THE MENTAL ELEMENT IN THE LAW OF MURDER

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The British experience concerning the adoption of the objective criteria in relation to criminal responsibility in the law of murder provides a strong argument for the advantages of codification. Justice Neasey examines proposed reforms by way of codification in the United Kingdom, as well as Code amendments in Canada and New Zealand, in order to comment on the proposed implementation of a national criminal code in Australia.

INTRODUCTION

It is instructive to observe that after the passage of more than a century since the United Kingdom Criminal Code Commission of 1878-1879 published its Draft Code, and the 1880 Bill based on it failed to pass, the House of Lords was still struggling to state definitively the mental element in the crime of murder. Their Lordships' particular difficulties in this area began thirty years ago with the well-known case, *Director of Public Prosecutions v Smith* ("*Smith*"),[1] and did not become reasonably settled until recent times, by *Regina v Moloney* ("*Moloney*"),[2] and *Regina v Hancock* ("*Hancock*").[3] In the latter cases, the House largely demolished the effect of its earlier decision in *Hyam v Director of Public Prosecutions* ("*Hyam*"),[4] and appears to have established settled principle, but the relevant law for the United Kingdom remains in a state widely regarded as unsatisfactory.

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1. [1961] AC 290.
2. [1985] AC 905.
3. [1986] AC 455.
4. [1975] AC 55.

This unsteady course of authority at the highest level in Britain over the last thirty years vividly illustrates at least three things. The first is the intrinsic difficulty of devising satisfactory law in respect of the mental elements of which proof is to be required before socially dangerous conduct can be labelled criminal, and its perpetrator punished by the State. Whether there are entities which can be labelled *mind* and *will*; and if so, what part they play in the essentiality of each human person, or whether they are merely abstract concepts, are questions which have troubled all the great philosophers. But lawyers and legislators, faced with the mundane but essential task of defining criminal conduct, have been content to adopt the view of those elusive concepts which accord with the Christian religion and common experience. Accordingly the common lawyers proceeded from earliest times upon the basis that since humankind possesses free will and is capable of making choices between one form of conduct and another, acts should only be punished as criminal where the actor chose knowingly to engage in them. Thus, as early as Bracton's time we find that writer laying down that "a crime is not committed unless the will to harm be present".[5]

However, the task of formulating laws to govern the mental elements of crime has remained extraordinarily difficult. This is due not only to the abstract nature of the notions involved, but also because such laws must take into account the inescapable link between subjective and objective criteria, since the human mind, whatever its essential nature, remains unknowable except in so far as it is revealed by conduct. That being so, the laws must be so framed as to be, in our system, conformable with principle but also capable of being understood and applied by lay juries. The difficulties increase in relation to the crime of murder, which itself is an intractable concept.

Another and related point illustrated by their Lordships' difficulties is the great advantage of having a criminal code or comprehensive statute, to provide a steady reference point for the application of existing law and as a base for improvement. Most English-speaking and European countries realised that long ago, as Sir Samuel Griffith observed in his letter to the Attorney-General of Queensland when forwarding his draft of the Criminal Code in 1897.[6] Britain was then one of the few developed countries which had not enacted a criminal code, and it remains so.

5. Bracton, *De Legibus et Consuetudinibus Angliae*, in F G Jacobs *Criminal Responsibility* London School of Economics Research Monographs, no. 8, 1971, 14 (London: Weidenfeld & Nicholson, 1971).
6. Letter of Sir Samuel Griffith to Attorney-General of Queensland, forwarding draft of the Criminal Code, Brisbane, October, 1897.

Thirdly, this course of authority in the House of Lords was not an exercise in the traditional common law process of *finding* or *declaring* the law, but with its shifts and turns of interpretation and content amounted to law-making on the run, in a particularly sensitive area of the criminal law. Such a process contrasts unfavourably with the mature and orderly consideration, aided by submissions and consultations along the way, which bodies such as the law reform commissions in the United Kingdom, Canada and New Zealand, and the Australian Commonwealth Review Committee presently at work, can give to bringing the law to a more satisfactory state. This is a further argument in favour of the codification process in the criminal law. It is intended to support these arguments in that which follows.

Fortunately there is again a strong movement to enact a Criminal Code in the United Kingdom. A draft Code has been proposed. As it happens, there are also presently under consideration proposals to amend substantially the Criminal Codes of Canada and New Zealand, and the possible beginning of some sentiment towards enacting a uniform criminal code for Australia. These are very interesting developments. A principal purpose of this article is to consider these proposals in relation to the law of murder, against the background of the relevant existing law. It is not intended to discuss provocation or drunkenness.

I. THE UNITED KINGDOM

As relatively recently as 1954, the two senior judicial witnesses before the Royal Commission on Capital Punishment, Lord Chief Justice Goddard and Justice Humphreys, were prepared to accept a definition of murder based upon section 174 alone of the 1879 Draft Code; though they would not accept section 175 because it embodied concepts of constructive malice, and also because they thought its content was already covered by the general provisions of section 174.[7] This was after more than a century and a half during which leading English criminal lawyers had shown a desire to move away from objective notions of guilt in murder towards subjective expression of the mental element involved. The learned editor of *Russell on Crime* traces this movement,[8] and makes advocacy of it his principal theme.

7. See J W C Turner (ed) *Russell on Crime* 12th edn (London: Stevens, 1964) 472, 495; and *Royal Commission on Capital Punishment 1949-53 Report*, Cmnd 8932 paras 472, 473, 478.

8. *Russell on Crime* ibid, chapter 29; J W C Turner "The Mental Element in Crimes at Common Law", in L Radzinowicz and J W C Turner (eds) *Modern Approach to Criminal Law* (London: Macmillan, 1958).

It will be recalled that Sir James Stephen, the principal author of the 1879 Draft Code,[9] in *History of the Criminal Law* placed Article 223 of his *Digest of the Criminal Law* ("*the Digest*")[10] alongside sections 174 and 175 of the Draft Code, stating that the first represented the common law as it was, and the second the same law with necessary improvements. Section 174 of the Draft Code corresponded with Article 223 (a) and (b), and section 175 occupied the same position with respect to Article 223 (c) and (d). Section 174 of the Draft Code is expressed in these terms:

> 174. Culpable homicide is murder in each of the following cases:
>
> (a) If the offender means to cause the death of the person killed.
>
> (b) If the offender means to cause to the person killed any bodily injury which is known to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death is caused or not.
>
> (c) If the offender means to cause death, or such bodily injury as aforesaid, to one person, so that if that person be killed the offender would be guilty of murder, and by accident or mistake the offender kills another person, though he does not mean to hurt the person killed.
>
> (d) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

Thus in 1954, at that distance in time from the Draft Code's publication, Lord Goddard and Justice Humphreys still found Stephens' formulation acceptable, with its inclusion of the subjective mental elements of foresight of likelihood of death combined with recklessness whether it ensues, but combined also with foresight of death imputed according to an objective standard, indicated by the expression, "ought to have known".

However, the House of Lords soon afterwards, in 1961, aroused some outrage by regressing to a rigidly objective standard of criminal responsibility in its decision in *Smith*.[11] Their Lordships were probably surprised by the strength of the adverse reaction. Lord Denning, who concurred in the decision, later made a valiant but unsuccessful attempt to justify it.[12] The facts of *Smith* are well known. The trial judge directed the jury substantially in

9. J F Stephen *A History of the Criminal Law of England*, (London: Macmillan, 1883), Preface, vi-viii, VIII, 349.
10. *Digest of the Criminal Law* (1st edn) (London: Macmillan, 1877). Art. 223 is Art. 244 in the commonly used 5th edition.
11. Supra n 1.
12. "Responsibility Before the Law" in T Hadden "Offences of Violence: The Law and the Facts" (1968) Crim LR 521, 523.

terms of what he referred to as a presumption of *law* that "a man intends the natural and probable consequences of his acts".[13] The Court of Criminal Appeal said the direction was wrong because the presumption is one of fact, though evidentially persuasive because of usual patterns of human conduct. The House of Lords disagreed. The Lord Chancellor, Viscount Kilmuir, with whose speech all the other members of the House (including Lord Goddard) agreed, stated that which he regarded as the unacceptable aspect of an exclusively subjective approach. "...[The decision of the Court of Criminal Appeal] involves this, ... that if an accused said that he did not in fact think of the consequences, and the jury considered that might well be true, he would be entitled to be acquitted of murder".[14] The "true principle", Viscount Kilmuir said, was that provided the accused was an accountable and responsible person who had voluntarily done something to somebody, it did not matter what he in fact contemplated or whether he contemplated at all. The sole question was whether his unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result of it. And the only test for deciding that was what "the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result".[15]

The vehemence of reaction to the *Smith* decision was due mainly to the fact that it involved the adoption of a wholly objective criterion of criminal responsibility which was out of tune with the times, even though it had enjoyed considerable currency in the past. The genesis of the argument lay in the philosophical and legal debate referred to earlier. Standards which emphasise objectivity have persisted in the criminal law. The late Professor Peter Brett, in his book, *An Inquiry into Criminal Guilt*[16] traced the appearance and development in the first half of the eighteenth century of the most influential of these, involved in the expression, "the natural and probable consequences of his act". But the most famous proponent of the objective standard which the expression describes has been the redoubtable Justice O W Holmes Jnr, upon whose authority the House of Lords relied mainly for the adoption of that standard in *Smith*. No English or American jurisprudential writer fails to quote Holmes with respect, and indeed he deserves it, for

13. Supra n 1, 300.
14. Ibid, 326-327.
15. Ibid, 327.
16. (Sydney: Law Book Co, 1963).

many reasons having to do with greatness in the law.[17] But Holmes was a hard-line legal positivist, and a utilitarian in the broadest sense, in that the greatest good of the greatest number meant to him imposition of the will of the majority, if necessary at the expense of the individual. The latter view is a principal subject of criticism levelled at utilitarianism by modern rights-centred jurisprudential writers such as Ronald Dworkin.[18] There are many statements in Holmes' great book, *The Common Law*, which illustrate his view. It is fairly inferable from Holmes' life and work as a whole that this attitude of subordination of the interest of the individual to the public good was seared into his mind in youth by his memorable Civil War experiences, which he never ceased to write and talk about publicly for the remainder of his long life.[19]

But the House of Lords' misjudgment in *Smith* was to assume that Holmes' view that an individual accused person's rights could be set aside by having his actual mental state of blameworthiness or otherwise ignored in favour of a general de-personalised standard, was any longer acceptable in the society in which the judgment was given. After two world wars, the 1948 Universal Declaration of Human Rights, and endless lip-service paid to individual rights in the modern world, it simply was not. It can be concluded safely that prescribing objective standards as *the criteria for criminal responsibility* is for the foreseeable future unfashionable and unacceptable. All the proposals for Code amendments or enactments mentioned above illustrate that. But even so, when that proposition is accepted and the law comes to describe the subjective standards to be required, the problems are only just beginning, especially in relation to murder. Further experience in Britain soon proved that.

The extreme objectivism of the House's test in *Smith* for the mental element in murder satisfied virtually no one, and soon lead to statutory rejection of it in England, by section 8 of the *United Kingdom Criminal Justice Act* 1967. The High Court of Australia had already discouraged use of the "natural and probable" or "reasonable" consequences of his or her act

17. For homage paid by a prominent present-day American writer, see R A Posner *The Problems of Jurisprudence*, (Cambridge: Harvard University Press, 1990).
18. See H L A Hart "Between Utility and Rights" in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) chapter 11.
19. O W Holmes *The Common Law* (Boston: Little, Brown, 1881); "Memorial Day" in M De Wolfe (ed) *The Occasional Speeches of Justice Oliver Wendell Holmes* (Cambridge: Belknap Press, 1962); J J Marke (ed) *The Holmes Reader* (New York: Oceana Publications, 1955).

presumption and formulation years earlier, in *Stapleton v The Queen*;[20] and in *Parker v The Queen*[21] it banned use of *Smith* as an authority in Australia. The House of Lords has never overruled *Smith*, but the Privy Council in *Frankland v The Queen*[22] said it was wrong in law in so far as it laid down the objective test of intent for murder.

The next chapter in the United Kingdom experience was *Hyam*.[23] The Appeal Committee consisted of five members, four of whom divided equally, with Lord Cross of Chelsea tipping the balance in favour of dismissing the appeal.[24] The facts were that the accused woman thought she had been supplanted in the affections of her former lover by another woman. She went to the house where the other woman and her three children were sleeping and set it on fire, by putting a quantity of petrol in the letter box and igniting it. Two of the children died in the fire. The accused claimed she had not intended to kill or hurt anyone, but only to frighten the other woman. She was convicted of murder and her appeal was dismissed by the Court of Appeal. Thus the question of intention was crucial, but various actions of the accused showed that she had realised she was putting the occupants of the house in great danger. The trial judge instructed the jury that the necessary intent to kill or do serious bodily harm would be proved if the jury were satisfied that when the accused set fire to the house she knew it was highly probable that the fire would cause death or serious bodily harm.

Professor Glanville Williams wrote of *Hyam* as "a prime example of discordant reasoning",[25] referring mainly to their Lordships' treatment of the expressions "intention", and "grievous bodily harm", and the content of "malice aforethought". The comment, with respect, is justified, but all five of the Lords did approve the relevant law as stated by Stephen, either in Article 223 of the *Digest* or section 174 of the Draft Code. This is significant, because the House in the later cases of *Moloney*[26] and *Hancock*[27] departed from Stephen's statement of the law without giving any substantial reasons for doing so.

20. (1952) 86 CLR 358, 365.
21. (1963) 111 CLR 610, 632.
22. [1987] AC 576.
23. Supra n 4.
24. Ibid, 98.
25. G Williams "The Mens Rea for Murder: Leave it Alone" (1989) 105 *Law Quarterly Review* 387, 391.
26. Supra n 2.
27. Supra n 3.

Lord Chancellor Hailsham in his speech in *Hyam* was firmly of the opinion that knowledge or foresight (meaning the same in this context) of probability of consequence, even of high probability, is no part of intention, but may be strongly evidentiary of it.[28] But he considered the further question whether, in addition to intention to kill or cause grievous bodily harm, intention to expose wilfully to serious risk of death or grievous bodily harm is sufficient mental element for murder as an alternative type of malice aforethought.[29] He decided it was, approving and apparently basing himself partly upon Stephen's Article 223 of the *Digest*, and partly upon the Report of the 1839 Commissioners, but giving convincing reasons of his own also. Any of the following intentions, "always subjective to the actual defendant", his Lordship held, were sufficient for murder - intention to cause death or grievous bodily harm (meaning "really serious injury", as in *Smith*), or:

> Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as a result of those acts.[30]

This latter view was decisive for Lord Hailsham's dismissal of the appeal.

Viscount Dilhorne cited Article 223 of Stephen's *Digest* and the endorsement of it by the Report of the Royal Commission on Capital Punishment, which said it was the statement of the modern law most commonly taken as authoritative. He also mentioned the Victorian case of *R v Jakac*,[31] which also supports Stephen's formulation of the law. However, Viscount Dilhorne did not accept the proposition that grievous bodily harm should be interpreted to mean harm of such a character as is likely to endanger life. His position was that the House's task was to say what the law was, not what it ought to be.[32] Lord Diplock, on the other hand, emphasised his view that it was within the judicial power of the House to declare the law as it thought it should be, in order to conform with the needs of contemporary society.[33] His elegant and instructive speech therefore concentrated upon what the law should be, and why. An important part of his theme was that the phrase "grievous bodily harm" had first been used in Lord Ellenborough's Act of 1803,[34] which made causing grievous bodily harm a felony; and that intent to do grievous bodily

28. Supra n 4, 65, 75.
29. Ibid.
30. Ibid, 79
31. [1961] VR 367.
32. Supra n 4, 81-86.
33. Ibid, 93, 94.
34. 43 Geo 3 c 58, later incorporated into the Offences Against the Person Act 1861 (UK).

harm thereafter was relied on as sufficient mental element for murder only in the form of felony-murder. Viscount Dilhorne disagreed, and affirmed *Regina v Vickers* ("*Vickers*"),[35] in which the Court of Appeal had said that intent to cause grievous bodily harm had "always" been sufficient mental element for murder.[36]

Apart from the above issue, there were few differences in the fundamental thrust of the four speeches in *Hyam* other than that of Lord Cross. Lord Diplock advocated strongly that on a charge of murder the relevant intention should be an intention to kill or cause any bodily injury which is known to the offender to be likely to endanger life. He thought the law should be so declared, particularly since constructive malice had been abolished by section 1 of the United Kingdom Homicide Act 1957 ("the 1957 Act"), and said he understood that all his colleagues on the Appeal Committee were of the same opinion as to what the law should be. He also cited the uniform view to this effect of Commissioners on the Criminal Law from 1839 onwards, including Stephen, and the United Kingdom Royal Commission on Capital Punishment 1957 and the Law Commission's Report No. 10 in 1966.[37] Lord Kilbrandon agreed with Lord Diplock.[38] Lord Cross was unable to decide whether Lord Diplock's argument as to grievous bodily harm was right or not, and was only prepared to hold that *Vickers* should be affirmed, and Stephen's Article 223(a) and 223(b) approved.[39] Later, in *Regina v Cunningham*,[40] the House held unanimously that it was not empowered to do other than declare the law as it stood.

After *Hyam* came *Regina v Moloney*.[41] This was a case in which a young man shot his stepfather in their house, after a dare by the latter. They were on good terms but had been drinking. It was a perfect example of what the accused "ought to have known to be likely to cause death in the circumstances", in terms of section 174(c) of the 1879 Draft Code. The accused claimed he never considered the possible consequences of his action in pulling the trigger, though he agreed he knew the gun was pointing at the head of the deceased. The trial judge directed the jury as to the meaning of intention in terms of both desire and foresight of probability. The principal speech in

35. [1957] 2 QB 664.
36. Supra n 4, 84.
37. Ibid, 92-94.
38. Ibid, 98.
39. Ibid, 97-98.
40. [1982] AC 566, 581.
41. [1985] 1 AC 905.

the House was that of Lord Bridge. Lord Chancellor Hailsham, and Lords Fraser, Edmund-Davies, and Keith agreed with him, the Lord Chancellor adding some material of his own. Lord Bridge in his speech examined developments during the last thirty years. He noted that "a particularly strong Court of Criminal Appeal" in *Vickers* had said that since the 1957 Act, in order to constitute murder there had to be an intention either to kill or to cause grievous bodily harm; that is, express or implied malice. He dealt briefly with *Smith*, and then at length with *Hyam*, but, with respect, did scant justice to Lord Diplock's speech. In the result, Lord Bridge simply approved *Vickers*, which confined the relevant states of mind to intention to cause death or grievous bodily harm, it being clear that intention in that context meant a purpose to achieve either of those ends. In effect, Lord Bridge said that foreseeability of consequences was only relevant evidentially, in that it may provide cogent evidence as to whether the consequence was intended in the purposive sense.[42] Lord Chancellor Hailsham was content to accept Lord Bridge's view.[43] He did not address himself to the question of wilful exposure of another to the risk of death or grievous bodily harm, even though in *Hyam* he had advanced persuasive reasons for including that state of mind.

Lord Bridge's formulation of the law in *Moloney* was accepted in *Hancock*,[44] decided soon after; though his attempt in *Moloney* to lay down guidelines for trial judges was not. The House in *Hancock* accepted the statement of the law in *Moloney* as to the mental element in murder. Lord Scarman for the Appeal Committee said that "the confusions which had obscured the law during the last 25 years" had been cleared away, and that it was now laid down authoritatively that the mental element required in murder is nothing less than intent to kill or cause grievous bodily harm. Further, his Lordship said, it was now "absolutely clear that foresight of consequences is no more than evidence of the existence of intent".[45]

As a result of these cases in the House of Lords, the relevant law in Britain can still be regarded as inadequate, because the required mental element in murder does not now include in any form awareness of likelihood of causing death by unlawful and dangerous act. The terrorist cases, where a bomb is left where it may well but will not certainly cause death, illustrate the need. It may be that in many of them, actual purpose to cause death can be proved to the criminal standard, but, for example where a warning is given, that will not

42. Ibid, 921-924, 927-929.
43. Ibid, 913.
44. [1986] 1 AC 455.
45. Ibid, 471.

always be so. Yet it is argued here that, where death does ensue, the crime should be classed as murder. Again, suppose that in *Hyam* the accused had made no statements indicating her intention. Intent to cause death or grievous bodily harm would have been very difficult to prove; as would be so in many arson cases where death is caused. *Regina v Nedrick*,[46] in which the facts were very similar to *Hyam*, is another good example. *Moloney* and *Hancock* also illustrate the point. It is a palpable gap in the present United Kingdom formulation that it does not include such an element.

On a narrower level, this United Kingdom experience shows that "intention" is too amorphous a concept to be used as a mental element in the law of murder unless defined. "Intention" in English usage is a word of very broad scope and range in relation to directing the application of the mind, as reference to the Oxford English Dictionary will at once show. Courts of highest authority have had little success in interpreting it satisfactorily in criminal law contexts. The High Court of Australia has had as much difficulty as the House of Lords - see for example, *Pemble v The Queen*,[47] and *The Queen v Crabbe* ("*Crabbe*").[48] It is not, with respect, the fault of the courts, but the intractability of the concept. It should be either replaced by one which can be more easily understood and applied by a jury, or given specific content by definition. "Intention" can be adequately replaced by description or definition involving the idea of purpose to achieve an end. An appropriate and simple replacement is the concept of meaning to do something. That is an expression familiar in ordinary life and has certainty of meaning. When a child says to its mother, "I didn't mean to do it", both parties understand exactly what is being said. The New Zealand Criminal Code has used this expression from the beginning, without causing any difficulty. Clarity and simplicity, for ease of explanation to and application by juries, should be a constant aim. They are not always achievable of course.

The use of "foresight", too, in describing a mental element for murder is not helpful. It is not an idea with which juries are comfortable. In ordinary usage it suggests an act of foresight, the formation of a pre-judgment or formed conclusion as to future events or consequences, which is unlikely to exist in the case of an offender committing one of the common kinds of emotionally charged acts which result in the death of another. It would be better to abandon "foresight". It will be submitted that there are more appropriate expressions available.

46. [1986] 1 WLR 1025.
47. (1971) 124 CLR 107.
48. (1985) 156 CLR 464.

In the United Kingdom the Law Commission in its 1989 Report[49] has recommended the enactment of a draft Criminal Code for England and Wales which achieves, it is submitted, desirable objectives in this regard. In relation to murder the Draft Code recommends in effect increasing the subjective quality of the state of mind required beyond that of the latest House of Lords formulation, in that an intention to cause "serious personal harm" must be accompanied by "aware[ness] that he may cause death". This adopts a recommendation of the Fourteenth Report of the United Kingdom Criminal Law Revision Committee,[50] and is an improvement in two respects over intent to cause "really serious injury" alone. The first is the addition of the subjective requirement; and the second, that the notion of foresight has been put aside and replaced by the more realistic concept of "awareness". This is also better than "knowledge", because that suggests too much a formed concluded belief as to future events or circumstances, which is inappropriate in the criminal context. The "intention" concept is retained, but its troublesome aspects are removed by definition.

The Draft Code has definitions (by clause 18) of "knowingly", "intentionally" and "recklessly". It is provided that "a person acts ... intentionally with respect to a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events". This accords substantially with the *Moloney* and *Hancock* treatment of "intention". The first part of the definition sensibly equates intentional with purposive conduct, and the second replaces satisfactorily the inappropriate expression, "natural and probable consequence". The substantive provision is:

> 54.-(1) A person is guilty of murder if he causes the death of another -
>
> (a) intending to cause death; or
>
> (b) intending to cause serious personal harm and being aware that he may cause death....[51]

The only serious criticism the writer would make of these draft provisions concerns the omission, mentioned above, of a clause which would encompass as murder unlawful and dangerous conduct in respect of which the actor is aware of a likelihood that death will be caused. It will be interesting to see whether a codification measure in any form succeeds in getting through the legislative mill in the United Kingdom.

49. Law Commission (UK), *Report and Draft Criminal Code Bill*, (Report No 177).
50. Criminal Law Revision Committee (UK), *Offences Against the Person* (Report No 14 1980), para 31.
51. Ibid, cls 18, 54.

II. CANADA

The federal parliament of Canada, having jurisdiction to do so, enacted a national Criminal Code in 1892. Its general structure, including the provisions regarding homicide, is based upon the United Kingdom 1879 Draft Code, but there are significant alterations from the original.[52] During this century various additions have been made, including some elaborate provisions dividing murder into capital and non-capital and first and second degree murder, and adding motoring offences; but the basic provisions defining murder have remained intact. The four basic forms of murder under the common law as at 1892, as set out in Stephen's *Digest*, were enacted substantially in Draft Code terms. These are, to kill -

1. with an intent to kill or do grievous bodily harm;
2. with knowledge that the act done will probably kill or do grievous bodily harm;
3. with intent to commit any felony; and with intent to oppose by force any officer of justice in discharging certain duties,

In respect of constructive malice these differ from the common law forms set out in Article 223 of the *Digest*. It will be recalled that in the common law felony-murder rule as set out in *Digest* Article 223, the mental element is stated as "(d) An intent to commit any felony whatever", whereas the constructive malice provisions of the Draft Code, section 174(c) and section175 are much more restricted and focussed.

There follows in section 213 of the Canadian Criminal Code a list of offences, including resisting lawful apprehension, rape, robbery, burglary and arson. There are also two other sub-paragraphs relating to administering any stupefying thing and wilfully stopping the breath, for any of the aforesaid purposes, where death results. These are the constructive malice provisions which the Canadian Code adopted, as did the New Zealand Code, and in the main, the Tasmanian also. There are, however, some significant Canadian differences of formulation in other parts of their homicide provisions. For example, intent to cause grievous bodily harm is not a sufficient mental element; under section 212(a)(ii) there must be intent to cause bodily harm "that he knows is likely to cause death".

52. Law Reform Commission of Canada *Homicide* (Working Paper 33 1984) 8.

The Canadian Code retained the whole substance of Draft Code section 174(d) by its section 212(c), which makes it murder

> where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

The Supreme Court of Canada held in *R v Vasil*[53] that the unlawful object for which the act is done must be different from the dangerous act being done, and the unlawful object must itself be a serious indictable offence requiring *mens rea*.[54] The same case also dealt with the meaning of the expression, "ought to know is likely to cause death". The accused set fire to a house in which he had been living with a woman. The woman's two children who were in the house died.

> [W]hilst the test under section 212(c) is objective and the behaviour of the accused is to be measured by that of the reasonable man, such a test must nevertheless be applied having regard, not to the knowledge a reasonable man would have had of the surrounding circumstances that allegedly made the accused's conduct dangerous to life, but to the knowledge which the accused had of those circumstances.[55]

After fifteen years of research and debate, the Law Reform Commission of Canada stated its conclusion that the existing Code needed replacing because of its poor organisation, use of archaic language and other defects.[56] A new draft Criminal Code was proposed and set out in the Report.[57] The scheme proposed for culpable homicide is to restrict the crime of murder to "purposely" causing the death of another person, and then to have a crime of manslaughter, which is "recklessly" causing the death of another person, and a further crime of negligent homicide.[58] A scheme is made, as in the existing Code, for certain specially heinous kinds of culpable killings, labelled first degree murder.[59] The draft Code has quite elaborate provisions covering requirements for culpability, in which the principal terms are "purposely", "recklessly" and "negligently", which of course apply to the proposed homicide offences.[60]

53. (1981) 1 SCR 469; 58 CCC 97.
54. Supra n 52, 43.
55. Ibid.
56. Law Reform Commission of Canada *Report on Recodifying Criminal Law* (Report 31 1987) (Revised and Enlarged Edition of Report 30) 1.
57. Ibid, 43.
58. Ibid, 56-57 (Cls 6(1)-(3)).
59. Ibid, 58 (Cls 6(4)).
60. Ibid, 21 (Cls 2(4)).

Leaving aside the provision as to negligence, it is provided that where the definition of a crime requires recklessness, no one is liable unless as concerns its elements he acts purposely as to the conduct specified by the definition, recklessly as to the consequences, if any, so specified, and recklessly as to the circumstances.[61] It is further provided that a person is reckless as to consequences or circumstances if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.

With respect to murder the draft Code provides that a person acts purposely as to conduct if he means to engage in such conduct, and purposely as to a consequence if he acts in order to effect that consequence, or another consequence which he knows involves that consequence.[62] This latter is intended to cover such cases as blowing up an aircraft to recover insurance, or for a political objective. The end effect of the Canadian definition of "purposively" is the same as the United Kingdom Draft Code definition of "intentionally", detailed earlier, in that the latter requires purpose to achieve the result, or awareness that the result will occur in the ordinary course of events, which is equivalent to awareness that such a result is "involved". "Causing" in the Canadian draft is defined as conduct which substantially contributes to the occurrence of a result, and no other unforeseen and unforeseeable cause supersedes it.[63]

It may be said of both the United Kingdom and the Canadian draft Codes in relation to the law of murder that they represent great improvement upon the law which presently applies. They both adopt the subjective approach, which alone is acceptable, and they do not leave broad concepts undefined. Further, both drafts retain the nomenclature of murder. The writer supports that approach.[64] There is also a clear and relatively simple definition and scope proposed for this most serious of crimes. The writer's main criticism of the Canadian draft relates, as with the British, to the concept of the crime of murder rather than with the form of the draft. The criticism applies more to the Canadian than to the English Draft Code. To summarise it, a satisfactory definition of murder should provide for inclusion of recklessly that is, knowingly, endangering life.

61. Ibid, 22 (Cls 2(4)(a)(ii)).
62. Ibid, 23 (Cls 2(4)(b)(i)-(ii)).
63. Ibid, 27 (Cls 2(6)).
64. Compare the Crimes Bill 1989 (NZ), which abolishes the old terminology. An earlier recommendation of the Law Reform Commission of Canada to the same effect has not been followed, supra n 56, 27.

III. NEW ZEALAND

New Zealand enacted in 1893 a Criminal Code Act ("the Criminal Code") closely modelled upon the English Bill of 1880, which incorporated the 1879 Draft Code with some modification, but failed to pass. The Criminal Code was in substance re-enacted by a consolidating Act, the New Zealand Crimes Act 1908 ("the 1908 Act").[65] This has since been consolidated by the New Zealand Crimes Act 1961 ("the Crimes Act"). The provisions relating to murder, sections 167 and 168, are practically a reproduction of sections 174 and 175 of the Draft Code. In 1961, after the English decision in *Smith*, the expression in section 167(d) (formerly section 182(d) of the 1908 Act) "ought to know" was deleted, so that under that sub-paragraph the test became subjective. The subjective approach has consistently been emphasised in recent years by the New Zealand Courts, in relation to intention and recklessness.[66] However, the Draft Code versions of constructive malice remain, as in Canada. The expression, "unlawful object" in section 167(d) has not been so restrictively interpreted as in Canada.[67]

Proposals for reform of homicide law have been made in New Zealand, but not as yet implemented. A Criminal Law Reform Committee Report to the Minister of Justice in July 1976 on Culpable Homicide recommended that a new offence, to be called "unlawful killing", be substituted for existing offences now classified as murder and manslaughter by reason of provocation. That would result in murder and manslaughter being abolished as discrete crimes, which would achieve a result suggested by Lord Kilbrandon in *Hyam*,[68] although that was not the reason for the New Zealand Committee's suggestion. Their main concern had to do with provocation.[69]

There is now before the New Zealand Parliament a Crimes Bill which proposes a new Criminal Code. In relation to homicide, the Bill re-writes the law, substantially influenced by the 1976 Report.[70] Under the scheme of the Crimes Act there is an offence of culpable homicide, which if not murder as

65. F B Adams (ed) Criminal Law and Practice in New Zealand 2nd edn (Wellington: Sweet and Maxwell, 1971) 1, 2; J M E Garrow and W S Spence (eds) Criminal Law 4th edn (Wellington: Butterworths, 1962) 1, 2.
66. *R v Piri* [1987] 1 NZLR 66; *R v Harney* [1987] 2 NZLR 576.
67. *R v Hakaraia* [1989] 1 NZLR 745. Compare *Hughes v The King* (1951) 84 CLR 170.
68. Supra n 4, 98.
69. Criminal Law Reform Committee (NZ) *Report on Culpable Homicide* (July 1976) para 6(p 3). For unenthusiastic comment on the proposals, see G F Orchard "Culpable Homicide -Part I" [1977] NZLJ 411 and Id "Culpable Homicide - Part II" [1977] NZLJ 447.
70. Explanatory Note to *Crimes Bill* (NZ) cl xv.

defined, is manslaughter. The new draft clauses (in particular, clause 122) in substance combine the existing culpable homicide plus murder provisions into a new crime called culpable homicide.[71] The effect in the main is to provide that crimes which are now murder under the Crimes 1961 Act would become culpable homicide. If there were no additional provisions, that would leave some types of criminal conduct which are now manslaughter not specifically provided for. The solution is to propose three new offences of "endangering" (clauses 130, 131 and 132), which incorporate a number of the elements of the remaining present instances of manslaughter, but may be committed whether or not death occurs.

If these measures were enacted, the result would be a set of homicide provisions distinctive to New Zealand, and resembling in basic structure the existing provisions, except for the abolition of the traditional appellations of murder and manslaughter. The New Zealand Law Society submission expresses disagreement with the recommendation to abolish murder and manslaughter as discrete crimes. The writer agrees with the Society's view.

However, the New Zealand draft Bill proposes some important provisions concerning mental elements involved in criminal responsibility. Clause 3 defines "act" and "omission" along lines similar to clause 15 of the United Kingdom draft Criminal Code, so as to include any result or circumstance which is an element of the offence if the context permits. This would eliminate most of the uncertainties which have arisen under Australian Codes, as exemplified by *Vallance v The Queen*[72] in Tasmania, and *Kaporonovski v The Queen*[73] and other cases in Queensland. Then Part II of the New Zealand draft Bill sets out rules of interpretation and definitions regarding intention, knowledge and recklessness, along the lines of the United Kingdom draft, with some differences of wording which are not significant except that the United Kingdom draft is clearer. For example, the New Zealand draft (clause 21) provides that "[f]or the purposes of criminal responsibility, a person intends or knows any consequence of any act or omission." However, the meaning of "knowing" a consequence of an act or omission seems unclear.

71. Compare Explanatory Note to Crimes Bill (NZ) cl xv.
72. (1961) 108 CLR 56.
73. (1973) 133 CLR 209.

The main departure of these draft provisions from the United Kingdom and Canadian drafts is that New Zealand proposes a definition of "heedlessness", which is designed to accord with the decision in *Commissioner of Police of the Metropolis v Caldwell*,[74] followed in England in *Regina v Lawrence*,[75] in which the concept of recklessness was held to include a situation where the person acting gave no thought to existing risk. The New Zealand Law Society, in submissions made on the Crimes Bill, opposed this suggestion as unnecessary, and also on the basis that it would introduce "an undesirable objective standard into the definition of the mental element of crimes". The writer would support that view. "Heedlessness" is defined as being where the person gives no thought to whether there is a risk that the consequence will result, even though the risk would be obvious to any reasonable person, and it would in the circumstances be an unreasonable risk.[76] This definition is similar in meaning to the expression, "an act that he knows *or ought to have known* to be likely to cause death", in section 182 of the 1908 Act.[77] The High Court of Australia interpreted "ought to have known" in *Boughey v The Queen* ("*Boughey*")[78] as meaning in effect unreasonable heedlessness of existing risk. New Zealand got rid of that expression in 1961, and it would seem to be retrograde if a similar expression were re-enacted as a mental element.

IV. AUSTRALIA

A. Non-Code States.

In Australia, where the constitutional position leaves general criminal law within State jurisdiction, three of the States have criminal codes and three have not. The Northern Territory has a Criminal Code based upon the Queensland Code. The law as to murder in the three non-Code States, New South Wales, Victoria and South Australia, is governed by the common law with some statutory modification. The applicable common law in Australia, however, has not been affected by recent House of Lords decisions. *Moloney* and *Hancock* were referred to in *Crabbe*,[79] but not applied. Consequently, in

74. [1982] AC 341.
75. [1982] AC 510.
76. Crimes Bill (NZ) cl 23.
77. Emphasis added.
78. (1986) 161 CLR 10.
79. Supra n 48.

the non-Code States the mental element for murder is wider than it now is in England. According to Howard's *Criminal Law*,[80] it is possible to distinguish five different mental states which can satisfy the requirements of murder - intention to kill, intention to inflict grievous bodily harm, recklessness as to causing death, recklessness to causing grievous bodily harm, and states of mind which are capable of supplying the mental element for crimes amounting to murder under the doctrine of constructive malice.

Australian courts have been prepared to examine "intention", "recklessness", and associated concepts, but no concluded opinion has yet been expressed in a non-Code case as to whether doing an act knowing the probable consequences equates with intention. In *Crabbe*,[81] a truck driver was ejected from a bar in a motel at Ayers Rock in Central Australia. In the early hours of the next morning, under the influence of alcohol, he drove his vehicle through the wall of the motel and into the bar. Five people were injured and died. The case was governed by Northern Territory law, which was then as to murder based on common law.[82] The main point dealt with resolved doubts which had carried over from previous cases, including *Pemble*[83] and *La Fontaine v The Queen.* ("*La Fontaine*")[84] This was that malice aforethought by reckless killing requires, in accordance with Article 223(b) of Stephen's *Digest*, foresight of probability that what the actor does might cause death or "really serious bodily injury", and not mere possibility.[85] But the Court also made significant statements about states of mind. It said that the blameworthiness of doing an act knowing that death or grievous bodily harm is a probable consequence is equal to that involved in intending to kill or cause grievous bodily harm; and that "on one view" a person who acts with the former state of mind may be regarded as having intended the consequence. However, the Court left the question open.[86]

An argument involving "wilful blindness" was also considered in *Crabbe*. The Court, citing Glanville Williams,[87] held that for wilful blindness there

80. B Fisse *Howard's Criminal Law* 5th edn (Sydney: Law Book Co, 1990) 45.
81. Supra n 48.
82. The Criminal Code Act 1983 (NT) had not been passed at the times material to this case and the rules of the common law governed the question as to what mental element is necessary to constitute the crime of murder.
83. Supra n 47.
84. (1976) 136 CLR 62.
85. Supra n 79, 419.
86. Ibid.
87. G Williams *Criminal Law: The General Part* 2nd edn (London: Stevens & Sons Limited, 1961) 159; id, *Textbook of Criminal Law* (London: Stevens & Sons Limited, 1978) 79.

has to be foresight of probability of consequence, and therefore the concept added no element that was not already there.[88] The Court in *Crabbe* stayed very close to Stephen's *Digest* Article 223(b), in that in addition to the matters already cited, it:-

1. affirmed that reckless indifference to consequences is not essential to the mental element for murder under this head. It may or may not exist. Only foresight of probability of consequence counts.
2. affirmed that for this purpose, whether an act is lawful, that is, justified or excused by law, does not depend on whether it has a social purpose or utility; though that may be relevant to lawfulness. Again, the test is whether there was foresight of probability.[89]

The only difference from Article 223(b) seems to be that the High Court has adopted the United Kingdom definition, from *Smith*, *Moloney* and *Hancock*, of grievous bodily harm as meaning "really serious bodily injury".

Malice aforethought in Victoria and South Australia follows the common law, but in New South Wales there are statutory modifications.[90] Section 18(1) of the New South Wales Crimes Act 1900 defines the mental elements for murder as intent to kill or inflict grievous bodily harm, and reckless indifference to human life; and also enacts constructive malice in relation to an act done in an attempt to commit, or immediately after commission of a crime punishable by penal servitude for 25 years. Malice is an element of murder as defined by section 5 of the same Act.[91] However, the definition of malice adds little if anything.[92] Thus in New South Wales, recklessness to causing grievous bodily harm is not an element. The expression, "reckless indifference to human life" (compare Model Penal Code, "extreme indifference to human life") has caused difficulties - *R v Tavai*;[93] *R v Solomon*;[94] *R v Royall*.[95] In Victoria and South Australia, the mental element necessary for murder follows Stephen's *Digest* Article 223.[96] In the Victorian case of *La Fontaine* Justice Gibbs criticised the use of "recklessness or reckless indifference" to describe the mental element in murder unless the relevant statute

88. Supra n 48, 420. For criticism of this view see Fisse, supra n 80, 61-62.
89. Supra n 48, 420.
90. Supra n 80, 43.
91. Crimes Act 1900 (NSW) s 18(2).
92. Supra n 80, 44-45; *Mraz v The Queen* (1955) 93 CLR 493.
93. CCA Unreported 14 June 1979.
94. [1980] 1 NSWLR 320.
95. CCA Unreported 12 July 1989, 8, 12.
96. *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Jakac* [1961] VR 367; *R v Sergi* [1974] VR 1; *The Queen v Hallett* [1969] SASR 141.

required it, on the ground that these terms tend to invite confusion between murder and manslaughter and criminal negligence.[97]

The non-Code States of Australia must be among the last refuges among the "old" British Commonwealth countries for the felony-murder rule. The exact scope of the rule in these States is examined closely in *Howard's Criminal Law*.[98] The learned author rightly describes it as "a barbarous relic which quite unnecessarily complicates the law and its enforcement (and) should be abolished."[99] However, whether that is likely is another matter.

B. Australian Criminal Codes.

The first Australian State to enact a Criminal Code was Queensland, in 1899. It came into force on the same day as the Commonwealth of Australia did - 1 January 1901. Western Australia adopted the same Code in 1902, and the two remain basically similar. The Queensland Code has also become the basis of criminal law in some fifteen other African and Pacific countries.[100] Tasmania's Code followed in 1924. The Queensland Criminal Code was the work of Sir Samuel Griffith, Federation founder, Premier and Chief Justice of Queensland, and first Chief Justice of the High Court of Australia. Griffith was a linguist and an admirer of things Italian and American. He stated in a letter transmitting the Code to the Attorney-General that he had "derived very great assistance" from the Italian Penal Code of 1888, and that he had "had frequent recourse to the Penal Code of both the State of New York".[101] Griffith also took close note of the 1879 Draft Code and the Bill of 1880, and made some use of them, but was well aware of Sir Alexander Cockburn's criticism of the Draft Code.[102] The Queensland Code contains an important provision, section 23, which provides *inter alia*, that, subject to express provisions of the Code, "a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident". The Tasmanian Code has a similar provision (section 13(1)) which appears to be derived from section 23, which provides in part that "no person shall be criminally responsible for an act, unless it is voluntary and intentional; nor ... for an event which occurs by

97. Supra n 76. See also, I Leader-Elliott "Recklessness and Murder-The Facts of the Case" (1986) 10 Crim LJ 358 (1986) 10 Crim LJ 358.
98. Supra n 80, 64-78.
99. Ibid, 71; supra n 25.
100. R S O'Regan *New essays on the Australian criminal codes* (Sydney: Law Book Co, 1988).
101. Supra n 6.
102. Ibid.

chance". By the decision of the High Court of Australia in *Vallance*,[103] it has been settled for almost thirty years in Tasmania that the "act" referred to in section 13(1) of the Tasmanian Code is the physical act of the accused which brings about the result, and does not include the result. However, the position still does not appear entirely clear in Queensland.[104]

There are five subsections in section 302 of the Queensland Code, which define murder. Section 302(1) describes murder as the unlawful killing of another if the offender intends to kill or to do grievous bodily harm. Section 302(2) provides that it is murder "if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger life". The third, fourth and fifth subsections relate to intending to do grievous bodily harm for the purpose of facilitating the commission of a crime or the flight of an offender after committing or attempting to commit it; to causing death by administering a stupefying or overpowering thing for any of such purposes, and to wilfully stopping the breath. Obviously there is a substantial degree of objective content in the last four of these subsections, but they are restrictive, and thus more acceptable forms of constructive malice provisions than are related common law concepts. However, they still raise the question as to whether they are currently acceptable as constructive malice provisions at all.

Section 302(1) is closely related to the corresponding common law provision, as in Article 223(a) of Stephen's *Digest*. It raises questions similar to those which have been discussed in *Hyam*, *Moloney*, *Hancock*, and the other House of Lords decisions referred to earlier, concerning the meaning of "intends". Although the question seems not to have been much discussed, it did arise in *R v Willmot* (No. 2).[105] In that case, the appellant killed a woman by choking her with a mouth gag while attempting to rape her. He claimed he did not know she was dead when he left her, and that he did not intend to kill or do grievous bodily harm. The trial judge directed the jury that they should concentrate on the question whether the accused realised that what he was doing was likely to lead to the woman dying or suffering grievous bodily harm. As in *Hancock*, the jury asked for further directions on the meaning of "intend".

103. Supra n 72.
104. See *Kaporonovski v The Queen* (1973) 133 CLR 209.
105. [1985] 2 Qd R 413.

On appeal in *Willmot*, the Court of Criminal Appeal held that the direction given by the trial judge was misleading and ordered a new trial. But the decision in *Moloney* had been given after the appeal in *Willmot* was argued and before judgment, and Justice Connolly relied on *Moloney* in holding that under section 302(1) "actual intent", in the sense of meaning to achieve a purpose, was the mental element to be proved. Foresight of probability of death, his Honour said, could only be evidentiary of intention to kill. Justice Moynihan agreed. At present, there are no more recent authorities in Queensland on the question of whether reckless killing can be regarded as intentional, within the meaning of section 302(1), so the prevailing view is that it may not.[106]

The Tasmanian Criminal Code is closely modelled upon the 1879 Draft Code, even to the extent of including the provision that all common law defences should be preserved (section 8 in the Tasmanian Code). The inclusion of such a provision in the Draft Code was criticised by Sir Alexander Cockburn, who argued that it negated the idea of certification.[107] In Tasmania it is clear that foresight of probability is, for the purposes of the Code, equivalent to intention. At least it has been so treated since *Vallance*.[108] The problem with *Vallance* is that the opinions of the Court were diverse. It was a case of unlawful wounding, not murder, yet the Court's exposition of the meaning of intention, in the context of a voluntary and intentional act, was arguably general and applicable to any crime committed under the Tasmanian Code. Section 13 of that Code provides that a person shall not become subject to criminal liability by reason of an act unless it is voluntary and intentional. Chief Justice Dixon interpreted the word "intentional" in the sense used by Kenny in the first edition of *Outlines of Criminal Law* published in 1902, meaning a result which is forseen as likely but is not desired.[109] Likewise for Justice Kitto, an "intentional" act causing injury was a state of mind in which the injury was not necessarily desired but was foreseen and assented to.[110] Justice Kitto thought that the notion of an "intentional" act was not satisfied by "the causing of an injury by mere negligence falling short of recklessness".[111] This seems to indicate that there

106. The question is fully examined by I G Campbell in "Recklessness in Intentional Murder Under the Australian Codes" (1986) 10 Crim LJ 3.
107 Supra n 101.
108. Supra n 72.
109. Ibid, 61. C S Kenny *Outlines of Criminal Law* 1st edn (Cambridge: University Press, 1902).
110. Ibid, 64-65.
111. Ibid, 64.

is little difference between an intentional and a reckless act in this interpretation of "intention".[112] Justice Windeyer defined an intentional act in a similar way. He said that an accused would be guilty of unlawful wounding if his actual purpose was to inflict a wound, and also if, without having any actual purpose to wound anyone, but foreseeing that what he was about to do was likely to cause a wound to someone, the accused went on to so wound. The common law treats what was done recklessly, in that way, as if it had been done with actual intent.[113] In summary, three of the five Justices agreed on this approach to intention, but two of them, Chief Justice Dixon and Justice Windeyer were in the minority on the main issue in the case, that is, whether the act which must be intentional includes the proscribed consequence. However the case has been treated as authority for the interpretation of "intention" as adopted by the three majority Justices. It is submitted there is no reason why intention should not be similarly interpreted in relation to murder, or any crime under the Tasmanian Code.[114] Nevertheless, it has been generally found unnecessary in Tasmanian murder cases under section 157(1)(a) of the Code to direct juries on other than actual purposive intent to kill, because of the foresight elements contained within sub-paragraphs (b) and (c) of section 157.

Thus there is strength of opinion either way in both England and Australia as to whether the notion of intention to produce a result encompasses foresight of probability of the result occurring if the act is done. However, no amount of argument can definitively solve this semantic problem. Definition is highly desirable where the law of murder is statute based. It is at least clear that the concept of intention to produce a result is more complex than that of performing an intentional act. Under the Criminal Code of Tasmania, for example, which as mentioned earlier requires an "intentional" act for criminal liability, it has long been accepted that such an act is "one which the actor knows he is doing and means to do". The notion of intending to produce a result or consequence, however, involves mental processes on the part of the actor which may be relatively complex. There are often questions as to whether and to what extent the accused considered the consequences which might flow from the act he contemplated, and what state of mind resulted. The act (more often acts, or conduct) which causes the death of another may be,

112. Compare Howard, supra n 80, 58.
113. Supra n 80.
114. This accords with the view taken by Howard *Criminal Law* 4th edn (Sydney: Law Book Company, 1982) 57, 55.

and in real life often is done in such a state of rage, or frenzy as to almost preclude rational thought, as Hadden has pointed out.[115] That is why objective formulations for the mental element in murder will remain attractive to some.

In the Tasmanian case of *Boughey*[116] the High Court of Australia gave an interesting interpretation of Stephen's formula, "knows or ought to know", from section 174(d) of the Draft Code, which appears in section 157(1)(c) of the Tasmanian Code, and section 212(c) of the Canadian Code. The accused was a medical practitioner. While living with the deceased woman, for the purpose of sexual stimulation when engaged in sexual activity he applied manual pressure in the area of the carotid arteries on both sides of her neck. This caused her death. He was convicted of murder. There was medical evidence that such a practice was likely to cause death, and that possession of a relatively low level of medical knowledge would have alerted a doctor to the danger of it. The accused said he did not know of the danger, and had not intended any harm to the deceased. Justices Mason, Wilson and Deane, with whom Chief Justice Gibbs agreed, said firstly that it was clear that the expression referred to "the knowledge, the intelligence, and, where relevant, the expertise which the particular accused actually possessed", and secondly that:

> The jury must be persuaded, on the criminal onus in the context of a murder trial, that the established circumstances were such that the particular accused, with the knowledge and capacity which he or she actually possessed, ought to have thought about the likely consequences of his or her action. They must also be persuaded, again on that onus and in the context of such a trial, that if the particular accused had stopped to think to the extent that he ought to have, the result would, as a matter of fact, have been that he or she would have known or appreciated that the relevant act or acts were likely to cause death.[117]

It is submitted that a criterion so defined is too clinically objective and remote from the reality of human conduct. There is some opinion in Tasmania that a conviction for manslaughter would have been more appropriate in the *Boughey* case. Tasmania's Law Reform Commissioner, the Honourable H E Cosgrove QC, in his Report[118] cited "professional unease" about the phrase "ought to have known", and has recommended that it should be removed from section 157(c) of the Code. It is understood the Government has accepted the recommendation, and intends to legislate accordingly.

115. Supra n 12.
116. Supra n 78.
117. Ibid, 29.
118. Law Reform Commissioner of Tasmania (Report No 60 1988).

V. THE COMMONWEALTH OF AUSTRALIA

In February 1987, the then Attorney-General of the Commonwealth set up a Review Committee under the chairmanship of the former Chief Justice of the High Court of Australia, Sir Harry Gibbs. The Committee was given terms of reference which in effect required it to review the criminal law of the Commonwealth, with a view to consolidation and rationalisation. After a substantial consultative process it produced Interim Reports on "Computer Crime", "Detention Before Charge", and in July 1990, "Principles of Criminal Responsibility and Other Matters" ("the Report"). The "other matters" were Secondary Offences, Common Law Offences, Attempts, Conspiracy, and Omnibus Offences. The report included a Draft Bill.

The Review Committee pointed out in the Report that section 4 of the Commonwealth Crimes Act 1914 provides that common law principles apply in relation to offences under that Act, but in respect of offences against Commonwealth law under a variety of other enactments, the effect of sections 79 and 80 of the Judiciary Act appears to be that they must be decided in accordance with the law of the place in which they are tried.[119] That means that the principles of criminal responsibility which apply in such cases will depend upon which of the eight criminal jurisdictions of the Commonwealth the offence is tried in. For that reason, the Committee decided that it should recommend codification of those principles in order to ensure uniformity in such cases.[120]

In its discussion of the "mental or fault element" in crime,[121] the report examines the contents of the United Kingdom, Canadian and New Zealand proposals referred to earlier in this article, and is influenced by but does not follow any of them specifically. In summary, the report makes the following recommendations:-

1. It should be provided in a consolidating Commonwealth criminal law that knowledge or intention be required in respect of every element of an offence unless otherwise stated.[122] The Review Committee decided not to follow the Australian Code formulations in

119. Paras 3.4; 3.5.
120. Para 3.12 cl 3E. For appraisals of the Report, see E Colvin "Unity and Diversity in Australian Criminal Law: A Comment on the Draft Commonwealth Code" and M Weinberg QC "Review of Commonwealth Criminal Law - Some Important Issues" 3rd International Criminal Law Congress, Hobart (Tas) September 1990.
121. Chapter 5.
122. Para 5.30.

respect of voluntariness due to difficulties of interpretation arising from the case law.

2. The terms, "knowingly", "intentionally", "recklessly" and "negligently" should be defined,[123] as follows:-

"knowingly" should follow the United Kingdom Law Commission's Draft Code provision (which is set out above), with one modification (paragraph 5.34 a.). In result, "a person is taken to act knowingly in respect to a circumstance if the person is aware that the circumstance exists or will exist or that it is probable that it exists or will exist" (Draft Bill, clause 3F a);

"intentionally" should, for practical purposes of the criminal law be assimilated with foresight of probable consequences, which would accord with recent Australian cases (in the High Court) (paragraph 5.34 b.). Thus, "a person is taken to act intentionally with respect to a circumstance if the person means it to exist or occur or knows that it will probably exist or probably occur" (paragraph 5.34 c.; Draft Bill, clause 3Fb).

"recklessly" should follow the United Kingdom Draft Code (mentioned above, which requires awareness of risk which is in the circumstances unreasonable (paragraph 5.34 d; Draft Bill, clause 3F c.);

"negligently" should follow the United Kingdom Law Commission Code Team recommendation, requiring "a very serious deviation from the standard of care to be expected of a reasonable person" (paragraph 5.34 d., Draft Bill clause 3F d.).

Professor Colvin suggested that the Committee recommendations represented a clear preference for common law concepts of criminal responsibility as against the more objective code formulations[124] Although this is true, the Chairperson, Sir Harry Gibbs, in speaking on the Report at the Third International Criminal Law Congress held in Hobart in September 1990, made it clear that the Committee's choice was specific to the individual wording rather than one reached out of philosophic preference for common law as against Code provisions. What is apparent from the Report, is that its recommendations are entirely in accord with modern thought in its rejection of objective criteria.

These Commonwealth Review Interim Reports will out of constitutional necessity, deal only with offences against Commonwealth law, therefore such crimes as murder will not come within their purview. Nevertheless, the recommendations concerning criminal responsibility, if enacted, might well form a nucleus for uniform provisions, or even a national criminal code, if a

123. Para 5.32.

124. See E Colvin ibid, 3; Weinberg, ibid, 2,3; G James "Areas of the Criminal Law Which Might Have Been Developed", 8, 9; and V M del Buono "International Perspectives on Criminal Law Reform", 11, papers delivered at the 3rd International Criminal Law Congress, Hobart (Tas) September 1990.

tendency to move in that direction grows. At the Third International Criminal Law Congress, a number of speakers referred to the desirability of having one criminal code for the whole of Australia.[125] The writer supports such a proposal, having regard to the unnecessary diversity of jurisdictions in a country with such a small population, and the close interconnection of commercial and social intercourse in modern times between the various States and Territories. The recommendations so far made by the Commonwealth Review Committee in relation to criminal responsibility, as summarised above, accord closely with the thinking of criminal law reform bodies in the other countries earlier referred to. Although exception may be taken to certain details, the recommendations are such that the work of the Commonwealth Committee could well be made the starting point for a uniform law. To bring about such a change would be a difficult and probably long-term process, but would be a great advance if achievable.

CONCLUSION

1. The British experience over the last thirty years concerning the law of murder provides a strong argument in favour of codification.
2. The proposed reforms by way of codification in the United Kingdom, and Code amendment in Canada and New Zealand, though they inevitably involve preferences which can be debated in detail, if enacted, would improve the existing law in those jurisdictions. The recommendations all exhibit a commendable movement away from objective and towards subjective criteria in relation to criminal responsibility.
3. The diversity of criminal law jurisdictions in Australia is increasingly being seen as a disadvantage. Some advocacy for an Australian national criminal code, perhaps using the work of the Review Committee on Commonwealth criminal law as a nucleus, appears to be developing. The achievement of such a code is an objective worth pursuing.

125. Supra n 124.