Homicide

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I INTRODUCTION

The Crimes Bill 1989 proposes radical changes to the law of culpable homicide. In particular, it would abolish the crimes of murder and manslaughter. Killings which are now murder would be called culpable homicide, and would be punishable by a maximum of life imprisonment instead of the mandatory sentence of life which is imposed under the present law. This crime would also cover manslaughter by reason of provocation. Provocation would cease to be a partial defence and would merely be a factor relevant to penalty. Other cases of manslaughter, and cases of non-fatal wounding and injury, would fall to be dealt with as intentional, reckless, heedless or grossly negligent "endangering", the maximum penalty being imprisonment for fourteen, five or two years, depending on the degree of danger created and the degree of fault on the part of the offender.

These changes are in essence those recommended by the Criminal Law Reform Committee in 1976,[1] although there are a couple of noteworthy departures from that Committee's proposals.

First, apart from the abolition of the partial defence of provocation, and a change of name to "unlawful killing", the Committee did not suggest any change to the definition of murder. The Bill, however, introduces two significant, and complementary, changes. At present, section 168 of the Crimes Act 1961 provides an extended definition of murder, directed mainly at killings in the course of committing other serious offences when the offender meant serious injury but may not have realised that death was likely (such awareness being the minimum mens rea required for murder by section 167). The Bill does not retain section 168, but the effect of this is more than nullified by clause 122(3). This extends what is presently section 167(d) by providing that there is sufficient mens rea for culpable homicide if the killer was pursuing any unlawful object and knew that the act was likely to cause death *or serious bodily harm* to another. The addition of the emphasised words allows the excision of section 168. This is tidy but the result is a seemingly unwarranted enlargement of constructive murder.[2]

Second, in relation to penalty, the Committee was concerned that a finite sentence for murder might be unacceptable because of the loss of the indefinite. It therefore proposed that anyone sentenced to more than two years for unlawful killing should, after

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1 Criminal Law Reform Committee, *Report on Culpable Homicide* (1976); for earlier discussions of this Report, see Orchard [1977] NZLJ 411, 477; Doyle [1977] NZ Recent Law 93.

2 The explanatory note, at p xvii, states that clause 122(3) "re-enacts without substantive amendment" s167(d), but in fact it adds foresight of serious harm as an alternative to foresight of death; this is a major change.

release, remain liable to judicially reviewable recall for indefinite detention, even after expiry of the sentence, until such liability was terminated by the Minister of Justice or the courts. The Bill does not adopt this, no doubt because it was seen as unacceptable and unnecessary.[3]

It may also be noted that the Committee favoured the legal abandonment of the term "murder" in favour of "unlawful killing". It thought that it would be wrong to apply such a pejorative term as "murder" to provoked killings, although it expected that, when there was no provocation and a long sentence is imposed for unlawful killing, the accused would in common parlance be called a murderer. This proposed change in terminology was understandably criticised as being euphemistic and as being calculated to make the crime seem less heinous. But "unlawful killing" is at least plain English, which can hardly be said of the Bill's "culpable homicide", which is legal jargon which judges already feel they need to explain to juries.

There remain three important matters which justify fuller consideration: the abolition of the defence of provocation, the penalty for murder, and the supposed irrelevance of the result in the case of non-murderous killings and woundings.

II ABOLITION OF THE DEFENCE OF PROVOCATION

Provocation is an obvious mitigating factor and no one has suggested that the defence could properly be abolished if the mandatory sentence was retained. But abandonment of the mandatory penalty does not necessarily mean that the defence should also be dispensed with. The law could sensibly retain both murder and manslaughter and provide that both be punishable by a maximum of life imprisonment, it being recognised that in practice manslaughter would attract a significantly lower penalty in almost all cases. If it was thought that that did not sufficiently mark the difference between the crimes, there could be a statutory presumption that for murder the appropriate sentence is life, this being subject to discretionary reduction where there were significant mitigating circumstances (this being the position in New South Wales since 1982). Alternatively, murder might be subject to a maximum of life and manslaughter to a maximum finite term (in Victoria the maximum for manslaughter has been 15 years imprisonment since 1864).

The Criminal Law Reform Committee, however, thought that the defence of provocation was unsatisfactory, to an extent which justified its abolition. It thought it anomalous that provocation should change the nature of the crime when there has been a killing, while it goes only to penalty in other cases. It also said that the defence does not do justice to some accused, who may be precluded from successfully relying on it when their mental or emotional make-up or condition was such that they could not fairly be expected to behave as an "ordinary" person. It also thought that the defence was overly complex, and that jurors frequently could not fully understand it.

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3 Compare Law Reform Commission of Victoria, *Report No 1, The Sentence for Murder* (1985), para 38; for the liability to recall of offenders released on parole, see now the Criminal Justice Act 1985, s106; Hall, *Sentencing in New Zealand* (1987), 264-266.

It has been suggested that none of these points is entirely convincing on its own, but that taken as a whole they have some force.[4] I suggest, however, that they do not have sufficient weight to justify the legal abandonment of the notion and name of murder, nor the removal of the accused's right to have the fact of provocation determined by the jury and reflected in the verdict.

The view that the defence is anomalous is, I believe, convincingly rebutted by Sir Robin Cooke's observations that the readiness of juries to accept the defence "is wholly consistent with confining the stigma of murder to the worst of killings", and that "the very gravity of murder ... justifies singling it out from the generality of offences, where provocation bears on penalty only."[5] Plain murder should be stigmatised as such, killings as a result of real provocation should not be.

It is also manifestly the case that, largely as a result of judicial development, the defence is more generally available than it once was. A number of factors have led to this. In particular: strict adherence to the *Woolmington* principle governing the burden of proof[6]; a judicial reluctance to allow considerations of time lapse and proportionality to justify removing the issue from the jury[7]; an expansive view of which "characteristics" might qualify the objective test[8]; and a refusal to impose artificial limits on which factors are relevant to the subjective test.[9] Possibly there may still be deserving cases which fall outside the defence. If so, some further expansion of it might be justified, but it is not much of a reason for removing the defence from those who already qualify. Also, quite apart from abolition of the mandatory sentence, it may well be that there is a case for the recognition of additional qualified defences (to go with infanticide and suicide pacts, which the Bill retains): obvious examples are diminished responsibility and mercy killing.

The idea that the defence is too difficult for juries appears to be speculative, does not seem to have been supported by the judges in 1976, and it seems has yet to be supported by the judges today. For what little it is worth, it has not been my experience, and I do not agree with the assertion of the Minister of Justice that "the defence is generally regarded as being too hedged round with difficulty and technicality".[10] In its fundamentals the defence is readily understood, and it recognises in an appropriate way that in a crime of passion culpability is diminished. It involves issues which I suggest are ideal for a jury.

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4 Celia Wells, "The Death Penalty for Provocation?" [1978] Crim LR 662, 670-671.

5 [1989] NZLJ 235, 239.

6 Eg *R* v *Nepia* [1983] NZLR 754.

7 Eg *R* v *Taaka* [1982] 2 NZLR 198; *R* v *Dougherty* [1966] NZLR 890; *R* (1981) 28 SASR 321; compare *R* v *Anderson* [1965] NZLR 29.

8 Eg *R* v *Taaka* [1982] 2 NZLR 198; *R* v *Lafaele* (1987) 2 CRNZ 677, 679; compare *R* v *Dincer* [1983] VR 460; *R* v *Romano* (1987) 33 SASR 283.

9 *R* v *Barton* [1977] 1 NZLR 295; compare *R* v *Van Den Hoek* (1986) 161 CLR 158, 166-168.

10 Palmer, above 17.

Of course, in support of abolition of this defence, and the mandatory penalty, rather more emphasis is now being placed on another factor: it is said that it will encourage more guilty pleas, and thus avoid what are described as "unnecessary trials". This will be admirable if it results from otherwise justified reforms, but in itself it would not be a proper reason for radical change to an area of the law as important as this. It may also be doubted whether abolition of the provocation defence will lead to any great reduction in trials, and such reduction as may occur will be somewhat offset by the need for more elaborate sentencing hearings, probably involving evidence. Moreover, if the insanity defence is restructured in the form proposed in clause 28 (although that is perhaps unlikely), I think it would encompass most cases presently dealt with as manslaughter under provocation.

III THE PENALTY FOR MURDER

The mandatory life sentence has been fairly described as "part of the political price of the abolition of the death penalty".[11] Its merits have been much debated.

In support, it has been argued that the automatic imposition of such a penalty best marks the gravity of the crime and the State's concern for the preservation of human life; and as it is at least potentially more severe than a fixed term, it provides the most effective deterrent. It avoids the need for the sentencing Judge to attempt an assessment of the offender's dangerousness (this being left to those who will later decide on parole), and it provides social protection after release through indefinite liability to recall, but also allows the possibility of early release in very exceptional cases.[12]

But there are strong arguments against the mandatory penalty. Murders vary in heinousness and culpability, so it is only just that they be treated differently, as is the practice with other serious crimes. Conferring a sentencing discretion on the court allows the true gravity of a particular offence to be clearly marked in a public and appealable way, whereas the deterrent and denunciatory impact of a life sentence (mandatory or otherwise) is reduced by the universal awareness that actual detention for life is not at all likely. The present mandatory penalty is wrong in principle in that it allows the sentencing judge no say in the amount of time which ought to be served; and as with other crimes, any mitigating circumstances ought to be recognised upon sentencing. Murderers generally present no greater future danger than other violent offenders, and indeed there will often be no significant risk of recidivism. The uncertainty of the life sentence is diminished by the fact that parole is not normally available until after 10 years, but its indeterminate nature may still adversely affect a prisoner's attitude; and even after 10 years the ability of the Parole Board to reliably assess dangerousness is debatable, and prisoners may be detained longer than is necessary. More pragmatically, the existence of a mandatory penalty means that there is

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11 DA Thomas, "Developments in Sentencing 1964-1973" [1974] Crim LR 685, 687.

12 See, eg, Criminal Law Revision Committee (UK), *Twelfth Report: Penalty for Murder* (1973); Penal Policy Review Committee, *Report* (1981) para 164 (minority view); apart from the prerogative of mercy, the possibility of early release is preserved by the Criminal Justice Act 1985, s94(3).

nothing to be gained from a plea of guilty, and its severity means that almost all cases will be defended; allowing the courts a discretion will increase the number of guilty pleas.[13]

On balance, there is a strong case for abolishing the mandatory sentence. Of course, it does not follow that the operation of a discretionary regime will be free of difficulty, and nor does it follow that legislation should necessarily confer an unrestricted discretion on the courts. In particular, it is worthy of mention that when New South Wales abandoned the mandatory penalty in 1982, it did so by legislation which provides that the penalty for murder is life imprisonment, unless the offender's "culpability for the crime is significantly diminished by mitigating circumstances". This qualified discretion was adopted in order to avoid the possibility of extravagantly long finite sentences, to avoid unjustified disturbances to sentencing relativities, and because it was thought to be important in terms of public acceptability that life be the first sentence the judge must consider.[14]

The effect of this legislation is that murder remains a special category, life being the required sentence unless the statutory test is met. On that threshold question, the inquiry is solely into the offender's blameworthiness for the crime and factors which (on the probabilities) did not influence this are to be ignored, although they may be relevant once it is found that a sentence of other than life is appropriate. Thus, events after the murder will not be relevant to the threshold question: for example, later illness, helping the police, a guilty plea.[15] In the result, it seems that life remains the most usual sentence, with only about 1 in 5 cases receiving a lesser penalty (and by 1987 the shortest sentence had been 12 years).[16]

The Law Reform Commission of Victoria decided that such complicating controls on discretion are unnecessary, and it simply recommended that life be the maximum, with the judge having the power to set a binding non-parole period in all cases.[17] In the event, the Victorian legislation provides that the sentence for murder must be a term of imprisonment which is to be either life or such other term as is fixed by the court. Applying this formula the courts have resisted confining life to the "worst" cases. It has been said that murder is a crime of the utmost gravity, which "does not admit of categorizing each offence into degrees of gravity", and that life will still be appropriate "for a wide variety of deliberate criminal killings".[18] Life is appropriate not only when

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13 See, eg, Law Reform Commission of Victoria, above n 3, para 7; Criminal Law Reform Committee, above n 1, paras 26-41; *Report of the Committee on Mentally Abnormal Offenders* (The Butler Committee) (1975; Cmnd 6244) para 19.11 - 19.13; Penal Policy Review Committee above n 12, para 164 (majority view).

14 GD Woods, "The Sanctity of Murder: Reforming the Homicide Penalty in NSW" (1983) 57 ALJ 161, 163

15 *R* v *Bell* [1985] 2 NSWLR 467; *R* v *Burke* [1983] 2 NSWLR 93; *R* v *Murray* [1982] 1 NSWLR 740.

16 S Yeo, "Sentencing Murderers: A NSW Innovation" [1987] Crim LR 23, 27.

17 Above n 1, para 50.

18 *R* v *Dumas* [1988] VR 65, 71-72.

the crime was particularly horrific,[19] but will rarely be disproportionately severe if there was brutal violence from an offender who is apparently a continuing danger.[20] Moreover, in such cases the courts have set minimum terms of as long as 18 and 22 years, which may be contrasted with the maximum non-parole period of 10 years allowed by the New Zealand Bill.[21]

Unlike these Australian precedents, clause 123 of the Bill simply provides for a maximum of life imprisonment for those who commit culpable homicide. How is this discretion likely to be exercised?

The intention appears to be that the life sentence should be rather exceptional and should be reserved for the "worst" or "most serious" cases.[22] That would be consistent with the usual approach to maximum penalties, although it does not mean that a lesser penalty must be imposed merely because a worse case can be imagined. It suffices if a particular offence "falls within the broad band or bracket comprising the worst class of cases encountered in practice"[23] or is not "recognisably outside the worst category."[24]

On the other hand, in England the courts hold that when a maximum of life is available it may be properly imposed although the case is not within the worst category, provided the offence was sufficiently grave to justify a lengthy sentence, and it appears that the offender is unstable and is likely to commit further serious offences. Normally medical evidence of such dangerousness is required, but in exceptional cases the offender's history or the nature of the criminal acts may suffice.[25] One objection to this is that it is notoriously difficult to predict reliably future dangerousness, although once an offender has deliberately killed it might be thought that on such an issue the courts would be justified if they erred on the side of protection of society. In Australia, however, the High Court has rejected the English approach and has insisted that a sentence should not be extended beyond what is proportionate to the crime merely to protect society. But grim experience has led the Court to recognise that with homicide the "worst category" which justifies a life sentence is not a narrow band, that diminished responsibility does not necessarily take a case out of it, and that when a case is within it the protective object may confirm that life is the appropriate sentence.[26] There is no doubt that it will be a relevant factor in New Zealand.[27]

If the courts accept that, with the possible exception of dangerous offenders, the life sentence should be reserved for the most serious murders, it should follow that a finite

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19 Compare *R* v *Stone* [1988] VR 141.

20 *R* v *Dumas*, above n 16.

21 Compare *R* v *Von Einem* (1985) 38 SASR 207.

22 Criminal Law Reform Committee, above n 1, paras 20, 26. In his lecture the Minister of Justice refers to "the more serious cases".

23 *R* v *Beri* [1987] 1 NZLR 46, 48.

24 *Veen* v *R* (No 2) (1988) 164 CLR 465, 478.

25 DA Thomas, *Principles of Sentencing* (2 ed, 1979) 301; Andrew Ashworth, *Sentencing and Penal Policy* (1983) 233-234; compare *R* v *Virgo* [1989] Crim LR 233.

26 *Veen* v *R (No 2)*, above n 24.

27 *R* v *Beri*, above n 23.

sentence will be imposed in many cases.[28] In that event, what term of imprisonment might be expected? In relation to manslaughter it has been recognised that the crime varies so greatly in gravity that "generalisations about sentencing for it are ... unwise",[29] and some might think the same could be said of murder. However, the relatively precise definition of the mens rea required means that it covers a much more limited range of killings, and it should be possible for the Court of Appeal to follow the common practice of establishing a normal range of sentence, or even a particular starting point from which the sentence may be increased or decreased according to the presence of aggravating or mitigating circumstances.[30] Some such approach would appear to be essential if reasonable consistency in sentencing is to be attained.

It also seems clear that the sentence ordinarily imposed will have to be severe. Murder is still generally seen as the worst of crimes. It commonly engenders a special degree of revulsion or alarm, with the police investigations and the trial attracting particular publicity and interest. The nominal latinisation and dilution of murder to "culpable homicide" will not change this. If it became at all common for the sentence to be lenient, or, indeed, more lenient than for other major crimes, the law would be seen as treating murder as "not such a serious offence after all". There would surely be a loss of confidence in the courts, and in the law which protects human life, and perhaps ultimately a diminution in the abhorrence with which the crime is properly regarded.[31]

It may further be speculated that, at least for a principal offender, a sentence of around 15 years may be expected in "ordinary" cases where there are no very clear mitigating circumstances (such as provocation, or compassion as the motivation). This is suggested by the reality under the present law. When the sentence is life there is, of course, no possibility of remission and, exceptional cases apart, parole is not possible until after ten years (this having been raised from seven years in 1987).[32] But an offender serving a finite sentence is eligible for remission after two-thirds of the sentence.[33] Thus, any sentence of less than 15 years must represent a lesser penalty than that presently imposed for murder. That might be justified if there were distinct mitigating circumstances, but it will not be surprising if the judges are cautious in experimenting with this. Moreover, where there is evidence of provocation it should continue to be the rule that the accused should receive the benefit of any reasonable doubt on that issue. If it is found that the same rule must apply to other possible mitigating factors, it might be felt that there is additional need for caution before great

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28 Although Sir Robin Cooke has warned that "experience might show that sentences other than life should be exceptional" - above n 5

29 *R* v *Wickliffe* [1987] 1 NZLR 55, 62; compare Young and Atkins, *NZ Law Society Seminar on Sentencing* (1989) 16.

30 Compare *R* v *Clark* [1987] 1 NZLR 380, 383; and for the need for judges to conform with prevailing levels, see *R* v *B (an accused)* [1986] 2 NZLR 751, 753-754.

31 JC Smith, "Some Problems of the Reform of the Law of Offences against the Person" (1978) 31 CLP 15, 24; *R* v *Johnstone* (1987) 45 SASR 482.

32 Criminal Justice Amendment Act (No 3) 1987, s9(2).

33 Criminal Justice Act 1985, s80(1).

effect is given to them.[34] There has been no recent widespread call for a reduction in penalties for violent crime generally, or for murder in particular. On the other hand, it seems unlikely that there will be many cases attracting substantially longer finite terms than 15 years, for such a sentence would suggest that the crime was in the more serious class where life is the appropriate penalty.

Finally, brief mention should be made of clause 343. This provides that on imposing a finite sentence for culpable homicide (or aggravated violence) a court may prohibit parole until the expiry of a specified period of up to two-thirds of the sentence or ten years, whichever is the lesser. This would override the usual rule permitting parole after half the sentence, or seven years when the sentence is for 14 years or more.[35] The maximum impact of this would be three years (when the sentence is 14 years or more). If the courts are to be given some further control on the time to be served, this is a modest proposal. It is also remarkable that while it is thus proposed that the judges have a discretion to limit or bar parole for culpable homicide or aggravated violence, it is also proposed that section 93(3) of the Criminal Justice Act 1985 (as amended in 1987) should continue to automatically preclude parole for those sentenced to more than two years for a variety of lesser violent offences (including attempted culpable homicide and endangering with intent).[36]

IV MANSLAUGHTER AND THE RELEVANCE OF HARM

Under present law a person commits manslaughter (punishable by a maximum of life imprisonment) if he or she causes the death of another by an unlawful act, which includes any offence which any reasonable person would know was likely to cause some injury to another.[37] It may also be manslaughter if a person causes another's death by omitting to perform a duty recognised by the criminal law, the most important instances being those where a person is in charge of or responsible for a dangerous thing or activity. In most of these cases the present New Zealand law is that mere negligence is sufficient fault, although gross negligence or "recklessness" is required at common law.[38] A person acquitted of murder because of absence of murderous intent is almost always guilty of the lesser included offence of manslaughter, and in practice this is the main use of the offence.

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34 Compare Young and Atkins, above n 29, 96-97; Hall, above n 3, 333-334; it may also be doubted whether it would be wise to suggest that some broad categories of killing are presumptively less heinous than others (eg unpremeditated domestic killings): compare *R* v *Armstrong* (1982) 29 SASR 196; *R* v *Stewart* (1984) 35 SASR 477; and *R* v *Wheeldon* (1978) 19 ACTR 10.

35 Criminal Justice Act 1985, s93(1); but it would not prevent a member of the Parole Board requiring parole to be considered at any time: clauses 346, 347.

36 See clause 344.

37 *R* v *Church* [1966] 1 QB 59; *DPP* v *Newbury* [1977] AC 500; notwithstanding occasional doubts it seems clear that test must be met in NZ: *R* v *Grant* [1966] NZLR 968; but more restrictive approaches in Australian cases have not been developed here: compare *R* v *Fleeting* (No 1) [1977] 1 NZLR 343, 346.

38 *R* v *Storey* [1931] NZLR 417; for the Common Law see, eg *R* v *Bateman* (1925) 19 Cr App R 8; *R* v *Seymour* [1983] 2 AC 493.

When there has been personal violence but death has not resulted, then, apart from attempted murder, the attacker may be guilty of one or more of a number of offences, liability depending largely on the harm caused, and the degree of fault: in particular, wounding or injuring with intent, or recklessly injuring by an unlawful act, or assault (which does not require any harmful result).[39] Deliberately and unlawfully endangering the life, safety or health of another is criminal nuisance, although prosecutions for this are rare.[40]

In this context, chance or luck may play a significant part in the determination of criminal liability. Thus, manslaughter may be committed when a relatively minor offence causes death, although this may not have been an obvious risk. Conversely, dangerous and grossly negligent conduct may involve little or no liability when neither death nor injury results, although this may be a matter of chance. For example, the potential victim may adroitly avoid the blow, or there may happen to be available a surgeon who prevents death.

The Criminal Law Reform Committee thought that this was illogical, and that existing sanctions for non-fatal gross negligence were "quite inadequate". It proposed that the seriousness of an offence should depend only on the degree of danger created and the degree of fault on the part of the actor. Resulting harm (if any) might be cogent evidence of the degree of risk, but it should not be an element of the offence, nor (it is implicit) should it be relevant to penalty.[41] It therefore recommended two new offences to replace manslaughter by an unlawful act or omission, offences of wounding and injuring, endangering by neglect and criminal nuisance.

The Bill gives effect to this in clauses 130 and 132. These provide for "conduct offences" which are committed regardless of whether death or any harm results, liability varying according to the degree of danger and the degree of fault.

In summary, under clause 130 an act or omission is punishable by up to 14 years if the offender intended to cause another serious bodily harm, or knew this was likely and was reckless. The express requirement of knowledge as well as recklessness departs from the Committee's assumption that in this context recklessness properly includes gross negligence, but is consistent with more recent New Zealand case law.[42]

Clause 132 creates two less serious offences. The first carries a maximum of five years and requires that the offender intended to injure, or recklessly or heedlessly caused the likelihood of injury, or danger to another's safety or health. Not only is no actual

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39 Crimes Act 1961, ss188-196.

40 Crimes Act 1961, s145.

41 Above n 1, paras 45, 48; the theory had been previously propounded by a member of the committee, Patricia Webb, see "To Let the Punishment Fit the Crime: A New Look" (1967) 2 NZULR 439.

42 Above n 1, para 54; compare *R* v *Harney* [1987] 2 NZLR 576; *R* v *Stephens* Unreported, 8 December 1983, High Court, Auckland Registry T91/83; *Smith* v *Police* (1988) 3 CRNZ 262.

harm required, but nor need the act be independently unlawful. Arguably, smoking where others may be will be an indictable offence.

It is a feature of this crime that "heedlessness" is sufficient fault. Clause 23 crudely defines this in terms of giving no thought to a risk which would be obvious to any reasonable person - that is, *Caldwell* recklessness.[43] But clause 132(2) further extends liability for harmless objective fault, by providing that negligent conduct which is likely to injure or endanger the safety or health of another is punishable by up to two years. However, "negligence" requires "a very serious deviation from the standard of care of a reasonable person" (clause 24). How this differs from "heedlessness" is problematic.

These offences replace involuntary manslaughter, offences of wounding and injuring, and criminal nuisance. When culpable homicide is charged, they will be lesser alternative offences (clause 269(2)). Indeed, if evidence of intoxication (voluntary or involuntary) raises a reasonable doubt as to whether the accused had the "mental element" required for culpable homicide the jury is to be required to convict of one of them (clause 269(3)). The Court of Appeal has left it open whether manslaughter is necessarily the inevitable verdict in such a case, and the High Court of Australia has held that it is not.[44] Under the Bill the jury could presumably acquit in respect of clause 130, applying the general rule that intoxication can negate intention, knowledge or recklessness (clause 29), but as a minimum the accused must be convicted under clause 132, on the theory of heedlessness or negligence, and involuntariness caused by intoxication will not exclude responsibility (clause 19(3)).

More needs to be said about the principle that the occurrence or non-occurrence of any harmful result is irrelevant. This theory is fundamental to the important crimes in clauses 130 and 132, although the Bill is thoroughly inconsistent in implementing it. For example, generally attempts will continue to be punishable by half the maximum for the full offence (clause 66), and attempted culpable homicide by up to 14 years rather than life (clause 125). But chance may frustrate an attempt just as it may affect the outcome of negligent conduct. Further, and extraordinarily, clause 131 punishes endangering with intent to facilitate crime, but it is an essential element that there be actual wounding, injuring or incapacitation. There appears to have been no indication that it is proposed to amend the Transport Act 1962, by getting rid of offences of injuring or killing by careless, dangerous, reckless or alcohol impaired driving. The theory would require this, but it will be no surprise if it does not happen. Further examples abound. It is perhaps sufficient to add references to aggravated violence, which requires the causing of serious bodily harm (clause 148); intentional or reckless property damage (clause 217); and theft, where failure to get as much as one hoped for will continue to mitigate (clause 182).

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43 *R* v *Caldwell* [1982] AC 341; the Bill appears to affirm the lamentable principle in *Elliott* v *C* (*a minor*) [1983] 2 All ER 1005, but apparently exculpates a person who unreasonably believed there was no risk.

44 *R* v *Grice* [1975] 1 NZLR 760, 766-767; *R* v *Martin* (1984) 51 ALR 540; compare explanatory note, p xxvi.

Apart from the objection of inconsistency, there are objections in principle to the view that the possible and actual penalty in any particular case should depend only on the degree of fault and the danger created, and not at all on what the consequences were. The purposes of punishment in the criminal law have never been confined to prevention, deterrence and reform. A further purpose - some would say the primary purpose - is to impose a penalty which is deserved and just, if not as an end in itself, then in order to maintain support and respect for the law, and the values which it embodies. At least two reasons may be offered to support the view that an assessment of what is deserved and just should include the consequences of conduct. One looks to the reaction of others to the event, the other to the appropriate reaction of the actor.

First, when serious harm has in fact resulted people generally react with much greater resentment, anger, outrage or alarm than when no harm, or little harm, is done. The courts should take account of this in deciding whether leniency is possible or severity required. Too great a departure from the attitude of the public, whether in favour of leniency or severity, will undermine support for the law, while leniency when little or no harm resulted will not significantly weaken the deterrent effect of a prohibition directed to the result which the law seeks to prevent.[45]

Second, the common intuition that punishment may justly vary according to the harm a person has caused seems to be supported by the fact that an actor's feelings of guilt and remorse will vary with it, and probably would not be appropriate at all if no harm is done. We ourselves - as reasonable people - would not regard it as just if, when we were subjected to punishment, no account was taken of the degree of harm caused, or the fact that no harm was caused.[46]

None of this suggests that there is anything wrong in the common practice of defining offences by reference to particular conduct and states of mind, without requiring any actual result,[47] or that there should not be an appropriately defined offence of endangering. Nor does it support the present width of the crime of manslaughter, which is excessive because of the inadequate degree of fault which it requires. But the above considerations do amply support the conclusion that the gravity of an offence is properly, and perhaps inevitably, regarded as varying according to the results of an offender's conduct.

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45 Stephen, *A History of the Criminal Law of England* (1883) Vol III, 311; JC Smith, "The Element of Chance in Criminal Liability" [1971] Crim LR 63, 71; JC Smith, above n 31, 17; Smith and Hogan, *Criminal Law* (6 ed 1988) 8-9; Glanville Williams, *Textbook of Criminal Law* (2 ed 1983) 405; compare Hart, *Punishment and Responsibility* (1968) 131.

46 George Fletcher, *Rethinking Criminal Law* (1978) 482-483; James Brady, "Punishing Attempts" (1980) 63 The Monist 246, 255-256; and for the thesis that "outcome responsibility" is the basic form of responsibility in any society, see Tony Honore, "Responsibility and Luck" (1988) 104 LQR 530.

47 Compare Andrew Ashworth, "Defining Criminal Offences Without Harm" in PF Smith (ed) *Criminal Law: Essays in Honour of JC Smith* (1988) 7.

It can hardly be doubted that the judges will continue to recognise this in sentencing, an approach which is implicitly affirmed by section 8 of the Victims of Offences Act 1987, although this is entirely inconsistent with the theory which underlies clauses 130 and 132. But differentiation in sentencing is not enough. This part of the Bill deals with two of the primary concerns of the criminal law: the killing and injuring of human beings or, if you will, personal and bodily integrity. These harms are of such central importance that they should be part of the definition of the major offences. To define these under the pretence that in the absence of murderous intent results do not matter is, I suggest, unrealistic and unacceptable.

I will conclude this discussion by briefly mentioning two or three further objections to clauses 130 and 132. First, the creation of offences which can be committed recklessly, heedlessly, or by gross negligence, by conduct which might not be otherwise unlawful, and which might not have caused any harm whatever, is a considerable expansion of the criminal law. It is an expansion for which there is no apparent need, and for which there has been no demand (apart from the claim by the Criminal Law Reform Committee that the penalties for non-fatal gross negligence are inadequate). Second, the unnecessary nature of this expansion of liability will surely be confirmed by non-enforcement. When no harm has in fact occurred it will be rare for these offences to be prosecuted, even if they could be proved. In most cases judges and juries will be required to assess liability for so-called "endangering" when confronted by photographs and other evidence of corpses and grievous wounds, plus potentially refined disputes as to mens rea. And this last point prompts doubts as to whether the practical operation of the law is going to be simplified by these proposals. At present, if an accused is found not guilty of murder simply because of possible lack of murderous intent, the conclusion that nevertheless manslaughter has been proved will usually follow almost as a matter of course. But under the scheme in the Bill there may be quite straightforward cases, perhaps arising from beatings, stabbings, or even shootings, where the jury will be required to move from culpable homicide to consider whether the accused was guilty of endangering under clause 130, or the lesser offence under clause 132. This exercise will involve a tour of the various mental elements used in these clauses, and defined elsewhere in the Code. Even when there is just one accused a quite simple case may well become tangled; and the possibly unavoidable difficulties which can arise when there are several parties, with possibly varying degrees of guilt, will be aggravated.

V CONCLUSION

I have said enough to reveal a lack of enthusiasm for much of this part of the Bill. Perhaps some will think my views are so conservative as to be shocking. I do not apologise. I do not think that anything like a sufficient case has been made for depriving an accused of the long established right to a jury verdict on the question of provocation. While it is strongly arguable that the mandatory sentence for murder should be abandoned, it remains to be seen what practical effect this will have in the great majority of non-provocation cases. There should be no obscuring the gravity of murder, in particular by identifying it by the legalistic euphemism "culpable homicide". When people are unlawfully killed or badly hurt this does aggravate the offence, and the law should say so.