

Justice Committee

Oral evidence: Law of Homicide, HC 622

Wednesday 14 September 2016

Ordered by the House of Commons to be published on 14 September 2016.

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Members present: Robert Neill (Chair); Richard Arkless; Alex Chalk; Philip Davies; Mr David Hanson; John Howell; Dr Rupa Huq; Victoria Prentis

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Witnesses

Paul Bogan QC, Criminal Bar Association and Professor David Ormerod QC, Law Commissioner for Criminal Law and Evidence.

Sir Oliver Heald QC MP, Minister of State for Courts and Justice.

Examination of witnesses

Paul Bogan QC and Professor David Ormerod QC.

Q1 **Chair:** Good morning, Professor Ormerod and Mr Bogan. Thank you very much for coming to give evidence to us. I am going to start the questioning very shortly. I just have to ask members in the usual way whether or not we have any declarations of interest to make. I am a non-practising barrister and consultant.

Victoria Prentis: I am a non-practising barrister.

Alex Chalk: I am an occasionally practising barrister.

Richard Arkless: I am a non-practising solicitor in England and Wales and Scotland.

Q2 **Chair:** Gentlemen, would you briefly introduce yourselves for the sake of the record and those who are watching?

Professor Ormerod: My name is David Ormerod. I am the Law Commissioner responsible for criminal law.

Paul Bogan: I am Paul Bogan, Queen's Counsel, criminal law.

Q3 **Chair:** And I think a member of the Criminal Bar Association.

Paul Bogan: Correct.

Q4 **Chair:** Mr Bogan, the Law Commission, nearly 10 years ago, described the law of homicide as "a mess;" I think the phrase was rickety



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foundations. Would you and your colleagues in the CBA, of which I have to own to being a former member when I was in practice, disagree with that?

Paul Bogan: We would not disagree. Indeed, we would wholeheartedly agree. We find in practice that the law is difficult to understand. When it comes to the crucial point in a jury trial when a judge has to sum up the ingredients of the offence to the jury and how they are to approach the offence of murder, and indeed manslaughter, on a step-by-step guide, it invariably involves lengthy argument, discussion and debate, sometimes lasting two or three days, in which counsel suggest different alternatives from the judge as to the proposed directions a jury should be given. Often the prosecution disagrees with the judge's initial draft. Often defence counsel disagree among themselves. They are all submitting arguments based on authorities that have changed and moved on over dozens—hundreds—of years.

Q5 **Chair:** It seems as if the authorities are on shifting sands.

Paul Bogan: They certainly are. Of course, each case that is tried is factually different. There are nuance differences and substantial differences, and one picks up on various dicta in different judgments that will assist one argument; other judgments will assist another argument. It is often an extremely difficult task to arrive at any sort of consensus as to the appropriate manner in which to direct a jury. You can only imagine what the jury will make of the convoluted directions that result when they retire to consider whether or not someone is guilty. Then of course you have the Court of Appeal often criticising the way in which the summing-up is drafted. Then you get Professor Ormerod critiquing the summing-up in the *Criminal Law Review*. It is extremely difficult and arcane. We would certainly welcome a codification of the law so that at least we have a fixed starting point.

Q6 **Chair:** I understand. Is that because murder is a judicial description rather than a form of statutory definition?

Paul Bogan: Precisely. There will still be hard cases and grey areas where there is room for argument, but if we had a written statutory code there would be a fixed starting point.

Q7 **Chair:** Professor Ormerod, the Law Commission has been critical, as I have just quoted. Has anything changed in the time that has elapsed?

Professor Ormerod: Things have changed but I do not think the state of the law is any clearer. It is astonishing really that the most serious offence is still based on a definition provided by a legal commentator in the 17th century. The common law, by incremental development, has obviously produced the present state of law, but there has been no systematic consideration as to what the offence of murder should contain. The Law Commission recommendations from 2006 provide a structure—a solid foundation rather than the rickety one—and they would accord more



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keenly, we think, with public opinion as to where the boundaries of murder ought to lie.

- Q8 **Chair:** The Government seemed to suggest that the time was not right; I think that was the phrase that was used. Has the Law Commission had any explanation as to what on earth they meant by that?

Professor Ormerod: The suggestion originally in the terms of reference back in 2004 was that this would be a phased work, with the Law Commission's work being followed up by the Ministry of Justice and the Home Office. The Ministry of Justice did so of course in relation to partial defences, infanticide and so on. They were implemented in the Coroners and Justice Act 2009. It was the subsequent phase of work that then came to a halt.

We think there is a really timely opportunity now. Since 2006, we have a clearer understanding of public attitudes. There was a very extensive Nuffield survey of the way that people understand, or misunderstand, the offence of murder and its sentencing. There have been developments at common law, not least the Supreme Court's decision in *Jogee* on joint enterprise. There have been the experiences of the schedule 21 mandatory sentencing regime for a decade, so we have a lot of learning there. There have been increases in manslaughter sentencing—probably an average five-year increase over the last decade or so. There is a real opportunity, not least as well because of the proposed refinement, from Mr Chalk, of the Law Commission's recommendation, for a further review as to whether or not the Law Commission's recommendations continue to offer the optimal reform solution.

- Q9 **Chair:** You would broadly go with those recommendations as they are, perhaps with some adjustment.

Professor Ormerod: Yes. There is an opportunity to review public understanding, given the developments in relation to sentencing under schedule 21. We have had experience of that. People can now be asked about their understanding more clearly than they were back in 2006 when the scheme had only just come into play. That would give us a good foundation for the two-tier structure.

What is really crucial is that there was such strong support for the creation of a two-tier structure for murder, with first degree murder for the most egregious cases and second degree murder and manslaughter. That scheme, which has such strong support, should not be lost. We should be looking to work out the finer detail of that scheme, which may involve a further scoping review by the Commission in order for that to take place.

- Q10 **Chair:** At the same time, you can perhaps tighten what is quite a broad definition of manslaughter.

Professor Ormerod: Yes. There is certainly an opportunity. As I said, some of the sentencing changes in manslaughter have been marked.



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There is an increase of about five years on average. The boundary between murder and manslaughter in sentencing terms has shifted, certainly since the time of the report.

Q11 **Chair:** Do you have any thoughts on that, Mr Bogan?

Paul Bogan: We agree that there should be a three-tier structure. We responded to the initial consultation positively. There were various parts of it with which we did not wholly agree—in particular as to the scope of murder in the second degree. Those are the sorts of arguments and debates that are likely to occur if there is to be further consultation and reform.

Q12 **Chair:** Is the next step that both of you would like to see a consultation by Government?

Professor Ormerod: Yes; a review of the best solution based on the two-tier structure. It was very clear in the Law Commission's recommendations, and very widely supported by the CPS, the police, judges and others, that this was not about creating greater leniency in murder; it was about creating greater coherence in the structure of murder. Given that solid foundation, I think the opportunity to build on it should be taken.

Q13 **Chair:** The last question from me is this. To what extent, gentlemen, do you regard the lack of coherence as posing a risk of injustice in practice, leaving aside the theoretical problems it creates? They are not just theoretical, are they? You have talked about the difficulty of summing up.

Paul Bogan: In practice it can, and it does. We regularly find that hours or days after juries have retired, they come back with questions which we had assumed they would not be asking, because the directions were comprehensible; whereas in fact at least some of them clearly have not understood what the judge is asking them to do and the guidance he is giving them. That may lead to injustice. There may be circumstances in which juries may be reluctant to ask what they regard as a stupid question and proceed on a hunch that it is what the judge means. Plainly, the number of appeals—even those that are not allowed but where nevertheless criticisms were made of the summing-up—alone demonstrates that there is at least the risk of injustice by juries not following or not understanding the guidance they are given by the judiciary when being asked to convict of murder or manslaughter.

Q14 **Chair:** I get the sense that this generates a number of appeals that is disproportionate to the number of cases.

Paul Bogan: A huge number of appeals. I would think that at least 50% of murder convictions result in an appeal. Whether or not it reaches the stage of a final hearing is another matter, but invariably there are complaints about the way in which a jury has been directed.



Professor Ormerod: There is a broader point, I think. Of course, I agree that there are potential injustices because of the ambiguity in individual cases, but there is a broader point about injustice, because there is a lack of public confidence in what is the most serious offence. We ought to have the strongest public confidence that it is applying in the right cases, and the public attitude surveys suggest that it is both under and over-inclusive. That cannot be a good thing for the criminal justice system generally.

Q15 **John Howell:** I will start with you, Professor Ormerod. I am a non-lawyer on this Committee, one of the voices of sanity, if you like. I appreciate that you said there is a lot of detail that needs to be fleshed out with your three-tier structure, but could you simply set out the differences between the tiers and what is involved?

Professor Ormerod: In the present law, there is simply one offence of murder and then various varieties of manslaughter lying beneath that. The recommendation from the Law Commission is that first degree murder would encompass those who intended to kill and did so—they are clearly the worst cases—and those who intended to cause serious injury and were aware that in doing so there was a serious risk of death posed by their conduct. That might include, for example, the drug dealer who seizes his rival, holds them captive and tortures them for several days intending eventually to release them, but the rival dies in the company of the defendant. In those circumstances, that seems to be almost the moral equivalent of somebody who set out with intent to kill. First degree murder would be intent to kill or intent to do serious injury, being aware of the serious risk of death.

Second degree murder will encompass the individual who intends to cause grievous bodily harm or serious injury, as is present within the definition of murder, but also those who intend to cause injury, or fear or risk of injury, and again have an awareness of serious risk of death. Perhaps an example of that category would be somebody who sets a fire outside somebody's home—an arson attack on somebody's home—and they intend to cause extreme fear, possibly injury, but they are aware that there is a serious risk of death if somebody is trapped and cannot escape. There have been a number of those cases. That would be brought into second degree murder, whereas potentially at the moment it lies within manslaughter.

Then there is the question of partial defences; that is individuals who have the intention to kill but have either done so in the context of having lost their self-control with a qualifying trigger, or have diminished responsibility at the time or are part of a suicide pact. All of those partial defences were dealt with in the Coroners and Justice Act 2009. At the time the Law Commission's recommendations were being made, the recommendations included clarification of those defences. That subsequently happened.

Q16 **John Howell:** In relation to first degree murder, was there not some



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difference between your initial consultation paper and how it subsequently turned out?

Professor Ormerod: That is right. In the consultation paper our initial proposal was that first degree murder would be limited to cases of intention to kill. But there were some very powerful supporters of a broader version of first degree murder, not least some of the very senior judges who looked at it. The argument was made in relation to an individual who is showing a reckless disregard for life. To use another example, there is the paramilitary who kneecaps the victim, intending or hoping that he will survive but wanting him to have a serious injury that will then serve as a deterrent to others. If that individual dies as a result of the injury inflicted, and if the defendant intended the serious injury and was aware of a serious risk of death from shooting somebody in the knee, that is a moral equivalent to the intention to kill cases. There was considerable support for extending first degree murder in that way.

Chair: Do people want to come in on Professor Ormerod's responses? Then we will go back to Mr Howell.

Q17 **Victoria Prentis:** I wouldn't mind butting in on partial defences while Professor Ormerod is very kindly explaining the system. That may in a way show how muddled the position has become. Those of us who listen to "The Archers" are, of course, very keen on partial defences at the moment. We have had a very exciting week listening to a very good explanation, broadly, of how coercive control works.

Seriously, what worries me is that the Law Commission's proposals were supposed to reduce first degree murder to second degree murder in some way, but instead they seem to have been transplanted into the old murder/manslaughter distinction. Do you think it was the right approach that Parliament pressed ahead and made the 2009 changes without adopting the overall package, or do you think that was unhelpful and has caused some of the current confusion?

Professor Ormerod: That is a very good question. The optimal solution would have been to adopt the entire package, because it was constructed in anticipation of the whole being in force. The difficulty with partial defences, as they have taken root now, is that they are not even the final versions that were recommended by the Law Commission. They were subsequently amended by the Ministry of Justice, and then in the course of debates. The versions of the partial defences, as you say, have leapfrogged ahead and are in force in a different form from that which the Law Commission envisaged, and in a different structure and context from that which the Law Commission envisaged. It is very early to say how well they are working or not. They have only been in force for six years or so, but they are already generating a number of appeals, and in fact there is a pending Supreme Court decision on one of them. I think they were very heavily criticised by a former Lord Chief Justice, certainly in relation to the loss of control defence. They are complicated. They have not clarified but have rather complicated matters.



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Q18 John Howell: This is a question for Mr Bogan. I know that you said you agreed with the three-tier structure in its generality, but would you like to be more specific about the areas with which you do not agree?

Paul Bogan: We agreed with the initial Law Commission consultation that first degree murder should be limited to intention to kill. When the final proposal emerged, it included, as Professor Ormerod said, an intention to cause serious injury together with an awareness of a risk of death. We have not had the opportunity of consultation on that, and I am not going to commit the Criminal Bar Association to an answer. I suspect that we would be concerned about the additional and mental element being part of a murder in the first degree, not least because of the difficulties that the prosecution and the jury will have in the establishment of someone's awareness of a risk of death.

The first question is whether or not there is a risk of death, which may well be a very complex medical matter. The second question is whether or not the defendant has in his mind, remembering that most of these types of offences are committed on the spur of the moment, that possible risk of death. Therefore, I am not sure that we will agree, on a further consultation, that that should form part of first degree murder.

Where we positively disagreed with the Law Commission was in relation to the effect of a successful partial defence. The Law Commission proposal was that, if diminished responsibility or loss of control were established, it would reduce first degree murder to second degree murder. The CBA's approach was that those partial defences should reduce both first degree and second degree murder to manslaughter—in other words, to maintain the current status. We, for our part, think that, if those defences are properly established, they override whatever intention the defendant had, whether it be to kill or to cause really serious injury. That was the disagreement we had in relation to second degree murder. As far as manslaughter was concerned, subject to the partial defences being part of the manslaughter regime, we were in agreement with their proposals on that.

Professor Ormerod: What is really at the heart of this is the relationship between the label of murder and the mandatory sentence. They become so closely intertwined that, when we are asking people where the boundaries of murder lie, it becomes a question about where the boundaries of the mandatory sentence for murder lie. What is really important is that, if there is a further review, we can identify which forms of killing ought to lie within the first degree murder category so that they are caught by the mandatory sentence. It is a really crucial question about labelling as well as sentence.

Q19 Alex Chalk: Of course the mandatory sentence is an important consideration, but isn't the almost trumping consideration, which you mentioned, the public understanding? The public understand murder to be where you go out and intend to kill someone. Isn't there a danger that the Law Commission's proposal, with the add-on, tends to dilute that in a



way that is a little bit confusing, particularly where there are so many other offences—whether under the Terrorism Act, the Explosive Substances Act or goodness knows what—which can sometimes indict people for the kind of criminality it seems to be catering for, if you see what I mean? Isn't the whole point of this to create something that enjoys public support? That is more important in this than in any other statute in the calendar.

Professor Ormerod: I would agree with that. I suppose the question is the extent to which the public anticipate that the category of first degree murder should be limited to those with intent to kill. If they anticipate that first degree murder must mean mandatory life, would they also want the paramilitary or the torturer I described to you to be subject to that mandatory life penalty? I agree that it is a fine distinction. The Law Commission shifted ground between its consultation and the report. I think there is an opportunity for a better understanding as a result of public attitude surveys as to whether the first degree murder category should be limited to intent to kill. I think everybody is agreed that it should include that; it is a question of whether or not the additional examples that I have given ought also to be subject to the first degree murder label and sentence.

Q20 **Chair:** Do you have any sense as to whether public attitudes have shifted since 2006? Have the views you had as a Commission been reinforced or otherwise?

Professor Ormerod: The subsequent work that was done by the responses collected by Nuffield in 2010 demonstrated that there was still a misunderstanding by the general public about the definitions of murder. What it made clear was that the public do not expect everybody who deserves to be labelled as a murderer to deserve a mandatory sentence. That was very clear, and there was overwhelming support for a more discretionary or subtle approach than that. That was consistent with the findings of the surveys done at the time.

Q21 **Alex Chalk:** Isn't the real issue this? If you say to members of the public, "Right, the circumstances are that person A has gone round to the home address of person B with a cricket bat with the intention of breaking their toe and they then fall over and die," they do not automatically assume that that person should be labelled a murderer. Isn't that really what it comes to?

Professor Ormerod: I think that is probably true. I do not know whether that was one of the scenarios that was put to the public in the attitude survey. I doubt that it had the colourful illustrations that your example in the debates had. That takes us into the other category: the lower end of murder or second degree murder. To what extent ought those who cause death without intending to kill or without being aware of a risk of death be liable for murder?

Q22 **Richard Arkless:** It is the conventional wisdom that the reclassification



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of murder into two tiers is not about leniency; it is about reclassification to fit in with public understanding and to create public support behind the proposal. I am interested to know your views. Does the very action of splitting it up not create two tiers of murder and say to the public, "Well, this is a more okay type of murder than another type of murder"? Is that a distinction that would sit comfortably with public opinion, given your knowledge about the Nuffield survey?

I am thinking about the position in Scotland, where we have the extra qualification of wicked recklessness. Intention to kill or intention to cause serious injury is not a prerequisite, and murder can be constituted by wicked recklessness, which I think is a lower test than intention to cause serious harm. In effect, the one classification in Scotland would catch more of these types of crimes and would conceivably catch some of the crimes that are in the upper echelons of manslaughter in England. It is my view that that creates more public support.

I can think of one instance. There was a chap in Glasgow a few years ago who put an air rifle outside a block of flats and fired it recklessly into a crowd. There was no evidence that he intended to kill and no evidence that he intended to cause serious injury, but he was convicted of murder. The victim's family—a child was killed—would have seen that act as murder. I would be interested in your views.

Professor Ormerod: I do not think that splitting murder into two tiers would destroy public confidence. On the contrary, I think it might enhance public confidence, because they would be happy to see the most serious cases labelled as first degree murder, and no doubt receiving a very severe penalty. It would give the opportunity to impose the very severest penalty for that pool of offenders.

There is a risk, if you dilute second degree murder too much by stretching it into manslaughter, that you undermine public confidence. If you impose a very low sentence under the label murder, some people might feel that the whole offence of murder is being devalued. That is as true with a single offence of murder as it is with two tiers. At least by separating it into two tiers, you signal the most egregious cases and allow for the severest penalty. That restores public confidence in what they regard as the most severe murders.

The opportunity for the label murder to be applied to other individuals, such as the character you are describing—which I think would be caught by the recommendations we are making—would be well received by the public. Having that label attached to that kind of activity would be regarded as appropriate.

Paul Bogan: I am not sure that victims' families, strong as their feelings might be, are necessarily the best guide for the proper approach to the criminal law. The de facto position of course is that at present, when someone is convicted of murder in which their culpability is relatively low, the judge will sentence, as he must, to life imprisonment but with a



minimum term of perhaps as little as 10 or 12 years. That must perhaps dent public confidence, in the sense that, although it might be the appropriate sentence, they assume that someone who receives a life sentence is going to be banged up for 20 or 30 years. It would be much more representative of the reality of the situation if, for second degree murder—in other words, a lower culpability murder—the judge had discretion to impose determinate terms of imprisonment. That is not to say that, in some cases of second degree murder, life imprisonment would not be the appropriate term. The proposal would be that for second degree murder life imprisonment would still be available for very serious offences, perhaps the sort that we were arguing a moment ago ought to be first degree murder. Where there is kneecapping with an understanding of the possibility of death ensuing, even if it were to be second degree murder, the judge might say, “Well, this is so serious a second degree murder case that I am going to impose life imprisonment.” It seems to us that the sentencing would be much more in line with public understanding of the seriousness of the offences if the judge had discretion in sentence for second degree murder.

Beyond that I wanted to make an additional point about public opinion. It is obviously very difficult to know what truly is public opinion, particularly when it is being led by headlines in newspapers that are somewhat extreme. My own view of public perception is really governed by my observation of how juries respond to cases in which it seems that the prosecution has over-charged, in particular the sorts of case Jogee was concerned with: namely, people on the periphery of a group or a gang where one person wields the knife and inflicts the fatal injuries and others are just using fists, for example, and the prosecution indicts all defendants for murder.

It seems to me—I think it is the general perception of those who practise in crime—that juries apply common sense. They are concerned when they see five, six or eight people in the dock. They think, “Are the prosecution really saying, and are we really being asked to say, that there are eight murderers, when in fact only one of them wielded the knife fatally?” In applying that common sense, and possibly even not being entirely dutiful in following the judge’s directions, they may often acquit of murder, because they feel that there is a sense of injustice in having eight murderers in the dock.

Q23 Alex Chalk: Isn’t the point that, if there was something they could be charged with that more accurately fitted the culpability, it would command better public confidence, and in turn more convictions?

Paul Bogan: Absolutely.

Professor Ormerod: To return to the public opinion point, I am not suggesting that public opinion should dictate sentencing policy, but it is important that sentencing policy is created on an awareness and appreciation of public understanding of the boundaries of offences and what appropriate levels of sentencing might mean. At the moment, the



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suggestion is that the public do not understand the schedule 21 regime or the mandatory sentence.

Q24 Richard Arkless: Could I very quickly get your view on the principle of wicked recklessness and whether you think it is a principle too far in first degree murder? Do you think it would be unwise to move to that, because it seems to me that these proposals move you away from that principle?

Professor Ormerod: It would go beyond what the Commission recommended. We come close to that with the awareness of a serious risk of death, but it is a ratchet up from wicked recklessness, I accept.

Chair: Mr Chalk, we were talking about joint enterprise. Do you want to put your question?

Alex Chalk: When are we going to talk about manslaughter and what would go into second degree? Have we really talked about that yet?

Chair: We have to some degree, but if you want to raise that issue and then move on, fire ahead.

Q25 Alex Chalk: Supposing first degree is either intention to kill-plus, query the add-on that you refer to, which the CBA and a lot of people are not so keen on, and looking at what should be in second degree murder, which would be GBH murder—the person who intends to do grievous bodily harm—is there a decent argument, in the interests of keeping things neat and simple so the public can understand it, that you also fold into second degree murder the person in the pub queue, for example, who thumps someone and causes ABH? There would be two people. At the moment, the person who punches someone, causing a sub-orbital fracture and the victim dies, goes down as second degree murder; but the person who thumps someone in the pub queue and by pure luck does not cause a fracture but does cause bruising is currently manslaughter. That seems to be nonsense. Do you think there is an argument for having both of those within second degree murder, so that the only bit that is left on manslaughter would be the truly trifling assault—the person who comes up and flicks someone behind the ear and they fall over and die? What are your views about that?

Professor Ormerod: There are some potential difficulties in extending second degree murder that low. There is a risk in relation to labelling and stigma. The label “murder” is the most serious. Even if it is second degree murder, it is going to carry a significant stigma. There is a danger that, if we lower the threshold of culpability, there will be public dissatisfaction because they will perceive there to be injustices. It is easy to construct a set of facts when it is a simple push. There is the case, which I think would be caught by your proposals, of the individual who threw the television remote control across the room in frustration at his partner and it caught her awkwardly and she died. He is intending injury and he would be a murderer. I am not sure whether that level of



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culpability would sit well with the public in terms of being labelled “murderer”. That is one issue.

The second issue is whether the jury, as a microcosm of that, would convict. Would they feel that they could be faithful to their oath and convict on that? The other thing is about sentencing. Would the public be content adopting the current sentencing regime in relation to manslaughter? As you know, manslaughter carries a discretionary sentence up to life. That would carry across to second degree murder. Some of the one-punch manslaughters, as they are rather inappropriately called, may receive a five-year term. Assuming that the same would apply if they became second degree murderers, what would the public’s reaction be to a murderer released after two and a half years? There is a danger that, if you lower the threshold of second degree murder too low, you undermine public confidence rather than enhance it.

Q26 Dr Huq: I want to return to a particular offence. The example I am thinking of is not from “The Archers” but something that happened in Ealing and went on to have greater national significance. It was during the Ealing riots of 2011—the case of Darrell Desuze. My constituent Richard Mannington Bowes was the one fatality in that wave of violence on 8 August 2011. One full body punch rendered him unconscious, but the judge on that occasion—Justice Saunders—rejected the idea of a separate offence in that particular case, so Darrell Desuze got eight years for manslaughter, violent disorder and burglary. There was local outrage about it. There has been concern raised, and Chris Grayling asked for a review of the guidelines. Do you think that the law is too lenient? In that case, one punch was enough.

Professor Ormerod: The difficulty with that category is that it is often used inappropriately as a label. It is not the technical legal label. Obviously it is one that has been adopted for convenience to describe that kind of attack, where there is no intention to kill. There is a very short burst of violence and it results in a death, usually because the person has fallen awkwardly. Even with those parameters, cases range markedly from the single push in the queue where there is nothing worse than an assault, up to the situation where you have repeated punching of a vulnerable individual. The sentencing reflects that, but it is fair to say that the sentencing of those cases has increased quite significantly in recent years, and certainly from about 2010. Sentences have increased. Paul is better placed to speak on typical sentencing for that than I am, but it would be potentially five or six years or more.

Q27 Dr Huq: Paul, what do you think?

Paul Bogan: It could be 10 years or 12 years in fact. I did a case recently in which there was more than one punch but there were no weapons. It was spontaneous, not premeditated or planned in any way, outside a pub late at night and in the early hours of the morning when everyone was drunk. I think the three who were convicted of manslaughter, although they were charged with murder, got 12 years, 10



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years and 10 years. I would have thought that those were appropriate sentences. I believe one is being appealed. I do not know whether the public would be horrified at those sentences. I would have thought they were fairly sensible sentences in the particular circumstances. As Professor Ormerod said, these cases differ from case to case. When there is a spontaneous punch or push, where the assailant really intends no more than a reddening of the cheek or at worst a bruise, it would be difficult to persuade the public that that person should be prosecuted and convicted of murder.

Q28 **Dr Huq:** Would you both say that the law is not too lenient on these occasions?

Professor Ormerod: Let me make two points. The Court of Appeal has recognised the concern you have, and in recent years has increased the sentences for that type of case. That is in recognition of the number of instances in public when there has been spontaneous violence as a result of excess alcohol and so on. The court has recognised that. The second point is that, if the Law Commission's recommendations were introduced, when there is an awareness that there is a serious risk of death—if it was repeated punching of somebody who was frail or something of that nature—it would fall into the category of murder.

Paul Bogan: If you think about it like this, it may assist; I don't know. If the assailant's intention was simply to administer a punch that resulted in a bruise, and that is all that happened, the person who would be pleading guilty at the magistrates court the next week would probably receive a fine and maybe pay £50 compensation. At worst, there would be a community sentence. The fact that the victim fell over backwards and cracked his or her skull open on the kerb and as a result suffered a fracture, subdural haemorrhage and death is the difference between what would be prosecuted as a homicide offence and a magistrates court trial with a fine as the result. Looking at it from the perspective of the culpability of the assailant—of course there are ranges of culpability—it is difficult to see that the distinction in culpability should be so great as to be between a £100 fine and life imprisonment by virtue of the fact that unfortunately the person, as a result of the punch, fell over backwards and died.

Q29 **Alex Chalk:** It would not be life imprisonment. That would just simply be the statutory maximum.

Paul Bogan: It would be at present for a murder, if it was established that there was intent to cause serious injury; but subject to that, no, you are right. It would be manslaughter, if there was an intention to cause some injury.

Q30 **Dr Huq:** In the Ealing case it happened three days later; he was unconscious, went to hospital and then expired, so it was not immediate. Do you think there is a case for a specific category?

Professor Ormerod: Of one-punch manslaughter.



Q31 **Dr Huq:** Yes, a type of homicide that is separate.

Professor Ormerod: It would be very difficult to define. As I said, there are any number of cases that involve one, two or three punches. Some of them are blows, some of them are pushes and some of them are repeated blows. It is very difficult to define. What some jurisdictions have done—I know they have in Australia—is to introduce specific sentencing provisions in relation to one-punch manslaughter type cases, so that mandatory minimum sentences are imposed. Again, that is a potentially dangerous route to go down when the circumstances of the cases can differ so significantly.

Q32 **Alex Chalk:** You have mentioned Jogee, which of course has recast the law on joint enterprise. In a recent article in the *Criminal Law Review*, Professor Ormerod, you indicated that you did not think that the Supreme Court had necessarily conclusively resolved the matter. First of all, could you indicate what your concerns are? Secondly, as part of looking again at the law of homicide, do you think that scope exists to tidy this up and put in what Mr Bogan referred to as a clear set of principles for the lawyers to work from?

Professor Ormerod: I should qualify that by first of all saying that the article in the *Criminal Law Review* was co-authored with my colleague, but it was also very clearly my personal view.

Q33 **Alex Chalk:** Your personal view and not that of the Commission; yes, that is very important.

Professor Ormerod: It was really an attempt to demonstrate that there was still some work to do by the courts in transposing the high level policy conclusions reached by the Supreme Court into the working practices of the Crown court, and that may take some time. The Court of Appeal may have a number of appeals to resolve the difficulties that I identified in the article around the definitions of intention, how juries ought to be directed and how they deal with the retrospective issue; how they deal with cases that were a result of the law, which we now regard as erroneous, over the last 30 years and which are being brought as appeals out of time. I think there is work to do there.

To answer your broader question, a review of the law of homicide and whether or not the Law Commission's recommendations still represent the best solution could encompass the decision in Jogee. It would be important at least to understand how that decision would play out in a reformed two-tier murder structure. Of course, I do not want to be critical of the Supreme Court; they are constrained, as ever in the common law, by the facts of the case and the nature of the argument. It was not possible for them to offer a comprehensive review of the whole of the law relating to secondary liability, which the Law Commission could do by looking at public opinion surveys, considering sentencing and so on. I think there is an opportunity there, without being critical of the Supreme



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Court, for a further review to consider the way in which the principle in *Jogee* would play out in a two-tier murder structure.

Q34 **Alex Chalk:** Would you welcome that, Mr Bogan?

Paul Bogan: I think we would. Any clarification in the form of written statutory rules would be very helpful to us. There would be a fixed starting point and although, as I said earlier, there would be grey areas, it would be of assistance not only to practitioners but to the judiciary in enabling them to decide whether, for example, a case should go beyond the halfway stage at the end of the prosecution, but more importantly in formulating written directions for a jury to follow in their retirement.

Q35 **Philip Davies:** Are you making the case that you think joint enterprise has gone too far and that there are too many cases of joint enterprise?

Paul Bogan: I think the answer is yes. It is borne out in murder cases by the number of acquittals that one sees, or certainly the number of manslaughter verdicts rather than murder verdicts. I did a case three or four years ago involving a stabbing at Victoria underground station. There were 20 defendants charged with murder on a joint enterprise basis. It was ludicrous. I think by the end of the third trial—I am not 100% sure of the statistics—two were convicted of murder, two or possibly three of manslaughter and the vast majority of some sort of violent disorder, with two or three acquitted.

Q36 **Philip Davies:** But would you not accept that if it was not for joint enterprise, there would be fewer guilty people being convicted? It means that people cannot rely on hiding behind a wall of silence to get away with the most serious of crimes.

Paul Bogan: I do not think it would lead to failure to prosecute or a want of convictions. They simply would not be convicted of the most serious offences based on the intention of the principal assailant. There would still be convictions, as there were in that case, mostly for violent disorder.

Q37 **Philip Davies:** But if you speak to organisations like Families Fighting for Justice, there seem to be a number of cases where joint enterprise should have been applied and was not. I can list a handful straightaway: Kevin Lavelle, Andrew Jones, Donald Banfield, and Jamie Kiteley. These are all cases where it was known which group of people among them was the killer, yet a joint enterprise prosecution was not brought. Those killers still remain at large.

Paul Bogan: I do not know the circumstances of those particular cases, and I am not sure that any change in the law is going to persuade people to reveal information that they have not hitherto revealed. As I said, my view is largely formed by what I see happening in the court itself. Whereas I am sure that many victims' families would like to see a large number of people prosecuted and convicted of murder, the reality is that, whatever they may wish to happen, they may very well be disappointed



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with the result, which is our representatives of the public on the jury finding that it would be unjust to convict everyone on the periphery of an offence for the offence of murder.

Professor Ormerod: I have two points. The decision in *Jogee* simply draws the threshold between murder and manslaughter in these cases at a high level. The individuals are more likely to be convicted of manslaughter than they would previously have been. The pool of individuals who would have been guilty of being an accessory to murder would now be guilty of being an accessory to manslaughter. This is an opportunity. If a two-tier structure of murder was introduced, some of that pool would shift back, because they would become accessories to second degree murder. It is another argument for the two-tier structure, if it was felt that the labelling was now inappropriate. It would require further review, as I have already said repeatedly, because the structure for the two-tier murder recommendations put forward by the Law Commission was predicated on a scheme of secondary liability of joint enterprise liability that has not been adopted. The Supreme Court has gone off in a different direction, so we would have to review the way that that decision in the Supreme Court would work.

Q38 **Philip Davies:** Finally, on a slightly different note, related to first degree and second degree murders, you mentioned over-charging earlier. Many of the public have concern about the CPS under-charging offences. Is there a danger that in order to try to secure a conviction with as little cost as possible we may end up with the CPS under-charging at second degree murder rather than the actual real offence of first degree murder?

Professor Ormerod: I would say—I think Mr Chalk knows where this is going—that that is more likely if first degree murder is limited to intent to kill cases, because intention to kill is difficult to prove. There is at least some evidence of that from the fact that attempted murder, which requires an intention to kill, has a conviction rate that is usually about half that for murder. There are many variables, and that may not explain the disparity in the statistics, but it is certainly difficult to prove an intention to kill, and if first degree murder was limited to that there would be a risk that second degree murder would have more work to do.

Q39 **Alex Chalk:** Would you agree, though, that you could put them both on the indictment and then say to the jury, “He is charged in the alternative with first and second degree murder. If you find that he intended to kill, convict him of the first”?

Professor Ormerod: Yes.

Paul Bogan: That is invariably what would happen. It is invariably the case, I would have thought, that the prosecution would aim high but have the alternative, and the jury would be left to select which of the two it was.

Q40 **Chair:** It makes it easier for a judge to sum up and put those options to



them.

Professor Ormerod: And to sentence.

Chair: On the basis clearly of which count the conviction came on.

Professor Ormerod: Yes.

Chair: I understand that. Gentlemen, that was extremely helpful. We very much appreciate your time and your evidence. Thank you very much. We are much obliged to you.

Examination of witness

Sir Oliver Heald QC MP

Q41 **Chair:** Sir Oliver, welcome and congratulations on your appointment as Minister of State. Welcome for the first time, although I am sure not for the last time, to the Committee. We are very pleased to see you in post.

Sir Oliver Heald: Thank you very much, Chair. It is a great honour to have this position and a great pleasure to appear in front of your Committee on an important topic.

Q42 **Chair:** You have patiently waited and heard some of the topics in the evidence. You will be aware that some time ago, back in 2006, the Law Commission described the law on murder and manslaughter—the law of homicide—in England and Wales as being “a mess”. It used the rather striking phrase, a “rickety structure upon shaky foundations”. The evidence we have had this morning is that nothing has changed; it has not got any better. If anything, it may have got worse. What is the Government’s view on that? Do you agree with that assessment?

Sir Oliver Heald: The Government are certainly not at the point of thinking that we would have a review of this area of law.

Q43 **Chair:** The next question is going to be, why not?

Sir Oliver Heald: We are keeping an open mind and obviously we will listen very carefully to what has been said and look at what was said before I entered the room.

The point about murder and manslaughter is that the law covers all the areas of criminality. There are not any gaps. It is an area where there has always been legal discussion. I can remember back in 1973, when I was studying the law, that there were great lectures on intention in murder and manslaughter. It is something that has been discussed. I am sure that you and I have discussed it in the past. It is a subject of great legal interest, but we also need to think about the interests of the public and the difficulties for juries. Although we are open-minded, at the moment the intention is not to have a review in this area.

Q44 **Chair:** Interesting. Part of the evidence we have had today specifically raises the point that we are now getting real difficulties in juries being



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properly directed, and that that creates a disproportionate number of appeals in murder cases as opposed to other types of offence. Would that not be precisely the sort of area that might prompt the Government to think again about having a review?

Sir Oliver Heald: Looking at it from purely a legal point of view, there are some obvious areas of complexity in the law. Recklessness has always been a particular issue—whether reckless killing should be in the manslaughter or murder category. As we all know, the Law Commission had something to say about that in 2006. The partial defences are complex in their facts in many instances. It is not surprising that courts have difficulty with the directions in cases and that they are not always straightforward. In a case where the issue is whether an unlawful killing has been prompted by an intention to kill or an intention to cause grievous bodily harm, I think juries find that very straightforward. The directions are straightforward. It is really the other cases that create the difficulty. It is often because they are complex.

Q45 **John Howell:** I want to start by repeating something that the Law Commission said. They argued for the reform of the law in this area and said that it was “an essential task for criminal law reform.” What is your opinion on that?

Sir Oliver Heald: There are a lot of different views about how the law should be reformed. Just by way of example, the Law Commission has a proposal for a three-tier system of homicide law. The previous Director of Public Prosecutions, Ken Macdonald, suggested four or five tiers. Mr Chalk has suggested a refined version of a three-tier system, but with very different elements from those of the Law Commission. Then we have Louis Blom-Cooper, who says that we should not have that at all; we should have a law of homicide and judges sentencing according to the seriousness of the facts. I do not think it is a situation where there is a clear call for a particular change. It is a case where, because it is a very important subject within the law, there are many different ideas about what might be done to improve it.

Q46 **Chair:** Isn't it the job of Government, therefore, to grasp the nettle, if it is a very important matter, and to say which of the various ideas they will decide and act on, rather than saying that they are a reason for doing nothing?

Sir Oliver Heald: I also have some other doubts, Chair, if it is helpful—while retaining an open mind. I am concerned about what the public would think about either more cases falling into the secondary category of second-tier murder or, in the case of Mr Chalk's proposal, most murders falling into that category. There is a perception among our constituents that murder is an abhorrent crime of the utmost seriousness. I am not sure that to have a category that might get described in the newspapers as “murder-lite” is in the public interest. I have a concern about that.



I have a concern about creating complexity for juries. The Law Commission has done a fantastic job in researching this issue and it is a very impressive report, but imagine trying to explain to the jury—you will have had that experience, as I have, as well as other members of the Committee—an intent to cause grievous bodily harm with the element of recklessness as well; that you foresaw that there might be injury. That is more complicated than what we have at the moment for most murders, and I worry about that. I also worry that sentences would be moved downwards. As somebody who is an advocate of having the right sentence for murder and treating it as very abhorrent, when I was Solicitor General I took a number of cases to the Court of Appeal as unduly lenient, and I feel that the way in which things have hardened up, and sentences are that bit longer, is welcome.

Of course in our Department, as you know, we have other priorities and pressures. We have a massive reform programme and there is quite a queue of other laws that we would like to introduce. There is just an issue of priorities as well as to where we would place this in the scheme of things.

Q47 Alex Chalk: On the issue of people having different ideas, is there not a danger of overplaying that? In fact, there is remarkable consensus about the broad architecture for first and second degree murder. Yes, there may be differences of tone in respect of detail, but there is remarkable consensus. That existed in 2006. It remains the case today and is described as an essential task. The Minister of State as recently as 30 June accepted that the time had come for the Law Commission's report to be given proper consideration. What has changed since June?

Sir Oliver Heald: We have said that we will keep an open mind, and I will very carefully review with officials everything that is said at this session. I am certainly not diminishing the debate we have in the law about a very important topic. If I was to think about the difference between the Law Commission proposals and your idea on this, both are very interesting proposals and so on, but the Law Commission proposal makes it a bit too complicated for the jury by introducing the element of recklessness into the intention, and I think you agree, on murder one. In terms of yours, there would be very few cases in the murder one category. You are saying that there would have to be an intent to kill, and I think that reduces it to cases such as contract killings, cases where a victim is being killed so that she cannot give evidence and cases where there are clear words by the accused. It would be a very narrow category. Equally, your category for manslaughter would also be very narrow because it would be gross negligence cases. In the middle, you would have most murders. I am not sure that saying to the public that most murders are second degree is the message we want to give, or what they would expect to hear. The public treat murders as the most serious offences and I am just not convinced. Of course, as I said, I am keeping an open mind on it.



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Alex Chalk: Artfully put. Thank you.

- Q48 **Victoria Prentis:** I want to ask you about partial defences. The Committee knows that I talk about “The Archers” a lot. I am sure you are a keen follower of the way that the public have been educated by the marvellous Archers, and in the way that coercive control—

Sir Oliver Heald: I am delighted that Helen was acquitted.

Victoria Prentis: We are all delighted, and we are very worried about how the family courts are going to cope with the next step, but that is possibly a matter for another day. To be serious, partial defences were reformed by the Coroners and Justice Act in 2009. Have the Government been able to assess the effectiveness of the reforms?

Sir Oliver Heald: The first thing to say is that I think Mr Hanson was the Minister when this went through. It was an important part of the 2003 report by the Law Commission and again in 2006. There was a general feeling that on diminished responsibility and on provocation the law had not kept pace with the times. With diminished responsibility, there was an appreciation that ideas about mental health had become much more current. People knew more about it and there was a desire, I think, to put diminished responsibility in the context of somebody having a recognised mental condition that was affecting their judgment. That modernisation was very welcome. The Government’s view of that is that it was the right thing to do and that it works.

- Q49 **Victoria Prentis:** Has there been an assessment of cases since then and how well it has worked? Is there anything formal?

Sir Oliver Heald: We have not held a formal review, but obviously our Department is very close to the legal world. We follow what happens in the courts, and our view is that it seems to be working.

- Q50 **Victoria Prentis:** One of the things we are worried about in this Committee is whether making those changes, but not making the other changes recommended by the Law Commission at the time, muddled the water even further in this area.

Sir Oliver Heald: It is undoubtedly true that it was always going to be a two-phase operation. That was the previous Government’s idea. Cases of diminished responsibility and loss of control are very complex, as you will know with your background. The directions for them are complex. The facts are often very complicated as well, and difficult, and they involve people at their most difficult emotional moments. It is an area where it will always be quite difficult and complex, but the reforms modernised the idea of diminished responsibility and took it into the world of modern mental health thinking, if you like, and that was a good thing to do.

- Q51 **Alex Chalk:** On the topic of joint enterprise you will be aware, of course, that the case of Jogee really recast the law, and suggested that it had gone into error in the case of Chan, I think it was. In his personal capacity, not in his Law Commission capacity, Professor Ormerod raised



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some concerns about whether the Supreme Court had conclusively settled all the issues. Do you think the time has come for Government to be looking to legislate in order to clarify the law, for the assistance, as we have heard, both of practitioners and of judges seeking to direct a jury on a difficult topic?

Sir Oliver Heald: The first thing to say is that this Committee did a very good report on joint enterprise. The changes the Committee was looking for are reflected in the judgment in *Jogee*, which took the law back to what it had been when the Chair and I were first practising. It was a change that was in line with the way the legal world, this Committee and others were thinking. We are still considering the detail of it. We are also looking at how it works out in the Court of Appeal, because there are some cases that will now have to be looked at again. We think there is a fairly narrow band of cases, because it is a narrow band of joint enterprise that the case considers. We have not finally decided what our response to *Jogee* is going to be, but I think it is unlikely that we would legislate.

Q52 **Alex Chalk:** In a Westminster Hall debate, Mike Penning, then the Minister of State, indicated that there would be a review of the law and that the response would be made available to this Committee. Do you know when we are likely to get that?

Sir Oliver Heald: We are certainly intending to write to the Committee shortly. I do not know if the Chair has had the letter yet.

Chair: Not as yet.

Sir Oliver Heald: It is not far away.

Q53 **Philip Davies:** You were here, Minister when we were discussing joint enterprise with the previous witnesses. Obviously, my concern was that we did not throw out the baby with the bath water, and that in many cases joint enterprise was being underused. Do you have some sympathy with the other side of the argument?

Sir Oliver Heald: All three aspects of joint enterprise are a tremendously useful tool for a prosecutor. There are joint principals; principals and accessories; and there is no question but that parasitic accessory liability—the *Jogee* liability—has been used as well. Losing *Jogee* liability is probably, as I said, something that takes us back to what the law was previously.

If you read the judgment in the case, it is interesting that they are very keen to make the point that joint enterprise is not dead. It is still there and it is still available to prosecutors. I believe it is a very useful tool. If you imagine a situation where a man is on the ground and is being kicked by three individuals, one kicking harder than the others but all intending to cause serious harm, or one is encouraging and the others are kicking, it is very useful to be able to join everybody in the indictment as somebody committing a joint enterprise. You are right; it is something



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that is important. It should not be underestimated and it should be correctly used. It is important that prosecutors get it right. It is very useful and important.

Q54 Philip Davies: If you make any changes, could I encourage you to speak to organisations like Families Fighting for Justice? They have first-hand experience of some of the cases and have legitimate concerns about potential changes in the law.

Sir Oliver Heald: Yes, absolutely. I practised the law for many years and, as a lawyer, it is very easy to look at it in terms of precision, correspondence and issues of legal technicality. Our job as MPs is also to look at it as representatives of our constituents and what they think about these cases. It is right that murder/homicide should be considered as a very important, serious and abhorrent crime and that the punishments should match that.

Q55 Alex Chalk: If that is right, and considering that the public view is important and putting power in the hands of the public is important, isn't it a very good reason why we should have first and second degree murder, because then the jury can decide?

Sir Oliver Heald: As I say, we are keeping an open mind and we will certainly look at what has been said today. My personal view is that the public understand what murder is. There are some complex areas, such as recklessness, partial defences and the categories of manslaughter, where it is always going to be difficult, but personally I am not convinced at this stage.

Chair: There is an issue sometimes around what is termed one-punch manslaughter. I think Dr Huq wants to raise an issue about that.

Q56 Dr Huq: Minister, I think you were here for the questions on this to the previous witnesses. There is particular controversy surrounding it. The example I gave was the Ealing rioter who got eight years for other things mixed up with manslaughter when the victim died three days later. Do you think that these cases are dealt with too leniently?

Sir Oliver Heald: When I was Solicitor General we took a case to the Court of Appeal as unduly lenient, which was a sentence of four years for a one-punch manslaughter. Previously, in 2009, there had been some guidelines from the Court of Appeal that had suggested that a sentence of five years might be reasonable. Lord Judge made the point in that case that the fact that there is a death does matter and it is important. We took a case of four years to the Court of Appeal, but they did not change the sentence. What they said was that, if we wanted to do more on this and really have it reviewed, we should take it to the Sentencing Council. That is what the Secretary of State for Justice at the time did, and we are still waiting for the report. It was Dominic Grieve I believe, who was Attorney General at the time, who took the case to the Court of Appeal. I supported that, and it is an indication that I thought that those sentences could be looked at again and perhaps were too low.



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Q57 **Dr Huq:** Do you think there should be specific legislation on one-punch manslaughter??

Sir Oliver Heald: I think the Sentencing Council can do the job. It is up to them of course, but if they feel that it needs changing, they can change it by changing the guidelines for sentencing.

Q58 **Dr Huq:** In the recent Westminster Hall debate that has already been referred to, your predecessor Mike Penning said that he would write to Richard Burgon, our shadow Lord Chancellor, about one-punch manslaughter, and that it would be a public response and made available to this Committee. We have not seen that yet. Do you know when it will be forthcoming?

Sir Oliver Heald: I can certainly chase it up, and I will. I was not aware that you had not had the letter.

Q59 **Richard Arkless:** In 2015, the MOJ stated that the average time in custody before release by offenders serving a mandatory life sentence had increased from 13 to 17 years. Are you broadly satisfied with that development?

Sir Oliver Heald: As I have said previously, I felt there was a need for the sentences to be a little firmer than they had been, and over recent years that has happened. There are two ways of looking at it. There is what has happened on average, looking at people who are being released. You would say, "How long have they served?" In 2005, I think the average sentence was 14 years served at the time the person was released. It is now about 17. The other way of looking at it is to look at what is happening in imposing the minimum sentence: when the judge is sentencing now, what is the minimum sentence that he requires to be served? That has increased a good deal. It is now 21.2 years, and it was 16 years in 2005. The minimum required to be served has gone up very substantially in that 10-year period.

Q60 **Richard Arkless:** Like you, I think that to take the life of another is the most abhorrent crime. My concern with the proposals to split murder into two sections, as you rightly identified, is that they would create a category of "murder-lite". I agree with the concerns that that could be troubling for all our constituents. In that respect, do you think there is any virtue in the position in Scots law, which has the added requirement of wicked recklessness? There does not necessarily need to be intention to kill or to cause serious bodily harm, but if you can prove wicked recklessness, it falls within the strong category of murder and attracts a mandatory life sentence. Is that not really more in tune with what you think public opinion would be?

Sir Oliver Heald: This is one of the great debates that we have had over centuries in criminal law. It really goes back to what Sir Edward Coke meant by "malice aforethought". My view is that we have got it about right. At the moment in English law you need an intention to kill or an intention to cause grievous bodily harm. There is another category, which



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is that, if it was virtually certain that your actions would lead to death and you none the less go ahead and do it, that can also be the mens rea for murder. Although that is not quite as wide as the category in Scotland, it gives a gloss on what the intention is.

I think it is about right at the moment, but you are quite right that recklessness is the issue. The Law Commission rightly recognised that, and their suggestion was that in English law it should be intention to kill or intention to cause grievous bodily harm foreseeing that death might result. You would have those two intentions, which would be closer to Scots law. My concern would be that, in a two-tier system, it would narrow the mental intention required, so you would end up with more cases in murder two, about which I am personally doubtful.

Q61 **Chair:** Wouldn't you get some manslaughters in murder two? Wouldn't that be a good thing in terms of public perception?

Sir Oliver Heald: Of course that is the thing about reckless killing; it is a manslaughter at the moment, except in the very limited circumstances that I have just mentioned. You are right, Chair, that a lot of people would think that what the Law Commission is suggesting tackles that issue. My personal view is that I am just not convinced about the three-tier system at the moment, and of course, although we are keeping an open mind, we have all those other priorities and pressures. This evidence session is showing what a complex and big review it would be if it was to be undertaken.

Q62 **Chair:** That is probably not a reason for not undertaking a review. We are about to undertake a massive and complex review as a result of the people's will on something else, aren't we?

Sir Oliver Heald: You are absolutely right that there are priorities. You know as well as I do that the Department has some massive programmes under way which require law to support them. We have a range of priorities to consider as well.

Q63 **Victoria Prentis:** A lot of work has already been done in this area by the Law Commission and others.

Sir Oliver Heald: Although the Law Commission has looked at this area and has done a very thorough and fine job in the process, the real issue is that a lot of other ideas are out there on the table and could not be ignored. As a Government, if you were doing a major review in this area you would want to consider Mr Chalk's ideas. You would want to consider Louis Blom-Cooper, who is a very experienced senior barrister. Ken Macdonald has made suggestions, and there are many others. As you know, Chair, in the robing rooms of Britain, there are further ideas on the subject.

Q64 **Chair:** I just cannot help but get the sense, however elegantly put, Minister, that this is coming across as in the "Too difficult to do" box, because, frankly, the bureaucracy of Government cannot be bothered to



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get its butt into gear to deal with it.

Sir Oliver Heald: It is not a question of not being bothered. As you know, this is a very serious area. It is something that I have engaged with in a serious way, but it is extremely complex and we have to think about it against the current background, which is that the law is adequate and covers all areas of criminality in this sphere. It is understood in broad terms by the public, and most of the murder cases that come before the courts are cases where the issue is intention to kill or cause grievous bodily harm, although I fully accept that there are complicated cases involving recklessness, the partial defences and the various forms of manslaughter. I do not think you will ever make those simple.

Q65 **Chair:** I am perturbed—this is my final attempt—that the advice you no doubt get from your officials seems to be so dismissive of the very compelling evidence that the public do not understand the way it works, and that actually they do not follow it. That seems like a cop-out from civil servants who do not want to tackle the issue.

Sir Oliver Heald: It is true that it would require jury service and a case involving one of the partial defences for a member of the public to get into some of the detail of the legal issues involved. I think the public have a broad understanding that murder is somebody being killed unlawfully with an intention to kill or cause grievous bodily harm. In fact, it is something that is often portrayed in the news or in drama. It is something where, quite often, there will be a case where it has been an inquiry into grievous bodily harm and now it has become a murder case. I think that is broadly understood, but I accept that the research done by the Law Commission bored down into the detail more than that and it showed, as I am sure you heard, that there is some question about whether at the moment the intention is both too narrow and too broad. It is too narrow in that it does not cover recklessness and too broad in the sense that cases just involving grievous bodily harm intent are covered.

Q66 **Chair:** Minister of State, thank you very much for your time. It may be a topic that we return to. I know you to be a man who acts upon the evidence. Can we assume that, if evidence comes along, the Government will not rule anything out?

Sir Oliver Heald: We are certainly open-minded about the subject. I meant it when I said that we would look at everything. I did not actually hear the earlier evidence prior to coming in the room, but we will obviously examine it very carefully.

Chair: I understand that and I take your word on it. Thank you very much for your time and your evidence.