Liberty’s response to the Ministry of Justice consultation:
“Murder, manslaughter and infanticide: proposals for reform of the law”

October 2008
About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.


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Introduction

1. Liberty welcomes the Ministry of Justice consultation on proposed reforms to the law in relation to murder, manslaughter and infanticide. The unlawful taking of the life of another human being is the most serious matter which the law must deal with, and it is therefore necessary for any associated legislation to be both clear and certain.

2. However, as the offence of murder has evolved in a piecemeal fashion over many years through numerous developments in case law and statute, there has been little consideration of how the law as a whole fits together. The Law Commission, in its report entitled “Murder, Manslaughter and Infanticide” (the Murder Report), refers to the law governing homicide in England and Wales as “a rickety structure set upon shaky foundations”\(^1\). Liberty therefore welcomes a comprehensive review of the current law to ensure that it meets the needs of the 21\(^{st}\) century.

Background

3. In June 2003, the Home Secretary asked the Law Commission to review the law in relation to partial defences to murder, and the Law Commission subsequently published a report entitled “Partial Defences to Murder” in August 2004. In response to ongoing criticisms that the law governing murder was in need of a wholesale review, the Law Commission was then asked to carry out a fundamental review of the various elements of murder and manslaughter, which culminated in the publication of the Murder Report in November 2006.

4. The Murder Report was intended to form the first stage in the review of the law governing murder. The Government has stated that it will proceed with the next stage of the review on a step-by-step basis, looking first at the recommendations in relation to areas of the law that are of most pressing concern. The consultation therefore reviews the Law Commission’s recommendations in relation to the partial defences of provocation and diminished responsibility, complicity in relation to homicide, and infanticide.

\(^1\) The Murder Report, paragraph 1.8
5. We welcome many of the Government’s proposals in the above areas, although we emphasise the importance of undertaking a wholesale review of all elements of the law of homicide, rather than pressing forward with piecemeal revisions in certain areas of the law, which is unlikely to lead to greater clarity and certainty.

The Current Law

6. Murder is a common law offence, the essential elements of which are an unlawful killing, coupled with an intention to kill or do serious harm. A conviction for murder attracts a mandatory sentence of life imprisonment or, if the offender is aged under 18, detention at Her Majesty’s pleasure.

7. Given the range of acts falling within the category of murder with vastly differing degrees of culpability, Liberty considers that the retention of the mandatory life sentence for murder cannot be justified. No other offence under the criminal law provides the courts with one sentencing option for such a broad range of acts. The replacement of the mandatory life sentence for murder with a discretionary life sentence would solve many of the problems addressed in the consultation, as the courts would have greater flexibility to take into account any factors that are relevant to the offender’s culpability (for example, any premeditation, provocation and/or the mental state of the offender) at the sentencing stage.

8. The Murder Report recommends the replacement of the current offence of murder with two new offences: first degree murder (where the offender intended to do serious injury to another, and was aware that his or her conduct posed a serious risk of death), and second degree murder (where the offender intended to do serious injury to another but was unaware of a serious risk of death). Manslaughter would be retained as the third tier of the structure, but the scope of the offence would be limited (for example, to situations in which there was gross negligence as to causing death). The Law Commission recommends the retention of the mandatory life sentence for first degree murder, with both second degree murder and manslaughter to attract a discretionary life sentence.

9. We are concerned that the Government has not taken this opportunity to review the abolition of the mandatory life sentence for murder, or alternatively, the Law Commission’s proposed offence structure. We suggest that, should the
Government consider that the mandatory life sentence for murder be retained, the offence structure proposed by the Law Commission would provide a coherent and logical framework for the law, and is in line with public perception that “murder” requires an intention to kill\(^2\). The proposed structure would also provide courts with the much-needed flexibility in relation to sentencing described above.

**Partial Defences**

10. There are currently three partial defences to murder: provocation, diminished responsibility, and killing in pursuance of a suicide pact (the latter is not considered in the consultation). If successfully pleaded, a partial defence reduces a conviction for murder to a conviction for manslaughter (which carries a discretionary life sentence).

**Provocation**

11. This partial defence is available where an offender is provoked (by things done and/or things said) to lose his self-control, in circumstances where a ‘reasonable man’ would have done as the offender did. The partial defence has evolved over many years through case law, and has become what the Law Commission refers to as “a confusing mixture of common law rules and statute”\(^3\).

12. The Law Commission has identified specific problems with the law in relation to provocation, in particular in relation to the loss of self-control element. The consultation therefore proposes replacing the existing partial defence of provocation with two new partial defences.

13. It is proposed that the first new partial defence should be of “killing in response to a fear of serious violence”. The consultation suggests that there are broadly two situations in which such a partial defence would be relevant:
   - where a victim of sustained abuse kills the abuser to thwart an anticipated, but not imminent, attack; and
   - where a person overreacts to what they perceive as an imminent threat.

   We consider this proposal to be a reasonable response to some of the current problems arising under this partial defence. For example, in relation to the first

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\(^2\) The Murder Report, paragraph 1.21
\(^3\) The Murder Report, paragraph 5.6
situation above, the current need to rely on provocation places the focus on the victim’s reaction to the acts of the abuser, rather than focusing on the victim’s fear of serious violence. In relation to the second situation, under the current law if a person acts in a disproportionate manner to a perceived imminent threat, the only option under the current law is to plead self-defence. However, as this full defence can be difficult to prove in such situations, such an overreaction usually leads to a conviction for murder, and therefore a mandatory life sentence. This may explain, for example, why juries are currently reluctant to convict people who kill burglars, even though the killing is considered to be a disproportionate response to the threat posed.

14. The second proposed partial defence, which may only be used in exceptional circumstances, covers “killing in response to words and conduct which caused the defendant to have a justifiable sense of being seriously wronged”. It is intended that this partial defence would only be available in situations which go far beyond what anyone could reasonably be expected to appropriately deal with (the Law Commission provides the example of a 15 year old rape victim who kills his attacker after being taunted about the attack⁴). While we accept that there may be a small number of occasions on which injustice might be done if “fear of serious violence” is the only available partial defence, this proposed partial defence should be treated with extreme caution. The concept of “being seriously wronged” is entirely subjective, and therefore the defence would add little certainty or clarity to the current law. The defence could also, for example, be used by vigilantes who have killed as a result of feeling seriously wronged by an event or other person’s behaviour.

15. The consultation proposes to retain the requirement for the offender to have suffered a loss of self-control for both of the proposed partial defences described above, although proposes the removal of the requirement for such a loss of self-control to be sudden. We welcome this proposal, as the ‘sudden’ requirement has been difficult to reconcile with the ‘slow-burn’ responses associated with domestic abuse cases. We also agree that a general requirement for a loss of self-control should be retained, as we would consider that there is a fundamental problem in providing a partial defence to an offender who has killed while in full possession of his or her senses (except in cases of self-defence, in which case a full defence will be available).

⁴ The Murder Report, paragraph 5.7
Diminished Responsibility

16. This partial defence enables those who kill with the requisite intention for murder to be convicted of manslaughter if, at the time of the killing, they were suffering from a mental abnormality which reduced their responsibility for their actions. The Law Commission has identified a number of problems with the partial defence of diminished responsibility, in particular the fact that it was not established with the needs and practices of medical experts in mind. For example, “abnormality of mind” is not a recognised psychiatric term, and therefore its meaning has had to be developed by the courts from case to case.

17. The consultation proposes replacing diminished responsibility with a new partial defence based upon the concept of a “recognised medical condition”, and clarifying what aspects of an offender’s functioning must be affected in order for the partial defence to succeed. Liberty welcomes such proposals on the grounds that they should provide for greater medical certainty.

Effect of a Partial Defence

18. As the consultation does not review the Law Commission’s proposed offence structure (discussed above), the consultation also does not review the effect of successfully pleading a partial defence under the Law Commission’s proposed threetiered structure. Should the Law Commission’s proposed offence structure subsequently be adopted, we would suggest that a conviction for manslaughter should be the consequence of establishing a partial defence, rather than second degree murder. We cannot see any compelling reason why the current law, under which a partial defence reduces a murder conviction to manslaughter, should be altered given the highly stigmatising nature of a murder conviction.

Complicity

19. When a crime is committed by one person, other people may also be found guilty of the same crime if such other people played a part in assisting or encouraging the crime. The current law in relation to complicity in homicide is described by the Law Commission as being both complex and uncertain. The Government therefore proposes to reform the law by creating new statutory offences
in relation to intentionally assisting and encouraging murder, with the intention of codifying and simplifying the current law.

20. Liberty has no comment to make at this time on the proposed reforms to the law of complicity in homicide

Infanticide

21. The consultation proposes amending the law to make it clear that infanticide cannot be charged in cases that would currently not amount to homicide. Liberty has no comment to make at this time on this proposed reform.

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