The mental element

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I INTRODUCTION

The importance of the mental element in crime should not be underestimated. For it is the mental ingredient of an offence that distinguishes between accident and crime, between murder and misadventure, between the innocent taking of property and theft. In all these comparisons, the act in each part is the same - it is the mental state that characterises them, and it is the mental element that delimits when the criminal law will be involved.

The recently introduced Crimes Bill marks a significant change in our criminal law. For the first time general definitions of these essential terms are attempted as part of the new "General Part" - see Part II of the Bill. My primary focus is to explore the suggested definitions, and in some cases to offer alternatives. First, however, I hope to show that the existing position is not satisfactory, and thereby make the case for reform.

II THE EXISTING POSITION

Analysing the existing law is a task which necessarily involves criticisms of judicial decisions and in particular those of the Court of Appeal. However, I do wish to emphasise that these criticisms are made in the context of the challenge presented by this new legislation. In general, I believe that in recent times our courts have adopted an approach the criminal law that has been governed by a clear appreciation of basic principles. It is an approach which can stand tall in comparison with the efforts of some overseas jurisdictions to which we traditionally look, and in particular in comparison with the House of Lords.

My analysis of the need for reform begins with the 1982 Court of Appeal decision in *Howe*.[1] It is I suggest an excellent illustration of both the good and the not so good of recent years. On the positive side, one can extract from it two important fundamental principles:

a) that in true crimes mens rea in some form attaches to every element of an offence,[2] and
b) that mens rea generally consists of intention and recklessness.[3]

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1 [1982] 1 NZLR 619.

2 Above n 1, 623.

3 Above n 1, 623.

However, when one turns to the definition and use of these fundamental principles, the very aspects with which a general part deals, one finds a mass of conflicting decisions and uncertainties. The first aspect I wish to consider is almost inevitably the history of *Caldwell*[4] recklessness in New Zealand. Recklessness is generally regarded as the second limb of traditional mens rea. It therefore occupies an important position in assessing liability. Many are familiar with the tremendous controversy sparked by the decision of Lord Diplock to give recklessness a new and wider definition, a definition which he felt to be more in tune with the ordinary meaning of the word, but a definition which to many eyes divorced the criminal law from basic principles of justice.

Until *Caldwell*, recklessness had a reasonably settled meaning, namely unjustified risk taking.[5] To be reckless an accused had to appreciate the risks in his or her conduct, and decide to run those risks. The essential element was awareness that the risks existed. Lord Diplock felt such a definition to be foreign to the ordinary meaning of the word "reckless".[6] It was too difficult for juries to deal with, and it drew invalid distinctions in culpability. He therefore advanced a wider definition which was more in tune, he argued, with ordinary perceptions of the word reckless. The essential aspect of the new definition was that it extended liability to those who did *not* see the risks involved but who should have.

I will return later to the debates on the place in the criminal law for objective standards of mens rea. It is sufficient at this stage to say that any inclusion of such standards is hotly debated. This proved to be even more the case when an objective definition of fault was smuggled in by the redefinition of such a basic concept as recklessness. The attacks on the new recklessness were heated and acrimonious. This debate was still raging when the New Zealand Court of Appeal was called on to decide *Howe*.

Howe was a case arising out of the 1981 Springbok tour. Rioting protestors had destroyed an unmarked police car. They were charged with riotous damage contrary to section 90 of the Crimes Act 1961; an essential aspect of the offence was that it protected only certain types of property, but included among the protected items were Crown vehicles. There was no doubt, then, that the actus reus had been fulfilled, and that the damage had been deliberate. The issue facing the Court was whether there was any mental state attaching to the nature of the property - in other words, was it necessary for the accused to know that the vehicle he was damaging belonged to the Crown? The Court first held that some mens rea attached to this ingredient, and such a conclusion must be correct. If the rioters had damaged your car or my car, different and lesser offences existed. What made them liable to this more serious charge was that it was a Crown car. This being so, it seems fair to require that some mens rea attach to that fact. However, the Court's second step was to choose the new *Caldwell* recklessness as the fault ingredient.

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4 [1981] 1 All ER 961.

5 See, for example, *Stephenson* [1979] 2 All ER 1198.

6 Above n 4, 965.

The relevant passage in the law reports occupies just 35 lines.[7] Elsewhere[8] I have criticised the paucity of the argument that accompanied what was a significant development, and little would be gained by repeating those arguments here. In many ways, though, what was worse was the situation in which the law was left. In *Howe* the Court drew back to some extent from the new definition by taking pains to emphasise that this was not a *general* adoption of *Caldwell*, and that it was only a case of the new definition assisting within the particular statutory context. But this was clearly inadequate. First, such purported limitations achieve little. The concept was useful once. Why would it not be useful again? Yet no assistance was provided as to what aspects made the rioting section special, nor as to when similar conditions might be found to exist in another provision. Second, and more fundamentally, it must be remembered that recklessness was not mentioned in the statute. Rather, it was being read in by the court. Yet the very underpinning of Lord Diplock's new definition is that it reflected the ordinary meaning of the word. How, then, can it be suggested that it has one meaning when read into section 90 of the Crimes Act 1961, and possibly another meaning when read into a different provision? Either a word is a term of art and acquires that meaning, or it is an ordinary word and keeps its usual meaning. I query whether in this context it can be both.

Some years later in *Harney*,[9] the Court of Appeal returned to *Caldwell* in what it itself described as obiter observations. On this occasion the Court attempted to draw back further from *Caldwell* to the extent of proclaiming that the general position in New Zealand was that recklessness should be given its narrower pre-*Caldwell* subjective definition. However, the position is *still* uncertain. The Court would not rule out the possible use of *Caldwell*, but once more there was no debate as to its appropriateness nor was guidance provided as to when it might be used.[10]

If the above were my only example of judicial uncertainty, I would accept that too much can be made of one instance. But there are others. For example, consider the meaning to be given to the traditional subjective use of recklessness. The modern formulation usually adopted is that given by the English Law Commission; it was subsequently accepted by the English Court of Appeal in *Stephenson*, and then by Lord Diplock himself when he was formulating the subjective limb of his new breed of recklessness. It is indeed the definition of recklessness that has been adopted in the Bill (clause 22):

> A person is reckless as to any consequence ... where:
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> (a) The person does or omits to do the act knowing or believing that there is a risk that the consequence will result; and
> (b) It is, in the circumstances known to the person, unreasonable to take the risk.

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7 Above n 1, 623.
8 Simon France, "A Reckless Approach to Liability" (1988) 18 VUWLR 141, 149.
9 [1987] 2 NZLR 576.
10 Since *Harney*, the High Court has generally adopted a stance of subjective recklessness: see, for example *Smith*, (1988) 3 CRNZ 262.

Looking at New Zealand case law, however, this concept of conscious risk taking has been variously defined. In *Harney*, the description proffered was:[11]

> foresight of dangerous consequences that could well happen.

The requirement that the risk foreseen be one of "dangerous consequences" is new. In the context in which *Harney* was set, namely homicide, it might be appropriate, but as a general standard for subjective recklessness, it is too high. Similarly, a requirement that the dangerous consequences "could well happen" invites the task of measuring degrees of risk, an unhelpful and uncertain concept.

More recently, in *Tihi*[12] the Court was faced with someone accused of injuring a taxi driver with intent to commit a crime (section 191(2) Crimes Act). The facts themselves are rather strange. In the course of attempting to rob a taxi, the accused held a knife near the side of the driver's face. It transpires that the knife must have touched the side of the driver's eye for a small cut was inflicted. However, it seems that at the time neither the accused nor the driver was aware of this injury. The issue to decide was whether the accused had to realise he was injuring the person, remembering that the charge was injuring with intent to commit a crime. The mens rea the Court settled on was either an intention to cause injury or "foresight that his actions may well cause injury".

Harney and *Tihi* therefore offer general definitions that differ significantly from the traditional definition in that they require appreciation of a degree of risk, the level adopted in these cases being foresight that the event could well happen. Recently, in *Piri*,[13] the Court has also stated that there is no magic in those words and that expressions such as a real risk or a substantial risk are equally acceptable. My point here is this - it may well be open to the courts to adopt their own definition of the word which is different from the traditional definition; however such new definitions have invariably been unaccompanied by any acknowledgement that this is what is being done, and one is never quite sure whether it is a new definition for all purposes, or just a semantic variation on a previous one.

Finally, in this overview of existing difficulties, I wish to refer to the fact that the courts have not limited themselves to intention and recklessness but have looked farther afield to describe relevant fault elements. Thus in *Millar*[14] Casey J defined the a concept of honest belief in these terms:

> honest belief... in this context means more than mere belief or ignorance. Wilfully closing one's eyes is not acceptable; nor a couldn't care less attitude. The word 'honest' is intended to add a quality which I would sum up in the proposition that it describes the state of mind of a law abiding citizen intending to do his or her best to comply with the obligations or duties imposed.

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11 Above n 9, 579.
12 Unreported, 21 March 1989, CA 322/88.
13 [1987] 1 NZLR 66, 79.
14 [1986] 1 NZLR 660, 678.

I confess to being uncertain as to what "honest belief" means, but I do fear the re-emergence of a reasonableness requirement under the guise of good citizenry. If it is not that, I am unclear as to what *is* the state of mind of a citizen intending to do his or her best. I am also equally unclear as to its legitimacy. As an aside, there is perhaps a lesson here for legal drafting. Honest belief had previously been thought to be a harmless tautology, the honest adding nothing to belief. The danger, of course, is that if you keep using such phrases someone may give them a meaning!

Similarly, in *Waaka*,[15] the Court of Appeal was faced with a defendant charged with assaulting a police officer in the execution of duty. The Court addressed the issue of whether the accused had to know that the police officer was acting in the execution of duty. To its credit, the Court declined, as it had in *Howe*, to follow the lead of the High Court of Australia and hold this element of the offence to be one of absolute liability. The mens rea was described in these terms:[16]

> The prosecution must prove that the defendant knew that the person assaulted was a police officer and knew that he was acting in the execution of duty; or that the defendant wilfully shut his eyes to these possibilities or was indifferent to whether or not they were the truth.

The new concept to appear here is indifference, and again its meaning is uncertain. It may be a reference to the term developed in England for rape cases,[17] a development clearly related to the English Court of Appeal's desire to avoid the worst excesses of the new *Caldwell* recklessness, or it may be a reference back to the use of the term in *Howe*. Either way, it may have a number of meanings. Smith and Hogan, for example, equate "indifference" with subjective recklessness.[18] In *Howe* the Court seems to suggest a rather different meaning covering the "state of mind" of the person who gave no thought to the risk, but who would still have acted in the same way if they had been aware of it.[19] If that is the meaning, there are real difficulties in basing liability on an assessment of how someone would have acted if they had thought about something. John Spencer once observed of similar reasoning by the House of Lords:[20]

> This seems to be saying that [the defendant] must be treated as if he had done it knowingly, because if he had not done it accidentally, he would have done it [knowingly], had he thought of it. Lewis Carrol might have given such a reason, but he unlike the House of Lords would have been joking.

Perhaps it is unfair to attribute this meaning to the word, but if it is not that, what is it and where does indifference come from? My point again is that uncertainty *is* engendered, not only as regards the definition, but also as to its use. Is the term simply subjective recklessness in a new disguise? If it is not, how general is its application?

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15 [1987] 1 NZLR 754.
16 Above n 15, 759.
17 See, for example, *Pigg* [1982] 2 All ER 591; *Satnam S* (1983) Cr App R 149.
18 JC Smith and B Hogan, *Criminal Law* (6 ed, 1988) 437-438.
19 Above n 1, 624.
20 In a commentary on *Seymour* ([1983] 3 WLR 349) - see (1983) 42 CLJ 187, 190.

Further, is it the same thing as Casey J's reference in the honest belief passage in *Millar* to "couldn't care less"? How *do* we decide that someone who did not realise their victim was a police officer, in fact could not care less whether his victim was a police officer or not? And, even if we can decide that, where is the debate as to whether such a concept is a sufficient base for liability?

In conclusion on this part then, I believe the case can be made out most emphatically for legislative intervention. The purpose of such intervention should be to achieve two things:

a) to identify and define the basic concepts, and
b) to provide guidance as to when they form part of an offence.

If the Crimes Act 1990 (or whenever it is passed) can achieve these goals, then I believe that it is a justified exercise.

III THE BILL AND "OBJECTIVE" LIABILITY

As a starting point to a discussion of the Bill, it is necessary first to traverse the concepts and assumptions that underlie it.

In the area of mens rea, the traditional tension in the criminal law revolves around what place, if any, there is for negligence in particular, and objective tests of mens rea in general. The opposing factions are often described by the labels subjectivist and objectivist. Neither term is entirely accurate or complete, and of late it has been popular to criticise their use. However, the labels are useful in so far as they do provide a convenient shorthand to mark out the difference between those who would define fault by reference only to the accused's actual state of mind (the subjective approach) and those who would include a reference to what the reasonable person would do (the objective).

I think it fair to say that in recent years the subjective approach has increasingly held sway. This has not however always been the case; for example, until *Morgan*[21] in 1975 the ruling doctrine was that to provide a defence mistakes had to be reasonable.

The most recent effort to spark a resurgence of objective definitions of basic mens rea concepts is Lord Diplock's new definition of recklessness. It is an attack on subjectivism made all the more difficult to resist by the fact that it is the hijack of what had until then been smugly thought to be a subjective concept.

If one looks at the proposed legislation, it is clear that the subjective approach is almost totally dominant. Certainly, the definitions in the general part are divided between those which emphasise subjective and objective states of mind. Examples of the former are intention and recklessness, and of the latter are heedlessness and

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21 [1976] AC 182.

negligence. However, when one looks at the actual offences, the objective states are seldom if ever used. In fact, heedlessness and negligence both seem to be used only the once - in one of the new endangering provisions (clause 132). Furthermore, the predominance of subjectivism is not limited to defining the mental states - it can be seen in clause 29 which allows intoxication to deny mental states, and in the definition of defences such as self-defence, where the relevant circumstances are taken to be as the accused believed them to be. It is my contention that the stance taken by the Bill, a stance which is present in the existing legislation, is the correct one and I will try briefly to support this.

First, it is necessary to bear in mind the type of offences that we are talking about. Several years ago in *MacKenzie*[22] the Court of Appeal created three categories of offences - namely (i) true crimes, (ii) public welfare/regulatory offences and (iii) offences of absolute liability. The alleged characteristic of public welfare offences is that they are not true crimes, but deal rather with the administrative/regulatory type activity which it is convenient to control by the criminal law process. The fact that they are not true crimes has been taken to mean that the trappings usually associated with the criminal law need not apply. Mens rea is not an ingredient, negligence becomes the appropriate level of culpability, and the burden of proof does not rest with the prosecution. It is not the time here to debate the correctness of such classification. The point to take though is that there is now a very large body of offences for which negligence is recognised as the appropriate standard. The focus for the Crimes Bill and the general part is not on those offences but rather on true crimes, where the emphasis is on punishment, not regulation, on culpability rather than the protection of the general social welfare.

In this context, to adopt a subjective approach to criminal liability has I believe several attractions. First, the essential aspect of the subjective approach is to require that accused people had a basic level of cognition - in other words they were aware of the possible consequences of their activity and *chose* to run them. Such an analysis necessarily allows the accused to bring into the formula all of his or her capabilities and incapacities. If the accused is slow, young, infirm, absent-minded, inexperienced or anything else, this will feed into the relevant situation and produce the state of mind that can be assessed as culpable or not. Such factors are not always seen to be relevant in the general law of negligence, where of course the primary aim is compensation.

I would like to illustrate this general rejection of objective standards by reference to the case most often cited in the battle against *Caldwell*. It is *Elliot* v *C*,[23] a 1983 decision of the English Divisional Court. C was a 14 year old schoolgirl of low intelligence who was in a remedial class at school. One night she stayed away from home; by 5 o'clock in the morning she was cold and exhausted. She entered a garden shed, and lit a small fire with white spirits. In the subsequent conflagration, the shed was destroyed and she was charged with arson. The mental element for the offence was intention or recklessness. The lower court made an express finding of fact that not only did C not see the risk of the shed burning, but even if she had turned her mind to it she

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22 [1983] NZLR 78.
23 (1983) 77 Cr App R 103.

was not capable of appreciating the risks involved. The balance of the case's legal history is superbly summarised by P R Glazebrook:[24]

> The Magistrates, blessed with common sense, ordinary notions of fairness and a feel for the English language, decline to convict... But the Divisional Court, with Lord Justice Robert Goff displaying studied reluctance at reaching a decision he regards as unjust, inappropriate and an abuse of the English language, considers itself constrained by recent House of Lords' decisions to hold that the Magistrates should have convicted... And the Appeal Committee of the House of Lords, regarding the matter as too plain for argument, refuses her leave to appeal.

It does the criminal law no credit to convict the delinquent Miss C. She may be a nuisance, she may be liable for the limited damage she intended to cause and the shed owner may well be entitled to compensation, but to convict her of arson of the shed is, in my opinion, to divorce the criminal law from basic notions of justice. This is even more emphatically the case when it is an accused who not only did not measure up to the standards of the reasonable person, but who could not.

Second, and equally as important a reason for rejecting objective notions of culpability, the adherence to subjective liability serves admirably to restrain the ambit of the criminal law. The purposes of the criminal law are very different from those of other areas, and the sanctions provided are very much more serious. The criminal law is punitive - it is the method by which " we affirm fundamental principles" by punishing those who deliberately breach those values. It should be used with restraint. Resort to objective standards broadens the range of conduct caught to a degree I believe to be unacceptable.

To illustrate this, I would like to focus on the one of the endangering provisions of the new Bill - clause 132(1). I doubt that I have ever seen a provision with which I have been in such profound disagreement. I believe that you would be surprised and probably horrified at the extent to which it brings the criminal law into your life.

To summarise, it provides that if you heedlessly do an act which is likely to cause injury, or endanger safety, you are liable to five years imprisonment. Subsection (2) provides for a two year penalty where it is done negligently. Note also that subsection (5) provides that there need not actually be injury.

Several points require noting. First, the section employs objective fault and visits it with very severe penalties. Second, and related to this, it does so in a context where actual harm is not required. This has the effect then of exposing people to the risk of up to 5 years in prison where they did not intend or foresee harm, and indeed where no harm actually eventuated. I know of no justification for such a proposal.[25] It is I suggest

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24 [1984] CLJ 1, 1.

25 In making this claim I do not ignore the recommendations of the Criminal Law Reform Committee in their *Report on Culpable Homicide* (1976). I believe the arguments contained in the Report do not make out the case for such liability at all convincingly.

nothing short of an abomination; the only limit to the conduct it catches is your imagination. For example, two youths are playing; one pursued by the other slams a door behind him. The other is nearly hit by the door; she is shaken, perhaps a tad aggrieved and maybe her pride is a little damaged, but otherwise she is fine. But think again; in slamming a door in someone's face, is there an obvious risk of endangering their safety, or of injuring them? I would suggest so, and certainly the person was heedless within the meaning of the Crimes Bill. Similarly, one night you drive home. You park your car on the road; a little distracted you open the door without looking. A passing cyclist has to swerve sharply to avoid it. She offers some choice opinions on your parentage; you are apologetic and mortified and probably a little thankful that she was not knocked off her bike. Again, if this proposal is carried forward you have committed an offence; but it gets better - your conduct merits a higher penalty than if you had actually got out of the car and assaulted the cyclist with intent to injure her - a maximum of five years jail as opposed to three for the assault.

The message is clear. One, we should not draft offences such as this to capture situations where harm has not occurrred - we have a perfectly adequate attempts law to deal with situations where harm was intended but doesn't result. Two, we should not create offences simply for the purpose of using new, fancy and unnecessary concepts. And, three, if despite all this we do do it, we must be sure we get it right.

Another clear message from the endangering provision is that the person who is heedless is regarded as being significantly more culpable than the person who is grossly negligent. I have real reservations whether there is any difference at all between the two states, but there is not time to develop this fully. Rather let me spend a brief moment exploring the perceived difference. My example is the person who fires a gun near people. She is charged with the endangering offence. To have done it heedlessly, she would have to be shown not to have turned her mind to the risk of injuring people, when reasonable people certainly would have turned their mind to that possibility. Turning now to negligence, what different "state of mind" is caught? It is the person who did turn their mind to it, but very stupidly did not think about the risk in the way the reasonable person would have done. Such a person is negligent but not, due to the wording of clause 23, heedless. In one then you do not think about it *when* the reasonable person would have. In the other you don't think about it *as* the reasonable person would have. Why are we dealing in such distinctions?

I believe that we have no need at all for heedlessness in the criminal law. If we wish to define an objective state, let us return to basic ideas of negligence, rather than seek slavishly to reflect the ideas of another jurisdiction which has consistently got it wrong. Further though, there is no demonstrated need for either of these concepts. If it is desired to impose objective liability it ought to be done in carefully defined situations on an individual basis, such as was done in the recent reform of the law of rape,[26] and where, it

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Actual harm is, always has been and always will be, seen by the vast bulk of humanity as being worse than potential harm. It is worse to be killed than nearly killed.

26 See Crimes Amendment (No 3) Act 1985.

should be noted, the mens rea was described in terms of the more traditional "belief on reasonable grounds", rather than in terms of heedlessness or negligence.

My third and final argument in support of subjective liability is that we have experience of a subjective system and it has served us well. I am not aware of any clamour that villains are escaping the net. Indeed, I find it hard to imagine that as a country we could possibly need more or broader offences. I offer this perhaps very much as a supporting argument, but I suggest clause 132 is vivid proof of its validity.

It follows from this that I support the general thrust of the Bill, the predominant use of subjective terms, and the principled approach taken to intoxication. I have the strongest objections to offences such as clause 132, and I have grave reservations on the use of heedlessness and negligence.

IV THE DEFINITION OF THE SUBJECTIVE STATES OF MIND

The Bill contains two basic definitions of subjective liability - intention in clause 21 and recklessness in clause 22. As it is my belief that they should be the standard ingredients of almost every crime, it seems appropriate that I spend the time I have left on these. I have no difficulties at all with the definition of recklessness, but I do have serious reservations over the approach taken to intention.

I am sure that at first blush the definition of intention does not immediately fulfil one's expectations. One suspects a joke and looks for the hidden camera when one is told that to intend something is to know that its occurrence is highly probable.

In fact, however, of recent times the courts have recognised three possible meanings of intention. Thus it is said that a person intends a consequence when:

a) she desires or wants it, or it is her aim or purpose, or she means to bring it about or acts in order to achieve it;
b) when she knows the consequence to be (practically) certain; or
c) when she knows it to be highly probable.

In every formulation the first meaning is always included. The other two, however, are offered in addition to a) and as alternatives to each other.

Where do these alternatives come from, and why does the Crimes Bill adopt the formulation it has?

The concern which generates options b) and c) is that to define intention only in terms of purpose - which is surely its ordinary meaning - is to leave the law too narrow. Glanville Williams has created a commonly used fact situation to illustrate the concern:[27]

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27 G Williams, "Oblique Intention" [1987] CLJ 417, 423.

> Suppose that a villain of the deepest dye blows up an aircraft in flight with a time-bomb, merely for the purpose of collecting on insurance. It is not his aim to cause the people on board to perish, but he knows that success in his scheme will inevitably involve their deaths as a side-effect. To say that the villain *desired* or *purposed* to kill the occupants of the plane would not be a statement of truth; ...

It is the desire to capture this situation within the meaning of intention, and the belief that if the word is defined only in terms of option a) it will not be caught, which is the impetus for option b). But that is not the end of the tale for it is time for mathematicians and philosophers to enter: you cannot define intention in terms of knowledge of a certainty, it is said, because nothing in life is certain. The people on the aircraft may miraculously escape. They may soar majestically earthward or be carried away on the wings of Pegasus. To cater for these possibilities, a multitude of variations on certainty have been offered; thus we are faced with "virtual" certainty, "practical" certainty, "almost" certain, and "no substantial doubt". The Bill offers another possibility - "high probability". All these to ensure that the concept of intention captures our villain of the deepest dye.

There is another, simpler answer to these problems. If recklessness is incorporated as part of the basic statement of culpability in all offences, we can both return intention to a meaning more in keeping with ordinary perceptions of the word, and we can catch our bomber.

To attribute such a lofty status to recklessness is not a novel idea. Recklessness figures prominently in contemporary expressions of mens rea. What is perhaps more novel is to suggest that this lofty status should be reflected in the definition of all offences. The commonly accepted wisdom is that recklessness is an integral part of mens rea, but the practice on the part of the courts and the legislature does not match this.

As an example, the proposed Bill centres very much on the concept of intention which is used approximately twice as often as recklessness (give or take a few clauses). This pre-eminence of intention mirrors the position under the existing Act, which significantly was drafted in 1960 when recklessness had not yet perhaps gained the prominence it now has. In general, its use seems to have been random and infrequent, and I wish to suggest that it is the absence of a consistent policy on recklessness that has led to the ever-widening, and at times farcical definitions of intention.

In a law reform proposal of this nature the concern should be not only to state the law as it is, but also to redraft it as it should be. In this latter context, I wish to demonsrate that to make recklessness an ingredient of all offences is the best option.

Let me restate what is involved in recklessness - put simply, it is deliberately and knowingly running an unjustified risk that a prohibited consequence will happen. In the area of serious crimes, the risks we are talking about are that your conduct will result in death or injury, or in damage to another's property.

To draft the criminal law so as to capture the person who consciously and for no good reason runs such a risk, is to set the standard of culpability at a level which is, in my view, appropriate and just. By this means, one does not capture the person who acted in ignorance of the possible consequences of their act, however stupid that ignorance may be. Awareness or cognition remains the basic ingredient. Nor, however, does one so limit the criminal law that it will be regarded as too lax, or as letting off those who, for no worthwhile purpose, knowingly jeopardise people's safety or property.

There are examples in the existing law of this approach; indeed one finds it in the most serious of all offences. Murder is often colloquially described as intentional killing. Yet, if one looks at the statute, one finds that murder is something much less than that.[28] It is in fact deliberately injuring someone in circumstances where you realise that the injury is likely to cause death.

If we can accept a brand of recklessness as being sufficient for murder, for that is what it is, why do we not translate this across to all offences?

Further, why do we require foresight of *likely* death? It is notoriously difficult to gauge the degree of risk someone saw; and more fundamentally, is there a sufficiently different measure of culpability between the person who knows the injury they are inflicting is likely to cause death and the person who knows it may cause death? It is my submission that whatever difference there is, it is not one we can or should reflect in definitions of culpability.

To return to Glanville Williams' illustration, I agree that the bomber should be caught, but not by the misuse of intention. Rather if one recognises that offences incorporate recklessness, then foresight of a certainty is caught, as is foresight of a high probability, indeed as is any foresight where to run that risk is not justified.

One is then able to adopt the following formula:

a) *Intention*: a person acts intentionally as to a specified result if s/he acts in order to bring it about. (Knowledge shall have a corresponding definition.)
b) *Recklessness*: defined as in the Bill (clause 22) - deliberate risk-taking.
c) *Unless* a contrary intention appears, a person does not commit a code offence (at least) unless s/he acts intentionally, knowingly or recklessly in respect of each of its elements other than fault elements.[29]

The advantage of c) is that it states clearly the approach both courts and Parliament should take to the interpretation and drafting of offences, and it does so in a way that will simplify drafting.

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28 See sections 167(b)(d) and 168 Crimes Act 1961.

29 The drafting of this requirement is based on that of the 1989 English Draft Code. See Law Commission *Criminal Law, A Criminal Code for England and Wales* (Law Comm No 177, 2 vols, 1989) clause 20(1).

The main issue left to be addressed is what situations, if any, should attract a fault element of intention only. A currently acknowledged situation is in the area of attempts where it has long been held that a person must have the offence as their aim.[30] Even here though, clause 65(5) now introduces a measure of recklessness for attempts, at least in so far as the mental element as regards circumstances is concerned.

What of the many other current offences where only intention is used? Here, it becomes necessary to decide whether it really is desired that intention alone should suffice, or whether the absence of recklessness in the definition of the offence is due more to historical reasons than the pursuit of a clear policy. In assault, for example, we are one of the few jurisdictions that does not provide for reckless assaults. Is there really any reason for this? The final effect will be a clearer and simpler structure of offences with words defined much in terms of their ordinary meaning.

Before concluding, let me express a backup position. It is my strong belief that the definition of intention as currently expressed in the Bill must be changed. It seems, from the rather confused explanatory note to the Bill, that "highly probable" is - in spite of what it says - an attempt to capture option b) above.[31] I have never been certain (for want of a better word) how much of a real difficulty the sorts of situations covered by option b) present, especially if intention is defined under option a) not in terms of desire or want but rather in terms of aim of purpose or what the defendant "means" to do. Surely the bomber who plans to destroy luggage in a plane in mid-air "means" to cause the death of the passengers on that plane whether or not she desires their death? Such a description seems to me to involve no stretching of the language at all.

Still, if such situations need to be expressly caught then a word is needed. The explanatory note talks of it as a question of semantics, preferring "highly probable" to almost certain and the other options. I believe that highly probable is rather different. The best illustration is JC Smith's example of a game of Russian Roulette.[32] The gun has six chambers. Virtual certainty is designed to capture the situation where there are bullets in each of the six chambers but there remains the remote possibility that the gun may not work. High probability, I suggest, is not this, but more likely to be a five bullets out of six situation. It may even be four. The solution I suggest, is to express the definition in terms simply of "certainty". "Practical" or "moral" certainty adds little.

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30 See generally JC Smith and B Hogan, above n 19, 287-291.

31 The explanatory note justifies the use of "highly probable" as follows:

> There is nothing magic about those words. They are intended to have their ordinary meaning. The drafters of the proposed Criminal Code (UK) preferred "almost certain", and section 2.02(2)(b)(iii) of the Model Penal Code (US) plumps for "practically certain".

32 JC Smith, "Intent: A Reply" [1978] Crim LR 14, 20.

V CONCLUSION

I have tried to to argue the need for reform and to suggest the direction it should take. The criticisms levelled at the actual proposals are serious and strongly held; nevertheless, I believe we should pursue this Crimes Bill. There are problems with it which need addressing, but they are by no means insurmountable. So long as those charged with its progress show the flexibility suggested by the Minister in the opening lecture in this series, I believe that an excellent piece of reform can be achieved. I do not agree that we should hold back for developments in other countries - least of all England. The history of the criminal law there in recent times has not been a happy one, and it remains doubtful whether they will ever achieve a Code. New Zealand has developed its criminal law to a significant extent, a fact illustrated by the limited use now made of English texts in Law Schools and, indeed, of English cases in the courts. The Crimes Bill is the next inevitable step in that development and I welcome its introduction.