, a conviction for (gross negligence) manslaughter would instead be appropriate.[20]

6.15 Finally, we rejected the possibility of defining "serious injury". We argued that any definition of "serious" would not significantly remove uncertainty. Therefore, we concluded that it was appropriate to leave the concept undefined and leave the assessment of seriousness to the jury. Since second-degree murder carried a discretionary life sentence, the sentencing judge would also be able to reflect the degree of harm intended in the sentence passed.[21]

COMMENTARY

6.16 Commentators' views regarding the scope of second-degree murder, and generally regarding the fault element of murder short of intention to kill, are influenced by their views about the degree of adherence to the correspondence principle that is required to criminalise culpable conduct causing death.

6.17 Those in favour of strict adherence to the correspondence principle would reject any form of constructive liability: therefore, they would argue that the only appropriate fault element for an offence of murder is intention to kill.

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16 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.79.

17 Above, para 2.80.

18 See para 6.29 below.

19 Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.100 to 2.108.

20 Above, paras 2.109 to 2.111.

21 Above, paras 2.86 to 2.94.

6.18 For example, Edmund-Davies LJ in his dissent in *Cunningham* said:

> I presently favour that there should be no conviction for murder unless an intent to kill is established. I find it passing strange that a person can be convicted of murder if death results from, say, his intentional breaking of another's arm.[22]

6.19 Those in favour of more flexible adherence to the correspondence principle would be satisfied with some form of fault in addition to the intention to cause serious injury. This could include, for instance, foresight of a risk of death or recklessness as to the risk of death.

6.20 For example, Professor Matthew Dyson suggested in response to our Call for Evidence that some conduct we recommended be included in second-degree murder should instead be downgraded to manslaughter.[23] In his view, second-degree murder should be limited to the intention to cause serious injury with awareness of a "significant" risk of causing death (in our 2006 recommendation, this was part of first-degree murder).

6.21 Also in response to our Call for Evidence, Professor Findlay Stark argued that constructive liability arising from murder with intention to cause serious harm is indefensible, unless foreseeability of death is reconceived of as a negligence test. On his view, a defendant would be liable for death resulting from serious harm if they were negligent as to the more serious result.[24] Therefore, he opposed the recommended fault element of second-degree murder (intention to cause serious injury), arguing that "it has the same problems as murder with intention to cause grievous bodily harm, even if it is called second-degree murder".[25]

6.22 Those who reject the correspondence principle for murder would argue that acting with the intention to cause serious harm is sufficiently wrongful to make it acceptable to hold a defendant accountable for the consequence of their culpable conduct.

6.23 For example, Professor Jeremy Horder, the Commissioner for criminal law at the time of the earlier review of homicide, has noted that there are "sound moral reasons" for using the murder label, albeit second-degree, in cases of intention to cause serious injury. As he pointed out:

> To launch an attack of that severity against another person demonstrates a disregard for the vital interests of others deserving of the label 'murderous', even if it would not be right to regard the crime as one of first-degree murder. Liability for

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22 *R v Cunningham* [1957] 3 WLR 76; 2 QB 396, 41 Crim App 155. Edmund-Davies LJ conceded that it is for Parliament to decide whether an intention to cause serious injury would justify a conviction for murder.

23 Professor Dyson suggested renaming it "culpable homicide". He also noted that it is unclear why "awareness that the conduct involved a serious risk of causing injury" (in the second type of second-degree murder in the 2006 Report) is different from the gross negligence formulation in terms of the risk to be foreseen.

24 For more details of Professor Stark's defence of "moderate constructivism", see F Stark, "Deconstructing Constructive Liability" [2023] *Criminal Law Review* 115.

25 Professor Stark also argued that recklessness-based liability should be part of reckless manslaughter (limited to foresight of a risk of death) and that foresight of a risk of serious injury should not be included within its scope.

second degree murder is justified by the fact that when death occurs, albeit unforeseen, D is not being held responsible for harm done out of all proportion to the harm intended.[26]

6.24 In response to our Call for Evidence, Professor Dennis Baker, generally sceptical of the need to reform the current structure of murder, argued that there is merit in treating constructive murder as second-degree murder, but doubted that the moral difference from killing with the intention to kill is sufficient "to garner solid public and political support".

6.25 Some commentators on our 2005 provisional proposal for second-degree murder were also broadly in favour of constructive liability arising from intention to cause serious injury. Professor William Wilson, for example, has argued that:

> Those who intentionally attack others are morally responsible for and so fully legally accountable for the consequences of so doing whether or not such consequences were foreseen so long as these consequences are not out of proportion to the nature of the attack launched.[27]

6.26 Some commentators criticised other aspects of our earlier offence of second-degree murder. Commenting on our 2005 provisional proposal, Dr Jonathan Rogers has observed that cases of intention to cause serious harm and cases of reckless indifference to death greatly overlap, noting however that there is broad "moral equivalence between the two categories. He concluded that "a fully flexible sentencing regime is needed" for the types of second-degree murder.[28]

6.27 Professor Victor Tadros has questioned the assumption that a defendant who satisfied the correspondence principle (because they intended to kill) is always more culpable than a defendant who does not (because they intended to cause serious harm). For example, a defendant who intended to cause the victim to live with severe and long-term physical disability may be regarded as equally, or even more, culpable than a defendant who intended to kill, because they caused the victim's quality of life to worsen.[29]

6.28 Commenting on the 2006 recommendations, Professor Andrew Ashworth agreed that intention to cause serious harm (without foresight of death) should be moved down to second-degree murder. However, he argued that this "creates boundaries that will inevitably become the site of intense forensic argument" to try to distinguish between cases with intention to cause serious harm *with* awareness of a serious risk of causing

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26 J Horder, "The Changing Face of the Law of Homicide" in J Horder (ed), *Homicide Law in Comparative Perspective* (2007), p 25.

27 W Wilson, "The Structure of Criminal Homicide" [2006] *Criminal Law Review* 471, 475. Professor Wilson was a consultee in our earlier homicide review, and his article is cited in Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.60, 2.103 and 2.111.

28 J Rogers, "The Law Commission's Proposed Restructuring of Homicide" (2006) 70(3) *Journal of Criminal Law* 223, 226 - 228. Dr Rogers was a consultee in our earlier review, and his article is cited in Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.103 and 2.141.

29 V Tadros, "The Homicide Ladder" (2006) 69 *Modern Law Review* 601, 609. Professor Tadros was a consultee in our earlier homicide review, and his article is cited in Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.47, 2.104, 3.22 and 3.23.

death; cases with intention to cause serious harm *without* such an awareness; and cases with intention to cause (non-serious) harm.[30]

6.29 There was broad agreement among commentators that it was appropriate to move some reckless killing from manslaughter into second-degree murder. However, some disagreed with the expression "reckless indifference" we proposed in 2005. Professor Wilson, for example, has argued that it is not possible "to draw a bright line between murder and manslaughter using such an emotionally-loaded concept as 'reckless indifference'". He argued that the concept is "puzzlingly ambiguous and does not provide a secure basis for directing the jury".[31] On the new formulation in the 2006 recommendation (intention to cause fear or risk of injury), Professor Ashworth has noted that there is no reference to the magnitude of the risk, which may overextend this head of second-degree murder.[32]

6.30 Finally, some criticised the approach to the definition of some key terms in our previous review. Professor Wilson has observed that uncertainty about what counts as *serious* injury should be rectified to differentiate more neatly (second-degree) murder from manslaughter (whose fault element falls short of intention to cause serious injury).[33] Similarly, Professor Ashworth has argued that possible definitions of "serious injury" should have been further explored in line with the objective of achieving certainty and clarity. In addition, Professor Ashworth has observed that "serious risk" (of causing death) is not only undefined, but also ambiguous in that it is unclear whether it involves "a judgment of probability alone or has an evaluative element too".[34]

PROVISIONAL PROPOSAL FOR SECOND-DEGREE MURDER

6.31 In Chapter 5, we explain why splitting murder into two degrees would contribute to achieving the principle of fairness and proportionality which is one of the overarching principles guiding our review. In this section, we explain our provisional proposal for the fault element of second-degree murder.

Intention to cause serious injury

6.32 We provisionally conclude that it is appropriate to limit liability for second-degree murder to intention to cause serious injury, without requiring an additional fault element as to the consequence (whether conceived of as foresight of death, recklessness or other variations). To explain our provisional view, we begin by discussing the meaning of "serious injury".

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30 A Ashworth, "Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform" [2007] *Criminal Law Review* 333, 337. Professor Ashworth was a consultee in our earlier homicide review.

31 W Wilson, "The Structure of Criminal Homicide" [2006] *Criminal Law Review* 471, 477.

32 A Ashworth, "Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform" [2007] *Criminal Law Review* 333, 339.

33 W Wilson, "The Structure of Criminal Homicide" [2006] *Criminal Law Review* 471,475 - 476.

34 A Ashworth, "Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform" [2007] *Criminal Law Review* 333, 344.

Serious injury

6.33 Currently, murder may be committed with the intention to cause what is traditionally referred to as "grievous bodily harm".[35] The term "grievous bodily harm" is also employed in the Offences Against the Person Act 1861, which contains most of the current offences against the person.[36]

6.34 As we noted in our 2014 consultation paper on offences against the person, the term "grievous" is archaic and not frequently used in modern English. While the term is overall understood, it means nothing more than really serious.[37] As a result, in the 2015 Report, we recommended that "grievous" should be replaced with "serious" to modernise the law on offences against the person.[38] In our view, the same is true regarding second-degree murder. In line with the principle of clarity which underpins our review, we provisionally conclude that "serious" is a more modern and readily understandable term than "grievous".[39]

6.35 On the meaning of "serious", we provisionally conclude, as also argued in the 2006 Report, that defining what counts as "serious" injury would not be likely to remove ambiguity and uncertainty in borderline cases.[40] On the one hand, a definition of the term may be too narrow and risk excluding important aspects of seriousness from its scope, which are for the jury to consider in each case. On the other hand, a broadly defined term would not significantly clarify its meaning. Therefore, in our view "serious" should not be defined; it would be for the jury to apply their common sense in determining whether an injury is "serious" for the purpose of second-degree murder. In addition, in line with our recommended flexible sentencing regime for second-degree murder, the sentencing judge would have discretion to consider the seriousness of the injury intended when passing sentence.

6.36 Finally, we provisionally conclude that the term "injury" is to be preferred to "harm". In homicide offences, the harm caused to the victim (death) is the result of the defendant's conduct and should be kept conceptually distinct from the injury which the defendant originally intended.[41] We note that the Offences Against the Person Act

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35 *R v Vickers* [1957] 2 QB 664, per Lord Goddard CJ: "Murder is, of course, killing with malice aforethought, but 'malice aforethought' is a term of art. It has always been defined in English law as either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim, and the victim died as the result".

36 For example, ss 18, 23, 29 and 31.

37 As interpreted by courts: among many, *DPP v Smith* [1961] AC 290, [1960] 3 All ER 161. See also the discussion in Reform of Offences Against the Person (2014) Law Commission Consultation Paper No 217, paras 3.72 to 3.76.

38 Reform of Offences Against the Person (2015) Law Com No 361. We did not provide a definition of "serious".

39 In both our 2005 provisional proposals and 2006 recommendations on homicide, we employed the term "serious" instead of "grievous".

40 Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.88 to 2.94.

41 Our 2006 recommendations on homicide employ the term "injury" instead of "harm" which was originally used in the 2005 provisional proposals.

1861 primarily uses the term "harm".[42] In our 2015 recommendations on offences against the person, we recommended replacing "harm" with "injury".[43] We also argued that the term "injury" should be used to encompass not only physical injury, but also a recognised psychiatric injury, in line with the established caselaw.[44] In 2006, we similarly maintained that the reference to "bodily" harm in homicide law is misleading as it is a stretch to its ordinary meaning to include recognised psychiatric conditions within its scope.[45] We find it difficult to imagine a scenario where a defendant intended to cause a recognised psychiatric injury which later caused the victim's death.[46] Indeed we are not aware of any case where the defendant was convicted of murder when they intended and caused a non-physical injury. However, given that the injury caused may be different from the injury intended, we see no reason to exclude from the scope of second-degree murder cases where a defendant intended to cause serious psychiatric injury but, with that intention, caused the victim's death.

6.37 In sum, we provisionally conclude that the fault element of second-degree murder should be intention to cause serious injury.

Correspondence principle

6.38 In this section, we consider the correspondence principle in relation to the fault element of second-degree murder.

6.39 We note that the Law Commission has consistently taken the position that some departure from the correspondence principle may be justified. In the 2006 Report, as noted above, we emphasised the non-absolute nature of the principle, concluding that there is sufficient correspondence between a defendant's intention to cause *serious* injury and a victim's death, irrespective of the defendant's actual awareness of death as a possible result.[47]

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42 However, the terminology is not consistent, and "injury" is sometimes also used: see ss 20, 28 and 30.

43 Reform of Offences Against the Person (2015) Law Com No 361, ch 9. There is a long history of the Law Commission's engagement with this issue. In Reform of Offences Against the Person (2014) Law Commission Consultation Paper No 217, we explained that previously the Law Commission recommended using the term "injury", including in Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218. In that report, we explained that the 1992 draft Criminal Code had included the term "personal harm", however the Law Commission reverted to the term "injury" because "the word 'injury' is more appropriate than 'personal harm' to describe the appreciable interference with the complainant's body or mental state [and] is a shorter and more natural way of indicating the basic idea of damage to the person than is a reference to 'harm'" (para 15.4). The Law Commission agreed with Professor Glanville Williams, who had criticised the use of "personal harm": see G Williams, "Force, Injury and Serious Injury" (1990) 140 *New Law Journal* 1227.

44 Reform of Offences Against the Person (2015) Law Com No 361, paras 4.123 to 4.126. For relevant cases, see *R v Chan-Fook* [1994] 1 WLR 689; *R v Ireland* [1998] AC 147.

45 Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.82 to 2.85.

46 Recognised psychiatric injuries may be relevant in cases where the victim died by suicide as a result of domestic abuse by the defendant. Such cases raise issues of causation, as discussed in Chapter 14.

47 See para 6.13 above.

6.40 More recently, we said in the context of our review of the offences against the person that "the desirability of always constructing offences so as to respect the correspondence principle is not universally accepted".[48] As we observed:

> The justification for [the correspondence] principle is that D is not morally to blame for causing harm unless he or she intended that harm, or at least knowingly took the risk of it. To hold D responsible for harm going beyond what was intended or foreseen is to make criminal liability depend on luck. That is not to say that D must have foreseen the precise chain of events. It is sufficient if the harm intended or foreseen is of the kind and degree specified in the definition of the offence.[49]

6.41 We reiterated that:

> The correspondence principle is correct in principle and should be the default position, though there may be reasons for departing from it in particular instances. If any factor is important enough to make the difference between guilt and innocence, awareness of that factor or of the possibility of it should in principle be an element of the offence. Otherwise potential defendants will not know whether they are committing the offence, and the requirement of fair warning is not met. The alternative, namely constructive liability, accepts the fault element for a lower level but related offence on the argument that D knew that he or she was doing "something wrong".[50]

6.42 We provisionally conclude that causing death when the defendant intended to cause serious injury is one of those cases which justify departing (to a degree) from the correspondence principle. We base our provisional conclusion on the following considerations:

(1) The harm intended (serious injury) is similar in kind to the harm that resulted (death). In most cases it is justified to hold the defendant liable for (second-degree) murder on the basis that the intention to cause serious injury by its very nature includes within it the acceptance of a non-negligible possibility that the more serious, lethal consequence may occur.[51] It is appropriate to hold those who intend to cause serious injury liable for the more serious consequences that occurred in the normal course of events, but not for "freakish" results.[52] As Professor Horder has described, in such cases there is a degree of "moral proximity" between the intended serious injury and the resulting death. Accordingly, "it would be wrong to require an exact match between the conduct

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48 Reform of Offences Against the Person (2014) Law Commission Consultation Paper No 217, para 3.38.

49 Above, para 3.36.

50 Reform of Offences Against the Person (2015) Law Com No 361, para 4.97.

51 This is not the case when the defendant intended to cause (non-serious) injury: see Chapter 8 for our different approach to the correspondence principle.

52 M Moore, "Causation in the Criminal Law" in J Deigh and D Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (2011) pp 168 - 193.

element and the fault element, rather than simply a close approximation between the two".[53]

(2) The "eggshell skull rule" (according to which a defendant should not, in principle, avoid liability when the harm caused is greater than the harm intended due to pre-existing vulnerabilities of the victim) supports this view.[54] For example, if a defendant stabbed the victim who died from the shock due to a preexisting heart condition, it would be unfair for the defendant to avoid liability for (second-degree) murder because they did not foresee death as a result.

(3) The qualification to points (1) and (2) above is that it would still be open to a jury to find that the consequence (death) is so far removed from the serious injury intended and caused by the defendant that it cannot be reasonably said that death is the natural and obvious result of that serious injury. This stems from ordinary rules of legal causation, according to which the defendant's action or omission must be a "substantial and operating" cause of the result.[55] For example, if a defendant stabbed the victim and the victim, conscious but feeling faint from the injury, got run over by a car while trying to escape, a jury is entitled to conclude that the serious injury inflicted by the defendant was not "a substantial and operating" cause of death.[56] That is to say that causation acts as the safeguard against the risk of an overreach of criminal liability when a consequence is out of proportion with the defendant's original intention.

6.43 We believe that our approach is in line with the positive obligation to protect life under article 2 of the European Court of Human Rights.[57] Since death is an irreversible condition, the enhanced protection of life required by human rights law permits holding a defendant criminally liable for the fatal consequence directly stemming from an intentional serious injury. In addition, we believe that it would be profoundly unjust if a defendant could avoid liability for (second-degree) murder because they intended to cause serious injury but thought that death was not a realistic prospect.[58]

6.44 We recognise that, even if justified, our approach departs from the correspondence principle. Unlike first-degree murder, which would be fully compliant with the correspondence principle, second-degree murder would be only partially compliant, in that culpability for a serious injury would be sufficient to hold the defendant liable for the death. As we noted in the 2005 Consultation Paper, the more serious the crime, the more important it is that the fault element corresponds to the intended consequence. For this reason, it is appropriate that the intention to cause serious injury is classified under second-degree murder, rather than equated with the intention

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53 J Horder, "A Critique of the Correspondence Principle in Criminal Law" [1995] *Criminal Law Review* 759, 770.

54 On this rule (also known as "thin skull rule"), see *R v Watson* [1989] 2 All ER 865 (CA).

55 On the test of legal causation as "substantial and operating cause", see *R v Mellor* [1996] 2 Cr App R 245; *R v Hughes* [2013] UKSC 56. See also discussion in Chapter 2.

56 The contrary is also true, since a jury could conclude that the car incident did not break the chain of causation and therefore the defendant remains liable for second-degree murder.

57 See Chapter 5 on life as a legally protected value.

58 On the other hand, as we noted above, ordinary rules on causation continue to operate as a safeguard to protect the defendant from an overreach of criminal liability.

to kill under first-degree murder.[59] Under our provisionally proposed structure, this would allow the sentencing judge to adjust the sentence for second-degree murder to reflect the specificities of each case, including the degree of seriousness of the intended injury and the actual culpability of the defendant. In other words, flexibility regarding the correspondence principle requires some flexibility at sentencing. This strengthens our broader argument that separating murder into two degrees is warranted.

Recklessness liability in second-degree murder

6.45 We are not persuaded, at this stage, that there is a strong case in favour of promoting some form of recklessness-based liability for causing death from manslaughter into second-degree murder.[60] As noted above, in our earlier review indifference as to the risk of causing death was distinguished from "simple" recklessness (when a defendant took an unjustified risk without having a careless attitude towards the risk of death).[61] The former fell under second-degree murder, while the latter fell under manslaughter.[62]

6.46 We believe that such a distinction, based on a defendant's attitude towards an existing risk, would add unnecessary complication to the law. It would be difficult for a jury, even when properly directed, to make an assessment as to the defendant's degree of calculation of a given risk and disregard of a victim's life. This would result in the line between second-degree murder and manslaughter being unacceptably blurred.

6.47 We accept that the definition of recklessness for the purpose of second-degree murder could be clarified, as the 2006 recommendation attempted to do. However, we are not convinced that, from a fair labelling perspective, there is a strong case for creating a category of second-degree murder which would include a fault element additional to the intention to cause serious injury. From the sentencing perspective, both second-degree murder and manslaughter, in our proposed structure, would carry a discretionary life sentence. Therefore, cases where a defendant was highly culpable (for example, because they were aware of a risk that their conduct would cause death or serious injury and it was unreasonable to take that risk)[63] would attract a commensurate sentence.

6.48 Our provisional conclusion is in line with the rationale of the proposed structure of homicide offences. As we observed in Chapter 4, our structure is based on a separation of types of intention (those necessary for first-degree and second-degree murder) from other fault elements (those necessary for manslaughter). This follows from the rationale of structuring homicide offences on the basis of degrees of

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59 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, paras 2.103 to 2.109.

60 For "recklessness-based liability" we mean liability based on recklessness or similar reformulations which do not use the term "recklessness", such as that recommended in 2006, on which see para 6.14 above.

61 We used "reckless indifference" in the 2005 proposal but changed it to "intention to cause some injury or a fear or risk of injury with awareness of a serious risk of causing death" in the 2006 final recommendation: see para 6.14 above.

62 However, we did not recommend introducing an offence of reckless manslaughter; see para 6.14 above.

63 See our proposed offence of reckless manslaughter in Chapter 8.

culpability, according to which types of intention demonstrate higher culpability (warranting the murder label), whereas fault elements short of intention demonstrate lower culpability (warranting the manslaughter label).

6.49 In Chapter 8, we set out our provisional proposal for reckless manslaughter.

CONCLUSION

6.50 On the basis of the principles guiding our review, we provisionally propose that the fault element of second-degree murder should be the intention to cause serious injury.

6.51 Second-degree murder would be situated in the second tier of our proposed three-tier structure and would therefore carry a maximum sentence of life imprisonment (discretionary life sentence).

Consultation Question 3.

6.52 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?

Chapter 7: The role of partial defences

INTRODUCTION

7.1 In this chapter, we discuss the role of partial defences within our provisionally proposed structure of homicide offences. The discussion is not concerned with the substantive elements of the respective partial defences, which we will review as part of the future strand of our review focussing specifically on partial defences to murder and full defences (as relevant to homicide).

7.2 Under the current law, loss of control,[1] diminished responsibility[2] and killing pursuant to a suicide pact[3] are partial defences to murder because, when they are successful, the defendant will be convicted of manslaughter rather than murder.[4] As a result, the defendant will not be subject to the mandatory life sentence for murder.[5] For a partial defence to be applicable, the fault element of murder (either intention to kill or to cause grievous bodily harm) must be proven.

THE LAW COMMISSION'S PREVIOUS HOMICIDE REVIEW

7.3 In our previous homicide review ("2006 Report"),[6] we made recommendations both on the role of partial defences within the structure of homicide offences and on the respective elements of provocation (the predecessor to loss of control) and diminished responsibility.[7] In line with the purpose of this chapter, the discussion here is limited to the role of partial defences within the three-tier structure that we recommended in the 2006 Report, which drew in part on the 2004 report on partial defences to murder ("2004 Report").[8]

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1 Coroners and Justice Act 2009, ss 54 to 56.

2 Homicide Act 1957, s 2 (as amended by the Coroners and Justice Act 2009, s 52).

3 Homicide Act 1957, s 4. In this chapter, we focus on loss of control and diminished responsibility. In Chapter 11, we discuss killing pursuant to a suicide pact, explaining that we will review the elements of the partial defence in our separate strand of the homicide review focusing on defences. In principle, our provisional proposals in this chapter would also apply to a killing pursuant to a suicide pact.

4 Manslaughter when a partial defence is successful is known as "voluntary" manslaughter to distinguish it from "involuntary" manslaughter offences (such as unlawful dangerous act and gross negligence manslaughter).

5 The introduction of partial defences in the Homicide Act 1957 was a step towards reducing the reach of the mandatory death penalty, which was in place at that time for some types of murder: see *Hansard* (HL) 21 February 1957, vol 201.

6 Murder, Manslaughter and Infanticide (2006) Law Com No 304.

7 The elements of (what became) loss of control and diminished responsibility were reformed by the Coroners and Justice Act 2009, which implemented in part the Law Commission's recommendations: see Chapter 2.

8 We explained the relationship between the 2004 recommendations and the 2006 recommendations on partial defences in Law Commission, Homicide Law: Call for Evidence (14 August 2025), para 3.4. In Chapter 1 we explain the relevance of our previous reviews to the current homicide review.

The 2004 report on partial defences to murder

7.4 In our 2004 Report, we observed that:

> During consultation there was a single, prominent and endless refrain: the partial defences of provocation and diminished responsibility have as their origin and main purpose the protection of the defendant from the mandatory death/life sentence for murder.[9]

7.5 Regarding the defence of provocation (as it was), we noted that:

> The expansion of provocation over the past half century can be seen as an attempt by courts and juries to avoid a conviction of murder with a mandatory life sentence in cases where the court has had some degree of sympathy for the defendant.[10]

7.6 Consultees were "nearly unanimous that the defence of provocation should not be abolished while the mandatory life sentence remained".[11] Those in favour of abolishing provocation if the mandatory life sentence were to be abolished believed that a sane person who kills should in any event be guilty of murder, and provocation should be taken into account in passing sentence, but not in defining the offence.[12] In contrast, those who argued in favour of retaining the partial defence argued that it is morally right that provocation should be "reflected in the way that society labels and sentences the defendant" and that the assessment as to whether the defendant was provoked should be made by the jury, rather than by the sentencing judge.[13]

7.7 Some consultees also argued that:

> It is unfortunate that one is forced to refer to provocation as a 'defence', when the critical question is whether a killing under provocation should be categorised as a less grave offence than murder.[14]

7.8 Regarding diminished responsibility, we noted that consultees' opinions were divided on the issue of whether the partial defence should be retained if the mandatory life sentence were to be abolished. Those in favour of abolishing diminished responsibility if the mandatory life sentence were to be abolished believed that issues raised by the partial defence are issues of mitigation that should be dealt with at the sentencing stage.[15] Those in favour of otherwise retaining the defence argued that the requirement of "fair and just labelling" would make it unjust for a defendant who is not

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9 Partial Defences to Murder (2004) Law Com No 290, para 2.59.

10 Above, para 3.19.

11 Above, para 3.33.

12 Above, para 3.36.

13 Above, para 3.37.

14 Above, para 3.41.

15 Above, para 5.17. See also para 5.43.

fully responsible for their actions to be labelled as a murderer since “their *culpability* is diminished”.[16]

7.9 In addition to “fair and just labelling”, consultees mentioned other factors in favour of retaining diminished responsibility, including: the outdated nature of the defence of insanity; the need to enable jurors to convict a defendant of a homicide offence where, if the only alternative were murder, they might otherwise (perversely) acquit; the need to ensure that issues of culpability are determined by the jury and not by the sentencing judge; the need for a jury to assess expert evidence.[17]

The 2005 consultation paper on murder, manslaughter and infanticide

7.10 In our 2005 consultation paper on murder, manslaughter and infanticide, we stated that “individual partial defences should reduce the level of seriousness of a crime to the extent warranted by the degree of mitigation involved”.[18] We provisionally proposed that first-degree murder be reduced to second-degree murder where the defendant successfully argued a partial defence.[19]

7.11 We specifically discussed the rationale of diminished responsibility. We argued that the reason diminished responsibility is a partial defence only to murder is “to enable the courts to avoid imposing the mandatory life sentence for murder in cases where there was powerful mitigation”.[20] For all other offences, this mitigation can be considered by the sentencing judge.

7.12 We acknowledged the argument that a defendant with an abnormality of mental functioning should not be labelled a murderer. We said that we “see the force of this argument, but we find it to be somewhat fastidious”,[21] because:

> ‘Manslaughter’ is also a significant label; but it does not necessarily follow that someone who commits ‘motor-manslaughter’ only through diminished responsibility should for that reason have the offence reduced to causing death by dangerous driving. We think that such logic is over-refined.[22]

7.13 We recognised that the public may disagree with the label of second-degree murder for defendants with diminished responsibility, however ultimately:

> The public will recognise that ‘second degree murder’, while a very serious offence, is not as serious as ‘first degree murder’. They will therefore understand a judge imposing a lesser sentence for ‘second degree murder’.[23]

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16 Partial Defences to Murder (2004) Law Com No 290, para 5.18 (italics in the original).

17 Above, para 5.22.

18 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 1.32.

19 Above, para 1.39.

20 Above, para 6.28.

21 Above, para 6.29.

22 Above, para 6.29.

23 Above, para 6.31.

The 2006 report on murder, manslaughter and infanticide

7.14 In the 2006 Report we recommended that, under the three-tier structure, first-degree murder should be reduced to second-degree murder where the defendant successfully argued a partial defence.[24] We thought that a partial defence should not reduce second-degree murder to manslaughter.[25]

7.15 We took the view that the very justification for the existence of partial defences lies in the existence of the mandatory life sentence:

> The primary importance of partial defences should be seen as lying in the impact they have on sentence rather than on verdict. This is what could be called the 'sentence mitigation' principle. Matters of verdict and of sentence are effectively fused in murder cases. Partial defences affect the verdict of murder, and only that verdict, because a verdict of murder is the only one that carries in its wake a mandatory sentence of such gravity (life imprisonment). Therefore, in our view, the argument for partial defences that is based on fair labelling – avoiding the label 'murderer' – is of secondary importance compared to the sentence mitigation principle.[26]

7.16 We argued that the "secondary importance of labelling considerations" partly explains why partial defences are not available to reduce other crimes that carry discretionary maximum sentences, such as attempted murder, to lesser included offences.[27] On that basis, we justified our position that a partial defence should not also reduce second-degree murder to manslaughter because second-degree murder, within the recommended structure, would not carry the mandatory life sentence.[28] However, we placed more emphasis on fair labelling in relation to diminished responsibility:

> There is a case on 'labelling' grounds for reducing the offence from first degree murder, when there is evidence of diminished responsibility. The mitigating factor of an abnormality of mental functioning can be such that a killer acting under its influence does not deserve to be labelled a first-degree murderer.[29]

7.17 We further argued that "the idea of 'partial defence' is in reality something of a misnomer". Ordinarily, mitigation should be achieved by creating space for discretion in sentencing, however this is not possible for murder due to the mandatory life sentence, thus partial defences are currently required to reduce murder to manslaughter.[30]

7.18 We also discussed why a partial defence should reduce first-degree murder to second-degree murder rather than reducing first-degree murder to manslaughter. We

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24 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.70

25 Above, para 2.146.

26 Above, para 2.147.

27 Above, para 2.148.

28 Above, paras 2.149 to 2.151.

29 Above, para 5.99.

30 Above, para 2.150.

argued that “someone who unjustifiably kills with the fault element for first-degree murder deserves to be labelled as a ‘murderer’”, even when they have a partial defence.[31] We stated that it would be “illogical” to recommend that a partial defence reduce first-degree murder to manslaughter considering that a partial defence would not reduce second-degree murder to manslaughter in our recommended structure; doing so would result in those convicted of second-degree murder being “irrationally … treated too harshly”.[32]

COMMENTARY

General commentary on the rationale of partial defences

7.19 Whilst much of the commentary on the partial defences has focussed on their substantive elements, some commentators have examined the role of partial defences within the current structure of homicide offences.

7.20 As we also observed in the 2004 Report, some have argued that the partial defences are purely, or at least primarily, necessitated by the existence of the mandatory life sentence for murder and the need to remove less culpable conduct from its scope. Professors Alan Reed and Michael Bohlander have argued that partial defences were created as “a stopgap safety valve … to arrive at a more lenient sentencing frame” in instances of murder where the mandatory life sentence appears “too draconian” a response to the defendant’s culpability.[33] In answer to our Call for Evidence, Dr Jonathan Rogers similarly submitted that the partial defences are “by definition murder-specific and should be needed for as long as some form of the mandatory life sentence remains”. In 1953, the Royal Commission on Capital Punishment observed that the old partial defence of provocation was “a device” to enable courts to avoid passing a death sentence in cases of murder with mitigating circumstances.[34]

7.21 Professors G R Sullivan, Hans Crombag and John Child have likewise argued that, were the mandatory life sentence to be abolished, there would be little need for the current partial defence of loss of control, because issues relating to a loss of control would be better accounted for at the sentencing stage.[35]

7.22 Other commentators have argued that partial defences have a distinct role to play beyond removing conduct from the scope of the mandatory life sentence, namely to ensure fair labelling.[36] Professor Andrew Ashworth has questioned the notion that sentencing mitigation alone sufficiently reflects the reduced culpability of defendants

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31 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.156.

32 Above, para 2.157.

33 A Reed and M Bohlander, “Introduction” in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility. Domestic, Comparative and International Perspectives* (2011) p 1.

34 Report of the British Royal Commission on Capital Punishment (1953) Cmd 8932, para 413. In this quotation, the Royal Commission also referred to the Scottish doctrine of diminished responsibility. The partial defence of diminished responsibility had not yet been introduced in England and Wales at the time of the report.

35 G R Sullivan, H Crombag and J Child, “Loss of Control in the Appeal Courts” (2021) 72 *Northern Ireland Legal Quarterly* 200, 217.

36 The principle of fair labelling is discussed in further detail in Chapter 3.

with a partial defence, and has contended that different offence labels are also important.[37]

7.23 Dr Louise Kennefick has observed that partial defences are closer to an excuse that adjusts a defendant's "condemnation-phase culpability" rather than a form of sentence mitigation which adjusts a defendant's "punishment-phase culpability".[38] The "condemnation-phase culpability" relates directly to the defendant's individual culpability in the context of the crime committed, whilst "punishment-phase culpability" considers wider sentencing factors which are often minor and remote from the crime itself.[39] Dr Kennefick has argued that part of the reason why partial defences relate to "condemnation-phase culpability" is their location in the criminal justice process, affecting the verdict itself.[40]

7.24 Professor Richard Taylor has argued that the definition of murder has an "evaluative" element, aimed at singling out the most heinous or inexcusable categories of killing. Partial defences then define the cases where an unlawful or intentional killing does not involve this element of heinousness or inexcusable conduct and therefore is not murder.[41] Professor Taylor has suggested that whilst the partial defences only *partly* reduce the defendant's overall criminal responsibility, they *fully* eliminate the defendant's responsibility for murder.[42]

7.25 Similarly, Professor Stephen J Morse has argued that partial defences play an important role beyond sentencing mitigation in allowing the jury to consider a defendant's culpability according to community norms, rather than relying on the sentencing judge to consider the defendant's culpability.[43]

Commentary on the 2006 recommendation

The label of second-degree murder

7.26 Some commentators have questioned the fairness of the label of "second-degree murder" which would apply to defendants with a successful partial defence under the three-tier structure recommended in 2006.

7.27 Professors Oliver Quick and Celia Wells have argued that our earlier review "glosses over" issues of "fair and accurate labelling" which are raised by the label of second-

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37 A Ashworth, "Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform" [2007] *Criminal Law Review* 333, 339. Professor Anna Carline, Dr Sarah Singh, Dr Matthew Gibson and Dr Laurène Soubise made a similar argument in their joint response to our Call for Evidence.

38 L Kennefick, *The Boundaries of Blame, Towards a Universal Partial Defence for the Criminal Law* (2025) p 168.

39 Above, p 170.

40 Above, p 169.

41 R Taylor, "The Nature of 'Partial Defences' and the coherence of (Second Degree) Murder" [2007] *Criminal Law Review* 345, 346.

42 Above, 347.

43 S J Morse, "Diminished Rationality, Diminished Responsibility" (2003) 1(1) *Ohio State Journal of Criminal Law* 289, 299.

degree murder for defendants with a partial defence.[44] Both Professor William Wilson[45] and Dr Matthew Gibson[46] have argued that the label of murder is too strong for defendants with a partial defence, given the stigma attached to such a label, and does not accurately represent the wrongdoing involved. Professor Rudi Fortson KC has argued that the label of murder, or second-degree murder, instead of manslaughter, could be an unfair label particularly for victims of domestic abuse who kill their abusers and have a partial defence.[47] In their responses to our Call for Evidence, a number of consultees have made the same point. For example, Professor Susan Edwards argued that the label of "murderer" would have a detrimental impact on these defendants' identities and their prospect of rehabilitation.

7.28 From a more pragmatic perspective, Professor Ashworth has questioned whether juries would be prepared to apply the label of second-degree murder to defendants who have a partial defence.[48] He has suggested that the label of murder in such cases may not fit with the public understanding of murder. In contrast, Professor John R Spencer submitted to our Call for Evidence that many members of the public might believe that a manslaughter conviction is an insufficient label for a defendant with a partial defence to murder, since that defendant still intended to kill or cause grievous bodily harm.

7.29 Commentators have also objected to the label of second-degree murder for defendants with a partial defence on the grounds that this would result in the inclusion of too many forms of conduct and culpability within the offence of second-degree murder. Professor Wilson has argued that killings where a defendant intended to kill but had diminished responsibility are not "in any sense comparable" to the other types of killings included under second-degree murder.[49] Professor Taylor has likewise suggested that grouping these types of killings together displays no real coherence or unity.[50]

7.30 Some have proposed alternative labels when a defendant killed with a partial defence. In response to our Call for Evidence, Professor Spencer suggested that the jury should simply be given the power to return a verdict of "murder, extenuating

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44 O Quick and C Wells, "Getting Tough with Defences" [2006] *Criminal Law Review* 514, 516. Professor Ashworth has also argued that the 2006 Report failed sufficiently to address fair labelling considerations in regard to partial defences, see: "Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform" [2007] *Criminal Law Review* 333, 334.

45 W Wilson, "What's Wrong with Murder?" (2007) 1 *Criminal Law and Philosophy* 157, 177

46 M Gibson, "Pragmatism Preserved? The Challenges of Accommodating Mercy Killers in the Reformed Diminished Responsibility Plea" (2017) 81(3) *The Journal of Criminal Law* 177, 179.

47 R Fortson KC, "The Law of Homicide: is it Fit for Purpose for Women who Kill their Abusers?" (2026) p 20 (unpublished).

48 A Ashworth, "Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform" [2007] *Criminal Law Review* 333, 334.

49 W Wilson, "The Structure of Criminal Homicide" [2006] *Criminal Law Review* 471, 483.

50 R Taylor, "The Nature of 'Partial Defences' and the Coherence of (Second Degree) Murder" [2007] *Criminal Law Review* 345, 354. See also, A Bickle, "Proposed Reforms to Partial Defences and their Implications for Mentally Disordered Defendants" (2008) 1 *Journal of Mental Health Law* 38.

circumstances”.[51] Professor Matthew Dyson submitted in his response that killings with a partial defence which would otherwise be murder should be labelled “manslaughter through [loss of control or diminished responsibility]”.

Reducing second-degree murder to manslaughter

7.31 Others have criticised the 2006 Report for not recommending that partial defences should also reduce second-degree murder to manslaughter.

7.32 Professor Victor Tadros has queried why, under our 2006 recommendations, provocation (as it was then) would reduce the culpability of a defendant who would otherwise be convicted of first-degree murder, but would not have the same effect on the culpability of a defendant who would otherwise be convicted of second-degree murder. He argued that, “there would seem good reason to allow partial defences a role in moving between categories […] regardless of sentencing consequences”.[52] In their joint response to our Call for Evidence, Professors Anna Carline, Drs Sarah Singh, Matthew Gibson and Laurène Soubise argued that “if partial defences play a normative role in downgrading liability” in order to comply with the principle of fair labelling, they should apply to both the highest-tier and the middle-tier of a three-tier homicide structure. Otherwise, in their view, the partial defences will “lack coherence from a fair-labelling angle”.[53] The Criminal Bar Association also submitted that allowing partial defences to reduce second-degree murder to manslaughter would “properly reflect the gravity of the offending and the culpability of the offender”.

7.33 Professor Jeremey Horder, the Commissioner for Criminal Law at the time of the earlier homicide review, has defended the rationale of the 2006 recommendation, arguing that:

> Since manslaughter can be committed with a fault element well short of an intention to kill, it is not obvious that the partial defences should have the effect of reducing murder to manslaughter, thus lumping together in the same offence category those who killed intentionally in excusing circumstances and those who may not have even intended to do someone an injury.[54]

PROVISIONAL PROPOSAL FOR MURDER WITH A PARTIAL DEFENCE

7.34 In this section, we set out our provisional proposal regarding the role of partial defences within the three-tier structure. There are two related issues which we address:

(1) whether a partial defence should apply to both first-degree and second-degree murder; and

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51 Professor Spencer noted that this idea was taken up by Lord Lloyd of Berwick who, with Professor Spencer, drafted an ultimately unsuccessful amendment to the Coroners and Justice Bill.

52 V Tadros, “The Homicide Ladder” (2006) 69 *Modern Law Review* 601, 614.

53 Professor Vanessa Bettinson, Professor Nicola Wake and Kathryn Nisbet made a similar point in their joint response.

54 J Horder, *Homicide and the Politics of Law Reform* (2012) p 92.

(2) what the appropriate offence label should be when a defendant committed an unlawful killing but a partial defence was successful.

The application of partial defences

7.35 We agree with the rationale of the current law that a defendant who killed but successfully argued a partial defence should not be subject, on conviction, to the mandatory life sentence for murder. That is because a successful partial defence reduces the (broader) culpability of the defendant to the extent that a life sentence may be disproportionate. A discretionary life sentence regime is better able to reflect a defendant's reduced culpability at sentencing, allowing for a life sentence to be passed if appropriate, but not requiring it to be.

7.36 Under the existing law of murder, partial defences may apply when the defendant had either the intention to kill or to cause grievous bodily harm. Since we propose separating murder into two degrees, the issue arises as to whether partial defences, in our proposed structure, should apply only to first-degree murder or also to second-degree murder.

Partial defences to first-degree murder

7.37 We provisionally conclude that partial defences should apply only to first-degree murder. For partial defences to reflect a defendant's reduced culpability, a defendant who has successfully argued a partial defence must be taken out of the reach of the mandatory life sentence (and therefore out of the scope of first-degree murder). It would be possible, in principle, to achieve some degree of flexibility at sentencing by including circumstances akin to partial defences in the sentencing framework for murder (as part of a starting point, or as mitigating factors). However, the effect of such provisions would still be too limited within the context of a conviction for first-degree murder which carries the mandatory life sentence.

7.38 In our proposed structure, first-degree murder (requiring intention to kill) would carry the mandatory life sentence, whereas second-degree murder (requiring intention to cause serious injury) would carry a discretionary life sentence. Therefore, murder that falls within second-degree does not require a separate mechanism (the partial defences) to ensure that the appropriately flexible sentencing regime applies: it is already subject to the discretionary, not mandatory, sentencing regime.[55]

7.39 In all offences other than murder, where the elements of the offence are made out but the defendant has reduced culpability, mitigation is reflected at sentencing. Sentencing guidelines for offences against the person recognise factors substantially similar to loss of control and diminished responsibility as mitigating a defendant's culpability. For example, the sentencing guideline for offences of causing grievous bodily harm explicitly includes "a significant degree of provocation" and "mental disorder or learning disability" among those "factors reducing seriousness or reflecting personal mitigation".[56] We follow this approach in relation to second-degree murder: if

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55 We discuss considerations of fair labelling in relation to second-degree murder from para 7.51 below.

56 Sentencing Council, *Sentencing guidelines on causing grievous bodily harm with intent to do grievous bodily harm, wounding with intent to do GBH* (July 2021); Sentencing Council, *Sentencing guidelines on inflicting grievous bodily harm, unlawful wounding, racially or religiously aggravated GBH, unlawful wounding* (July 2021).

the evidence presented at trial, or as part of the sentencing process, supports the conclusion that the defendant intended to cause serious injury but their culpability was reduced as a result of, for example, circumstances amounting to loss of control or diminished responsibility, the sentencing judge would be able to pass a sentence commensurate with this reduced culpability.

7.40 We turn now to consider the operation of a partial defence to first-degree murder and fair labelling issues. Currently a partial defence operates to reduce a charge of murder to (voluntary) manslaughter. We think this is problematic.

7.41 Firstly, manslaughter is an inaccurate label when a partial defence is successful. Under the current law, the conduct and fault elements of murder are established in cases where a partial defence is successful. Therefore, killing when a partial defence applies has much more in common with murder than it has with types of (involuntary) manslaughter. However, due to the existing two tiers of homicide offences, currently the only available alternative to murder when a partial defence is successful is for a defendant to be convicted of (voluntary) manslaughter. Our homicide review provides an opportunity to remedy this as part of our proposed three-tier structure.

7.42 Secondly, removing killing when a partial defence applies from the scope of manslaughter would have the additional advantage of clarifying the rationale of manslaughter and the respective boundaries of manslaughter offences. As we explain in Chapter 8, manslaughter is too broad an offence encompassing a wide range of culpable conduct for almost all homicides falling short of murder. The problem is exacerbated by the coexistence of voluntary manslaughter (which requires the defendant to have one of the fault elements for murder), alongside involuntary manslaughter offences (which require the defendant to have one of the less culpable fault elements required for those offences). Therefore, taking killing when a partial defence applies out of the all-encompassing scope of manslaughter contributes to our principled approach to manslaughter, discussed in Chapter 8.

7.43 We also note there has been public opposition to the label manslaughter in high profile cases of killings where the defence of diminished responsibility applied. It has been suggested that the manslaughter label undermines the seriousness of the conduct, failing to reflect the culpability of a defendant who intended to kill. In the 2006 Report, we noted that the label of second-degree murder for cases of killing when a partial defence applies was "strongly supported by groups representing victims' families".[57] Further, the report of HM Crown Prosecution Service Inspectorate ("HMCPSI") on the Crown Prosecution Service's handling of the Valdo Calocane case observed that, had the Law Commission's 2006 recommendations been implemented, Valdo Calocane would have been convicted of second-degree murder, rather than manslaughter.[58] We note that criticism of labelling in cases of killing when a partial

[57] Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.38.

[58] HMCPSI, An Inspection of Crown Prosecution Service Actions in the Valdo Calocane Case (March 2024), p 57. The Inspectorate urged the Government to reconsider the three-tier structure recommended in 2006 and consider whether the culpability of a person who commits murder should be reduced to manslaughter by reason of diminished responsibility (p 10).

defence is successful intersects with criticism of the substantive elements of each partial defence and the proportionality of sentences.

7.44 We have considered whether killing when a partial defence is successful should be subsumed within second-degree murder, similarly to what we recommended in 2006 (ie for a successful partial defence to operate to reduce a charge of first-degree murder to second-degree murder). However, we think that there is benefit in a distinct category and label for these cases. Second-degree murder is a clearly defined offence, intended to signify a separation in culpability between intent to kill and intent to cause serious injury. This would be undermined should it also have to incorporate murder with the intention to kill (albeit with a partial defence).[59] We would be replicating some of the concerns with the current overinclusive offence of manslaughter, albeit in the second tier.

7.45 We have proposed a homicide structure with three tiers that accord with broadly similar levels of culpability: the most culpable (killing with the intention to kill) in the first tier with the label murder; the second tier reflects conduct that is still appropriate to categorise as murder but is of lower culpability; and the third tier reflects conduct that falls outside the definition of murder and is generally less culpable than murder (manslaughter). We have concluded in Chapter 6 that second-degree murder should sit in the second tier of homicide, distinct from first-degree as it requires a less culpable intention and warrants a discretionary, instead of mandatory, life sentence. In our view, killing with the intention to kill where a partial defence is successful should also sit in this second tier. In such cases, the defendant had the necessary intent for first degree-murder. It is therefore consistent and coherent that the conduct retains the label of murder. However, since a successful partial defence reduces the defendant's culpability, this should be reflected in both a more flexible sentencing regime and a label that is distinct from first-degree murder. We think that the most logical solution is to have a separate offence that we refer to as "murder with a partial defence" that sits within the second tier of homicide and is subject to the discretionary life sentence.[60]

7.46 The use of a more descriptive label which specifies the essence of an offence is not uncommon in criminal law. For example, fraud offences are labelled differently to describe the different ways in which a fraud could be committed.[61] Similarly, "murder with a partial defence" expresses with a clear and easily understandable label the fact that a defendant has indeed been found to have had the required fault element of murder, albeit with reduced culpability.

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59 As noted from para 7.26 above, some commentators argued that the offence of second-degree murder recommended in 2006 was incoherent, as it included killings when a partial defence is successful alongside other fault elements.

60 As we explained in Chapter 1, the labels of the offences in this consultation paper are used for the purpose of describing our policy. The labels may change in the final recommendations and in future legislation.

61 For example, Fraud Act 2006, s 2 (fraud by false representation), s 3 (fraud by failing to disclose information), s 4 (fraud by abuse of position). This comparison was suggested by Professor Matthew Dyson in response to our Call for Evidence.

7.47 We envisage that the label would be specific to the defence, such as "murder with loss of control" or "murder with diminished responsibility".[62] However, since we will review the substance of the existing, and prospective, partial defences in a separate strand of our homicide review, there is a possibility that we may eventually recommend reform, including the renaming of the partial defences. Therefore, for the time being we provisionally propose the more generic label of "murder with a partial defence", without affecting its future specification.

7.48 Currently, the jury are not required to specify which partial defence they found proven when returning a verdict in the rare cases where more than one partial defence was left to them to consider.[63] While we conclude that specification of the particular defence in the verdict would enhance fairness, in order to maintain the current practice the specific label would only apply when only one partial defence was left to the jury.[64] In cases where more than one partial defence is left to the jury, on conviction the jury would return a verdict with the more generic label.

7.49 We acknowledge concerns that the label murder is harsher than the current label of manslaughter where a partial defence succeeds. However, we think that there is real benefit in a homicide law with clear, consistent and accurate offence categories and labels which also reflect the jury's finding. In addition, we note that this proposed change is in the context of a new structure with more than one offence of murder.

7.50 In sum, in our proposed structure loss of control and diminished responsibility play the same substantive role in relation to both first-degree and second-degree murder: in both cases, their rationale is to recognise that the defendant's (broad) culpability is reduced. The key difference is in *how* this rationale would be pursued: in the case of first-degree murder, by taking the defendant out of the reach of the mandatory life sentence to allow flexibility in sentencing; in the case of second-degree murder, by recognising partial defences as mitigating factors within a flexible sentencing regime. Conceptually, loss of control and diminished responsibility would be partial defences to first-degree murder and mitigating factors at sentencing for second-degree murder (as they already are for other offences).[65]

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62 A specific verdict would also apply in a case of killing pursuant to a suicide pact. As we explained at para 7.1 above, we will review the defence in the second strand of the homicide review on defences.

63 In *R v Jones* (1999) *The Times*, 17 February 1999, the Court of Appeal Criminal Division held that there is no obligation on the judge to ask the jury whether their verdict was based on diminished responsibility or loss of control, or on both, since that is "a matter entirely for him or her in the exercise of his or her discretion". Neither is there any obligation on the jury to answer, if asked by the judge. Any answer given by the jury would be additional information for the judge to consider at sentencing. The Court of Appeal Criminal Division further clarified that, provided that the jury are sure that the defendant committed an unlawful killing and is guilty of manslaughter, "it is unnecessary that there be any unanimity by the jury as to the route by which that verdict is achieved". For a commentary and previous cases, see *Blackstone's Criminal Practice* (2025), section B1.45.

64 While cases where two partial defences are left to the jury are indeed rare under the current law, we cannot anticipate, at this stage, whether our reform of the substantive elements of the partial defences may lead to such cases becoming more frequent.

65 Circumstances akin to diminished responsibility are mitigating factors across criminal law, and not only relevant to the sentencing of offences against the person: see Sentencing Council, *General guideline: overarching principles* (October 2019), mentioning "mental disorder or learning disability" among the factors reducing seriousness or reflecting personal mitigation. The general guideline is applicable to sentencing

Partial defences to second-degree murder

7.51 As noted above, in addition to facilitating a suitable sentencing framework, partial defences have a role in appropriately classifying and labelling criminal conduct. For the reasons we set out above, we are satisfied that partial defences are not needed in second-degree murder to ensure that an appropriately flexible sentencing regime applies. The discretionary life sentence with clear sentencing guidelines will allow courts to reflect the reduced culpability of defendants who intended to cause serious injury but acted in circumstances amounting to, for example, loss of control or diminished responsibility.

7.52 However, we find the commentary, described above from paragraph 7.19, that partial defences have value beyond sentencing persuasive. We have therefore considered whether it would be appropriate to extend partial defences to second-degree murder.

7.53 As explained above, our approach to second-degree murder is based on the fact that it is the general rule in criminal law that factors akin to partial defences are considered at sentencing, and the exception to this rule is justified in the case of first-degree murder due to the mandatory life sentence. However, there is some force in the counterargument that, once murder is split into two-degrees, partial defences should also apply to second-degree murder and, if successful, there should be a separately labelled offence. It could be argued that it is more important for partial defences to apply consistently to both types of murder than to ensure consistency between second-degree murder and other criminal offences. As some commentators to our 2006 recommendations have observed, it would make sense for partial defences also to apply when a defendant intended to cause serious injury, as is the case under the current law.[66] Further, applying partial defences to second-degree murder would preserve the role of the jury in deciding whether a partial defence has succeeded in cases of both first-degree and second-degree murder. This would result in a jury returning a verdict of murder with a partial defence also on a charge of second-degree murder.

7.54 As outlined above, there are normative and labelling benefits with partial defences that would also apply in cases where the defendant intended to cause serious injury. While maintaining these benefits is attractive, ultimately we think that applying partial defences also to second-degree murder would necessarily result in added complexity in the proposed homicide structure. We are concerned that the labelling benefit would be limited if a partial defence to second-degree murder would result in a conviction for "murder with a partial defence", a label that would also apply to more culpable conduct of killing with the intention to kill, and would sit in the same tier with the same sentencing framework as the underlying offence of second-degree murder. We anticipate logical arguments that, if we take the labelling point seriously, applying a partial defence to second-degree murder should reduce second-degree murder to a

offences for which there is no offence-specific guideline and for use in conjunction with offence-specific guidelines.

66 See from para 7.31 above.

lesser offence. However, this would lead to four separate murder offences across a four-tier homicide structure, which is unjustifiably complex.[67]

7.55 In reaching this provisional view, we do not dismiss those arguments that there is principled benefit for defendants charged with second-degree murder to be able to raise a partial defence. We think that the issue is finely balanced, but at this stage we are not convinced that those benefits outweigh the resulting complexity of creating yet a further tier.

CONCLUSION

7.56 We accept that there are limitations to all approaches to partial defences from a theoretical standpoint.[68] However, we think that limiting partial defences to first-degree murder provides the clearest and most coherent approach while ensuring that culpability can be properly reflected in all cases where there are circumstances that could give rise to a partial defence. We therefore provisionally propose that partial defences should apply only to first-degree murder. Where successful, they would result in a conviction for a separate, lesser, offence of murder in the second tier of the homicide structure and be subject to the discretionary life sentence, not the mandatory life sentence.

7.57 Finally, we stress that murder with a partial defence would not be a separate, chargeable, homicide offence. It is the *verdict* that a jury would return on a charge of first-degree murder when a partial defence is successful (or the conviction that would result when a plea to a partial defence is accepted by the prosecution). This reflects the way partial defences currently operate. Under the current law, voluntary manslaughter is not charged by the prosecution,[69] because the onus is on the defendant to raise partial defences on a charge of murder.[70] The operation of murder with a partial defence, in our proposed structure, does not change the existing onus on the defendant to raise partial defences if the facts justify it.[71]

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67 In Chapter 3 we explained the principle of practicality, according to which the law should operate effectively, including by ensuring that offences are not too complex for jurors to understand.

68 As we noted in Chapter 2, the existence of the mandatory life sentence for murder has distorted the architecture of homicide offences. This remains true under our proposed three-tier structure, which must assume the continuing existence of the mandatory life sentence for the most serious type of murder.

69 "Voluntary manslaughter is not an offence one can be indicted for, but rather is a verdict which can result from an initial indictment for murder. The actual verdict, however, will be simply 'manslaughter' without the label 'voluntary'": *Blackstone's Criminal Practice* (2025), section B1.44.

70 The evidential and legal burdens are different for loss of control and diminished responsibility: regarding loss of control, see Coroners and Justice Act 2009, s 54(5)(6); regarding diminished responsibility, see Homicide Act 1957, s 2(2). For an overview, see Crown Prosecution Service, *Prosecution guidance on homicide: murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult* (last updated March 2026). For relevant cases on the evidential and legal burden, see *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322; *R v Clinton and others* [2012] EWCA Crim 2.

71 We will consider in our separate strand on defences whether a possible reform of the partial defences would require a different approach to the respective evidential and legal burdens.

Consultation Question 4.

7.58 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?

Consultation Question 5.

7.59 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?

Chapter 8: Manslaughter

INTRODUCTION

8.1 In 1973, Lord Atkin said that of all crimes, manslaughter:

> … appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. From the early days when any homicide involved penalty the law has gradually evolved 'through successive differentiations and integrations' until it recognises murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill but with the presence of an element of 'unlawfulness' which is the elusive factor.[1]

8.2 More recently, respondents to our Call for Evidence[2] described the law of manslaughter as a "hodgepodge", a "jumble" and "a 'dumping ground' for defendants displaying vastly different degrees of fault".[3]

8.3 Over the last 50 years, law reform bodies have carried out a considerable amount of work on the law of manslaughter. The work of the Criminal Law Revision Committee in 1980[4] informed the Law Commission's 1996 report on involuntary manslaughter (the "1996 Report").[5] This led to a Home Office consultation in 2000, setting out the Government's response to the 1996 Report and consulting on amended proposals for reform.[6] In turn, the Law Commission drew on the 2000 Consultation in our 2005 consultation paper[7] and 2006 report on murder, manslaughter and infanticide. This list is not exhaustive but provides some insight into the longstanding challenges surrounding reform of this area of law.

8.4 The persistent criticisms we have identified, both in existing literature and in response to our Call for Evidence, can be summarised as follows:

(1) The overall scope of manslaughter is too wide. The offence covers a broad range of fault elements, from intentional killing with a partial defence to unforeseen deaths resulting from objectively dangerous unlawful acts.

(2) The category of unlawful dangerous act manslaughter ("UDAM") is unprincipled. The only fault element is the objective risk of some harm, which breaches the

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1 *Andrews v Director of Public Prosecutions* [1937] A.C. 576 at pp 581-582.

2 Law Commission, Homicide Law: Call for Evidence (14 August 2025).

3 Citing A Lodge, "Gross Negligence Manslaughter on the Cusp: The Unprincipled Privileging of Harm over Culpability" (2017) 81 JCL 125, 128.

4 Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (1980) Cmnd 7844.

5 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

6 Home Office, *Reforming The Law On Involuntary Manslaughter: The Government's Proposals* (May 2000).

7 A New Homicide Act for England and Wales? (2005) Consultation Paper No 177.

subjectivity principle[8] unjustifiably and is inconsistent with other general homicide offences. At the bottom end of the offence range, culpability is comparatively low. These offenders do not belong in the same category as others within the manslaughter bracket.

(3) The test for gross negligence manslaughter ("GNM") as set out in *Adomako*[9] is circular, leaving the definition of "criminal" up to the jury, and may produce inconsistent results. However, GNM itself is generally regarded as functioning as intended.

(4) The existence of reckless manslaughter as a separate category of manslaughter is controversial. If it exists separately from gross negligence manslaughter, there are no statistics to suggest that it is commonly used in practice. However, there is a general sense that homicides involving recklessness as to the risk of serious injury or death are more culpable than other forms of manslaughter.

8.5 We note that UDAM is commonly referred to as "unlawful act manslaughter" or "constructive manslaughter".[10] The former label does not reflect the requirement that the unlawful act be one which a reasonable person would realise was bound to subject another person to the risk of physical harm, introduced in *R v Church*[11] to limit the scope of this category. This is referred to as a requirement that the unlawful act be "dangerous".[12] In this consultation paper, we use the term "unlawful *dangerous* act manslaughter" to describe the modern elements of this category of manslaughter more accurately.

8.6 In this chapter, we consider the purpose and principles of this tier of the homicide structure and explain the approach that we have taken to reach our provisional proposals for reform. We then consider each category of involuntary manslaughter in turn, setting out the issues with the current law and our provisional proposals to address these issues and create a coherent and consistent structure of manslaughter.

8.7 Despite its piecemeal development, we take the view that manslaughter should still have a place within the structure of homicide offences. History tells us that the offence has generally been extended in two directions; to offer clemency to those otherwise subject to the mandatory life sentence,[13] and to hold accountable those who would otherwise fall out of the homicide offences altogether. It would be impossible to predict every circumstance in which a killing which should not amount to murder could still be considered sufficiently culpable to amount to a homicide offence. We consider that

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8 The subjectivity principle refers to the principle that the fault element of an offence should be concerned with the defendant's state of mind at the time of the offence.

9 *R v Adomako* [1995] 1 AC 171.

10 Unlawful dangerous act manslaughter is sometimes referred to as constructive manslaughter because liability for the death is "constructed" from the defendant's liability for the basic offence.

11 *R v Church* [1966] 1 QB 59; see also Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 2.6.

12 See, for example, the judgement of Lord Hope in *Attorney General's Reference (No. 3 of 1994)* [1998] AC 245. See also Judicial College, *Crown Court Compendium: Part 1,* p 19-34.

13 And the mandatory death sentence before that.

there are significant benefits to retaining a tier of homicide which is flexible and capable of responding to a range of conduct and fault – provided that the offence has clear boundaries and a consistent conceptual basis.

8.8 We provisionally propose that manslaughter should consist of three categories: UDAM, GNM and reckless manslaughter. While there will inevitably be overlap between these categories, we envisage that reckless manslaughter will encompass the most serious offences within this tier of the homicide structure, where the defendant was subjectively reckless as to the risk of death or serious injury. This will appropriately label the most culpable offences, while narrowing the scope of UDAM and GNM to keep them principled and conceptually clear.

8.9 We provisionally propose reform of UDAM, introducing an additional subjective fault element requiring that the defendant intended to cause some injury or was reckless as to the risk of some injury. We propose the retention of GNM, with reform of the circular requirement that the jury assess whether the defendant's conduct was so bad as to require criminal sanction.

BACKGROUND

Current law

8.10 In our Call for Evidence, we identified four main categories of manslaughter in the existing law:

(1) The involuntary manslaughters: UDAM, GNM and reckless manslaughter.

(2) Voluntary manslaughter: intentional killing where the offence of murder is reduced to manslaughter by a partial defence.[14]

Involuntary and voluntary manslaughter are commonly used terms to describe these types of manslaughter, rather than formal classifications of offences.

8.11 In Chapter 7, we consider the operation of the partial defences to murder within the general structure of homicide offences. We provisionally propose that the partial defences should operate to reduce first-degree murder to a separate verdict of murder with a partial defence, on the same tier as second-degree murder. Because voluntary manslaughter in the current law refers only to cases in which an offence of murder is reduced to manslaughter by a partial defence, there would be no separate category of voluntary manslaughter in our provisional structure. [15] This chapter therefore deals with involuntary manslaughter alone.[16]

8.12 Briefly, the elements of each head of involuntary manslaughter are:

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14 These are diminished responsibility (Homicide Act 1957, s 2, as amended by the Coroners and Justice Act 2009, s 52), loss of control (Coroners and Justice Act 2009, s 54), and suicide pact (Homicide Act 1957, s 4).

15 See Chapter 7 for discussion of our provisional proposals for the outcome of a successful partial defence, and Chapter 4 for consideration of the effect of our proposals on the overall structure of homicide offences.

16 In our proposed structure, there would be no need to distinguish UDAM, GNM and UDAM from murder with a partial defence, and therefore no need for the term "involuntary manslaughter".

(1) UDAM: killing by conduct which constituted an unlawful act involving an objective danger of some harm.

(2) GNM: killing by conduct or omission that was in all the circumstances grossly negligent given the risk of death.[17]

(3) Reckless manslaughter: killing by conduct or omission that the defendant knew involved a risk of causing death or serious harm.

8.13 It is sometimes argued that reckless manslaughter and GNM are in fact a single category of manslaughter.[18] In our Call for Evidence, we acknowledged those arguments but proceeded on the basis that reckless manslaughter still exists as a separate but rarely-charged category of manslaughter. This is addressed in more detail below; in short, we mainly concern ourselves with the question of whether reckless manslaughter *should* exist in our proposed structure, rather than whether it exists at present.

Previous recommendations for reform

8.14 In considering how to approach reform of the law of manslaughter, we have explored the recommendations of past projects and the rationale that underpinned them. Some of these are summarised in the following section. We are not bound by their approaches, but they have helped to inform and structure our thinking.

8.15 We are mindful that changes in the legal and social landscape since the publication of these reports will have altered the strength of the arguments they put forward. In particular:

(1) **The introduction of the Sentencing Council.** Some earlier works express concerns about the challenges facing sentencing judges due to the breadth and complexity of manslaughter. The Sentencing Guidelines Council was introduced in 2003, becoming the modern Sentencing Council in 2010. The weight placed on issues when sentencing manslaughter offences may be lessened by the availability of specific sentencing guidelines for each category of manslaughter. We did not receive any evidence suggesting that manslaughter continues to present significant sentencing difficulties for judges. Concerns expressed in earlier reports about public understanding of manslaughter sentencing may persist.

(2) **Changes in public attitudes towards causing death**. The 1996 Report and the 2000 Home Office consultation on involuntary manslaughter ("the 2000 Consultation")[19] drew comparisons between GNM and causing death by dangerous driving[20] to explain why the former should be considered less culpable than other manslaughter offences. At the time, causing death by dangerous driving carried a maximum sentence of 10 years' imprisonment; this

[17] *R v Adomako* [1995] 1 AC 171.

[18] See Law Commission, Homicide Law: Call for Evidence (14 August 2025) p 10 and p 17.

[19] Home Office, *Reforming The Law On Involuntary Manslaughter: The Government's Proposals* (May 2000).

[20] Road Traffic Act 1988, s 1.

was increased to 14 years in 2004 and then to (discretionary) life imprisonment in 2022. The offence now has comparable sentencing guidelines to manslaughter. There is some evidence, albeit limited, that public attitudes to causing death by dangerous driving may have grown stricter since the offence's introduction.[21] Any conclusions based on comparisons between these offences must therefore be treated with caution.

The 1996 Law Commission report on involuntary manslaughter

8.16 The 1996 Report dealt with criminal liability for those who kill without intending to cause death or serious injury.[22] It argued that the offence of manslaughter is too wide, causing problems for sentencing judges and for public understanding of those sentences, as well as creating labelling issues by applying the same label to conduct just short of murder and conduct bordering on "mere" carelessness.

8.17 The Report further concluded that UDAM is wrong in principle. It took the position that a person should not be convicted for causing death when the most serious risk inherent in their conduct was the objective risk of causing some injury. It also identified some "minor" issues relating to uncertainties in the formulation of the law, predominantly in relation to GNM.

8.18 The Report recommended replacing involuntary manslaughter with two new offences – "reckless killing" and "killing by gross carelessness". It recommended the abolition of UDAM in its present form. It also recommended a new offence of corporate manslaughter, roughly equivalent to killing by gross carelessness.

8.19 Reckless killing would have been the more serious of the two new offences, carrying a discretionary life sentence. The recommended elements were that:

(1) the defendant's conduct caused death; and

(2) the defendant was aware of a risk that their conduct would cause death or serious injury; and

(3) it was unreasonable for the defendant to take that risk, having regard to the circumstances as they knew or believed them to be.

8.20 Killing by gross carelessness would have carried a determinate sentence, with a maximum sentence of a fixed term of years rather than life imprisonment. The recommended elements were:

(1) the defendant's conduct caused death; and

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21 S Cunningham, "Vehicular Homicide: Need for a Special Offence?" in CMV Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008), p 104 and B Mitchell, "Further Evidence of the Relationship between Legal and Public Opinion on the Law of Homicide" [2000] *Criminal Law Review* 814, 823.

22 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

(2) the conduct involved an obvious risk of causing death or serious injury, and the defendant was capable of appreciating that risk (they need not actually have been aware of that risk); and

(3) the defendant's conduct fell far below what could be expected of him in all the circumstances **or** he actually intended to cause some unlawful injury to another **or** was reckless as to whether he caused some unlawful injury to another.

8.21 Only the recommendation to create an offence of corporate manslaughter was ultimately implemented.[23] The remaining recommendations were later superseded by the 2006 report on murder, manslaughter and infanticide ("the 2006 Report"), considered below.

The 2000 Home Office consultation on involuntary manslaughter

8.22 In the 2000 Consultation, the Government indicated that it accepted "the vast majority" of the Law Commission's 1996 recommendations on involuntary manslaughter. The notable area of disagreement was the abolition of UDAM. In 1996, the Law Commission had taken the position that it is "wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee, and which would not even have been foreseeable by a reasonable person observing his conduct".[24] The Government was "less convinced" of the merits of that argument.

8.23 The Government noted that responses to the Law Commission's Consultation Paper were divided on this issue. It argued that:

> The Law Commission's approach would mean that behaviour which may be regarded as seriously culpable because it involves intentional or reckless criminal behaviour which results in death, would no longer attract an appropriate charge. It might be viewed as unacceptable if the law permitted only a charge of assault where that assault had in fact resulted in death. The Government considers that there is an argument that anyone who embarks on a course of illegal violence has to accept the consequences of his act, even if the final consequences are unforeseeable. This is in line with our proposals contained in our Consultation Paper Violence: Reforming the Offences Against the Person Act 1861[25] where we said that offences should be based on motivation and outcome. In addition, perhaps liability in such circumstances should exist, as being essential for the protection of the public.[26]

8.24 The Government therefore proposed a third manslaughter offence in addition to killing by gross carelessness and reckless killing. The offence would cover a situation where a person's conduct caused the death of another, the person intended to cause some injury or was reckless as to whether some injury was caused, and the conduct constituted a criminal offence.

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23 Corporate Manslaughter and Corporate Homicide Act 2007.

24 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 3.6.

25 Home Office, *Violence: Reforming the Offences Against the Person Act 1861: consultation paper* (February 1998).

26 Home Office, *Reforming The Law On Involuntary Manslaughter: The Government's Proposals* (May 2000), para 2.10.

8.25 The Government believed that this third offence should cover reckless conduct as well as intentional conduct. They believed that this would appear to be in line with the Law Commission's proposals for reforming offences against the person, "which makes individuals liable for causing intentional or reckless injury to another".[27]

The 2005 Consultation Paper

8.26 In the 2005 consultation paper on homicide ("the 2005 Consultation Paper"), we suggested that manslaughter was too broad – at the most serious end of the spectrum, it was "too generous to defendants who kill by reckless conduct" – while at the less serious end the law "may be too harsh on defendants who kill as a result of an unlawful and dangerous act". [28]

8.27 We suggested that the "step" between murder and manslaughter was too great, and that this could be resolved by the introduction of a middle tier to bridge the gap. Our proposed structure in 2005 was:

(1) First-degree murder (mandatory life sentence): intentional killing.

(2) Second-degree murder (discretionary life sentence): killing with intention to do serious harm; or killing through reckless indifference to causing death; or intentional killing with a partial defence such as diminished responsibility.

(3) Manslaughter (fixed term of years maximum sentence): killing through gross negligence as to causing death; or killing through a criminal act which the offender intended to cause some injury or realised might cause some injury.

8.28 We justified this as follows:

> This basic structure constructs a ladder of offences by making the degree of harm intended or knowingly risked the pivotal element. If some harm is intended or risked, and death is caused, that is manslaughter. If serious harm is intended, or death is knowingly risked, that is "second degree murder". If death is intended, that is "first degree murder".[29]

The 2006 Report

8.29 In the 2006 Report, we took a broadly similar approach to the 2005 consultation paper and the Government's 2000 proposals for manslaughter. We recommended that the following should amount to manslaughter:

(1) Killing through gross negligence as to a risk of causing death.

(2) Killing through a criminal act:

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27 Home Office, *Reforming The Law On Involuntary Manslaughter: The Government's Proposals* (May 2000), para 2.12.

28 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 1.14 to 1.15.

29 Above, para 2.8.

(a) intended to cause injury; or

(b) where there was an awareness that the act involved a serious risk of causing injury.

(3) Participating in a joint criminal venture in the course of which another participant commits first-degree or second-degree murder, in circumstances where it should have been obvious that first-degree or second-degree murder might be committed by another participant.

8.30 We recommended a revised definition of "gross negligence", which required that the risk that the conduct would cause death would be obvious to a reasonable person in the defendant's position, that the defendant was capable of appreciating that risk at the material time, and that their conduct fell far below what could reasonably be expected of them in the circumstances.[30] We were of the belief that reckless manslaughter could be subsumed within second-degree murder and GNM.[31]

General issues raised in response to the Call for Evidence

8.31 In keeping with the concerns underpinning previous reports, a clear theme emerged from the responses to the current Call for Evidence: manslaughter remains broad and uncertain and is frequently used as a catch-all category for offences that fall short of murder.

8.32 Respondents generally supported the existence of manslaughter as a category, highlighting the importance of avoiding the stigma of a murder label for certain types of offending. On the other end of the spectrum, a theme emerged concerning the "adequacy" of the existing legal tests for dealing with certain scenarios that respondents considered sufficiently culpable to amount to manslaughter. It seems that the offence is often required to stretch in both directions to reach a "just" result – to protect less culpable offenders who might otherwise fall within murder, and to capture more culpable conduct falling outside of murder.

8.33 We consider this in relation to the fundamental principles of manslaughter below. Issues specific to certain types of manslaughter are discussed in more detail in the category-specific sections below.

A PRINCIPLED APPROACH TO MANSLAUGHTER

8.34 In Chapter 3, we considered the general principles that guide our approach to reform of the law of homicide. The law of homicide should uphold the principles of coherence, consistency, clarity, proportionality and fairness, and practicality.

8.35 In examining the justifications for imposing liability in "one punch" manslaughter cases, Professor Findlay Stark has suggested that "… ultimately, one senses that the debate will devolve into intuition trading".[32] Intuition is seemingly unavoidable in

30 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 3.60.

31 Above, paras 3.53 to 3.57.

32 F Stark, "Deconstructing Constructive Liability" [2023] *Criminal Law Review* 118.

discussions of manslaughter. In approaching reform of this area, we have remained cautious of attempting to cater for all possible scenarios; there will always be specific cases in which a principled approach will produce a result with which one intuitively disagrees. That said, one must always be wary of a strict application of principles if it is likely to produce significant counterintuitive outcomes in practice. This is particularly apparent in UDAM, where well-founded principled criticism of constructive liability for death contrasts with persuasive arguments regarding moral and social responsibility for the outcomes of one's actions.

Contrasting approaches to reform of manslaughter

8.36 We have found it useful to contrast two approaches taken by the Law Commission in previous attempts at homicide reform: the stricter subjectivist approach taken in the 1996 Report, and the ladder-based rationale of the 2005 Consultation Paper.

The 1996 Report

8.37 In the 1996 Report, the Law Commission took the view that it traditionally applied "subjectivist theory" in its work and would continue to do so. It identified three principles underpinning subjectivist criminal liability:

(1) The "*mens rea* principle", which only imposes liability for outcomes which were intended or knowingly risked by the defendant. Strict adherence to this principle would preclude liability for negligence or strict liability offences.[33]

(2) The "belief principle", which judges a defendant according only to what they believed they were doing or risking.

(3) The "principle of correspondence", in which the fault element of a crime must correspond to the conduct element, ensuring that the defendant is punished only for causing a harm which they chose to risk or to bring about.

8.38 These principles pose few issues in cases where the defendant unreasonably and knowingly runs a risk of causing death or serious injury. However, the Report acknowledged that the extent to which a person should be responsible for the unintended and unforeseen consequences of their actions is "a question with no easy answer".

8.39 It favoured the view that the main argument for criminalising inadvertence to risk is where the person is at fault in failing to consider the possible consequences of their conduct – a situation it described as "culpable inadvertence". Ultimately, the Commission considered that it may be justifiable to impose criminal liability for the unforeseen consequences of a person's acts "where the harm risked is great and the actor's failure to advert to this risk is culpable".

8.40 The Report justified this as follows:

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[33] Offences in which one or more of the relevant acts does not require proof of a corresponding mental element, such as the offence of being the owner or person in charge of a dog dangerously out of control (section 3 of the Dangerous Dogs Act 1991).

> Where a person embarks on a course of conduct which inherently involves a risk of causing death or serious injury to another, society is justified in requiring a higher standard of care from her than from someone whose conduct involves a lesser risk or no risk at all.[34]

8.41 It identified the following criteria for culpability:

(1) The harm was at least foreseeable, "if not strikingly foreseeable or obvious". An ordinary person should be judged by what would have been apparent to the average person in their position. An expert can be held to higher standards.

(2) As a matter of strict principle, a person should only be culpable for causing death if the risk that they culpably failed to foresee was one of *death*. However, it acknowledged that in practice, there is a thin line between behaviour risking death and risking serious injury – this is often a matter of chance. It also observed that the fault element for murder includes intention to cause serious injury and saw no reason to distinguish between murder and manslaughter in this regard.

(3) The accused must have been capable of perceiving the risk in question.

8.42 If those criteria were satisfied, the Law Commission concluded that it would be appropriate to impose liability for inadvertent harm – but only where the harm risked was "very serious".

8.43 For these reasons, the Report concluded that, as a matter of principle, the criminal law should hold a person responsible for unintentionally causing death only in the following circumstances:

(1) when they unreasonably and *advertently* take a risk of causing death or serious injury; or

(2) when they unreasonably and inadvertently take a risk of causing death or serious injury, where their failure to advert to the risk is culpable because

(a) the risk is obviously foreseeable; and

(b) they have the capacity to advert to the risk.[35]

8.44 The Report took a strict approach in applying these principles to the existing categories of manslaughter. UDAM did not satisfy these criteria, and so the Law Commission recommended that it should be abolished. It sympathised with the instinct "to blame a person for what he has actually done, rather than for the aspects of his conduct that are blameworthy,"[36] but did not accept that this justified retaining this category of manslaughter. It rejected the suggestion that a person should be held morally and legally responsible for the harmful consequences of their actions, concluding that "just because judgements based on outcome allocation do occur in

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34 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 4.23.

35 Above, para 4.43.

36 Above, para 5.15.

everyday life, this does not mean that they ought to do so". The most serious forms of UDAM could instead be prosecuted under the recommended offence of reckless killing (see above).

8.45 The Report recommended the retention of GNM in line with these principles, albeit reformulated as killing by gross carelessness (see above).

The 2005 Consultation Paper

8.46 In 2005, we asked whether manslaughter should "really continue to cover … all culpable unlawful killing, from a trivial assault that unexpectedly causes death to killing through a very high degree of recklessness?"[37] We considered that defendants "should not be labelled as guilty of murder, or of manslaughter, unless their conduct is sufficiently blameworthy to deserve that label". However, we were wary of becoming "bogged down" in questions of fair labelling, noting that views on fair labelling will differ greatly.[38]

8.47 Our relationship with the orthodox subjectivist argument had somewhat relaxed compared with the position in 1996. We identified the correspondence principle and subjectivity principle as relevant considerations, remarking that:

> These principles are far from absolute, but they are a useful reference point in analysing the nature and use of fault terms within the criminal law. They tend to influence, rather than determine, the character of criminal offences with fault element.[39]

8.48 It is worth observing that while the 1996 Report's scope was limited to involuntary manslaughter, the 2005 Consultation Paper was considering the law of homicide as a whole. As such, the key principle underpinning the 2005 proposals for reform of manslaughter was the ladder principle: the offences should exist within a graduated system of offences reflecting degrees of seriousness and mitigation. We suggested that the degree of conformity with the correspondence and subjectivity principles could help determine where an offence should fall on the ladder of homicide offences. Offences with a lower degree of conformity with those principles could still be justified, provided that this was recognised by a lower position on the ladder.

8.49 As in 1996, we took the view that is not acceptable that someone who accidentally causes death in the course of some minor act of criminal damage should be liable to conviction for manslaughter. However, the 2005 Consultation Paper favoured the retention of the offence, reformed in line with the approach taken by the Home Office in 2000 (see paragraph 8.22 above). This reform would produce "a slight – and fully justified – narrowing of the current offence"[40] by making intention or recklessness as to some injury the main focus of the fault element. We believed that, in light of our other proposed reforms to the structure of homicide, this would create "a readily

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37 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 1.34.

38 Above, para 1.46.

39 Above, para 2.102.

40 Above, para 3.191.

understood, just, and fair law of homicide that, from the least serious offence to the most serious offence, respects the ladder principle".

8.50 We acknowledged the 1996 Report's distinction between reckless killing and killing through gross carelessness but preferred to use this to draw the line between second-degree murder and manslaughter. We argued that killing recklessly "is recognised to be more blameworthy than killing by gross negligence because recklessness implies an awareness at the relevant time that there was a risk of death whereas negligence need not involve such awareness".[41] We considered that the most blameworthy type of reckless killing should fall within second-degree murder. Whether a reckless killing was sufficiently blameworthy to justify a conviction for second-degree murder would turn on the most culpable kind of recklessness – indifference manifesting as a "couldn't care less attitude" – as opposed to reckless stupidity "which is really just a kind of gross negligence".[42]

8.51 We considered that GNM should turn on whether the degree of negligence shown in causing death, including the degree of someone's reckless stupidity, was such as to amount to gross negligence as to causing death. We accepted that reckless stupidity does not fully respect the subjectivity principle but argued that this is reflected in the fact that it justifies "nothing higher than a conviction for manslaughter".[43]

Our analysis

Manslaughter as an offence

8.52 What is the purpose of manslaughter? It is often defined by what it is *not* – less serious than murder, but more serious than the non-lethal offences against the person. As a catch-all offence, it has simultaneously sought to mitigate the harshest extremes of the law by providing an appropriate tier for less culpable offenders, whilst also convicting those who unintentionally but culpably cause death of a homicide offence that corresponds to their degree of culpability. Although piecemeal, the way that manslaughter has developed can tell us something about the conduct that society views as deserving of the label of a homicide offence.

8.53 As described in Chapter 4, we believe that manslaughter should occupy a third tier in a new structure of homicide offences. The cornerstone of this third tier is the legal causation of death in circumstances where the defendant's culpability is sufficient to justify (or even require) liability for a homicide offence.

8.54 In Chapter 10, we compare and contrast manslaughter with the existing specific homicide offences. These are offences which fall short of murder or manslaughter, but still carry a homicide label; examples include causing death by dangerous driving[44] and the aggravated offence of being the owner of a dog dangerously out of control

41 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 2.97.

42 Above, para 3.55.

43 Above, para 3.56.

44 Road Traffic Act 1988, s 1.

where death is caused.[45] Consideration of these offences provides some insight into the practical and principled reasons to retain manslaughter as a general homicide offence.

8.55 We identify three main justifications for retaining the general homicide offences and the specific homicide offences separately. The rationale for introducing the specific homicide offences varies; reasons include evidential difficulties in proving the elements of murder or manslaughter, particularly when it comes to causation, and public attitudes towards certain types of offending leading to reluctance to convict defendants of an offence as serious as manslaughter. For some specific homicide offences, legal causation is a less central concept than it is in murder and manslaughter; in cases of causing or allowing the death of a child or vulnerable adult, for example, the prosecution does not need to prove whether the defendant allowed the death or actually caused it.[46] Finally, the defendant's culpability in many of the specific homicide offences (although not all) falls short of the high level required for the general homicide offences.

8.56 It would not be practicable to try to anticipate every factual circumstance in which a death could be caused and design a specific homicide offence to address those cases. As a matter of principle, many cases of homicide may still justify a label which reflects the offender's level of culpability, rather than the method of causing death alone. Manslaughter's utility, then, is in providing a flexible offence which is capable or responding to a range of circumstances and signalling an approximate level of culpability in appropriate cases.

8.57 In the following section, we consider the circumstances in which conduct leading to death might be considered sufficiently culpable to amount to manslaughter.

Principles underpinning the categorisation of manslaughter

8.58 We began our analysis of the principles of manslaughter, and homicide law reform more generally, by acknowledging that it will sometimes be necessary to strike a balance between competing principles. The law ought not be based on intuitive moral judgements of culpability, but nor should it produce wholly counterintuitive outcomes in practice.

8.59 The correspondence and subjectivity principles are important considerations applied widely across the criminal law of England and Wales. These legal principles are reflected in the considerations that we identified in Chapter 3; they speak to the fairness, coherence and proportionality of the law. We do not, however, believe that the correspondence and subjectivity principles are universal or absolute.

8.60 We take the view that the gradation of culpability is informed by many factors, including considerations of responsibility for the outcome of one's actions. As we said in 2005, the subjectivity and correspondence principles should influence, but not

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45 Dangerous Dogs Act 1991, s 3. See Chapter 10 for discussion of the nature of this offence; in short, s 3(4A) provides an aggravated form of the basic offence of being the owner or person in charge of a dog dangerously out of control in circumstances where the dog injures a person, thereby causing death.

46 For more detailed discussion of causation in such cases, see Chapter 10.

determine, the boundaries of the homicide offences.[47] A strict subjectivist approach would create a stark cut-off for liability after foresight of serious injury, which would be inconsistent with the graduated approach we have applied elsewhere in the homicide structure. We do not think there is sufficient conceptual difference between the intention to cause serious injury and the intention to cause some injury to justify removing the latter from the homicide ladder altogether; similarly, if those who foresee the risk of serious injury are culpable for deaths resulting from their actions, those who foresee *some* injury should have their culpability reduced rather than extinguished. In Chapter 6, we consider the correspondence principle in relation to the fault element of second-degree murder. We note that many critics who accept a departure from the correspondence principle in imposing liability for (second-degree) murder in cases of intention to cause serious injury do so on the basis that serious injury is similar enough to death to justify liability for a form of murder. We accept that this argument does not apply to those who intend to cause or are reckless as to causing some injury. However, here we are considering whether the sufficiency of the difference is such that a defendant should not be guilty of a homicide offence at all; we do not consider that it is.

8.61 A firm cut-off after "foresight of death or serious injury" could also risk creating an unprincipled gap between manslaughter and the specific homicide offences (which are discussed in Chapter 10). The specific homicide offences cover a broad spectrum of conduct and culpability, and so general statements about their elements should be approached with a degree of caution. Nevertheless, we note that many of these offences require no foresight of injury whatsoever.[48]

8.62 The tiered structure we propose is better suited to nuanced gradations of culpability in homicide cases. This approach creates tiers of offences proportionate with the principles of subjectivity and correspondence but provides adequate room for consideration of other factors that go to culpability. Strict compliance with the subjectivity and correspondence principles is more important at the highest level of the homicide structure (first-degree murder); lower levels of compliance with these principles should be reflected in the lower position on the homicide ladder and the corresponding approach to sentencing.

8.63 As discussed at paragraphs 8.53 to 8.56 above, the cornerstone of this tier of homicide is the causation of death in circumstances where the defendant's culpability is sufficient to justify or require liability for a general homicide offence. We consider that there are three main ways in which a defendant's culpability might meet this threshold. These three pathways are very broadly equivalent in culpability but have conceptually separate underpinnings, which should be reflected by the different labels for the different categories of manslaughter.

8.64 The first type of culpability, which typically underpins cases treated as GNM, is "culpable inadvertence".[49] In these cases, the defendant did *not* advert to the serious

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47 A New Homicide Act for England and Wales? (2005) Consultation Paper No 177, para 2.102.

48 With the notable exception of causing or allowing the death of a child or vulnerable adult contrary to the Domestic Violence, Crime and Victims Act 2004, s 5.

49 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 4.16, citing HLA Hart, *Punishment and Responsibility* (1968).

and obvious risk of death where they should have done. Their culpability arises from the failure to appreciate the risk, and a serious breach of their duty to the deceased person. To reflect this category's lower compliance with the subjectivity principle, liability is reserved for "truly exceptionally bad" breaches.

8.65 The second type of culpability arises in cases where the defendant was subjectively reckless as to death or serious injury when carrying out the conduct that caused death. These cases are analogous with the fault element of first-degree and second-degree murder, but the lack of intent to kill or cause serious injury justifies placing them in a lower tier. These cases do not require an additional constructive element of unlawful conduct or moral responsibility for the consequences of one's unlawful actions; the wrong that underlies culpability is the subjective and unreasonable risk-taking itself.

8.66 The third type of liability underpins our proposal for the retention of a form of UDAM. In our proposed reforms, culpability would rest on a combination of three main elements – a level of correspondence with the ultimate harm (death), a subjective recklessness as to some injury, and responsibility for the outcomes of one's unlawful actions. In these cases, the defendant either intended, or was reckless as to, causing some injury. The fact that death resulted is a variation in the *degree* of harm caused, not the *nature* of the outcome. This category's lower compliance with the subjectivity and correspondence principles is justified by the unlawful nature of the basic conduct. Although the death may have been unforeseen (or even unforeseeable), the unlawful nature of the basic act ought to have provided the defendant with sufficient warning of potential criminal consequences and opportunity to desist from acting. When combined with the intention to cause some injury or recklessness as to whether some injury was caused, this is sufficient to justify liability for death. However, these cases are rightly placed on a lower tier than murder.

8.67 There will naturally be some overlap between these approaches in individual cases. A person who was subjectively reckless as to the risk of death or serious injury may well have committed an unlawful and dangerous act. A person who has breached their duty in circumstances where the risk of death was serious, obvious and reasonably foreseeable may have been subjectively reckless as to the risk of death. The justifications for imposing liability set out above are neither exhaustive nor mutually exclusive; however, we consider them sufficiently clear and distinct to provide a principled foundation for the law of manslaughter.

8.68 Below, we consider reform of the existing categories of manslaughter with these principles in mind.

UNLAWFUL DANGEROUS ACT MANSLAUGHTER

8.69 The essence of UDAM is causing death by an unlawful act which involved an objective danger of *some* harm. Over time, this category of manslaughter has developed a number of caveats, reflecting caution over the constructive nature of liability in these cases:

(1) UDAM cannot arise by omission; the defendant must have committed some positive unlawful act.[50]

(2) The act must have been a criminal act in and of itself, separate from the fact that death was caused – this is sometimes referred to as the "base offence". All elements of the base offence must be proved, and any defences disproved, before a jury can find a defendant guilty of manslaughter.[51]

(3) The unlawful act must have been "dangerous". This requirement, described in the 1996 Report as a judicial attempt to narrow the scope of liability,[52] is an objective one. An act is "dangerous" if a reasonable person would have realised that it was bound to subject someone else to the risk of *some* physical harm.[53] Physical harm in this context can include shock where this results in actual injury, such as lasting effects on the nervous system.[54]

8.70 The unlawful act will often be an offence against the person, but "need not be so".[55]

8.71 Two elements of the test must be "carefully differentiated".[56] The defendant must have the necessary mental element of the base offence. Further, and separately, the unlawful act must have been objectively dangerous.

Issues in unlawful dangerous act manslaughter

8.72 As set out above, UDAM has attracted criticism across a long series of law reform projects; unsurprisingly, it continued to face significant criticism in response to our Call for Evidence.

8.73 Professor Matthew Dyson, for example, highlighted the low fault element, "not even requiring dangerousness to mean the risk of serious harm". Professor Dennis Baker focused on the objective nature of the current test, arguing that the fault element pays insufficient attention to subjective intent. He described UDAM as a stigmatising label which can apply strictly to highly unlikely (and therefore unforeseeable) deaths.

8.74 The Criminal Bar Association ("CBA") referred to "well-deserved", sustained and principled criticism of UDAM. It noted the uncertain reach of this category of manslaughter, raising particular concerns about the use of strict liability offences as the base offence in prosecutions for UDAM. Overall, it felt that there was "merit in its

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50 *R v Lowe* [1973] QB 702.

51 *R v Grey (Auriol)* [2024] EWCA Crim 487.

52 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 2.6.

53 Judicial College, *Crown Court Compendium: Part 1,* p 19-33; *R v Church* [1966] 1 QB 59; *R v Dawson* [1985] 81 Cr App R 150.

54 *R v Dawson* (1985) 81 Cr App R 150.

55 Judicial College, *Crown Court Compendium: Part 1,* p 19-33. In the case of *R v Nica* [2021] EWCA Crim 1790, for example, the base offence was facilitating a breach or attempted breach of immigration law.

56 *R v JF and NE* [2015] EWCA Crim 351. The Court of Appeal acknowledged the Law Commission's 2006 recommendations for reform of unlawful dangerous act manslaughter at paras 30 to 33, but considered that it must be for Parliament to determine whether the law required reform or further consideration by the Law Commission.

retention, but clarity about its contours is urgently required", suggesting that this should be delivered by codification.

8.75 Some respondents observed particular difficulties in applying UDAM to certain scenarios such as prosecutions after suicide resulting from domestic abuse and deaths arising from the supply of unlawful drugs. We address these concerns below, and in Chapters 10 and14.

8.76 We also note the following uncertainty highlighted by the Judicial College's Crown Court Compendium:

> It is unclear whether the base offence that must be proved needs to be one of mens rea or whether it is sufficient that it is a crime of negligence or strict liability. Prosecutions have been successful based on such crimes. However, there is authority from the House of Lords[57] that conduct that becomes criminal simply because of its negligent performance is not sufficient.[58]

The role of unlawful dangerous act manslaughter

8.77 We consider that there is merit in the retention of UDAM in some form. There is a persuasive moral argument that those who embark upon a dangerous and unlawful course of action should retain some legal and moral responsibility for the direct consequences of their actions. When placed appropriately on our proposed ladder of homicide offences, this category is capable of imposing liability for wrongful acts causing death whilst applying appropriate reductions in severity to account for the defendant's comparatively lower culpability.

8.78 The need for an offence appropriately labelling culpable deaths arising from unlawful conduct is reflected across other jurisdictions. In Canada, homicide is either culpable or not culpable; only culpable homicide can amount to an offence.[59] "Culpable" here takes on a specific legal meaning – homicide is culpable where a person causes the death of a human being:

(1) by means of an unlawful act;

(2) by criminal negligence;

(3) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(4) by wilfully frightening that human being, in the case of a child or sick person.[60]

8.79 A culpable homicide is then further classified as murder, manslaughter or infanticide. Culpable homicide will amount to murder where the person meant to cause death, or meant to cause bodily harm knowing that it was likely to cause death and was reckless as to whether death occurred, or where a person, "for an unlawful object,

57 *Andrews v Director of Public Prosecutions* [1937] AC 576.

58 Judicial College, *Crown Court Compendium: Part 1,* p 19-33.

59 Criminal Code RSC 1985, c C-46, s 222(2).

60 Criminal Code RSC 1985, c C-46, s 231 (5).

does anything that they know is likely to cause death, and by doing so causes the death of a human being".[61] Any homicide not amounting to murder or infanticide is manslaughter.

8.80 Unlike in England and Wales, unlawful act manslaughter can be committed by omission.[62]

8.81 In *R v Creighton*, the Supreme Court of Canada held that the mental element required for unlawful act manslaughter is simply "objective foreseeability of the risk of bodily harm which is neither trivial nor transitory…foreseeability of the risk of death is not required".[63] The court held that this mental element "is entirely appropriate to the stigma [and sentence] associated with the offence of manslaughter".[64]

8.82 This decision is not without criticism. Professor Amar Khoday, for example, has argued that the court's decision results in "considerable asymmetry" between the stigma attached to the manslaughter label and the mental element required for manslaughter.[65] Likewise, Professor Stanely Yeo has argued that the decision in *R v Creighton* "has led to the degree of moral culpability [for manslaughter] being pitched at too low a level to warrant conviction for what is, after all, a very serious offence".[66]

8.83 In France, acts of violence causing unintended death are treated as a separate criminal offence, rather than attracting the label of manslaughter.[67] Acts of violence causing an unintended death are punished by fifteen years' criminal imprisonment. The offence of manslaughter set out in article 221-6 of the *Code Pénal* – causing the death of another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulation – is punishable by three years' imprisonment. However, as France is a civil law jurisdiction, parallels with our own common law jurisdiction must be approached with caution.[68]

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61 Criminal Code, RSC 1985, c C-46, s 229.

62 T Storey, "Unlawful and Dangerous: A Comparative Analysis of Unlawful Act Manslaughter in English, Australian and Canadian Law" (2017) 81(2) *Journal of Criminal Law* 143, 153.

63 *R v Creighton* (1993) CanLII 61 (SCC), [1993] 3 SCR 3, pp 44 to 45.

64 *R v Creighton* (1993) CanLII 61 (SCC), [1993] 3 SCR 3, p 48. This decision is also supported by the earlier Supreme Court decision in *R v Desousa* (1992) CanLII 80 (SCC), [1992] 2 SCR 944.

65 A Khoday, "*R v Creighton* Twenty Years Later: Harm versus Death Revisited" (2013) 37 *Manitoba Law Journal* 167, 174.

66 S Yeo, "The Fault Elements for Involuntary Manslaughter: Some Lessons from Downunder" (2000) 43 *Criminal Law Quarterly* 291, 299.

67 Code Pénal, art 222-7.

68 The development of civil law systems such as the French legal system was heavily influenced by the law of the Roman Empire (see e.g. S Carlson, "Intro to Civil Law Legal Systems", *International Network to Promote the Rule of Law*, May 2009). The drafting of the Napoleonic Code in particular drew directly upon Justinian's Institutes (D Kelley, "What Pleases The Prince: Justinian, Napoleon and the Lawyers" (2002) 23(2) *History of Political Thought* 295). One of the three core precepts of the Institutes of Justinian is that a person shall injure no-one (*The Institutes of Justinian* (trans JB Moyle, 1913), I-I para 3). Although the current Code Pénal was drafted in 1994 to replace the Code Pénal de 1810 (I Stewart, "*Mors Codicis*: End of the Age of Codification?" (2012) 27 *Tulane European and Civil Law Forum* 28), this precept is likely to have shaped the development of the French law of homicide, which may account for this divergence in approach.

8.84 Similarly to the Canadian model, New Zealand first sets out the definition of culpable homicide, which is then categorised as murder or manslaughter depending on fault elements set out in statute. The conduct elements for culpable homicide include the killing of another person by an unlawful act. A culpable homicide is murder in the same circumstances as in Canadian law, set out above. Culpable homicide that does not amount to murder or infanticide is manslaughter.[69]

8.85 In *Everett v R*, the New Zealand Court of Appeal stated that:

> Manslaughter essentially is the causing of death by an unlawful act where the defendant neither intends death nor apprehends death to be a likely consequence of their acts. It encompasses homicide across a wide range of circumstances, including reckless conduct, and impulsive acts of violence (including cases falling short of self-defence), causing death.[70]

8.86 We are of the view that there remains a principled basis for retention of some form of UDAM, and that there is evidently a social desire for a form of liability in some of these cases. Concerns about the reach of this offence are best addressed through reconsideration of the fault element, which we discuss below.

Previous recommendations for reform of unlawful dangerous act manslaughter

8.87 In 2000, the Government accepted the Law Commission's 1996 proposals for two new offences of reckless killing and killing by gross carelessness. However, it objected to the wholesale abolition of unlawful act manslaughter, proposing the addition of a third offence. This would cover a situation where:

(1) a person's conduct caused the death of another;

(2) the person intended to cause some injury or was reckless as to whether some injury was caused; and

(3) the conduct constituted a criminal offence.

8.88 In the 2005 Consultation Paper, we supported the Government's 2000 proposal, defining unlawful act manslaughter as "killing through a criminal act which the offender intended to cause some injury or realised might cause some injury". We suggested that this change would produce a "slight" and "justified" narrowing of the current offence by "making the main focus, in terms of culpability, whether or not [the defendant] intended to cause, or was reckless as to causing, injury". We also suggested that this would create a fair and readily understood ladder of homicide offences when combined with our other proposals. We argued that this was part of the basic structure of offences, "making the degree of harm intended or knowingly risked the pivotal element".[71]

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69 Crimes Act 1961 (New Zealand), ss 171 and 178.

70 [2019] NZCA 68 at [20].

71 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 2.8.

8.89 In the 2006 Report, the proposal had been slightly altered. We recommended that UDAM covered killing through a criminal act:

(1) intended to cause injury; or

(2) where there was an awareness that the act involved a serious risk of causing injury.

8.90 We considered suggestions that in cases where the defendant did not intend to injure, manslaughter should require an awareness of a risk of *serious* injury. We saw some force behind this suggestion, but did not recommend it, believing that this would introduce excessive complexity into the law. However, we did believe that liability should be dependent on the risk of injury being a serious risk.[72]

Reform of unlawful dangerous act manslaughter

8.91 We agree with concerns that the current test sets the definition of "dangerous" at too low a level. As a result, UDAM covers a very wide range of conduct, and sits uncomfortably with the other offences in the homicide structure.

8.92 The justifications for UDAM's position within our proposed tiered structure of homicide offences are twofold. A level of culpability arises from the defendant's unlawful act. Further culpability arises from their intent to injure or recklessness as to the risk of injury; this is analogous to the intention to kill or cause serious injury in the higher tiers of the homicide structure but reduced in proportion to the level of injury and the inclusion of subjective recklessness as a fault element. Moral responsibility for the consequences of one's unlawful dangerous actions is further factored into the assessment of culpability, justifying inclusion of this category of offences in the homicide structure.

8.93 Although we acknowledge the limitations of this source, we consider that the Sentencing Council's evaluation of the sentencing guidelines for UDAM can provide some valuable insight into the use of this category of manslaughter in practice.

8.94 In December 2025, the Sentencing Council published an evaluation of the manslaughter guidelines. The evaluation looked at statistics on volumes, outcomes and sentence lengths for manslaughter cases, analysis of Crown Court judges' sentencing remarks for each type of manslaughter, interviews with judges qualified to sentence murder and manslaughter cases (and one interview with a barrister) and Court of Appeal transcripts.

8.95 UDAM comprises the majority of manslaughter cases.[73] The guideline sets out four levels of culpability. In broad outline, low culpability (category D) relates to cases in which the unlawful act was in defence of the self, or where there was no intention to cause harm and no obvious risk of anything more than minor harm, or where the

[72] Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 3.49.

[73] Sentencing Council, "Evaluation of the Sentencing Council's manslaughter offences guidelines" (2025) para 2.2.5. "In the two most recent years analysed, the proportion of offenders sentenced for unlawful act manslaughter was just under 80 per cent. The volume of offenders sentenced for the other three types of manslaughter … are low and make up a small proportion of offenders sentenced for manslaughter offences, so care should be taken when interpreting the findings".

offender played a minor role or had substantially reduced responsibility. Medium culpability (category C) concerns cases including but not limited to the intention to cause some harm or recklessness as to some harm, or where death was caused in the course of committing or escaping from another, less serious offence. High culpability (category B) cases are defined by an intention to cause harm falling just short of serious bodily harm, or cases with a high risk of death or serious bodily harm which was or ought to have been obvious, or those cases involving desecration of the body. Culpability A (very high) is a combination of B factors or the extreme nature of one or more B factors.

8.96 Unlawful act manslaughter offenders were most commonly categorised as category B (61% of all offenders), while around 30% of offenders fell into category C. Only 2% of cases fell into category D.

8.97 These cases do not represent every case charged as UDAM, nor can we say definitively which of these factors contributed to the assessment of culpability in each case. However, as a rough indication, this would suggest that very few convictions are actually based on the objective foresight of the risk of some harm alone.

8.98 We are provisionally persuaded by the approach taken in 2005. There are principled and pragmatic reasons for requiring that the defendant had subjective foresight of the risk of some injury. A proposed model of subjective foresight would remove a proportion of offenders with the lowest level of culpability, who we agree should not have the same label as others in the manslaughter bracket. Under this model, for example, a person who pushes someone during an argument, causing them to stumble backwards and hit their head and ultimately leading to their death, would be unlikely to be liable for UDAM unless they foresee the risk of some injury to the victim. However, a person who throws a punch leading to the same result would generally still fall within the ambit of this category of manslaughter as it is more likely they foresaw the risk of a punch causing some injury.

8.99 A subjective requirement would be in keeping with the approach to culpability within our proposed structure, and the justifications for imposing liability set out above, representing a step down from the higher tiers. When considered in light of our other provisional proposals for reform of manslaughter, this could also create a consistent and coherent step down from other, graver cases falling within the ambit of manslaughter.

8.100 Below, we discuss justifications for retaining (or introducing) a category of reckless manslaughter. This category would overlap with UDAM; we envisage that the most serious cases of UDAM would properly be charged as reckless manslaughter in our reformed structure of homicide law. As a result, the breadth of UDAM would be significantly reduced. The label would now generally apply to those currently falling into category C on the sentencing guidelines, creating more accurate offence labelling and addressing concerns that UDAM applies to too wide a range of offenders.

8.101 We therefore provisionally propose that UDAM should include an additional subjective fault element, namely that the defendant intended to cause some injury or was reckless as to whether some injury was caused.

Consultation Question 6.

8.102 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?

8.103 As discussed at above, there is some uncertainty as to whether a strict liability offence can form the basis of a conviction for UDAM. By this, we refer to an offence in which one or more of the relevant conduct, circumstance or result elements does not have a corresponding fault element. When the defendant is charged with a strict liability offence, the prosecution does not have to prove intention, recklessness or even negligence in relation to the strict liability elements. Examples of strict liability offences which have been used to form the basis of convictions for UDAM include causing danger to road users[74] and administering a medicinal product when not an appropriate practitioner or acting in accordance with the directions of an appropriate practitioner.[75]

8.104 We did not receive significant evidence on this point in response to our Call for Evidence. However, if part of the rationale for constructing liability in UDAM cases is that the unlawful nature of the base offence provides the defendant with sufficient warning of criminal consequences and opportunity to refrain from acting, as we suggest above, it seems appropriate that the base offence ought to contain a fault element of its own.

8.105 It is possible that there may be cases of UDAM in which the only available base offence is one of strict liability, but the individual defendant retains a high level of culpability for the death exceeding the base offence. We suggest that, under our provisional proposals, such cases could instead be charged as reckless manslaughter, considered below.

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74 Contrary to s 22A(1)(b) of the Road Traffic Act 1988. Prosecuted as manslaughter in *R v Meeking* [2012] EWCA Crim 641.

75 Contrary to s 58 of the Medicines Act 1968. Prosecuted as manslaughter in *R v Andrews* [2003] Crim LR 477.

Consultation Question 7.

8.106 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?

GROSS NEGLIGENCE MANSLAUGHTER

8.107 The current test for GNM was set out in *R v Adomako*[76] and refined through a series of appeal cases over the subsequent 25 years. That test, as summarised in *R v Broughton*,[77] is as follows:

(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. The risk must be one of death, not just serious injury. A serious risk, in this context, is something much more than minimal or remote. An obvious risk is one that is present, clear and unambiguous. It is immediately apparent, striking and glaring.

(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 (more than minimal) contribution to the death of the victim.

(6) The circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction. This is a question for the jury to decide.

8.108 Although cases of GNM often involve defendants in a position requiring particular expertise or care, such as doctors, this category of manslaughter can apply far more broadly. Some recent examples of the use of GNM outside of the medical context include:

(1) A case in which the defendant was convicted of GNM after her child died of a severe asthma attack. The defendant had taken her son to a friend's address for the night without bringing any of his medication, despite earlier medical advice, medical intervention and emergency hospital admissions.[78] The

76 [1995] 1 AC 171.

77 [2020] EWCA Crim 1093 at [5].

78 *R v Heath* (2022), unreported. See BBC News, "Mum jailed over son's asthma attack death", 28 April 2022.

defendant was unconscious due to drug consumption at the time of the child's death.

(2) The conviction of a paddleboard instructor and company owner after four deaths occurred on a paddleboarding tour she was running, organised by her company. The tour took place in severe flooding conditions; an expert concluded that the defendant "did not have a suitable qualification, and her planning and supervision was inadequate".[79]

(3) The conviction of a ship's captain accused of killing a crew member through gross negligence. The captain was the only person on watch duty when the ship collided with another tanker, and "did absolutely nothing" to avoid the collision.[80]

(4) A case in which the owner of a food waste management company was convicted of two counts of gross negligence manslaughter after two employees died whilst cleaning an unventilated and enclosed pig feed tanker.[81] The first victim was sent into the tank to clean it, and the second died trying to rescue him. The relevant breaches of duty included failures to put health and safety procedures in place or carry out risk assessments, a lack of ventilation in the tank or personal protection equipment for employees, and disregard of safety concerns that had previously been expressed about the activity.[82]

8.109 Despite (or perhaps because of) its overlap with the other categories of manslaughter, cases of GNM are comparatively rare. In response to our Call for Evidence, the Crown Prosecution Service ("CPS") told us that GNM "is, and should remain, reserved for the most serious (gross) breaches of duty where there was a serious and obvious risk of death and the breach of duty caused the death". This is borne out by the available data on manslaughter convictions; GNM is classed as a "low volume offence", making up just 5% of offenders sentenced for manslaughter in 2019 and 2022.[83]

Issues in gross negligence manslaughter

8.110 Respondents to our Call for Evidence did not raise substantial concerns about the principles underlying this category of manslaughter. Criticism of its circular nature, however, has persisted since 1996.

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79 CPS, "Woman jailed for gross negligence manslaughter after UK's worst paddleboarding tragedy" (23 April 2025).

80 BBC News, "Captain guilty of North Sea tanker crash death" (2 February 2026).

81 The company itself was also found guilty of corporate manslaughter.

82 BBC News, "Pig feed deaths: Managers jailed after yard workers drowned" (16 June 2022) and ITV News, "Firm fined £2 million and Greenfeeds Ltd bosses jailed after two workers drowned in toxic pig feed" (16 June 2022).

83 Sentencing Council, Evaluation of the Sentencing Council's manslaughter offences guidelines (December 2025). Gross negligence manslaughter accounted for 9% of offenders sentenced for manslaughter pre-guidelines (around 30 offenders within the transcripts analysed for 2014 and 2016). After the guidelines, the proportion was 5% (around 20 offenders in the transcripts from 2019 and 2022).

8.111 In response to the Call for Evidence, Professor Susan Edwards cited Dr Anne Lodge,[84] who "has described GNM as a 'dumping ground' for defendants displaying vastly different degrees of fault". Professor Edwards considered the offence uncertain and unpredictable, with "precarious" causation and outcomes depending on subjective value judgements. She also suggested that there has been a:

> … more recent appropriation of gross negligence manslaughter as a 'safety net' for achieving a conviction in cases other than medical negligence where the criminal law has failed to create a specific entry offence in an unlawful act.

8.112 The CPS, however, did not believe there was any clear rationale for reforming the common law offence of GNM or introducing a statutory offence. It told us that the test was settled and well-understood by prosecutors. It did flag an area in which gross negligence manslaughter might be considered inadequate, potentially justifying a separate offence – where a death occurs after a person supplies drugs and fails to seek timely medical assistance following a bad reaction to those drugs. This is discussed below.

8.113 Professor Dennis Baker also supported GNM, which he considered to be significantly less problematic than UDAM. In his response to our Call for Evidence, he acknowledged concerns about the circularity of some elements of the test but noted that this may be true for every objective element in criminal law. He suggested that:

> Much of the circularity is removed from the offence in that the objective mental element has been held to require a reasonable person to have been able to see that the grossly negligent conduct/omission carried a serious risk of causing a death. This line will be fairly clear in all similar cases, even if it is not possible to state in advance all the potential acts/omissions of gross negligence in a criminal statute.

8.114 Professor Findlay Stark, too, was supportive of the current approach to GNM. He has defended developments in the common law following the case of *R v Rose*,[85] arguing that *Rose* "endorses an approach to (gross) negligence that speaks meaningfully to defendants' personal culpability for a caused death".[86] In his response to the Call for Evidence, he highlighted the importance of retaining the requirement that the risk of death in gross negligence should be "serious and obvious".

Previous recommendations for reform

8.115 In the 1996 Report, the Law Commission identified "minor" issues in the formulation of GNM. Of particular concern was the use of the terminology "negligence" and "duty of

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[84] A Lodge, 'Gross Negligence Manslaughter on the Cusp: The Unprincipled Privileging of Harm over Culpability' (2017) 81 *Journal of Criminal Law* 125, 128.

[85] *R v Rose (Honey Maria)* [2017] EWCA Crim 1168 ("*Rose*"). This was an appeal against conviction for gross negligence arising from the death of a child following an eye examination by a registered optometrist. The prosecution alleged that the defendant had breached her statutory duty of care by failing to properly examine the internal structure of the child's eyes during an examination and failing to refer the child for urgent medical treatment despite significant clinical signs in retinal images. The child died five months after the eye examination from acute hydrocephalus. The Court of Appeal held that the jury must assess whether there was a "serious and obvious risk of death" based on what the defendant actually knew at the time of the breach of duty, not on information the defendant would have had if the duty had been properly performed.

[86] F Stark, "In Praise of *Rose*" [2019] 8 *Archbold Review* 7.

care". The Report argued that the use of civil law terminology "is best avoided within the criminal law, because of the uncertainty and confusion that surround it".[87] It recommended the creation of an offence of killing by gross carelessness, where:

(1) the defendant's conduct caused death; and

(2) the conduct involved an obvious risk of causing death or serious injury, and the defendant was capable of appreciating that risk (they need not actually have been aware of that risk); and

(3) the defendant's conduct fell far below what could be expected of them in all the circumstances **or** they actually intended to cause some unlawful injury to another **or** was reckless as to whether they caused some unlawful injury to another.

8.116 We did not make major proposals for reform of GNM in the 2005 Consultation Paper. Instead, we noted the importance of ensuring that the grossness of negligence "be made relative to someone's individual capacity to appreciate the nature and degree of risks, which may be affected by youth or disability".[88] We argued that the absence of this in the current law could create discrepancies with other offences such as allowing the death of a child or vulnerable adult, an "anomaly" that would be "an embarrassment".[89]

8.117 We also proposed that the gross negligence should continue to relate to the risk of death, not simply the risk of serious injury, suggesting this "would ensure that the crime respects the correspondence principle" and would reflect the current legal position.[90]

8.118 In the 2006 Report, we recommended a revised definition of "gross negligence", which required that the risk that the conduct would cause death would be obvious to a reasonable person in the defendant's position, that the defendant was capable of appreciating that risk at the material time, and that their conduct fell far below what could reasonably be expected of them in the circumstances.

Reform of gross negligence manslaughter

8.119 The reformed offence of killing by gross carelessness recommended in the 1996 Report contains a somewhat complicated set of elements. In the absence of UDAM (whose abolition was recommended in 1996), killing by gross carelessness would have encompassed a broad range of culpability. It would have applied not just to those who were truly inadvertent to a risk to which they should have adverted, but to those who were actively reckless as to the risk of some harm.

8.120 We consider that these are conceptually different forms of criminal liability with different justifications and should not be dealt with under the same offence label. In

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87 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 3.13.

88 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 3.185.

89 Above, para 3.187.

90 Above, para 3.189.

the 2000 Consultation, for example, the Government distinguished between intentionally harmful acts and genuinely careless acts, commenting that "in some circumstances an intentional act which unforeseeably results in death eg an assault may be viewed as more culpable than a grossly careless act which results in death".[91] The principles underpinning GNM in our proposed structure of homicide relate to culpable inadvertence; the justification for imposing liability in these cases is the failure to do what the defendant ought to have done based on the duty they owed to the victim. This should be clearly and narrowly defined, and ought to be kept conceptually separate from the categories of UDAM (above) and reckless manslaughter (below).

8.121 The evidence we have received suggests that the key issue in this area of law lies with the language used to define "gross negligence". This is most evident in the use of the phrase "so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction", a circular test which leaves the meaning of "criminal" in the hands of the jury.

8.122 We agree with Professor Baker's suggestion that the risks posed by circularity in the current test are mitigated to an extent by the objective mental element that a reasonable person would have been aware of the serious and obvious risk of causing a death. While we accept that a test requiring the jury to determine whether conduct was "criminal" is unhelpfully circular, we do not think it would be possible or practical to create a test that did not require *any* subjective value judgement of the defendant's conduct. As with many offences in the criminal law of England and Wales, it will ultimately be for the jury, as a cross-section of society, to determine the reasonableness and culpability of the defendant's conduct in any particular case.

8.123 We therefore provisionally propose a reformed approach to the language of the elements of GNM. We suggest that GNM 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. The risk must be one of death, not just serious injury. A serious risk, in this context, is something much more than minimal or remote. An obvious risk is one that is present, clear and unambiguous. It is immediately apparent, striking and glaring.

(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 (more than minimal) contribution to the death of the victim.

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91 Home Office, *Reforming The Law On Involuntary Manslaughter: The Government's Proposals* (May 2000), p 12.

(6) The defendant's conduct was truly exceptionally bad, falling far below what could reasonably be expected of them in the circumstances.

8.124 We do not suggest that this is the precise wording that will be used in any Bill; rather, this form of words is an example of how the test could be restated to reduce circularity without fundamentally altering the current approach to such cases.

8.125 We consider that use of a phrase such as "falling far below what could reasonably be expected of them in the circumstances" would be better aligned with the language used elsewhere in specific homicide offences, such as causing death by dangerous driving.[92] We stress that we do not seek to water down the level of negligence required in these cases. The high threshold required for GNM correctly reflects the unusual nature of this category of manslaughter, which imposes liability for inadvertence and for omissions as well as actions. Defendants should not be convicted merely on the basis of serious or very serious omissions; for this reason, we recommend retention of the requirement that the defendant's conduct be "truly exceptionally bad".

8.126 In such cases, it would be irrational to require a defendant to advert to a risk which they were for some reason incapable of appreciating. We therefore agree with the position taken in 2005 that gross negligence should be assessed relative to the defendant's individual capacity to appreciate the nature and degree of risks; we consider that this would be included as part of the requirement that the jury consider what could reasonably be expected of the defendant at the time.

Consultation Question 8.

8.127 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?

92 Road Traffic Act 1988, s 1.

CORPORATE MANSLAUGHTER

8.128 The offence of corporate manslaughter under section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 is not in fact a separate category of manslaughter, at least in the sense that the term manslaughter is used in the common law. It is a separate statutory offence which uses the language of manslaughter. It is, however, sufficiently closely related to GNM that it warrants consideration in this chapter.

Background and current law

8.129 The Law Commission's 1996 report on involuntary manslaughter[93] considered the operation of the offence of manslaughter in cases where a corporation, rather than an individual, was responsible for causing a person's death.

8.130 At the time, there were two main legal techniques for holding corporations responsible for the acts of their employees: the "identification principle", in which those who control the corporation are treated as embodying the corporation for the purposes of criminal liability, and the use of the civil law concept of vicarious liability, not generally used in criminal law, through which employers can be held liable for certain acts of their employees.[94]

8.131 In the 1996 Report, the Law Commission identified several reasons for creating a new offence of corporate manslaughter. Some argued that the identification principle was inadequate, placing individuals "actually or notionally" on trial alongside the company, whereas what was actually needed was "genuine corporate liability".[95] The identification principle did not recognise the realities of corporate structures, and allowed companies to escape liability by not making any one person responsible for safety.[96] There were concerns about public confidence if companies appeared to escape prosecution.[97] There were also issues with causation in the existing law, given that death was rarely caused by the negligence of a single individual.[98] The Commission also acknowledged the need for deterrence, and the need for new types of sentence appropriate to corporations.[99]

8.132 The Commission considered several methods for extending corporate criminal liability, ultimately favouring an approach which would apply the elements of the recommended offence of killing by gross carelessness to corporations "in a form adapted to a corporate context".[100] While the recommended offence of killing by gross

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93 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

94 For more detailed consideration of these principles, see above, from para 6.1.

95 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 7.9.

96 Above, para 7.10. The Law Commission later considered the criticisms of the identification principle more widely in a project on Corporate Criminal Liability, see Law Commission, Corporate Criminal Liability: an options paper (2022). This work led to the creation of another route to corporate criminal liability now found in the Crime and Policing Act 2026, s 250, where a senior manager acting within the actual or apparent scope of their authority commits the offence.

97 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 7.12.

98 Above, para 7.13.

99 Above, paras 7.14 and 7.15.

100 Above, para 7.36.

carelessness was never implemented, the offence of corporate manslaughter was subsequently introduced by section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007. As a result, GNM no longer applies to corporations.[101]

8.133 The corporate manslaughter offence applies to particular organisations and bodies specified in the Act.[102] This offence cannot be committed by individuals,[103] who should instead be charged with GNM.[104]

8.134 An organisation is guilty of corporate manslaughter if the way in which its activities are managed or organised causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased person.[105] An organisation can only be guilty of the corporate manslaughter offence if the way in which its activities are managed or organised by its senior management is a substantial element of the breach.[106]

The impact of our provisional proposals on corporate manslaughter

8.135 There is undeniably some overlap between the offence of corporate manslaughter and GNM. In some cases, the evidence may indicate that the offence was due to the "gross failings of identifiable directors or managers"; in such cases, the CPS suggest that it may be more appropriate to charge the relevant individuals with GNM.[107] However, the elements of the two are not identical, and we do not consider that the existence of corporate manslaughter is a bar to reform of GNM. The offence of corporate manslaughter is a separate statutory offence and does not rely on common law GNM for its statutory definition.

8.136 Unlike GNM, the offence of corporate manslaughter does not contain a requirement that there was a serious and obvious risk of death, nor that such risk was reasonably foreseeable.

8.137 The offence of corporate manslaughter explains the test for a gross breach of duty in different terms to those required in GNM cases:

> A breach of a duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances.[108]

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101 Corporate Manslaughter and Corporate Homicide Act 2007, s 20.

102 Corporate Manslaughter and Corporate Homicide Act 2007, s 1(2) and Sch 1.

103 *Blackstone's Criminal Practice 2026,* B1.90.

104 CPS, "[Corporate Manslaughter]" (last updated July 2018).

105 Corporate Manslaughter and Corporate Homicide Act 2007, s 1(1). Relevant duties of care are specified in section 2 of the Corporate Manslaughter and Corporate Homicide Act 2007.

106 Corporate Manslaughter and Corporate Homicide Act 2007, s 1(3).

107 CPS, "[Corporate Manslaughter]" (last updated July 2018).

108 Corporate Manslaughter and Corporate Homicide Act 2007, s 1(4)(b).

8.138 It is for the jury to decide whether the breach was a gross breach.[109] There are statutory factors that are relevant to this consideration, relating to compliance with health and safety legislation and evidence of attitudes, policies, systems or accepted practices within the organisation, but these do not limit consideration of any other relevant factor.

8.139 Although the Act uses different language to that currently used in GNM, the Crown Prosecution Service guidance states that:

> Notwithstanding the statutory definition, as a matter of practice the Court will often direct the jury in accordance with the language used in respect of the common law offence of gross negligence manslaughter. Various formulas have been used, including 'truly, exceptionally bad' and 'so bad that it amounts to a crime and deserving of punishment'; see in particular *R v Adomako* (1994) 99 Cr App R 362. The duty of the Judge is to bring home to the jury the very high threshold which amounts to gross failure.[110]

8.140 We have not received any evidence to suggest that the offence of corporate manslaughter is in need of reform and we do not intend to consider the substantive elements of the offence in this project. However, in response to our Call for Evidence, the CBA told us that we may wish to consider the relationship between GNM and the corporate manslaughter offence, noting that the distinction between individuals and organisations "may cause problems if an individual is charged along with a company and the jury is faced with different tests of liability".

8.141 We have considered whether any of our provisional proposals might have an impact on this offence. We do not intend to create any additional disparity between GNM and corporate manslaughter, nor do we believe that our provisional proposal for reform of GNM will have any detrimental impact on corporate manslaughter.

Consultation Question 9.

8.142 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.

RECKLESS MANSLAUGHTER

8.143 A substantial body of opinion suggests that truly reckless manslaughter – by which we mean a killing in which the defendant was subjectively aware of the risk of death or serious injury but continued to run that risk unreasonably and caused death as a result – is one of the most serious types of manslaughter. In 1996, for example, the Law

[109] Corporate Manslaughter and Corporate Homicide Act 2007, s 8(1)(b).

[110] CPS, "Corporate Manslaughter" (last updated July 2018).

Commission considered this type of "conscious risk taking" to be "the most reprehensible form of unintentional homicide, on the very borders of murder".[111]

8.144 This became the basis for the 1996 Report's recommendation for the most serious form of manslaughter, "reckless killing". This would have applied where the defendant was subjectively aware of a risk that their conduct would cause death or serious injury, and it was unreasonable for the defendant to take that risk in the circumstances as they knew or believed them to be. The Government accepted this reasoning in the 2000 Consultation, agreeing that reckless killing should carry a maximum sentence of life imprisonment.[112]

8.145 In the 2005 Consultation Paper and the 2006 Report, we went one step further, incorporating killing through reckless indifference to causing death as part of the offence of second-degree murder. Under those proposals, killing through reckless indifference as to causing serious injury would have been subsumed within GNM.[113]

8.146 This view of the comparative severity of recklessness is reflected in the sentencing guidelines for UDAM, albeit in regard to objective recklessness as well as subjective recklessness. The fact that death was caused "in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender" is a factor indicating high culpability.[114]

The fault element for recklessness

8.147 The law of England and Wales has vacillated on the test for recklessness across the criminal law. The subjective standard of recklessness set out in *R v Cunningham*[115] (sometimes referred to as "Cunningham recklessness") was overturned in 1982 in favour of an objective test. Following *R v Caldwell*,[116] the question was whether in the circumstances an "ordinary prudent individual" would have been aware of "the possibility of [the relevant] kind of harmful consequence".[117]

8.148 *Caldwell* was in turn rejected in 2003 by the House of Lords in *R v G*[118] in favour of a subjective standard of recklessness, requiring that the defendant was actually aware of the risk. Under this test, a person will be reckless with respect to a *circumstance*

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111 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 4.10.

112 Home Office, *Reforming The Law On Involuntary Manslaughter: The Government's Proposals* (May 2000), para 2.15.

113 While the 2005 provisional proposals used the term "reckless indifference", the 2006 recommendations moved away from this term, as consultees argued that the term was too vague. "Reckless indifference" was replaced with the alternative formulation of "intention to cause some injury or a fear or risk of injury" (plus awareness of a serious risk of causing death). See Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 2.102 to 2.107.

114 Sentencing Council, Unlawful act manslaughter (effective from 1 November 2018). Note that this is a factor in category B (factors indicating high culpability); category A is reserved for very high culpability cases, indicated by a combination of category B factors or the extreme nature of a category B factor.

115 *R v Cunningham* [1957] 3 WLR 76.

116 *R v Caldwell* [1982] AC 341.

117 *R v Caldwell* [1982] AC 341.

118 *R v G* [2003] UKHL 50.

when they are aware of a risk that it exists or will exist; they will be considered reckless with respect to a *result* when they are aware of a risk that it will occur, and it is unreasonable to take that risk in the circumstances known to them.

8.149 The objective *Caldwell* test was used in the law of manslaughter for some time.[119] In 1983, in *R v Seymour*, the House of Lords held that the appropriate fault element in motor manslaughter cases, and by extension all gross negligence cases, was one of recklessness.[120] This persisted until the decision in *Adomako,*[121] in which *Seymour* was rejected and the test reframed in terms of gross negligence.

The existence of reckless manslaughter as a separate category of manslaughter

8.150 As we highlighted in the our Call for Evidence, it has been argued that reckless manslaughter does not exist as a separate category of manslaughter.[122] Sources talking about this category tend to hedge their bets, if they acknowledge it at all.[123] If it does exist, it appears to have been created as a byproduct of the narrowing of the fault element for murder.[124] It may simply be a product of the use of the terminology of recklessness in cases that were in fact gross negligence cases.

8.151 In the 1996 Report, the Law Commission primarily acknowledged the existence of two forms of manslaughter: UDAM and GNM. However, it added that:

> There is one further way in which manslaughter may now be committed in the absence of intention to kill or cause serious injury. This arises when the accused is aware that her conduct involves a risk of causing death (or, probably, serious injury) and she unreasonably takes that risk. This combination of awareness of risk and unreasonable risk-taking is called "subjective" recklessness. Again, this type of mental state does not exclude liability for gross negligence or unlawful act manslaughter; a defendant may be guilty on all three counts.[125]

8.152 It also remarked:

> Until ten years ago many cases of this type were treated as falling within the definition of murder. However, in a murder case in 1985 the House of Lords held that cases in which the defendant may have foreseen that death or really serious injury were highly probable to result from her act, without intending such consequences, would no longer constitute murder. These cases must then have fallen, by default, into the scope of the offence of manslaughter. There is little or no separate authority, however, about this type of manslaughter, since such cases are dealt with in practice as cases of unlawful act manslaughter, and the accused's

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119 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237 at para 6.51.

120 *R v Seymour* [1983] 2 AC 493. See above at para 2.12.

121 *R v Adomako* [1995] 1 AC 171.

122 F Stark, "Reckless Manslaughter" [2017] *Criminal Law Review* 763 - 784.

123 Above, p 763.

124 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 2.27.

125 Above, para 2.26.

awareness of the risk is taken into account only as an aggravating factor when it comes to sentencing.[126]

8.153 In our Call for Evidence, we suggested that reckless manslaughter was acknowledged by the Court of Appeal in *R v Lidar.*[127] However, Professor Stark has suggested that *Lidar* may not have been a case of reckless manslaughter, but rather a case of GNM framed through the language of recklessness*.* He states that it is "impossible to be *absolutely* certain, because what is available of the judgment is unclear". The Law Commission made similar observations in 1996, noting that judges had found the terminology of gross negligence "unwieldy and difficult" to explain to juries, and had begun to use "recklessness" to describe a high degree of negligence.[128]

8.154 Even if reckless manslaughter did once exist as a separate category, some suggest that it did not survive the reformulation of GNM in *Adomako*.[129] In their response to our Call for Evidence, the CPS highlighted a first-instance decision in which the prosecution unsuccessfully attempted to argue for the existence of reckless manslaughter, submitting that this "appropriately reflected the offender's high level of culpability, and better fitted the case (neglect where the risk of death was plain)". The trial judge was apparently not satisfied that reckless manslaughter had survived the House of Lords decision in *R v Adomako*. We understand that the prosecution was instead able to proceed on an alternative count of GNM, and so the decision was not appealed; this case is not an authority for the proposition that reckless manslaughter no longer exists but may be indicative of wider issues needing exploration.

8.155 We do not consider it necessary to reach a conclusion on whether reckless manslaughter exists or has ever existed. We agree that if it does exist as a separate category, it appears to rest on extremely shaky foundations. Instead, we concern ourselves with whether some form of reckless manslaughter *should* exist in a new structure of homicide offences.

What form, if any, should reckless manslaughter take in our new structure?

8.156 We agree that reckless killing – by which we mean killing in which the defendant was subjectively reckless as to the risk of serious injury or death – is one of the most culpable forms of killing that does not amount to murder. It entails wilful exposure of another to the risk of death, displaying a "couldn't care less"[130] attitude to killing that we believe most people would agree falls just short of murder.

8.157 This is not a case in which there is a significant lacuna in the law requiring reform. It is difficult to imagine a truly reckless killing which could not currently be prosecuted as either UDAM or GNM. However, we provisionally conclude that there are principled

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126 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 2.27, citing *Moloney* [1985] AC 905.

127 *R v Lidar* (unreported) 11 November 1999 CA, [2000] 4 Archbold News 3.

128 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, para 2.11

129 [1995] 1 AC 171.

130 A New Homicide Act for England and Wales? (2005) Consultation Paper No 177, para 3.27.

and practical reasons to recognise this category of homicide as a distinct category of manslaughter.

8.158 These killings do not sit well with the other types of offending in UDAM or GNM. Above, we considered that the basis for liability in UDAM arises from a combination of the culpability inherent in undertaking a harmful act, and the moral responsibility for the consequences of one's unlawful actions. In reckless manslaughter, however, the fault flows from the defendant's reckless indifference to the risk of death or serious injury alone – there is no need for an additional element of underlying unlawfulness to justify legal liability for the death. The subjectivity and correspondence principles are satisfied to a different degree in such cases, and this ought to be appropriately signalled by their place on the homicide ladder.

8.159 Similarly, liability in GNM stems from what the 1996 Report described as "culpable inadvertence" to a risk.[131] Reckless manslaughter cases are not cases of inadvertence, and do not warrant the same label as cases in which the defendant is liable for failing to appreciate a risk. Professor Stark, for example, has argued that the difference between advertent and inadvertent wrongdoing is taken to be "morally significant" in criminal law. A category of reckless manslaughter would therefore provide a more accurate label for such cases. In addition, concerns about the breadth of UDAM may be mitigated if the most serious offences of this nature are removed from this category and dealt with under a more fitting offence label.

8.160 This principled distinction may provide a further practical benefit at the sentencing stage of proceedings. Professor Stark has argued that under the current law, a verdict of "guilty" to either UDAM or GNM gives no indication of the jury's findings as to the defendant's actual awareness of the risk of harm. The sentencing judge is left to infer culpability in order to properly place the defendant within the broad range of the offence. It would be "far more transparent, and hopefully more consistent" if trial judges were given an indication of the jury's verdict on whether the defendant was aware of the risk of death or serious injury.[132]

8.161 We therefore provisionally consider that the recognition of a clearly defined third category of reckless manslaughter would better reflect gradations of culpability within the homicide structure and improve the conceptual underpinnings of each of the three categories of manslaughter. This would effectively narrow the remaining categories of manslaughter by removing the most serious examples of reckless manslaughter from their scope, creating conceptual clarity and addressing concerns about the breadth of the existing categories.

8.162 We acknowledge that there will be a level of overlap between the three categories; however, this is also the case at present, and we have not received evidence that it has caused significant practical difficulties in the current law. In practice, the most serious cases would be properly charged as reckless manslaughter. UDAM would then represent a narrower category of lower-culpability offenders, applying the ladder

131 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

132 F Stark, "Reckless Manslaughter" [2017] *Criminal Law Review* 763-784, p 782.

principle within the tier of manslaughter and potentially mitigating concerns about the correspondence principle in such cases.

8.163 We therefore propose a category of reckless manslaughter which would apply in homicide cases where the defendant was aware of the risk of serious injury or death and unreasonably ran that risk, causing death.

Consultation Question 10.

8.164 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?

OUR PROPOSED STRUCTURE

Summary of our provisional proposals

8.165 Across the consultation questions above, we provisionally propose the following structure of manslaughter, contained within the third tier of the structure of general homicide offences discussed in Chapter 4:

(1) Reckless manslaughter: killing where the defendant's conduct caused the death of another; the defendant was aware of a risk that their conduct would cause death or serious injury; and it was unreasonable for the defendant to take that risk, having regard to the circumstances as they knew or believed them to be.

(2) GNM: killing where the defendant owed an existing duty of care to the victim; the defendant negligently breached that duty; at the time of the breach there was a serious and obvious risk of death; it was reasonably foreseeable that the breach gave rise to a serious and obvious risk of death; the breach caused or made a significant contribution to the death of the victim; and the defendant's conduct was truly exceptionally bad, falling far below what could reasonably be expected of them in the circumstances.

(3) UDAM: killing where the defendant did an act which constituted a criminal offence; 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; the defendant intended to cause some injury or was reckless as to whether some injury was caused; and the defendant's conduct caused the death of another.

8.166 We envisage that these categories would remain as separate categories of a single offence of manslaughter. As we consider above, these cases overlap significantly in terms of causation, conduct and culpability, which justifies retaining manslaughter as a catch-all category. We believe that there are cogent comparisons to the offence of fraud,[133] which consists of a single offence that can be committed in three ways.[134]

FURTHER SUGGESTIONS FOR REFORM

The term "manslaughter"

8.167 In response to our Call for Evidence, several stakeholders raised concerns about the use of the label "manslaughter". Those expressing this concern noted that although the offence sits on a lower tier of the homicide ladder, the use of the term "slaughter" arguably carries more serious connotations than "murder or "killing". One stakeholder observed the unnecessary use of the gendered prefix "man".

8.168 There was no clear consensus on alternative labelling options. Suggestions included "culpable homicide", "third-degree homicide" and "grave homicide". We also note that the 1996 Report favoured the labels "reckless killing", "killing by gross carelessness" and "corporate killing".[135]

8.169 Others took the view that the label is generally understood by the public and by professionals. In the 2006 Report, we said:

> The murder label is one of the highest moral and social significance. It is widely used not only in England and Wales but also in many other jurisdictions across the world. It is central to the public perception and evaluation of the seriousness of homicide. We believe that it would be wrong to abandon it and that for very similar reasons the manslaughter label should also continue to be used.[136]

8.170 Similarly, Dr Andrew Cornford has argued that we would lose something of value by abandoning the labels of murder and manslaughter. He suggests that these labels have "moral authority and resonance acquired over time, which gives the law legitimacy".[137]

8.171 We did not ask about this specifically in our Call for Evidence, and do not consider that we have received sufficient evidence to reach a provisional position on any reform of the offence label.

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133 Fraud Act 2006, s 1.

134 These are fraud by false representation (Fraud Act 2006, s 2), fraud by failing to disclose information (Fraud Act 2006, s 3), and fraud by abuse of position (Fraud Act 2006, s 4).

135 Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

136 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.19.

137 A Cornford, "The Architecture of Homicide" (2014) 34(4) *Oxford Journal of Legal Studies* 819.

Consultation Question 11.

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

Liability for death in certain circumstances: following supply of drugs and failure to seek medical assistance, and causing death by suicide following domestic abuse

8.173 Several consultees[138] suggested that we should address liability for abusers whose victims die by suicide, including considering the appropriateness of the existing liability to such cases under unlawful dangerous act manslaughter.

8.174 Similar arguments were made in relation to supply of drugs resulting in death. The CPS flagged the case of *Broughton*,[139] raising the possibility of the creation of an offence to overcome difficulties in proving causation in these circumstances. Dr Jonathan Rogers also considered causing death through the supply of drugs and noted similar issues with causation. He suggested that a new offence could be worth consideration.

8.175 As these issues were raised in the context of manslaughter, it is right that they are noted here. However, we consider that these issues are separate from the fundamental structure of manslaughter. Our understanding is that the primary issue is one of causation; in domestic abuse cases, there are also evidential issues in relation to how the prosecution present the case at trial and the use of expert evidence.[140] Neither of these is a matter for reform of the principles and structure of manslaughter. If causation is to be reformed, it should be a universal test. To the extent that there is a lacuna in the law that does not justify wholesale reform to the principles of causation, it should be addressed through a separate offence or offences with appropriate labels and suitable conduct and fault elements. We consider this in Chapter 10.

138 Dr Jonathan Rogers, CWJ, Professor Vanessa Munro, AAFDA, and SafeLives.

139 *Broughton v R* [2020] EWCA Crim 1093.

140 Centre for Women's Justice.

Chapter 9: Infanticide

INTRODUCTION

9.1 Infanticide is a unique legal doctrine within the law of homicide in England and Wales. It is both an offence and defence, shaped by its historical and social context to address the rare cases in which a mother[1] kills her young child. Specifically, the law of infanticide recognises that the culpability of some mothers who kill their children is reduced due to their acute vulnerability in the circumstances that led to the killing. Infanticide convictions in England and Wales are extremely rare, with only one or two recorded each year over the past five years, meaning the doctrine applies in only a very small number of exceptional cases.[2]

9.2 In England and Wales "infanticide" is defined in law as the killing of a child aged under 12 months by their biological mother where the substantive elements of the offence/defence are satisfied.[3] However, this term is also used more broadly across other jurisdictions and in other disciplines to refer to the killing of young children, usually (but not exclusively) by their mother. Where relevant, we distinguish between cases of "neonaticide" (killing of newborn children) and "infanticide" (killing of infants who are not newborn but are under 12 months old).[4]

9.3 In this chapter we explain the law of infanticide, including its historical development, and consider the rationale for a separate regime of infanticide as both an offence and a defence. Our focus in this chapter is on the principled justification for maintaining a distinct infanticide doctrine within the wider homicide framework. As explained in Chapter 1, we will publish a separate consultation paper focusing on defences to homicide and sentencing for murder in due course. The offence and defence under the doctrine of infanticide are identical in substance. The scope of this chapter is necessarily limited because issues relating to the substantive elements of the doctrine, including its wording, structure, and interaction with other defences, will be addressed in our later consultation paper. Our purpose in this paper is first to consider the justification for maintaining a separate doctrine for infanticide. We will then review the structure and operation of the infanticide doctrine to the extent necessary to situate infanticide within the homicide structure. Our aim is to ensure that the law continues to provide a tailored approach and distinct offence for relevant cases.

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[1] In line with the Infanticide Act 1938 we use the language of "mother", "woman" and "she/her" pronouns in relation to infanticide defendants in this chapter.

[2] Ministry of Justice, Ministry of Justice Criminal Justice Statistics Quarterly, (September 2025).

[3] Infanticide Act 1938, s 1(1).

[4] See K Brennan and E Milne, "100 Years of Infanticide: The Law in Context" in K Brennan and E Milne (eds), *100 Years of the Infanticide Act: Legacy, Impact and Future Directions* (2023) p 5; Cambridge Pro Bono, The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938 (August 2024), p 32.

THE LAW OF INFANTICIDE

Infanticide as an offence

9.4 Under section 1(1) of the Infanticide Act 1938, a woman commits the offence of infanticide where she causes the death of her child under 12 months old "by any wilful act or omission", but at that time "the balance of her mind was disturbed" either by "her not having fully recovered from the effect of giving birth to the child", or "the effect of lactation consequent upon the birth of the child".

9.5 The 1938 Act originally provided that an infanticide conviction applied "notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder". It should be remembered that in 1938 when the Act was passed, the death penalty was the only sentence available for those convicted of murder. In *R v Gore*,[5] the Court of Appeal held that the offence in section 1(1) was not restricted to instances where a mother would otherwise be convicted of murder and therefore did not require proof of an intention to kill or cause grievous bodily harm. Rather, section 1(1) created "a new offence of infanticide which covered situations much wider than offences that would otherwise be murder".[6] The Court of Appeal noted that it was Parliament's intention when passing the Infanticide Act to mark out cases of infanticide as being a "lower grade criminal offence" entirely, rather than a "lower grade of murder".[7]

9.6 Following *Gore,* the Coroners and Justice Act 2009 amended section 1(1) of the 1938 Act so that an infanticide conviction is now only applicable "if the circumstances were such that but for this Act the offence would have amounted to murder or manslaughter".[8] This amendment aligned the statutory language with the Court of Appeal's understanding that infanticide could apply to cases beyond murder, while limiting the scope of the offence/defence so that it does not apply inappropriately in wider circumstances not fitting the seriousness of the offence.[9] Therefore, while infanticide can still be charged as a separate offence, it can only be charged where it would also be possible to charge the mother with either murder or manslaughter.

Infanticide as a defence

9.7 Infanticide also operates as a partial defence to murder and manslaughter. Where a woman is charged with either murder or manslaughter, but the jury consider that the

5 *R v Gore* [2007] EWCA Crim 2789 ("*Gore*").

6 *R v Gore* [2007] EWCA Crim 2789 at [33].

7 *R v Gore* [2007] EWCA Crim 2789 at [19].

8 The defence in section 1(2) was amended similarly. The defence may now be raised in a trial "of a woman for the murder or manslaughter of her child", and a jury may return a verdict of infanticide "if the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder or manslaughter".

9 The amendments sought to ensure that a woman could not be convicted of infanticide where a father who caused the death of their child in the same circumstances would only be guilty of the lesser offence of child cruelty. Ministry of Justice, Attorney General's Office and Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law*, Consultation Paper CP19/08 (2008) at paras 121-124. See also *Archbold Criminal Pleading Evidence and Practice* (2026), 19-195.

elements of the infanticide defence apply, they may return a verdict of infanticide.[10] It is therefore a lesser alternative verdict available to juries in the relevant circumstances.

9.8 There are differences between infanticide as a defence and other partial defences (those that currently reduce murder to manslaughter, which are discussed in Chapter 7). In cases where a defendant charged with murder or manslaughter raises the partial defence of diminished responsibility, the defendant bears the burden of proving this defence to the relevant standard, whereas where a defendant raises the defence of infanticide, the prosecution has the burden of disproving the elements of infanticide.[11] Infanticide applies to both murder and manslaughter, unlike the other partial defences. It also operates as a separate offence so that defendants who are guilty of infanticide are not guilty of murder or manslaughter and instead are guilty of the different and "lower grade" offence[12] of infanticide. Currently, other successful partial defences result in a conviction of manslaughter (and under our provisional proposals for murder with a partial defence, in the second tier of murder). However, section 1(1) of the Infanticide Act 1938 provides that someone guilty of infanticide should be sentenced as if guilty of manslaughter, linking infanticide and manslaughter somewhat in terms of their severity and sentencing.

Common law interpretation

9.9 There has been limited interpretation of the substantive requirements of the offence and defence of infanticide. The Court of Appeal has held that while the effect of giving birth or effect of lactation must be at least a minimal cause of the disturbance in the balance of the mother's mind, it need not be the sole cause.[13] A woman may therefore still succeed in raising infanticide even where she suffered from pre-existing mental health conditions that also contributed to the disturbance.

9.10 There is no requirement to prove a causal connection between this disturbance and the killing. Rather, the offence and defence only require that the killing occurred at the time of the disturbance. Once this temporal connection exists, "there is no required causal link between the disturbance of balance of mind and the act or omission causing death."[14]

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10 Infanticide Act 1938, s 1(2).

11 Infanticide Act 1938, s 1(2); Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 8.9, *R v Tunstill* [2018] EWCA Crim 1696 at [13], Blackstone's 2026, B1.110.

12 See *R v Gore* [2007] EWCA Crim 2789 at [19]: "The other interesting fact to emerge from the Commission's analysis is that at the committee stage of the Infanticide Act 1922 the then Lord Chancellor informed the House that it was not the Bill's intention to place infanticide 'in a lower grade of murder', but to treat it as a 'lower grade criminal offence'."

13 *R v Tunstill* [2018] EWCA Crim 1696.

14 *R v Tunstill* [2018] EWCA Crim 1696 at [32].

Sentencing

9.11 As noted above, a conviction of infanticide is punishable as if the defendant had been convicted of manslaughter, which has a maximum sentence of life imprisonment, but life imprisonment is not mandatory as it is for murder.[15]

9.12 The Perinatal Legal Project's response to our Call for Evidence highlighted the following selection of cases decided between 2017 and 2025 in which mothers killed their infant child, which it considered to show "a significant disparity in [sentencing] outcomes in circumstances when the facts are not always significantly different". Recent convictions for infanticide have resulted in a hospital order[16] and a three-year community sentence.[17] Meanwhile several women who also killed their infant child received significant minimum terms after being convicted of murder.[18]

9.13 Clearly the sentencing outcomes between cases where women are convicted of murdering their child compared to cases where women are convicted of infanticide can be vastly different. This disparity reflects the lower culpability associated with an infanticide conviction.

HISTORICAL BACKGROUND

9.14 As noted above, prior to the introduction of the Infanticide Act in 1922, a mother who killed her infant child would be charged with murder, and if convicted would receive a mandatory sentence of the death penalty.[19] At this time, infanticide was closely associated with young mothers who gave birth to children outside of marriage. There were some cases in which women would conceal their pregnancy and kill their baby shortly after birth to avoid the severe social stigma and resulting poverty associated with pregnancy outside of marriage.[20]

9.15 Towards the end of the 19th century, greater recognition of the social and economic causes of infanticide meant that social attitudes towards such defendants began to improve. It is thought that juries considered a murder conviction too severe for mothers in such circumstances. [21] Consequently, juries frequently acquitted women in such cases, and even where a defendant was convicted, the death sentence was sometimes commuted to a sentence of imprisonment. This made what has been

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15 Infanticide Act 1938, s1(1); Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 8.6.

16 Hayley MacFarlane received a hospital order.

17 Sarah Barron received a three-year community order.

18 For example: Jia Xin Teo, Elodie Goncalbes and Rachel Tunstill who were sentenced to life with a minimum term of 17 years; Paris Mayo who was sentenced to a minimum term of 12 years.

19 K Brennan and E Milne, "100 Years of Infanticide: The Law in Context" in K Brennan and E Milne (eds) *100 Years of the Infanticide Act: Legacy, Impact and Future Directions* (2023) p 3, citing M Jackson, *New Born Child Murder: Women, Illegitimacy and the Courts in Eighteenth-Century England* (1996); A-M Kilday, *A History of Infanticide in Britain, c 1600 to the Present* (2013); J M Beattie, *Crime and the Courts in England, 1660-1800* (1986).

20 Above, p 3.

21 Above, p 11 citing D Seabourne Davies "Child Killing in England Law – Part 1" (1937) 1 MLR 203.

described as a "solemn mockery"[22] of the judicial process: judges were sentencing women to death, with the belief that the execution would probably not be carried out.[23]

9.16 The Infanticide Act 1922 was introduced to ensure that vulnerable women who killed their children would be held criminally responsible through an appropriate conviction and sentence that reflected public attitudes as to their culpability.[24] Sixteen years later, the Infanticide Act 1938 amended the Infanticide Act 1922 by extending its scope from "newly-born" children to those under 12 months of age and broadening the basis for the mother's disturbed mental balance to include the effects of lactation following birth. Issues had continued to arise over the definition of "newly-born".[25] After the 1922 Act was introduced, mothers who killed young (but not newborn) infants continued to be acquitted by juries who felt they should not face the death penalty or when convicted, were sentenced to death with the sentence then being commuted. Accordingly, the age limit of the offence/defence was extended. The reference to the "effects of lactation" sought to explain why a disturbance of the mother's mind might arise after childbirth during the first year of motherhood, where she could no longer be said to be suffering from the immediate effects of childbirth.

9.17 Drs Brennan and Milne have suggested that the infanticide legislation was introduced primarily to respond to concerns regarding the need for leniency for mothers who kill their infant children in the context of significant social and economic pressure.[26] Specifically, they have emphasised that the focus of the original 1922 Act was the killing of newborn babies following pregnancies outside of marriage, where mental health conditions were not always a primary feature of the offending.[27] The introduction of the reference to lactation broadened the legislation, however Drs Brennan and Milne argue this was intended to supplement the original rationale rather than impose a requirement of psychiatric disorder in all cases.[28]

9.18 The only other amendments that have been made to the Infanticide Act were introduced following *Gore*, which clarified that the offence and defence of infanticide are available only in respect of a woman who would otherwise be found guilty of

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22 A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 9.5, citing N Walker, Crime and Insanity in England: Volume One, The Historical Perspective (1965) 130; K O'Donovan, "The Medicalisation of Infanticide" [1984] Crim LR 259, 261; K Laster, "Infanticide: A Litmus Test for Feminist Criminological Theory" (1989) 22 *Australian and New Zealand J of Criminology* 151, 162.

23 Above, para 9.5 citing N Walker, *Crime and Insanity in England: Volume One, The Historical Perspective* (1965) 130; K O'Donovan, "The Medicalisation of Infanticide" [1984] *Crim LR 259*, 261; K Laster, "Infanticide: A Litmus Test for Feminist Criminological Theory" (1989) 22 *Australian and New Zealand J of Criminology* 151, 162.

24 K Brennan and E Milne, "100 Years of Infanticide: The Law in Context" in K Brennan and E Milne (eds) *100 Years of the Infanticide Act: Legacy, Impact and Future Directions* (2023) pp 11-12, citing D Seabourne Davies "Child Killing in England Law – Part 1" (1937) 1 MLR 203.

25 Above, p 13, citing the 1936 case of *Hale,* in which the judge held the 1922 Act could not apply to the killing of a three-week-old infant.

26 Above, p 5, citing A M Kilday, *A History of Infanticide in Britain, c 1600 to the Present* (2013).

27 Above, p 14, citing T Ward, "The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860-1938" (1999) 8 *Social and Legal Studies* 163.

28 Above, p 14; K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 211-212.

murder or manslaughter (these amendments are discussed above at paragraphs 9.5 to 9.6). We also considered potential reform to the law of infanticide prior to the decision in *Gore* in our 2006 report on murder, manslaughter and infanticide. We concluded that "the lesser category of offence [of infanticide], and consequently the more lenient sentences that are customary, are warranted."[29]

JUSTIFICATIONS FOR A SEPARATE INFANTICIDE DOCTRINE

9.19 Cases in which a mother kills her infant child typically occur in the context of the mother facing extreme vulnerabilities. Discourse on the explanations underlying these vulnerabilities often distinguishes between two categories: bio-psychiatric[30] and socio-economic explanations. These explanations may be used to justify the existence of the doctrine of infanticide as they lead to the unique "disturbance in the balance of the mind" in mothers of young children as contemplated by the legislation.

Bio-psychiatric explanations

9.20 Mothers who kill their children may suffer from mental health conditions, which may be pre-existing, directly connected to the childbirth itself, or independent of childbirth.[31] These disorders include postpartum psychosis or postpartum depression, dissociative psychosis, dissociative hallucinations, and "intermittent amnesia delivery".[32] Symptoms of these disorders may arise within days of birth and may last beyond a year,[33] but medical literature suggests that symptoms are most prevalent from one month to the first year after birth.[34]

9.21 Understandings of bio-psychiatric causes have developed since the introduction of the Infanticide Act. While some mental health conditions experienced by mothers post-childbirth are generally understood to be caused by hormonal and biological changes from labour and childbirth, uncertainty remains over the precise causes and the impact of social or genetic factors.[35] The Cambridge Pro Bono Project's report on

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29 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 8.36.

30 We have taken this term from Drs Brennan and Milne who have observed that "one strand of scholarship classes infanticide as … a bio-psychiatric doctrine that requires a mental disorder based on the hormonal consequences of pregnancy, birth and lactation." K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 211-212.

31 Cambridge Pro Bono, *The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938* (August 2024).

32 Above, p 34. See also, K Brennan and E Milne, "100 Years of Infanticide: The Law in Context" in K Brennan and E Milne (eds) *100 Years of the Infanticide Act: Legacy, Impact and Future Directions* (2023) p 7, citing M G Spinelli, "Neonaticide: A Systematic Investigation of 17 Cases" in M G Spinelli (ed), *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill* (2003) p 105.

33 Action on Postpartum Psychosis (Call for Evidence response).

34 Cambridge Pro Bono, *The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938* (August 2024), p 34 citing M G Spinelli, 'Maternal infanticide associated with mental illness: Prevention and the promise of saved lives' (2004) 161(9) *The American Journal of Psychiatry*, 1548.

35 Action on Postpartum Psychosis (Call for Evidence response); K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 201 citing B McSherry, 'The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility' (1993) 15 *Sydney Law Review* 292; K Brennan, 'Beyond the Medical Model: A Rationale for Infanticide Legislation' (2007) 58 *NILQ* 505, at 507–11; T Porter and H Gavin, 'Infanticide and

infanticide (“the CPP report”) includes a review of the medical literature on the underlying vulnerabilities which lead some mothers to kill their infant child. In relation to the psychiatric explanations, it concluded

> While there is no consensus in the medical literature that childbirth alone can cause sufficient mental disturbance to cause the mother to commit infanticide, there is some medical evidence correlating childbirth and the months that follow with heightened risk of psychiatric illness. Accordingly, the extent of causal connection remains unclear.[36]

9.22 Despite this ambiguity as to the causal connection, it is clear that some mothers may be impacted by bio-psychiatric explanations at the time that they kill their infant child. Accordingly, we conclude these vulnerabilities justify the reduction of the mother’s culpability for the killing.

9.23 We specifically discussed evidence relating to the effects of lactation in our 2006 Report and considered whether that reference should be removed. We referred to forthcoming empirical research that could “suggest that lactation may increase dopamine sensitivity in some women, which may trigger psychosis”.[37] We concluded that “we are not aware of evidence that definitively refutes the lactation theory. Thus, on balance, we recommend retaining the reference to lactation”.[38] Since the 2006 Report, medical evidence has been published which does not support the assertion that the effect of lactation is a cause of these postpartum disorders.[39] We will consider this medical evidence further, together with the need for the retention of the reference to lactation, in our subsequent consultation paper.

Socio-economic explanations

9.24 Alongside bio-psychiatric explanations, a range of social and environmental pressures can significantly impact the circumstances in which infanticide occurs. The underlying factors can include experiences of helplessness, fear, shame, isolation, economic

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Neonaticide: A Review of 40 Years of Research Literature on Incidence and Causes’ (2010) 11 *Trauma, Violence & Abuse* 99.

36 Cambridge Pro Bono, The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938 (August 2024), p 36.

37 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 8.26, citing M N Marks, A Wieck, A Davies, N Brown, R McIvor and I C Campbell, “Neuroendocrine Studies in Women at Risk of Post Partum Psychiatric Illness”. Although the 2006 Report indicates this research was forthcoming, it does not appear to have been published.

38 Above, para 8.26.

39 Cambridge Pro Bono, The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938 (August 2024), pp 34, 53; K Brennan and E Milne, “The Need for Judicial Interpretation of the Infanticide Act 1938” (2025) 89(4) *The Journal of Criminal Law* 193, 220-221, citing K Brennan, “Beyond the Medical Model: A Rationale for Infanticide Legislation” (2007) 58(4) *Northern Ireland Legal Quarterly* 505, 507-19. At fn 181, they note that “lactational psychosis” was a term recognised by the medical profession in 1938, but this was used interchangeably with “exhaustion psychosis”. The socio-economic and personal effects of motherhood more generally were considered relevant to the development of postpartum disorders, rather than breastfeeding.

hardship, lack of support, inability to cope and overwhelming pressures arising from the circumstances of pregnancy, birth, and early caregiving.[40]

9.25 Socio-economic explanations of why mothers kill their children are said to be particularly relevant in neonaticide cases, which sometimes do not appear to involve psychiatric illness, either pre-existing or developing immediately after childbirth.[41] Rather, cases of neonaticide occur following a "crisis pregnancy".[42] This term is used to refer to a situation where the fact of pregnancy causes a crisis for a woman due to the context of her life, usually where she is suffering domestic abuse, alcohol or substance abuse, poverty or economic deprivation and/or a lack of support. Crisis pregnancies can also result in the woman concealing or denying her pregnancy from herself as well as others.[43] These killings tend to be motivated by a range of features such as intense fear, shame, or panic following birth.[44]

9.26 The CPP report highlights research into the "risk factors" for mothers in neonaticide cases which include: mothers who are young; single; having a child for the first time; living with their parents and/or have had a break down in family communication due to strict fundamentalist or highly religious beliefs.[45] The CPP report includes detailed examples of 17 contemporary cases in which a mother has killed her infant child. These case studies include relevant facts and sentencing remarks.[46] Many of these cases involve women with complex and intersecting vulnerabilities at the time they killed their children, including mothers who: themselves were children at the time of

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40 K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 200 citing P J Resnick, 'Murder of the Newborn: A Psychiatric Review of Neonaticide' (1970) 126 American Journal of Psychiatry 1414; d'Orbán, above n. 8; S Amon, H Putkonen, G Weizmann-Henelius, M P Almiron, A K Formann, M Voracek, M Eronen, J Yourstone, M Friedrich and C Klier, 'Potential Predictors in Neonaticide: The Impact of the Circumstances of Pregnancy' (2012) 15 Archives of Women's Mental Health 167–74; Meyer and Oberman, above n. 37; L J Miller, 'Denial of Pregnancy' in M G Spinelli (ed.), Infanticide: Psychosocial and Legal Perspectives on Mothers who Kill (American Psychiatric Pub.: Washington DC, 2003), 81; M G Spinelli, 'A Systematic Investigation of 16 Cases of Neonaticide' (2001) 158 American Journal of Psychiatry 811; Beyer, McAuliffe Mack and Shelton, above n 37; G Milia and M Noonan, 'Experiences and Perspectives of Women who have Committed Neonticide, Infanticide and Filicide: A Systematic Review and Qualitative Evidence Synthesis' (2022) 29 Journal of Psychiatric and Mental Health Nursing 813.

41 Cambridge Pro Bono, The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938 (August 2024), pp 32-34, citing G Milia and M Noonan, 'Experiences and perspectives of women who have committed neonaticide, infanticide and filicide: A systematic review and qualitative evidence synthesis' (2022) 29(6) *Journal of Psychiatric and Mental Health Nursing*, 813; T Porter and H Gavin, 'Infanticide and Neonaticide: A Review of 40 Years of Research Literature on Incidence and Causes' (2010) 11(3) *Trauma, Violence & Abuse*, 99

42 K Brennan and E Milne, "100 Years of Infanticide: The Law in Context" in K Brennan and E Milne (eds) *100 Years of the Infanticide Act: Legacy, Impact and Future Directions* (2023) pp 6-7. See also, E Milne, *Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother* (2021).

43 Above, pp 6-7.

44 Above, p 7 citing K Beyer, S McAuliffe Mack and J L Shelton "Investigative Analysis of Neonaticide: An Exploratory Study" (2008) 35 *Criminal Justice and Behaviour* 522.

45 Cambridge Pro Bono, The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938 (August 2024), p 32, citing M Craig, 'Perinatal risk factors for neonaticide and infant homicide: can we identify those at risk?' (2004) 97(2) *Journal of the Royal Society of Medicine* 57.

46 Cambridge Pro Bono, The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938 (August 2024), Appendix I.

the killing; had unstable living and/or family situations; were not British citizens and may have had limited access to health and social services; and/or had significant mental health issues.

Analysis

9.27 The underlying purpose of the doctrine of infanticide is to show leniency within the criminal justice process to vulnerable mothers who kill their children in exceptional circumstances.[47] In all instances where someone has caused the death of another person, the harm is the same given that the person has died. Whether the conduct causing the death amounts to a homicide offence (and which offence should apply) should be determined by the culpability of the offender. The doctrine of infanticide does not exist because the harm is lesser, but because the mother's culpability is understood to be reduced in certain circumstances. As explained above, the specific vulnerabilities a mother may experience can arise as a result of both bio-psychiatric and/or acute socio-economic explanations. In our view these are legitimate bases upon which the culpability of a mother who kills her infant child is reduced. In assessing these justifications for the continued existence of infanticide doctrine, we also recognise the importance of situating it within its historical context. As noted at paragraph 9.17, the Infanticide Act 1922 was motivated by concerns about the socio-economic pressures that led vulnerable mothers to kill their newborn babies, and by a corresponding need for leniency in such cases.

9.28 We recognise that while social and cultural norms have shifted since the early 20th century, most women and girls who commit infanticide today continue to have extreme and complex vulnerabilities that may be exacerbated by the fact of pregnancy and giving birth. Recognition of the need for leniency in these cases has been reaffirmed since the introduction of the Infanticide Act 1922, and the difficult positions faced by mothers who kill their young children are widely recognised today.

9.29 Infanticide has also remained a distinct doctrine despite the introduction of partial defences to murder including diminished responsibility. There are views that infanticide is no longer necessary because of the partial defence of diminished responsibility.[48] For example, James Mason has argued that infanticide should "be readily subsumed under the gender-neutral doctrine of diminished responsibility".[49] He has criticised the conclusion in our 2006 Report that the doctrine should remain and has argued that this allows for unjustified leniency in circumstances "where the mother is not suffering from an identifiable mental illness, and may even kill for reasons other than her emotional disturbance".[50]

9.30 As noted in Chapter 1, we will consider the interaction between diminished responsibility and infanticide in greater detail in our subsequent consultation paper.

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47 See eg *R v Tunstill* [2018] EWCA Crim 1696 at [30]: "the purpose of the Infanticide Act was to ameliorate the potential harshness of the law of murder by recognising that in a period after birth a mother's balance of mind may be affected".

48 H Howard, "Myths and Moral Agency: A Principled Approach to Infanticide Law" in K Brennan and E Milne (eds) *100 Years of the Infanticide Act: Legacy, Impact and Future Directions* (2023).

49 J Mason, 'The Myth of Madness: Murderous Mothers and Maternal Infanticide' (2021) 85(6) *Journal of Criminal Law* 441, p 441.

50 Above, p 454.

Our initial view is that the existence of a partial defence of diminished responsibility does not undermine the continuing justification for the separate doctrine of infanticide. As we explained above, there are key differences in how the offence/defence of infanticide operates compared to partial defences to murder. The doctrine of infanticide accommodates a broader range of conduct and applies where the mother would otherwise be guilty of murder or of manslaughter.

9.31 In Chapter 7, we set out our conclusion that the primary role of the existing partial defences is to ensure appropriate sentencing which reflects a defendant's reduced culpability. The primary purpose of the infanticide doctrine is to provide for a "lower grade" offence than murder and manslaughter in appropriate cases involving vulnerable mothers, with corresponding implications for sentencing, procedure and labelling.[51] The doctrine recognises that these cases are qualitatively different due to the mother's very low level of culpability and therefore justify a distinct legal response.

9.32 Our present view is that the partial defence of diminished responsibility does not adequately account for the forms of vulnerability grounded in social, economic, or situational pressures described above, nor for disturbances of the mother's mind that may not amount to a medical disorder. A separate infanticide doctrine recognises the unique combination of bio-psychiatric and social vulnerabilities that can diminish culpability where a mother kills her infant child. Infanticide therefore remains a necessary option for cases where those vulnerabilities render a charge of murder or manslaughter inappropriate.

9.33 Finally, we also recognise that not all mothers who kill their children have reduced culpability, meaning that a murder or manslaughter conviction would be appropriate. For example, some cases may involve intentional child abuse. Drs Brennan and Milne have highlighted research which suggests that women kill their children far less frequently and for different reasons than men, who are much more likely to kill their children out of anger, frustration or abuse.[52] They concluded that, based on their 20 years of research, "maternal infant killings are almost always tragedies that involve vulnerable women with responsibility but limited culpability for the death of the child".[53]

THE CURRENT OPERATION OF THE INFANTICIDE DOCTRINE

9.34 Although the substance of the doctrine of infanticide has remained unchanged in law, its operation in practice appears to have shifted in recent years. We have heard evidence from stakeholders that in recent years mothers who kill their children are increasingly likely to be charged with murder rather than infanticide. Further, depending on the facts, juries may be reticent to accept infanticide as a defence. The evidence we received from stakeholders is outlined below.

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51 See para 9.5 above, citing *R v Gore* [2007] EWCA Crim 2789 at [19].

52 K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 201 citing K. Cavanagh, R E Dobash and R P Dobash, 'The Murder of Children by Fathers in the Context of Child Abuse' (2007) 31 *Child Abuse & Neglect* 731; A Wilczynski, 'Mad or Bad? Child-Killers, Gender and the Courts' (1997) 37 *British Journal of Criminology* 419.

53 Above, p 201.

9.35 Drs Brennan and Milne have argued that up until the 2000s, the Infanticide Act 1938 was used as a "legal device" to ensure lenient outcomes for women who killed their infants, with the CPS consistently accepting infanticide pleas and few cases reaching trial.[54] In contrast, within the last two decades there has been a "discernible shift" from the CPS, with the CPS increasingly charging murder rather than infanticide and greater reluctance from juries to accept infanticide.[55] This appears particularly acute in neonaticide cases; there have been no cases in the past 20 years in which the jury has convicted a mother of infanticide where she has killed her newborn child.[56] In contrast, where a mother kills her older infant, infanticide may be more frequently successful as a defence, but only if the defendant has been able to demonstrate some form of diagnosable mental health condition.[57] Drs Brennan and Milne have noted that neonaticide cases are very rare, meaning it is difficult to identify a pattern in these cases. Despite this limitation, they conclude that it appears to be increasingly difficult to obtain an infanticide conviction.[58]

9.36 According to the CPP report, there were only nine cases in which women were convicted of infanticide from 2002 to 2024, out of 17 cases in which women killed their infant child.[59] The report commented that there seemed to be little difference in the seriousness of the underlying facts between cases resulting in murder convictions and those resulting in infanticide.[60] Further, the CPP report highlighted that psychiatric evidence will often be critical to the outcome of these cases.[61]

9.37 In its response to our Call for Evidence, the Perinatal Legal Project compared the findings of Professor Mackay's research cited in our 2006 Report to the data in the CPP report. It argued that over a similar 12-year period (albeit with a smaller sample pool), the data showed the following trends:

(1) The number of murder convictions for women who killed their child increased from zero to seven.

(2) The number of custodial sentences increased from three to eight.

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54 K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 194-195, quoting R D Mackay, "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21.

55 Above.

56 Above, p 27, referring to the convictions for murder of Rachel Tunstill, Hannah Cobley and Silipa Keresi.

57 Above, p 28; K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 196.

58 K Brennan and E Milne, "The Need for Judicial Interpretation of the Infanticide Act 1938" (2025) 89(4) *The Journal of Criminal Law* 193, 194-195, pp 27-28.

59 Cambridge Pro Bono, The Law of Infanticide: A Preliminary Review of the UK Infanticide Act 1938 (August 2024), p 20.

60 Above, p 20.

61 Above, p 20.

(3) The minimum time that must be spent in custody increased from three to five years to 12 to 18 years.[62]

9.38 Stakeholders suggested various explanations for these trends:

(1) A prosecutor suggested that infanticide cases are not charged because they are likely diverted out of the criminal justice system entirely. This suggests that the CPS charge murder or manslaughter in cases where infanticide is not an appropriate charge.

(2) Academic stakeholders and a barrister suggested the approach of both the CPS and juries may be in part due to harsher public attitudes. They suggested this may lead the CPS to leave decisions to the jury to avoid criticism for appearing lenient.

(3) The Perinatal Legal Project also suggested that a general hardening of attitudes among the police, CPS, judges and juries, a lack of familiarity with the infanticide doctrine, and the relative simplicity of a murder charge may all contribute to these charging patterns. It also noted that the complexity of jury directions where a mother is charged with murder and the indictment includes manslaughter and infanticide as alternatives.

9.39 Drs Brennan and Milne have also observed that infanticide may increasingly be understood as a psychiatric defence requiring a diagnosed medical condition related to giving birth, reflecting a diminished shared understanding of the broader vulnerabilities that historically justified the infanticide doctrine. [63]

9.40 The apparent recent decline in charges and convictions does not alter our conclusion that the continued existence of the infanticide doctrine remains justified in principle. However, we recognise that this evidence suggests the doctrine is not currently operating in practice as it once did. The consideration of infanticide in our subsequent consultation paper will include discussion of whether substantive or procedural reform is needed to enable the current offence/defence to function more effectively.

INFANTICIDE AS BOTH AN OFFENCE AND DEFENCE

9.41 As we explain above, the doctrine of infanticide uniquely applies as both an offence and defence. There is relatively little in the historical development, academic commentary, or case law that explains the purpose in the current homicide structure of having a separate offence as well as defence. Below we explain the distinction between these two aspects of the infanticide doctrine and their application in practice.

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62 We note that the increase in the minimum time spent in custody may reflect broader trends towards longer custodial sentences for homicide offences, rather than any development specific to sentencing approaches in infanticide-related cases. See, Dr Richard Martin, *Sentencing for Murder: A Review of Policy and Practice,* https://www.sentencingacademy.org.uk/wp-content/uploads/2024/04/Sentencing-for-Murder-A-Review-of-Policy-and-Practice.pdf (April 2024).

63 K Brennan and E Milne, “The Need for Judicial Interpretation of the Infanticide Act 1938” (2025) 89(4) *The Journal of Criminal Law* 193, 196-197.

Infanticide as an offence

9.42 Infanticide as an offence provides an avenue for mothers who kill their infant children to avoid facing an indictment for murder or manslaughter in circumstances where their culpability is significantly reduced. As Blackstone's explains:

> [Infanticide] differs from diminished responsibility (and thus has survived the introduction of that defence) in that it can be charged from the outset and can be used to avoid charging a woman with the offence of murder (or now manslaughter) in relation to her own child.[64]

9.43 In our view, maintaining infanticide as a separate offence enables appropriate cases to be treated as infanticide from the very beginning of the charge(s) being laid. This is because it allows some vulnerable women in appropriate circumstances to avoid facing the prospect of a trial for murder or manslaughter.

9.44 This approach also permits the CPS and other criminal justice agencies to treat these offenders as distinct from other homicide offenders and has potential practical and procedural implications for the way the case is treated from the outset. For example, a defendant charged with murder cannot be granted bail by a magistrates' court as only a Crown Court judge has this power, and a decision must be made within 48 hours of first appearance.[65] The usual general right to bail under the Bail Act 1976 also does not apply to murder, and bail may only be granted where "there is no significant risk of the defendant committing, while on bail, an offence that would, or would be likely to, cause physical or mental injury to any person other than the defendant."[66] This demonstrates that a charge of infanticide, rather than murder, may have significant practical implications.

9.45 We acknowledge recent charging patterns suggest that the offence of infanticide is seldom charged in practice.[67] However, we consider that this trend does not undermine the principled rationale for retaining the offence. As we explain above, the justification for a distinct infanticide offence is grounded in its function within the homicide framework, rather than in current CPS charging behaviour. That said, we note that the apparent decline in its use may indicate that the benefits of a separate offence are not currently being realised in practice.

9.46 Ultimately, we recognise that a separate offence of infanticide is unusual given that no other defence to murder or manslaughter currently operates as an offence as well. However, from its introduction infanticide has always operated as a standalone offence and therefore has retained a degree of public and legal resonance. In our view the option to charge infanticide continues to play a valuable role in enabling appropriate cases to be treated outside the framework of murder or manslaughter. We therefore propose to retain an offence of infanticide within the homicide structure, as a separate offence to murder and manslaughter.

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64 Blackstone's 2026, B1.110.

65 Coroners and Justice Act 2009, s 115.

66 Coroners and Justice Act 2009, s 114(2).

67 See discussion at paras 9.35-9.37.

Infanticide as a defence

9.47 As explained at paragraphs 9.7 to 9.8, infanticide also operates as a defence. Accordingly, defendants charged with murder or manslaughter, where the statutory criteria are satisfied, are able to argue that infanticide is the appropriate verdict instead of the more serious charge. The defence must be available so that a defendant can raise it at trial. Without it, mothers who are charged with murder or manslaughter in circumstances where infanticide could have been charged would be at risk of being convicted of the more serious offence.

9.48 The defence ensures that even in cases where a decision has been made to charge a more serious offence of murder or manslaughter, the defendant is still able to raise infanticide, and the jury are able to consider it. It can result in the defendant being convicted of the lesser offence of infanticide, rather than murder or manslaughter. Therefore, for similar reasons to those we provide in support of maintaining infanticide as a separate offence, we conclude that the existing defence of infanticide remains an important mechanism for reflecting the reduced culpability of vulnerable mothers through a bespoke verdict. As with the offence, a verdict of infanticide following a successful plea of the defence leads to a more appropriate label and sentencing outcomes.

Consultation Question 12.

9.49 We provisionally propose that both the offence and defence of infanticide should be retained.

9.50 Do consultees agree?

CONCLUSION

9.51 Infanticide occupies a distinctive and circumscribed place within the law of homicide. We have concluded in this chapter that the acute vulnerabilities faced by mothers who kill their children, stemming from both bio-psychiatric and socio-economic explanations, can reduce the culpability of their actions. This reduced culpability is reflected in the doctrine of infanticide.

9.52 While we take the view that the offence/defence structure remains justified in principle, detailed analysis concerning the substantive elements of the doctrine, including its scope, language and interaction with other defences such as the partial defence of diminished responsibility, will be addressed in our subsequent consultation paper on defences. This is because the offence and defence share identical substantive elements and must be analysed together. The later consultation paper on defences will therefore consider these issues in depth, including whether substantive reform is needed to ensure infanticide can operate effectively. This may also include consideration of substantive issues such as:

(1) whether the doctrine should continue to be restricted to biological mothers;

(2) whether the doctrine should continue to be restricted to a child under the age of 12 months, and not apply to the killing of any other of the mother's children;

(3) whether the doctrine should be updated to reflect current medical evidence in relation to the effects of lactation; and

(4) whether the doctrine should refer to the effect of socio-economic factors on the balance of the mother’s mind.

Chapter 10: Other homicide offences

INTRODUCTION

10.1 In Chapters 5 to 8, we consider the general homicide offences of murder and manslaughter. The criminal law of England and Wales, however, contains a wide variety of offences relating to death, ranging from road traffic offences to cases involving dangerous dogs.

10.2 These offences can be described collectively as "specific" or "other" homicide offences.[1] These are inexact terms but, in this project, we use them to mean an offence in which death is a distinct element that must be proved by the prosecution, but which falls outside the general homicide offences. It may not always be apparent that an offence is in fact a homicide offence; by way of example, we consider offences which have a higher maximum sentence where death is caused[2] to have created a form of homicide offence.[3]

10.3 Although we refer to these offences under a single heading, they cover a spectrum of conduct and culpability that cannot be easily categorised or distinguished. The rationale behind their introduction, and the reasons why they have been grouped separately to the general homicide offences, vary significantly. These reasons include:

(1) Gaps in the conduct covered by the existing general homicide offences of murder and manslaughter.

(2) A distinct element of the specific homicide offence which means that the offence is better suited to address the specific conduct that it targets, or that the offence would not be properly grouped with the general homicide offences.

(3) Public and political pressure to create the offence.

(4) Consistency across the criminal law.

(5) Social issues or concern for public safety. This includes a desire to signal the importance of an offence by recognising it as separate from the general homicide offences.

(6) Prior to the abolition of capital punishment in 1965, the need to remove certain conduct from the remit of the death penalty.

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1 See, for example, Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 1.12.

2 Such as aggravated vehicle-taking, Theft Act 1968, s 12A(4).

3 In *R v Courtie* [1984] AC 463, Lord Diplock stated at [471] that where the punishment for an offence prescribed in statute varied according to the existence or absence of particular factual ingredients, then that statute had created separate and distinct offences. This was so regardless of whether the language of the statute described them as distinct offences. See also *R v Sherwood* [1994] 10 WLUK 74, which applied this principle to s 12A of the Theft Act 1968.

10.4 In this chapter, we consider the existence of these offences in relation to the structure of the general homicide offences, and address areas in which we have received evidence suggesting a need for reform. Just because something is a homicide offence does not mean that we are compelled to consider it for reform within the scope of this project. Although we identify a range of offences in order to explore their relationship to murder and manslaughter, we only consider them in more detail where we have received evidence suggesting that there are concerns about a particular offence.

THE EXISTING SPECIFIC HOMICIDE OFFENCES

10.5 Below, we set out some of the offences in this category to provide an overview of this area of homicide law and consider the evidence we have heard in relation to reform of certain specific homicide offences. This chapter does not provide an exhaustive list of specific homicide offences. Further, although the offence/defence of infanticide could be considered a specific homicide offence, we consider infanticide in detail in Chapter 9, and so it is not included in this chapter.

Road traffic offences

10.6 While most of the specific homicide offences relating to vehicles are found in the Road Traffic Act 1988, they were introduced at different points in the Act's lifetime. They are:

(1) Causing death by dangerous driving.[4] This offence is indictable only.[5] It replaced the existing offence of causing death by reckless driving.[6] On introduction in 1991, causing death by dangerous driving carried a maximum sentence of ten years' imprisonment. This rose to 14 years in 2004, and then to discretionary life imprisonment[7] in 2022.[8]

(2) Causing death by careless or inconsiderate driving whilst under the influence of drink or drugs.[9] Although this could be seen as an aggravated form of causing death by careless driving (below), it was introduced first; liability was not extended to drivers who had merely been careless until 2008. Like causing death by dangerous driving, the offence is triable only on indictment and carries a maximum (discretionary) sentence of life imprisonment for offences committed after 28 June 2022. For offences committed before that date, the maximum sentence is 14 years' imprisonment.

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4 Road Traffic Act 1988, s 1.

5 Meaning that the offence can only be tried in the Crown Court and not in a magistrates' court.

6 Road Traffic Act 1960, s 1 (and later Road Traffic Act 1988, s 1), which carried a maximum sentence of five years' imprisonment. This was amended by the Road Traffic Act 1991, becoming causing death by dangerous driving.

7 A discretionary life sentence means the judge may still have the power to sentence someone to life imprisonment in deserving cases, without it being mandatory. For further explanation see Chapter 1.

8 The maximum sentence of discretionary life imprisonment applies to offences committed after 28 June 2022; for offences committed before that date, the maximum sentence is 14 years' imprisonment.

9 Road Traffic Act 1988, s 3A, in force since July 1992.

(3) Causing death by driving whilst disqualified.[10] Originally included in the offence of causing death by driving whilst uninsured or without a license (below), this became a separate offence with a higher maximum sentence in 2015. The offence is indictable only, with a maximum sentence of ten years' imprisonment.

(4) Causing death by careless or inconsiderate driving.[11] This offence is triable either way,[12] and carries a maximum sentence of five years' imprisonment.

(5) Causing death by driving whilst uninsured or without a license.[13] This offence is triable either way. It came into force in August 2008 and carries a maximum sentence of two years' imprisonment.

10.7 As with many of the offences in this chapter, these offences could perhaps be thought of as aggravated forms of existing driving offences (such as dangerous driving or driving whilst disqualified)[14] rather than stand-alone homicide offences.

10.8 Some responses to our Call for Evidence discussed the offence of causing death by dangerous driving. This offence is committed where a person causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place.[15] The definition of "dangerous driving" for the purposes of this offence is the same as the lesser offence of dangerous driving:[16]

> …. a person is to be regarded as driving dangerously if …
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.[17]

10.9 It is not necessary for the prosecution to prove that the defendant's driving was the sole or main cause of death.[18] It is enough to show that the driving was a real cause of death which was more than minimal.[19]

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10 Road Traffic Act 1988, s 3ZC.

11 Road Traffic Act 1988, s 2B.

12 Meaning that it can be tried in the Crown Court or in a magistrates' court.

13 Road Traffic Act 1988, s 3ZB.

14 Road Traffic Act 1988, ss 2 and 103 respectively.

15 Replacing the existing offence of causing death by reckless or dangerous driving under s 1 of the Road Traffic Act 1960 (and later s 1 of the Road Traffic Act 1988), which carried a maximum sentence of five years' imprisonment.

16 Road Traffic Act 1988, s 2.

17 Road Traffic Act 1988, s 2A.

18 *Archbold Criminal Pleading and Evidence* 2026 at 32-9. See also Crown Court Compendium, pp 7-30 to 7-32.

19 *R v Hennigan* [1971] 3 All ER 133.

10.10 In response to our Call for Evidence, Professor John R Spencer argued that the offence "is capable of causing grave practical injustice" as it stands. He suggested that many of the defendants who are convicted of the offence have a "minimal" level of blameworthiness and have made driving mistakes that many others do, just not usually with such fatal consequences.

10.11 By contrast, we heard a suggestion that causing death by dangerous driving should be reclassified as a more serious offence, which could then result in similar sentencing outcomes to those seen in murder cases.

10.12 To the extent that this is an issue concerning sentencing in causing death by dangerous driving cases, it is best considered as part of the future sentencing consultation paper for this project. To the extent that this relates to the fault element of causing death by dangerous driving, it is possible that this would be better suited to consideration in the context of the wider road traffic offences rather than a homicide review.

Aggravated vehicle-taking causing death

10.13 The offence of aggravated vehicle-taking[20] is committed where the defendant commits the "basic" offence of taking a vehicle without consent,[21] and there is an additional statutory aggravating element. These are that the vehicle was driven dangerously in a public place, or that the vehicle was damaged, or that, owing to the driving of the vehicle, an accident was caused which either injured any person or caused damage to any property other than the vehicle.

10.14 Ordinarily, the maximum sentence on conviction on indictment is two years' imprisonment. However, if it is proved that an accident was caused owing to the driving of the vehicle and the accident caused the death of a person, then the statute provides for a higher maximum sentence.[22] As a result, the authorities suggest that "aggravated vehicle-taking causing death" should be considered a distinct homicide offence.[23] When the offence came into force in 1992, the maximum sentence where death was caused, was five years' imprisonment. This was raised to 14 years' imprisonment in 2004.

10.15 The Crown Prosecution Service ("CPS") guidance for the offence states:

> Following the principle in *R v Courtie* [1984] AC 463 aggravated [taking without consent] resulting in death should be considered a separate offence and the death should be pleaded on the face of the indictment or charge. Where there is evidence of dangerous driving and that the defendant was the driver, prosecutors should

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20 Theft Act 1968, s 12A.

21 Theft Act 1968, s 12.

22 Criminal Justice Act 2003, s 285(1).

23 In *R v Courtie* [1984] AC 463, Lord Diplock stated at [471] that where the punishment prescribed varied according to the existence or absence of particular factual ingredients, separate and distinct offences were created "whether the statute by which they are created does so by using language which treats them as being different species of a single genus of offence, or by using language which treats them as separate offences unrelated to one another". See also *R v Sherwood* [1994] 10 WLUK 74, which applied this principle to s 12A of the Theft Act 1968.

charge an offence of causing death by dangerous driving contrary to section 1 of the Road Traffic Act 1988.[24]

10.16 We are aware that in *R v Taylor*, the Supreme Court remarked that:

> Although aggravated vehicle-taking carries a higher sentence if the vehicle is involved in a fatal accident, the death of the victim is not an element of the offence. This is not therefore strictly speaking an offence of homicide.[25]

The fundamental issue in *Taylor* was not whether section 12A of the Theft Act 1961 creates a separate homicide offence. The court was considering whether to distinguish aggravated vehicle-taking from the offences of causing death by driving while unlicensed or uninsured in order to establish whether the former was an offence of strict liability. The judgment did not give detailed reasons for this statement, and the court does not appear to have engaged with *Courtie*[26] or *Sherwood*[27] in reaching this conclusion. We consider that the court may have fallen into error in this aspect of the judgment; it does not, however, appear to have made a substantive difference to the outcome of the case.

10.17 We have not heard specific calls for reform of this offence. We note that the basic offence does not require the defendant to have been driving or to have actually taken the vehicle; it can be committed by allowing oneself to be carried in the vehicle knowing that it has been taken without authority.[28] It is a defence to the aggravated offence to prove that the defendant "was neither in nor on nor in the immediate vicinity of the vehicle when that driving, accident or damage occurred".[29] The aggravated vehicle-taking causing death offence could therefore potentially be committed by a person who was not driving but was in the vehicle at the time of the relevant accident.

10.18 It seems that the courts have not expanded on how the offence applies to persons other than the vehicle-taker.[30] However, *Wilkinson's Road Traffic Offences* cites a remark from then-Home Secretary Kenneth Baker explaining the rationale behind the offence:

> The Bill does not want any legal argument about the precise state of mind of those involved. It does not want to know whose foot was on the pedal, whose hand on the wheel or handbrake, or who might have said what to whom. The Bill is looking at the total aggravating consequences of the whole joyriding event, and it states that

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24 Crown Prosecution Service ("CPS"), *Theft Act Offences* (last updated 12 September 2024). See also *Archbold Criminal Pleading, Evidence and Practice* 2026 ed., 21-165.

25 *R v Taylor* [2016] UKSC 5.

26 [1984] AC 463.

27 [1994] 10 WLUK 74.

28 Theft Act 1961, s 12(1).

29 Theft Act 1961, s 12A(3)(b).

30 *Wilkinson's Road Traffic Offences* 32nd Ed, 15-32. There is some discussion of the justification for imposing strict liability for the aggravated offence on those who were party to the basic offence in *R v Taylor* [2016] UKSC 5 at [28].

everyone guilty of taking, or travelling in the car should be liable for more serious punishment. [31]

10.19 Despite the uncertainty as to whether a passenger could be prosecuted for causing death as a principal under this offence, we are not aware of any cases in which this argument has been pursued in practice.

Prospective offences relating to automated vehicles

10.20 The Automated Vehicles Act 2024 implements the recommendations of the joint report on automated vehicles carried out by the Law Commission of England and Wales and the Scottish Law Commission.[32] The Act inserts several prospective homicide offences into the Road Traffic Act 1988.[33] These are not yet in effect, and at the time of writing the date for implementation is still to be appointed. The offences relate to causing death or serious injury through use of an automated vehicle without a driver or licensed oversight[34] or through use of an automated vehicle in a dangerous state,[35] or by causing a danger to road users resulting in an automated vehicle killing or seriously injuring a person.[36]

10.21 These are an example of offences created to address a lacuna in the law – in this case, where the existing homicide offences do not adequately address the developing technology of automated vehicles. We considered whether the offence of manslaughter could be sufficient to address some cases, but concluded that a statutory aggravated offence "would be preferable". We noted existing criticism on the use of crimes of negligence to underpin unlawful dangerous act manslaughter, and argued that the offence of gross negligence manslaughter "would be available but has uncertain boundaries, which might be further blurred if case law is adapted to automated vehicles."[37]

Prospective cycling offences

10.22 Until recently, there were no homicide offences specific to causing death as a cyclist. It was possible to deal with some cases of cycling equivalent to the existing motoring homicide offences through the offence of causing bodily harm by wanton or furious driving.[38] However, this is a very old offence, created predominantly in respect of driving a horse-drawn vehicle, and the offence only carries a maximum sentence of two years' imprisonment. The Court of Appeal had previously observed the sentencing disparity between this offence and the offence of causing death by dangerous driving.

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31 *Hansard* (HC), 9 December 1991, vol 200 col 620–86.

32 Automated Vehicles: joint report, Law Com No 404, Scot Law Com No 258. See discussion of road traffic offences at paras 4.37, 8.106 to 8.119 and 11.59 to 11.74.

33 For another prospective homicide offence contained within the Automated Vehicles Act 2024, see s 25 (an aggravated offence of failure to provide information relevant to vehicle safety where death occurs).

34 Road Traffic Act 1988, s 34C.

35 Road Traffic Act 1988, s 34D.

36 Road Traffic Act 1988, s 22B.

37 Automated Vehicles: joint report, Law Com No 404, para 12.48 and fn 626.

38 Offences against the Person Act 1861, s 35. See *R v Lambert* [2008] EWCA Crim 2109, [2009] 1 Cr App R (S) 92 and *R v Hall* [2009] EWCA Crim 2236, [2010] 1 Cr App R (S) 95.

In *R v Lambert,* the court invited Parliament to "consider legislating for an appropriate specific offence and maximum penalty" if the risk of death or serious injury to pedestrians by dangerous cycling was becoming a significant problem "as is widely believed".[39]

10.23 The Crime and Policing Act 2026 inserts two new offences into the Road Traffic Act 1988. These are causing death by riding a cycle dangerously[40] and causing death by riding a cycle carelessly.[41] The maximum sentence for each offence mirrors the maximum sentences for the offences of causing death by dangerous driving and causing death by careless driving.

Offences related to infanticide

10.24 We consider infanticide in Chapter 9. There are, however, other offences which may be relevant in the event of the death of a child.

Causing or allowing the death of a child or vulnerable adult

10.25 Section 5 of the Domestic Violence, Crime and Victims Act 2004 imposes criminal liability on a defendant in circumstances where a child or vulnerable adult dies or suffers serious physical harm as a result of the unlawful act of a person who was a member of the victim's household and had frequent contact with them. At the time of the unlawful act, there must have been a significant risk of serious physical harm being caused to the victim.[42] The defendant is then liable where either:

(1) the defendant was the person whose act caused the death or serious physical harm; or

(2) the defendant was or ought to have been aware of the significant risk of serious physical harm, and they failed to take reasonable steps to protect the victim, and they foresaw or ought to have foreseen the circumstances of the act.

10.26 Where death is caused, the offence is indictable only. The offence came into force in March 2005, and originally only applied to causing death; causing serious injury was added in 2012. The fatal version of the offence remains a "distinct offence with its own rules".[43]

10.27 Given the fault element of the offence and the requirement for an underlying unlawful act, there are obvious comparisons with unlawful dangerous act manslaughter.[44]

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39 *R v Lambert* [2008] EWCA Crim 2109, [2009] 1 Cr App R (S) 92 at [4].

40 Road Traffic Act 1988, s 27A, as amended by Crime and Policing Act 2026, s 141.

41 Road Traffic Act 1988, s 28B, as amended by Crime and Policing Act 2026, s 141.

42 We are aware that there have been some controversial recent developments in the case law for this offence. In *R v Jamal* [2026] EWCA Crim 135 (unreported), for example, the court held that a significant risk of serious physical harm does not require that the risk was based on proof of previous behaviour or that the risk pre-dated the time of the unlawful act. The court stated that "even if the causer is engaged in conduct that will instantaneously harm the victim (V), it is possible to say that there is a present significant risk in the split second before that occurs" (at [37]).

43 *Blackstone's Criminal Practice 2026*, B1.91.

44 For a more detailed discussion of the offence of manslaughter, see Chapter 8.

However, section 5 “provides a route to conviction whenever the jury are unable to say which of two (or sometimes more) defendants, caused or allowed the death of a child or vulnerable adult”.[45] The prosecution only has to prove that the defendant caused or allowed the death – they are not required to prove whether they caused or whether they allowed the death. Although the CPS guidance to prosecutors states that the prosecution should be “clear about the basis on which the case is put against each suspect”, it acknowledges that “it may or may not be possible after all of the evidence has been heard to invite conviction for one defendant on the basis that they caused the death … and the remaining suspects on the basis of allowing [the death]”.[46]

10.28 The CPS guidance specifies that where there is sufficient evidence to prosecute murder or manslaughter, these should be charged.[47] However, the section 5 offence can be charged alongside murder and manslaughter as an alternative.[48]

10.29 The maximum sentence for causing death under this section is discretionary life imprisonment for an offence committed on or after 28 June 2022; prior to this, it was 14 years’ imprisonment. Although this section creates a separate offence, there is a “clear” link with manslaughter, and “the general approach to sentencing in manslaughter cases provides useful assistance to the court considering the sentencing decision after conviction of the section 5 offence”.[49] Sentencing such cases calls for careful assessment of culpability, but “allowing” a death is not necessarily less culpable than “causing” a death.[50]

10.30 We have heard some concerns that the section 5 offence may be used to prosecute mothers who are themselves victims of abuse. We consider issues of domestic abuse more widely in Chapter 14. To the extent that this is an issue which requires law reform, rather than a change in prosecutorial practice, we consider that this is best dealt with in our future consultation paper on defences.

Suffocation of a child under three years of age

10.31 The statutory offence of cruelty to persons under 16[51] contains provisions that relate specifically to the suffocation of infants. Section 1(2)(b) of the Children and Young Persons Act 1933 provides that a person shall be deemed to have neglected an infant in a manner likely to cause injury to its health (and will therefore be guilty of an offence) if:

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45 *R v Ikram and Parveen* [2008] EWCA Crim 586, [2008] 4 All E.R. 253 at [67].

46 CPS, *Homicide: Murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult* (last updated 10 March 2026).

47 CPS, *Homicide: Murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult* (last updated 10 March 2026).

48 As a result, there are special evidential and procedural rules for cases where the defendant is charged with murder or manslaughter and a section 5 offence in respect of the same death – see Domestic Violence, Crime and Victims Act 2004, s 6.

49 *R v Ikram and Parveen* [2008] EWCA Crim 586, [2008] 4 All ER 253 at [67].

50 *Blackstone’s Criminal Practice 2026*, B1.98.

51 Children and Young Persons Act 1933, s 1.

(1) the death of an infant under three years of age was caused by suffocation;

(2) that suffocation was not caused by disease or by the presence of any foreign body in the throat or air passage of the infant;

(3) the death was caused while the infant was in bed with another person aged 16 or over; and

(4) that other person was under the influence of drink or a prohibited drug at the time they went to bed.

10.32 This offence is, strictly speaking, one of child cruelty rather than homicide. In suffocation cases, however, the death of the infant is a factual element that leads to a finding of neglect and therefore to a conviction, and so we include this aspect of the offence of child cruelty. The offence is triable either way. The maximum sentence on conviction is 14 years' imprisonment for offences committed on or after 28 June 2022. The maximum sentence for offences committed before that date is ten years' imprisonment.

Encouraging or assisting suicide

10.33 Section 1 of the Suicide Act 1961 revoked the common law rule that suicide was a criminal offence. Originally, section 2 of the Act created an offence of aiding, abetting, counselling or procuring another's suicide or attempted suicide. This was amended in 2009,[52] becoming the offence of encouraging or assisting suicide:

(1) A person commits an offence if—

(a) they do an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

(b) their act was intended to encourage or assist suicide or an attempt at suicide.

10.34 As of February 2010, an offence can be committed under this section whether or not a suicide or an attempted suicide actually occurred.[53]

10.35 The offence is triable only on indictment. The Director of Public Prosecutions'[54] consent is required to initiate proceedings. The maximum penalty is 14 years' imprisonment.

10.36 Encouraging or assisting suicide is available as an alternative verdict on a trial on indictment for murder or manslaughter (if it is proved that the deceased person died by suicide).[55] The partial defence of suicide pact, which operates to reduce a charge

52 Coroners and Justice Act 2009, s 59.

53 Suicide Act 1961, s 2(1B), amended by Coroners and Justice Act 2009, s 59(2).

54 The head of the Crown Prosecution Service.

55 Suicide Act 1961, s 2(2).

of murder to voluntary manslaughter,[56] originally covered being a party to the other person killing themselves, but this was repealed by the Suicide Act 1961.[57]

10.37 We note that this offence could potentially be charged as an alternative to manslaughter in suitable cases relating to suicide resulting from domestic abuse; we consider this in Chapter 14.

Dangerous dogs

10.38 Section 3 of the Dangerous Dogs Act 1991 provides for an offence of being the owner or person in charge of a dog which is dangerously out of control. The section creates an aggravated offence where the dog injures any person or assistance dog while out of control.

10.39 The offence is triable either way. The maximum sentence for an aggravated offence varies depending on the severity of the harm. Under subsection 4A, the relevant maximum sentences are 14 years' imprisonment if a person dies as a result of being injured, five years in any other case where a person is injured, or three years in any case where an assistance dog is injured. Following the rationale in *R v Courtie*[58] (considered above in relation to aggravated vehicle-taking), there may therefore be a distinct offence of being the owner or in charge of a dog dangerously out of control where death is caused.

10.40 The Sentencing Council notes that in some dangerous dog cases involving a death, manslaughter charges have been brought instead of a charge under section 3 of the Dangerous Dogs Act 1991.[59]

RELATIONSHIP WITH THE GENERAL HOMICIDE OFFENCES

10.41 In Chapter 8 we consider the principles underpinning the offence of manslaughter, describing it as a catch-all tier for offenders who cause death with sufficiently high culpability to justify conviction for a homicide offence. One might reasonably ask why a principled structure of homicide should also need a variety of specific homicide offences scattered across a range of different statutes. Could the boundaries of manslaughter not have been adjusted to capture this conduct? If conduct falls outside of the boundaries of manslaughter, is it deserving of a homicide label at all? Should there instead be a *fourth* tier on the general homicide ladder which aims to capture conduct falling outside of manslaughter?

10.42 We have identified three main justifications for retaining the specific homicide offences in their current form as supplementary offences, rather than attempting to incorporate them into manslaughter or restructure them as a fourth tier of the homicide ladder. Firstly, the rationale underpinning the creation of the specific homicide offences varies and often explains why they should be separate from the general homicide offences.

56 Homicide Act 1957, s 4.

57 Suicide Act 1961, Sch 2.

58 [1984] AC 463.

59 Sentencing Council Dangerous dog offences guideline: Overarching issues and the context of the guidelines, Sentencing Council (2015), p 1.

Secondly, strict legal causation is a less central concept for some of these offences. Thirdly, in most cases (although not all) the defendant's culpability falls short of the high level required for the general homicide offences.

10.43 On a pragmatic level, creating a single general offence encompassing the vast range of conduct and culpability covered by the specific homicide offences would be a near-impossible task. Any offence attempting to do so would likely find itself substantially amended or obsolete in future, as new technologies, emerging social issues or unanticipated practical difficulties necessitated the creation of new elements or offences. The proof of this lies in the way in which the existing specific homicide offences have evolved, considered below. Applying a single label to such a broad range of conduct could also create issues of inaccurate or unfair labelling; we consider this problem more generally in Chapter 3.

The rationale behind the specific homicide offences

10.44 The specific homicide offences can be distinguished from the general homicide offences through examination of the reasons underpinning their introduction. In this section, we explore some of those reasons.

10.45 The two most apparent reasons for the statutory scheme of fatal motoring offences are that:

(1) the road traffic element of these cases distinguishes them from the general homicide offences, meaning that they are better grouped as road traffic offences; and

(2) there were concerns that those who had caused death by driving were being charged with manslaughter but not convicted.

10.46 The Law Commission's 1985 report on codification of the criminal law[60] recognised that "it is obviously tempting" to codify the fatal motoring offences alongside other homicide offences. However, it argued that the separation of these offences from other motoring offences would cause serious difficulties.[61] Firstly, all the motoring offences share "complex provisions relating to the disqualification from driving and endorsement of licences". Secondly, serious motoring offences causing death are usually charged alongside other traffic offences. The report therefore concluded that all motoring offences should remain under the Road Traffic Act 1972 (as it then was).

10.47 It might be argued that the road traffic context is the defining factor in these cases; the fact that death has been caused is an aggravating element, and as such it is necessary to group deaths caused by driving as road traffic offences, rather than alongside the general homicide offences. Similar approaches can be seen in the aggravated vehicle-taking and dangerous dog offences considered above.

10.48 The second reason we have identified is the perceived reluctance of juries to convict drivers of manslaughter where they have caused death. During debate over amendments to the Road Traffic Act 1988, including the introduction of the offence of

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60 Codification of the Criminal Law (1985) Law Com No 143.

61 Above, para 2.11.

causing death by dangerous driving, Lord Brabazon of Tara argued that "causing death has existed in the road traffic code since 1956, since juries were reluctant to convict of manslaughter".[62]

10.49 Professor Sally Cunningham has argued that this reluctance from juries to convict drivers of manslaughter:

> … stemmed from a feeling that it could just as easily be the jurors themselves who were in the dock, and luck was between them and the label of 'manslaughterer'. This mentality…was to be cured by creating a new offence, bearing a succinct description of what the offender had done.[63]

10.50 However, Professor Cunningham also argued that public attitudes to deaths caused by driving may have changed since 1956, noting that what little evidence there is suggests that juries would now be more willing to convict drivers of manslaughter. Professor Barry Mitchell's public opinion research from 2000 found that many interviewees believed motor vehicle homicides should be placed on par with murder and manslaughter, with drunken motor drivers who cause death being convicted of "at least" manslaughter.[64]

10.51 Evidential issues leading to difficulties securing convictions are not an uncommon reason for the introduction of a new homicide offence. We do not consider that this is problematic, provided that the severity of the new offence remains proportionate to the fault elements of that offence and does not simply carry the same consequences as murder or manslaughter without the equivalent safeguards. Hansard suggests that the rationale behind the introduction of the aggravated vehicle-taking offence was to resolve the problem of evidential difficulties in prosecuting such cases for serious offences like manslaughter. Then-Home Secretary Kenneth Baker MP remarked on the Government's reasons for introducing the offence:

> Over the past few months we have witnessed a succession of very nasty cases of aggravated vehicle taking. In some cases, the law has been able to punish the basic taking itself. It has also, on occasion, been able to provide more serious charges against some of the offenders involved - in some cases it has been possible to charge for manslaughter. Thanks to the efforts of the police, the Crown Prosecution Service and the courts, it has, on occasion, managed to bring serious charges in some really bad cases, but it has not, and cannot, treat the total mischief with the certainty and severity which it deserves. The Bill will enable it to do so.[65]

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62 *Hansard* (HL), 10 June 1991, vol 529, col 904.

63 S Cunningham, "Vehicular Homicide: Need for a Special Offence?" in CMV Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008), p 104.

64 B Mitchell, "Further Evidence of the Relationship between Legal and Public Opinion on the Law of Homicide" [2000] *Criminal Law Review* 814, 823.

65 *Hansard* (HC), 9 December 1991, vol 200, col 625.

10.52 In the same debate, Roy Hattersley MP asked the Home Secretary why the offence was needed, given that existing offences such as causing death by dangerous driving carry similar penalties.[66] Then-Minister of State John Patten MP responded:

> It is because of the evidential difficulties of bringing a successful prosecution, under all the different statutory provisions to which the right hon. Gentleman referred, when so-called joyriding takes place.[67]

10.53 Similar reasoning underpinned the creation of the offence under section 5 of the Domestic Violence, Crime and Victims Act 2004. The explanatory notes to the Act[68] state that the introduction of the offence follows on from the Law Commission proposals the 2003 report "Children: their non-accidental death or serious injury (criminal trials)".[69]

10.54 The Law Commission's 2003 report recommended the introduction of an aggravated version of the offence of child cruelty, in the form of "cruelty contributing to death", as well as a new offence of "failure to protect a child" from offences being committed against them.[70] The report argued that in many cases where a child had died or been injured, it was difficult to prove which of two or more defendants (often two parents) were directly responsible due to the rules of evidence and procedure. With no case against any one defendant, all defendants must be acquitted. The offences being charged in these cases - murder, manslaughter and offences against the person - were not operating effectively.[71] The report concluded that the law represented:

> … a significant obstacle to the effective investigation into and identification and punishment of those who are guilty of the most serious offences against the most vulnerable members of society.[72]

10.55 The section 5 offence was ultimately formulated differently to the Law Commission's recommended offences. However, the rationale behind the offence appears to remain rooted in filling the perceived gaps left by the general homicide offences.

10.56 Public safety concerns, as well as social and political pressure, underpin the offence of being the owner or person in charge of a dog which is dangerously out of control causing death.[73] At the second reading of the Dangerous Dogs Bill in the House of Lords, particular reference was made to several recent high-profile dog attacks.[74] Lord Richard remarked on the speed with which the Government had reacted, suggesting

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66 *Hansard* (HC), 9 December 1991, vol 200, col 628.

67 *Hansard* (HC), 9 December 1991, vol 200, col 629.

68 Domestic Violence, Crime and Victims Act 2004, Explanatory Notes, para 6.

69 Children: their Non-Accidental Death or Serious Injury (Criminal Trials) (2003) Law Com No 282.

70 Children: their Non-Accidental Death or Serious Injury (Criminal Trials) (2003) Law Com No 282.

71 We acknowledge, however, that offences are not necessarily failing to operate effectively merely because defendants are being acquitted; an acquittal may have been the appropriate outcome in the individual case.

72 Children: their Non-Accidental Death or Serious Injury (Criminal Trials) (2003) Law Com No 282, para 2.37.

73 Dangerous Dogs Act 1991, s 3.

74 *Hansard* (HL), 25 June 1991, vol 530, col 510 and *Hansard* (HL), 25 June 1991, vol 530, col 534.

that this seemed to "smack more of a concentration on the headlines"[75] and had led to a "perhaps not entirely coherent" approach.[76] Similarly, Baroness Ewart-Biggs expressed concerns about the way in which policy had been "invented rather as an instant response to the terrible attacks".[77]

10.57 Explanatory notes attached to various recent amendments to the Dangerous Dogs Act 1991 imply that the overall rationale behind the Act is one of public policy, aimed at ensuring public safety.[78] In 2014, the offence in section 3 was amended to apply to dog attacks in any place, not just public places, after "reports of increases in deliberate attacks using dogs raised concerns about the need for further powers that could be applied to dog owners".[79]

10.58 It is unlikely that a single general homicide offence could adequately address all of these purposes; it is equally unlikely that it could anticipate justifications for specific homicide offences that may arise in future.

Causation

10.59 The meaning of causation is "heavily context-specific" and it is "not always safe to suppose that there is a settled or 'stable' concept of causation which can be applied in every case".[80] The courts have remarked that "as in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury".[81] In Chapter 8, we consider the causal element of manslaughter. While the general principles of factual and legal causation apply to the specific homicide offences, we observe that causation is sometimes less central to these offences than it is to the general homicide offences. Provided that the relevant fault element is satisfied, some of the offences discussed in this chapter can be committed by simply allowing or being present for the conduct which actually caused the death.[82] Even where there is a direct causal requirement, it is sometimes attached to conduct with a comparatively low fault element.

10.60 To amount to an offence of causing death by driving whilst uninsured,[83] for example, a defendant's driving need not amount to careless or inconsiderate driving. There must be some act or omission in the control of the car which involves *some* element of fault and which contributes in some more than minimal way to the death.[84] This act or

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75 *Hansard* (HL), 25 June 1991, vol 530, col 517.

76 *Hansard* (HL), 25 June 1991, vol 530, col 519.

77 *Hansard* (HL), 25 June 1991, vol 530, col 560

78 See, for example, the Dangerous Dogs (Designated Types) (England and Wales) Order 2023, Explanatory Memorandum.

79 O Bennett, Dangerous Dogs (House of Commons Briefing Paper No. 4348, August 2016), p 3.

80 *R v Hughes* [2013] UKSC 2016 at [20].

81 *R v L* [2011] RTR 19 at [16].

82 Domestic Violence, Crime and Victims Act 2004, s 5 and Theft Act 1961, s 12A respectively.

83 Road Traffic Act 1988, s 3ZB.

84 We note that in some cases, "more than minimal" has been used to explain the meaning of "substantial", which complicates efforts to explore the concept of causation between different offences. See, for example, *R v Hughes* [2013] UKSC 2016.

omission does not need to be the principal cause of death.[85] In *R v Wilson,*[86] the court held that the prosecution did not have to prove that the pedestrian who ran out in front of the defendant's vehicle would have survived if the defendant had driven carefully and within the speed limit, endorsing a "common sense" approach to causation in these cases.[87] It was enough for the prosecution to prove that the defendant's culpable conduct significantly and materially increased the risk of death occurring.

10.61 A similar test is used in cases of aggravated vehicle-taking causing death. The courts have held that the inclusion of "owing to the driving of the vehicle" in the drafting of the offence implies an element of causation.[88] As with other road traffic offences, there must be "at least some act or omission in the control of the car, which involves some element of fault, whether amounting to careless/inconsiderate driving or not, and which contributes in some more than minimal way to the death".[89] Causation in this offence is rendered less central by the possibility that the defendant need not have been the driver, as considered at paragraph 10.17 above. As the then-Home Secretary remarked:

> The mischief would not have happened had the vehicle not been taken in the first place. Who is to say which of the takers or passengers is sufficiently personally culpable to get extra punishment? The Bill answers that question: they all are.

10.62 The offence of causing death by careless or inconsiderate driving whilst under the influence of drink or drugs is not limited to cases where the defendant is unfit to drive through drink or drugs at the time of the offence.[90] A defendant may also be charged with this offence where they were over the prescribed limit of alcohol or the specified limit of a specified controlled drug, or where they fail to provide a specimen for analysis within 18 hours of the incident or fail to give consent for a laboratory test of a specimen of blood.

10.63 The CPS guidance states that "where drugs or alcohol are involved in the commission of a driving offence, there will be increased culpability and this must be reflected in the appropriate charge if these additional elements can be proved".[91] Despite this, there is no requirement for a causal link between the intoxication or refusal to provide a specimen and the careless driving.[92] Indeed, a failure to provide a specimen or give consent for laboratory analysis could only take place after the death was caused. We understand that there is therefore no causal link necessary between the aggravating feature of this offence and the death. Despite this, these features raise the maximum

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85 *Archbold Criminal Pleading, Evidence and Practice* 2026, 32-76.

86 [2018] EWCA Crim 1184, [2019] 1 WLR 3916 at [41].

87 See *Blackstone's Criminal Practice 2026* at A1.28.

88 *Wilkinson's Road Traffic Offences* 32nd Ed, 15-32.

89 *R v Taylor* [2016] UKSC 5.

90 Road Traffic Act 1988, s 3A.

91 CPS, *Road Traffic - Fatal Offences and Bad Driving* (last updated January 2025).

92 Inferred from *R v Redding* [2021] EWCA Crim 1502 at [18].

sentence to one of life imprisonment, as opposed to the five-year maximum sentence for causing death by dangerous driving.

10.64 In cases of causing or allowing the death of a vulnerable child or adult, the death must have occurred as a result of the unlawful act of a person who was a member of the victim's household. One route to conviction is to prove that the defendant is the person who caused the death. However, the offence is not limited to the person who caused the death. A defendant may have allowed the death (but was, strictly speaking, neither a factual nor legal cause of the death) and still be considered sufficiently culpable. Further, the prosecution is not required to prove whether the defendant caused the death or allowed it.

10.65 In cases involving the suffocation of a child,[93] a person can be *deemed* to have neglected an infant in a manner likely to cause injury due to the fact that death occurred. It is not necessary to show that the person caused the death. If the suffocation occurred while the infant was in bed with the person while the person was under the influence of drink or drugs, then the person will be guilty of an offence, provided that the suffocation was not attributable to disease or the presence of a foreign body in the infant's airways. In this case, the causal requirement appears to be satisfied by the absence of another explanation. While not strictly a homicide offence, this is another example in which a conviction would rely upon the fact of death even where there was no direct causal link between the fact of the intoxication and the death of the victim.

10.66 Causation is by no means a settled or stable concept; however, it appears to be less central to some of the specific homicide offences than it is to the general homicide offences. The justification for this may sit within the rationale for the creation of each offence, including evidential difficulties with the existing offences and public policy reasons for imposing wider liability. This is part of the justification for keeping these offences conceptually separate from the general homicide offences. While they may have good reasons to exist, we do not consider that they should be incorporated into the general homicide structure.

Gravity

10.67 Assessing the gravity of the specific homicide offences as a whole is not straightforward. It is not as simple as describing them as a fourth tier of the homicide structure. Their maximum sentences vary widely, as does the level of fault required for a conviction. In some areas, there is a clear hierarchy of offences – in the motoring offences, for example, there is a list of offences with escalating sentencing powers reflecting the relative severity of the offence.

10.68 As we saw above, maximum sentences have been steadily increasing across these offences. Causing death by reckless driving, for example, carried a maximum sentence of five years, rising to ten years when it was replaced with causing death by dangerous driving. The offence now carries a maximum sentence of life imprisonment. However, we do not necessarily consider that the maximum sentence of an offence can be taken as a reliable indicator of its gravity as compared to the general homicide offences. We are particularly mindful of the work of the Independent Sentencing

93 Children and Young Persons Act 1933, s 1(2)(b).

Review in this area, which observes that there has been a steady increase in the use and length of custodial sentences and warns against the impact of a "tough on crime" political narrative.[94]

10.69 Some specific homicide offences, however, could still be said to be comparable with manslaughter. As we considered above, the authorities on causing the death of a child or vulnerable adult suggest there is a clear link with manslaughter and draw comparisons between the sentencing process for both offences.[95] In our 2006 report on murder, manslaughter and infanticide, we suggested that offences such as infanticide or causing death by dangerous driving "can be thought of as constituting a fourth tier to the law of homicide".[96] Attractive as this is from a structural perspective, we do not think it is an accurate description of the wide range of specific homicide offences in their present form.

Conclusions

10.70 Given the significant variation in the causation requirements and fault elements of the specific homicide offences, often attributable to the different aims that led to their creation, we have not attempted to incorporate them into our provisional structure of general homicide offences. As we consider in Chapter 8, the offence of manslaughter is already criticised for its breadth – attempting to incorporate additional conduct, causation and fault elements into the offence would defeat this project's aims. Attempts to formulate a general homicide offence capable of covering the full spectrum of specific homicide offences would create a convoluted and unprincipled offence. Such an offence would inevitably contain lacunas requiring creation of new offences in time, rendering the exercise largely pointless.

10.71 Whilst acknowledging the gravity of these cases, we consider that the specific nature of these offences, including the different fault elements and approaches to causation described above, justifies considering them differently to murder or manslaughter. Culpability will often be higher in the general homicide offences, and for this reason, offences which could be prosecuted as manslaughter or murder should typically be charged accordingly. However, it would not be accurate to suggest that these cases should fall universally on a lower tier of the homicide structure. Instead, the specific homicide offences should be thought of as complementary to the general homicide structure, addressing cases in which murder and manslaughter are not appropriate or available.

CALLS FOR REFORM

10.72 We have addressed examples of the specific homicide offences, and considered the issues that have been highlighted with individual offences that may call for further investigation and reform. In response to our Call for Evidence, we received some evidence in relation to some of these offences; however, we did not receive significant

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94 The Rt Hon David Gauke, Independent Sentencing Review: History and trends in sentencing (February 2025), p 22 and the Rt Hon David Gauke, Independent Sentencing Review: final report and proposals for reform (May 2025), pp 13 and 150.

95 *R v Ikram and Parveen* [2008] EWCA Crim 586, [2008] 4 All ER 253 at [67].

96 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 2.32.

volumes of evidence suggesting that reform of the elements of any one offence was required.

10.73 We heard mixed evidence on the use of new homicide offences to address particular areas of difficulty in homicide law.

10.74 In response to our Call for Evidence, Dr Jonathan Rogers argued that some "conduct-specific offences" may be better suited to their tasks than the general offences, suggesting that it "would be a mark of respect for human life that we might have a number of extra offences, if necessary and if appropriately differing in gravity". There may also be practical reasons for doing so. Dr Matthew Gibson, for example, has observed that:

> There is a view that basing offence specifications on social morality in the first place would ultimately produce more "jury acceptable" crimes. That may increase conviction rate for some forms of wrongdoing. This would explain why crimes like "causing death by dangerous driving" ought to be retained alongside murder or manslaughter.[97]

10.75 Professor Matthew Dyson, however, cautioned against creating too many narrow offences. He argued that this would be bad for the fair and effective operation of the law and often creates new problems without solving the old ones. He warned against creating such offences "to give the false appeal of 'doing something'".

10.76 We take the view that many of the aims of this project can be achieved by principled reform of the general homicide offences; we do not consider it necessary to explore wholesale reform of the specific homicide offences, nor do we seek to create new homicide offences just for the sake of it. However, there is some merit in the use of specific offences to address proven lacunas in the law which cannot be addressed by the general homicide offences.

Creation of new specific homicide offences

10.77 As we consider in Chapter 8, respondents to our Call for Evidence highlighted two main areas in which a new offence might be an appropriate method of addressing shortcomings in the existing law. These are liability for abusers who contribute to the suicide of their victims, and liability for those who supply unlawful drugs resulting in death.

10.78 We consider issues relating to domestic abuse in Chapter 14, and so discussion relating to liability for abusers whose victims die by suicide is properly contained within that chapter.

10.79 In response to our Call for Evidence, the CPS flagged the case of *Broughton*,[98] raising the possibility of the creation of an offence to overcome difficulties in proving causation in these circumstances. In *Broughton,* the appellant had supplied the deceased person, his girlfriend, with a controlled Class A drug which she took alongside ketamine and ecstasy at a music festival. Following a bad reaction to the

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97 M Gibson, "Three Justifications of Fair Labelling" (2024) 140 *Law Quarterly Review* pp 431-452.

98 *Broughton v R* [2020] EWCA Crim 1093, [2021] 2 All ER 819.

drugs, her condition deteriorated and she eventually died. The appellant was in telephone contact with the deceased person's family during this time, but refused their requests to seek help or medical attention. The appellant was charged with gross negligence manslaughter on the basis that, having created a dangerous situation by supplying the drugs and having been there as the deceased person's condition deteriorated, he had been grossly negligent in failing to obtain medical assistance.

10.80 The appellant was originally convicted at trial. He appealed against his conviction on the grounds that there was insufficient evidence to be sure that his negligence had caused the death. The Court of Appeal remarked that:

> The test for causation in homicide cases has long been that it is sufficient for the prosecution to prove that the act (or omission) of the accused was a significant contributory cause of death, rather than the sole or principal cause of death. That reflects the obvious reality that there can be concurrent causes of death. In most cases the issue will not arise.[99]

10.81 The Court considered that it was not sufficient to show that there was a significant chance that life could have been preserved, or that the defendant's negligence deprived the deceased person of a substantial chance of survival. Legal causation could only be established if the defendant's negligence was a substantial contributory cause of death. To be sure that the gross negligence caused the death, the prosecution "must exclude realistic or plausible possibilities that the deceased would anyway have died".[100] Applying this to the facts of the case, the Court concluded that there was insufficient evidence to establish causation. The manslaughter conviction was quashed, and no retrial was ordered; the appellant's conviction for supplying the deceased person with Class A drugs still stood.[101]

10.82 Quashing a conviction, or an acquittal at trial, does not necessarily indicate that there is any issue with the law. It could be considered as evidence that the law is maintaining an appropriately high threshold for serious criminal liability. However, this is not the first time that this issue has been raised. Catherine Elliott and Professor Claire de Than have argued that new homicide legislation "needs to tackle directly the type of homicide offences that are being committed in a modern society".[102] They have suggested that specified offence labels would be "an impetus for effective prosecutions", sending a message that prosecutions under certain circumstances, such as supply of drugs resulting in death, are appropriate and that convictions are possible.[103] They have noted particular issues with the "traditional but narrow" approach to causation in manslaughter prosecutions for drug-induced deaths.[104]

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99 *Broughton v R* [2020] EWCA Crim 1093, [2021] 2 All ER 819 at [14].

100 *Broughton v R* [2020] EWCA Crim 1093, [2021] 2 All ER 819 at [23].

101 "Bestival death: Ceon Broughton manslaughter conviction overturned", *BBC News* (18 August 2020).

102 C Elliott & C de Than, "Restructuring the Homicide Offences to Tackle Violence, Discrimination and Drugs in a Modern Society" (2009) 20(1) *King's Law Journal* 3.

103 C Elliott & C de Than, "Restructuring the Homicide Offences to Tackle Violence, Discrimination and Drugs in a Modern Society" (2009) 20(1) *King's Law Journal* 6. We note that this argument was made in relation to both supply of drugs resulting in death and domestic abuse leading to suicide.

104 C Elliott & C de Than, "Restructuring the Homicide Offences to Tackle Violence, Discrimination and Drugs in a Modern Society" (2009) 20(1) *King's Law Journal* 17.

Criminal organisations are often one step removed from the death itself, and so issues of proximity pose difficulties in the existing law even where those organisations might be considered more culpable for the ultimate death. They have therefore argued for the creation of a statutory drug homicide offence, suggesting that, in a social context where drug use is prevalent, a specific offence is necessary to enable prosecution of those who cause or contribute to death through the supply of illegal drugs. They proposed that such an offence could carry a maximum sentence of ten years, less than manslaughter but in line with the fatal road traffic offences; this would be "appropriate to the lower threshold requirements for the imposition of liability".[105]

10.83 Professors Mark James and Alan Reed have also made the case for a criminalisation of causing death by the supply of unlawful drugs.[106] They have argued that the existing principles of causation, particularly those relating to intervening conduct by the deceased person, operate inappropriately in these cases. They have suggested that it is not necessary or appropriate to preclude *all* homicide liability for deaths such as these. Instead, fair labelling and proper imposition of liability require a "novel and original" approach to causation, in which the deceased person's ingestion of the drug should not be treated as a break in the chain of causation, but as a concurrent cause of death. They drew comparisons with liability in tort law, where liability can be imposed on all "legally relevant" contributors. Rather than modifying the principles of the general homicide offences, there should be a specific offence in which alternative principles apply, which should carry a maximum sentence of up to two years' imprisonment to correspond with comparable existing offences.

10.84 In response to our Call for Evidence, Dr Jonathan Rogers also raised the issue of causing death through the supply of drugs and noted issues with causation in these cases, suggesting that a new offence could be worth consideration.

10.85 We recognise these arguments and acknowledge that they bear resemblance to the factors that underpinned the creation of many of the existing specific homicide offences. At present, we do not consider that we have sufficient evidence or expertise in relation to prevalence, public policy and causation in drug death cases to assess the need for such an offence. We therefore invite consultees' views on the need for a bespoke offence to address cases of causing death through the supply of unlawful drugs.

Consultation Question 13.

10.86 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.

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[105] C Elliott & C de Than, "Restructuring the Homicide Offences to Tackle Violence, Discrimination and Drugs in a Modern Society" (2009) 20(1) *King's Law Journal* 21.

[106] M James & A Reed, "Causing Death by the Unlawful Supply of Drugs: A Remodelling of Criminal Causation Using Tortious Precepts" (2025), in A Reed, M Bohlander, B Simpson & V Adams (eds), *Causation in Criminal Law: A Research Companion* (1st ed 2025).

Proposals for a "duty to rescue" offence

10.87 We have received evidence from several respondents in relation to cases in which people do not receive assistance during a medical emergency or in other dangerous circumstances: these often relate to failures to call for medical assistance or to respond to indications of suicidal intention.[107] In addition to the potential use of such an offence in some cases of suicide related to domestic abuse,[108] any such offence could also cover the facts of *R v Broughton,* discussed at paragraph 10.79 above.

10.88 As the law stands, there is no general duty to rescue those in danger. The criminal law imposes liability for omissions in rare cases. It is for this reason that offences which can be committed by omission typically impose a high threshold for responsibility; gross negligence manslaughter, for example, requires the existence of a specific duty of care between the defendant and victim.

10.89 Further, while these cases often tragically overlap with the law of homicide, this is not necessarily an issue specific to this area of law. The creation of a duty to rescue or similar duty which relates to the circumstances of a danger or emergency, rather than the result of death, could have wider implications beyond the law of homicide.

10.90 However, we note that there is gathering momentum behind calls for some form of liability in cases where there has been a culpable failure to seek medical assistance or intervention for another. We consider that cases in which a person dies following a culpable failure to obtain assistance are potentially within the scope of this project.

Consultation Question 14.

10.91 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.

CONCLUSION

10.92 We consider that the specific homicide offences are sufficiently conceptually distinct that they should not be incorporated into the general homicide structure. Instead, they complement and reinforce the boundaries of the general homicide offences, ensuring a proportionate level of culpability for cases falling outside of murder and manslaughter but still requiring some level of criminal justice response.

10.93 We see some merit in specific homicide offences in cases where there is evidence of a significant lacuna which cannot properly be addressed using the general homicide offences; examples of possible lacunas in the law which have been brought to our attention include suicides resulting from domestic abuse and fatal supply of drugs

[107] See, for example, Danielle's Law, C Slater "She died after being left alone in a flat, now her family want change" *The Manchester Evening News* (26 January 2026), Kimberley's Law, L O'Neill "Kimberley McAssey: 'We still don't know how our amazing daughter died'" *BBC News* (6 April 2025) and Matthew's Law, "Petition - Matthews law duty to rescue - United Kingdom", Change.org (27 April 2024).

[108] We also discuss this in Chapter 14.

cases. We invite consultees' views on the need and justification for an offence of causing death through supply of unlawful drugs. Issues relating to domestic abuse are considered in Chapter 14.

10.94 We have not heard substantial evidence calling for reform of any one specific homicide offence. This does not mean that these offences are beyond review, nor that we positively recommend their retention in their present form.

Consultation Question 15.

10.95 We provisionally conclude that the specific homicide offences (criminal 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?

Consultation Question 16.

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

Chapter 11: "Mercy" and consensual killings

INTRODUCTION

11.1 A mercy killing is a killing with the intention to kill for compassionate reasons. This definition is not without controversy; the definition and reach of "compassion" and "mercy" are not universally agreed.[1] Often associated with, but distinct from, "assisted dying",[2] mercy killings include cases where the deceased person is suffering extreme physical or psychological harm often due to an illness or injury, and the person who kills them has a genuine belief that killing them is the compassionate thing to do. Some cases involve reluctant killings (when the deceased person has pressured someone to kill them). Some involve killings where the deceased person indicated no particular wish to die; it is instead the belief of the person who kills them that it is the compassionate thing to do.

11.2 A consensual killing is a killing with the intention to kill where the deceased person requested or consented to be killed. In cases involving someone wishing to die because of extreme physical or psychological harm or life-limiting illnesses, there is overlap with mercy killings. However, just as not all mercy killings are consensual, not all consensual killings are compassionate. Consensual killing also includes killing pursuant to a suicide pact (where both parties agreed to die) and other kinds of consensual killing where the deceased person would not have considered themselves as suffering beforehand.

11.3 Throughout this project we consider ways that the law of homicide can better reflect different levels of culpability. Killing for genuinely compassionate reasons, or with the valid consent of the deceased person, can reduce someone's culpability. In these cases, the criminal justice system currently relies on either prosecutorial discretion,[3] defences to murder,[4] and/or sentencing[5] to reflect that lower culpability. We have considered elsewhere in this paper the benefits of separate offences to reflect distinct conduct with lower culpability (see, for example, Chapters 9 and 10). While clear arguments in support of a distinct homicide offence of mercy or consensual killing

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1 See for example, S O'Dwyer and C Bishop et al, "From caring to killing: A typology of homicides and homicide-suicides perpetrated by caregivers" (2025) 14(6) *Social Sciences*, 376. We use the terms "mercy" and "consensual" killings to refer to the category of killing. We acknowledge that whether a killing was motivated by mercy or was consensual is sometimes heavily disputed, not investigated, or not established.

2 This is also a contested term with varying definitions. Assisted dying can be an umbrella term encompassing both the termination of an individual's life on request and the provision of assistance to an individual to take their own life. See, for example, Criminal Code (Canada), s 241.1. In the debate over legalisation in England and Wales, assisted dying is most frequently defined as the provision of assistance to a terminally ill adult to take their own life. See, for example, clause 1 of the Terminally Ill Adults (End of Life) Bill - Parliamentary Bills - UK Parliament.

3 CPS, *Homicide: Murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult* (last updated March 2026).

4 Including diminished responsibility, loss of control, and killing pursuant to a suicide pact. We will consider the role of defences in this context in our defences consultation paper.

5 See for example, Sentencing Code, Sch 21, para 10(f).

were not raised with us, for coherence with the approach throughout this paper, we consider here the rationale for such an offence.[6]

CURRENT LAW AND COMMENTARY

11.4 Mercy and consensual killings are distinct concepts, but they are not separate legal categories of homicide offending. As they both involve the intention to kill, mercy and consensual killings generally fall within the offence of murder. They may however be charged as, or result in conviction for, manslaughter due to the operation of a partial defence (primarily either diminished responsibility or killing pursuant to a suicide pact[7]).

11.5 In our 2006 report on murder, manslaughter and infanticide (the "2006 Report"), we described the difficulty with such cases, namely that the conduct and intent fall into the most serious type of offence, but the defendant and their rationale may be among the most sympathetic.

11.6 We considered previous recommendations for reform, including the 1976 Criminal Law Revision Committee ("CLRC") proposal for a new offence of mercy killing.[8] In the 2006 Report we cited the extensive criticism this received for not providing sufficient safeguards for victims, and explained that the CLRC did not ultimately recommend such an offence in their final report.[9]

11.7 There is a separate offence of complicity in suicide under section 2 of the Suicide Act 1961, which we also discuss in Chapters 10 and 14. This offence criminalises acts capable of encouraging or assisting suicide, where such encouragement or assistance was intended. In cases involving consensual killing or suicide pacts, this offence may be charged instead of homicide where the deceased person carried out the fatal act. However, where another person intentionally performs the act causing death, the conduct usually amounts to murder.

11.8 There are concerns about the way that the current partial defences operate in cases of mercy killings. Some suggest that the defence of diminished responsibility is often used to show leniency in deserving cases, but as it was not designed for such use,[10]

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6 We consider the arguments for a separate offence of mercy or consensual killing, by this we mean the potential for an offence that is mercy killing, consensual killing, mercy *and* consensual killing, or mercy *or* consensual killing.

7 Homicide Act 1957, s 4. This is a limited recognition of the impact of the deceased person's wish to die (or consent) on the culpability of the defendant.

8 Criminal Law Revision Committee, *Working Paper on Offences against the Person* (1976) paras 79 to 87. The offence would have been based on the defendant's belief that the victim was (1) permanently subject to great bodily pain or suffering; permanently helpless from bodily or mental incapacity; or subject to rapid and incurable bodily or mental degeneration and (2) that the defendant killed for compassionate reasons.

9 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 7.10.

10 Indeed, in our 2006 Report we recognised that the changes we recommended to the defence of diminished responsibility would not "assist rational 'mercy' killers" but concluded that the defence should not be "stretched" to allow for such cases. Often in mercy and consensual killings, the intention to act is considered, they do not often involve the type of "irrational" killings for which the defence of diminished responsibility is designed: Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 7.37

its boundaries are being unhelpfully stretched to accommodate them. This has led to calls to consider instead a new defence specifically for mercy killings.[11]

11.9 Stakeholders also suggested to us that the partial defence of killing pursuant to a suicide pact should not be available in cases involving relationship dynamics that involve a power differential (for example a care giver and care recipient) or with a history of abuse.

Prosecutorial discretion

11.10 Leniency may also be provided in suitable cases through the application of prosecutorial discretion. When deciding whether to charge conduct that constitutes a criminal offence, prosecutors have some discretion not to charge if the public interest does not require a prosecution. In 2023, the CPS published updated prosecution guidance on homicide,[12] following a public consultation on the sections of the public interest guidance that cover mercy killing and suicide pacts. The update provides guidance to prosecutors when deciding if it is in the public interest to charge a homicide offence in a case of mercy killing or a suicide pact. As we explained in our Call for Evidence, the updated guidance draws heavily on the CPS policy for cases of assisting or encouraging suicide.[13]

Prevalence and outcomes

11.11 Without separate offence or defence labels for much of this conduct, it can be difficult to obtain a clear picture of the prevalence of mercy and consensual killings.[14]

11.12 Ongoing research by Professor Hannah Bows and Merili Pullerits suggests that the majority of cases either do not face prosecution or result in manslaughter convictions.[15] The Other Half (a think tank focusing on policy for women) found that most male perpetrators of mercy killings or failed suicide pacts were convicted of

11 A Clough, "Mercy killing, partial defences and charge decisions: 50 shades of grey" (2020) 84(3) *Journal of Criminal Law* 211; M Gibson, "Pragmatism Preserved? The Challenges of Accommodating Mercy Killers in the Reformed Diminished Responsibility Plea" (2017) 81(3) *Journal of Criminal Law* 177; J Rogers, "The Law Commission's Proposed Restructuring of Homicide" (2006) 70(3) *Journal of Criminal Law* 223; J Rogers, "The New Homicide Ladder" (2007) 157 *New Law Journal* 48.

12 CPS, *Homicide: Murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult* (last updated March 2026).

13 CPS, *Suicide: Policy for Prosecutors in Respect of Cases of Encouraging and Assisting Suicide* (last updated October 2014). The policy was published after the Appellate Committee of the House of Lords ordered the Director of Public Prosecutions to clarify the public interest factors in favour of and against the prosecution of cases of assisting or encouraging suicide: *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345 at [55] and [56].

14 Further, there are many inter-related issues in cases involving interpersonal killings, meaning that some cases could, for example, be defined as both a domestic homicide and a mercy killing.

15 This research considers 41 cases identified as mercy killings between 2007 and 2024. They found there were prosecutions in only 22 of the 41 cases, with 16 of those ending in conviction for manslaughter and 5 murder convictions. In 15 cases the defendant died by suicide, meaning the case did not proceed.

manslaughter, while female perpetrators were “more likely than not to be convicted of murder, with a life sentence”.[16]

11.13 Stakeholders also emphasised that the majority of mercy killings are perpetrated by men and the majority of victims are women.[17] Given this, and the common interpersonal relationships between the defendant and the deceased person, stakeholders raised concerns that many mercy killings are domestic homicides “rebranded”. However, not all stakeholders share this view, and we were also directed towards recent cases where female defendants were prosecuted for killing male victims.

ANALYSIS

11.14 There is a clear need to consider how the law of homicide should operate in cases of mercy and consensual killing. The commentary we have reviewed, including the responses to our Call for Evidence, suggests there is still a valid argument that the law should reflect the lower culpability in genuine cases of mercy or consensual killing.[18] Available public attitude research indicates support for leniency in cases where the facts amount to a mercy killing.[19] The main themes in the available commentary are: the gendered nature of such killings; and the role of the existing partial defences.[20] There is very little commentary on the need for a separate offence.

11.15 These issues are best considered in the next stage of this project, which will consider both defences and sentencing. The calls for a partial defence require consideration of the way the current defences operate, and concerns with their role in this context.

11.16 Mercy and consensual killings often occur in complicated dynamics that can involve domestic abuse, power differentials,[21] and mental health conditions. As these factors relate to culpability and vulnerabilities, they also arise in other homicide cases where

16 The Other Half, Safeguarding Women in Assisted Dying (November 2024) p 11. This review identified cases of mercy killings or failed suicide pacts from 1999 to 2024. They found that 60% of male perpetrators were convicted of manslaughter (after successfully pleading the partial defence of diminished responsibility) and received suspended sentences. 13% of male perpetrators were convicted of murder.

17 See, for example, The Other Half, Safeguarding Women in Assisted Dying (November 2024).

18 In our Call for Evidence, we invited evidence “on the practice of prosecution and trial of ‘mercy’ and consensual killings and on any relevant development in relation to these issues”: Homicide Law: Call for Evidence (14 August 2025) Issue 4.

19 B Mitchell and J Roberts, *Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales* (2010).

20 In our earlier consultation paper, we provisionally proposed repealing the partial defence of killing pursuant to a suicide pact in s 4 of the Homicide Act 1957 on the basis that it failed to operate effectively for deserving cases but was sometimes used in undeserving cases. We ultimately recommended maintaining the defence pending a public consultation on mercy killing: Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 7.50.

21 For example, a systematic review of homicides perpetrated by caregivers includes cases where the motive was mercy or compassion, but also includes other motivations such as abuse, and killings in the interests of the perpetrator rather than victim: S O’Dwyer, C Bishop, et al, “From caring to killing: A typology of homicides and homicide-suicides perpetrated by caregivers” (2025) 14(6) *Social Sciences*, 376.

defences are engaged. We will be able to consider these interrelated issues more holistically in our future consultation paper on defences.

11.17 The relationship between the law's response to mercy and consensual killings and the societal debate over the possible legalisation of assisted dying and euthanasia is complex. This project will not consider the arguments for and against the legalisation of euthanasia and assisted dying. Our Terms of Reference explain:

> The review will only consider the areas of euthanasia and involvement in suicide inasmuch as they form part of the law of homicide, not the issues associated with their possible legalisation and regulation which would need separate debate.[22]

11.18 Such separate, wider debate is ongoing during this first stage of the project. Introduced in 2024, the Terminally Ill Adults (End of Life) Bill was subject to intense debate during the parliamentary process both in Parliament and among the public. The Bill would have allowed medical professionals to provide end of life assistance for adult patients with mental capacity who were terminally ill with less than 6 months left to live. It did not progress when the Parliamentary term ended on 24 April 2026.[23]

11.19 Were a similar Bill to become law, the response of the criminal law to individuals who choose mercy killing over the legally permissible route, or where the deceased person would not qualify for a legally permissible medically assisted death, would require consideration, whether in our review or as part of later work on the law of homicide.

Justification for a separate offence

11.20 We now consider whether there should be a specific offence for mercy or consensual killing.

11.21 Creating a separate offence for mercy or consensual killings would provide an alternative way to reflect reduced culpability. We are not aware of calls for such an offence, only for a partial defence. We have considered the previous attempt by the CLRC to introduce a mercy killing offence and the criticism that it failed to safeguard victims.

11.22 We are concerned that a separate offence for mercy or consensual killings would undermine the coherence of the law. Separate offences (like the other homicide offences) are justified when the conduct or fault elements differ from existing ones. Mercy and consensual killings both involve killing with the intention to kill, which is the defining feature of first-degree murder (under our proposals and of murder under the current law). Creating a new offence for conduct already covered by murder would be incoherent. What makes mercy and consensual killings arguably different from other types of murder is that the defendant's culpability may be lower. As we have explained for all partial defences where this is also true, the appropriate response is to retain the conduct within the offence of murder, but within the second tier.[24] This provides the

[22] Law Commission, Reviewing the law of homicide: terms of reference (January 2025).

[23] See Terminally Ill Adults (End of Life) Bill - Parliamentary Bills - UK Parliament.

[24] Where the maximum sentence remains life imprisonment, but that sentence is not mandatory.

court with the necessary flexibility to reflect the lower culpability at sentencing where appropriate.

11.23 In Chapter 9 we propose the retention of the infanticide doctrine. Infanticide, though both a partial defence and a separate offence, is a longstanding and exceptional doctrine with established meaning and protective value for the vulnerable women to whom it applies. This unique justification does not extend to mercy or consensual killings.

11.24 Given our aim of creating a simpler, more coherent homicide structure, any new offence must justify the complexity it introduces. In our view, lower culpability in mercy and consensual killing cases is more appropriately addressed through prosecutorial discretion, sentencing, and partial defences where applicable. These are the current mechanisms in operation, and we have not heard evidence that suggests they are insufficient. They provide adequate flexibility to reflect the relevant facts of individual cases. Using such mechanisms to reflect lower culpability is also consistent with the ways in which lower culpability is reflected in comparative and related homicide cases (for example, the operation of partial defences as described in paragraph 11.22 above). A separate offence is therefore unnecessary.

CONCLUSION

11.25 We provisionally conclude that the current mechanisms (prosecutorial discretion, defences, and sentencing) are the appropriate ways for the law to reflect lower culpability in mercy and consensual killings. We do not consider that a separate offence is justified.

Consultation Question 17.

11.26 We provisionally conclude that a separate homicide offence for mercy or consensual killings is not justified.

Do consultees agree?

11.27 We intend to consider mercy and consensual killings when reviewing defences in homicide, and sentencing for murder, in future consultation papers. In the defences strand we will consider:

(1) the use of the defence of diminished responsibility in cases of mercy or consensual killing;

(2) the use of the defence of killing pursuant to a suicide pact in such cases and more generally;

(3) how reform of existing defences in the context of homicide (including duress) would affect such cases; and

(4) the need for a new partial defence.

11.28 In the sentencing strand we will consider how mitigating and aggravating factors should apply in such cases. We note here that the strict application of existing sentencing factors may not accurately reflect culpability in these cases. Generally, the facts of genuine mercy killings appeal to mitigating factors reflecting lower culpability and vulnerability of circumstance, yet because of their nature there is often the presence of aggravating factors such as premeditation, lack of remorse and vulnerability of the victim.

11.29 Finally, we note that consensual killings raise the question whether consent to serious injury or death should be legally effective. This is something we will consider when we begin work on our future project reviewing consent within the criminal law.[25]

[25] This project is part of our Fourteenth Programme of Law Reform. For more information, see https://lawcom.gov.uk/project/consent-in-the-criminal-law/.

Chapter 12: Complicity in homicide

INTRODUCTION

12.1 In this chapter, we discuss the law of complicity to the extent relevant to our homicide review. For the law of complicity to apply, there must be more than one person involved in the commission of a criminal offence.[1] The expression "joint enterprise liability" is used widely as shorthand to refer to cases where criminal liability arises in respect of multiple defendants. We acknowledge that the expression has become a catalyst for mobilising support among advocates for legal reform for what is more accurately termed the law of complicity. However, as we explain throughout this chapter, we consider the expression to be legally inaccurate and potentially misleading as it may be understood as suggesting that a separate set of rules continues to exist within the law of complicity.[2]

12.2 The Law Commission made recommendations on complicity in homicide in the 2006 report on murder, manslaughter and infanticide ("2006 Report").[3] At about the same time, we made recommendations for reform of the general rules governing complicity in the 2007 report on participating in crime ("2007 Report").[4] None of the recommendations have been implemented.[5]

12.3 In the 2007 Report, we said that the doctrine of complicity "has developed haphazardly and is permeated with uncertainty".[6] We believe that this remains true despite some crucial developments that have occurred in the period of almost twenty years since our previous reviews. The law of complicity continues to rest on shaky theoretical foundations and is replete with persisting uncertainty and contradictions. Consequently, its application has at times enabled practices that may disproportionately affect some groups of defendants.[7]

12.4 Since general rules governing complicity apply across the criminal law, and are not specific to homicide offences, a full review of these general rules is outside the scope of the homicide project. Our review is limited to consideration of issues of complicity

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1 The reference to the "commission" of a criminal offence is not meant to exclude cases where secondary liability may be founded on an omission. In this chapter, any reference to "commission" should be understood as a reference also to omissive conduct.

2 We explain from para 12.27 below why the term is criticised and what alternative terms have been proposed. In this chapter, we use "joint enterprise" and "joint enterprise liability" to describe the pre-2016 law or to refer to publications and documents which use the expression (usually as synonymous with "the law of complicity").

3 Murder, Manslaughter and Infanticide (2006) Law Com No 304, part 4.

4 Participating in Crime (2007) Law Com No 305.

5 On the interaction between the 2006 and 2007 recommendations, see para 12.64 below.

6 Participating in Crime (2007) Law Com No 305, para 1.12.

7 We have dealt with the way the "substantial injustice" test operates in appeals regarding complicity cases in Criminal Appeals (2025) Law Commission Consultation Paper No 268. For an overview, see also para 12.31 below.

which specifically apply to, or directly affect, the law of homicide. Our Terms of Reference clarify that we will "consider the implications of the current law on joint enterprise (following the Supreme Court decision in *Jogee*) for any reform of the law of homicide".[8] We emphasise that the expression "to consider the implications" instead of "to review" confirms that the review of the law of complicity within this project is limited to its impact on the law of homicide.

12.5 In this chapter, we do not make provisional proposals. Instead, we explain why we have concluded that it is not possible to review substantive rules governing complicity within the homicide project. However, we also explain how our provisional proposals to reform the structure of homicide offences would have a positive impact on the operation of the law of complicity in homicide cases, without affecting the existing complicity rules which apply generally in criminal law.

12.6 To explain how we have reached this conclusion, firstly we lay out the general legal frameworks governing complicity; secondly, we provide an overview of the outstanding challenges raised by the law; thirdly, we explain the relationship between our 2006 recommendations on complicity in homicide and our earlier review of the law of complicity in the 2007 Report; fourthly, we discuss how our current provisional proposals on the structure of homicide offences would interact with existing general rules governing complicity.

OVERVIEW OF THE LAW OF COMPLICITY

Meaning of complicity and legal framework

12.7 When a person assisted, encouraged or otherwise contributed to the commission of an offence committed by another person, the law of complicity applies. Criminal offences (not only homicide offences) are often committed by two or more people. When this happens, each person's contribution to the commission of the offence may differ depending on their role.[9] For example, if P stabs the victim and D supplied the knife intending to assist P in committing the offence, P is the "principal" (because P carried out the act of killing), and D is the "secondary party" or "accessory" (because D encouraged or assisted P in committing the offence).[10] Therefore, the law of complicity is also known as "secondary liability" or "accessory liability" (or sometimes "accessorial liability").[11]

12.8 D will usually be found guilty of the same offence committed by P (murder, in the above example). Secondary liability is derivative, since the liability of an accessory derives from the liability of the principal who committed the offence. However,

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8 Law Commission, Reviewing the law of homicide: terms of reference (January 2025), para 1.3. We used "law on joint enterprise" as synonymous with law of complicity. We explain from para 12.15 below the law of complicity and the impact of the decision in *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

9 This chapter is not concerned with cases where two (or more) perpetrators are "joint principals" (or "co-perpetrators") because they have both committed the offence with the same mental element (for example, two defendants attacked the victim at the same time with the intention to kill, causing the victim's death). In such cases, secondary liability does not arise because neither are *secondary* parties to a principal offence.

10 See Law Commission, Homicide Law: Call for Evidence (14 August 2025), para 2.48.

11 In this chapter, we also use "secondary liability" to refer specifically to the liability of the secondary party.

derivation is not full, since the accessory may be convicted of a lesser offence than that for which the principal is convicted. A typical example is when D is convicted of manslaughter when P is instead convicted of murder, discussed at paragraph 12.23 below.[12]

12.9 The Accessories and Abettors Act 1861 ("AAA 1861") provides the procedural legal basis for treating an accessory in the same way as the principal. Section 8 reads as follows:

> Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

12.10 Substantive rules governing the conduct and fault element that a secondary party must have for secondary liability to arise have been developed at common law. The law is currently governed by the 2016 decision of the Supreme Court and the Judicial Committee of the Privy Council in the joint cases of *R v Jogee and Ruddock* ("*Jogee*").[13] We discuss the decision and the criticism of it from paragraph 12.18 below.

Inchoate liability for encouraging or assisting offences

12.11 An important distinction must be made between cases where the (secondary) liability of D is established and the offence has been committed by P, and cases where the liability of D is established *whether or not* the offence has been committed by P. While the latter cases also involve more than one (potential) perpetrator, traditionally they are classed as cases of "inchoate liability", because it is D's act of assistance or encouragement as such which is criminalised, irrespective of whether P has proceeded to commit the crime.[14] In the former cases, instead, D's secondary liability derives from P's liability for the offence.

12.12 The inchoate offences of encouraging or assisting are found in the Serious Crime Act 2007 ("SCA 2007").[15] The SCA 2007 implements, in part, the Law Commission's 2006 recommendations on inchoate liability.[16] These offences give rise to inchoate liability

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[12] An example in a non-homicide context is when D is convicted of the lesser offence of taking a motor vehicle or other conveyance without authority (section 12 of the Theft Act 1968) when P is instead convicted of theft of a bicycle: see *R v Jogee and Ruddock* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [90].

[13] [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

[14] "Inchoate" means "incomplete", because the defendant has taken steps towards the commission of an offence. Another example of inchoate liability is the law of attempt; in the homicide context, this governs the offence of attempted murder.

[15] SCA 2007, ss 44 (intentionally encouraging or assisting an offence), 45 (encouraging or assisting an offence believing it will be committed) and 46 (encouraging or assisting offences believing one or more will be committed).

[16] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300. Notably, the Law Commission recommended the introduction of two offences, rather than the three eventually introduced by the SCA 2007. There is consensus that the offences, as introduced in the SCA 2007, are overly complex and difficult to understand: for an overview of the criticism, see Law Commission, Homicide Law: Call for Evidence (14 August 2025), paras 2.44 - 2.55. See also Post-legislative Scrutiny of Part 2 (Encouraging or

because a defendant may be convicted whether or not the act of encouraging or assisting has in fact encouraged or assisted the commission of a crime by another person.[17] What counts is that the act as such is *capable* of encouraging or assisting an offence. On conviction, the maximum penalty available is the same as the maximum available for the anticipated offence that the defendant encouraged or assisted. If the anticipated offence is murder, the maximum penalty available is imprisonment for life (namely a discretionary life sentence).[18]

12.13 Although inchoate liability is theoretically distinct from secondary liability, the two may overlap in practice. A typical example is when D has encouraged or assisted an offence, which is then committed by P. In this case, it is open to the prosecution to charge D with one of the SCA 2007 offences, or with the same offence committed by P (under the AAA 1861) on the basis of secondary liability, provided that the elements of the respective offences are satisfied.[19]

12.14 An additional difficulty, at least at a descriptive level, arises from the conflation of the terminology used to refer to the defendant's conduct in both inchoate and secondary liability cases. The expression "encouraging or assisting" is usually employed to refer also to the older terms of "aiding, abetting, counselling or procuring" under the AAA 1861, in addition to the offences of encouraging or assisting under the SCA 2007.[20] Some argue that the modernisation of the archaic terms "is a better frame for communication of the same substance as the older terms, without losing the depth of meaning".[21] For similar reasons, in 2007, the Law Commission recommended repealing section 8 of the AAA 1861 and replacing its terminology with "assisting or encouraging".[22] The recommendation was not implemented. Therefore, the terms used in section 8 of the AAA 1861 remain applicable, although they are usually described as "encouraging or assisting".[23]

Substantive rules governing complicity

12.15 There are two possible scenarios to which the law of complicity applies:

(1) D intentionally assisted or encouraged P to commit crime A, and P commits the same crime A.

Assisting Crime) of the Serious Crime Act 2007, Report of the House of Commons Justice Committee (2013-14) HC 639, Appendix A (letters from academics).

17 SCA 2007, s 49(1). See also Explanatory Note to the SCA 2007, para 216 (section 58: penalties).

18 SCA 2007, s 58. See also Explanatory Note to the SCA 2007, para 215 (section 58: penalties).

19 For prosecution guidance on charging decisions, see Crown Prosecution Service, *Prosecution guidance on secondary Liability: charging decisions on principals and accessories* (revised 4 July 2024).

20 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [86].

21 *Archbold: Criminal Pleading, Evidence and Practice* (2026), pp 2212 - 2213.

22 Participating in Crime (2007) Law Com No 305, para 3.10.

23 However, the terms "aiding", "abetting", "counselling" and "procuring" have been interpreted as having different meanings: see, for example, *Attorney General's Reference (No 1 of 1975)* [1975] QB 773; (1975) 61 Cr App R 118 ("there is a difference between the words for, if there were none, Parliament would be wasting time in using four words where two or three would do").

(2) D intentionally assisted or encouraged P to commit crime A, but P commits (also, or instead) a different crime B (sometimes called a "collateral offence").[24]

12.16 Under the existing rules of secondary liability explained above, in both scenarios D may be convicted of the same crime committed by P. However, scenario (2) has posed more theoretical and practical challenges which have not been satisfactorily resolved to date.[25]

12.17 Under the doctrine of joint enterprise liability as it was understood before 2016, where D and P engaged in a course of criminal conduct as parties to a joint enterprise or with a common purpose to commit crime A and P committed (also, or instead) crime B, a separate set of rules of complicity used to apply. Their origin is usually traced to the Privy Council's judgment in *Chan Wing-Siu*.[26] It used to be sufficient, in such cases, that D *foresaw* the possibility that P might commit crime B to find D liable for crime B. For example, if D and P set out to rob a bank, and P intentionally killed a security guard, then D could be convicted of murder if D foresaw the possibility that P, in furtherance of the joint enterprise or the common purpose, might act with the intention either to kill or cause grievous bodily harm (the alternative fault elements of murder). In other words, it was not required that D specifically assisted or encouraged P to commit crime B and foresight that P might commit crime B, rather than intention, was sufficient to convict D for the same offence as P. This distinct form of complicity was known, pejoratively, as "parasitic accessory liability".[27]

12.18 In *Jogee*, a constitution of both the UK Supreme Court and the Judicial Committee of the Privy Council held that the common law had taken a "wrong turn".[28] For D to be convicted of crime B, D should have intentionally assisted or encouraged P and *intended* that P would commit crime B with the required fault element, rather than simply foreseeing it as a possibility.

12.19 *Jogee* sought to clarify five key issues relating to the law of complicity. Firstly, cases where D and P are parties to a joint enterprise or act with a common purpose should not be treated differently from cases where D intentionally encouraged or assisted P, because "there is no reason why ordinary principles of secondary liability should not be of general application".[29] In both cases, it must be proved that D intentionally

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24 *R v A, B, C & D* [2010] EWCA Crim 1622; 2010 WL 2771946, at [9], noting that cases where there are two (or more) joint principals can also be understood as falling under the category of "joint enterprise". While this is correct to the extent that joint principals may be parties to a joint enterprise, in such cases secondary liability does not arise because there is no secondary party to a principal offence (see also para 12.7 above).

25 In scenario (1), "any reference to the criminal project as a joint enterprise was never of any legal significance in determining who was a principal or secondary party to a crime": G R Sullivan, "Law Reform in the Supreme Court: The Abolition of Joint Enterprise Liability?" in B Krebs (ed), *Accessorial Liability After Jogee* (2019), p 7.

26 *Chan Wing-Siu v The Queen* [1985] AC 168. The doctrine was then consolidated in *R v Powell and R v English* [1999] 1 AC 1. However, the history is disputed, as it has been shown that the doctrine predates *Chan Wing-Siu*: see F Stark, "The Demise of 'Parasitic Accessorial Liability': Substantive Judicial Law Reform, not Common Law Housekeeping" (2016) 75(3) *Cambridge Law Journal* 550.

27 The expression was coined by Professor Sir John Smith: see J Smith, "Criminal Liability of Accessories: law and law reform" (1997) 113 *Law Quarterly Review* 453.

28 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [87].

29 Above, at [76].

encouraged or assisted P. The existence of a joint enterprise or a common purpose between D and P may be evidentially relevant to prove D's encouragement or assistance but does not provide a distinct set of rules to establish D's liability.

12.20 Secondly, in relation to the conduct of encouraging or assisting, D's participation in the crime may take many forms, including "providing support by contributing to the force of numbers in a hostile confrontation".[30] However, the Supreme Court observed that the expression "joint enterprise liability" had generated some public misunderstanding, since:

> It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law.[31]

12.21 Thirdly, regarding D's fault element, *Jogee* specified that D must intend to encourage or assist P to commit the offence with whatever fault element the offence committed by P requires. The intention that the principal crime be committed may also be conditional; for example, when D has agreed with P to commit crime A, it is still open to the jury to conclude that D had the conditional intention that P might commit crime B "if the occasion arose".[32] This marked a move away from the previous interpretation of the fault element in secondary liability cases, in that it relegated foresight to "no more than evidence from which a jury can infer the presence of a requisite intention".[33] As explained, foresight:

> May be strong evidence [of intention], but its adoption as a test for the mental element for murder in the case of a secondary party is a serious and anomalous departure from the basic rule, which results in over-extension of the law of murder and reduction of the law of manslaughter. Murder already has a relatively low mens rea [or fault] threshold, because it includes an intention to cause serious injury, without intent to kill or to cause risk to life. The *Chan Wing-Siu* principle [requiring D simply to foresee that P might commit the offence] extends liability for murder to a secondary party on the basis of a still lesser degree of culpability, namely foresight only of the possibility that the principal may commit murder but without there being any need for intention to assist him to do so. It savours, as Professor Smith suggested, of constructive crime.[34]

12.22 As the Supreme Court and Privy Council argued, the reinstatement of intention, instead of foresight, as the requirement for secondary liability to be found "brings the

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30 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [89].

31 Above, at [77].

32 Above, at [90] to [94]. The Supreme Court gave the following example: "The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done" (at [92]).

33 Above, at [83].

34 Above, at [83]. The reference at the end of the quote is to J Smith, "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 *Law Quarterly Review* 453 (cited in *Jogee* at [2]).

striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal [to an end]".[35]

12.23 Fourthly, the judgment also sought to clarify the relationship between murder and manslaughter in complicity cases:

> If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results.[36]

12.24 This confirmed the earlier case law that the test for establishing the fault element of manslaughter is an objective one, because:

> If a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result.[37]

12.25 Finally, *Jogee* sought to explain under which circumstances secondary liability should not be found, that is, when there is an "overwhelming supervening act" by the principal perpetrator causing death, "which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history".[38]

CRITICISM OF THE LAW OF COMPLICITY AFTER *JOGEE*

12.26 In the sections below, we provide an overview of the many lines of criticism levelled against the law of complicity. The aim of this overview is to show that, ten years after *Jogee*, the law continues to raise a great number of complex challenges. Even though these challenges are not specific to the law of homicide, they have been raised repeatedly by consultees with whom we have engaged in the course of this project. Therefore, we believe that there is value in setting them out here to illustrate that there is a compelling case for a wholesale reform of the law of complicity.

Terminology

12.27 As noted in the introduction, the expression "joint enterprise" is frequently used also post-*Jogee*, especially by advocacy groups, to signal the enduring problems with the law of complicity. As Dr Nisha Waller has observed, the expression has

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35 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [84].

36 Above, at [96].

37 Above, at [96], referring to *R v Reid* (1976) 62 Cr App R 109 and other relevant cases.

38 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [97]. The overwhelming supervening act replaced the "fundamental difference rule" pre-*Jogee*. For a comment, see B Krebs, "Overwhelming Supervening Acts, Fundamental Differences, and Back Again?" (2022) 86(6) *Journal of Criminal Law* 420.

"communicative benefits" for those advocating for change and fosters solidarity and support among those impacted by the law and the wider community.[39]

12.28 However, its continuing use is imprecise and potentially misleading in legal language. The expression is not found in statutes and generally it is accepted that it is not "a legal term of art".[40] Many commentators agree that its use should now be avoided, not only because it adds nothing to the existing rules governing complicity, but also because it has potential to confuse juries as to the necessary requirements to prove D's liability.[41] Many consultees who responded to the Call for Evidence also opposed its continuing use.[42] Notably, the Crown Court Compendium employs the expressions "joint participation" or "joint criminal activities" generally to describe cases where two or more defendants are involved.[43]

12.29 As noted at paragraph 12.19 above, *Jogee* clarified that "joint enterprise liability" is not a legal category.[44] The existence of a joint enterprise between an accessory and a principal may be evidentially significant to prove encouragement or assistance but is not legally significant to describe the current rules governing complicity. If used, it should be treated as nothing more than synonymous with "complicity".[45]

Limited practical impact

12.30 *Jogee* has been credited with having attempted to clarify aspects of the law, in particular by specifying that cases where two or more defendants are parties to a joint enterprise in principle should not be treated differently from ordinary rules governing secondary liability.[46] However, there is wide agreement among critics that in practice little has changed, and that the state of the law is far from satisfactory. Drawing from an analysis of prosecution and conviction trends pre- and post-*Jogee*, Helen Mills, Matt Ford and Roger Grimshaw concluded that the "Supreme Court [decision] had no

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39 N Waller, The Legal Dragnet. Joint Enterprise Law and its Implications (Centre for Crime and Justice Studies 2024), p 10.

40 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [77].

41 Among many: B Krebs, "Written Jury Directions and Contributing to the Force of Numbers: *R v N*" (2020) 84(2) *Journal of Criminal Law* 172, 175; J Child and D Ormerod, *Simith, Hogan and Ormerod's Essentials of Criminal Law* (3rd ed, 2019), p 513.

42 Including Dr Beatrice Krebs and Professor Matthew Dyson. Many others used "complicity" instead of "joint enterprise liability", including the Criminal Law Reform Now Network, Professor Dennis Baker and Dr Charlotte Bishop.

43 Judicial College, "The Crown Court Compendium. Part I: Jury and Trial Management and Summing Up" (last updated March 2026).

44 See A Simester, "Accessory Liability and Common Unlawful Purposes" (2017) 133(1) *Law Quarterly Review* 73, 73-74.

45 Although this use is also inaccurate, since there are cases of complicity where there is no joint enterprise or common purpose between D and P (for example, where D encourages or assists P, but they do not act in concert with each other).

46 E van Sliedregt, "Joint Criminal Confusion: Exploring the Merits and Demerits of Joint Enterprise Liability" in B Krebs (ed), *Accessorial Liability After Jogee* (2019), p 190; J Child and D Ormerod, *Simith, Hogan and Ormerod's Essentials of Criminal Law* (3rd ed, 2019), p 513.

discernible impact on the numbers of people prosecuted or convicted of serious violence as secondary suspects".[47]

12.31 In addition, as we observed in our 2025 consultation paper on criminal appeals, only two appeals based on the 2016 change of law in *Jogee* have been successful.[48] The "substantial injustice" test applied by the Court of Appeal Criminal Division to appeals based on a change of law requires a defendant to demonstrate that, had the jury been directed in line with *Jogee*, the outcome would have been different. That is a difficult threshold to meet. Since *Jogee* held that foresight could be evidence of intent, in most cases it would have been possible for a jury properly to convict if they had followed a post-*Jogee* direction (although it does not follow that they would have done so on the facts of the case).[49] Relatedly, many have criticised the implication that there is no substantial injustice where a defendant was convicted of murder but, had the *Jogee* direction been followed, they might instead have been convicted of manslaughter.[50]

Conduct (encouraging or assisting)

12.32 Despite *Jogee*'s reiteration that mere association or presence is not sufficient to ground liability for an accessory, commentators broadly agree that it remains unclear what counts as "encouraging or assisting" the commission of the principal offence.

12.33 As noted by many, *Jogee* did not specify the minimum contribution to the principal crime for D to be convicted of the same offence as P, since that is an issue of fact for the jury. The judgment held that "once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on [the principal's offender's] conduct or on the outcome".[51] Perhaps more ambiguously, it held that "both association and presence are likely to be very relevant evidence on the question whether assistance or encouragement was provided" however "neither association nor presence is necessarily proof of assistance or encouragement; it depends on the facts".[52] Dr Beatrice Krebs has observed that "this approach does not work so well, however, where presence is relied on both as *evidence* of assistance or encouragement and as *the very act* of assistance or encouragement".[53]

12.34 The difficulty with understanding the degree of contribution that D must make to the principal offence admittedly predates *Jogee* and is inherent in the law of complicity. For D to be convicted as an accessory, causation is not required, even though it is accepted that there must be "some connecting link" between D's act of

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47 H Mills, M Ford and R Grimshaw, *The Usual Suspects. Joint Enterprise Prosecutions Before and After the Supreme Court Ruling* (Centre for Crime and Justice Studies 2022), p 15.

48 Criminal Appeals (2025) Law Commission Consultation Paper No 268, para 10.74.

49 Above, paras 10.68 to 10.73.

50 Above, paras 10.110 to 10.111.

51 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [12].

52 Above, at [11].

53 B Krebs, "Does Complicity Require a Measurable Contribution? *R v Hussain and others* [2023] EWCA Crim 697" (2023) 87(4) *Journal of Criminal Law* 294, 296 (emphasis in the original).

encouragement or assistance and the principal's offence.[54] As Professor Rebecca Williams argued, the theoretical basis for accessory liability cannot be fully explained by causation and thus looking for a rational basis to ground liability is a difficult exercise.[55]

12.35 One justification in support of the retention of liability in joint enterprise cases as distinct from liability in cases of encouraging or assisting has been provided by Professor Andrew Simester. He has argued that once an accessory in a joint enterprise has engaged in a criminal activity, they have changed their "normative position" and therefore they may be held legally and morally accountable for any crime (including a more serious one) committed by a principal in pursuit of the criminal venture. This is because "whereas aiding and abetting doctrines are grounded in D's contribution to another's crime, joint enterprise liability is grounded in affiliation".[56] However, some have rejected this position, maintaining that it ignores the reality that weak or potentially vulnerable secondary parties are sometimes unable to withdraw from a criminal association.[57]

12.36 Recent research drawing from interviews with solicitors and barristers and trial observations appears to show that the prosecution often relies on the vagueness of "encouraging or assisting" to establish overarching narratives about the accessory's involvement, in particular in cases of spontaneous and escalating violence. Such narratives are then used to imply "collective intent", explaining why "guilt by association" is an expression still frequently employed by critics of joint enterprise law.[58] This is compounded by what critics believe is a racialised use of gang narratives, discussed from paragraph 12.58 below.

12.37 To address this problem, Professor Matthew Dyson has suggested that it could be clarified, either by way of judicial development or in legislation, that D's act of encouragement or assistance must make a "substantial contribution" to the principal offence. He concludes that without such a substantial contribution requirement, secondary liability is not the appropriate framework, but there might be instead inchoate liability under the SCA 2007.[59] However, the Court of Appeal in *Hussain and*

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54 *R v Stringer* [2011] EWCA Crim 1396, at [48]. If one were to apply the traditional rules governing causation, P's voluntary act would break the chain of causation, ruling out D's liability for the offence. See also the discussion at para 12.25 above on overwhelming supervening acts. The exception is "procuring", which requires a causal link between D's act of procuring and P's commission of the offence: *Attorney General's Reference (No 1 of 1975)* [1975] QB 773 (CA).

55 R Williams, "What is the Theoretical Basis for Accomplice Liability?" in B Krebs (ed), *Accessorial Liability After Jogee* (2019).

56 A Simester, "The Mental Element of Complicity" (2006) 122(4) *Law Quarterly Review* 578.

57 S Hulley and T Young, "Joint Enterprise in England and Wales: Why Problems Persist Despite Legal Change" (2025) 37(1) *Current Issues in Criminal Justice* 134, 138.

58 N Waller, *The Legal Dragnet. Joint Enterprise Law and its Implications* (Centre for Crime and Justice Studies 2024), p 13. See also N Waller and T Sultan, *Joint Enterprise on Trial. A Wide Net Cast on Weak Grounds* (APPEAL, 2025).

59 M Dyson, "The Contribution of Complicity" (2022) 86(6) *Journal of Criminal Law* 389, 412-413. He has noted that other areas of criminal law expressly recognise non-causative contributions, notably section 52(1B) of the Coroners and Justice Act 2009 on diminished responsibility, whereby the abnormality of mental functioning must be a "significant contributory factor" in the killing.

Others explicitly rejected this additional requirement, simply reiterating that no causal link is required when D encouraged or assisted P, following *Jogee*.[60]

12.38 An attempt to add a "significant contribution" requirement into legislation was recently made by Kim Johnson MP via a private member's bill. The bill sought to amend section 8 of the AAA 1861 to that effect. The bill was debated in February 2024 but not put to a vote due to the dissolution of Parliament.[61]

Fault element

12.39 Perhaps the most challenging aspect of the law of complicity, at both a theoretical and practical level, is the fault element of the secondary party. As explained above, *Jogee* held that for D to be convicted as an accessory, they must have intended that P would commit the offence, with foresight relegated to evidence from which the jury could infer such an intent. There are a number of problems with this position, as noted by critics.

12.40 Firstly, there is no clear dividing line between intent as a fault element and foresight as evidence of intent. Professor David Ormerod and Karl Laird have argued that, unless the jury are directed that a high level of foresight is required from which to infer intention, there is a risk that the jury could otherwise "infer the intention too readily from some 'middling' degree of foresight".[62] Dr Krebs has echoed the same concerns, noting that leaving juries with the possibility of inferring intention from evidence of presence and foresight "risks slipping back to parasitic accessory liability".[63]

12.41 Secondly, while in some cases D intended that P would commit the offence, in some others D might have had only a *conditional* intention.[64] The problem with conditional intention is that it is already a theoretically challenging concept in a single-defendant case and therefore it may be ill-suited to be applied in a case with multiple defendants. As Dr Christopher Cowley has observed,

> First … there is a general difficulty of speaking of one person 'intending' the other to perform an action, even when the other's action is nearby in time and space … Second, however, since P's planned crime is in the vague future, D cannot be sure (and is certainly not 'virtually certain') that P will commit it at all, and this impedes the ascription of an intention to D.[65]

12.42 Additionally, it remains unclear how conditional intention would be able to operate in cases of "a disagreement between D and P about *which* conditions are in question,

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60 *R v Hussain and others* [2023] EWCA Crim 697, at [84].

61 For the text of the bill and its parliamentary history, see https://bills.parliament.uk/bills/3550.

62 D Ormerod and K Laird, "*Jogee*: Not the End of a Legal Saga but the Start of One" [2016] *Criminal Law Review* 539, 545.

63 B Krebs, "Written Jury Directions and Contributing to the Force of Numbers" (2020) 84(2) *Journal of Criminal Law* 172, 174.

64 Because D intended that P would commit the offence "if the occasion arose": see para 12.21 above.

65 C Cowley, "*Jogee*, Parasitic Accessory Liability and Conditional Intention" in B Krebs (ed), *Accessorial Liability after Jogee* (2019), p 59.

about *when* they will be fulfilled, and to *whose* satisfaction".[66] Professor Simester has made the same point, concluding that *Jogee* is open to criticism for "mishandling conditional intention".[67] Similarly, Professor John Child has observed that "introducing such an uncertain concept to an area of law fraught with appeal litigation is concerning, particularly … because conditional intention is discussed by the court using vague language such as 'tacit agreement' and 'scope of the venture'".[68] He has argued that it is incorrect to say that D's intention to encourage or assist is conditional, because present intention can never be conditional; instead, D has an (unconditional) intention to encourage or assist P with a specific intention as to the future conduct of P.[69]

12.43 Thirdly, the higher fault threshold now required to convict an accessory of murder has resulted in an expansion of (unlawful act) manslaughter in cases where D's mental element falls short of intention to kill or cause grievous bodily harm. *Jogee* explicitly envisaged the possibility of a manslaughter conviction for a secondary party who either was party to a violent attack without an intent to assist or encourage P in causing death or serious harm; or assisted or encouraged any other unlawful act which sober and reasonable people would realise carried the risk of some harm.[70] However, as many have argued, transplanting the elements of unlawful act manslaughter into complicity cases is far from straightforward. For example, Dr Krebs has noted that *Jogee* seemed to overlook cases of unlawful act manslaughter when the base offence is non-violent (for example, some types of burglary), arguing that:

> The Supreme Court, whose own examples concern unlawful acts that are inherently violent, does not seem to appreciate the wide range of potential base crimes and the discretion left to prosecutors who might make a tactical choice in selecting that crime that allows them to inculpate the greatest number of participants.[71]

12.44 She has suggested that secondary liability should only be found in cases where the accessory has encouraged or assisted violence, not just any (non-violent) base offence, "lest in the wake of *Jogee* the common law has simply replaced joint enterprise murder with … 'joint enterprise manslaughter'".[72]

12.45 Related to this point is the overarching problem of whether manslaughter is a *lesser* offence to murder, or instead a *different* offence. Professor Dennis Baker has repeatedly argued that a secondary party cannot be convicted of manslaughter when the principal has committed murder, since "full derivative liability as envisaged by section 8 of the Accessories and Abettors Act 1861 means both parties should be

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66 C Cowley, "*Jogee*, Parasitic Accessory Liability and Conditional Intention" in B Krebs (ed), *Accessorial Liability after Jogee* (2019), p 61 (emphasis in the original).

67 A Simester, "Accessory Liability and Common Unlawful Purpose" (2017) 133(1) *Law Quarterly Review* 73.

68 J Child, "Understanding Ulterior Mens Rea: Future Conduct Intention is Conditional Intention" (2017) 76(2) *Cambridge Law Journal* 311, 316.

69 Above, pp 317 to 320.

70 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [96].

71 B Krebs, "Joint Enterprise Murder is Dead – Long Live Joint Enterprise Manslaughter?" in B Krebs (ed), *Accessorial Liability After Jogee* (2019), p 130.

72 Above, p 131.

liable for the exact same crime. Manslaughter is not a lesser-included offence for murder”.[73] Dr Krebs has argued that this criticism is unfounded, both because manslaughter *is* a lesser offence (the intention to cause *serious* harm necessarily incorporates the intention to cause *some* harm) and because derivative liability at common law is not full (an accessory’s culpability can be based on a lesser form of the principal’s culpability).[74]

12.46 More generally, Dr Cowley has noted that *Jogee* involved a small-scale case of violence, rather than the large-group gang violence with which cases of complicity are typically concerned, and concluded that “the traditional categories of criminal law – intention and complicity – are too clumsy and crude to deal with gangs alone, and over the longer term might even make the situation worse”.[75]

Fair labelling

12.47 Some have raised concerns that to ascribe liability to the accessory for the same crime as if they were the principal is contrary to the principle of fair labelling. Professor Dyson, for example, has noted that secondary liability is often based on a special form of derivation (from the principal’s liability): rather than “less than”, in complicity cases derivation effectively means “equal to”, with participants labelled as all having committed the substantive offence. He has maintained that this “arguably mischaracterises and misrepresents what the accessory did … wiping out all nuance in discussing a potentially huge range of contribution and culpability”. While conceding that equal liability is an attractive proposition when it cannot be established whether the defendant was a principal or an accessory, Professor Dyson has suggested that it would be fairer to convict all as secondary parties (having proved the principal offence even when the principal offender cannot be identified).[76] Alternatively, he has suggested an offence of “being a secondary party to X offence” to label the wrong more fairly and allow flexibility in sentencing.[77]

12.48 On fair labelling, Dr Susie Hulley and Dr Tara Young have observed that:

> For individuals who have not committed the fatal act, being labelled a ‘murderer’ and being sentenced to a long indeterminate period of custody (sometimes as long as the principal party), feels deeply illegitimate and generates strong feelings of anger and frustration. Inaccurate labelling of one’s actions is also stigmatising and can

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73 D Baker, “Unlawfulness’s Doctrinal and Normative Irrelevance to Complicity Liability: A Reply to Simester” (2017) 81(5) *Journal of Criminal Law* 393, 396. See also D Baker, “Lesser Included Offences, Alternative Offences and Accessorial Liability” (2016) 80 *Journal of Criminal Law* 446.

74 B Krebs, “Joint Enterprise Murder is Dead – Long Live Joint Enterprise Manslaughter?” in B Krebs (ed), *Accessorial Liability After Jogee* (2019), p 120. For a discussion of derivation in secondary liability, see para 12.8 above.

75 C Cowley, “*Jogee*, Parasitic Accessory Liability and Conditional Intention” in B Krebs (ed), *Accessorial Liability after Jogee* (2019), p 63.

76 M Dyson, “The Contribution of Complicity” (2022) 86(6) *Journal of Criminal Law* 389, 392.

77 Above, p 404, concluding that “this might require a fact-finder, including a jury to determine whether D was a secondary party or a principal, which is no bad thing”.

significantly curtail an individual's life chance post release (eg, leading to difficulties in finding employment).[78]

12.49 They have pointed out that the existing law fails to consider that the assessment of the gravity of an offence and its place within a framework of offence seriousness "is expected to be conducted both when offences are initially 'graded' for the purpose of legislation and at the point at which an individual is sentenced in court".[79]

Sentencing

12.50 In complicity cases, the accessory is liable to be sentenced for the same offence as the principal offender (unless the accessory is convicted of a lesser offence). In cases of murder, on conviction both will be subjected to the mandatory life sentence. There is no provision in Schedule 21 to the Sentencing Code expressly mentioning a different starting point or a mitigating factor applicable to an accessory whose culpability may be lower due to not having directly caused death.[80]

12.51 In contrast, the sentencing guideline for unlawful act manslaughter provides that the fact that "the offender played a minor role" is a factor indicating lower culpability to be taken into account by the sentencing judge.[81]

12.52 The Sentencing Council has not issued guidelines specific to the sentencing of accessories. This reinforces the idea that the culpability of accessories is derivative of the crime committed by the principal.[82] However, the general guideline on overarching principles on sentencing includes aggravating and mitigating factors when an offence was committed as part of a group.[83] The guideline clarifies that "mere membership of a group (two or more persons) should not be used to increase the sentence, but where the offence was committed as part of a group this will normally make it more serious" due to the possibility of greater harm and the role of the offender within the group. It further specifies that there might be higher culpability when the offender had a leading role in the group or resorted to coercion, intimidation or exploitation of others; or lower culpability when the offender had a lesser or subordinate role under direction, or was coerced, intimidated or exploited. It adds that courts should be alert to factors suggesting that the offender could have been coerced, intimated or exploited, for example, as a result of domestic abuse, trafficking or modern slavery "which the offender may find difficult to articulate". Finally, the fact that the offender was part of an organised criminal network will make the offence more serious, taking into account the offender's role in the organisation.

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78 S Hulley and T Young, "Joint Enterprise in England and Wales: Why Problems Persist Despite Legal Change" (2025) 37(1) *Current Issues in Criminal Justice* 134, 140.

79 Above, p 140.

80 However, different starting points may apply depending on the facts of each case (for instance, where only P has brought a knife to the scene).

81 Sentencing Council, *Sentencing Guidelines for Unlawful Act Manslaughter* (November 2018).

82 M Dyson, "The Contribution of Complicity" (2022) 86(6) *Journal of Criminal Law* 389, 393.

83 Sentencing Council, *General guideline: overarching principles* (October 2019). The general guideline can be used when there is no specific offence guideline and in conjunction with offence-specific guidelines.

12.53 The Court of Appeal has appeared to be reluctant to consider the different role played by an accessory in relation to the commission of the principal crime as relevant in sentencing. For example, in *Sanchez* the Court of Appeal held that:

> Although the culpability of the secondary party may in many cases be less than the principal, the sentences must be viewed proportionately in the light of the policy of the law, that he who encourages the commission of a murder or assists with the commission is to be dealt with as a murderer.[84]

Policy and pragmatic considerations

12.54 It has been argued that the law of joint enterprise pre-*Jogee* was grounded in policy and pragmatic considerations which justified trumping doctrinal clarity. In *Powell and English* (decided pre-*Jogee*), Lord Hutton stated that:

> The rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs … In my opinion there are practical considerations of weight and importance related to considerations of public policy which justify the principle stated in *Chan Wing-Siu* and which prevail over considerations of strict logic.[85]

12.55 Similarly, Lord Steyn observed that parasitic accessory liability:

> Is undoubtedly a lesser form of mens rea [or fault] … In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases… The criminal justice system exists to control crime … Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.[86]

12.56 A similar tension between pragmatism and doctrinal clarity has also been observed in relation to the existing law of complicity. For example, Professor Dyson has noted that "in complicity, like many other areas of English law, legal actors routinely and mistakenly sacrifice precision about doctrine for the sake of a purportedly practical application of the law".[87]

12.57 The law of complicity remains a convenient tool for the prosecution to charge defendants in cases of multi-handed violence which quickly escalates. Professor Williams has argued that the rationales of complicity lie in pragmatic considerations regarding proof (the possibility of convicting a defendant as a principal when the prosecution cannot prove whether they participated as principal or accessory); and

84 *R v Sanchez* [2008] EWCA Crim 2936, at [20]. See also *R v Semusu* [2021] EWCA Crim 513, at [23] to [27]; and *R v Fearon* [2021] EWCA Crim 1706, at [19] to [25].

85 *R v Powell and R v English* [1999] 1 AC 1.

86 Above.

87 M Dyson, "The Contribution of Complicity" (2022) 86(6) *Journal of Criminal Law* 389, 389.

normative concerns about deterrence, particularly in cases of group violence.[88] Similarly, in the 2007 report on participating in crime, the Law Commission argued that there is a "forensic advantage" in the rules governing secondary liability. This is because a defendant can be convicted of the principal offence even when the prosecution cannot prove whether the defendant was a principal or secondary party (provided that it can be proved that they were either one or the other).[89]

Gang narratives

12.58 It has been argued that the resurgence of joint enterprise liability since the 1980s has been driven by policies aiming to tackle youth violence and gangs, and that the law has developed to accommodate these policy objectives.[90] Before *Jogee*, Dr Andrew Green and Professor Claire McGourlay warned that the lowering of the standard of proof in joint enterprise cases allowed the prosecution to draw inferences of gang membership, noting that tenuous forms of evidence have made it easier and cheaper for investigators to construct their cases, often resulting in injustice.[91]

12.59 In more recent years, the issue of gang narratives in the prosecution of complicity cases has attracted considerable interest from academics and activists. There is widespread agreement among many that inferences of gang affiliation are often relied upon by the prosecution in cases of young Black men and boys.[92] As Dr Waller has observed, gang narratives are particularly useful to prosecutors as "conviction-maximising" tools and are facilitated by the vagueness of the law as to what counts as acts of encouragement or assistance.[93] Many have pointed in particular to what they say is the prosecution's tendency to interpret aspects of Black youth culture, such as clothing and rap music, as evidence of gang membership, resulting in stereotyping and discrimination.[94]

12.60 The CPS has published guidelines on decision-making in gang-related offences. Although not specific to complicity cases, the guidelines specify that "prosecutors

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88 R Williams, "What is the Theoretical Basis for Accomplice Liability?" in B Krebs (ed), *Accessorial Liability After Jogee* (2019), pp 30-31.

89 Participating in Crime (2007) Law Com No 305, para 3.2 (referring in particular to joint enterprise liability existing at that time).

90 A Green and C McGourlay, "The Wolf Packs in Our Midst and Other Products of Criminal Joint Enterprise Prosecutions" (2015) 79(4) *Journal of Criminal* Law 280; P Squires, "*Vodoo Liability*: Joint Enterprise Prosecution as an Aspect of Intensified Criminalisation" (2016) 6(4) *Oñati Socio-Legal Series* 937; J Jacobson and A Kirby, *Joint Enterprise: Righting a Wrong Turn?* (Prison Reform Trust 2016).

91 A Green and C McGourlay, "The Wolf Packs in Our Midst and Other Products of Criminal Joint Enterprise Prosecutions" (2015) 79(4) *Journal of Criminal* Law 280.

92 Among many: P Williams and B Clarke, *Dangerous Associations: Joint Enterprise, Gangs and Racism* (Centre for Crime and Justice Studies 2016); M L Eisen and others, "Examining the Prejudicial Effects of Gang Evidence on Jurors" (2013) 13(1) *Journal of Forensic Psychology Practice* 1; J Pitts, "Who Dunnit? Gangs, Joint Enterprise, Bad Character and Duress" (2014) 113 *Youth & Policy* 48. See also the sources cited in the two footnotes immediately below.

93 N Waller, *The Legal Dragnet. Joint Enterprise Law and its Implications* (Centre for Crime and Justice Studies 2024), pp 16-18.

94 E Quinn, E Kane, W Pritchard, *Compound Injustice. A Review of Cases Involving Rap Music Evidence in England and Wales* (University of Manchester 2024); T Young and S Hulley, "'It's Tantalising Evidence…but You've Got to Look at the Wider Picture': Rap Music as Evidence in Joint Enterprise Cases" (2024) 21(3) *Crime, Media, Culture: An International Journal* 338.

should guard against unconscious bias and should not make assumptions about gang membership", warning that:

> Given the negative connotations of the term 'gang', prosecutors should not refer to a group as a 'gang' in proceedings unless there is evidence to support the assertion. Using the term 'gang' inappropriately risks casting the net of liability beyond that which can be established. It also disproportionately affects minority ethnic people.[95]

12.61 Data from the recent Joint Enterprise National Monitoring Scheme 2024-25 undertaken by the CPS showed that out of 168 joint enterprise homicide or attempted homicide cases, the prosecution sought to adduce evidence of alleged "gang-related" offending in 21 of them (12.5%), of which over half were in London.[96] According to Local Scrutiny Involvement Panels convened by the CPS:

> Use of the term 'gang' to describe a group of black children, in the absence of any evidence to suggest that they are involved in a 'gang', invokes a racial stereotype which may be racially discriminatory. This was noted as a particular issue in the context of joint enterprise homicide, where misconceptions around 'gang' association may lead to assumptions regarding the involvement and motivation of an individual implicated in a group-based offence.[97]

Groups affected by the operation of the law of complicity

12.62 There is a growing body of evidence suggesting that some categories of defendants may be disproportionately affected by the way the law of complicity operates, including:

(1) **Young Black men and boys**. The CPS Joint Enterprise National Monitoring Scheme reported that there were 168 cases prosecuted as joint enterprise homicide or attempted homicide cases in 2024-2025, involving 511 defendants (a single case may contain multiple defendants).[98] The data shows that the proportion of Black defendants prosecuted in joint enterprise homicide or attempted homicide cases is considerably higher than the overall Black population in England and Wales.[99] Black defendants made up 25.2% of all defendants, while Black individuals make up only 4% of the population. In

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95 Crown Prosecution Service, *Decision Making in Gang Related Offences* (last updated 22 July 2025).

96 Crown Prosecution Service, *Joint Enterprise National Monitoring Scheme 2024-25* (23 September 2025). The CPS noted that the definition of the word "gang" can vary amongst agencies. We highlight that the CPS treats joint enterprise liability as synonymous with secondary liability.

97 Local Scrutiny Panels are convened by each CPS Area once per year and invite local community representatives, academics and other experts to scrutinise two completed joint enterprise cases.

98 Crown Prosecution Service, *Joint Enterprise National Monitoring Scheme 2024-25* (23 September 2025). The definition of "homicide offence" under this scheme also covers causing or allowing the death of a child or vulnerable adult, child destruction, driving offences causing a death, and inchoate offences such as conspiracy to commit murder. The CPS notes that cases represent a small sample and that, given that a single case may involve multiple defendants, a single case can have an impact on patterns in the data (see sections 4-5 and the annex to the Scheme).

99 The data records the ethnicity of the defendant according to their self-identification. The data shows that defendants from Asian, Mixed and Other ethnicities are also overrepresented, though the extent of the overrepresentation varies for each group. The disparity between the percentage of Black defendants and the Black population of England and Wales is the largest such disparity among the ethnicity groups.

comparison, White defendants made up 36.2% of all defendants, while White individuals make up 91.7% of the population. Black defendants were most likely to be aged 18-24 years (44.2%), whilst White defendants were most likely to be aged 30-59 years (36.8%), followed by 18-24 years (34.1%). The CPS Scheme also reports "'adultification' in the context of disproportionality" (where a Black child is assumed to be more mature than they are) to be a potential issue in joint enterprise cases.

Drawing from previous CPS data, studies conducted by the Centre for Crime and Justice Studies and APPEAL found that young Black men and boys are particularly affected by the operation of the law of complicity, which the researchers argued was also due to the CPS's reliance on racialised gang narratives and stereotypes as evidence from which intention may be inferred.[100]

(2) **Women**. A study conducted by Becky Clarke and Dr Kathryn Chadwick has shown that most women in the study who had been convicted under the law of complicity were often marginal to the violent event.[101] In the seventy cases analysed, in only seven cases the women engaged in some "physical exchange" with the victim. In all these seven cases, the physical exchange was of a low level of seriousness (a "push", "slap" or "punch"), with none of the women using a deadly weapon. In three of these seven cases, the physical exchange occurred as a separate incident prior to the main event.[102] From the interviews with women convicted under the law of complicity and the analysis of case documents, the authors of the study argued that the criminal justice system, especially the prosecution, often relies on gendered stereotypes, with women being portrayed, for example, as manipulators and organisers of violence.[103]

Dr Hulley, drawing from twelve interviews with female prisoners, has found that domestic abuse and coercive control often resulted in women feeling unable to withdraw from the scene and to engage with investigations; this may reinforce police officers' (often gendered) inferences about the role women played in encouraging or actively assisting their male partners to commit the offence.[104]

(3) **People with Autism Spectrum Disorders ("ASD")**. Some evidence suggests that people with ASD (often not diagnosed or misdiagnosed) are at risk of being

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100 N Waller, *The Legal Dragnet. Joint Enterprise Law and its Implications* (Centre for Crime and Justice Studies 2024); N Waller and T Sultan, *Joint Enterprise on Trial. A Wide Net Cast on Weak Grounds* (APPEAL, 2025). The studies relied on data contained in the CPS, *Joint Enterprise Pilot 2023: Data Analysis* (September 2023). The pilot was the result of campaigning from organisations such as Liberty and Joint Enterprise Not Guilty by Association (JENGbA), following the recommendation contained in the report of the Rt Hon David Lammy MP's Independent Review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System (September 2017), p 20.

101 B Clarke and K Chadwick, *Stories of Injustice: The Criminalisation of Women Convicted Under Joint Enterprise Laws* (2020).

102 Above, p 10.

103 Above, p 25.

104 S Hulley, "Defending 'Co-offending' Women: Recognising Domestic Abuse and Coercive Control in 'Joint Enterprise' Cases Involving Women and Their Intimate Partners" (2021) 60(4) *Howard Journal of Crime and Justice* 580, 597.

convicted under the law of complicity (and some have been convicted) even though they are often prone to be misunderstood or not able to assess the future conduct of another person due to their communication difficulties.[105]

THE LAW COMMISSION'S PREVIOUS HOMICIDE REVIEW

Context and recent developments

12.63 In the 2006 Report, we made two recommendations on complicity applicable to homicide offences.[106] These recommendations must be understood in light of the broader context in which they were made and the developments that have occurred in the almost twenty years since then.

12.64 Regarding the context, the 2006 recommendations on complicity in homicide were not made in isolation. In 2007, the Law Commission also made recommendations to reform the law of complicity holistically,[107] and therefore the recommendations on complicity specific to homicide offences were part of a broader package of law reform.[108] At the time we published the 2006 Report, our report on participating in crime had not yet been published. However, in 2006 we made clear that complicity in homicide cases "is nothing more than an important example" of the general law of complicity, on which we were due to make recommendations for a wholesale reform in the (at that time) forthcoming report.[109] Like the 2006 recommendations, the 2007 recommendations on participating in crime were not implemented by the Government.

12.65 Regarding recent developments, in the almost twenty years since the two reports were published, the law of complicity has significantly changed. Firstly, the SCA 2007 replaced the offence of incitement with the three offences of encouraging or assisting crime, discussed from paragraph 12.11 above. Secondly, in 2016 *Jogee* made some significant changes to the law of complicity, emphasising that the common law had taken "a wrong turn", as discussed at paragraph 12.18 above.

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105 F Gerry, C Allely and A Rowland, "Autism Spectrum Disorder and the Criminal Law" (Libertas Chamber 2021). For some recent cases, see *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA 1228. For a commentary, see Youth Justice Legal Centre, "Court of Appeal Judgment on Joint Enterprise and Trials of Vulnerable Defendants" (2017).

106 The 2006 Report employs the term "complicity", which in that context is not different from "secondary liability".

107 Participating in Crime (2007) Law Com No 305.

108 That package also included recommendations on inchoate secondary liability in Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, discussed from para 12.11 above.

109 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 4.19. The report on participating in crime was published in May 2007, while the report on murder, manslaughter and infanticide was published in November 2006. At the time the 2006 Report was published, the recommendations on complicity contained therein were already aligned with the recommendations in the report to be published in 2007.

The 2006 recommendations

12.66 In 2006, we made two recommendations on complicity in homicide cases.[110] Here we explain to what extent those recommendations would have addressed some of the enduring criticism of the law of complicity post-*Jogee*.

12.67 The first recommendation distinguished between complicity in cases of encouraging or assisting and complicity in joint enterprise cases (then called "joint criminal venture"):

> D should be liable to be convicted of P's offence of first or second-degree murder (as the case may be) if:
>
> (a) D intended to assist or encourage P to commit the relevant offence; or
>
> (b) D was engaged in a joint criminal venture with P, and realised that P, or another party to the joint venture, might commit the relevant offence.[111]

12.68 Our recommendation was in line with the common law at the time (pre-*Jogee*), according to which D would be liable as an accessory in a joint enterprise case if they *foresaw* that P might commit (first-degree or second-degree) murder. We acknowledged that some consultees considered the test of foresight "unduly harsh",[112] however we observed that such a test is justified for many reasons, including because:

> D's assent to the agreed offence, and even more so – where relevant – his or her *continued presence at the scene*, can be regarded as providing assistance or encouragement in the form of continuing 'moral' support for P. It must be kept in mind that *even a minimal degree of assistance or encouragement can be sufficient* to ground D's liability for P's offence. The law is entitled to take the view that, from P's perspective, D's continued assent to the agreed offence (and, where relevant, continued presence) meant that D accepted that [D] was, metaphorically, 'in for a penny; in for a pound'.[113]

12.69 This recommendation is now superseded by the rules established in *Jogee*, according to which there is no separate set of rules applicable to joint enterprise cases and foresight of P's offence is not sufficient to hold D liable as an accessory, as discussed at paragraph 12.21 above.[114] It is also important to stress that the requirements of a minimal degree of assistance or encouragement, or continued presence at the scene,

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110 In this section, we focus on recommendations specific to complicity in homicide. The three-tier structure recommended in 2006 also had an impact on secondary liability in homicide, as explained from para 12.81 below.

111 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 4.4. We said that "the concept of 'joint venture' should be defined broadly to cover criminal ventures following on from a conspiracy or an informal 'tacit agreement' involving two or more individuals; but it should also extend to the type of situation where D encouraged or assisted P to commit a crime and they acted with a common purpose notwithstanding the absence of any prior agreement between them" (para 4.9).

112 Above, para 4.12.

113 Above, para 4.16 (emphasis added).

114 Many recommendations in the 2007 report on participating in crime are also superseded by *Jogee*. A detailed discussion of the 2007 recommendations is not provided in this chapter.

which we argued might be sufficient to ground D's liability, have been widely criticised in recent years, as discussed from paragraph 12.32 above.[115]

12.70 We also expressed the view, supported by the vast majority of consultees, that an accessory who had only a peripheral role in the joint venture should not be granted a partial defence.[116] This was, and still is, in line with the understanding of secondary liability as derivative of the principal's liability.[117]

12.71 The second recommendation was as follows:

D should be liable for manslaughter if the following conditions are met:

(a) D and P were parties to a joint venture to commit an offence;

(b) P committed the offence of first-degree murder or second-degree murder in relation to the fulfilment of that venture;

(c) D intended or foresaw that (non-serious) harm or the fear of harm might be caused by a party to the venture; and

(d) a reasonable person in D's position, with D's knowledge of the relevant facts, would have foreseen an obvious risk of death or serious injury caused by a party to the venture.

12.72 We argued that such a recommendation aimed to "remedy an important defect in the common law" because, as the law stood at the time, when D and P are involved in a joint criminal venture, but D did not foresee that P might commit murder, D may escape liability for V's death. We maintained that "this treats D too generously if D was aware that P meant to do some harm to V, even if D did not realise that P might commit murder".[118] This recommendation is broadly in line with what was held in *Jogee* ten years later, the criticism of which is summarised from paragraph 12.43 above.

12.73 In conclusion, the common law distinction between rules applicable, respectively, to joint enterprise complicity and to non-joint enterprise complicity, as it existed before 2016, was supported by our 2006 recommendations but was rejected by *Jogee*. Additionally, had our recommendations been implemented, they may not have resolved some of the challenges raised by secondary liability discussed in this chapter.[119]

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115 The recommendations on participating in crime have also been criticised by A Green and C McGourlay, "The Wolf Packs in Our Midst and Other Products of Criminal Joint Enterprise Prosecutions" (2015) 79(4) *Journal of Criminal* Law 280. The authors argued that Professor Simester's normative position theory, which underpins the recommendations, is not based on empirical data and is questionable in that it makes "a pack [of wolves] equally responsible for any crime its members commit" (at 290).

116 Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 4.35-4.36.

117 See discussion in this chapter at para 12.8 above

118 Murder, Manslaughter and Infanticide (2006) Law Com No 304, para 4.5.

119 In the 2006 Report, we also argued that duress should be available to D as a full defence to murder to the same extent that it would be available to P. This would allow the law on homicide to take into consideration

12.74 Many of these challenges, admittedly, predate our 2006 recommendations and *Jogee* and are inherent to the general rules governing complicity. More than twenty years ago, Professor Andrew Ashworth argued that the law of complicity is:

> Replete with uncertainties and conflict. It betrays the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence.[120]

12.75 In response to our earlier recommendations on complicity in homicide, Professor G R Sullivan objected to the retention of the common law rules governing joint enterprise liability (or joint venture), arguing that it is "unsustainable in terms of principles and should be abolished". As he observed, "if there are persistent failures of justice because of difficulties of proof arising from multi-party violent incidents, this problem should be addressed directly and not 'solved' by perpetuating false doctrine".[121]

12.76 Professor Sullivan also criticised our recommendation on complicity in manslaughter, noting that the elements of this form of liability are "a compound of joint enterprise and gross negligence", however the objective test constitutes a "major step beyond liability for gross negligence manslaughter".[122] As he argued, had the recommendation been implemented:

> It would then be possible to be directly liable for a homicide offence on the basis of an objective assessment of the risk of someone else's conduct. It would be possible for D to be liable for this form of homicide without contemplating any form of violence against the victim. For instance, D may agree with P to burgle the victim's home, unaware of P's violent nature. D does contemplate the possibility that if the victim is disturbed by the burglary, the victim will fear that he might be harmed. Should P kill the victim, acting with intent to kill or cause serious harm, D would be liable for complicity in an unlawful killing if a jury were to take the view that the circumstances gave rise to an obvious risk of death or serious harm. This is objective liability with a vengeance.[123]

12.77 Since our 2006 recommendation on manslaughter is substantially similar to what was held in *Jogee* ten years later, as noted above, Professor Sullivan's criticism applies also to the existing elements of manslaughter in complicity cases.[124]

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cases where D unwillingly became party to a joint venture as a result of duress: Murder, Manslaughter and Infanticide (2006) Law Com No 304, paras 4.37 to 4.41. Duress falls within the Terms of Reference of the present homicide review; we will consider it in the second strand of the project on defences.

120 A Ashworth, *Principles of Criminal Law* (4th ed 2003) p 441.

121 G R Sullivan, "Complicity for First-degree Murder and Complicity in an Unlawful Killing" [2006] *Criminal Law Review* 502, 509 to 510.

122 Above, p 512.

123 Above, p 512.

124 For additional criticism of manslaughter in complicity cases, see from para 12.43 above.

ANALYSIS OF RESPONSES TO THE CALL FOR EVIDENCE

12.78 We have received a large number of responses to our Call for Evidence from academics, practitioners, civil society and prisoners highlighting what they consider the many challenges with the way the law of complicity operates (most of which are the same as those outlined from paragraph 12.26 above). While we agree that most of these challenges are relevant to the law of homicide, we are not persuaded that they are *unique* to the way the law of complicity applies in homicide cases. The fact that these challenges in practice arise mostly in homicide cases does not mean that they do not also arise when the law governing complicity applies to other (violent and non-violent) offences.

12.79 On the contrary, a number of consultees observed that the law of secondary liability is of general application across the whole criminal law, therefore they should not be reviewed in the context of a project whose subject is the law of homicide.[125] Some stressed that, due to the wide range of problematic issues in the law of complicity, there should be a separate wholesale review.

12.80 We agree with those consultees that a reform of the law of complicity within the homicide project would unavoidably risk creating a separate regime applicable to homicide offences. This risk had been already convincingly raised by Professor Sullivan in the context of our previous reviews in the early 2000s. As he noted, the possibility that our 2006 recommendations on complicity in homicide could have been implemented by the Government without the implementation of the 2007 recommendations on general rules governing participating in crime was "disturbing".[126] He argued that proposals for reform of complicity in homicide cases "are likely to prove controversial and should be subjected to the kind of scrutiny and debate only possible within a general review of complicity".[127] He concluded that "discrete proposals for complicity in homicide cannot be made in isolation from a general review of complicity".[128]

IMPACT OF OUR PROPOSALS ON THE STRUCTURE OF HOMICIDE OFFENCES ON THE LAW OF COMPLICITY

12.81 We now turn to explain how our provisional proposals on the structure of homicide offences would affect the operation of the law of complicity in homicide cases.

12.82 Under the current offence of murder, in a complicity case D may be convicted of murder even when they intended that P would cause serious injury, but P instead intended to kill. This is because D would have the required intention for murder (either

125 Including the Criminal Law Reform Now Network, Dr Jonathan Rogers and Professor Findlay Stark.

126 G R Sullivan, "Complicity for First-degree Murder and Complicity in an Unlawful Killing" [2006] *Criminal Law Review* 502, 502.

127 Above, 503.

128 Above, 513.

intention to kill or to cause serious injury). Under our current proposal to split murder into two degrees, that would no longer be the case.[129]

12.83 Applying the law of complicity set out in *Jogee* to our proposed structure of murder offences, when D intentionally encouraged or assisted P in the commission of any offence, D would be liable for either:

(1) first-degree murder: when D intended that P would kill intentionally (where P intended to kill);[130] or

(2) second-degree murder: when D intended that P would cause serious injury (where P intended either to kill or to cause serious injury).

12.84 In both cases, D may be convicted of either first-degree or second-degree murder even when D originally intended to encourage or assist a non-homicide offence (say, burglary), provided that D had the fault element required for either first-degree or second-degree murder.

12.85 Our provisional proposal for reform of the elements of unlawful dangerous act manslaughter would also have a positive impact on manslaughter in complicity cases. In Chapter 8, we provisionally propose adding to the existing objective foresight requirement in unlawful dangerous act manslaughter a subjective fault element as follows: "the defendant intended to cause some injury or was reckless as to whether some injury was caused".[131] The proposed subjective fault element would be the same for unlawful dangerous act manslaughter in complicity cases. In line with the law of complicity set out in *Jogee*, where P has committed first-degree or second-degree murder, D would be liable for manslaughter when they:

> Participated by encouragement or assistance in any other unlawful act which was dangerous in that a reasonable person would inevitably recognise that it must subject another person to the risk of some injury, and D intended to cause some injury or was reckless as to whether some injury was caused.[132]

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129 In the 2005 Consultation Paper, we said that one of the advantages of confining first-degree murder to intention to kill was that "at a stroke, it would also consign to history" the persistent problem that has arisen in the law governing the liability of accomplices to murder: A New Homicide Act for England and Wales? (2005) Law Commission Consultation Paper No 177, para 2.15. The advantage was more limited under the scope of first-degree murder eventually recommended in 2006 (which required proof either of intention to kill or intention to cause serious injury with awareness of a serious risk of causing death).

130 Where D intended that P would kill with the intention to kill, but P instead intended to cause serious injury resulting in the victim's death, D cannot be convicted of first-degree murder where P is convicted of second-degree murder. This is because the principal offence is second-degree murder, and the accessory cannot be convicted of a more serious offence. D would be convicted of second-degree murder because D's intention to kill necessarily includes the lesser fault element of intention to cause serious injury.

131 See Chapter 8.

132 This is our reformulation of the law set out in *Jogee* modified with our proposed subjective fault element for unlawful dangerous act manslaughter. For the original statement of the law, see *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387, at [96]. See also the discussion from para 12.23 to 12.24 above.

12.86 Therefore, our proposed structure would not alter the current general rules governing complicity, nor would it address their enduring criticism (especially regarding the conduct and fault elements).

12.87 However, our proposed structure would improve the way the law of complicity operates in homicide cases because:

(1) In a case of complicity, the availability of two murder offences would allow greater differentiation between D and P's respective intentions. As explained, such a differentiation is precluded under the current wide scope of murder, where D may be convicted of murder even when they intended that P would intend to cause serious injury. In turn, our proposed structure would untangle more accurately during a trial the actual roles played by each defendant. The prosecution would need to select charges to reflect possible differences in culpability between D and P. Additionally, a conviction for second-degree murder would reflect the different culpability and ensure fair labelling when D intended only that P would intend to cause serious injury.

(2) Convictions for murder where an accessory is subject to the mandatory life sentence under the current law of murder could, under our proposed structure, fall under second-degree murder, with the advantages that have been explained above. This also permits flexibility in sentencing. The sentencing judge would retain the power to impose a life sentence where D's culpability was very high (even though D did not have the intention required for first-degree murder). Lower culpability on the part of D would be reflected in the sentence.

(3) The proposed subjective fault element for unlawful dangerous act manslaughter would better reflect D's culpability in a complicity case by ensuring that D would be convicted only if they either intended to cause some injury or were reckless as to whether some injury would be caused. The existence of an objective risk of some injury arising from D's encouragement or assistance would no longer be sufficient to warrant D's conviction for manslaughter.

12.88 Therefore, despite the significant challenges of the current law, we believe that our proposed structure would result in a fairer and more proportionate application of the law of complicity in homicide cases.

CONCLUSION AND THE WAY FORWARD

12.89 As we noted throughout this chapter, the law of complicity raises complex challenges and is in need of reform. However, we have concluded that the review of homicide cannot be the vehicle to reform general rules governing complicity. Doing so would result in making proposals for reform which would apply beyond the law of homicide. This would be outside our Terms of Reference. Alternatively, the review would result in the development of a separate regime on complicity applicable only to homicide offences. However, we are of the view that a separate regime would introduce unjustified complexity.

12.90 We found the arguments that the law of complicity should be the object of a wholesale review persuasive. Indeed our 2006 recommendations on complicity in homicide were possible only to the extent that they originated from, and aligned with, our 2007 recommendations for reform of the general framework on complicity. The present homicide review does not take place under the same circumstances.

12.91 We do not reach this conclusion lightly. We recognise that it will disappoint many activists, civil society organisations, prisoners, practitioners and academics who have been advocating tirelessly for a change in the law. We are aware that work is currently being undertaken on complicity in many quarters, including by the Westminster Commission on Joint Enterprise. We will continue to keep the law of complicity under review in the two other strands of our homicide review focusing, respectively, on defences in homicide and the sentencing framework for murder.

Chapter 13: Attempted murder

INTRODUCTION

13.1 Criminal attempt is an inchoate offence that imposes criminal liability on a person who intends to commit an offence and takes steps towards committing that offence, although the underlying offence is not completed. Attempted murder is part of the wider homicide framework given that, although it is a non-fatal offence, it has an inherent connection with the underlying offence of murder.

13.2 In this chapter we examine the current law of attempted murder and whether it requires review and reform as part of this project. We first outline the current law and highlight some concerns raised by stakeholders in relation to the elements of attempted murder and the interaction between attempt and transferred fault. We conclude at this stage that reform of the law of attempted murder is not necessary. Finally, in this chapter we also explain how attempted murder would fit within our proposed restructuring of general homicide offences.

CURRENT LAW

13.3 The Criminal Attempts Act 1981 ("CAA"), together with the common law, sets out the framework for attempt offences. Inchoate offences, including attempts, impose criminal liability based on intention and conduct alone, without requiring proof of any resulting harm or consequence.

Conduct element

13.4 Section 1(1) of the CAA provides that a person is guilty of attempting to commit an offence if, with intent to commit that offence, they do an act that is "more than merely preparatory" to its commission. What constitutes "more than merely preparatory" conduct will depend on the facts of the case.[1]

Fault element

13.5 The offence of attempted murder requires that the defendant must have had the intention to kill.[2] Although the intention to cause grievous bodily harm ("GBH") currently suffices as the fault element of murder,[3] it does not suffice for attempted murder. This is because the intention required in attempted murder cases is related to the intended consequence (death) of the underlying offence (murder). In relation to the law of attempt generally, where the completed offence depends on a particular consequence, liability for attempting that offence requires proof that the defendant

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1 D Ormerod and K Laird, *Smith, Hogan, & Ormerod's Criminal Law* (16th ed 2021) pp 443-447. For example, in *R v Jones (Kenneth Henry)* [1990] 1 WLR 1057, the Court of Appeal held that the steps of obtaining a gun, shortening it, loading it, putting on a disguise, and going to the location of the victim only amounted to preparatory steps. However, the defendant's further acts of getting into the victim's car, taking out the loaded gun and pointing it at the victim with the intention of killing him were more than merely preparatory.

2 *Whybrow* (1951) 35 Cr App R 141.

3 See discussion of the current law of murder at Chapter 2.

intended to bring about that consequence.[4] In the case of attempted murder, the underlying offence of murder requires that the defendant cause the death of the victim, meaning that the intention required for attempted murder must be the intention to cause that death. If the defendant intended to cause GBH and took more than merely preparatory steps towards doing so, the appropriate offence would be attempted GBH, rather than attempted murder. The requirement of intention to kill encompasses both cases where the defendant's purpose is to kill and cases where the defendant foresees the death as a "virtual certainty"[5] of their conduct.[6]

13.6 The CAA also provides that a person may be guilty of attempt even if the commission of the offence was impossible in the circumstances. Their intention will be assessed on the facts as the defendant believed them to be.[7] For example, if the defendant intends to kill their victim using a poisonous mushroom, but, unbeknownst to the defendant, the mushroom they had harvested was harmless, the defendant could still be found guilty of attempted murder.

Sentencing

13.7 Attempted murder carries a maximum penalty of life imprisonment.[8] Unlike murder, there is no mandatory life sentence for attempted murder; it is a discretionary life sentence instead. This differs from other attempt offences, where the maximum sentence generally corresponds to the penalty that would have been available upon conviction on indictment for the completed offence. Sentencing for attempted murder is subject to Sentencing Council Guidelines.[9]

CONCERNS WITH THE LAW OF ATTEMPTED MURDER

13.8 We received limited responses to our Call for Evidence in relation to attempted murder. However, a small number of stakeholders raised concerns about the relationship between attempted murder, transferred fault and the practical challenges involved in prosecuting such cases because of the current fault element.

Challenges with prosecuting attempted murder

Preparatory offence for murder

13.9 One barrister told us that, in their view, a gap exists in the law in relation to establishing criminal liability where an individual prepares to kill, but cannot be charged with an offence because their actions do not go beyond "mere preparation". They suggested that this could be addressed by a new offence of preparing to murder.

13.10 The threshold for attempt offences means that defendants who engage in merely preparatory conduct cannot be charged with attempted murder. While we recognise

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4 See D Ormerod and K Laird, *Smith, Hogan, & Ormerod's Criminal Law* (16th ed 2021) p 435.

5 *R v Woollin* [1999] AC 82.

6 See the discussion in Law Commission, Homicide Law: Call for Evidence (14 August 2025), paras 2.28-2.31; D Ormerod and K Laird, *Smith, Hogan, & Ormerod's Criminal Law* (16th ed 2021) p 436.

7 CAA 1981, ss 1(2)-(3).

8 CAA 1981, s 4.

9 Sentencing Council, Attempted murder (1 July 2021).

that this restricts the scope of the liability for attempt offences, we do not consider this restriction warrants further consideration of a new preparatory offence for murder. We considered this issue more broadly in our 2009 report on conspiracy and attempts,[10] explaining that criminal liability for attempts should be limited and "should not encompass preparatory acts unless they were sufficiently proximate to the final act necessary to commit the intended offence."[11] Consultees responding to the project on conspiracy and attempts raised various concerns in relation to a limited proposal to introduce a separate "preparation" offence. The concerns included that it could risk over-criminalisation and generate unnecessary complexity.[12]

13.11 The introduction of a preparatory offence for murder, if justified, may have implications extending beyond our current project. Formulating a new preparatory offence would require careful analysis of the scope and structure of "preparation" as a basis for criminal liability to ensure it properly reflects principles of fairness and coherence within the criminal law generally. This would require substantial consideration that lies beyond the scope of this project, given the potential for analogous offences such as preparing to kidnap or preparing to commit a sexual offence. We also note that the Government is currently considering whether there should be an offence to address the preparation of a mass killing.[13] In our view, whether the scope of inchoate liability should include preparing to commit an offence (or a subset of offences) should not be decided within a project limited to the law of homicide.

The requirement to prove intention to kill

13.12 A barrister also raised concerns with us about the practical difficulties they consider are caused by the requirement to prove the intent to kill. We heard that this high fault threshold leads to cases that should be considered as attempted murder, instead resulting in convictions for causing GBH with intent,[14] or for attempted GBH, where the victim is not harmed. This is because the high threshold of "intent to kill" may lead prosecutors to charge a defendant with causing GBH with intent or to add alternative, lesser, charges in anticipation of the risk that the defendant will be acquitted of attempted murder. We have been told that this may also increase the likelihood that prosecutors accept pleas to lesser offences for similar reasons. This, in turn, may mean that the full factual circumstances are not always presented before the court, meaning sentencing judges may be required to make decisions without a complete evidential picture. Arguably, this issue could be addressed by widening the scope of the fault threshold for attempted murder to include intention to commit GBH.

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10 Conspiracy and Attempts (2009) Law Com No 318. In our consultation paper we originally proposed replacing the single offence of attempt with two offences to clarify the meaning of "more than merely preparatory" and address inconsistencies in case law. Consultees were largely opposed, arguing that the current test already offers necessary flexibility. We acknowledged the limited support from our provisional proposals and concluded the reform would not improve the law in practice. We therefore decided not to pursue the proposal and recommended retaining the existing "more than merely preparatory" threshold in the Criminal Attempts Act 1981. See paragraphs 8.68-8.71.

11 Conspiracy and Attempts (2009) Law Com No 318, paragraph 8.4.

12 See Conspiracy and Attempts (2009) Law Com No 318, paragraphs 8.44 and 8.57.

13 Dominic Casciani, 'New criminal offence to target violence-obsessed suspects before they attack' (20 July 2025) *British Broadcasting Corporation.*

14 Offences Against the Person Act 1861, s 18.

13.13 We accept that proving the intention to kill, rather than the intention to cause serious injury, may be challenging in some attempted murder cases. Nonetheless, successful convictions for attempted murder demonstrate that these difficulties do not prevent the offence from being prosecuted where the evidence supports it.[15]

13.14 Although we accept that it may be difficult in attempted murder cases to demonstrate that the defendant intended to kill, rather than cause serious injury, it is appropriate that this threshold remain. As explained above at paragraph 13.5, the intention required in attempted murder cases is related to the intended consequence of the offence, that is, to kill a person. Extending the fault element of attempted murder to include the intention to cause serious injury would blur the boundaries of attempted murder and potentially lead to unnecessary and confusing overlap with other attempt offences.

13.15 In our view, the existing criminal justice response whereby a defendant can be convicted of causing GBH with intent or attempting to cause GBH is an entirely appropriate reflection of both the culpability involved and the harm caused. The existing sentencing framework for GBH-related offences is well equipped to reflect the seriousness of such conduct without the need to expand the scope of attempted murder. We note that both attempted murder and causing GBH with intent carry a maximum penalty of life imprisonment, meaning neither offence attracts a mandatory life sentence, but that life imprisonment can be imposed in appropriate cases.

Attempted murder and transferred fault

13.16 We have also heard concerns relating to the application of the doctrine of transferred fault in attempted murder cases. The doctrine of transferred fault (also known historically as transferred malice)[16] establishes that where a defendant intends to harm one person but instead harms another, the defendant's intention to cause that harm can be transferred to the actual victim so that the defendant can be convicted of the intended offence.[17] As an example, D tries to shoot V with the intent to kill V, however, D's shot misses V and hits a passerby (T), killing T. D can be charged with the murder of T under the doctrine of transferred fault.

13.17 The case of *R v Grant*[18] illustrates the operation of transferred fault in attempted murder cases. In this case there were three defendants who chased their intended victim, Bryan, into a shop. One of the defendants fired into the shop, missing Bryan, and instead injuring (but not killing) two unintended victims.[19] At trial, the defendants were charged with the attempted murder of Bryan and with causing GBH with intent to the two injured bystanders. Additional counts of attempted murder in relation to the two bystanders were dismissed by the trial judge who held that the intent to kill Bryan

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15 Ministry of Justice, Ministry of Justice Criminal Justice Statistics Quarterly, (September 2025).

16 In *Gnango* [2011] UKSC 59, at [16] the Supreme Court suggested that "transferred mens rea" is a better description of the doctrine; see also, Blackstone's Criminal Practice 2026, A2.31. In this consultation paper and throughout our work, we use English rather than Latin to increase accessibility, so therefore use "fault" rather than "mens rea".

17 Blackstone's Criminal Practice 2026, A2.31, citing *Latimer* (1886) 17 QBD 359.

18 *R v Grant* [2014] EWCA Crim 14 ("*Grant*").

19 *R v Grant* [2014] EWCA Crim 14, [4] to [6].

could not be transferred to support charges of attempted murder against the unintended victims.[20]

13.18 This means that if a defendant shoots at their intended victim, misses, and kills a bystander, the defendant can be charged with murder based on transferred fault. However, if the bystander is shot but does not die, the defendant cannot be charged with attempted murder in relation to the unintended victim. In this scenario, the defendant could, however, be charged with attempted murder in relation to the intended victim and potentially with a separate offence for injuring the bystander.

13.19 In our view, the principle that transferred fault cannot apply to attempted murder in these circumstances is appropriate and stems from fundamental characteristics of attempt liability and the doctrine of transferred fault itself. The doctrine of transferred fault has been described as a legal "fiction"[21] developed to enable legal responsibility for culpable and relevant harm. As Lord Mustill explained in *Attorney General's Reference (No 3 of 1994)*:

> The effect of transferred [fault], as I understand it, is that the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married to make a notionally intended and actually consummated crime. The cases are treated as if the actual victim had been the intended victim from the start. To make any sense of this process there must, as it seems to me, be some compatibility between the original intention and the actual occurrence…[22]

13.20 In attempted murder cases, liability is already complete once the defendant, intending to kill a particular victim, does an act amounting to an attempt to kill. It is therefore not appropriate or necessary for transferred fault to extend liability to an unintended victim who is not killed. In the circumstances where the unintended victim is injured, there is still a means of holding the defendant criminally liable through the offences of causing GBH with intent and wounding with intent.[23]

ATTEMPTED MURDER UNDER OUR PROPOSED HOMICIDE STRUCTURE

13.21 We have considered the application of attempt liability to our proposed homicide structure, and we conclude that it should operate solely as an attempt offence attached to first-degree murder.[24] We consider this to be the most coherent and principled approach to aligning attempt liability with the corresponding substantive offence. Under our provisional proposal, first-degree murder requires that the

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20 See *R v Grant* [2014] EWCA Crim 14, [31].

21 S Eldar, "The Limits of Transferred Malice" (2012) 32 *Oxford Journal of Legal Studies* 633. See further discussion in F Stark, "Recycled Malice" (2023) 82 *Cambridge Law Journal* 509.

22 *Attorney General's Reference (No 3 of 1994)* [1998] AC 245 (Lord Mustill).

23 See Offences Against the Person Act 1861, s 18.

24 See discussion of proposed re-structure of the homicide framework in Chapter 4..

defendant intended to kill, which, as explained above, is mirrored in the fault element of attempted murder.

13.22 In Chapter 6 we provisionally propose that there should be an offence of second-degree murder where the defendant killed another with the intention to cause serious injury. In our view, attempt liability for murder should not extend to cases involving the intention to cause serious injury. As we have explained at paragraphs 13.14 to 13.15 above, we do not consider it appropriate to extend the intent requirement for attempted murder beyond the intention to kill, which is how the law currently operates. Further, this combination of conduct and fault elements is already covered by existing offences of causing GBH with intent and attempted GBH. Creating an offence of attempted second-degree murder is therefore unnecessary. This conclusion aligns with our analysis in the 2006 report on murder, manslaughter and infanticide ("2006 Report"), in relation to the appropriate application of attempt to the homicide regime. In that report we concluded, based on the application of the case law to the intent required for attempted murder:

> An offence of attempted second degree murder would needlessly complicate the law. It would also in part be covering ground that is already adequately covered by, for example, the extant offences of attempting to inflict grievous bodily harm, and wounding with intent to do grievous bodily harm.[25]

13.23 In the 2006 Report, we also briefly considered the application of labelling considerations to other offences stating:

> The secondary importance of labelling considerations explains, in part, why partial defences do not reduce other crimes that carry discretionary maximum sentences, such as attempted murder, to lesser included offences, such as, in appropriate cases, wounding with intent to do grievous bodily harm. We found it significant that those consultees who thought labelling considerations ought to have played more of a role in structuring our proposals for partial defences to homicide, did not extend the logic of their arguments to those homicide-related crimes that have lesser included offences.

13.24 This reasoning still resonates in relation to the homicide offences we propose in this consultation paper. Given that attempted murder does not attract a mandatory life sentence, the remaining fair labelling justification for applying a partial defence to attempted (first-degree) murder is insufficient.[26] We note that the Sentencing Council Guidelines for attempted murder already address factors that may be relevant to assessing the defendant's culpability, including where their culpability is reduced.[27]

13.25 In our view, attempted murder should remain a narrowly defined offence requiring the intention to kill and should apply exclusively to first-degree murder under our proposed

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25 Murder Manslaughter and Infanticide (2006) Law Com No 304, Appendix B. B.3.

26 See the discussion in Chapter 7 at paras 7.37 to 7.39 in relation to our conclusion that partial defences should not apply beyond first-degree murder.

27 The Sentencing Council, Attempted murder (2021).

structure. This approach ensures consistency within the broader homicide hierarchy, while preserving a clear and principled approach to attempt liability.

Consultation Question 18.

13.26 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?

Consultation Question 19.

13.28 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.

13.29 Do consultees agree?

Chapter 14: Victims of domestic abuse and homicide

INTRODUCTION

14.1 Before we were asked to revisit the law of homicide, we had started work on a project reviewing defences for victims of abuse who kill their abuser.[1] We were asked to review that discrete area of the law of homicide following Clare Wade KC's sentencing review of domestic homicides.[2] That project was focussed on the operation of the defences (full and partial) for victims of domestic abuse who kill their abuser. There are longstanding concerns that, despite reform,[3] the available defences to murder and manslaughter do not operate effectively for this group of defendants. When we started work on this wider homicide project we decided to incorporate into it the work of the smaller defences project, to enable us to consider the issues for victims of abuse in homicide more holistically. In this chapter we consider the issues relevant to victims of domestic abuse in the context of homicide offences.

14.2 Domestic abuse and related homicides are often discussed as "gendered" issues because they predominantly involve male perpetrators and female victims. This dynamic is not universal, as cases can also involve family members, male victims, female perpetrators, and varying cultural or personal characteristics. However, the majority of deaths that occur in the context of domestic abuse involve men who kill women and girls.[4]

14.3 Data published by the Office for National Statistics ("the ONS") shows that for the year ending March 2025, "the victim was female in 72.1%, and male in 27.9%, of domestic abuse-related crimes recorded by the police".[5] For the same period, the Crime Survey for England and Wales estimated that "2.2 million females and 1.5 million males, aged 16 years and over, experienced domestic abuse in the last year".[6]

14.4 In relation to domestic homicides, the ONS data shows that there were 111 domestic homicides[7] from April 2024 to March 2025 with 67 victims killed by a partner or

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1 See https://lawcom.gov.uk/project/defences-for-victims-of-domestic-abuse-who-kill-their-abusers/.

2 Clare Wade KC, Independent Review of Domestic Homicide Sentencing (March 2023).

3 Including reform of provocation and diminished responsibility in the Coroners and Justice Act 2009, implementing in part Law Commission recommendations from our report: Partial Defences to Murder (2004) Law Com No 290.

4 Office of National Statistics ("ONS"), *Homicide in England and Wales: year ending March 2025* (February 2026); see also, Law Commission of England and Wales, *Defences for victims of domestic abuse who kill their abusers* (10 December 2024, updated 20 January 2025), p 21 to 23.

5 From data supplied by 32 police forces. ONS, *Domestic abuse victim characteristics, England and Wales: year ending March 2025* (November 2025).

6 ONS, *Domestic abuse victim characteristics, England and Wales: year ending March 2025* (November 2025).

7 The ONS records a homicide as a domestic homicide "when the relationship between a victim aged 16 years and over and the perpetrator falls into one of the following categories: spouse; common-law spouse;

ex-partner, 24 killed by parents/children and 20 killed by other family members.[8] Consistent with broader data on domestic abuse, women were disproportionately represented as victims, while men were more likely to be identified as suspects. Women constituted 68% of victims in these cases and the vast majority of suspects were male (71 out of 75 domestic homicides of a female victim involved a male suspect). Over half of female homicide victims (75 out of 103) aged 16 and over were domestic homicides.[9] In comparison, 11% of male victims of homicide (36 out of 329) aged 16 and over were domestic homicides.[10]

14.5 In 2018 the Femicide Census published research that documented and analysed all known cases of women killed by men over a ten-year period. It stated that in its analysis of cases in which women were killed between 2009 and 2018:

> … the primary context in which perpetrators killed victims are unequivocal: overwhelmingly, perpetrators killed women who were or had previously been their spouses or intimate partners. 62% of all femicides were committed in the context of "intimate partner violence": eight times as many (888) as the next context category of sons killing mothers (111).[11]

14.6 As the data above demonstrates, the majority of domestic homicides involve a (male) abuser who kills a (female) victim. The evidence we have heard and considered suggests the main issues with the law in such cases also relate to sentencing[12] and the availability of defences.[13] Again, we will therefore consider this group of defendants in the defences and sentencing strands.

14.7 Similarly, our review of commentary and research shows the main issues with the operation of the law for victims of domestic abuse who kill their abuser are prosecutorial decision-making,[14] the availability of defences,[15] and sentencing.[16] We are not aware of significant concern with the way that the offences of murder and manslaughter themselves operate in these cases. We will be better able therefore to

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cohabiting partner; boyfriend or girlfriend; ex-spouse; ex-cohabiting partner or ex-boyfriend or girlfriend; adulterous relationship; son or daughter (including step and adopted relationships); parent (including step and adopted relationships); brother or sister; other relatives." ONS, *Homicide in England and Wales: year ending March 2025* (February 2026).

8 ONS, *Homicide in England and Wales: year ending March 2025* (February 2026).

9 ONS, *Homicide in England and Wales: year ending March 2025* (February 2026).

10 ONS, *Homicide in England and Wales: year ending March 2025* (February 2026).

11 J Long et al, *UK Femicides 2009-2018* (2018), p 21.

12 For example, whether the aggravating factors are sufficiently well-defined in cases of domestic homicides.

13 For example, the overuse of diminished responsibility in cases of domestic abuse, and the potential for abusers to subvert any defence intended for victims.

14 For example, the decision-making regarding pleas to partial defences. We therefore consider it relevant to the defences strand.

15 For example, the elements of self-defence, loss of control and diminished responsibility do not always apply in cases of violent responses to long-term abuse. We note the recommendations in this regard in the recent Women's Justice Board report: Women's Justice Board, "Recommendations for reducing women's imprisonment: A report to the Deputy Prime Minister and Lord Chancellor" (16 March 2026). See also Clare Wade KC, Independent Review of Domestic Homicide Sentencing (March 2023).

16 For example, the impact of aggravating factors involving use of knives.

consider the relevant issues for this group of defendants in the defences and sentencing strands.

14.8 The prevalence of suicide in cases of domestic abuse highlights an issue that has gained prominence in recent years. There are concerns that the operation of the general homicide offences does not fully address the culpability of perpetrators of abuse when their victim dies by suicide as a result of that abuse. Those concerns fall within the scope of this strand on offences and are the focus of this chapter.

VICTIMS OF ABUSE WHO DIE BY SUICIDE

14.9 The Domestic Homicide Project 2020-2025 report contains data on domestic homicide, and recommendations for progress in the criminal justice response.[17] Across the five years they have collected data, death by suicide following abuse was more prevalent than intimate partner homicide.[18] Their data shows that the number of suspected victim suicides following abuse have increased over the last three years. They suggest this "likely reflects better case identification and reporting, rather than an empirical increase in cases".[19]

14.10 The data on falls from heights and "unexpected" deaths further complicates the picture.[20] These deaths, in the context of domestic abuse, may well be homicides or suicides but are not investigated or established as such, potentially indicating an underreporting of homicides or suicides.[21] Further, recent campaigns for a legal duty to help someone in danger intersect with deaths related to domestic abuse. These campaigns arise out of cases where person A is in danger (for example clinically very unwell, or exposed to a serious risk of death) and person B, capable of providing or seeking help, does not do so, leaving person A to die. In some of these cases, the person who died was left, or help was not sought, by an abusive partner.[22] While we are not able to consider calls for a duty to assist someone in danger within this

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17 K Hoeger et al, "Domestic Homicides and Suspected Victim Suicides 2020-2025, Year 5 Report" (April 2026).

18 From April 2020 to March 2025, 38% of the 1452 identified domestic homicide related deaths were categorised as suspected victim suicide following abuse, 29% were categorised as intimate partner homicide: above, p 17 to 18.

19 K Hoeger et al, "Domestic Homicides and Suspected Victim Suicides 2020-2025, Year 5 Report" (April 2026), p 19.

20 "Unexpected deaths" amount to 9% of the identified domestic homicides between April 2020 and March 2025; they are cases categorised by the police as "unexpected", and are deaths which may be due to natural causes, accident, suicide or homicide where the circumstances and/or the cause of the death may be unclear or unknown. They are typically cases with an ongoing investigation or inquest. K Hoeger et al, "Domestic Homicides and Suspected Victim Suicides 2020-2025, Year 5 Report" (April 2026), p 5.

21 The Domestic Homicide Project reviewed cases involving falls from height; they were deaths categorised either as suicide, intimate partner homicide, adult family homicide, or unexpected deaths. See also R Vinter, "'Hidden homicides': campaign calls for review of cases where women fell from height" *The Guardian* (4 March 2024).

22 See, for example, the coroner's findings in the case of Danielle Haggerty: that Danielle's death was "the unintended outcome of an act of self-harm at a time of distress, in the context of a volatile and abusive relationship, and in the immediate aftermath of a violent argument". Danielle's family report that her partner had left her in a dangerously vulnerable state contributing to her death. See, C Slater, "She died after being left alone in a flat, now her family want change" *The Manchester Evening News* (26 January 2026). We also discuss this in Chapter 10.

project,[23] it is important to acknowledge the overlap with the issues we are considering in this chapter.

14.11 We also note research supporting the need for better intersectional understanding. Data from the Domestic Homicide Project suggests that women from Black, Black British, Caribbean or African ethnic groups were over-represented in the numbers of domestic homicide victims.[24] A report by Imkaan and the Centre for Women's Justice highlight concerns about disproportionality in this context and note the limitations of available data that would help with visibility of this issue.[25] A 2010 report by Southall Black Sisters highlights the connection between domestic abuse (including so-called "honour"-based abuse)[26] and mental health, self-harm and suicide amongst Black and minoritised ethnic victims, particularly South East Asian women.[27] Black, minoritised and migrant women face additional hurdles in seeking help and support for abuse, and therefore opportunities to prevent the abuse, and subsequent murder or suicide are lost.[28] There are then additional barriers to the justice system accurately responding to the harm they experienced.[29] Kirith Entwistle MP spoke to this issue in a debate on the Crime and Policing Bill, saying:

> When domestic abuse ends in suicide, it must be recognised for what it is: a crime. The injustice of this issue falls heaviest on those already most marginalised. Black, minoritised and migrant women face the highest barriers to safety—barriers rooted in racism, immigration insecurity, stigma and a lack of culturally competent services. Too often they are misjudged, criminalised or simply ignored.[30]

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23 We do consider in Chapter 10 the possibility of a separate homicide offence where someone dies as a result of the failure of another to obtain emergency assistance. The calls to create a legal duty, however, are not limited to cases where the person in danger dies as a result of the failure to seek assistance, thus it would exceed the boundaries of the homicide project. Imposing any duty of this kind would require careful consideration to ensure it is appropriately targeted and does not have unintended consequences.

24 K Hoeger et al, "Domestic Homicides and Suspected Victim Suicides 2020-2025, Year 5 Report" (April 2026), p 36.

25 Centre for Women's Justice and Imkaan "Life or Death? Preventing Domestic Homicides and Suicides of Black and Minoritised Women" (November 2023), p 100.

26 Now defined in the Crime and Policing Act 2026, s 144 as: person A engaging in abusive conduct towards person B who is a family member, friend or acquaintance of A, and A is motivated by A's perception that B has behaved or may behave in a way that shames or dishonours A or B, or their families, or A's community, and does not comply with the behavioural norms of A's community.

27 H Siddiqui and M Patel, "Safe and Sane: A Model of Intervention on Domestic Violence and Mental Health, Suicide and Self-harm Amongst Black and Minority Ethnic Women" (2010) Southall Black Sisters.

28 A Woolley, "Access Denied: The cost of the 'no recourse to public funds' policy" (June 2019); S Sanghi, J Feanny and H Siddiqui, "Invisible Woman 'Made Visible': Learning from the Femicides of Black, Minoritised and Migrant Women" (October 2025).

29 H Siddiqui and M Patel, "Safe and Sane: A Model of Intervention on Domestic Violence and Mental Health, Suicide and Self-harm Amongst Black and Minority Ethnic Women" (2010) Southall Black Sisters; Centre for Women's Justice and Imkaan, "Life or Death? Preventing Domestic Homicides and Suicides of Black and Minoritised Women" (November 2023).

30 *Hansard* (HC) 17 June 2025, vol 769, col 197.

CURRENT LAW

14.12 There is a justifiable desire to hold a perpetrator of abuse criminally responsible when their victim takes their own life as a result of that abuse. The reasons why someone may decide to take their own life are complex and varying. However, where that decision is influenced by the abuse they experience, the question of criminal culpability is raised.

> The abuser does not pull the trigger or provide the rope. The victim may even see the act of suicide as a form of liberation or a final expression of rebellion or subversion against a partner's control. But this does not mean that the actions of the abuser are not a significant cause of death, and nor does it mean that the act of taking one's life is a reflection of voluntary agency.[31]

14.13 Existing offences may be committed by someone who is involved in another's death by suicide or self-harm. It is possible for murder or manslaughter to apply in cases where one person was responsible for the death of another even if the death was a result of an act of suicide or self-harm by the victim. The offences could apply as long as that act of suicide or self-harm was not so independent from the abusive conduct that it amounts to a break in the chain of causation between the abuse and the death.[32] Indeed, the Crown Prosecution Service ("CPS") guidance on murder and manslaughter states:

> Murder or manslaughter may be the appropriate charge where suicide follows an unlawful act or acts by the suspect. This most obviously applies (but is not restricted to) a domestic abuse context; for instance, where a suspect has subjected the victim to controlling and coercive behaviour or ongoing violence.[33]

14.14 The literature suggests that manslaughter is the most common homicide charge contemplated in cases of suicide following abuse, usually unlawful dangerous act manslaughter ("UDAM"), or gross negligence manslaughter where a duty of care can be established. For UDAM, there are a number of offences often prosecuted in domestic abuse contexts that can form the basis of the charge. The Domestic Homicide Project have identified a range of offences considered posthumously in cases of suspected victim suicide for abuse including stalking, harassment, assault occasioning actual bodily harm, controlling or coercive behaviour, and strangulation.[34] These could form the basis of a charge of UDAM. Indeed, these charges themselves

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31 V Munro and R Aitken, "Adding insult to injury? The criminal law's response to domestic abuse-related suicide in England and Wales" [2018] 9 *Criminal Law Review*, 732.

32 *R v Dhaliwal* [2006] EWCA Crim 1139 (although in that case the prosecution were unsuccessful in arguing that unlawful dangerous act manslaughter applied as the underlying act did not include the psychological injury the victim was said to have suffered before her suicide); *R v Wallace* [2018] EWCA Crim 690; *R v Rebelo* [2021] EWCA Crim 306; *R v Dear* [1996] 3 WLUK 208; [1996] Crim LR 595. On causation requirements for murder and manslaughter, see Chapter 2.

33 CPS, *Homicide: Murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult* (last updated 10 March 2026).

34 K Hoeger et al, "Domestic Homicides and Suspected Victim Suicides 2020-2025, Year 5 Report" (April 2026), p 69.

(in addition to or instead of being the basis for a charge of UDAM) reflect a wider range of possible criminal justice responses to domestic abuse leading to suicide.

14.15 There is also an offence of complicity in suicide under section 2 of the Suicide Act 1961. That offence criminalises acts capable of encouraging or assisting suicide where the act was intended to encourage or assist suicide or an attempt at suicide.

14.16 In addition to criminal offences, there is a statutory requirement for relevant authorities to conduct a review when a person aged over 16 dies as a result of domestic abuse.[35] The purpose of these Domestic Abuse Related Death Reviews ("DARDRs", previously known as Domestic Homicide Reviews or "DHRs") is to identify and implement any lessons from the case that can improve future responses and safeguarding. Further, coronial inquests must be held in cases involving a violent or unnatural death; this includes deaths by suicide. The purpose of an inquest is to establish the facts of a death, including who died, where, when and what the cause of death was. Inquests can also result in lessons learned to prevent future deaths. Inquests and DARDRs are both sources of information for review of this issue. They are also an important part of the wider picture of justice in this context, providing answers, accountability and, where relevant, recommendations to prevent similar outcomes in future cases.

COMMENTARY

14.17 The primary concern raised with us in respect of suicides following domestic abuse is the lack of prosecutions and convictions for homicide offences. To date, there has been only one successful prosecution for manslaughter in this context, and the defendant in that case pleaded guilty rather than being convicted at trial.[36]

14.18 Two reasons have been suggested to explain the lack of successful prosecutions:

(1) Practice: there is a lack of awareness and a perceived unwillingness to investigate and charge homicide offences in these cases from the police and prosecution. This includes barriers to recognising contextual abuse when investigating a suicide, resulting in missed opportunities to gather evidence that might support a prosecution. When relevant abuse is identified there is a lack of knowledge, confidence or willingness to take forward a criminal prosecution.

(2) Law: it may be difficult to prove that the abuse caused the death, which is a requirement of both murder and manslaughter.

Practice

14.19 Some commentators suggest that the prevailing issue is not the law itself, but its application in practice. There have been long-standing concerns that charges are not brought in cases of suicide following abuse, because of a lack of awareness, of

35 Under the Domestic Violence, Crime and Victims Act 2004, s 9.

36 Nicholas Allen was convicted in 2017 for the manslaughter of Justene Reece. He was sentenced to 10 years' imprisonment. There has been a recent conviction in Scotland for culpable homicide, an offence comparable to manslaughter, following a jury trial. Lee Milne was convicted of causing the death of his wife Kimberly Milne, who died after jumping from a motorway bridge following 18 months of abuse by Milne.

investigation and evidence gathering, or absence of professional curiosity in such cases.

14.20 For example, a Prevention of Future Deaths report following the inquest into the death of Kellie Sutton[37] found a lack of awareness among the police of the link between domestic abuse and suicide, informed by evidence from an expert witness:

> During the course of the inquest the court heard evidence from an expert in the field of violence against women and girls about the harms of controlling and coercive behaviour and abuse, the feelings of entrapment by victims meaning it was very common for a victim to be unable to extricate themselves and the higher incidence of suicide in victims of abuse: one third of all suicides in England and Wales are preceded by domestic abuse.[38]

14.21 This concern is not limited to homicide offences; abusers could also be charged with non-homicide offences for conduct that occurred before the victim's death, including controlling or coercive behaviour, harassment and offences against the person.[39] These are also an important part of the criminal justice response to abuse resulting in suicide.

14.22 In response to our Call for Evidence, some stakeholders suggested that the current offences are sufficient, and that training and improved practice are needed to ensure their use in appropriate cases.[40] We heard that better understanding of the link between domestic abuse and suicide would reduce the barriers to successful investigation and prosecution. This lack of understanding inhibits effective investigations, prosecutorial decision making, and juries' understanding of the evidence.[41]

14.23 Some stakeholders suggested that police should be required to investigate all suicides in the context of domestic abuse as potential homicides, to improve practice and evidence gathering. Advance, a charity which advocates for women and girls affected by domestic abuse and the justice system, echoed Project Resist's call for:

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37 Kellie Sutton died by suicide in 2017. In 2023, her inquest concluded with a jury verdict of unlawful killing as a result of the "months of controlling and coercive behaviour and domestic abuse by her then partner". During the course of the inquest, the Coroner identified a need for Hertfordshire Police to take action that could prevent future deaths, and accordingly published a Prevention of Future Deaths report: Samantha Broadfoot KC, Assistant Coroner for the Coroner area of Cambridgeshire and Peterborough, "Kellie Sutton: Prevention of future deaths report" (30 April 2024).

38 Samantha Broadfoot KC, Assistant Coroner for the Coroner area of Cambridgeshire and Peterborough, "Kellie Sutton: Prevention of future deaths report" (30 April 2024).

39 As detailed above, the Domestic Homicide Project have reported on charges when a victim of domestic abuse has died by suicide. They found 17 cases where a charge was successful. In their annual report from 2020-2024 of the 12 cases with a successful charge by that date, the most common offences being common assault, controlling or coercive behaviour, assault occasioning actual bodily harm, and harassment: Vulnerability Knowledge and Practice Programme, "Executive Summary: Domestic Homicides and Suspected Victim Suicides 2020-2024, Year 4 Report" (March 2025).

40 For example, Professor Vanessa Munro.

41 See, V Munro, V Bettinson and M Burton, "Coercion, Control and Criminal Responsibility: Exploring Professional Responses to Offending and Suicidality in the Context of Domestically Abusive Relationships" (2023) *Social and Legal Studies* 1.

> A clear and unequivocal recognition in police policy and procedural guidance that suicide in the context of any evidence of domestic abuse may be a potential homicide, ie a presumption that any such suicide should be investigated as a potential homicide from the outset until and unless there is clear evidence to rebut that presumption.[42]

14.24 Baroness Doocey and Baroness Brinton introduced amendment 361A to the then Crime and Policing Bill on the same topic.[43]

14.25 Recent literature suggests that the unwillingness or inability to prosecute homicide offences may be changing. The Domestic Homicide Project has described an explicit effort by police and CPS to improve their practices. They have made recommendations to the CPS and police forces, for example:

> To engage in joint working across the police, CPS and relevant stakeholders to share learning and emerging practice in relation to the response to unexpected deaths and posthumous prosecution of Unlawful Act Manslaughter and domestic abuse related offending to inform future guidance and policy developments.[44]

14.26 The aim of recommendations directed at police and the CPS is to facilitate shared practice to support successful prosecutions, and to ensure police investigate and manage evidence appropriately at the start of unexplained death investigations. They made similar recommendations in their previous annual reports and have reported on positive outcomes:

> We have increased efforts to raise awareness of unlawful act manslaughter through our national Domestic Abuse Area Leads network, seeking to cultivate a better understanding of the legal nuances prevalent in cases, and to create increased opportunities for peer advice, expertise and best practice in this field to be shared. Under the CPS' next Domestic Abuse Programme, domestic homicide, including [suspected victim suicide following domestic abuse], has been identified as a priority and work will be undertaken to update the prosecution guidance and learning in this area.[45]

14.27 At the time of writing, there are recent and upcoming prosecutions for UDAM following a domestic abuse related suicide.[46] The recent successful prosecution of culpable

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42 See Project Resist, Suicide is Homicide Campaign.

43 The amendment was not moved; it therefore did not become part of the Act when it received Royal Assent in April 2026.

44 K Hoeger et al, "Domestic Homicides and Suspected Victim Suicides 2020-2025, Year 5 Report" (April 2026), p 12.

45 Vulnerability Knowledge and Practice Programme, Appendix-A-Responses-to-Year-3-Recommendations.pdf pp 13 and 16.

46 See also: "More recently, there have been concerted efforts from the NPCC and the Crown Prosecution Service to bring charges in such cases. There are now two men being prosecuted for manslaughter following a suicide after domestic abuse, and both organisations have stressed they are keen to bring more cases to court.": H Al-Othman and G McKelvie, "Revealed: The true toll of female suicides with domestic abuse at their core" *The Guardian* (15 February 2026). We note that there have also been recent unsuccessful prosecutions, for example, Christopher Trybus was acquitted following a trial for controlling or

homicide in Scotland,[47] and recent findings of unlawful killing at inquests[48] are also indicative of this potential broader willingness to investigate the culpability of abusers, and to bring prosecutions when appropriate.

Law

14.28 For some commentators, there are limitations to the current law that cannot be addressed by improved practice. When a homicide charge is considered or prosecuted in practice, proving the required causation between the abuse and the suicide can be a barrier to charge or conviction.[49] As explained earlier in this paper, for both murder and manslaughter, the defendant's acts must have been a substantial and operating cause of the death, although they need not be the only cause.[50] The defendant's acts or omissions must have caused the death both factually and legally. To satisfy factual causation, it must be proved that but for the act of the defendant, the death would not have occurred. To satisfy legal causation, the defendant's acts must have significantly contributed to the death.

14.29 The chain of causation can be broken by an independent, intervening act: an act that causes the death and is so independent from the defendant's act it would not be appropriate to hold them criminally responsible for the death.[51]

14.30 Issues with causation are both legal and evidential. Causation is always context specific;[52] it is possible that suicide is considered an independent intervening act that breaks the chain of causation, whether in the context of domestic abuse or not. However, the law acknowledges that it is not inevitable that the act of suicide by the victim does so. In the case of *Wallace*, the defendant threw acid on the victim causing him debilitating injuries. Unable to live with the resulting pain and suffering, the victim chose to end his life with medical support. The Court found that the chain of causation was not broken by the victim's decision to take his own life, or even by the acts of the third (medical) party in doing so.[53]

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coercive behaviour, rape and manslaughter following the death of his wife Tarryn Baird: see "Husband cleared of manslaughter over wife's suicide" *BBC News Online* (22 April 2026).

47 An offence comparable to manslaughter in England and Wales. See "Man convicted of culpable homicide after wife takes her own life" *Scottish Legal News* (4 March 2026).

48 Inquests into the deaths of Kellie Sutton and Georgia Barter were the first to record verdicts of unlawful killing for women who died by suicide as a result of domestic abuse. See, Samantha Broadfoot KC, Assistant Coroner for the Coroner area of Cambridgeshire and Peterborough, "Kellie Sutton: Prevention of future deaths report" (30 April 2024) and https://dpglaw.co.uk/georgias-inquest-concludes-unlawful-killing-resulting-from-domestic-abuse/.

49 See, for example, Advocacy After Fatal Domestic Abuse ("AAFDA"), Justice Denied? Accountability after domestic abuse-related suicides and unexplained deaths, September 2025, para 4.1; V Munro and R Aitken, "Adding insult to injury? The criminal law's response to domestic abuse-related suicide in England and Wales" [2018] 9 *Criminal Law Review* 732.

50 *Smith (Thomas Joseph)* [1959] 2 QB 35; *R v Wallace (Berlinah)* [2018] EWCA Crim 690; See also Chapter 2, Chapter 5 and Chapter 8.

51 See Archbold Criminal Pleading Evidence and Practice 2026, 19-4.

52 *R v Kennedy* (No 2) [2007] UKHL 38 at [15].

53 *R v Wallace* [2018] EWCA Crim 690. The procedure took place in Belgium, where termination of life on request is permitted in certain circumstances.

14.31 However, the lack of successful prosecutions for manslaughter in this context suggests an issue with causation specific to suicide following domestic abuse. Improved understanding of the link between domestic abuse and suicide could assist juries to interpret the evidence relating to causation. However, there is concern that pre- or co-existing vulnerabilities of the victim are often used to minimise the impact of the abuse as a cause of the suicide, or to argue that factual causation is not established. For example, abuse victims often experience mental health conditions, psychological injury, and suicidal ideation. These may have presented before the current relationship.[54] This can then be presented in court by the defence to argue that the suicide was not a result of abuse in the current relationship, but linked to the pre-existing vulnerabilities.[55] Where this is in fact the case, it is appropriate that the law operates to prevent defendants being held criminally responsible for the death. However, there are concerns that the causation requirement of the general homicide offences, combined with the prevalence of pre- or co-existing vulnerabilities generally inevitable for victims of abuse, means that too few cases of culpable conduct result in an appropriate criminal conviction.[56]

14.32 Some stakeholders support the boundaries of the current law. The Criminal Law Reform Now Network "are concerned that intuitive appeal of prosecution for a homicide offence will negatively impact a principled interpretation of causation".[57]

14.33 The Centre for Women's Justice support the better use of existing offences.[58] They suggested that the current law allows for victims' pre-existing vulnerability to be taken into account, rather than undermining the prosecution case. Pre-existing vulnerabilities such as experience of previous abuse, mental health conditions or previous suicidal ideation may make the victim more vulnerable to the effect of the abuse perpetrated by the defendant. The "thin skull" rule[59] inhibits the defendant from successfully arguing that these vulnerabilities mean that they are not criminally responsible for the result of their conduct.

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54 Victims of abuse in an intimate partner relationship are likely to have experienced abuse in previous intimate or family relationships. Perpetrators of controlling or coercive behaviour often target victims with such history as they are more vulnerable to the abuse. See, for example, S Dangar, V Munro and L Andrade, Learning Legacies: An Analysis of Domestic Homicide Reviews in Cases of Domestic Abuse Suicide, The University of Warwick (June 2022) pp 27 to 29.

55 See, for example, the description of the defence argument in one case where manslaughter was charged in the Domestic Homicide Project Report: K Hoeger, C Gutierrez-Munoz, A Sadullah and A Whitaker, "Domestic Homicides and Suspected Victim Suicides 2020-2024, Year 4 Report" (March 2025) p 62; and AAFDA, Justice Denied? Accountability after domestic abuse-related suicides and unexplained deaths (September 2025) para 6.3.

56 See, for example, AAFDA, Justice Denied? Accountability after domestic abuse-related suicides and unexplained deaths (September 2025) para 6.4.

57 Citing A P Simester, "Free, Deliberate and Informed?" in A Simester (ed), *Modern Criminal Law* (2024) 3; G R Sullivan and A P Simester, "Deadly Whisky" (2022) 138 *Law Quarterly Review* 11.

58 They have, in their response to our Call for Evidence, suggested that the prosecution could present the evidence in such cases more effectively, for example by calling expert evidence on controlling or coercive behaviour.

59 That a defendant should not, in principle, escape liability when the injury caused is greater than the injury intended due to pre-existing vulnerabilities of the victim (also known as the "eggshell skull rule"). See Archbold Criminal Pleading Evidence and Practice (2026) 17A-13 and *R v Watson* [1989] 2 All ER 865 (CA).

14.34 Although most of the commentary is about the homicide offences, the organisation Advocacy After Fatal Domestic Abuse ("AAFDA") have commented on the use of the offence of encouraging or assisting suicide in these cases. As it requires explicit encouragement or practical assistance, it is not always applicable in cases where the suicide may be better characterised as a response to the abuse rather than as a result of direct encouragement.[60]

A new bespoke offence

14.35 Given the low rate of successful prosecutions for manslaughter, organisations such as Southall Black Sisters and AAFDA have argued for a new bespoke offence:

> AAFDA is concerned that the test for causation in manslaughter cases remains difficult to meet, especially in cases with victims suffering pre-existing or exacerbated vulnerabilities, and that this may continue to inhibit the number of successful prosecutions… A new law could assist juries to recognise the causative relationship between domestic abuse and suicide. This new law should attract a similar sentence to the offence of manslaughter.[61]

14.36 Frank Mullane, CEO of AAFDA, has also suggested that a bespoke offence would "make it easier for the jury to identify causation. It will give confidence to the CPS to bring cases and it will educate the public".[62]

14.37 Dr Jonathan Rogers submitted to our Call for Evidence that "consideration should be given to a new offence which does not rely upon principles of causation". He suggested an offence that reflects the fact the suicide was "primarily a response to unlawful behaviour by D, and where D should have anticipated that V might react in a way which would endanger their own safety".

14.38 Professor Vanessa Munro welcomed consideration of a bespoke offence in response to our Call for Evidence but has also expressed caution. With Ruth Aitken she has pointed to a number of countries that have a bespoke offence criminalising abuse that results in suicide but warned that they do not always result in "progressive enforcement".[63]

Sentencing

14.39 Instead of, or in addition to, a bespoke homicide offence, the fact that a victim of abuse died by suicide as a response to the abuse could be an aggravating factor at

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60 AAFDA, Justice Denied? Accountability after domestic abuse-related suicides and unexplained deaths (September 2025) para 3.4.1.

61 AAFDA, Justice Denied? Accountability after domestic abuse-related suicides and unexplained deaths (September 2025) para 8.2.2.

62 H Al-Othman and G McKelvie, "Revealed: The true toll of female suicides with domestic abuse at their core" *The Guardian* (15 February 2026).

63 V Munro and R Aitken, "Adding insult to injury? The criminal law's response to domestic abuse-related suicide in England and Wales" [2018] 9 *Criminal Law Review* 732. Countries with a specific offence include Tajikistan (art 109 of the Criminal Code: an offence of "driving someone to suicide" with an aggravated version if the victim was dependent on the perpetrator), Albania (art 99 of the Criminal Code: an offence of "causing suicide"), and Moldova (art 150 of the Criminal Code: an offence of "inciting suicide" through, for example, systematic persecution or humiliation of the victim's dignity).

sentencing for a non-homicide offence. Stakeholders including AAFDA, Southall Black Sisters and Advance have suggested this could be an important part of the criminal justice response.

14.40 There were two amendments to the then Crime and Policing Bill (now Crime and Policing Act 2026) that introduced aggravating factors in the context of self-harm and suicide following domestic abuse.[64] They both related to a new offence of encouraging or assisting serious self-harm introduced by section 135 of the Act.[65] Both were ultimately withdrawn.

ANALYSIS

Practice

14.41 The literature considered above suggests that improvements are being made in respect of police and prosecutorial practice when a victim of abuse dies by suicide. There are police-led initiatives which should support successful prosecutions in appropriate cases. This is not only an issue of homicide law reform; the concerns relate to failures to prosecute a number of homicide and non-homicide offences in these cases. They extend to DARDRs and coronial processes. It is important that improvements in police and prosecutorial practice continue through the right channels.

14.42 We acknowledge the argument that a bespoke offence would assist with improving practice. We consider the benefits of a bespoke offence below. However, we do not think that a new offence is capable of addressing all of the concerns about practice. Pragna Patel of the campaign group Project Resist[66] has argued:

> At the heart of the injustice is not the failure of training, the absence of 'professional curiosity' or the lack of laws, but a systemic culture of discrimination, arrogance, indifference and apathy.[67]

14.43 While law reform can support better outcomes in these cases, it should be accompanied by means of improving awareness of the impact of domestic abuse, and ongoing wider work to improve outcomes for all victims of abuse.[68]

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64 Firstly, amendment 20 brought by Kirith Entwistle MP would have added a history of abuse as an aggravating factor for sentencing. Secondly, amendment 334A brought by Baroness Doocey had a similar provision, and provided for a sentence of life imprisonment for the same offence where a defendant subjected the victim to "physical, psychiatric or psychological harm" resulting in death by suicide.

65 This implements the Law Commission's recommendation for a new indictable offence of encouraging or assisting serious self-harm: Modernising Communications Offences: A final report (2021) Law Com No 399, recommendation 14, para 7.97.

66 See https://www.projectresist.org.uk/.

67 H Al-Othman and G McKelvie, "Revealed: The true toll of female suicides with domestic abuse at their core" *The Guardian* (15 February 2026).

68 One example of recent improvement in this area is the introduction of the first statutory definition of "honour-based abuse" in the Crime and Policing Act 2026, s 144 (see footnote 26 above), with the aim of improving detection, prevention and prosecution in such cases.

Law

14.44 We agree that the current offences of murder and manslaughter are suitable in some cases involving suicide following abuse.

14.45 However, we accept the concerns regarding the limitations of the existing offences. In Chapter 2 and Chapter 8 we have explained the requirement to prove causation for murder and manslaughter. The causation requirement is an important limitation on the scope of those offences, ensuring that only those who are sufficiently culpable for the consequences of their actions are within the scope of the most serious criminal offences. Causation is appropriately flexible to accommodate the full range of homicide conduct: it allows for context-specific analysis in individual cases. Case law, and the commentary above, demonstrate that it is possible for causation to be proven in some cases of suicide following domestic abuse. The practice improvements also described above will help support evidence gathering and presentation in respect of causation in cases of abuse, facilitating successful prosecutions where appropriate.

14.46 It is possible to include provisions specifying that manslaughter applies in such cases in the legislation itself. For example, in Canada, culpable homicide (comparable to manslaughter in this jurisdiction) can be committed by causing the victim "by threats or fear of violence or by deception, to do anything that causes his death".[69] We do not think it is necessary to provide for this more explicitly in the offence of manslaughter. The existing offence is already capable of responding to the relevant conduct.[70] Such an addition would add complexity without meaningfully extending the scope of the offence (as causation would still be required).

14.47 As noted above, the most common homicide offence considered in this context is UDAM. The elements of that offence require that the act that caused death was both unlawful and dangerous. As we describe in Chapter 8, an act will be "dangerous" where a reasonable person would have realised that the act was bound to subject someone else to the risk of *some* physical harm.[71] Physical harm in this context can include shock where this results in actual injury, such as lasting effects on the nervous system, but does not include psychological harm that does not amount to physical injury.[72] We are concerned that this limitation to physical injury could limit the applicability of UDAM in some cases involving controlling or coercive behaviour that does not include physical violence. Controlling or coercive behaviour *might* lead to physical injury to the victim absent physical violence from the abuser. The victim might suffer a physical response to the abuse that amounts to physical harm. However, it is not clear to us that such conduct will always meet the objective test that the non-physical abuse was "bound" to subject the victim to physical harm. There is as yet insufficient caselaw to assess how this requirement is understood and interpreted by the courts in cases of suicide following abuse where the abuse did not include

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69 Criminal Code, s 222(2).

70 While we make proposals for reform of the offence of manslaughter in Chapter 8, we neither intend nor anticipate that those reforms would meaningfully change the way that the offence would operate in the context of suicide following domestic abuse.

71 Judicial College, *Crown Court Compendium: Part 1,* 19-33; *R v Church* [1966] 1 QB 59; *R v Dawson* [1985] 81 Cr App R 150.

72 *R v Dawson* [1985] 81 Cr App R 150.

physical violence or amount to physical injury. We would be grateful for views and evidence on this issue.[73]

14.48 We also do not think that reform is required of the offence of encouraging or assisting suicide. If evidence is found that an abuser encouraged or assisted the victim's suicide, it is possible to charge the offence in this context. It could be charged in addition to homicide offences and can be an alternative verdict on a charge of murder or manslaughter.[74] It has a maximum sentence of 14 years' imprisonment. The Sentencing Council's guidelines on sentencing cases involving domestic abuse provide that the context of abuse can be considered relevant to the sentencing in such cases.[75]

A new bespoke offence

14.49 We acknowledge that the limitations of the offences of murder and manslaughter mean they will not apply in all cases where it is argued that a perpetrator of abuse should be criminally responsible for conduct that resulted in the victim's suicide.

14.50 We now consider the justifications for holding someone criminally responsible for the suicide of another in the context of domestic abuse. As described above, the current law already imposes criminal liability in cases of suicide following abuse where this amounts to murder or manslaughter. This is a recognition of the wrong inflicted when one person intentionally and knowingly abuses another, where that abuse is the substantial and operating cause of the victim's death by suicide. A similar justification applies when the abuse contributes to the suicide in some way, even if it is not the substantial and operating cause. Much of this conduct amounts to prolonged, sustained abuse: a course of conduct intended to inflict suffering on the victim and to reduce their autonomy. It is therefore both tragic and unsurprising that suicide is a common response from victims subjected to such abuse. Relatedly, the law already imposes criminal liability where the abuse amounts to, or includes, encouraging or assisting suicide, even if a suicide does not then occur. As our understanding of the connection between abuse and suicide continues to improve, it becomes clearer that suicide is not an unlikely or remote outcome of abusive behaviour. When suicide results from such abuse, there is a clear argument for criminalising the abusive conduct in a way that reflects that the conduct resulted in or contributed to the death of the victim.

14.51 There are already criminal offences designed to reflect specific, wrongful conduct that causes, contributes to, or results in death, even if that conduct is not the substantial and operating cause of death. This is explored further in Chapter 10. In these specific homicide offences, and in UDAM, the law appropriately criminalises defendants for the fatal consequences of their criminal conduct even if that consequence was not intended by the defendant. We consider that the same rationale can apply in cases of

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73 Either in response to the consultation questions in this chapter, or Consultation Question 6 regarding the elements of UDAM in Chapter 8.

74 Suicide Act 1961, s 2(2).

75 Sentencing Council, *Domestic abuse: overarching principles* (24 May 2018).

criminal conduct amounting to domestic abuse that has a fatal consequence when the victim of abuse dies by suicide.

14.52 In Chapter 10 we identify the main rationales for the range of existing specific homicide offences, including:

(1) gaps in the conduct covered by murder and manslaughter;

(2) evidential difficulties in securing convictions for murder and manslaughter for conduct that is sufficiently culpable to warrant a homicide label;

(3) a distinct element of the conduct which means that a specific homicide offence based on an existing non-fatal offence is better suited to address the conduct; and

(4) social issues or concern for public safety.

14.53 The evidence we have considered regarding culpability for suicide following abuse engages these rationales. Given the very small number of cases charged and prosecuted, we do not yet have sufficient evidence to reach a conclusive view on the extent to which (1) and (2) above apply. However, we think there is sufficient justification for further consideration given the prevalence of the issue, the lack of convictions, and implications for the safety of victims of abuse. We therefore set out below what the boundaries of a bespoke offence could be, if further review confirms such an offence is justified.

14.54 To reflect the justifications for criminalisation, a new bespoke offence would need an underlying abusive conduct element (to limit the offence to culpable conduct), and an element that reflects the fact that death resulted (to limit the offence to conduct that has a sufficient link to the death to justify criminalisation). The existing specific homicide offences are therefore an appropriate blueprint for a new bespoke offence.

14.55 Following the logic of the fatal driving offences (see Chapter 10), we examine the possibility of creating an aggravated form of an existing offence. This would ensure that the underlying conduct is sufficiently culpable as it would already amount to an existing offence with appropriate conduct and fault elements. An aggravated version would address the fatal consequence of already criminal conduct. We also think this would have fair labelling appeal. As discussed in Chapters 9 and 10, some of the rationale for specific homicide offences (including infanticide) arises from an apparent unwillingness of juries to convict someone of murder or manslaughter where it feels inherently unjust to label that particular conduct as murder or manslaughter. The bespoke, specific, offences are able more accurately to reflect the conduct and the culpability.

14.56 It appears to us that the most appropriate base offence in this context is the controlling or coercive behaviour offence in section 76 of the Serious Crime Act 2015:

> A person (A) commits an offence if—
>
> (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,

(b) at the time of the behaviour, A and B are personally connected,

(c) the behaviour has a serious effect on B, and

(d) A knows or ought to know that the behaviour will have a serious effect on B.

14.57 This offence has been successfully charged in cases of domestic abuse after the death of the victim.[76] It is also the single offence that best recognises the way that abuse can lead to suicide, as described in the evidence of the expert in violence against women and girls heard at the inquest for Kellie Sutton (see paragraph 14.20 above). Controlling or coercive behaviour describes the nature of sustained offending intended to entrap the victim and reduce their capacity for independence. It is this impact on the victim that can lead some to take their own lives.[77]

14.58 While there are many offences that can be charged in cases of domestic abuse, most are not specific to such abuse. For example, offences against the person, theft, harassment and stalking can all apply where there is no abuse or relationship between the perpetrator and victim. It would be challenging therefore to build a sufficiently narrow, bespoke offence when these acts result in death primarily in the context of abuse.

14.59 We now turn to the possible elements for an aggravated version of the offence of controlling or coercive behaviour. The aggravation, and justification for criminalisation, comes from the fact that the underlying abuse led in some way to the death by suicide of the victim. The offence would therefore need an element that connects the underlying conduct with the death. We note the explanation above that suicide is often a response to abuse; this demonstrates a relationship with the abusive conduct, leading to calls for criminalisation. Culpability is not limited to cases where the abuse was a substantial and operating cause of the death. Where the abuse was a meaningful factor or part of the reason the victim took their own life, there is some culpability that could justify criminalisation.

14.60 Some of the current specific homicide offences have a less strict approach to causation than the general homicide offences. As described above, murder and manslaughter require that the defendant's acts must have been a substantial and operating cause of the death, although they need not be the only cause. For some of the specific homicide offences, causation is a less central concept than in murder and

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76 See, for example, Ryan Wellings who was convicted of controlling or coercive behaviour after the death of his partner Kiena Dawes by suicide. See also K Hoeger, C Gutierrez-Munoz, A Sadullah and A Whitaker, "Domestic Homicides and Suspected Victim Suicides 2020-2024, Year 4 Report" (March 2025), p 60.

77 As mentioned above, the causes of suicide are complex and varying. We do not intend to suggest that only abusive conduct that falls within the controlling or coercive behaviour offence will lead to the suicide of the victim. However, we are satisfied that there is sufficient evidence of suicide connected to this type of abuse to justify using controlling or coercive behaviour as a basis for a bespoke offence. See for example: H Siddiqui and M Patel, "Safe and Sane: A Model of Intervention on Domestic Violence and Mental Health, Suicide and Self-harm Amongst Black and Minority Ethnic Women" (2010) Southall Black Sisters; "The Intersection of Gender, Domestic Abuse, and Suicidality" (2025) Advance; R Aitken and V Munro, "Domestic Abuse and Suicide: Exploring the Links with Refuge's Client Base and Work Force" (2018) Refuge.

manslaughter.[78] This generally reflects their purpose: to criminalise sufficiently culpable conduct that results in death even in cases that do not amount to murder and manslaughter. Any bespoke offence here would also need a less strict approach to causation, otherwise it would simply replicate the limitations of manslaughter.

14.61 As mentioned above, there are high levels of vulnerability in cases of domestic abuse. Many victims have pre- and co-existing vulnerabilities that are contributing, or even leading, causes of suicide. It is conceivable therefore that some victims of abuse who die by suicide, do so as a result only of those pre- or co-existing factors. While it may still be appropriate to criminalise the perpetrator of the abuse for the abuse itself, criminalising them for the victim's death when their conduct has not contributed in any meaningful way to the death is unjustifiable.

14.62 The offences of murder and manslaughter require the defendant's conduct to be a substantial and operating cause of the death; this includes conduct that amounts to a significant contribution to the death even if it is not the sole or leading cause. As noted above, culpable conduct may not be limited to cases where such a threshold is met. As we explore throughout this paper, culpability is not binary; the criminal law is capable of reflecting variations in culpability with mechanisms such as partial defences, and separate offences of varying seriousness.

14.63 A bespoke offence should require a causal link between the abuse and the death, but it would not have to be as significant and central a contribution as required for murder and manslaughter. Currently, both "substantial and operating cause" and "significant contribution" are used to describe the required connection between the act and the death in murder and manslaughter. A bespoke offence would require something less than this; the abuse would have to have contributed, in some way, to the death.

14.64 While this is some departure from the orthodox approach to causation, we think such an offence would still be appropriately limited by the fact that the underlying offence of controlling or coercive behaviour would also need to be proved. This is the approach taken in other specific homicide offences that operate complementarily to the offences of murder and manslaughter. For example, the offence of causing death by dangerous driving[79] requires both factual causation and that the dangerous driving "was a real cause of death which was more than minimal".[80] Similarly, in the offence of causing death by driving while uninsured,[81] the wrongful conduct must have contributed "in some more than minimal way" to the death.[82]

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78 For example, the offence of causing death while driving uninsured or without a licence (Road Traffic Act 1988, s 3ZB) still requires a causal link between the manner of driving and the death, but that causation is more remote from the unlawful conduct than the "substantial and operating" requirement for murder and manslaughter. The offence of causing or allowing the death of a child or vulnerable adult can be established when the defendant "allowed" a death that was caused by another (Domestic Violence, Crimes and Victims Act 2004, s 5). See Chapter 10 for further discussion.

79 Road Traffic Act 1988, s 1.

80 Judicial College, *Crown Court Compendium*, p 7-33.

81 Road Traffic Act 1988, s 3ZB.

82 *R v Hughes* [2013] UKSC 56 at [28]. As we explain in Chapter 10, while there is a different approach to causation in the other homicide offences such as these, "more than minimal" is also used to explain what is

14.65 We have set out the potential justifications for creating a bespoke offence in these circumstances. We do not yet have the evidence to conclude that an offence that has wider scope than the existing homicide offences is necessary. However, this gap in evidence may be due to the low number of prosecutions to date. We anticipate therefore that more evidence may become available as more of these cases test the boundaries of the current offences. We have therefore considered the most appropriate way of approaching such an offence, were its introduction to be considered necessary. We have not in this project been able to review the underlying offence of controlling or coercive behaviour sufficiently to say with confidence that it is the right approach, although we think it has logical appeal. We therefore invite views on the potential for such an offence, which could contribute to further work on the viability of the use of the controlling or coercive behaviour offence in this context.

14.66 In addition, or as an alternative to a bespoke offence, introducing an aggravating factor at sentencing for domestic abuse offences commonly charged following a death by suicide could help ensure that the fact death resulted from the conduct is appropriately reflected in the criminal justice response. However, we note that for the judge to take account of this at sentencing, it is likely that evidence would be required to demonstrate a link between the conduct and the death. In practice, the aggravating factor may therefore need a similar formulation to the bespoke offence. We invite views on this approach as well.

Consultation Question 20.

14.67 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.

Consultation Question 21.

14.68 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.

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meant by "significant contribution" in the context of murder and manslaughter. This complicates efforts to distinguish causation by the terminology currently employed. We therefore do not rely solely on the terminology used, but the principle it is intended to reflect when reaching our provisional view in this chapter.

Chapter 15: Equality impact

15.1 The Law Commission is tasked with ensuring the law is fair. To achieve this, we must take account of the characteristics of the people the law affects, and whether anything in the current law, or our proposals would have a disproportionate impact on any particular group.

15.2 Throughout this paper we highlight research that suggests this is already the case. For example:

(1) In Chapter 14 we note the gendered nature of domestic abuse resulting in death; the perpetrators are predominantly male and the victims predominantly female. We will also consider the impact of different victims' experience in this context, including but not limited to their age, race, socio-economic position, culture, religion, sexuality, disability, and immigration status. For example, we cite research suggesting a disproportionate number of Black, minoritised and migrant female victims of domestic homicide.[1]

(2) In Chapter 12 we describe research that suggests the law of complicity has a disproportionate negative effect on Black men and boys.[2]

15.3 We are also aware of the impact of homicide law on children.[3] The criminal justice system generally recognises that children sometimes need different treatment to adults, whether as victims or perpetrators. There are some offences specific to child victims including infanticide[4] and causing or allowing the death of a child.[5] There are also provisions specific to child defendants such as the Crown Prosecution Service guidance on charging decisions involving child defendants,[6] special rules for sentencing children,[7] and the youth court for child defendants.[8] Beyond this, we are also interested in how any of the topics covered in this paper may have a different

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1 See K Hoeger et al, "Domestic Homicides and Suspected Victim Suicides 2020-2025, Year 5 Report" (April 2026), p 8; Centre for Women's Justice and Imkaan, "Life or Death? Preventing Domestic Homicides and Suicides of Black and Minoritised Women" (November 2023), p 100; A Woolley, "Access Denied: The cost of the 'no recourse to public funds' policy" (June 2019), p 30.

2 The data shows that defendants from Asian, Mixed and Other ethnicities are also disproportionately represented in complicity cases, though the extent of the disproportionate representation varies for each group. The disparity between the percentage of Black defendants and the Black population of England and Wales is the largest such disparity among the ethnicity groups.

3 As required by article 1 of the United Nations Convention on the Rights of the Child, we use the term "child" for anyone under the age of 18.

4 Infanticide Act 1938, s 1.

5 Domestic Violence, Crime and Victims Act 2004, s 5.

6 Crown Prosecution Service, *Children as suspects and defendants* (last updated 4 August 2025).

7 Sentencing Council, *Sentencing Children and Young People* (1 June 2017).

8 See "Criminal Courts: Youth Courts", HM Government, https://www.gov.uk/courts/youth-courts.

impact on children, for example, homicide in the context of gang offending or the relevance of child brain development on forming intent.

15.4 We therefore invite consultees to tell us if they believe or have evidence or data to suggest that the law relating to homicide offences, or our proposals for reform, does or could result in advantages or disadvantages to certain groups or those with certain characteristics, with particular attention to the protected characteristics in section 4 of the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation), and also other characteristics such as socio-economic position and immigration status.

15.5 We invite views throughout the earlier chapters on specific questions relating to homicide offences and our proposals for reform. We welcome any evidence or views about any impact on groups with particular characteristics in response to those questions. If consultees have more general evidence to submit in this regard, we also welcome responses to the open question below. Any views, experience and knowledge shared with us on this topic will help ensure reform results in a fair law for all.

Consultation Question 22.

15.6 We invite consultees to tell us if they believe or have evidence or data to suggest that the homicide offences, or our proposed reforms, could result in advantages or disadvantages to certain groups or based on certain characteristics, with particular attention to the protected characteristics in section 4 of the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation), and also other characteristics such as socio-economic position and immigration status.

Consultation Question 23.

15.7 We invite consultees to tell us anything relating to the homicide offences, or our proposed reforms, that they have not yet had a chance to in response to any of the earlier consultation questions.

Chapter 16: Consultation Questions

Consultation Question 1.

16.1 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.

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

Do consultees agree?

Paragraph 4.25

Consultation Question 2.

16.3 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?

Paragraph 5.62

Consultation Question 3.

16.4 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?

Paragraph 6.52

Consultation Question 4.

16.5 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?

Paragraph 7.58

Consultation Question 5.

16.6 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?

Paragraph 7.59

Consultation Question 6.

16.7 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?

Paragraph 8.102

Consultation Question 7.

16.8 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?

Paragraph 8.106

Consultation Question 8.

16.9 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?

Paragraph 8.127

Consultation Question 9.

16.10 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.

Paragraph 8.142

Consultation Question 10.

16.11 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?

Paragraph 8.164

Consultation Question 11.

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

Paragraph 8.172

Consultation Question 12.

16.13 We provisionally propose that both the offence and defence of infanticide should be retained.

Do consultees agree?

Paragraph 9.49

Consultation Question 13.

16.14 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.

Paragraph 10.86

Consultation Question 14.

16.15 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.

Paragraph 10.91

Consultation Question 15.

16.16 We provisionally conclude that the specific homicide offences (criminal 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?

Paragraph 10.95

Consultation Question 16.

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

Paragraph 10.96

Consultation Question 17.

16.18 We provisionally conclude that a separate homicide offence for mercy or consensual killings is not justified.

Do consultees agree?

Paragraph 11.26

Consultation Question 18.

16.19 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.

Do consultees agree?

Paragraph 13.26

Consultation Question 19.

16.20 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?

Paragraph 13.28

Consultation Question 20.

16.21 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.

Paragraph 14.67

Consultation Question 21.

16.22 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.

Paragraph 14.68

Consultation Question 22.

16.23 We invite consultees to tell us if they believe or have evidence or data to suggest that the homicide offences, or our proposed reforms, could result in advantages or disadvantages to certain groups or based on certain characteristics, with particular attention to the protected characteristics in section 4 of the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation), and also other characteristics such as socio-economic position and immigration status.

Paragraph 15.6

Consultation Question 23.

16.24 We invite consultees to tell us anything relating to the homicide offences, or our proposed reforms, that they have not yet had a chance to in response to any of the earlier consultation questions.

Paragraph 15.7