

Murder, Manslaughter and Infanticide

The Institute of Legal Executives

The Institute of Legal Executives (ILEX) is the professional and representative body representing Legal Executive Lawyers and has a membership of 24,000 students and practitioners.

Alongside Barristers and Solicitors, Legal Executives are recognised under the Legal Services Act 2007 as qualified Lawyers. Recent developments also mean that Legal Executives will be eligible for prescribed judicial appointments, including eligibility as legal Chairs of tribunals.

Moreover, Government legislation has recognised Legal Executives' significance in the legal system and will give them the right to run their own businesses, whether in partnership with other Lawyers or with commercial legal services providers.

Fully qualified and experienced Legal Executives are able to undertake many of the legal activities that solicitors do. For example, they will have their own clients (with full conduct of cases) and they can undertake representation in court where appropriate.

Legal Executives must adhere to a code of conduct and, like solicitors, are required to continue training throughout their careers in order to keep themselves abreast of the latest developments in the law.

ILEX provides policy response to Government consultations in order to represent its members and the public interest.

1.0 Introduction and summary:

1.1

ILEX welcomes the opportunity to respond to government's consultation on Murder, Manslaughter and Infanticide. This response to the government's proposals follows consultation with Legal Executive Lawyers specialising in the area of criminal law. The response addresses the relevant issues in the order that they have been raised by the above consultation.

1.2

ILEX is of the view that it is important, both for the maintenance of public confidence in the criminal justice system and for the proper functioning of the jury system, that the various strands of the law relating to murder are not at total variance (unless fairness or justice requires it) with the ordinary understanding of the public and the seriousness of the offence of murder. However, ILEX accepts that given the 'strained' interpretation of certain aspects of the law relating to murder, it is apt for a review. That said, ILEX is not convinced by the piecemeal approach to change adopted by the consultation.

2.0 Provocation:

2.1

Provocation has often been described as "a concession to human frailty" introduced by the common law to avoid the strictness of the then single penalty of death for murder. As such, it becomes a question of whether the defendant's blameworthiness or responsibility for murder should be mitigated to a lesser charge in light of the particular circumstances of a case. This is still the case, where there is evidence that a defendant charged with murder was provoked.

2.2

Understandably therefore, the Government's and the Law Commission's proposals are based on the premise that the 'moral blameworthiness' of homicide may be significantly lessened where the defendant loses self control in response to gross provocation or in 'exceptional circumstances' as a result of 'a thing or things done or said' (or a combination) giving the defendant a justified sense of being seriously wronged, or showing a real fear of serious violence. However, the proposed changes are significant but it remains important that the change of law should not in any way diminish the seriousness of the charge of murder

2.3

ILEX, however, accepts that the current state of law relating to provocation meant there were "long-standing concerns" that the partial defence as it stands is "too generous to those who kill out of anger and too hard on those who kill out of fear of serious violence" resulting in a gender imbalance that is difficult to justify. There is a need to tackle the gender bias, but ILEX has doubt whether a purely statutory version of the defence can be devised that addresses all the concerns that arise when provocation is at issue. It is important that the right balance is achieved without giving the perception of diminishing the seriousness of murder.

3.0 Proposed Partial Defences and Judicial Control

3.1

ILEX is concerned that the proposed new partial defence blurs the boundaries of the complete defence of self-defence and is potentially confusing for a jury. Thus, it may become extremely difficult to disentangle the defence of self-defence from the proposed partial defence relating to fear of serious violence and unwise to approach the facts as if they fell within mutually different compartments, both defences should be left to the jury to determine on the facts of the case.

3.2

It follows from the above therefore, that ILEX is not convinced by the proposals to impose judicial control in the sense that the trial judge will firstly determine whether there is sufficient evidence on which a jury can convict before the issue is left to the jury to determine. In any event the evidential burden is still on the defence in the sense of 'passing the judge' before provocation is left to the jury to determine. As such, the judge is under no obligation to put before a jury strained or implausible inferences for the purposes of creating provocation if there is no real basis (*Walch [1993] crim LR 714*). Similarly, ILEX is also of the view that any unnecessary judicial control as envisaged by the consultation risks undermining the important functions of the judge and jury in our criminal justice system. ILEX would, therefore, welcome a provision in the draft clause similar to s3 of the *Homicide Act* that continues to regulate the respective roles of judge and jury, which is essential to our criminal jurisprudence.

4.0 Loss of Self-Control

4.1

ILEX supports the removal of the requirements of a 'sudden' before 'loss of self control' since ILEX agrees that this disproportionately benefits the short-tempered response over the slow-burn response to the partial defence of provocation, resulting in the gender imbalance issue. That said, however, ILEX would like to see further safeguards to ensure that the proposed partial defence should not result in the legitimisation, or excusal, of retributive killing or vigilantism. ILEX is concerned that a legitimate and laudable provision does not inadvertently open up the defence too widely for illegitimate use or inappropriate cases. For example, the proposed partial defence may result in D (the defendant) utilising the defence in the following circumstances:

4.2

Victim (V) threatening D with serious harm following an argument where V says he will 'have D next week'. A couple of days later, D still fearing serious harm launches a pre-emptive strike on D with a baseball bat. V is fatally wounded following blows to his head. D was aware that V was a violent person. D can argue that, notwithstanding the attack happened a couple of days following V's threat of violence, he was in fear of serious harm and this was reinforced by the V's past history.

D, following 20 years of exemplary service, is dismissed for gross misconduct by his employer largely on the evidence of another employee who has started recently. D is aware that he will lose his house and will face bankruptcy. D loses it and exacts revenge on his employers fatally wounding his former boss.

Notwithstanding the reasonable person test in clause 1, D can argue that this was an exceptional thing in his life that justified a sense of being seriously wronged and thereby utilising the defence in mitigation of a charge of murder.

4.3

The above are only examples, but they highlight flaws that go to the Mens Rea of murder and issues relating to pre-meditation.

5.0 Reasonable Person 'Test'

5.1

ILEX agrees with the proposal to clarify and up-date the existing reasonable person test so that it measures the defendant's own reaction against the standards of someone of his or her age possessed of an ordinary temperament, who is neither intolerant nor lacking in a reasonable measure of self-restraint when facing provocation. This is a reasonable and proportionate measure.

6.0 Draft Clauses:

6.1

ILEX recommends the following changes:

6.1.1

1 Partial defence to murder:

6.1.2

After sub paragraph (a) D's .. remove 'acts' and insert 'actions'.

After 'acts' remove 'and' add 'or'

6.1.3

Subsection 4

After 'if' omit 'subjection' and insert 'subsections' before (5), (6) or (7)

6.1.4

End of subsection 4 omit 'applies' and insert 'apply'.

6.1.5

Consider revising 'Abolition of common law defence of provocation' to section 1.

7.0 Diminished Responsibility

7.1

ILEX accepts that the present definition of diminished responsibility is out-dated, and that it embraces too narrow a category of offenders. ILEX is of the view that that the defence of diminished responsibility should be available for all those whose capacity to choose to kill the victim was substantially impaired, except by temporary circumstances arising from their own fault (for example, voluntary intoxication or drug taking). However, ILEX makes the following note of caution: there may be cases that fall out of the box of 'recognised medical condition or 'relevant mental impairment'. For example, as regards the latter, arteriosclerosis (hardening of the arteries) would fall outside the definition of relevant mental impairment. However, it is still classed as a disease of the mind for diminished

responsibility purposes if it causes a temporary loss of consciousness despite being of physical origin¹.

7.2

ILEX agrees, for the reasons given in the consultation, that the extending the definition of diminished reasonability to include developmental immaturity in a defendant under the age of 18 is unnecessary bearing in mind that no specific cases have resulted in inappropriate verdicts.

8.0 Complicity to Homicide

8.1

Law on complicity to homicide in England and Wales goes back to at least the 17th century and it has become confused by various statutes and provisions that have led to the public perceiving that some people have received lenient sentences for complicity to murder (to the extent that a lacuna around the area of “common purpose” can lead to members of gangs escaping liability for murder as in example 9 of the consultation paper).

8.2

ILEX, therefore, agrees that while the law is complex and at times uncertain, it is of primary importance that in murder cases justice is not only done but also seen to be done. ILEX recognises, therefore, of the importance of striking the right balance between being seen to be too lenient on the one hand and being too hard on the other.

9.0 A new statutory offence of assisting and encouraging murder

9.1

Subject to the observations below, ILEX agrees that in these cases it is the intention of the secondary party that is important regardless of the intention of the primary perpetrator. However, ILEX is mindful that the meaning of such a fundamental term as ‘intention’ can be inconsistent with judicial opinion being uncertain. In the past, for example, the courts have consistently given the word a wider meaning, sometimes described as “oblique” as distinct from “direct intention”². That said, it should be left to the jury to determine that the defendant intended the offence to be committed in light of all the circumstances.

¹ See Devlin J in Kemp [1957] 1 QB 399 at p.408.

² Williams. ‘Oblique Intention’, (1989) CLJ 417

10. A new statutory offence of murder in the context of a joint criminal venture

10.1

For the reasons given by the Law Commission and the Government, ILEX agrees with the proposals on joint criminal venture.

11. The fundamental difference rule

11.1

ILEX accepts that the fundamental difference rule can be too rigid in the sense of focusing on the acts foreseen by the secondary party rather than the actual intention of the joint venture thereby ignoring the overall focus of the criminal activity. ILEX, therefore, has no fundamental objections to a new more flexible statutory rule based whether the defendant's act was within the scope of the joint criminal venture replacing the common law fundamental difference rule.

12. Infanticide

12.1

ILEX accepts the Government's view that the Judgement *in R v Gore*³ may have inadvertently opened up, albeit in a very small number of cases, liability for infanticide in cases that would not currently be homicide at all. As such, ILEX welcomes an amendment to the law to make it clear that infanticide cannot be charged in cases that would not currently be homicide at all.

³ {2007} EWCA Crim 7289