THE LAW OF OMISSIONS – PROPOSALS FOR REFORM

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INTRODUCTION

The criminal law has long drawn a distinction between doing something and failing to prevent its occurrence. "One of the first things that a student of criminal law will learn is that in general a person cannot be held liable for not doing something; normally he can only be held liable for what he does."[1] This statement is a fair reflection of what has been a traditional approach of common law jurisdictions to omissions liability. While pushing a stranger into a pool and allowing her to drown has always attracted the full force of the law, simply coming upon the same stranger and callously watching her drown has attracted only moral condemnation. As far back as 1880 Wharton observed that "[o]missions are not the basis of penal action unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested."[2] A central feature of this restricted approach to omissions was the narrow circumstances in which the special responsibilities referred to by Wharton would be recognised. For example, in *Beardsley*[3] the accused had a weekend liaison with a woman while his wife was away. Considerable alcohol was consumed. The woman also took some pills with the result that she fell into a coma. The accused arranged for her to be put to bed in another room but otherwise called no assistance for her. The woman died. Beardsley was held to owe her no duty, and so not to be liable for her death.

However, many cracks have appeared in the wall set up around omissions. First, there are now numerous examples in the statute books of offences of express omission liability. Many of these offences take the form of an act coupled with an omission – for example, driving *without* a licence or *without* a seatbelt. Others take the form of a pure omission, such as the offence of failing to file a tax return.[4] Yet another well known example of such liability, but at the more serious end of the spectrum, is that of culpable homicide, which can be the product of an unlawful act or *a failure to perform a legal duty*. Overall, then, while "acting" offences are by far in the majority, there are still many examples of omis-

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1 G Mead, "Contracting into Crime: A Theory of Criminal Omissions" (1991) 11 Ox Jnl of Legal Studies, 147.

2 F Wharton, *Philosophy of Criminal Law* (1880) (reprinted, Grant and Sons, USA, 1989) 160.

3 113 NW 1128 (1907).

4 Another group of offences involving liability for failing to act are public welfare offences where D is liable for failing to take all reasonable steps.

sion offences. Second, as a result of the House of Lords decision in *Miller*[5] there is seemingly greater potential for "acting" offences to be interpreted as being able to be committed by omission. In that case it was held that a vagrant could be guilty of damaging a house by a fire he had accidentally started if he failed to put the fire out or to call the fire brigade. Finally, the 1980s saw the presentation of several revised criminal codes, some of which would have altered the current law in relation to omissions. England, France, Canada and New Zealand[6] all produced proposed reforms of the criminal law. The New Zealand proposal in relation to omissions was a mixed package which sought generally to expand liability while at the same time significantly reducing such liability in one crucial aspect. These various law reform proposals appeared against the background of calls from prominent writers such as Ashworth and Steiner[7] for common law countries to follow the lead of European codes and provide a much more expanded liability for omissions.

The purpose of this article is to explore the New Zealand proposals in the light of the various competing factors already noted. A Crimes Consultative Committee[8] established by the Minister of Justice rejected the omission provisions of the New Zealand Bill on the basis that much more examination of the issue was needed, and that it would not be profitable to do that work at this point in time. This article begins that process and perhaps illustrates that not as much work is required as the Committee seemed to think.

THE EXISTING LAW

In order to consider the appropriateness of the path the proposed criminal reforms of the 1980s would have plotted in the area of omissions, it is necessary to set out briefly the existing law.

1 Express Liability

As noted, there are numerous offences which expressly outlaw the failure to act. Many of these offences apply to everyone within a clearly defined group — for example, to drivers or to those who earn income and accordingly must pay taxes. Few difficulties arise within these offences. The group to which they apply and the tasks required of the group are clearly stated and, equally important, the tasks are well known to those within the groups. Drivers, for example, are fully aware of the general duties attached to driving a vehicle. Sometimes, however, express liability is imposed in less well defined circumstances. The primary example is homi-

5 [1983] 2 AC 161.

6 The New Zealand Crimes Bill was introduced into the House in May 1989. At the time of writing it was still formally with Parliament's Justice and Law Committee, having been referred there on Introduction. For a discussion of the difficulties encountered by the Bill see France, "Reforming Criminal Law — New Zealand's 1989 Code" [1990] Crim LR 825.

7 A Ashworth and E Steiner, "Criminal omissions and public duties: the French experience" (1990) 10 Legal Studies 193.

8 Report of the Crimes Consultative Committee, April 1991.

cide. Section 160(2)(b) of the Crimes Act 1961 makes culpable all homicides that result from "any omission without lawful excuse to perform or observe any legal duty". The catalyst for liability is the failure to act when under a legal duty to do so. But undefined in this section is when that duty exists. The Crimes Act goes on in other sections to detail some of the legal duties (sections 151-157) but it is equally clear that this is not the whole range of legal duties which may found liability.[9]

2 Implied Liability

The extent to which failing to act can be brought within offences which are defined by active verbs is a controversial issue. Williams[10] has long campaigned against such a practice on the basis that it is both an abuse of the English language and an unwelcome example of judicial law making. It is argued, for example, that one who fails to prevent harm occurring cannot by that failure be said to have caused the harm. If I do not save the life of someone who is drowning, can it be said that I have killed them? Failing to prevent, it is argued, is not the same as causing. In *Miller* the House of Lords appears to have set the criminal law firmly along a path whereby "doing offences" can be committed by omission.

In *Miller* the accused described his own conduct in this way:[11]

> Last night I went out for a few drinks and at closing time I went back to the house where I have been kipping for a couple of weeks. I went upstairs into the back bedroom where I've been sleeping. I lay on my mattress and lit a cigarette. I must have fell to sleep because I woke up to find the mattress on fire. I just got up and went into the next room and went back to sleep. Then the next thing I remember was the police and fire people arriving. I hadn't got anything to put the fire out with so I just left it.

The charge against Miller was laid under the Criminal Damage Act (UK) and accused him of arson, in that he "damaged the house by fire". Traditional criminal law thinking would require us to ask what was the conduct which formed the basis of the charge. When Miller dropped the cigarette and started the fire that was clearly an accidental act unaccompanied by the necessary mens rea. One form of analysis would then say that after that accident, although Miller acquired the necessary mens rea — knowledge of the incident and clear recklessness as to the consequences — he did no act that could be used to charge him. Accordingly, unless his failure to act could be the basis of liability he must be acquitted. In other words, *unless arson could be committed by omission,* Miller was entitled to acquittal.[12]

9 The range of non-statutory duties that may be included here is uncertain. *Adams on Criminal Law* (ed Hon J B Robertson, 3rd ed, 1992) para 160.14 suggests the common law duty owed to a spouse would come within s 160(2)(b).

10 G Williams, "Criminal Omissions — The Conventional View" (1991) 107 LQR 86, 87-88. See also G Williams, "What should the Code do about omissions?" (1987) 7 Legal Studies 92.

11 Above n 5, 173.

12 For two competing views on how *Miller* might be analysed see J C Smith [1982] Crim LR 526 and G Williams, ibid 773.

The House of Lords, through Lord Diplock, responded to this situation by holding that the offence was capable of commission by omission. The key, Lord Diplock argued, was not whether Miller's behaviour was an act or omission but whether the wording of the statute was fulfilled by the conduct of the accused.[13]

> Likewise I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence. I venture to think that the habit of lawyers to talk of "actus reus", suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failure to act cannot give rise to criminal liability in English law.
>
> No one has been bold enough to suggest that if, in the instant case, the accused had been aware at the time that he dropped the cigarette that it would probably set fire to his mattress and yet had taken no steps to extinguish it he would not have been guilty of the offence of arson, since he would have damaged property of another being reckless as to whether any such property would be damaged.
>
> I cannot see any good reason why, so far as liability under criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would be at the time when he did it, does in fact create a risk that property of another will be damaged; provided that, at the moment of awareness, it lies within his power to take steps, either himself or by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk.

In essence, this approach is one which gives primacy to the wording of the statute. Lord Diplock is neither saying that every offence can be committed by omission, nor that every offence cannot be so committed. The crucial question is whether on the fair wording of the section the accused's conduct can be said to come within it.

The full potential of such an approach is not clear. Within New Zealand's statutory context it is arguable that, subject to the wording of the statute, any offence may be committed by omission. However, the proviso about the wording of the statute is very significant. For example, one does not need to go beyond the interpretation section of the Crimes Act to find an example of wording which would rule out omissions liability. Assault is defined as *the act* of intentionally applying force to the person of another. Such a definition leaves little scope for assault by omission although factually it is very easy to conceive of such an event. One who intentionally leaves a leg out to see V fall over it knowing V has not seen the danger surely assaults V as much as by putting the leg out to trip V. The section, however, by employing the term "act" would not embrace this conduct.

3 Duties to Act

Whether one is considering offences such as section 160(2)(b) which expressly incorporate a legal duty or whether one takes the construction

13 *Miller,* above n 5, 176.

approach of *Miller,* a premium is placed on the identification of duties. It is one of the features of omissions liability that it is definitionally more complex. While generally prohibitions *against* conduct are directed against everyone – eg "do not steal" applies to the whole world – injunctions to act require the delineation of duties so as to identify those people who must act. To take, for example, the facts of *Miller,* it is clear that if strangers happened upon the burning house, they could happily watch it burn; indeed they could cheer the house's demise without fear of criminal liability Miller, on the other hand, was held criminally liable for an identical act of indifference. What defines the group who must act and what separates the bystander from Miller is the duty to act.

The Crimes Act details a series of legal duties (ss 151-157) ranging from providing the necessaries of life to those in one's care, through to having and using reasonable skill and care in performing surgical or medical treatment. The duties specified in these sections are well-known, of long-standing and non-controversial.[14] Other duties may exist, however, and *Miller* is a clear example. The exact duty on Miller was not well articulated nor was much guidance given as to how it could be expanded into a general principle. It is clear that Miller was under a duty to take reasonable steps to avert or lessen the risk of damage to property that he had created. Depending on the time that his initial awareness comes, what may be required of Miller will presumably vary from putting out the fire through to calling the fire brigade. However, much uncertainty remains about the definition and extent of the duty. For example, are "reasonable steps" to be judged by taking any account of Miller's personal characteristics, and if so which characteristics? The recent history of the House of Lords would suggest a negative response to such attempts at personalising reasonableness,[15] but surely a return to compassion in the criminal law will soon come. One who is born without the personal qualities of the ordinary member of the community should not be required by the criminal law to have such characteristics. If there is to be an increase in the range of circumstances where positive duties to act are imposed then flexibility in assessing culpability becomes even more imperative.

Ashworth details several other duties that have been held to exist at common law, including duties stemming from contractual obligations.[16] In a brief background summary of the existing law it is not necessary to explore these other than to note that section 157 of the Crimes Act may well cover many of them anyway:

> Everyone who undertakes to do any act the omission to do which is or may be dangerous to life is under a legal duty to do that act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

14 The effect of these provisions is two-fold. Not only may the duty be used as the basis of a charge such as manslaughter, but some also create offences where the neglect of the duty has endangered life but death has not occurred: for example, s 151(2).

15 *Elliott* v *C* (1983) 77 Crim App R 103.

16 A Ashworth, "The Scope of Criminal Liability for Omissions" (1989) 105 LQR 424.

4 Conclusion

It is fair to say that liability for omissions is more widespread than much of the rhetoric suggests, but is still nevertheless much more restricted than liability for acting. The next section of the article explores the changes and the approach to omissions suggested in the New Zealand Crimes Bill, drawing on the other law reform documents of the 1980s for comparison. Suggestions for improvement to the Bill are made.

REFORM PROPOSALS

Against the background of the existing law it is appropriate to see what future the reforms of the late 1980s offered New Zealand. The late 1980s were an exciting time for criminal law reform. England, New Zealand and Canada all produced substantial draft codes which bore strong similarities to each other. There was also produced a major revision of the French code. Almost contemporaneously a major international Criminal Law Reform Society was established. The New Zealand Crimes Bill introduced a General Part which sought to establish basic criminal law principles which would apply to all offences. Included amongst these basic provisions was one relating to omissions. Clause 20 set out the extent of liability and detailed some of the circumstances where duties would arise. In addition, clauses 118-121 repeated some specific commonly recognised duties from the Crimes Act 1961: for example, to provide the necessaries of life to those in one's care, and to have and to use reasonable care when in control of dangerous things or doing dangerous acts.

1 Express Liability?

Clause 20(1) and (2) of the Crimes Bill provide:

> **20 Omissions** – (1) Subject to the succeeding provisions of this section, a person is not criminally responsible for any omission to do any act.
> (2) A person is criminally responsible for any omission to do any act where:
> (a) The appropriate enactment expressly provides that an omission to do that act constitutes an offence; and
> (b) The person, with the mental element required for the offence, omits to do that act.

On its face clause 20 is a rejection of the arguments of people such as Ashworth that there should be a general extension of omission liability.[17] However, in stating that an enactment must "expressly" provide for liability for failing to act, the Bill goes further than endorsing the current position. It would appear also to rule out any application of the *Miller* doctrine. It will be remembered that in that case Lord Diplock held that one could "damage" by omission. The relevant wording of the English offence read: "an offence committed under this section by destroying or damaging property by fire shall be charged as arson." While the facts of

17 Ibid, 438: ". . . there should be recognition of a principle that criminal statutes should be interpreted so as to apply to omissions as well as to acts, where a relevant duty can be established, unless the context indicates otherwise".

Miller illustrate that it is in fact possible to damage by omission, the section does not appear to provide expressly for such liability. The key was that neither did it expressly rule it out, and this allowed Lord Diplock to take the approach that he did. Clause 20 appears to reject such liability.

The limiting of omissions liability in this way is seen also in the Canadian draft which stated that no one was liable for an omission "unless it is defined as a crime by this Code . . .".[18] Curiously the English code does not have this limitation although the original draft did. The Law Commission preferred to leave the issue unaddressed in its final version, noting that the original provision (ie the New Zealand version) would have the effect of reversing decisions such as *Miller*. Concluding that it was very difficult to decide which offences should be capable of being committed by omission, and which should not, the Commission noted:[19]

> . . . we decided to make no attempt to define which offences . . . should be capable of commission by omission. This must remain a matter of construction and, so far as the duties to act are concerned, of common law.

It is not clear that the decision of the drafters of the New Zealand code to so limit omissions liability was deliberate. Certainly no reference to this development can be found in the Explanatory Note. The question remains whether it is a desirable approach.

It is a credible starting point to say that the current position brought about by *Miller* and preserved in the English draft is not desirable. As noted, Williams objects to it on the basis of its allowing too much scope for judicial legislation.[20]It is submitted that a more compelling objection is that it is too prone to the vagaries of the drafter and will lead to distinctions that have no merit. As an example the *Miller* facts can be considered against the background of the equivalent existing New Zealand provision. Section 294 of the Crimes Act 1961 defines arson in this way:

> Everyone commits arson . . . who wilfully sets fire to, or damages by means of explosive, (a) any building . . .

The difference from the English provision is apparent. Whereas there the accused must "damage by fire", in New Zealand the offence is "setting fire to". This would suggest that it cannot be committed by omission – "setting fire to" demands a positive act. It is not a result crime as in the English provision but rather a conduct crime which freezes liability at the time the act is done. In *Miller* it could be argued that the accused set fire to the mattress by the application of the cigarette, but of course that was

18 Canadian Law Reform Commission Report No 31 (1987), clause 2(3)(b)(i).

19 Law Commission Report No 177 (1989), Volume 2, p 187. Curiously one Law Commissioner had earlier expressed clear support for the original draft: R Buxton, "Codifying Action and Inaction" in *Criminal Law and Justice* (I Dennis ed, Sweet and Maxwell, 1987) 87.

20 (1991) 107 LQR 86, 88. A similar objection is made by B Hogan, "Omissions and the duty myth" in *Criminal Law Essays in Honour of J C Smith* (P Smith ed, Butterworths, 1987) 85.

unintentional. Miller's liability was based on his conduct or lack of it once he became aware of the fire. Under the New Zealand provision such inactivity could clearly not be classed as "setting fire to" the property as that event had long since happened. It seems an inevitable conclusion, therefore, that Miller, if charged in New Zealand, would have been acquitted. It is extremely unlikely that the respective drafters of the two provisions would have intended different results. The chance use of one set of words rather than another to describe identical conduct would determine conviction or acquittal and illustrates that the "construction" approach to omissions liability raises serious concerns about predictability and consistency. Resort to a general statement would therefore seem preferable.

Two options seem to exist: either the type of limiting clause found in the Crimes Bill or the exact opposite as advocated by Ashworth.[21] The best recent defence of the Crimes Bill approach comes from Williams, who identifies several arguments against an increase in omissions liability: there are enough offences and offenders already without creating more; our attitudes to wrongful inaction are rightly much less stringent than wrongful action — to allow someone to die is not perceived to be as culpable as actually killing them; general omissions liability can only be achieved by seriously distorting language and by unacceptable judicial creativity; and sufficient warning would have to be given to citizens if offences were suddenly to be held fulfilled by omitting to act.[22] Many of these points are arguable. The judicial legislation point is easily met by a clause inserted into the Crimes Act generally providing for omissions liability. It is true that in many cases failing to act is seen as less culpable, but that is not the same as saying it is not culpable or is sufficiently lacking in blameworthiness to not merit liability. All commentators agree, for example, that Miller was rightly convicted — it is submitted that it is equally clear that Miller's liability was based on a failure to act and there seems little reason why such an approach to liability should not be general.

The desirability of reverting to the pre-*Miller* days must be questionable. The ambit of the criminal law would be lessened, and while one has sympathy with Williams's argument that there is no need to create further offences, at issue here is whether conduct which clearly comes within the spirit, intent and ambit of an existing offence should artificially be excluded. To take a clear example, it is beyond question that the offence of assault cannot be committed by omission, because the section describes the prohibited conduct as "the *act* of intentionally applying force". Factually, however, it is not difficult to conceive of an assault by omission. Imposing liability for one and not the other does not provide a coherent approach to offending. Concerning the commission of existing offences, and putting to one side for the moment the creation of new omission offences or duties, it is submitted that the presumption should be that all offences should be regarded as being able to be committed by omission. This will not automatically create liability — issues of whether a duty

21 Above n 16.
22 (1991) 107 LQR 86, 88.

exists and whether the omission caused the prohibited harm will still arise. However, given a duty to act, and the appropriate mens rea, linguistic vagaries should not be allowed to dictate liability. Such a general statement by Parliament would overcome the Williams objection to judicial legislation and would provide certainty.

2 Duties

The identification of when the duty to act exists is perhaps the key aspect of omissions liability. Stating that an offence may be committed by omission does no more than create the potential for liability. It is the recognition in D of a duty to act which provides the catalyst. The existence of the duty is what separates a particular group of people from the world. For example, V, a three year old boy is drowning. A group stand by, watching but doing nothing. One of the group is the child's parent, the rest strangers. In such a situation the law currently imposes a duty only on the parent. The rest may watch and do nothing. The parent has a duty; no one else has.

Clause 20(4) and (5) of the Crimes Bill set out several duty situations, some of which were new:

> (4) For the purposes of *subsection (3)* of this section, a person is under a duty to do an act where:
> (a) There is a risk that the death of, or serious injury to, another will occur if that act is not done; and
> (b) The person is under a duty to do the act by virtue of any enactment or of his or her tenure of any office.
> (5) For the purposes of *subsection (3)* of this section, a person is also under a duty to do any act where:
> (a) There is a risk that the death of, or serious injury to, another will occur if that act is not done; and
> (b) The person is the spouse or a parent, guardian or child of the other person or is a member of the same household as that other person, or has undertaken the care of that other person; and
> (c) The act is one that, in all the circumstances including the person's age and other relevant personal characteristics, he or she could be reasonably expected to do.

The starting point is to note that the provision only applies where there exists a risk of death or serious injury. The duties therefore apply only to serious instances of physical danger, and exclude lesser situations of harm and property loss. Several duties are then described. Those who must act include anyone subject to a duty by virtue of tenure of office, spouses, guardians, children, members of the same household and any others who have undertaken the care of the person at risk. Compared to existing law, there is some expansion of liability here, arguably in relation to children and certainly in relation to members of the same household.[23] The final point to note in this preliminary analysis is that the duties are, with the

23 The imposition of liability on children or siblings at common law tended to be in situations where it could be said that the accused had undertaken to care for the victim. See, for example, note 24 below.

exception of the tenure of office, all subject to a reasonableness proviso. The duty holder need only do what can be reasonably expected given that person's age and other relevant characteristics.

Two features merit particular consideration – clause 20(4)(a) "tenure of office" and clause 20(5)(b) "members of the same household". The tenure of office provision is onerous in so far as it is expressly not made subject to a reasonableness requirement. This is presumably due to some theory that if one holds an office which requires one to act, then act one must. However, even so, if one is not protected by a qualification that one must only do what can be reasonably expected, then what is one to do? And what will exempt one from liability? Similarly no guidance is offered on who is covered by this particular phrase. Immediately obvious as office holders are such people as police officers, fire brigade officers and perhaps life-guards. What though of wardens of hostels or the like – is it sufficiently clear what the duties of their offices are? It can be argued that such positions are capable of being analysed at the appropriate time to see what the true nature of the duties are, but then one immediately runs up against the Williams injunction that fair warning to citizens about the extent of their obligations is essential. An ex post facto determination that one's "office" includes the obligation to prevent harm to nominated others may be too late to achieve any useful purpose.

The extension of liability to members of the same household is puzzling. The clause states that all members of the same household are under a duty to everyone else in the household whenever any of those persons is under risk of death or serious injury. It can be argued that "living in the same household" should be a qualification attached to any duty imposed on spouses, siblings etc as a proximity requirement to limit liability. Such a limit would restrict liability only to siblings who were still living together, and exempt those who have left the family home. This clause is not doing that, however, but rather *adds* being in the same household as an extra group. This will presumably cover those who are in a flatting situation where there is some sharing of living arrangements. What though of lodgers living separate lives under the same roof, perhaps sharing meal times? It is probably the case that the drafters had in mind the type of circumstance which arose in *Stone and Dobinson*.[24] One should not be able to allow someone with whom one is living to die without acting to prevent it. Further, this should be the case whether or not the parties are related. The difficulty, however, is that the section is not actually restricted to these situations but covers any occasion when one is in serious danger – when members of the same household are at the beach together, for example, or are tramping. If such situations are to be covered, why one should distinguish between flatmates and for example workmates or clubmates is not immediately apparent.

24 [1977] QB 443. The two accused, both socially backward, were found to have undertaken the care of S's sister who died from anorexia nervosa and complications stemming from remaining immobile in a bed for two weeks. It was found that medical treatment would have prevented it. The accused had made ineffectual attempts to find a doctor. Williams described the two year jail term imposed on Stone as "judicial cruelty". (1991) 107 LQR 86, 90.

The Canadian section, while casting the net of liability wider again, represents a superior approach. Clause 2(3)(c) provides

> (c) Duties. Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:
> (i) provide necessaries to
> (A) his spouse,
> (B) his children under eighteen years of age,
> (C) other family members living in the same household, or
> (D) anyone under his care
> if such person is unable to provide himself with necessaries of life;
> (ii) carry out an undertaking he had given or assumed;
> (iii) assist those in a shared hazardous and lawful enterprise with him; and
> (iv) rectify dangers of his own creation or within his control.

It is immediately apparent that the family and household situations we have been discussing are limited by clause (c)(i) to the *duty to provide necessaries* and so will not extend, for example, to a situation of rescue at the beach. This provides a far more sensible proximity link. Within this context the extension to all members of the same household becomes less controversial. The other duties created by this clause are also interesting in that they extend liability to any undertaking assumed or given. This will cover the tenure of office situations included in the New Zealand clause but also extend to catch common law duties such as those imposed in *Pittwood*.[25] Finally, reference should be made to the extension of liability to those engaged in shared hazardous enterprises. Although the clause falls way short of imposing general citizenship obligations, it recognises that bonds, and therefore duties, can arise in circumstances where one might not have necessarily undertaken to look after a companion.

In the absence of any general requirement that we all owe a duty of care to people in perilous situations, there will always be difficulties in drawing the line. The New Zealand Bill represented a move towards extending responsibility, and therefore liability, by including households within the net of providing care. It is likely that the intent of the drafters was similar to that of Canada's, but the Canadian provision, limited as it is by the reference to the necessaries of life, seems to capture the essence better. Further, the Canadian provision is much less vague and less open to definitional uncertainties. It is submitted, therefore, that New Zealand should adopt clause (c)(i) of the Canadian draft. Clause (iv) is a statutory embodiment of *Miller* and seems appropriate. Similarly, clause (ii) seems acceptable. There is in principle no reason why those who undertake to do acts, the failure to do which will obviously threaten others' lives, should not be placed under a criminal obligation to act. It must be remembered that liability for failing to perform this duty will still require the appropriate mens rea.

In relation to clause (iii), the shared hazardous occupation provision, it is submitted that this stands or falls on whether one accepts the case for general citizenship obligations is accepted(discussed below). If one is

25 (1902) 19 TLR 37. In that case D was under a contractual duty to supervise a railway crossing. He failed to do so with the consequence that someone using the crossing was killed.

not willing to extend a duty of "easy rescue" to all citizens, there is little in the shared hazards situation that sets it apart. If one has undertaken to assist fellow climbers then that will be caught by clause (ii). If not, then the obvious and pressing moral responsibility is no different from all easy rescue situations.

3 *Duties that are not recognised*

Ashworth was not content to limit himself to claiming that *existing offences* should be extended to embrace omissions. He further argued that some new general duties should be recognised. The main proposal was to impose liability on all citizens to assist those in danger where this could be done without risk to the one giving aid (the so-called duty of "easy rescue"). It is important to note that such duties are always qualified by a limitation that one does not need to risk one's own safety, and that only reasonable steps need be taken. Ashworth based his argument primarily on a claim that such liability would improve the overall quality of life in society and, more importantly, that it would provide for the maximisation of "individual autonomy" through a legal recognition of people's vital interests. "Each member of society is valued intrinsically, and the value of one citizen's life is generally greater than the value of another citizen's temporary freedom."[26] None of the three proposed codes under discussion adopts the Ashworth proposals. In an article which generally rejects Ashworth's thesis, Glanville Williams surprisingly acknowledges limited acceptance for an obligation to rescue, but only if a breach is punished by some minor penalty such as community service. At the same time there is a total rejection of any obligation to report crime: "What the citizen chooses to do to help the police must be left to his sense of citizenship."[27] The growing literature on the propriety of these obligations is voluminous and there is little profit in a full review here.[28] Rather, I would like to explore the suggestion that there is a middle ground – recognition of the duty, but visiting a breach with a minor penalty. Williams argued[29]

> . . . I would support a proposal to create a duty of "easy rescue", but would not give a blank cheque on the subject. Imprisonment as a means of enforcing the duty should be ruled out, because imprisonment creates great distress and is a poor way of trying to add to the sum of human happiness, unless the advantages of it are much clearer than they are in this instance. A purely moralistic approach, attempting to calibrate the degree of moral turpitude in omitting with the tragedy of the fatal result, as though the defendant had recklessly acted to cause the result instead of merely failing to prevent it, leads to the kind of judicial cruelty practised upon Mr Stone. So my support would be given only on condition that the maximum penalty is a fine and/or community service, the preferred outcome being either a discharge with a warning or an order for some kind of education or training. And I doubt whether the proposal would rank high in the list of priorities for new criminal legislation. At the moment we should be thinking about what new legislation is needed if we are to have a satisfactory criminal

26 Above n 16, 432. Such liability exists in European codes. For a discussion of how such clauses have worked in practice in France, see Ashworth and Steiner, above n 7.
27 Above n 22, 90.
28 For a list of publications see Ashworth, above n 16 at n 24 and Mead, above n 1 at n 4.
29 Above n 22, 89.

> code, and the creation of an offence of failing to make easy rescue would have little bearing on this.

This passage clearly reflects a belief on Williams's part that the failure to act is not conduct worthy of serious condemnation. To penalise the deliberate failure to save someone's life (in circumstances where D could easily have done so) with a fine or community service is derisory to say the least. It is surely better to say that there is no duty to assist others in mortal peril than to impose such a duty and punish a breach with a fine or warning.

When discussing the possibility of creating a new offence one must ask what it is expected the offence will achieve. To answer this it is necessary in turn to ask why it is that, in the types of "easy rescue" situation being envisaged, someone would not assist. It is conceivable, and indeed probable, that someone may not assist for reasons of fear – D has a higher level of fear than most people. It is generally accepted that not everyone is a hero and by definition not everyone can be. But there is not only one other level. In other words, should one be held responsible for having been given a smaller dose of ordinary courage than others? The normal person would take the risk to assist but D is not the normal person. If this is the situation, is it appropriate to hold the person criminally liable? (It is also interesting to speculate whether a court would accept a low fear threshold as a "characteristic" within the meaning of the word in clause 20.)

What is involved here are situations of serious harm where people are in mortal risk. It is not likely that in today's environment of full media exposure, instances of callous indifference to such suffering would go unremarked, yet our papers are not full of such events. It would seem safe to assume that instances of citizens failing to assist are rare. The problem is small and the reasons for failure to assist uncertain. Williams and I agree that there is little profit in punishing the less than brave. I would, however, have no such liability at all rather than meeting the failure to act with a nominal penalty. The grossly indifferent pose more of a problem. One would have little sympathy for someone who callously stands by in circumstances where they could easily assist (although one would also wonder at the social background that had produced such a reaction). The problem here, though, is one of definition. It would be very difficult to frame a law to catch only this person and it would require an impossible exercise of speculative judgment as to why someone had failed to assist. We must be sorry that a person incapable of helping or unwilling to help happened upon the scene but it must be doubted whether there is any gain in imposing liability. One must ask whether the accused is not to be pitied rather than punished. Perhaps the most society can require is for such an individual not to positively *take* a life – if they find themselves incapable of *preventing* the loss of life, then little can be done.

In conclusion on the topic I find many of Ashworth's comparisons compelling. It is not a huge step to move from requiring a spouse to throw a lifeline to a drowning partner to requiring everyone so to act. Further, society would indeed be a better place if everyone did so act. Finally I believe that one can easily envisage situations where a failure to act is as

culpable as acting. For example, there is surely no difference in turning off a life support system (an act) and failing to replace a vital drip (an omission). Even if one does not accept a claim of equal culpability, it is surely arguable that there is substantial culpability in callously watching someone drown when a lifeline is near at hand. However, in the final analysis any proposed new offence would be limited to life threatening situations, instances of failing to act are thankfully much rarer than instances of heroism, the reasons for failing to act are likely to be varied and it is doubted what might be achieved by such prosecution. For all these reasons, the creation of a new duty to act in these circumstances is rejected.

4 Causation

A small but important point remains to be covered. What link between D's failure to act and the prohibited harm is required? For example, D is charged with homicide by failing to perform a legal duty. What link between the omission and the death must be established? The Court of Appeal recently considered the issue in *Myatt*.[30] D was charged with a breach of section 156 of the Crimes Act 1961 in that he failed to use reasonable care when in control of a power boat with the result that a collision occurred and people died. In relation to causation the court held that the unlawful omission "must be causative of death, by which is meant a substantial and operative cause of the death of the deceased." This test is fine for situations where the omission takes the form of an act coupled with an omission, as in *Myatt* where the act of driving was accompanied by a failure to take reasonable care. The beginning and the end of the causation are clear and provide a framework for considering the failure to take reasonable care. However, in cases of pure omission it is not so straightforward. For example, D is a lifeguard who is under a duty to supervise a beach and assist those in danger. V gets caught in a rip and swept out to sea in the big waves. D, struck down by a sudden uncertainty, cannot bring herself to attempt to save V, who drowns. Can it be said that D's omission is a *cause* of death? The big waves, the fact that V cannot swim or the attack of cramp suffered by V might all be labelled causes. It is hard to say that the non-action of someone 200 yards away on the beach caused the death. Further difficult questions also arise — what if it is reasonably clear that no one could have saved V, or alternatively, that no one can say either way?

The English Law Commission draft settled on a test which required the prosecution to prove that the doing of the act "might have prevented" the occurrence of the harm. This is a low threshold which would seem to embrace a host of situations. It is also rather strange to think of the prosecution having to prove beyond reasonable doubt what *might have* happened, but if one applies it to the lifeguard example it is likely that a court would find that D *might* have made a difference.

The New Zealand Crimes Bill is silent on this point, and the difficulties

30 [1991] 1 NZLR 674.

associated with saying that a failure to throw a lifeline *caused* the death of a drowning person lead to a requirement that the Bill should specify the necessary link. Williams has suggested the following formula:[31] "the doing of the act would have prevented the occurrence of the event." While on the surface this seems consistent with the usual requirement that the prosecution prove that D's act was a substantial cause of the prohibited harm, there is much more difficulty in the hypothetical situation of omissions. The harm has actually happened yet the issue is not whether D brought it about but whether D might have stopped it happening. In these circumstances an alternative requirement might be to show that if D had acted she "would probably have prevented the occurrence". In the end the difference between the two is probably very little, but the latter arguably takes more realistic note of the hypothetical nature of the question. It is not overly onerous because all that D's duty involves is to take reasonable steps, not actually stop the occurrence. If D has not taken such reasonable steps, a requirement that the failure to act *probably* made a difference is a reasonable check on liability.

5 Conclusion

The Crimes Bill could be amended in relation to omissions to include the following features:

(1) An interpretation clause providing general presumption that a criminal offence should be interpreted as applying to omissions, unless the context requires otherwise. The description of the offence in terms of action should not of itself be seen as indicating a contrary intention.
(2) Duties. Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:
    (i) provide necessaries to
        (A) his spouse,
        (B) his children under eighteen years of age,
        (C) other family members living in the same household, or
        (D) anyone under his care
        if such person is unable to provide himself with necessaries of life;
    (ii) carry out an undertaking he had given or assumed; and
    (iii) rectify dangers of his own creation or within his control.
(3) A causation provision that provides that in the case of omissions the necessary link is established if "the doing of the act would probably have prevented the occurrence of the event".
(4) The usual mens rea provision requiring that the failure to act must be accompanied by the mens rea required for the offence.

31 G Williams, "Finis for Novus Actus?" (1989) 48 CLJ 391, 415.