

2011

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**Standing Committee on Justice and Community Safety
Crimes (Murder) Amendment Bill 2008**

GOVERNMENT RESPONSE

May 2011

Presented by
Attorney General
Simon Corbell MLA

Introduction

The Crimes (Murder) Amendment Bill 2008 (the Bill) was introduced in the Legislative Assembly in December 2008. The Bill proposed to amend the fault element for the offence of murder to include intent to cause serious harm.

In February 2009 the Assembly agreed in-principle to the Bill but voted during the detail stage to refer it to the Standing Committee on Justice and Community Safety (the Committee) to inquire into the Bill and report to the Assembly.

The Committee tabled the Inquiry into the Crimes (Murder) Amendment Bill 2008 Report 2 in August 2009. The Report made five recommendations. Recommendation 5 related directly to the Bill but recommendations 1-4 were broader in scope.

As the Committee had reported, the Legislative Assembly proceeded to the next stage of the Bill in accordance with Standing Order 176. In order to assist the Assembly to consider the Bill, the Government tabled a response addressing recommendation 5 of the report which is provided at Attachment 1. The Assembly proceeded to pass the Bill which commenced on 14 December 2009.

This response will address each of the outstanding recommendations in turn.

Recommendation 1

The Committee recommends that the ACT Law Reform Advisory Council be restructured and provided with sufficient resources to enable it to be a transparent and participatory body for the consideration of significant law reform proposals. The Council should be required to make publicly available its law reform consultation documents and reports.

The Government does not agree with this recommendation.

The ACT Law Reform Advisory Council (LRAC) was established in 2009 by the Attorney General. LRAC is a non-statutory advisory body which provides expert advice and recommendations on matters referred to it by the Attorney General. It consists of a wide panel of expert members from a variety of law related fields who are appointed for up to three years. All members of LRAC provide their time on a voluntary, unpaid basis.

LRAC is operated under the terms of a partnership agreement between the ACT Government and the Australian National University College of Law (ANU), with the provision of funds, resources, infrastructure and staff being shared. Additional expertise is provided by academic staff at the ANU.

The Government considers that the ACT is fortunate to have so many eminent members of the legal and other relevant professions prepared to give of their time and expertise. This enables the ACT to access expertise on difficult matters of law reform within financial constraints.

The Committee's recommendation effectively seeks to establish a Law Reform Commission on a par with other Australian jurisdictions, such as New South Wales and Victoria. The recommendation takes no account of the difference in available resources between those jurisdictions and the ACT. It is notable that the ACT had a Law Reform Commission in the recent past. After careful consideration this was discontinued in 2005 as the Government was unable to commit sufficient resources.

The stated rationale of the Committee in making this recommendation was the desirability of having such an important area of law fully and transparently considered.

The Government considered reform in this area carefully and at length. The 2008 ACT Labor election commitment arose from a need to modernise the offence of murder in the Territory to increase consistency with the other States and Territories. Prior to any legislation being tabled in the Legislative Assembly, key stakeholders were invited to comment on the Government's proposal. In addition, the Government's reasoning for the amendment is clearly set out in: the Explanatory Statement to the Bill; speeches recorded in Hansard; and the Government Response to Recommendation 5.

Recommendation 2

The Committee recommends that the Attorney General place on the agenda of the Standing Committee of Attorneys-General the need for uniformity in murder offence provisions, given the current differences across Australia, and the perception that there is uniformity.

The Government agrees in principle with this recommendation as the uniformity of murder offence provisions is already, in effect, on the Standing Committee of Attorneys-General (SCAG) agenda.

In 1990, SCAG placed the development of a model criminal code on its agenda and established a Committee, now known as the Model Criminal Law Officers Committee (MCLOC), to work on this concept. The work of MCLOC has produced the Model Criminal Code which aims to provide a basis for the codification of consistent criminal laws across Australia. This formed the basis for the *Criminal Code 1995* (Cwlth) and led to enactment of the *Criminal Code 2002* (ACT). The Model Criminal Code is set out in chapters, with Chapters 1 and 2 providing the mechanical provisions of the Code and the general principles of criminal responsibility. The other chapters of the *Criminal Code* contain offences in various subject areas. Chapter 5 relates to

Offences Against the Person which in turn is divided into fatal offences, non-fatal offences and sexual offences.

The section of Chapter 5 of the Model Criminal Code relating to fatal offences has yet to be completed as the work of MCLOC in this area has been somewhat delayed. However, any development of model criminal laws for fatal offences will inevitably consider the issues of the physical and mental elements as well as the penalties.

The Attorney General is aware of the delay in progressing the Model Criminal Code in relation to fatal offences and will keep the situation under review.

While, at present, there are no Model Criminal Code provisions relating to murder, there is already a substantial degree of uniformity in murder offence provisions. All Australian jurisdictions (with the exception of the Commonwealth) now have, as a mental element for the offence of murder, an intent that falls short of intent to kill or reckless indifference as to death. As discussed in the Government Response to Recommendation 5 (Attachment 1), the various drafting methodologies used in the States and Territories have affected the precise framing of the offence. The introduction of section 12(1)(c) of the *Crimes Act 1900* by the bill to which the Committee Report relates increased the level of uniformity in the murder provisions between the States and Territories.

It should be noted that, strictly, it is not SCAG practice for individual Attorneys-General to place issues on the SCAG agenda. SCAG provides a forum for Attorneys-General to discuss and progress matters of mutual interest. It seeks to achieve uniform or harmonised action within the portfolio responsibilities of its members. In accordance with the *Procedures for the Standing Committee of Attorneys-General 2009*, the proper process is for a request to be made to the National Justice Chief Executive Officers who must agree for the matter to be put forward for inclusion on the agenda. The Attorneys-General must agree in turn that the matter should be placed on the SCAG work agenda as requiring national cooperation.

Recommendation 3

The Committee recommends that the maximum sentence for manslaughter be increased to 25 years imprisonment, and to 31 years for aggravated manslaughter offences.

The Government agrees to consider the penalty for manslaughter as part of the work of SCAG in relation to criminal law as discussed in the response to recommendation 2. However, the Government does not consider it appropriate to review the penalty for manslaughter as a separate issue for the reasons given below.

The basis for this recommendation is contained in 3.24 of the Report which states that submissions to the Committee had expressed concern that offenders whose crime had resulted in a death were not being appropriately sentenced.

In fact the written submissions and oral evidence presented to the Committee were overwhelmingly in respect of the proposed new mental element for murder. Where comment was made in relation to sentencing, the context was concern that people who were being convicted of manslaughter in the ACT in circumstances where a conviction for murder might well have been the outcome in other States and Territories and consequently being sentenced more leniently than would be the case following a murder conviction. Only one witness clearly expressed the view that the penalty for manslaughter was, of itself, too low¹.

The ACT's sentencing framework is based on the maximum sentence for an offence being a reflection of seriousness. This guides the judiciary about the relative seriousness of an offence compared with other criminal offences. Imposition of the maximum penalty is reserved for the most serious offending within the ambit of that offence. Manslaughter covers a very wide range of

¹ Mr Bernard Collaery, Transcript of Evidence 29 July 2009, *Standing Committee on Justice and Community Safety Reference: Crimes (Murder) Amendment Bill 2008*.

offending behaviour resulting in death such as a single punch to more prolonged attacks involving the use of a weapon. It is therefore unsurprising that sentencing can vary from a non-custodial sentence to lengthy terms of imprisonment. It is pertinent that the United Kingdom Court of Appeal has commented that sentences for involuntary manslaughter cover the widest band of sentence of any offence.² The Queensland Court of Appeal has also commented that:

'manslaughter is, above all, an offence in which particular circumstances vary so much that it is difficult, and perhaps undesirable, to try to generalise in advance about the appropriate sentence to be imposed'.³

The maximum penalty is only one factor that guides the judiciary in determining the actual sentence imposed. The *Crimes (Sentencing) Act 2005* sets out a number of factors that must be considered and balanced in reaching a final sentence. In addition, judges use case law, including cases from other States and Territories, to provide guidance.

There is no indication that penalties imposed in the ACT for manslaughter are out of step with case law across Australia. A good gauge is the frequency of appeals against sentence brought by the Crown under the *Supreme Court Act 1933*. It is notable that in giving evidence to the Committee, the ACT Director of Public Prosecutions stated:

"Since I have been DPP, there have not been any occasions to consider murder or manslaughter sentences....".⁴

It is questionable whether increasing the penalty by 5 years would necessarily result in an increase in terms of imprisonment. It is relevant to note that in New South Wales where the maximum penalty for manslaughter is 25 years⁵ the median sentence of imprisonment for that offence between 1994 and 2001

² *R v Boyer*, 3 Cr.App.R.(S.) 35

³ *Whiting, Ex parte Attorney-General* [1995] 2 Qd R 199

⁴ Transcript of Evidence 22 July 2009, *Standing Committee on Justice and Community Safety Reference: Crimes (Murder) Amendment Bill 2008*

⁵ Section 24 *Crimes Act 1900* (NSW)

was 7 years⁶. In Victoria where the maximum sentence is 20 years⁷, in line with the ACT, the median sentence of imprisonment for manslaughter 2003-2008 was also 7 years⁸.

In addition, without clear justification, it is generally undesirable to amend a penalty for a single offence in isolation. The penalty framework should be logical, consistent and coherent and so alteration of penalties needs to take into account the relationship between offences. For example, there is a clear relationship between manslaughter and other offences against the person such as assault occasioning grievous bodily harm. If the penalty for manslaughter were to be increased, consideration would need to be given to increasing penalties for offences where serious injury is caused. This, in turn would lead to consideration of penalty amendment for less serious offences against the person. The danger of amending a single penalty is that it could lead to that offence being out of step with the overall penalty scheme.

While the Government does not rule out increasing the maximum sentence for manslaughter in the future, it is of the view that this would be better considered as part of the wider exercise of codification of fatal offences. This will ensure that the penalty structure remains logical and coherent.

Recommendation 4

The Committee recommends that the ACT Government consider the need to undertake a general review of sentencing in the ACT.

The Government agrees in part with this recommendation.

The basis for this recommendation appears to be what the Committee expresses as a 'level of disquiet' in relation to sentencing⁹. As commented in the response to recommendation 3 any such disquiet was confined, with one

⁶ Judicial Commission of New South Wales, Research Monograph 23 'Sentenced Homicides in New South Wales 1994-2001'.

⁷ Section 5 *Crimes Act 1958* (Vic)

⁸ Victorian Sentencing Advisory Council, *Sentencing Snapshot June 2009 No 85, Manslaughter*

⁹ Par 3.25 *Standing Committee on Justice and Community Safety 'Inquiry into the Crimes (Murder) Amendment Bill 2008, Report 2 August 2009.*

exception, to the fact that sentences were being imposed for manslaughter as opposed to murder. That is, offenders were being sentenced for an offence which did not reflect the level of culpability involved.

This position was summed up by the Attorney General in giving evidence to the Committee:

*"I am not saying that the existing sentencing options are insufficient as they relate to these particular offences. What I am saying is that there are some matters which currently do not fall within the appropriate sanction..."*¹⁰

The appropriate forum to address any question of adequacy of sentence is through the courts by way of a prosecution appeal against sentence¹¹. In giving evidence to the Committee, this was supported by the Director of Public Prosecutions. Further, he expressed the view that there was plenty of flexibility available to sentencing judges in relation to sentences for both manslaughter and murder.

In more general terms the legal framework for sentencing in the ACT has undergone a relatively recent overhaul. The Government's 2001 election platform stated that an incoming Labor Government would review sentencing procedures and the criteria used by the judiciary when sentencing. In 2002 a full sentencing review was announced and shortly after a Committee was formed to provide direction and advice. The Committee members were drawn from a wide range of backgrounds including legal professionals, service providers, statutory office-holders and academics. An issues paper was published in 2002 for public consultation and further consultation occurred with key stakeholders. In August 2004, the Government tabled two exposure drafts of sentencing reform Bills for community consultation and further consultation followed on from the submissions received.

The review led to the enactment of the following statutes:

¹⁰ Transcript of Evidence 22 July 2009, *Standing Committee on Justice and Community Safety Reference: Crimes (Murder) Amendment Bill 2008*

¹¹ Section 37O(7) *Supreme Court Act 1933*

- *Crimes (Restorative Justice) Act 2004*
- *Crimes (Sentencing) Act 2005*
- *Crimes (Sentence Administration) Act 2005*

The *Crimes (Sentencing) Act 2005* sets out sentencing methodology informing court decisions. The *Crimes (Sentence Administration) Act 2005* sets out the legal machinery for the administration of all sentences. Together, these two Acts replaced 12 different Acts and several subordinate laws dealing with sentencing and sentence administration.

Following on from this process the Government also introduced two further sentencing-related statutes:

- *Corrections Management Act 2007*
- *Children and Young People Act 2008*

In addition, the correctional facilities at the Bimberi Youth Justice Centre and the Alexander Maconochie Centre opened in 2008 and 2009 respectively. This is therefore only the third year in which both the law and infrastructure have been fully operational.

The Government considers a general review of sentencing laws in the current term of government would be premature and unnecessary given that a full sentencing review was conducted in 2002-4. However, the Government is currently considering mechanisms to improve the sentencing data that is available and anticipates that further work will be undertaken in this area. To this extent, the Government agrees with recommendation 4.

2009

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**Standing Committee on Justice and Community Safety of the Seventh
Legislative Assembly
Crimes (Murder) Amendment Bill 2008**

GOVERNMENT RESPONSE

September 2009

Circulated by authority of the
Attorney General
Simon Corbell MLA

Executive Summary

The Attorney General introduced the Crimes (Murder) Amendment Bill 2008 (the Bill) to the Assembly in the December 2008 sittings. In February 2009 the Assembly agreed in-principle to the Bill but referred the Bill to the Standing Committee on Justice and Community Safety to inquire into the Bill.

Recommendation five of the Committee's report recommends amending the Bill by replacing the words in clause 4 'intending to cause serious harm to any person' with 'intending to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person', and by omitting clause 5.

The Government does not agree with this recommendation and advocates the enactment of the Bill in its current form.

The Government will respond to the Committee's report in full in due course. This response addresses recommendation 5 of the Committee's report and sets out the reasons why the Government does not support the Committee's recommendation.

Part 1 of the response explains the history of the offence of murder and why the Committee's recommendation to transplant words from the Western Australian jurisdiction into the ACT statute book would inherently create problems of legal interpretation.

The Government is also concerned that the Western Australian provision is untested. Whereas the formulation used by the Government has been tested in the Northern Territory in the case of *Ladd v The Queen*.

Part 2 examines the issue of correspondence of the elements of murder with culpability. Part 2 advocates that in reality there are morally culpable killings equivalent to murder when a person dies because of an intent to cause serious harm. This part discusses the reports from the United Kingdom, Ireland and Western Australia on this issue.

Part 3 provides summaries of cases involving conviction for murder on the basis of intent to cause serious harm. The facts of the cases demonstrate why intent to cause

serious harm is an appropriate threshold for the offence of murder. The cases also show that it is a matter for the jury or judge alone to ascertain if the evidence of intent warrants a conviction for the offence or not.

Background

A commitment made in the ACT Labor 2008 Election Platform was to amend the offence of murder in the Territory to include a traditional fault element that contemplates a person who causes the death of another person while intending to inflict grievous bodily harm on their victim.

The current offence of murder contained in the *Crimes Act 1900*, section 12(1), states:

A person commits murder if he or she causes the death of another person—

(a) intending to cause the death of any person; or

(b) with reckless indifference to the probability of causing the death of any person.

The Attorney General introduced the Crimes (Murder) Amendment Bill 2008 (the Bill) to the Assembly in the December 2008 sittings.

The Government's Bill has the effect of changing the offence to read:

(1) A person commits murder if he or she causes the death of another person—

(a) intending to cause the death of any person; or

(b) with reckless indifference to the probability of causing the death of any person; or

(c) intending to cause serious harm to any person.

The new provision defines ‘serious harm’ as being the same as the *Criminal Code 2002* dictionary:

serious harm means any harm (including the cumulative effect of more than 1 harm) that—

- (a) endangers, or is likely to endanger, human life; or
- (b) is, or is likely to be, significant and longstanding.

In-principle debate on the Bill was held on 10 February 2009. The Assembly agreed in-principle to the Bill but voted during detail stage to refer the Bill to the Standing Committee on Justice and Community Safety to inquire into the Bill and report to the Assembly. The Assembly resolved that the report should be provided by the last sitting day of August.

The Committee’s Report was duly provided. The Committee made five recommendations.

The Government will respond to the Committee’s report in full in due course. This response is to address recommendation 5 of the Committee’s report, which is specifically about the terms of the Crimes (Murder) Amendment Bill to be debated by the Assembly.

Recommendation 5 reads:

3.39 The Committee recommends that the Attorney-General consider amending the Bill by replacing the words in clause 4 ‘intending to cause serious harm to any person’ with ‘intending to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person’, and by omitting clause 5.

Part 1: The offence of murder

The High Court affirmed the common law offence of murder as follows:

. . . Murder is unlawful homicide with malice aforethought. Malice aforethought means . . . a) An intention to cause the death of, or grievous

bodily harm to, any person, whether such person is the person actually killed or not; b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused.¹²

The archaic terms of the common law have been made into a number of statutes in Australia. Each statute is based upon a different method of drafting the same variations of the offence. In Australia there are now four methodologies informing the construction of criminal offences, including of murder: common law (ancient); statutory compilation of common law (1880–1900s); Griffith’s Code (1899 onwards); the Commonwealth Code (1995 onwards).

Victoria and South Australia rely on the common law to inform the offence of Murder. Queensland, Western Australia, Northern Territory and Tasmania adopted statutes based upon Griffith’s Code. NSW and the ACT used a statutory compilation of the common law in the *Crimes Act 1900*. The Commonwealth uses the Commonwealth Code. The ACT and Northern Territory are adopting the Commonwealth Code incrementally.

Currently two methodologies work side by side in the ACT: the statutory version of common law from 1900 and the Commonwealth Code methodology established in 1995 and commenced in the ACT in 2002 by the *Criminal Code 2002*.

Just prior to full self government, the Commonwealth amended the ACT’s Crimes Act 1900 to remove the element of murder involving intent to cause grievous bodily harm.¹³

Consequently, the offence of murder is currently contained in *Crimes Act 1900*, section 12(1), which states:

A person commits murder if he or she causes the death of another person—
(a) intending to cause the death of any person; or

¹² *The Queen v Crabbe* (1985) 156 CLR 464 at 467.

¹³ *Crimes (Amendment) Act (No 2.) 1990*, notified on 23 May 1990.

(b) with reckless indifference to the probability of causing the death of any person.

Although drafted using different historical methodologies, every jurisdiction apart from Western Australia and the Commonwealth, has a form of murder that is informed by the original common law of intent to cause grievous bodily harm.

Consequently, cases tried in the ACT that meet the factual threshold of a death as a consequence of intending to cause grievous bodily harm are tried on the basis of manslaughter rather than murder as they would be in other jurisdictions.

Risks of recommendation 5

The Committee's recommendation borrows from recommendation 7 of the Western Australian Law Reform Commission report on the Review of the Law of Homicide (2007) (WA Report). The WA Report's recommendation is a re-configuration of the existing words in section 279 of the WA *Criminal Code*.

The Committee's recommendation to insert specific words from WA is fundamentally flawed for these reasons:

- It would require the ACT's legal system to start from scratch with the concept of bodily injury that has no modern legal history in the ACT;
- Transplanting WA words into the ACT statute book would inherently give the words a different meaning from the WA context, while the ACT statute book contains none of the terminology or definitions used in the WA Code;
- The concept would be applied and interpreted in isolation from WA case law;
- The new WA provision was only made in 2008. No cases testing the new law have been decided.

The imposition of a new term, 'bodily injury' in the ACT jurisdiction would likely mean that the Courts would have to establish new jurisprudence on the term. It is also likely that defence and prosecution practitioners will need to develop significant submissions on the term for each new case before ACT Courts.

The term ‘bodily injury’ has no statutory definition in WA. The term is informed by WA case law. There is no statutory method to apply the WA jurisprudence to ACT law. Nor is there a way of articulating the WA law in a manner consistent with ACT law without using the language already contemplated in the Government’s Bill.

The term ‘bodily injury’ has jurisprudence in WA and other states and NT that use the Griffith’s Criminal Code, but not in the ACT.

The WA Criminal Code has its particular provisions dealing with issues such as the meaning of intent and motive, the notion of acts and omissions, insanity, intoxication etc. While these provisions are similar to the concepts in the ACT’s Criminal Code, they are not the same. Transplanting the WA words into the ACT statute book would inherently give the words a different meaning from the WA context.

The WA Parliament passed the new law in 2008. The WA Office of the Director of Public Prosecutions advises that at the time this response was prepared no cases have been tried that test the new provision.

The ACT Director of Public Prosecutions is concerned about the Committee’s intent to use the WA words. In an advice to the Attorney General the DPP noted that “WA is a Griffith Code State. It shares no historical roots with the ACT criminal law, and is different from the model criminal code of the Commonwealth which the ACT is adopting. It does not seem like good policy to pluck one aspect of the WA law in isolation . . . and place it in a foreign context in the ACT”.

The Committee also recommends omitting clause 5 of the Government’s Bill, which is the statutory definition of ‘serious harm’. This implies that the Committee is recommending that the meaning of ‘bodily injury’ in its proposed amendment would be informed by case law, rather than a statutory definition.

Omitting the statutory definition and using a term foreign to ACT jurisprudence will run the risk of making it very difficult for the Court to settle an appropriate meaning for bodily injury.

At common law in Australia, Supreme Courts of States and Territories pay great deference to each other’s decisions. However, the starting point of statute law is the statute itself and judicial interpretation of statutes. ACT Supreme Court recognition

of WA Supreme Court jurisprudence would be difficult in the absence of the same or very similar legislation being considered.

Northern Territory case law

As mentioned above, the Northern Territory (NT) is adopting the Commonwealth Criminal Code, as is the ACT. In the NT provisions dealing with murder came into effect on 20 December 2006. ‘Serious harm’ in the NT is defined in almost exact terms as the definition of ‘serious harm’ in the Government’s Bill.

In March 2009 the NT Court of Criminal Appeal heard the case of *Ladd v The Queen*,¹⁴ (*Ladd*) which was an appeal involving murder on the basis of intent to cause serious harm.

In *Ladd*, the appellant made submissions that comprehensively challenged the new offence and in particular murder on the basis of intent to cause serious harm.

The Court found that the definition of ‘serious harm’ had the same practical meaning as the previous iteration of the NT law. The Court also decided that the new offence of murder if the person “intends to cause the death or serious harm” works along the same lines as the common law offence.

The Court rejected a contention that the offence must be interpreted in a manner that required some advertence for the risk of death on behalf of the accused.¹⁵ The Court determined the legislature had intended the offence to apply in the same way as the previous offence, given the history and construction of the offence.¹⁶

Critically, the Court also rejected the contention that the use of words such as ‘endanger’ and ‘likely’ in the definition of serious harm meant that the prosecution would have to prove that accused knew that the conduct would endanger, or was likely to endanger the deceased life. The Court said:

... there is no basis in the legislation or the history of the law with respect to intention to cause grievous or serious harm to warrant the importation of a requirement of such knowledge. It is the intention to cause the harm, not

¹⁴ [2009] NTCCA 6.

¹⁵ Ibid, at para 95.

knowledge as to the likelihood or otherwise of success that has been and is now the basis of the necessary mental or fault element.¹⁷

The *Ladd* case provides strong evidence that the formulation in the Government's Bill is sound and applicable in the ACT. Given that the NT uses the Commonwealth Code methodology, using the NT formulation, as the Government has done, makes far more sense than using material from another jurisdiction.

Committee's approach too selective

The Committee's report makes a lot of the homicide report by the Law Reform Commission of Western Australia (the WA Report). The Committee sets aside the UK report, which in fact supports intention to cause grievous bodily harm as within the ambit of murder.¹⁸

In short, the Committee has been very narrow and selective in how it presents the deliberations and findings of the WA Report. The Committee's selection gives the impression that intent to cause grievous bodily harm as a threshold for murder is regarded as inherently wrong. However, the WA Report itself noted that an intention to kill and an intention to cause an injury likely to endanger life are morally equivalent. What the Commission advocated against was an "intention to cause a permanent injury to health" as a mental element of murder.¹⁹

The Committee could have expressed its agreement with the WA Report's policy view on the issue, which is set out in recommendation 4 of the WA Report. However, the Committee took words from the proposed draft law at recommendation 7. Substituting these words into the Government's Bill and omitting the definitional clause from the Bill would create an unworkable hybrid for the ACT.

The crux of the Committee's policy view appears to be in para 3.36, p36:

3.36 The inclusion of the element that attaches an offender's action in causing death to its likelihood of endangering the life of another provides

¹⁶ Ibid at para 97.

¹⁷ Ibid at para 118.

¹⁸ United Kingdom Law Commission, Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide, Law Com no 304, 28 November 2006, pp 32–36.

more certainty to the definition of murder. It is clearer and does not erode away the significance of the murder charge.

The Committee could have recommended this policy to the Government and the Assembly to allow the Government and the Assembly to consider relevant drafting to achieve the Committee's policy intent.

Part 2: Murder and correspondence with culpability

Homicides occur in society in a variety of circumstances — however society expects the criminal law to reserve the label of murder for the most morally heinous and culpable homicides.

The label of murder “has a very symbolic and declaratory effect, and serves to convey the seriousness of the particular killing and to indicate to society the nature and quality of the offender’s crime.”²⁰ This is reflected in society by the unique stigma and condemnation that is attached to murder and in the Criminal Justice System by the consequences that flow from a murder conviction, including life imprisonment. People who are convicted of manslaughter are considered both in society and the law as less morally culpable and therefore less blameworthy than those convicted of murder.²¹

“The commission of the crime of murder contravenes not only the law, but also deeply held societal values about the sanctity of human life. Murder is regarded by the community as a crime against humanity rather than the mere infraction of a legal code.”²²

The reservation of the murder label for the most morally culpable homicides also impacts on society’s perceptions of whether justice has been done. The label must

¹⁹ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007), pp 83, 84 and recommendation 4.

²⁰ Law Reform Commission of Ireland *Consultation Paper on Homicide: The mental element in murder* (LRC CP 17-2001) at para 9.

²¹ See Mitchell “Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide” [2000] CRIM LR 814. Surveys conducted in England.

²² Brown, David; Farrier, David, Egger, Sandra; and McNamara, Luke; *Brown, Farrier, Neal and Weisbrot’s Criminal Laws: materials and commentary on criminal law and process in New South Wales*; The Federation press; Sydney; 2001.
Brown, page 490

encompass the gravity of the behaviour. Mr John Hinchey, the Acting Victims of Crime Coordinator, Victims Support ACT believes that the families of victims may feel that a conviction for murder provides a greater sense of justice as opposed to a sentence for manslaughter. These families may think that justice is not done if the determination of their loved one's death in particular circumstances is regarded as manslaughter. In order to preserve public confidence in the criminal justice system this desire for justice must be recognised by the Criminal Justice System.²³

What culpability should be attributed to murder

The accused's state of mind is a fundamental criterion used by the criminal justice system and the community when drawing conclusions about the degree of moral culpability. In the context of murder the relevant state of mind or mental element is that of intent. The most obvious culpability is a pre-meditated intention to kill.

At common law culpability for murder includes:

- an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; and
- a person who engages in an act knowing that the act, which causes the death of someone, will probably cause the death of a person; and
- a person who engages in an act which kills someone, and is reckless towards the probability of causing the death of a person.

Naturally, there is debate on the scope of the mental element of murder.

Two views have developed.

The first view argues a murder conviction should be limited to intent to kill and should not be extended to include an intention to cause grievous bodily harm or other nuances of this concept which are codified in Australia.

This view is largely based on a literal and reified interpretation of the principle that the mental element of an offence should correspond with, or envisage, the harm

²³ J Hinchey, Acting Victims of Crime Coordinator, Victim Support ACT.

caused.²⁴ An intention to kill complies with this principle as it corresponds directly with the harm caused, namely death. Whereas when a killing occurs with the intent to cause serious injury the mental element does not neatly correspond with the harm caused.

Support for this view can be found in the English case of *R v Powerll*²⁵ when Lord Steyn stated that a murder conviction based on an intention to cause serious injury:

. . . does not correspond to the conduct leading to the charge, ie: the causing of death. A person is liable to conviction for a more serious crime than he foresaw or contemplated...the present definition of the mental element of murder results in defendants being classified as murderers who are not in truth murders.

Several law reform bodies, including the Victorian Law Reform Commission,²⁶ the Law Commission of England and Wales,²⁷ and the Law Reform Commission of Canada²⁸ also support the view that serious injury should not be a mental element for murder as it offends the correspondence principle.

Underlying this view is the belief that a person who kills intending to do serious injury is less morally culpable than a person who kills with an intention to kill.²⁹ Examples of injuries that are not life-threatening, but could be considered to be a serious injury, are frequently given to support this argument. For example if a person intentionally broke another's arm, and death ensued from unforeseen or unanticipated medical complications (*R v Cunningham* [1982] AC 566, 582 per Edmund-Davies LJ) and that such a person is not so morally culpable as to be labelled with a conviction for murder.³⁰

The alternative view, which is the Government's view, is that in reality there are morally culpable killings equivalent to murder when a person dies because of an intent to cause serious harm when death results.

²⁴ Ashworth A *Principles of Criminal Law*, Oxford, Clarendon Press 2nd ed, (1995) 261.

²⁵ [1997] 4 ALL ER 545.

²⁶ *Homocide* (Report No 40 1990-1991) at paragraphs 122-131.

²⁷ *Imputed Criminal Intent* (Director of Public Prosecutions v Smith) (1967) at paragraphs 15-17.

²⁸ *Recodifying Criminal Law* (Report 31 1987) at 57-58.

The critical issue is that is often set aside in the debate is the offence only arises if in fact the person died as a consequence of the act committed by an accused.

The Law Reform Commission of Ireland supports this view when it states that:

... in deliberately inflicting serious harm on another person the accused person crosses a moral threshold that demonstrates a sufficient disregard for life to justify a conviction for murder if death results.³¹

In reality without this form of intent it would be very difficult to establish a conviction for murder as an accused who in fact intended to kill could simply claim that they only intended to cause serious harm.³² The cases discussed in part 3 of this response demonstrate why in practice this element of murder is relevant and appropriate.

Furthermore, a literal approach to the correspondence principle ‘remains very much an ideal, if anything, rather than an accurate descriptive generalisation about crimes’.³³ This is supported by the fact that despite recommendations to remove serious injury as a mental element for murder, it remains with its different nuances, in all Australian jurisdictions except Western Australian and the ACT.

The Northern Territory, for example adopted the Commonwealth Code methodology in 2006, as did the ACT in 2002. The NT Government decided not to follow the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General recommendation to restrict the offence of murder to intent to kill.³⁴

Likewise, the United Kingdom (UK) Law Commission in its review of the law on murder, manslaughter and infanticide in England and Wales recommended that intent to cause serious harm should remain within the ambit of the offence of murder.³⁵ The Committee makes a reference to this report as supporting the notion that extending the

²⁹ Law Reform Commission of Ireland, *Homicide: The mental element of murder*, Consultation Paper No. 17 (2001) [4.083].

³⁰ See also the Law Reform of Victoria, *Homicide*, Report No 40 (1991) [124].

³¹ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report LRC 87 (2008) [2.66]

³² See for example *R v Winner* (1995) A Crim R 528 at 542.

³³ Horder J, ‘A critique of the correspondence principle in criminal law’ [1995] *Criminal Law Review* 759, 759.

³⁴ *Ladd v The Queen* [2009] NTCCA 6, at para 109.

³⁵ United Kingdom Law Commission, *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide*, Law Com no 304, 28 November 2006

definition of murder to include serious harm is unwarranted.³⁶ The Committee appears to have overlooked the recommendations contained in the body of the UK Law Commission Report at paragraphs 2.7 to 2.82 which recommends to the UK Government that serious harm should remain within the ambit of murder.

Considering the report as a whole, the Government's view is consistent with the policy approach of the Law Reform Commission of WA³⁷ although the Government differs with the WA LRC on the judgment about where to draw an appropriate line.

The WA Report determined that to reflect the reality of crimes there should be a "close match between the label attached to a crime such as murder and manslaughter and the nature and gravity of what the accused has done" rather than a precise match.³⁸

The Government's Bill aims to align the law of murder in the ACT with actual life experience. The use of the *Code* definition will ensure there is an appropriate match between the proposed new mental element as it provides greater certainty than the common law concept of 'grievous bodily harm'. The Government is of the view that the inclusion of the adjectives 'significant' and 'longstanding' provide greater qualification as to what type of injuries constitute serious harm.

The greatest protection against an inappropriate application of any offence is our judicial system, particularly the jury system.

It is the role of the Trier of fact in a criminal trial, either by a jury or judge alone, to determine on the evidence heard by trial what constitutes serious. The facts of the case would inform the definition of serious harm. When hearing and deciding a trial for murder, a court has to consider what a defendant says in their defence, and evidence led to support their defence, and what evidence is led that contradicts or undermines their defence. Intent is established on the basis of the facts decided by the court, not by attempting to read the mind of the defendant or hoping for a

³⁶ *Standing Committee on Legal Affairs Inquiry in the Crimes (Murder) Amendment Bill 2008* at para 1.5.

³⁷ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 46.

³⁸ See Horder above at 761.

substantiated confession. To this end a person's acts provide the most convincing evidence of intention.³⁹

Leaving the definition of serious harm as defined in the code will ensure that a conviction for murder by a jury or judge — as representatives of the community — is reserved for those cases that warrant such a conviction. It does not limit the court to finding an alternative of manslaughter or a finding of not guilty.

If the Legislative Assembly decides not include this mental element in its traditional scope, the Government is of the view that the ACT's murder law would not reflect contemporary community beliefs about which killings are so morally culpable as to be regarded as murder.

Part 3: The issue in practice

The Government's Bill has adopted the definition of 'serious harm' from the *Criminal Code* 2002 in preference to the common law 'grievous bodily harm' (GBH) used in the *Crimes Act 1900*.

As the Crimes Act definition of GBH is quite general and non-specific, there is a considerable body of common law findings in relation to what constitutes GBH. At common law, GBH has been defined as "really serious bodily injury"⁴⁰. All jurisdictions in Australia have similar definitions of GBH or serious harm in their respective legislation. It should be noted that these definitions of GBH are very similar to that contained in the Territory's Code.

In a trial, it is the jury that decides whether the actions of an accused amount to an intent to cause serious harm/grievous bodily harm, or kill the person, on the basis of the evidence presented.

International expert, Stanley Yeo, states that Australian common law recognises two heads of intentional murder found in English law: an intention to kill and an intention to cause grievous bodily harm.

³⁹ R v Winner (1995) A Crim R 528

⁴⁰ DPP v Smith [1961] (AC 290 at 334)

Under the second head:

. . . The accused must have intended to cause harm which the jury (and not the accused) considers to be heinous bodily harm. It is therefore immaterial that the accused believed that the harm he or she intended to cause did not amount to grievous bodily harm.⁴¹

It should be noted that murder and manslaughter are two descriptions of the offence of homicide. When murder is charged there is always an alternative verdict of manslaughter available to a jury.⁴²

The Committee's report gives the impression that people will be convicted on an unfair basis. However, a short exposition of leading cases examining the trial of murder on the basis of an intention to do grievous bodily harm demonstrates that this threshold of intent is appropriate when a person dies.

Winner

In *The Queen v Winner*⁴³ the appellant, having stolen a car, veered suddenly across two lanes of traffic and struck and killed a cyclist riding near the kerb. He then drove away. In a trial before a judge sitting without a jury, the appellant was convicted of murder. The prosecution relied upon eyewitness testimony of the car veering across the road, and upon the evidence of B, an acquaintance of the appellant. B stated that the appellant confessed that he had deliberately hit the cyclist and that the appellant had previously 'balked' cyclists.

At the trial, the appellant made an unsworn statement in which he claimed that he had trouble steering the car and that it had drifted to one side of the road. He denied previously baulking cyclists. The Crown evidence rebutted any suggestion that the stolen car had any mechanical faults which would have caused it to drift across the road. The appellant contended that the trial judge erred in failing to take into account similar fact evidence in support of the defence. He also contended that the judge

⁴¹ Yeo, Stanley; *Fault in Homicide – Murder and involuntary manslaughter in England, Australia and India*; The Federation Press; Sydney; 1997, p459

⁴² *Down* (1985) 3 NSWLR 312.

⁴³ (1995) 79 ACrimR 528

erred in his approach to the evidence of B. It was contended that the conviction was unsafe and unsatisfactory.

Court of Criminal Appeal New South Wales dismissed the appeal and held that the conviction of murder was not unsafe and unsatisfactory in the circumstances. The Court of Criminal Appeal found that the judge was entitled to infer the requisite intent for murder on the basis of the objective evidence alone. Acting Chief Justice Kirby found:

In fact, the effectiveness of the brakes of the vehicle had been sufficiently demonstrated by the way in which it had come to a halt at the lights shortly before the collision. Ireland J reviewed certain other evidence of a mechanic to the effect that there was a lot of free play in the steering wheel with no proper control of the car. This had been denied by the owner of the vehicle. Ireland J concluded:

The evidence of . . . four witnesses establishes beyond reasonable doubt that the steering gear of the Holden was functioning in a normal and effective manner on the night it collided with Benjamin Cox and I find there to be no deficiency in the steering of the Holden which was a factor in any way responsible for the Holden veering suddenly and sharply from the traffic lane adjacent to the median strip across the centre lane into the kerb-side lane where Benjamin Cox was riding his bicycle on the very edge of the bitumen where it adjoins the concrete gutter.⁴⁴

Because it is impossible for any court, judge or jury, to actually enter the mind of an accused person and search for his or her intent at the critical time, it is inescapable that the forensic process by which intent is judged (when it is denied) will address the objective facts from which an inference of intention may be derived. This is why it is often said that a person's acts may provide the most convincing evidence of intention. In *Richard III*, Shakespeare suggested that it is by acts that the observer straightway shall know the heart. So it is by acts that a court straightway may know the solution to the riddle of intention required by the criminal law. If it were

⁴⁴ (1995) 79 ACrimR 528, at 535.

otherwise intention, absent acknowledgment or reliable confession, could scarcely ever be proved.⁴⁵

The mind hesitates to accept a conclusion that a person driving a powerful and fast-moving motor vehicle would deliberately swerve across a lane of traffic, strike a cyclist with fatal or certainly grievous consequences, although he was a total stranger, and then depart without applying the brakes or even pausing for a moment. Such conduct is so callous that it seems unacceptable in humanity. Yet in this case there is objective evidence that the appellant did swing his vehicle, without reason across more than one lane of traffic, struck the deceased and took off without ever apparently applying his brakes. The absence of brake signals confirms the last statement. This too was affirmed by the objective witnesses whom Ireland J believed.⁴⁶

Kirby ACJ drew attention to the fact that a jury can be invited to draw an inference or conclusion from the accused's own acts that the acts were done with the intention alleged.

The Crown bears the onus of persuading the jury to draw such an inference; all that the High Court has said is that it should never be suggested to the jury that the law supplies a presumption on the point which satisfies that onus and which the accused is therefore required to rebut.

In cases in which the Crown has to establish that the act of the accused was done with a specific intention (that is, that he sought by that act to achieve a particular result), it is usual to direct the jury in the appropriate case that a person's acts may themselves provide the most convincing evidence of his intention. If, for example, a person deliberately hits another hard on the head with a hammer, it is easy to conclude from that act that he thereby intended to inflict grievous bodily harm upon that other person. Such harm (or injury) was the result which he sought to achieve by his act. If the argument is put by the Crown (and repeated by the judge) that a person who

⁴⁵ (1995) 79 ACrimR 528, at 542.

⁴⁶ Ibid, at 542–543.

deliberately does such an act must have intended to inflict such injury, it amounts to no more than an invitation to draw such an inference or conclusion because it is impossible to imagine from one's experience of life what other result the accused himself could have sought to achieve by that act. It is not in any way an invocation of [an] impermissible presumption.⁴⁷

Watson

In *R v Watson* [1987] 1 Qd R 440 the court of Criminal Appeal court of Appeal in Queensland considered whether the trial judge was correct in excluding evidence that the appellant proposed to call which the appellant believed would go to the fact that he did not intend to kill the victim, but intended only to discipline her.

The facts of this case are:

The appellant had been convicted of the murder of a woman with whom he lived in a de facto relationship. He was at the time of the offence, resident on Palm Island. Evidence was sought to be admitted from a sociologist, and from the appellant himself, that a large section of the Aboriginal community on Palm Island accepted that a male person has the right to discipline the female with whom he is living in a matrimonial relationship, by the infliction of a knife wound, and that for that section of the community, such discipline is associated with a firm belief that the person inflicting the discipline does not intend to seriously harm or kill the object of the knife wound.

The victim, Ms Rita Akee died from the effects of a knife wound inflicted by the accused in her abdomen. The depth of the wound was about 15cm moving from right to left at an angle of about 45 degrees to vertical, passing through the liver and gall bladder, and into the aorta, which is the main blood vessel to the lower part of the body. Medical evidence was that, using the weapon in question, which was a kitchen knife of substantial proportions, a moderate degree of force would be required to inflict such a wound in the abdomen — more than would be required for an equivalent wound in the chest.

⁴⁷ Ibid.

The victim was a heavily built woman, and in expert medical evidence at the trial, the injury would have required ‘positive action’, in the form of a pushing or thrusting movement, to inflict the wound described.

The appellant gave evidence at the trial that in stabbing her he had no intention of killing her or causing grievous bodily harm but simply intended to ‘cut’ her on the arm or on the side of the ribs.

In dismissing the appeal, the Court held that the trial judge was correct in rejecting the evidence, and that whether the death was caused ‘intentionally’ was the very issue for the jury to decide as a matter of inference from evidence. This was a matter within the ordinary capacity of juries to decide on the evidence put to the court.

In reaching his decision, McPherson J said:

The issue was thus whether the defendant had misrepresented the state of his belief. In the very broadest sense it may be said to correspond with the inquiry in this case, which also involved the drawing of inferences about the defendant's state of mind. But the state of a man's [*sic*] mind is, as Lord Bowen once observed, as much a matter of present fact as the state of his digestion. The inquiry that the jury was required to undertake here was the accused's intention with respect to a future event in the physical world lying within the range of common experience.

It is, of course, true that the issue before the jury at the trial of the appellant was whether he in fact appreciated the probability of death or grievous bodily harm as a result of his act. On that issue he was entitled to, and did, testify that his intention was only to ‘cut’ and by inference not to kill or seriously injure Rita Akee. The jury were, if satisfied beyond reasonable doubt, entitled to reject his testimony on that point, as indeed they did. They had before them cogent evidence of the nature, extent, and depth of the wound inflicted, and would have been justified in thinking that the force involved in that act that caused it disclosed an intention to inflict injury that went well beyond occasioning mere bodily harm. It plainly exceeded the

limits of ‘cutting’ as a form of domestic disciplines supposedly tolerated by the community of Palm Island.⁴⁸

Crabbe

In *R v Crabbe*,⁴⁹ the accused drove a road train through the Inlander Motel at Uluru killing five people. The trial judge had directed the jury that it would be murder if the death were a possible result of the accused’s actions. The federal court said that this direction was wrong, it should be probable and ordered a new trial. The prosecution appealed and failed.

In handing down its joint decision, the High Court said:

The conclusion that a person is guilty of murder if he commits a fatal act knowing that it will probably cause death or grievous bodily harm but (absent an intention to kill or do grievous bodily harm) is not guilty of murder if he knew only that his act might possibly cause death or grievous bodily harm is not only supported by a preponderance of authority but is sound in principle. The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm. Indeed, on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur. If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word ‘probable’ means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm. There is a difference between the case in which a person acts knowing that death or serious injury is only a possible consequence, and where he knows that it is a likely result. The former is not a case of murder even if death ensues, unless death or grievous bodily harm is intended (or, perhaps — and it is unnecessary to consider this proposition — unless the act is done with the

⁴⁸ *R v Watson* [1987] 1 Qd R 440, at 446 and 447.

⁴⁹ (1985) 156 CLR 464.

intention and for the sole purpose of creating a risk of death or grievous bodily harm).⁵⁰

Rhodes

A further authority is the case of *Rhodes v R*. Rhodes was convicted of murdering a prostitute who had died from asphyxiation. In the course of a quarrel he struck the victim, and then held a pillow over her face to “stop her from screaming”, although he asserted that he had not meant to kill her. Rhodes was convicted of murder in the lower courts and appealed to the Victorian Court of Criminal Appeal on the whether it was open to the jury to be satisfied beyond reasonable doubt of his murderous intent.

The Court of Criminal Appeal held that it was open to a jury to find that intent to render a person unconscious through suffocation was an intent to cause grievous bodily harm.

Brooking J in delivering the joint judgement of the court dismissed the application and found that:

The trial was conducted on the basis that there was only one real issue, that of murderous intent. At no stage was it submitted that the case should be withdrawn from the jury on the basis that there was no evidence of intent.

It was for the jury to say whether the state of unconsciousness which the applicant intended to induce by suffocating the victim amounted to grievous bodily harm. Accordingly, it was open to the jury to find that the applicant intended, by cutting off the victim’s air supply, if not to kill her, then at all events to cause her grievous bodily harm.

The law gives only very general assistance to juries in this regard. While some injuries are manifestly too slight and some injuries clearly sufficient to answer the legal test, there remains an infinite variety of situations in which a jury might reasonably take either view . . . The question is one of fact and no principle of law emerges from [the case of] *Weeding* that can be used as

⁵⁰ Ibid at pp 467–469.

a fetter in later cases, other than the obvious principle that a finding of fact cannot stand where there is insufficient evidence to support it.⁵¹

⁵¹ *Rhodes v R* (1984) 14 A Crim R 124, at 125–129.