The Bill in context

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I INTRODUCTION

In April 1989 the Government fulfilled a long-standing manifesto pledge by introducing the Crimes Bill 1989. After a brief First Reading debate it was referred to the Justice and Law Reform Select Committee for the hearing of public submissions. At that time it was hoped that the Bill would be back before the House by December 1989 and would be passed and in force by early 1990. The Select Committee received a total of 115 submissions on the Bill. Many were hostile. In addition considerable public criticism was voiced by, in particular, the legal profession and the judiciary. In July the then Minister of Justice, the Rt Hon Geoffrey Palmer, became Prime Minister. In early October his successor in the Justice portfolio, the Hon Bill Jeffries, proposed to the Select Committee that the Bill should be considered by a Consultative Committee in conjunction with the Justice Department. The results of these deliberations would then be reported back to the Select Committee and by this means, "the objectives of the legislation can be better reconciled with the concerns expressed in such strong terms in the submissions made to your Committee".[1] Not surprisingly the Select Committee agreed. In late November the membership of the Consultative Committee was announced. Chaired by Mr Justice Casey, it consists of Les Atkins (a prominent defence lawyer), Professor Sir Hugh Kawheru (Professor of Anthropology, Auckland University), Graham Panckhurst (Crown Solicitor), Janice Lowe (Chief Legal Adviser, Justice Department) and Neville Trendle (Chief Legal Advisor, Police Department). When the Committee is likely to report back to the Select Committee is unknown.

The essays that appear in this book are largely derived from a public lecture series that we organised, with the generous financial support of the Justice Department, to coincide with the consideration of the Bill by the Select Committee. It was intended that the series would encourage and assist public debate on the Bill, and that the lectures themselves would be made available to the Committee as submissions. Of the eight lectures delivered seven appear here with only minor editorial amendments. The eighth, delivered by the President of the Court of Appeal, Sir Robin Cooke, has already been published in full in the New Zealand Law Journal and is not reproduced here.[2] In addition there are four commissioned pieces on aspects of the legislation not covered in the lecture series - those by Hannan, Dawkins, Brookbanks and Doone. The essays

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1 Ministerial Press Release, 3/10/89.

2 "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235.

reflect a balance between the analysis of the existing law and its context and a consideration of the changes proposed in the Crimes Bill.

II THE INTRODUCTION OF THE BILL

The Bill seems to have gone through two major drafts - and up to six different documents - prior to its introduction. The first draft, which was largely the work of a single senior legal advisor in the Justice Department, was circulated for comment on a confidential basis to members of the judiciary, the police, the Law Society and selected academics. The second major draft was also circulated but on a rather more restricted basis. As a process of consultation this was regarded by most later commentators as inadequate. However, since it is clear that many of those who received one or other of the drafts failed to respond anyway, it may be that this criticism is a little disingenuous. Nevertheless it is clear that by international standards the consultation process was both short and secretive. There was no public discussion at any stage, no drafts or commentaries were ever published and the circulation list for the drafts that were produced was idiosyncratic and restricted. Furthermore, when introduced the Bill was accompanied only by the usual explanatory note which is long on description of the contents of the Bill, but decidedly short on discussion of the policy behind, and the implications of the major changes proposed.

As mentioned above, the introduction of the Crimes Bill fulfilled an election pledge made in the 1984 Labour Party manifesto and repeated in 1987. It is fair to say that its inclusion in Labour's Justice policy attracted little public comment and was largely ignored by the legal profession. In particular it was quite clear that there was no appreciable public or professional demand for a review of the whole Crimes Act 1961 of the sort that eventually emerged. As Sir Robin Cooke has commented:[3]

> As far as I know, there has been no demand in any section of the community, including the legal profession and the police, for a wholesale recasting of our existing law. People especially concerned about law and order do not seem to complain of much that they regard as unsatisfactory in the content of the present code.

The manifesto pledge and the subsequent introduction of the Bill seem to have been largely the result of the personal initiative of the Minister of Justice, the Rt Hon Geoffrey Palmer. In his Introduction speech the Minister gave three main reasons for the Bill.[4] The first and primary reason was simply that there had been no comprehensive review of the law relating to major criminal offences for over 25 years. To this extent the Bill marks what might be described as a "pure" law reform exercise. It is not driven by any perceived need for specific change or any particular problem that needs to be tackled. It emerges instead from a philosophy that major legislation such as this needs to be regularly reviewed and updated if it is to continue to serve society adequately.

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3 Above n 2, 237.

4 Weekly Hansard No 48, Tuesday 2 May 1989, 1085.

The second major reason for the Bill was the lack of a general part in the existing Crimes Act. Although New Zealand has had a codified criminal law since 1893, the Crimes Act has always consisted simply of a compilation of the major criminal offences, coupled with a partial codification of the most important defences. Basic principles have, by and large, not been articulated, nor have most basic concepts been defined. The 1989 Bill, for the first time, attempts, in our view rightly, to remedy those deficiencies. The third major reason was the desire to implement the report of the Criminal Law Reform Committee on culpable homicide.[5] This report, which recommends the abolition of the murder/manslaughter distinction, the abandonment of the defence of provocation, and the creation instead of a single offence of culpable homicide, had lain dormant since its presentation, victim it seemed of a lack of political enthusiasm for the "abolition of murder".

III THE MAJOR CHANGES PROPOSED IN THE BILL

The major features of the Bill are:

(a) The inclusion of a general part (see Part II Criminal Responsibility) which, for the first time, provides definitions of four basic fault elements - intention, recklessness, heedlessness and negligence; sets out and defines a basic requirement of voluntary act; makes explicit provision for factual mistakes and intoxication; and defines the limits of liability for omissions.

(b) The creation of a new statutory defence of necessity and the replacement of the antiquated compulsion defence with a more widely-drafted defence of duress.

(c) The abolition of the offences of murder and manslaughter and their replacement by a single offence of culpable homicide with a discretionary penalty of life imprisonment.

(d) The replacement of a number of specific aggravated offences against the person with general offences of "endangerment".

(e) A significant restructuring of offences of dishonesty including a detailed definition of the term "dishonesty" itself, and a number of new offences relating to the misuse of computers.

On the other hand, it should be noted that the Bill makes little or no effort to address issues raised by the procedural sections of the Crimes Act; provides no general principles for determining the fault elements required for offences where the legislature has neglected to make its intentions clear; and fails to incorporate, as it surely should, a number of areas of major offending that currently fall outside the Crimes Act 1961 - most notably in the Misuse of Drugs Act 1975 and the Transport Act 1965.

Each of the major changes is considered in more detail in the essays that follow, and relevant extracts from the Bill are reprinted in Appendix I. Nevertheless there are a number of general points that can be usefully made at this stage. In the first place, it is worth noting that although the fault elements that appear in the new general part are

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5 Criminal Law Reform Committee, *Report on Culpable Homicide* (1976).

fairly conventional, there are a couple of significant departures from the current orthodoxy. Thus while "recklessness" is confined to traditional subjective recklessness (clause 22) and "negligence" comprises what most would call "gross negligence" ("a very serious deviation from the standard of care expected of the reasonable person" - clause 24), "intention" extends beyond "purpose" and "foresight of virtual/moral certainty" to include "foresight of a high probability" (clause 21). Similarly the Bill includes a definition of "heedlessness" (clause 23) - although, significantly, it only makes use of this definition once. "Heedlessness" is simply the name for *Caldwell* objective recklessness which, in spite of a certain amount of confusion in recent decisions of the Court of Appeal,[6] most commentators had hoped had been largely repulsed in New Zealand.[7]

Secondly, it is clear that as regards homicide and serious offences against the person the new Bill follows the recommendations of the Criminal Law Reform Committee[8] very closely. Thus, the new offence of "culpable homicide" replaces the old offence of "murder" and requires, at a minimum, subjective awareness of risk of death or serious bodily harm (clause 122). While the penalty for this offence is still life imprisonment, it is no longer mandatory and there is nothing in the Bill to limit or guide judicial discretion in its use. The offence of manslaughter is to disappear and be replaced by a series of endangering offences which have as their core the doing of acts and the creation of situations of potential injury (clauses 130 and 132). Depending on state of mind of the accused, penalties range from 14 years imprisonment (intentional endangerment) to two years imprisonment (negligent endangerment). An essential attribute of these offences is that the creation of risk is all that is required - no injury or harm need actually occur for liability. Mention should also be made of the somewhat contradictory creation of a new offence of "aggravated violence" designed ostensibly to deal with acts of "exceptional violence or exceptionally serious cruelty", but clearly owing rather more to the symbolic needs of "law and order" than to a realistic and consistent policy for containing serious violence (clause 148).

IV THE RESPONSE TO THE BILL

The major changes listed above would all clearly be significant even if introduced individually as ordinary statutory amendments; brought together and introduced as a major recasting of the criminal law they proved to be too much for the legal profession and the judiciary. The strongest and most influential criticism of the new Bill came from the latter group. Thus Sir Robin Cooke, in the second lecture of the lecture series,[9] publically queried the need for the Bill and indicated that its passage would, because of the new definitions contained in the general part and because of the numerous linguistic changes made throughout the body of the Bill, create unnecessary uncertainty.

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6 See the discussion of "indifference" in *Waaka* [1987] 1 NZLR 754. Cf *Harney* [1987] 2 NZLR 576.

7 S France, "The Court of Appeal and recklessness" [1987] NZLR 338; S France, "A Reckless Approach to Liability" (1988) 18 VUWLR 141.

8 Above n 5.

9 Above n 2.

In addition he reasserted the adequacy of judicial development to cope with the need for a general part - "the administration of the criminal law in New Zealand has gone on very well without [the definitions contained in the Part II of the Bill] for nearly a hundred years".[10]

Sir Robin's strongest criticism, however, was reserved for the changes to the law of homicide and for the abolition of the offence of murder. Drawing heavily on the views of the English Criminal Law Revision Committee[11] and on Lord Hailsham's discussion of the potential for reform in this area in *Cunningham*,[12] he concluded:[13]

> The issue is social and moral as much as legal. The view of any individual judge, even Lord Hailsham, is entitled to no more weight than that of any other citizen. I can only add that my own view happens to be that it should remain open to a jury, having heard the evidence, to condemn a crime as so heinous as to cry out for the name of murder; ...

Sir Robin was not alone in his criticisms. The Chief Justice, Sir Thomas Eichelbaum, similarly expressed strong opposition to the legislation, and recorded grave concern over the potential for successful appeals and consequent retrials. In what must be regarded as an unusual step, the Chief Justice eschewed the normal conventions of judicial consultation by giving an interview to the news media in which he expressed concerns over Government legislation which was still before a Parliamentary Select Committee. The views of both judges received wide coverage in the press, and were the subject of several supportive editorials.

Members of the legal profession supported the judiciary in their reservations about the Bill, focussing first upon the changes to the law of homicide and then on the perceived uncertainty generated by the new general part. As the select committee process continued, it became apparent that the legislation was in difficulty. Government MP, and Select Committee member, Trevor de Cleene publicly announced that the Committee was struggling to come to grips with the difficult issues being raised by mostly critical submissions, and expressed a desire to refer the Bill to the Law Commission or some similar body. At the same time, Geoffrey Palmer, the prime political mover behind the Bill, became Prime Minister and relinquished the Justice portfolio. Faced with the opposition of the profession and the judiciary, a largely hostile Parliamentary Opposition, an unenthusiastic Select Committee and a new Minister with no personal stake in the Bill and considerably less political mana than his predecessor, it was probably inevitable that the Bill would languish. Its referral to the Consultative Committee for substantial reconsideration aroused little public or political comment and left in its wake no anguished supporters - at least in the public domain. It remains to be seen whether the Consultative Committee will provide a genuine avenue for revision and resubmission, or whether it will simply provide the final quietus for a mildly embarassing political event.

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10 Above n 2, 236.
11 *Offences Against the Person* (14th Report, 1980; Cmnd 7844).
12 [1982] AC 566, 579-81.
13 Above n 2, 239.

V A VIEW OF THE BILL

Both of us have contributed essays to this book and this is not the place to repeat the views that we express there. However, with the Bill at what might be termed a "natural break", it seems appropriate to make a few general comments on both its contents and the process by which it found its way into the public arena.

Even without the benefit of hindsight, it is clear that the legislative and consultative process could and should have been handled differently. At no stage was there adequate public and professional discussion of the major changes, and little guidance was ever given as to the rationale for many of the proposals, be they of substance or simply of drafting. Similarly, it is clear that relations between the Minister, the Department and the judiciary were badly mishandled. The depth of judicial opposition revealed after the introduction of the Bill suggests either that the consultation process was sadly defective at all levels, or that the Minister's political judgment for once played him false. It is no real answer to this to note that the process followed was similar to that followed for most legislation, for this is to misjudge the interest, and at times the paranoia, that legislation in the criminal law arena is likely to induce.

Further, the legislation must be seen in its international context. Both Canada and England are still undertaking similar exercises. In Canada, numerous working papers and reports were produced by the Law Reform Commission prior to the completion and publication of a draft code.[14] That code is now available for professional, public and political discussion. Similarly in England. There the most recent draft code, accompanied by a detailed commentary, is the product of many years' work and a number of previous drafts by the Law Commission and by a number of other eminent contributing bodies.[15] While it is certainly true that neither of these endeavours has yet borne legislative fruit, - and that the Canadian code at least seems to be permanently stalled, - this is scarcely an argument in favour of, as Sir Robin Cooke has put it, "setting off on ... a divergent course after much less travail and much less wide and deep consideration than they have gone through".[16] Paralysis through consultation is an occupational hazard of law reformers everywhere. Premature legislation is a less frequent but equally crippling disability that seems to have increasingly afflicted New Zealand politicians in recent years. Both should be avoided.

What though of the substance of the Bill? In our view many of the concerns expressed about the drafting of the Bill, the content and supposed ambiguity of the general part, and the changes to specific offences are exaggerated. While we, along with every other commentator, recognise that major changes will be necessary before the Bill should proceed, that is what the select committee process is for. Furthermore, it was made clear by the Minister, both in introducing the Bill, and in his address on it in the

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14 Law Reform Commission of Canada, *Recodifying Criminal Law* (Report 31, 1987).

15 Law Commission, *Criminal Law, A Criminal Code for England and Wales* (Law Comm No 177, 2 vols, 1989).

16 Above n 2, 242.

lecture series, that he regarded the process in the same way - if major changes needed to be made then they would be made after public submission and debate.

Concern about the drafting of the Bill focussed on the fact that it is littered with minor drafting changes whose significance is, it is suggested, difficult to assess. This concern is in our view overstated. Most of the minor "amendments" to existing offences are clearly simply drafting changes designed to update language and remove excess verbiage. Arguments addressed to them would cause courts only a momentary hesitation at the most. To be sure, it may be that the redrafting of the insanity defence in clause 28 is a little different, but it is not typical. Clause 28 substitutes "mental defect" or "mental disorder" for the hallowed term "disease of the mind" as the core requirement of the insanity defence. Clearly on its own "mental disorder" could extend to mental states currently falling within the defence of provocation, and there is a risk that its adoption as the basis of insanity could simply further confuse the already tenuous boundary between insanity and automatism. While ultimately we are fairly confident that the courts would not in fact extend "mental disorder" beyond "disease of the mind", it would have been preferable never to have embarked on this particular exercise in the first place.

Moving to the second area of criticism, it is undoubtedly true that the general part as currently drafted presents a number of problems. However comments by Sir Robin Cooke and others which suggest that many of the definitions in the general part are unnecessary and, indeed, in some way "new", are highly debateable. Concepts such as intention, recklessness, heedlessness, mistake, and so forth are relevant to all serious offences, whether such requirements are expressed in the offence provision or not, and are in constant use in the higher courts. While one might disagree violently with the definitions proffered in the Bill - or by the courts, for that matter, - one can scarcely argue that it is somehow improper or too limiting of judicial development to attempt to define them. Similarly with defences such as necessity - given that the Common Law in this area has solidified considerably since the time of the original Stephen code, it is surely the duty of Parliament to decide whether or not such a claim can constitute a valid defence and, if it can, incorporate it in the code. On the other hand, the critics may be right in relation to the development of a "voluntary act" requirement in clause 19. While the requirement is scarcely novel, it is certainly debateable how far the law currently recognises such a concept, and the drafters of the Bill have not presented any very convincing explanation of either why it is needed or why it takes the form it does. In such situations law reformers would do well to tread with care. Nevertheless, detailed criticisms of one or two of the central concepts should not be allowed to obscure the need for a general part of some sort in any properly codified system.[17] Overall the general part has a lot to recommend it.

The third area of concern - that of the changes to specific offences and specifically to the law of homicide - seems to us to be rather more solidly based. The abolition of

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17 See generally A Linden and P Fitzgerald, "Recodifying Criminal Law" (1987) 66 Canadian Bar Review 529; JC Smith, "Codification of the Criminal Law" (1987) 2 Denning LJ 137.

murder, the demotion of provocation to a matter of mitigation and the shift from an emphasis on harm to an emphasis on potential harm, creates a package which contains something to offend almost everyone. Yet the package is neither central to the Bill nor so inextricably entwined that it has to be taken on an all-or-nothing basis. It is unfortunate that the fate of the Bill so far has been so dictated by this aspect.

Overall, then, we see the project so far as one of lost opportunities. Underlying this view is a strong feeling that it is unlikely that this Bill will resurface before the next election, and that, even if it is not allowed to lapse, its fate after that may well be determined by the polls. Certainly it is hard to imagine that a new government, whether Labour or National, will rate it high on its legislative programme. Whether the history of the Bill so far is seen as a case of too many changes at one time, too many errors and ambiguities in the changes it attempts to make, or simply of inadequate consultation or poor political judgment, is a matter of debate. What is not a matter of debate, in our view, is the significance of both the attempt and the controversy it has generated and will continue to generate when the Consultative Committee reports. The debate is the first serious public and professional debate on criminal law reform in New Zealand for over 25 years. It needs to be continued. The essays that follow are intended as a contribution to that debate.