

Review Article

Homicide law reform: *Coke v Bumble* – revisited and reassessed

Sarah Hodgkinson BSc PhD* and Herschel Prins M Phil Hon LL D†

*Lecturer; †Professor, Department of Criminology, University of Leicester, Leicester, UK

Correspondence: Dr Sarah Hodgkinson, Department of Criminology, University of Leicester, 154 Upper New Walk, Leicester LE1 7QA, UK. Email: sf101@le.ac.uk

Abstract

This contribution is a sequel to an earlier paper in the journal by the second author. It examines the Government's remit to the Law Commission to suggest revision to the law relating to homicide, and the eventual somewhat muted implementation in the Coroners and Justice Act of 2009. These changes to the law of homicide, and more specifically the revisions to the partial defences of diminished responsibility and provocation, are critically reviewed, and are discussed in light of the future of homicide law reform. It is argued that more radical reform to the substantive law of homicide is needed, but this article also discusses the problems of implementing this more radical reform given the Government's reluctance to remove the mandatory life sentence for murder.

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Introductory comments

In an earlier article published in the journal in 2008 the second named author of the present paper set out some of his views on unlawful killing (homicide) and its disposal.¹ In doing so, he endeavoured to provide a description of the range of presentations and motivations for homicidal behaviour. (For some further contributions to the clinical aspects see D'Cruze *et al.*,² Doctor,³ Brookman⁴ and Royal Society⁵.) In addition he commented upon the constraints involved in dealing with such complex behaviours within the current legal framework and the remedies suggested by the Law Commission in its reports.^{6–9}

Sadly, neither the Law Commission nor the Government have embraced proposals to abandon the mandatory life sentence for murder, a proposal espoused almost unanimously by members of the judiciary, members of the legal profession and forensic mental health professionals. The arguments for such abandonment were presented cogently by Sir Louis Blom-Cooper and Professor Terrence Morris, along with their proposals for a restructuring of the offence itself.¹⁰ Any attempt to reform the law of homicide is necessarily hampered by the Government's commitment to retain the mandatory life sentence. Working within these constraints, the Law Commission put forward their recommendations in November 2006 for a restructuring of the offence of murder into first degree- and second degree-murder (with only first degree murder receiving the mandatory life sentence). They also suggested revisions to the partial defences to murder, in line with the Government's initial focus of homicide law reform. The Government chose to delay consideration of a restructuring of the

offence of murder until after revision of the partial defences. After consultation in 2008 the Law Commission's recommendations for revision of the partial defences were adapted to become part of the Coroners and Justice Bill enacted into law in December 2009. It is these changes, and in particular the changes made to 'diminished responsibility' and 'provocation' that form the basis for discussion in this paper. It is important to place these changes, and the ongoing attempts to reform the law of homicide more broadly, within a brief historical context.

Homicide law in England and Wales

There is a long history of dissatisfaction with the law on homicide, which developed in a piecemeal fashion over the centuries (see the work of Blom-Cooper and Morris¹⁰ for a comprehensive history of homicide law). In England and Wales there is currently no statutory definition of murder, our definition being based on that provided by Sir Edward Coke in 1628:

'Murder is when a man ... unlawfully killeth ... with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same' (cited in Blom-Cooper and Morris,¹⁰ p. 15).

This arcane common law definition, which has survived for almost 400 years, causes a multitude of problems and has been described on numerous occasions as unfit for our times. One of the major concerns with this definition

surrounds the interpretation of 'malice aforethought', which includes not only a conscious intent to kill on the part of the defendant, but is also interpreted to cover a conscious intent to cause grievous bodily harm. Therefore it is possible under this law for someone to commit the most serious offence of murder without any intention to kill, and without even considering that that may be a possible consequence of his or her actions.

The substantive law on homicide has never been codified within a single coherent Act of Parliament. The offence of 'murder' is still defined by centuries of evolving common law and case law precedence.¹⁰ Furthermore, the last major revision of homicide law was in 1957 with the introduction of the Homicide Act. This Act established in law the partial defences of diminished responsibility (adopted from Scottish law) and provocation (previously a common law defence) reducing the offence of murder to manslaughter if their conditions were met, and therefore allowing these defendants to escape the death penalty. The Homicide Act represented an attempt to restrict the use of capital punishment in a country that was already calling for its abolition.¹¹ The death penalty for murder was eventually removed and replaced with a mandatory life sentence in 1965 with the Murder (Abolition of Death Penalty) Act (and this abolition was ratified in 1969). While these Acts provided more humane legislation for the penalty for murder, it still, however, failed to provide that much needed statutory definition of the offence. Even in the early days of the implementation of the Homicide Act in the courts, the inconsistencies and problems became immediately apparent,¹¹ with the categories of murder being labelled as 'arbitrary' and against the spirit of justice.^a Over 50 years later the law has remained unchanged, and arguments continue about how the different interpretation of these defences can lead to considerable injustice. Lord Mustill's judgement in the House of Lords in July 1997^b encapsulates the significant problems with our current homicide law:

'Murder is widely thought to be the gravest of crimes. One would expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base. This is not so in England, where the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning' (cited in Blom-Cooper and Morris,¹⁰ p. 1).

In short, the current substantive law of homicide has been described as 'a mess'.^{6,10} The inconsistency in cases has led to frequent appellate action,¹⁰ with the judiciary left to make sense and deliver justice when the law itself is so

unclear. Consistent with the long history of debate and frustration regarding the law of homicide, calls for radical and wholesale reform of the law are by no means a new phenomenon.

The long process of reform

Over the years there have been numerous attempts to liberalize the law in this area and to strive to give more clarity and fairness to cases of unlawful homicide. These attempts at reform, like the law of homicide itself, have happened in a piecemeal (almost haphazard) fashion. They have also been typified by tensions between striving for a humane and fair sentence for those defendants who kill but may have lesser culpability for the killing, and between enforcing the harshest sentence for the most serious and abhorrent criminal offence.¹²

Those calling for fundamental reform of the law have recommended the replacement of the mandatory life sentence with a discretionary maximum life sentence, thus allowing greater flexibility of sentencing and negating the need for the problematic partial defences for murder (see Justice¹³ and Liberty¹⁴). For example, during the Parliamentary debates prior to the enactment of the Murder (Abolition of Death Penalty) Act 1965 suggestions were made on several occasions to reduce the mandatory life sentence to a more flexible sentence at the discretion of the judiciary.¹¹ These suggestions did not, however, make it into the final Act leading to widespread speculations that some kind of 'pact' was made at this time – i.e. in order for abolition to be allowed the proviso was made that the penalty for murder be 'life imprisonment' and that this would continue to involve incarceration for an extensive period of time.¹⁵ More recently in 1989 the report from the House of Lords Select Committee on Murder and Life Imprisonment¹⁶ (also known as the Nathan Report) recommended reducing the penalty for murder to a discretionary life sentence. Lord Lane in 1993 supported this proposal.¹⁷ The Government of the day rejected these recommendations.

The current session of reforms began in June 2003 when the Government tasked the Law Commission with a review of the partial defences to murder – provocation, diminished responsibility and self-defence. This review was spurred by the Government's interest in how these defences were used in cases of domestic violence,¹⁸ with an aim to ensure more equity between men and women who commit homicide. In October 2003 the Law Commission published their consultation paper,¹² with the findings published the following August.⁶ It outlined in detail the problems experienced in implementing the partial defences (for the purposes of this paper we are focusing on provocation and diminished responsibility, as these are the defences subject to the current revisions). The concept of provocation has become too widely applied in certain cases (such as in cases whereby the defendant claims to be 'provoked' by infidelity on the part of the victim), while being too restrictive in others. The stipulation that the defendant must suffer a 'loss of control' (and its interpretation as being both sudden and temporary)

^aThis dissatisfaction with the Homicide Act of 1957, and in particular with the application of the partial defences, lent considerable support to the campaign for the abolition of the death penalty in the early 1960s (see Block and Hostettler¹¹ for a more detailed discussion).

^bLord Mustill's judgement in *Regina v. Powell* in the House of Lords on the 17th July 1997.

favours male offenders who act through sudden anger, but has prevented female victims of domestic violence who kill their abusive partner being able to rely on this defence. This is not to say that female-favoured defences should be encouraged while male-favoured defences should be made more difficult to obtain. But it is better for the law in this area to be somewhat sympathetic to the plight of an abused spouse rather than the anger of a jealous one. Diminished responsibility was considered to be applied very inconsistently due to a lack of clarity in its definition of an 'abnormality of mind', and whether that abnormality substantially impaired the defendant (see Prins¹⁹ for a discussion of this).

In reaction to the strength and volume of responses outlining the fundamental problems with the law of homicide, the report recommended a wholesale review of the area. The continued existence of the partial defences was only considered necessary because of the retention of the mandatory life sentence. Some offenders who commit murder do not arguably merit a life sentence. Although a 'life sentence' rarely means that the offender will spend the rest of his or her life in prison, once released from prison the offender remains on license until the end of his or her life. The offender is bound by the conditions of the license, and if these are breached may well be recalled back to prison. The Law Commission⁶ considered this an unnecessarily onerous burden on some 'lifers' who pose no risk to society.^c The law and the courts have sought to find ways around this, hence the partial defences exist to reduce the charge to manslaughter, which allows a greater flexibility of sentencing. The Law Commission report⁶ also presented independent research including a survey of public opinion, which revealed that the public also recognized the need for a graduated response to homicide that the uniform application of a mandatory life sentence could not provide.

In light of the problems highlighted in the report the Government responded by commissioning a further report looking at homicide law more broadly, although stating that they would not consider abolishing the mandatory life sentence for murder. Working within this significant constraint the Law Commission published their second consultation paper⁷ in November 2005 and published the Murder Report⁹ a year later. This report outlined fundamental problems with the law of homicide including how the current categories of 'murder' and 'manslaughter' are inadequate to effectively deal with the variability of both behaviour and culpability. It recommended a restructuring of the offence, while also highlighting how the partial defences of provocation and diminished responsibility create further

injustice and uncertainty. Bound by the need to maintain the mandatory life sentence for murder, they rejected proposals to create a single unitary offence of 'criminal homicide' with a more flexible sentencing regime, as suggested by Blom-Cooper and Morris.¹⁰ Instead they proposed a new statutory law of homicide whereby most serious homicides (those committed with a clear intention to kill) are classified as 'first-degree murder'. Less serious homicides (where there was the intention to cause serious harm but not to kill) would become 'second-degree murder'. This category would also include homicides with an intention to kill but mitigated by a partial defence such as provocation, diminished responsibility or duress. 'Manslaughter' would remain but would be reconceptualized as unlawful homicide whereby the offender was acting in a grossly negligent way or realized that their actions could potentially cause harm, but not intending serious harm. They also proposed a new sentencing regime whereby first-degree murder would retain the mandatory life sentence, but second-degree murder would normally attract a discretionary one. Manslaughter would receive a fixed term sentence or a non-custodial penalty.

As this recommendation retained the partial defences they made further recommendations for their reform. Firstly, provocation should be extended to include those who kill because of a threat of serious violence. Secondly, diminished responsibility should be clarified to include only those suffering from a recognized medical condition. Other recommendations were made concerning issues of developmental immaturity, duress, and infanticide. The Law Commission⁹ also emphasized that reforming the partial defences in isolation was not going far enough, and that in the long-term more fundamental changes were needed with the law of homicide.

The Government responded in July 2008 with the Ministry of Justice consultation paper,²⁰ which laid out their proposed changes to the law. In this they focused solely on the more minor changes related to the partial defences of provocation and diminished responsibility, placing more fundamental reform 'on hold' for an indefinite period of time. This has led to widespread speculation that this much needed reform of the substantive law of homicide will never happen^{21,22} or is too 'troublesome'.²³ These somewhat superficial and limited reforms therefore met with considerable criticism from professionals working within the legal profession, the criminal justice system, and the field of forensic mental health. In particular, disappointment and anger were expressed at the Government's reluctance to review the sentencing principles laid out in the Criminal Justice Act 2003, and, in particular, to consider relaxing their commitment to the mandatory life sentence for murder.^{13,14,24,25} The Ministry of Justice released their response to the consultation in January 2009²⁶ and introduced the Coroners and Justice Bill. This Bill contained a disparate range of legislative changes including those to the partial defences for homicide. Despite Opposition criticisms that in this way the Government had 'buried' the reforms in a larger Bill to avoid full discussion of the issues surrounding homicide law reform,²² this Bill became enacted as law in December 2009.

^cObviously there are other available sentencing options currently in use in the courts, which have similarly severe outcomes. For example, indeterminate sentences such as a sentence of Imprisonment for Public Protection (IPP). Introduced under the Criminal Justice Act 2003 for offenders who pose a considerable risk to society and commit serious violent and sexual offences, an IPP mandates that the offender will remain incarcerated until such time as the relevant authorities consider them to no longer present any significant risk to society.

Table 1 Summary of changes to homicide law under the Coroners and Justice Act 2009*

Legislation affected by revisions	Law previous to Coroners and Justice Act 2009	Current law under Coroners and Justice Act 2009	Implications/Comments
Section 2 of the Homicide Act 1957: Diminished Responsibility	A defendant (D) who would be found guilty of murder will be guilty of manslaughter instead if they were suffering from an 'abnormality of mind'. The abnormality of mind 'substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing'.	'Abnormality of mind' replaced with Section 52 'abnormality of mental functioning which arose from a recognised medical condition'. Changed to 'substantially impaired D's ability to do one or more of the things mentioned in subsection (1A).' '(1A) Those things are – (a) to understand the nature of D's conduct; (b) to form a rational judgement; (c) to exercise self-control.' '... and provides an explanation for D's acts and omissions in doing or being party to the killing.'	This is argued to bring the defence more in line with psychiatry, although may be seen to narrow the defence. Provides greater clarity about what we mean by 'impairment' which is now defined as an impairment to one of three specific abilities.
Section 3 of the Homicide Act 1957: Provocation	A defendant who would be found guilty of murder will be guilty of manslaughter instead if they were provoked by things said or done (or both) to lose self-control.	Section 54 new defence of 'loss of self-control' which must have had a 'qualifying trigger' (defined in Section 55). Qualifying triggers are split into cases where the loss of self-control is: (i) 'attributable to D's fear of serious violence from the victim (V) against D or another person.' (ii) 'attributable to a thing or things done or said (or both) which (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged.'	Needs to be a significant contributory factor in causing their acts or omissions relating to the homicide. The impairment must explain their behaviour. Defence of provocation is abolished under Section 56 of the Act and replaced with this new defence. This defence excludes cases previously allowable under 'provocation' (i.e. those involving sexual infidelity). Additionally, the new defence introduces a qualifying trigger of fear of serious violence with the aim of allowing its application to cases of domestic abuse.
	According to the opinion of the jury the provocation was enough to make a reasonable person act as the defendant did.	'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.'	

*Note that Section 59 of the Coroners and Justice Act 2009 also covers changes to the law on 'assisting and encouraging suicide'. We are not considering these changes here as they refer to a highly contentious and complex area of the law, which we consider to be outside the remit of the current paper. Section 57 makes a minor revision to the Infanticide Act of 1938, extending its usage to cases of manslaughter as well as murder. Sections 53, 54 and 60 also update the law in Northern Ireland for the defences of 'diminished responsibility', 'infanticide' and 'assisting and encouraging suicide', respectively.

Long-awaited reform? The Coroners and Justice Act 2009

The Law Commission laboured long and hard in framing and putting forward a number of suggestions for the reform of homicide law.^{6,8,9} For interested readers their final proposals are summarized in more detail by Prins (notably at pp. 20–21).¹ The recent changes implemented by the Government in the Coroners and Justice Act 2009 seem very slim in comparison with the Law Commission's extensive proposals, and are very much at odds with the views of criminal justice, legal and forensic mental health professionals. We summarize the changes in Table 1, focusing on the partial defences of provocation and diminished responsibility.

The revisions made to the diminished responsibility defence aim to bring it more in line with modern-day psychiatry and reduce some of the problems associated with the interpretation of 'abnormality of mind'. As Prins¹ states:

'The law relating to homicide in its present form is highly unsatisfactory. And, in particular, where matters of disordered mental states are concerned, it can lead to somewhat unseemly "battles" in court between psychiatry on the one hand and the law on the other' (p. 19).

The present wording of diminished responsibility has always been problematic, somewhat tautological, and undoubtedly rather vague. 'Abnormality of mind' has no meaning within psychiatry and is therefore not easily matched against psychiatric diagnostic criteria^d such as the DSM-IV-TR²⁷ or the ICD-10.²⁸ Consequently, interpretation of what constitutes an 'abnormality of mind' varies widely and there have been numerous inconsistencies in its acceptance or dismissal in individual cases. Its success as a defence has been more reliant upon the perceived credibility of competing psychiatric testimony or the degree of sympathy for the defendant on the part of the jury,¹⁹ which, while important, has led to concerns over inconsistency of application. Even when an 'abnormality of mind' has been accepted further problems arise from the question of whether this substantially impaired the defendant. (For some case illustrations of these problems see Prins¹⁹ discussion of the cases of Peter Sutcliffe, Dennis Nilsen and 'M.T.' on pages 31–36.) The revisions made in the Coroners and Justice Act 2009 help to clarify the interpretation and application of the defence. Section 52 intends to bring the law up-to-date by requiring evidence of a proven medical condition, aimed to match the latest psychiatric diagnostic criteria. It also sets out what is meant by 'substantial impairment' and stipulates that this impairment needs to have significantly contributed to the defendant's behaviour in committing the homicide. Any attempt to provide greater clarification of such an uncertain and inconsistently applied defence is surely welcome.

The Government expectations are that the change in wording will not have a marked impact on the number of

cases successfully utilizing the diminished responsibility defence.¹⁸ There have, however, been concerns that the revised wording will narrow access to the defence,^{21,22,29} and could potentially introduce new problems of interpretation.²⁹ Mackay explores how the changes may well exclude cases that previously could have had recourse to this flexible defence – for example 'mercy killings' – as well as widening the defence beyond psychiatry to other branches of medicine (as it states a recognized *medical* condition and not *psychiatric* condition).²⁹ In addition, he considers how the specification of certain abilities that must be impaired will inevitably restrict the defence further. Offenders diagnosed with a personality disorder will find it very difficult to plead diminished responsibility as they usually retain the abilities to be aware of their own conduct, make rational judgements, and can exercise self-control. All of these things together, he speculates, could well make the defence even more limited in application than the insanity defence (although this defence is also 'up for review').³⁰ Miles agrees that the usefulness of the defence may very well be reduced with the new change in criteria, and she argues that this may well lead to more trials and convictions for murder.²² The commencement date for the changes to homicide law (in England and Wales only) was 4 October 2010, therefore the impact of the new diminished responsibility plea in terms of convictions for murder as opposed to manslaughter (or *vice versa*) remains to be seen.

Arguably the most significant change to the partial defences is the abolition of the provocation defence and its substitution by the new 'loss of self-control' defence. This constitutes two separate defences defined by two respective triggering factors. Firstly (and this is where the plea differs significantly from the provocation defence), that the loss of self-control was attributable to a fear of serious violence from the victim. Secondly, that the loss of self-control was attributable to things said and/or done in extremely grave circumstances or that resulted in the defendant feeling a justifiable sense of being seriously wronged. In an attempt to make these defences apply only in 'reasonable' circumstances, both of these defences require the condition to be met that a person of the defendant's sex and age (and with a normal degree of tolerance and self-restraint) in the same circumstances might have reacted the same as or similarly to the defendant. A loss of self-control because of sexual infidelity on the part of the victim is now expressly excluded (as are those based on a desire for revenge and 'honour-based' killings). In addition, unlike the law relating to provocation, this new plea does not require the loss of self-control to be sudden and temporary.

This new two-part defence sets to redress any gender inequity resulting from the wording of the provocation plea,²⁰ as men are more likely to kill out of anger at discovering their partner was having an affair, whereas women are more likely to kill as the result of a 'slow burn' response to years of domestic abuse. Consequently, the inclusion of a defence when the homicide occurred as the result of a fear of serious violence by the victim is aimed at its application in cases of domestic violence. Some may feel that these reforms, rather than redressing gender inequality, may serve to transfer the inequality in terms of making the law

^dObviously diagnostic categories themselves can also be vague and contentious, and therefore are also open to various interpretations.

more amenable to female-favoured defences than male-favoured ones. Most people are likely to feel more readily sympathetic to the victim of spousal abuse who eventually kills their abuser, than to the defendant who kills their spouse upon discovery of their adultery.

The Government expects that the new loss of self-control defence will lead to some convictions of murder where previously a conviction of manslaughter would have resulted.¹⁸ This is due to the restriction of the defence – only a handful of cases are expected to fit the second qualifying trigger, it being much stricter than the old provocation defence that was being too loosely applied.³¹ This is advantageous as the defence was seen to be too readily available to defendants killing after losing their tempers and only serving a sentence for manslaughter. They do not expect any differences in the rates of convictions for murder or manslaughter under the first qualifying trigger (fear of serious violence) as evidence suggests that judges already stretch their application of the provocation defence to cover victims of domestic violence, in the interests of justice.¹⁸ The new defence is merely aimed to prevent the judiciary having to misapply the plea by creating a new plea to fit these particular circumstances.

Making it easier for judges to deliver a conviction of manslaughter in cases of homicide by female victims of domestic violence will help readdress some of the inequities they currently face and may negate the need for judges to have to 'misapply' an existing defence that does not necessarily 'match' this particular situation. Finding a way to achieve this without relying on the diminished responsibility defence, given its new narrower scope, is also significant. But opinion is divided as to whether the law will actually have this desired effect, with some commentators suggesting that the new defence and its wording may cause further difficulties in the courtroom. Miles,²² for example, questions whether a loss of self-control can be anything other than sudden, and that, at best, judges will continue to have to 'shoehorn the battered spouse's case into a model that does not readily fit' (p. 8), or, at worst, will be unable to apply the defence at all. The Law Commission⁹ recommended dropping the requirement of a loss of self-control for this very reason, as actions can be defensive without involving a loss of self-control. The present authors feel that the Government, when drafting the Coroners and Justice Act 2009, missed an opportunity by maintaining that the defence must involve a loss of self-control, as this is somewhat inconsistent with the concept of the 'slow burn' response of a 'battered wife'. Again, only time will tell how the new loss of self-control defences will be applied in the courtroom.

These revisions to the partial defences can be argued to 'fine-tune' them, and may well address some of the well recognized problems of their inconsistency of application or their usage against the spirit of justice. They may also have the effect of narrowing their scope somewhat – perhaps an inevitable result in an aim to aid the coherency of the law in this area. As some commentators fear, in a few deserving cases a conviction of murder may be delivered, when under the old law they may have successfully pleaded manslaughter. But what is perhaps most significant

about these changes is how they would not be necessary if a more radical reform of the law of homicide had been achieved, such as those advocated by Blom-Cooper and Morris.¹⁰ Even without adopting such fundamental reform, it is grossly unwise to 'tinker' with the partial defences without also revising the legal framework in which these defences are embedded.^{13,22}

Although the Government has suggested that these revisions are merely stage one in a two-stage programme of reform, there is a widespread belief that reform will continue in this current piecemeal manner without really addressing the overarching problems with the substantive law of homicide.^{21,22} The ultimate barrier to significant reform of the law in this area is the Government's persistent commitment to the mandatory life sentence as the only sentencing option in cases of murder.^{1,10,13,14,25} They have stated on numerous occasions, both before and during this current session of reforms, that they have no intention of replacing the mandatory life sentence and that they will continue to uphold the sentencing regime laid out in the Criminal Justice Act 2003 (see, for example, the Law Commission's terms of reference laid out by the Government in 2003,¹² and reiterated in 2005⁷). The recent change in Government is unlikely to impact upon this situation, as historically (ever since the abolition of the death penalty) retention of the mandatory life sentence for murder has always been the Government line, regardless of which Government is in power.¹⁰ In addition, in 2009 both the Labour and Conservative parties publicly expressed their continuing commitment to this stance.²⁵ The new Coalition Government, while stating that it may consider further reform in the law of homicide, has yet to comment in detail on this issue.

This enduring commitment to such a restrictive sentencing regime persists in the face of overwhelming criticism. The majority view among the legal profession, mental health and criminal justice professionals, academics, and interest groups is that any attempt at reform is inherently limited by this approach.^{13,14,25} The recent consultation exercises by the Law Commission^{7,12} and the Ministry of Justice²⁰ bought the strength of this feeling to light, but failed to alter the Government position on this issue. The explanation for Government's insouciance concerning the majority view among professionals 'in the know' is likely to be attributable to political considerations and, thus, politicians' fears that, in spite of the unassailable logic underlying the former, the removal of the mandatory life sentence for murder would be perceived by the electorate as 'going soft on crime'. They therefore argue that this position is to ensure public confidence; that the most serious offence of murder is punishable by the most severe sentence within their power.²⁶ This viewpoint contradicts the independent research contracted by the Law Commission.^{6,12} As Blom-Cooper and Morris¹⁰ conclude, 'there is good reason to doubt that there is, in reality, a public that is unyielding and uniformly punitive in its response to homicide' (p. 12). The public recognize that the term 'murder' covers a wide range of behaviours; some more criminal than others; some more morally comprehensible than others. They realize that not all 'murderers' are deserving

of such harsh sentences, and they generally agree with a bespoke approach to sentencing.^{6,12}

Murder (despite covering such a varied array of behaviours) provides the judiciary with a single sentencing option.¹⁴ It is the broadness of the offence and rigidity of the sentencing regime that renders the partial defences necessary. Under the partial defences those defendants who have committed murder, but are less culpable, can have the charge reduced to manslaughter to allow a more just and flexible sentence. The partial defences have therefore been described as 'gateways' to justice in our flawed and outdated legal framework. They allow mitigating circumstances to be taken into account, as clearly not all defendants who technically 'fit' the current definition of 'murder' deserve a life sentence.^{1,10,13}

This raises another fundamental problem with the current conception of 'murder' – its definition solely within common law that has remained unchanged for nearly 400 years. A codification of homicide law into a single coherent statute is long overdue. When the Government responded to the Law Commission's call for a review of the law of homicide as a whole,⁶ there was optimism that the Government would grasp this opportunity to place 'murder' on the statute book and that they might rethink the offence structure in an aim to resolve many of the problems identified. For example, by codifying and restructuring the offence they could have attempted to amend the difficulties experienced with the current interpretation of 'malice aforethought'. One way to provide more wide-reaching reform would have been to adopt the approach suggested by Blom-Cooper and Morris.¹⁰ Under their proposals a new unitary offence of 'criminal homicide' would be created but coupled with a completely flexible approach to sentencing. The judge would therefore set the penalty proportionate to the individual circumstances of the case, thus removing any need for 'messy' and 'ill-fitting' partial defences. Blom-Cooper and Morris's¹⁰ proposals would be dependent upon an abandonment of the mandatory life sentence, in favour of a whole range of tariffs from a discretionary life sentence to fixed term sentences and/or fines. One consequence of this reform would be that power is transferred from the jury to the judiciary. Therefore one could argue that this in itself is problematic since it takes the definition of culpability out of the hands of the layperson. The present authors consider the judiciary to be 'better placed' to exercise this function and take this into account when delivering their sentencing decision. The Law Commission, however, rejected this proposal as an option in their Murder Report.⁹

Adoption of the Law Commission's proposed three-tier structure could have been an acceptable compromise between professional opinion and the Government position. Under this model the mandatory life sentence would be maintained for the most serious cases – those of first-degree murder where there was a conscious intent to kill (with no mitigation to their culpability), but greater flexibility would be allowed in cases of second-degree murder and manslaughter. While still problematic in some respects (for example those previously convicted of manslaughter under the partial defences would become 'second-degree

murderers' with the stigma that might be attached to the label)^e it would put in place a firmer definition and more coherent framework for homicide law. In particular it would restrict the life sentence to murders committed with intent to kill, which is more consistent with the public's understanding of 'murder' anyway.

Unfortunately, even this compromise was too radical for the Government. Although they do not explicitly rule out a reconsideration of these proposals at a later point in time, it is highly unlikely that they will. Even more unlikely is an open debate on the possibility of abolishing the mandatory life sentence. Forty-five years after the abolition of the death penalty, reconsideration of the sentencing policy for murder is not on the agenda. If reform is to continue (and a Law Commission report on the insanity defence was due by the end of 2010),³⁰ it appears this reform will continue to be piecemeal, disjointed, constrained, and will continue to be based within the current problematic legal framework. Meanwhile, inconsistency, confusion and injustice may well continue.

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