Law Commission Call for Evidence

"Homicide Law"

REPONSE OF THE CRIMINAL BAR ASSOCIATION

November 2025

OVERVIEW

1. The Criminal Bar Association ("CBA") welcomes the Law Commission's ("the Commission") review of and Call for Evidence upon the law relating to homicide offences, including partial defences to murder and full defences, and the sentencing framework for murder.

2. The CBA exists to represent the views and interests of specialist criminal barristers in England and Wales. This response to the Commission's Call for Evidence seeks to identify issues of practice which might profit from further exploration. It avoids, whenever reasonably possible, straying into areas of policy where opinions may be sharply divided. The proper time for fully developed submissions on such topics will be during the consultation process on the Commission's provisional proposals for reform.

3. Ahead of drafting this response, the CBA sought members' views on practical issues concerning the points and issues raised in the Call for Evidence. It is hoped this response reflects their views. However, given it is the work of only a few of those member barristers it is inevitable that all will not agree with its content and much might be left out.

4. Moreover, we are conscious that other respondents will be better placed to address many of the issues raised – in particular, as to the policy choices to do with the operation of partial defences and the way the law treats vulnerable victims of domestic abuse who kill their (mostly male) abusers.

5. Our response is predicated upon the condition that the Commission's review assumes the continuing existence of the mandatory life sentence for murder and that the sentencing framework for murder will continue to be set out in primary legislation.

6. It mirrors the Commission's three-part structure: homicide offences, full and partial defences and the sentencing framework for murder.

7. In very broad outline the key points we suggest the Commission should explore are:

   (a) Codification of general homicide offences and partial defences in a new Homicide Act for England and Wales.

   (b) The same to move away from a binary structure and adopt a tier of offences based on the "ladder" principle.

   (c) A fresh approach to secondary parties, particularly where they are children and young people, when their participation did not contribute to the principal's act.

   (d) Codification of the law governing self-defence.

   (e) Codification of the law governing insanity and non-insane automatism.

   (f) Whether the structure of Schedule 21 to the Sentencing Act 2020 is coherent and fit for purpose.

PART 1: HOMICIDE OFFENCES

Issue 1: the structure of homicide offences (paragraphs 2.25 to 2.27)

8. Issue 1 invites evidence upon the advantages and disadvantages of (a) the existing structure of homicide offences, (b) the three-tier structure recommended by the Commission in 2006 and (c) possible alternative structures.

9. The essential context for these questions is that the current definitions of the two general offences of homicide, murder and manslaughter, are largely the product of judicial law making. We agree that the result is a set of rules with uncertainty in their foundation and content. This is an unacceptable situation in any sphere of the law. It is particularly unacceptable given that homicide offences are the gravest of

crimes. In our view it is now time to grasp this nettle by rationalisation of the law through legislation.

10. That process should, firstly, provide a new structure that promotes clarity and in a way that the public as well as lawyers can understand and accept.

11. Second, we invite the Commission to consider reform of this structure through a new Homicide Act for England and Wales. It should, as the Commission proposed in 2006, provide clear definitions of murder and of the partial defences to murder (reformed and brought up to date as is considered necessary) and should also define manslaughter. This would mean that the general offences of homicide are largely dealt with within a single piece of legislation.

12. Third, it should get away from the current binary structure of murder / manslaughter. This conceals serious problems because each offence, and manslaughter especially, comprises diverse forms of conduct that cause death with an extremely broad range of forms of culpability. It would be preferable to redefine the general homicide offences with more explicit reference to differing forms of culpability, rather than retain the vague catch-all that we have now.

13. Fourth, as to an alternative to the present binary structure, we suggest that the Commission's work in 2006 was comprehensive and exhaustive. Whilst its arguable it requires updating because of subsequent developments over the last 20 years, its recommendation to use the "ladder" principle and formulate a graduated system or three-tier hierarchy of offences reflecting degrees of seriousness (of offence) and degrees of mitigation (in partial defences) is coherent and readily comprehensible.

14. The same can be said of the application of the ladder principle to punishments for offences.

15. Fifth, whilst there is a great deal of room for disagreement about the particular categorisation of offences within a three-tier system, the debate is not likely to be dominated by issues of practice. Rather, it will focus on important points of legal, moral and ethical principal, as well as issues of fair labelling.

16. Cases such as Valdo Calocane, who stabbed three people to death in Nottingham City Centre in 2023, where the prosecution accepted pleas of not guilty to murder but

guilty to manslaughter highlight the sorts of arguments that can be made for a tiered structure where such unlawful killings would be categorised as murder, albeit second degree murder.

17. All the policy arguments will require very careful consideration. But they are not for the CBA at this stage.

18. What we can say, in our view, is that the categorisation in the Commission's 2006 three-tier ladder should be explored because it strikes a workable balance between pragmatic considerations and the principle that offenders should be categorised relative to their degree of wrongdoing.

19. Sixth, we suggest the Commission should consider exploring the development of a system of categorisation that is, at heart, simple. We recognise immediately that a departure from the current binary system risks doing the reverse because it introduces more choice and the potential for more complication, especially in multi-handed trials, leading to inconclusive trials. However, since the Commission's proposals in 2006, the system of written directions and routes to verdict has been fully developed. It improves jury comprehension and focus and, in the face of greater choice, should help mitigate against the risk of increasing the incidence of inconclusive trials.

20. Seventh, and notwithstanding, the Commission should consider other tools in a three-tier system to (a) assist jury agreement and (b) promote certainty as to by what route the jury reached a verdict. In the Commission's 2006 proposed categorisation, first degree murder admits of 2 routes, second degree murder 3 and manslaughter 3. This could be addressed by way of clearer rules on indictments and alternatives (note the recent debate in **Odunuga [2025] EWCA Crim 532**).

21. Finally, in any structured tier of offences we see merit in using modern, plain and ordinary English terms. For example, "injury" is preferable to "bodily harm". However, "serious" in "serious injury" is a commonly understood term and, in our view, jurors have little difficulty understanding it. Despite the critical role it might play in the categorisation of offences, it requires no further exposition.

Issue 2: the fault element (paragraphs 2.44-2.46)

22. Issue 2 invites evidence on (a) the use of the fault elements of existing homicide offences and any challenges they have raised in practice, (b) the advantages and disadvantages of defining the fault elements and on their possible definitions and (c) the advantages and disadvantages of the fault elements the Commission recommended in 2006.

Fault Element for Murder

23. First, starting with the modern legal definition of malice aforethought. It is settled – an intention to kill any person or an intention to cause serious harm to any person (the GBH rule).

24. After **Matthews and Alleyne [2003] EWCA Crim 192** there is ambiguity in the definition of intention in **Wollin [1999] AC 82** which permits the jury to retain a margin of discretion when it comes to finding oblique intention. We note the Commission's proposal in 2006 retained this flexibility. In very hard cases this might be problematic because of the potential for inconsistent decisions on identical facts. This is worth exploring in codification.

25. However, in our collective experience in the vast run of cases the definition of intention presents no difficulty when directing juries.

26. We do not engage here with the debate of policy / principle surrounding the GBH rule which was confirmed in **Rahman [2008] UKHL 45**, and not overruled in **Jogee [2016] UKSC 8**. We simply note, that in our view, the Commission's 2006 recommendation to couple it with an awareness of a serious risk of causing death is unlikely to present practical difficulties from the use of such terms. They have an ordinary meaning. If that is correct, the Commission should ponder whether further attempts to define them risks causing unnecessary complication in directing juries.

Unlawful Act Manslaughter

27. Second, as to the fault element in involuntary manslaughter, and specifically unlawful act manslaughter, the current position is that it is sufficient that the unlawful act may be any criminal offence involving an act (but not an omission), with *mens rea* of more than mere negligence.

28. It is perhaps trite to observe there has been sustained and principled criticism of unlawful act manslaughter (see, most recently **Bukhari [2025] EWCA Crim 1353** at [§3]). In our view it's well deserved. Although its elements are easy to state – an unlawful act (intentionally performed), which was dangerous and caused death - it is sometimes a very difficult crime to apply in practice. A review of the plethora of case law is proof enough of the uncertain reach of the offence. Indeed, the law is now in such a state that at first instance there has been a prosecution based on a base offence of strict liability; for example, riding bicycles on a public road without a front brake in a case called **Alliston** at the Central Criminal Court in 2017.

29. Our collective experience suggests there is merit in its retention, but clarity about its contours is urgently required and should be delivered by codification. However, devising a clear and principled statement is, we accept, a difficult task.

30. The Commission's 2006 recommendation was in effect to recast the offence as criminal act manslaughter. Our basic steer is that any definition within a ladder structure should maintain correspondence between fault (intention or foresight of injury) and the harm (death).

Reckless Manslaughter

31. Third, if notwithstanding **Lidar [2000] 2 Cr.App.R 328**, reckless manslaughter still exists, as the authors of Smith, Hogan and Ormerod (17th Edition at page 643, §14.3) point out, it is quite controversial because it potentially covers where a person (a) kills by a reckless lawful act (no unlawful act manslaughter), foreseeing risk of causing serious harm (no gross negligence manslaughter available as no serious and obvious risk of death) and (b) kills by a reckless omission (no unlawful act) which does not pose a serious and obvious risk of death, with foresight of the risk of causing serious harm.

32. Despite the controversy it can, in rare cases, present a solution to challenging cases. For example, take child neglect, unless truly wilful, where experts do not agree an omission gave rise to a serious and obvious risk of death.

33. From a practical point of view therefore the Commission should seek to tidy up this area and explore proposals that avoid the controversy of prosecuting this very

uncertain offence by subsuming its residual utility as either second degree murder or in a codified offence of gross negligence manslaughter.

Gross Negligence Manslaughter

34. Fourth, gross negligence manslaughter. Like unlawful act manslaughter the problem is uncertainty and that is to do with the law's considerable refinement and development through decided case law.

35. Although the offence was expressed in simple terms in **Adomako [1995] 1 AC 171**, it is difficult to apply in practice because it involves complex issues of causation, omissions, duty, foreseeability and grossness. Whilst it is, in our view, relatively rarely prosecuted, the cases tend to be high profile attracting real public interest. The trials are often heavily dependent on expert evidence and the guidance / protocols and systems in place at workplaces or fields of professional practice. They involve difficult issues to do with whether *Brown* directions are appropriate, particularly in the context of alleged multiple failings giving rise to a serious and obvious risk of death. Accordingly, the burden on a jury is often a very significant one.

36. Given these circumstances it is an unhappy situation that the offence is still ill-defined. It was only in **Rose [2017] EWCA Crim 1168** that there appeared in one place a full statement of the offence. However, it was then further refined into six elements in **Kuddus [2019] EWCA Crim 837**. Moreover, there have been a series of decisions in the last 20 years adding further gloss, refinement and necessary explanation (ie: **Misra [2004] EWCA Crim 2375**, **Sellu [2016] EWCA**, **Rudling [2016] EWCA Crim 741**, **Bawa-Garba [2016] EWCA Crim 1841**, **Rubelo [2021] EWCA Crim 306**, **Broughton [2020] EWCA Crim 1093** and **Bah [2024] EWCA Crim 1499**).

37. Despite these cases many of the elements are either loosely defined or not defined at all. For example, *"grossness"* is simply left to the jury as to whether a defendant's conduct is so bad that it deserves to be criminal. That appears rather circular.

38. In addition, debate about the offence is heavily influenced by policy. This is seen most clearly in the field of medical practice.

39. Given the above, the time for codification is now. Like so many features of this project how this is done will involve hard policy choices. At this stage those things are beyond legitimate comment by the CBA in response to a Call for Evidence.

40. That said in our view the Commission's recommendation in 2006 recasting the offence has the merit of producing greater clarity, particularly as to its ambit and the fault element. On a practical level that is to be welcomed.

41. Although the Commission did valuable work upon expert evidence in 2011 (*see* Law Com No 325), which resulted in a number of reforms (principally under the auspices of the Criminal Procedure Rules and Practice Directions as well as a series of decided cases in the Court of Appeal confirming a reliability threshold for admissibility), in our view there is scope, too, for the Commission to think carefully about oversight of experts' training, experience and skills by an independent regulator to ensure that there is proper quality control of those who are not currently subject to duties, obligations and supervision administered by a statutory regulator.

Relationship to Corporate Manslaughter

42. Lastly, the Commission may wish to explore the relationship of gross negligence manslaughter with the free standing homicide offence applicable to corporate defendants in the **Corporate Manslaughter and Corporate Homicide Act 2007**. Individuals cannot be prosecuted as accessories to an offence of corporate manslaughter. They are, of course, liable for an offence of gross negligence. This distinction between organisations and individual fault may cause problems if an individual is charged along with a company and the jury is faced with different tests of liability.

Issue 3: Complicity as relevant to homicide (paragraph 2.71)

43. The grading of homicide offences would give an opportunity to the jury to identify different degrees of culpability, according to the degree of involvement that a defendant has had with the killing.

44. At present, both principals and secondary parties must receive the mandatory sentence of life imprisonment. Our experience as prosecutors and defenders,

particularly in multi-handed cases, informs our view that a re-grading is worth exploring in order to remove the potential for injustice that informed sources believe accrues to some secondary parties in such cases.

45. Put at its most stark the proposition in **Rowe [2022] EWCA Crim 27** at [§128], affirming dicta in **Jogee [2016] UKHL 8** at [§12], that "*that the prosecution does not have to prove that any encouragement or assistance by an accessory had a positive effect on the principal's conduct. It matters not that encouragement was given but ignored, if the counselled offence was committed*" should be moderated, because individuals who are marginally involved in a killing are being over-criminalised.

46. Unless there is an overwhelmingly powerful countervailing public policy argument, we think the Commission should give careful consideration to the case for labelling non-contributory involvement by secondary parties in such a way that it does not carry a mandatory sentence of life imprisonment. The availability of a discretionary life sentence would enable the Court to make the punishment match the level of the defendant's culpability. We must acknowledge, however, that Schedule 21 would need amendment.

47. Re-grading would also permit, in particular, the culpability of children and young people in multi-handed murder cases, to be fairly labelled and not excessively punished.

48. We note the Sentencing Council's Guidelines for Sentencing Children and Young People:

> *1.7 Offending by a child or young person is often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the child or young person from society if that can be avoided.*
> *1.8 The impact of punishment is likely to be felt more heavily by a child or young person in comparison to an adult as any sentence will seem longer due to their young age. In addition penal interventions may interfere with a child or young person's education and this should be considered by a court at sentencing.*
> *1.9 Any restriction on liberty must be commensurate with the seriousness of the offence. In considering the seriousness of any offence, the court must consider the child or young person's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.*

1.10 Section 57 of the Sentencing Code sets out the purposes of sentencing adults aged 18 or over on the date of conviction. There is no corresponding provision as to the purposes of sentencing children and young people but, as noted above at paragraph 1.1, section 58 of the Code makes clear that the court has the following duties when sentencing children or young people: to have regard to the principal aim of the youth justice system (which is to prevent offending), and to have regard to the welfare of the child or young person.

49. The intervener in **Jogee** made specific submissions about the capacity of children and young people to foresee the consequences of the actions or intentions of others, but the Supreme Court focussed on other aspects of the case. Nonetheless, we consider that the prevalence of multi-handed murder cases involving this cohort requires the Commission to give active consideration to whether a more tailored approach to assessments of culpability is required for them.

50. CPS Guidance is of some assistance, but is inevitably limited by the rigid categorisation of homicide offences. Insofar as relevant it provides:

"Prosecutors should exercise particular care when assessing the questions above in cases that involve:

1. *A spontaneous outbreak of multi-handed violence; and*
2. *Children, young people and persons with learning disabilities, autism (including Asperger syndrome) and mental health issues.*

In such situations and in respect of such suspects, it remains permissible to consider what the suspect foresaw and to use that as one part of the evidence in considering whether the evidence of intentional assistance or encouragement is made out (see the section on Conditional intent cases below). However, that inference must be approached with particular care because of the real possibility that the spontaneous situation, or the age, nature or condition of the person, might mean that they did not have such foresight, which will contribute to the decision about their intention. A fast moving situation, the lesser developed thinking or experience of a child or young person, the impaired or different thinking of a person with a learning disability, autism / Asperger syndrome or mental health issue - may mean a suspect is less able to appreciate what may follow.

Further, it may be determined that the evidence that these persons intended to assist or encourage D1 to commit a particular crime may not be sufficiently strong and reliable to

make D2 liable, once careful thought has been given to the situation in which they found themselves, or to their mental capacity due to age or condition.

Prosecutors should consider the available evidence concerning the situation or the suspect, identifying and seeking further evidence where necessary, asking themselves how that evidence should be taken into account in reaching safe inferences about the suspects intention.

For further information on autism, see the CPS Autism Checklist for Prosecutors on the Knowledge Hub and The National Autistic Society publication Autism: a guide for police officers and staff."

51. Putting the above suggestions together, we consider the Commission should explore whether the present law in the context of homicide offences bears down unfairly on secondary parties' participation, particularly in the cases of children and young people, who did not contribute to the principal's act.

Issue 4: Mercy and Consensual Killings (paragraph 2.86)

52. As with infanticide (see issue 5, below), cases involving mercy or consensual killing are very infrequent. The CBA received no feedback from members on the topic. The issue of whether the compassionate killing should be recognised by the criminal law, and how, is a policy matter on which the CBA does not adopt a position.

Issue 5: Infanticide (paragraph 2.101)

53. By virtue of s.1 of the Infanticide Act 1938, infanticide is both an offence and also a partial defence to charges of murder and manslaughter.

54. The CBA recognises that the language of s.1 of the 1938 Act may appear antiquated to a modern ear. In practice the interplay between infanticide and other forms of homicide is rarely encountered. The CBA received no concerns expressed by members concerning the offence. This is likely to be a consequence of a lack of experience among practitioners, given how unusual it is for infanticide to be charged, or raised by a defendant.

55. As to whether those suffering from post-natal mental health issues should be considered differently to other mentally disordered defendants, or whether the language of the Act requires updating to bring it in line with modern medical thinking, these are issues best addressed by other groups, principally those with legal or medical experience concerning mothers who have recently given birth, who are better placed to comment.

56. The CBA has nothing to add on this topic.

Issue 6: Additional issues relevant to homicide offences (paragraph 2.104)

57. The Call for Evidence notes at paragraph 2.103 there are multiple offences of causing death in addition to the general offences of murder and manslaughter.

58. To add to the offences highlighted by the Commission are offences ancillary to murder such as solicitation and threats to kill. There is also the whole scheme of offences to do with child destruction and abortion (ie: child destruction, attempting to procure a miscarriage, knowingly supplying or procuring poison, offences in the Abortion Act 1967, concealment of birth and other common law offences such as disposing of or destroying a dead body with intent to prevent an inquest from being held). Attempted murder sometimes attracts lively debate too.

59. Plainly the sanctity of life is a key feature of the criminal law. But we do not seek to raise issues that stray beyond the general homicide offences, full and partial defences and the sentencing framework. Much needed reform in these areas may be put at risk if the scope of the project is not kept within manageable limits.

PART 2: DEFENCES

Issues 7 and 8: Partial Defences of loss of control and diminished responsibility (paragraphs 3.46 and 3.47)

Placing partial defences within the tiered approach

60. The Commission's Call for Evidence highlights a plethora of important issues and questions that arise for consideration since the Coroners and Justice Act 2009 replaced the common law defence of provocation with that of loss of control, and reformed diminished responsibility (paragraphs 3.20 to 3.43). We don't wish to add to them but have the following three general observations.

61. First, were a "tiered" approach to be taken to the law of homicide, serious consideration should be given to the partial defences of loss of control or diminished responsibility operating so as to reduce the offending *"one rung down the ladder"*. Such a categorisation would properly reflect the gravity of the offending and the culpability of the offender. It seems logical that, if the partial defences should operate in cases of first-degree murder, then they should also be available where second degree murder is alleged. The operation of the defences in this way would also allow sufficient flexibility at the sentencing stage to avoid potential injustice.

Domestic abuse

62. Secondly, the CBA acknowledges that there are other contributors to this Call for Evidence, with a greater depth of expertise and experience, who are better placed to comment on whether the existing partial defences of loss of control and diminished responsibility adequately cater for those cases where a vulnerable individual kills their abuser. [1]

Expert Evidence

63. Third, in our experience, the vast majority of experts called to give evidence as to the mental state of a defendant raising the defence of diminished responsibility are suitably qualified, aware of their professional obligations and of the legal framework within which they are opining (however, see above at §40 in relation to unregulated experts). So far as can be ascertained, our practical experience is that juries appear able to understand the legal issues and properly comprehend and evaluate competing expert evidence.

[1] For example, we invite the Commission to have regard to the publication "Justice Denied: Exploring Inequalities in the Legal System" (Routledge) and in particular chapter 7 - "Social Entrapment: Is the Law Failing Women Who Kill ?" (Clare Wade KC and Rebecca Penfold).

Issues 9, 10, 11 and 12: Full Defences - Duress, Self-Defence, Others including where victims of domestic abuse kill their abusers (paragraphs 3.65, 3.70, 3.72-3.73 and 3.99-3.100)

Issue 9: Duress (§3.65)

64. Issue 9 invites evidence on the defence of duress, in particular on its possible application to homicide offences.

65. The reality is that this topic involves a hard-edged policy debate. It is not the CBA's role to enter such territory.

Issue 10: Self Defence (§3.70)

66. Issue 10 invites evidence upon the challenges posed by the law of self defence as relevant to homicide law.

67. As the Commission notes in the Call for Evidence the law is to be found in a variety of sources. That's never a good start and, moreover, the law in this area has developed in a piecemeal fashion.

68. There are some inconsistencies and anomalies. The common law plea of private defence overlaps with the plea of public defence under section 3 of the Criminal Law Act 1967. The defences at common law and further to section 3 are now regulated by s76 of the Criminal Justice and Immigration Act 2008.

69. There is a difficult relationship between the private defence and the defence of insanity as underlined in **Oye [2013] EWCA Crim 1725** and **Taj [2018] EWCA Crim 1743**.

70. There is uncertainty as to the circumstances when the courts will permit the defendant's psychiatric condition to be considered as relevant to the belief he or she held.

71. However, there is consistency on the operation of self-induced intoxication on a mistaken belief in householder and non-householder cases. Perhaps there should

not be. Why should someone at home regulate their drinking to the same extent that is to be expected of someone out and about in public ?

72. There are also important arguments about the anomaly that a householder is permitted to use disproportionate force against a trespasser, but in general terms the law does not permit an abused person to use disproportionate force against the abuser, unless a trespasser.

73. These issues and the fact the Court of Appeal has needed to make multiple interpretations of the statutory provisions and common law suggests clarity is needed within a single coherent statutory scheme.

Issues 11-12: Other Defences (§§ 3.72-3.73, 3.99-3.100)

74. Issues 11 and 12 invite views upon other full defences and the important topic of victims of domestic abuse who kill their abusers.

75. As to other defences, we invite the Commission to return to its proposals in 2013 to reform the common law defences of insanity and non-insane automatism. Although such cases are rare the defences are still raised.

76. For example, **BWP [2024] EWCA Crim 113** in which Macur LJ concurred with the description of the law on automatism by Lawton LJ in **Quick [1973] Q.B. 910** as a *"quagmire"*. This case involved an appeal against a terminatory ruling (submission of no case to answer) under section 58 of the Criminal Justice Act 2003. The Court of Appeal allowed the appeal and ordered a re-trial. At the subsequent re-trial, on a point of law decided pursuant to a Pre-Trial Hearing held under section 40 of the Criminal Procedure and Investigations Act 1996, Cavanagh J delivered a detailed judgment on the unsatisfactory state of the law - **Gower [2025] Crim. L.R. 220.**

77. We invite the Commission to consider that this area of the law is ripe for reform because of all the problems that it highlighted in 2013.

78. Finally, we have indicated above those with greater experience and expertise in the area of Issue 12 are better able to assist than us.

PART 3: SENTENCING

Issues 13 to 15: sentencing framework for murder (paragraphs 4.39-4.41)

79. Issues 13 to 15 invite evidence on the sentencing framework for murder in relation to offenders aged 21 and over; 18 to 20; and under the age of 18.

80. The existing structure of Schedule 21 to the Sentencing Act 2020 adopts a starting point by reference to whether a murder is of *"exceptionally high seriousness"*, *"particularly high seriousness"*, involves the taking of weapon to the scene to commit an offence or have it available to use as a weapon, or is any other case.

81. Examples are given of cases that would amount to *"exceptionally high seriousness"* or *"particularly high seriousness"*. The starting points see significant increases in the case of adults from 15 years, to 25 years, to 30 years and then ultimately whole life orders. The examples given in the starting points have seen frequent amendment, often as a result of particular cases or concerns. Although they are only examples, and the courts have made clear they are not to be construed technically,[2] the perceived effect on starting points has resulted in significant litigation around them.[3] Previous Governments have called the current approach both *"ill thought out and overly prescriptive"* and *"incoherent and unnecessarily complex"*.[4]

82. Against that background we invite consideration of the following issues and questions.

83. First, would it be preferable to adopt a model based explicitly on culpability (as the Sentencing Council has done for all guidelines relating to death) or is it appropriate to reflect harm factors at Step 1[5] ? Should any indicators of culpability be exhaustive or

[2] *R. v Last* [2005] EWCA Crim 106; [2005] 2 Cr. App. R.(S.) 64.

[3] As observed in *R. v Height* [2008] EWCA Crim 2500; [2009] 1 Cr.App.R. (S.) 117 although the legislation does not exclude the possibility that other cases might reach the indicted levels of seriousness there is a perception that such cases are rare.

[4] For example, D. Thomas, "Sentencing Murder—The Minimum Term" [2008] Crim L.R. 904, 905.

7 https://www.gov.uk/government/consultations/breaking-the-cycle-effective-punishment-rehabilitation-and-sentencing-of-offenders--2.

[5] As explored in CLW/18/30/8, although the approach of the Sentencing Council to manslaughter is to sentence on the basis the harm caused is inevitably of the utmost seriousness, in *R. v Wood* [2009] EWCA Crim 651; [2010] 1 Cr. App. R. (S.) 2, Lord Judge CJ observed "the very fact that a series of paragraphs offer starting points for the minimal custodial sentences – whole life, 30 years, and 15 years, with equally specific provisions for

indicative? Should any indicators be drafted more broadly to avoid the need for further amendment or technical legal argument? Does that run a risk of providing insufficient assistance to the sentencing court?

84. Second, would it be preferable to have a more staggered approach to starting points? Are the existing starting points appropriate? Should the starting points provide suggested sentencing ranges in a manner analogous to guideline categories? Sentences for murder have increased substantially since the enactment of Schedule 21 (initially in the Criminal Justice Act 2003); are existing sentencing levels appropriate? Have they had a deterrent effect? It is noted that the public protection function of a mandatory life sentence lies in the imposition of such a sentence, not in the minimum term. Should the Sentencing Council be invited to carry out a comprehensive evidence based review of Schedule 21 culminating in their making proposals for statutory reform?

85. Third, if the existing framework is largely maintained:

    a. Whether financial gain as a partial motive for the murder justifies a 30-year starting point (as in *R. v Tailor* [2007] EWCA Crim 1564; [2008] 1 Cr. App. R.(S.) 37) and whether there should be a distinction between cases in which a person is paid to commit murder, and one in which a person stands to gain (or which gain is incidental) ?

    b. Whether there should be a greater focus on cases in which a victim has suffered particular pain or degradation (and whether the existing example of murder involving sexual or sadistic conduct allows for that factor to be appropriately reflected in sentence) ?

    c. Whether cases that have been held to be typical examples of *"particularly high seriousness"* should be codified (e.g. cannibalism[6] or premeditated arson of homes using accelerant[7]) ?

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offenders aged under 18 years – demonstrates what every judge knows, that in murder cases although the result – the death of the victim – is identical, the gravity of each individual offence is not. Accordingly we disagree that the assessment of the seriousness of an offence of manslaughter on the grounds of diminished responsibility must be focused exclusively on the defendant's culpability."

[6] *R. v Morley* [2009] EWCA Crim 1302; [2010] 1 Cr. App. R.(S.) 44.

[7] *R. v Stanciu* [2022] EWCA Crim 1117; [2023] 1 Cr. App. R. (S.) 10.

d. Whether the starting point for the taking of a knife or other weapon to the scene with the necessary intent merits such an increased starting point in isolation, and whether it should be an example of a particular type of seriousness ? Does this risk injustice when one considers how the sentencing framework currently impacts a victim of domestic abuse who kills their abuser ?

e. Whether an intention to kill, or there being a high risk of death, should have greater relevance in relation to starting points (as, for example, is the approach to sentencing unlawful act manslaughter) ? If there has been reform of the types of murder which are capable of attracting the mandatory life sentence then this may become unnecessary.

86. Fourth, should chronological age have such a significant effect on starting points? If age is to continue to have a significant effect on starting points is there merit in having reduced starting points for offenders in their early 20s given the state of scientific research on the development of the brain.[8]

87. Fifth, whether the requirement that the sentencing framework for the mandatory life sentence continues to exist in primary legislation, requires specific aggravating and mitigating factors to be listed in statute ?

88. Sixth, whether the crediting of periods of remand and time on qualifying curfew should occur in a manner analogous to that for determinate sentences (automatically for time on remand, and by way of a direction for days to count as served for a qualifying curfew)? It is observed that the practical issue with announcing minimum terms has required judicial attention recently.[9] Is there any reason of principle why the court should have a discretion not to count such time towards any sentence[10] ?

89. Seventh, whether the limits on credit for a guilty plea for an offence of murder strike the appropriate balance, bearing in mind the purpose of such a reduction is pragmatic (namely, savings in court time, public money and most importantly in this context the sparing of witnesses from giving evidence, and giving certainty to victim's families as early as possible). If there are to be multiple tiers of murder, whether those limits

[8] See, the observations in *Attorney General's Reference (R. v Clarke)* [2018] EWCA Crim 185; [2018] 1 Cr. App. R. (S.) 52 at [5].
[9] See, R. v Sesay [2024] EWCA Crim 483; [2024] 2 Cr. App. R. (S.) 30 and *R. v Cookson* [2023] EWCA Crim 10; [2023] 2 Cr. App. R. (S.) 12.
[10] As would appear to be the effect of reading over *R. v Trendell* [2022] EWCA Crim 267; [2022] 4 W.L.R. 38.

should apply equally to each tier? Should the limits be brought in line with the approach to minimum sentences?

90. Finally, arguably the most notable difference in sentence for those under 18 at the time of sentence is the availability of the scheme under ss.27A and 27B of the **Crime (Sentences) Act 1997** to seek a review of their minimum term. Should such a scheme be available for those aged 18 or over at sentence? Sentencing law generally applies by reference to either age at conviction, not sentence – should these provisions be aligned in that way? Alternatively, should the focus be on age at the time of the commission of the offence given the nature of the mandatory life sentence? Should such a review be available for all offenders?[11]

Tom Forster KC
Red Lion Chambers

Francis FitzGibbon KC
23ES

Joel Smith KC
Furnival

Sebastian Walker
The 36 Group

[11] As is discussed in Julian V Roberts and Sir John Saunders, *Sentencing for murder: the adverse and unintended effects of Schedule 21 to the Criminal Justice Act 2003* [2020] Crim L.R 900.