Response to *Discussion Paper on the Mental Element in Homicide* (Scottish Law Commission, DP No 172)

This response has been written by Dr Ilona Cairns (Senior Lecturer) and Dr Elizabeth Shaw (Senior Lecturer) of the Centre for Scots Law at the University of Aberdeen. It responds only to particular questions raised in the Discussion Paper.

5. (a) Are there valid criticisms and calls for change in relation to the language of Scots homicide law?
(b) If so, are they of sufficient weight to justify reforming Scots homicide law by replacing all or some of the existing common law of homicide with new statutory provisions?
(c) Would those new statutory provisions have the effect of improving Scots homicide law?
(d) If so, what changes would you propose, and why?
(e) What language do you consider should be (i) used, or (ii) avoided, in any statutory reform, and why?

5.a) Yes, the language should be clear and easy for the public to understand. We agree that the current language is old-fashioned, emotive and vague.
b) Yes, the language in practice is leading to difficulties with interpretation (see comments in *Petto v HMA* [2011] HCJAC 78 *per* Lord Justice Clerk Gill at para 22) and is objectionable from a fair labelling perspective.
c) It is likely that statutory provisions that explained in greater detail the meaning of recklessness and intention in the context of murder would improve the law by providing clarity and promoting consistency between cases. However, careful attention must be paid to how the statutory provisions would fit with other areas of homicide law.
d) See below re 6 and 7.
e) See below re 6 and 7.

6. The case of Drury v HM Advocate introduced the word "wickedly" before "intended" in the first limb of the classic definition of murder (i.e. "wickedly intended to kill").
(a) Do you consider that statutory reform of this limb of the definition of murder is necessary?
(b) If so, should the qualification of "wickedly" be removed, or do you propose some other reform?

6. a) Yes. Currently "wicked" in the context of "wicked intention" seems to have a technical legal meaning – the absence of a defence - which is very different from the meaning of this term in ordinary language. This creates the possibility that some juries may depart from the legal definition (e.g. by allowing their compassion or hostility towards the accused to influence their interpretation of this limb) while other juries may stick more closely to the legal definition, creating inconsistency between cases. It cannot be ruled out that this risk may materialise in practice, given that juries do not give reasons for their verdicts and in the absence of *large-scale* studies of how non-lawyers understand this term. As noted in the discussion paper, the term "wicked" might provide a "vent for emotions" in the stressful context of a murder trial. However, this benefit could not justify the risk of undermining the primary function of a legal definition, which, in this context, should be to enable just and consistent outcomes to be reached, by using precise and accessible language. Consideration should be given to other ways

of enabling jurors to be "debriefed" or supported in order to mitigate the stressful impact of the murder trial.

b). Yes, but ways in which the law can show compassion to certain individuals who cause death intentionally (e.g., in cases of assisted dying and in certain situations involving necessity and coercion) should carefully be considered when reforming relevant defences and when issuing guidelines on the use of prosecutorial discretion.

7. (a) Should the "wicked recklessness" second limb of the crime of murder include the element of "intention to injure" as explained in *HM Advocate v Purcell*?
(b) If not, how should "wicked recklessness" be defined? Options might include the following:
• demonstrating complete indifference to human life
• acting "in such a way as to show that you don't care whether a person lives or dies"
• being "totally regardless of the consequences, whether the victim lived or died"
• showing "such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences"
• being recklessly or intentionally engaged in criminal conduct where it was objectively foreseeable that such conduct carried the risk of life being taken
• exposing someone to the risk of serious harm
• demonstrating willingness to run the risk of causing death (or serious injury), or creating an obvious and serious risk of death (or serious injury)
(c) Another approach might be to redefine "intention to injure" as "intention to cause any criminal harm or damage". Would you favour this approach?
(d) Yet another approach might be to provide by statute that "intention to injure" is not a necessary element of the wicked recklessness which constitutes the crime of murder. Would you favour this approach?

7(a) It should be stated in explanatory notes that intention to injure is not always required, with examples to illustrate that point. The term "wicked recklessness" should not be used as the phrase is too vague and open to different interpretations. In our view, these problems with wicked reckless cannot be solved by using that phrase as a shorthand accompanied by a longer legal definition of the phrase. In particular, if the phrase used as a shorthand includes terms that have a certain meaning(s) in ordinary language then jurors may read the ordinary meaning(s) into the legal concept, even where the ordinary meaning is legally irrelevant.

b) Our favoured second limb of the definition of the *mens rea* of murder is: Exposing someone to a severe and obvious risk of serious physical harm or death and the accused's conduct (in the specific circumstances) is extreme enough to demonstrate that the accused is completely indifferent to human life. We also recommend that a statutory non-exhaustive list should be provided of situations that could or could not constitute indifference to life. The statutory guidance could provide that the accused would normally have to foresee (judged subjectively) the severe risk unless, for example., they were intoxicated voluntarily, or their concentration on an unlawful purpose (e.g. escaping arrest or concealing evidence of a crime) meant that they did not notice the risk.

c) No, we do not favour that approach as it is unjustifiably broad. Someone could intend to cause criminal harm or damage (e.g., vandalism) without having the degree of culpability that should be required for murder.

d) It should be stated in explanatory notes that intention to injure is not always required with examples to illustrate that point.

8. Should the doctrine of constructive malice in relation to murder be explicitly abolished?

8. It should be stated in statute that the constructive malice doctrine has been abolished.

9. a) Do you consider that the law of homicide in Scotland would benefit from adopting all or some of the reforms proposed in the Draft Criminal Code for Scotland?
(b) If so, which reforms, and why?

9.a) We have concerns that the term "callous" could be open to some of the interpretive difficulties associated with "wickedness". We think that the definition proposed in 7b) above is more precise and avoids giving technical legal meanings to terms that differ from the way in which those terms are ordinarily understood.

28. (a) Should the existing Scots law partial defence of provocation be extended to include verbal provocation?
(b) If so, what should the essential elements of the defence be?
28.(a) If provocation remains a defence, our view is that verbal provocation that is roughly equivalent in seriousness to violent assault should be included.
28.(b)This could, for example, include revelations of violent or sexual criminal conduct against a third party (if there was a very close relationship between the accused and the third party such that it would be reasonable to expect an extreme emotional reaction on the part of the accused if the third party were threatened). It could also include a threat to seriously undermine a legally protected fundamental right of the accused (e.g., unjustifiably taking control of the accused's finances, unjustifiably preventing the accused from seeing close family members etc.). When judging whether such a threat could reasonably be believed to exist, the full context of the relationship between the accused and the victim should be taken into account. The Commission should give special consideration to the implications of recognising verbal provocation in domestic abuse cases, where the context of words (and indeed gestures) is particularly significant. It is possible that the expansion of provocation to include verbal provocation could have unforeseen negative consequences in domestic abuse cases, e.g., it could be used by perpetrators of domestic abuse who claim to have been verbally provoked by the victim.

29. a) Should a partial defence of third party provocation be recognised?
b) If so, what should the essential elements of the defence be?

29. (a) & b) If the provocation defence remains, we are of the view that third party provocation should be recognised but only if there is a very close relationship between the accused and the third party such that it would be reasonable to expect an extreme emotional reaction on the part of the accused if the third party were threatened. This is necessary to ensure that the net of the provocation defence is not cast too widely. Consideration should be given as to whether the scope of third-party provocation should be further limited, e.g., only to cases of physical threat, and to whether there may be any gendered and/or unintended consequences of recognising third party provocation, e.g., abusive partners using this to justify "protective" behaviours over their partner/ex-partner.

30. a) We are minded to recommend abolition of the partial defence of sexual infidelity provocation in homicide cases. Do consultees agree?

Yes, we strongly agree. The sexual infidelity trigger has no place in contemporary Scots law for the many reasons set out in the Discussion Paper.

a) If not, what defence, if any, should be available for a homicide on discovery of any intimate partner's sexual infidelity?

For the many reasons set out in the Discussion Paper, we agree that the sexual infidelity ground for provocation has no place in the modern Scots law of homicide. We consider that any potential benefits to allowing the discovery of sexual infidelity to form the basis of a defence are outweighed by potential risks. However, we take the view that the only situation in which infidelity should be considered would be in domestic abuse situations, which could be covered by a separate domestic abuse defence. Consideration should be paid to the case of *R v Challen* [2019] EWCA Crim 916 (in which revelations of sexual infidelity were used as a technique of abuse and as a means of controlling the defendant).

31. a) Should the partial defence of provocation to a charge of murder be abolished entirely?
b) If so, should it be replaced by a statutory defence?

31. a) Yes, we are of the view that the partial defence of provocation to a charge of murder should be abolished entirely. As noted in the Discussion Paper, the defence privileges anger over other emotions e.g. fear, and is inherently problematic from an equality perspective. We think it would be best to re-think the area based on first principles rather than try to modify a fundamentally flawed defence.
31. b) Yes, our view is that there should be a statutory defence to mitigate against the risk of miscarriages of justice.

32. a) Should that statutory defence be similar to the "loss of control" defence in English law, defined in sections 54-55 of the Coroners and Justice Act 2009?
b) If not, what should the essential elements of the defence be.

In our view there are several positive features of the "loss of control" defence, for example, the removal of the suddenness requirement, the exclusion of sexual infidelity as a trigger, and the inclusion of fear as a ground. We do not, however, think that it should be used as an exact model for Scotland. We have reservations relating to the phrase "loss of control", which was not defined, and which tends to imply suddenness, even though suddenness is not a formal requirement. Furthermore, the legislation did not provide clear guidance as to whether sexual infidelity could be considered as part of the "context", while not being a qualifying trigger in itself – see *R v Clinton & Others* (2012) EWCA Crim 2.

41. (a) Do you think that there should be a defence to a charge of homicide for domestic abuse victims?
b) If so, should the defence be complete or partial
c) What evidence would be required?
d) What safeguards would be required to avoid the misuse of such a defence?

e) As an alternative or an addition to such a defence, should a judge give specific directions to the jury, outlining the possible effects of domestic abuse on an abused partner?

41. a) This depends on how other defences are reformed, and whether they are reformed in such a way that would increase their availability to victims of domestic abuse. There may be inherent value, however, in having a distinct defence to a charge of homicide relating to domestic abuse as this would send an important message that about the insidious nature of domestic abuse and its severe effects on an abused partner. A tailored defence, if effectively drafted, is also likely to better fit the circumstances of someone who kills in the context of domestic abuse. We agree that a separate defence would serve an important communicative function.
b) We have reservations about making such a defence partial only as there may well be circumstances in particular cases that would justify the operation of a full defence. However, we accept that there is unlikely to be widespread support for a full defence in cases of domestic abuse. If such a defence is partial only, then it is essential that there is an alternate full defence available (e.g. a reformed self-defence) that could also apply effectively in domestic abuse cases. Accordingly, the creation of a new defence for domestic abuse victims should not mean that little or no consideration is given to how other reformed defences might also apply in domestic abuse cases. In short, it would be unfortunate if a new partial defence was automatically applied in domestic abuse cases, because some circumstances might well merit the application of a full defence.
c) Proving domestic abuse/coercive control is notoriously difficult[1] so we would recommend that the evidentiary threshold is not set too high. A previous criminal conviction against the victim, for example, should not be required. We agree with the suggestion in the Discussion Paper that evidence of domestic abuse should be required on the 'balance of probabilities'. We also agree that there should be no requirement for the existence of a specific medical condition at the time of the offence as this has the potential to medicalise and stigmatise victims of domestic abuse.
d) While it is important that the evidentiary threshold is not set to high, setting the threshold too low could increase the risk of the defence being used by abusers. Regular reviews of how the defence is operating may be necessary to ensure that it is not being used in this manner/disproportionately by men (who are statistically more likely to be perpetrators). We are not particularly convinced that individuals would see the defence as a 'licence to kill' as we think that it takes significantly more than the mere existence of a criminal defence to drive someone to kill, particularly in the context of an abusive relationship. We agree that such a defence would require to be tightly framed, but not so tightly that the full context of an abusive relationship could not be considered by the court. Context is everything when it comes to understanding domestic abuse and the effect that it has on its victims.
e) While jury directions would be better than nothing, we do not think that they should be regarded as a proper alternative to the introduction of a new defence. While there is some evidence that jury directions work to some extent in e.g. sexual offence cases, their potential effectiveness should not be over-estimated. The level of protection jury directions could offer to a victim of domestic abuse is, in our view, marginal when compared with a specific concrete defence.

33. (a) Is more clarity required as to what constitutes an "abnormality of mind" in terms of section 51B of the Criminal Procedure (Scotland) Act 1995? For example, should there be a requirement that the abnormality should be a recognised abnormality?

[1] See e.g. Ilona Cairns, The Moorov doctrine and coercive control: Proving a 'course of behaviour' under s.1 of the Domestic Abuse (Scotland) Act 2018 24(4) IJEP 396.

Although we have recommended a separate defence for domestic abuse victims, and regard this separate defence as more appropriate and less stigmatising in domestic abuse cases, it could also be appropriate to refer to the impact of domestic abuse in any guidance on interpreting s51B. For example, it could be helpful to provide guidance on "battered person syndrome" and to provide guidance to reduce the risk of the diminished responsibility defence being misused by perpetrators of domestic abuse. However, it could be problematic to impose a requirement of a recognised abnormality in the sense of a medical condition defined in psychiatric texts. For example, there can be situations where individuals face extreme pressure (e.g., in some cases of mercy killing or coercion), where the situation may interact with the accused's low mental functioning within the normal spectrum (and hence not a diagnosable psychiatric disorder), resulting in substantially impaired rational capacities. It might be appropriate to state that abnormalities that are not medically recognised will only be considered in exceptional cases. If the provocation defence were to be retained it would be inconsistent to recognise only the narrow range of "normal" human frailties that fall within the provocation defence, but to exclude non-medical abnormalities of mind from the diminished responsibility defence.

(b) If so, how should a "recognised abnormality" be defined? For example, should the definition be confined to those abnormalities contained in established texts on psychiatry or psychology?

See above.

35. Are the questions raised by Lord Carloway in *Graham v HM Advocate* so fundamental that some guidance (whether by statute or practice note) is required to assist trial judges?

In view of Lord Carloway's reference to "organic brain changes" being "vouched by scanning", it would be very helpful if the SLC could consider the growing literature on the use of brain scan evidence in court, including arguments that brain scan evidence can be open to different interpretations and may sometimes be of less value than behavioural evidence, and to consider how best to instruct juries on the interpretation of and weight to be given to brain scan evidence.

37. Are you aware of any problems which have arisen in the context of "mental disorder" as defined in section 51A of the Criminal Procedure (Scotland) Act 1995?

Yes, there are problems in principle in terms of how this defence relates to the automatism defence.

38. If so, what problems, and what reform do you consider necessary?

Medical conditions, such as epilepsy, hyperglycaemia, arteriosclerosis, and sleepwalking, do not fit the definition of "mental disorder", which is "mental illness, learning disability or personality disorder". Yet these medical conditions can cause the incapacities specified by the mental disorder defence – the inability to "appreciate the nature or wrongfulness" of the conduct. The automatism defence does not cover these conditions either, as they are not "external", so there is a risk that certain conditions will unjustifiably fall in a gap between these two defences. Furthermore, it may not be possible to acquit such individuals on the basis that they lack *mens rea.* Hyperglycaemia, epilepsy, and certain sleep disorders can cause confusional states. People in such states might form an "intention" or act "recklessly" and so could have *mens rea,* while being unable rationally to reflect on the wrongfulness of the conduct. Reforms that would help with

these problems include either a) merging automatism and mental disorder into a single defence, b) including physical conditions within the scope of the mental disorder defence, or c) allowing certain 'internal conditions' to be included within the automatism defence.

39. Are you aware of any problems which have arisen in the context of automatism?

Yes, there are problems in principle in terms of the wording of this defence and its relationship to the mental disorder defence.

40. If so, what problems, and what reform do you consider necessary?
Automatism is defined in terms of a total "alienation of reason". This phrase had also featured in the common law definition of insanity but was rightly criticised by the SLC as old-fashioned. "Alienation of reason" was replaced in the mental disorder defence by the "appreciation test", which uses clear, modern terminology. As the defences are so closely related, a helpful reform would be to use the "appreciation test" for both defences, or to merge the two defences. See also the problems and reforms discussed in 38 above.