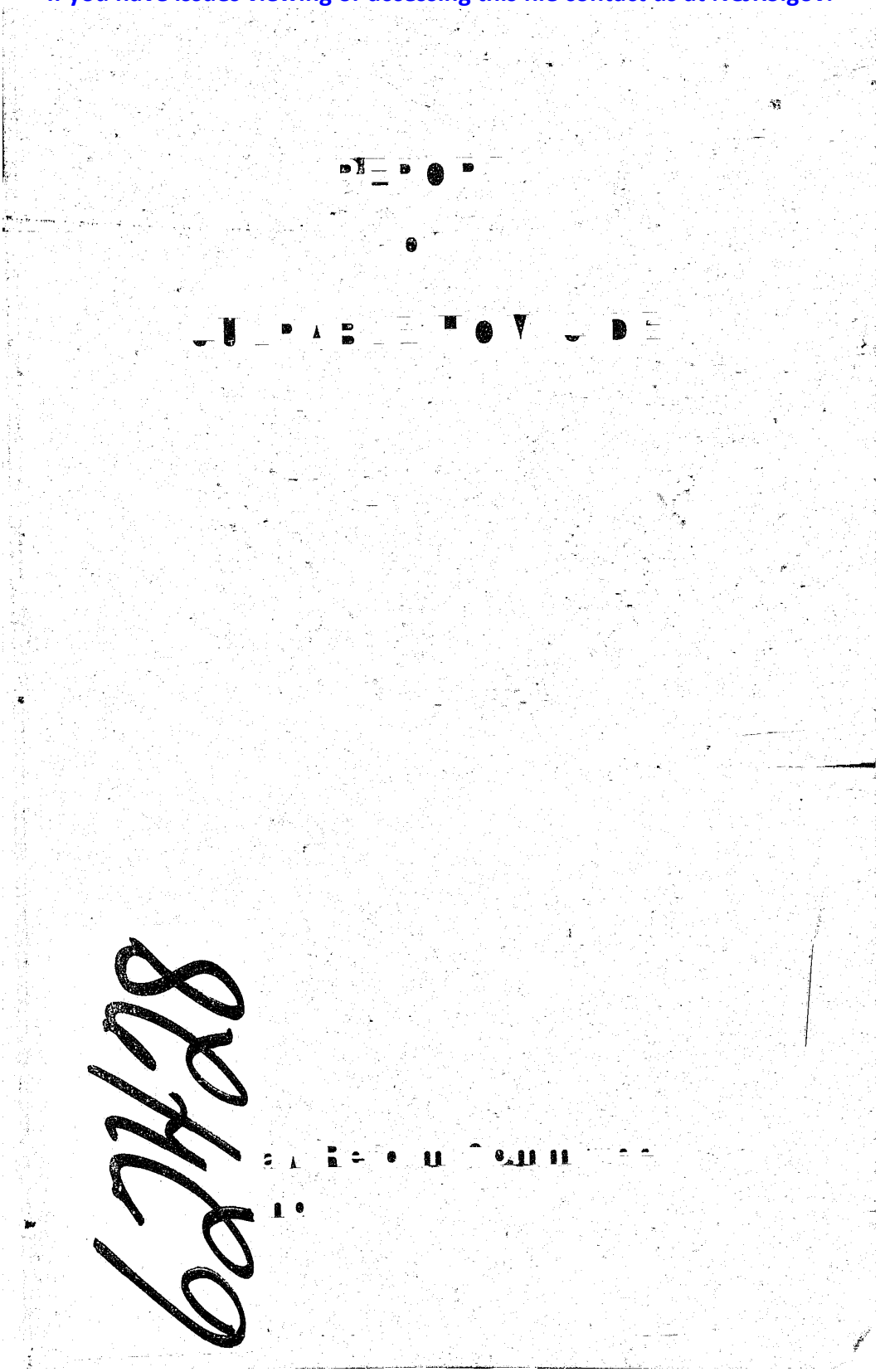

REPORT

on

CULPABLE HOMICIDE

Criminal Law Reform Committee
New Zealand

Presented to the Minister of Justice
July 1976

REPORT of CRIMINAL LAW REFORM COMMITTEE

on

CULPABLE HOMICIDE

TO: The Minister of Justice

INTRODUCTION

1. For the sake of brevity this report is entitled a report on culpable homicide, but it deals with a range of issues considerably wider than the title may suggest. It is concerned not only with murder, manslaughter, provocation and suicide pacts, but also with acts and omissions endangering life, safety or health. It is the result of nearly four years of deliberation and consultation, and recommends some major changes in the criminal law of New Zealand.

2. The Committee recommends:

(a) that there be a single offence of unlawful killing to cover what is now comprised in the offence of murder and those cases where murder is reduced to manslaughter by reason of provocation;

(b) that a person convicted of this offence be liable to a maximum penalty of life imprisonment and be automatically subject to liability to recall after release except where the sentence imposed is one of imprisonment for 2 years or less;

(c) that provocation be consequently a matter of fact to be taken into account by the Judge at the time of sentencing;

(d) that, except in certain specifically defined cases, a person causing a death that he neither intended nor knew to be likely to result - the present manslaughter cases - be no longer punishable under the homicide provisions but where his act or omission was intended to cause harm or showed reckless disregard for others he be liable accordingly;

(e) that the present sections defining the offences of wounding or injuring someone with intent to cause grievous bodily harm or injury or with reckless disregard for the safety of others be re-defined so as to apply regardless of whether harm is caused;

(f) that the law on suicide pacts be substantially amended.

No change is recommended on infanticide.

A draft Bill amending the Crimes Act 1961 to give effect to these recommendations is in Appendix I.

3. Before reaching these conclusions the Committee paid close attention to relevant reports of committees in England and Scotland, and studied decisions of the courts both in New Zealand and overseas, particularly in Great Britain, Canada and Australia. On the subject of provocation a working paper was first prepared and widely circulated for comment.

4. The Report is presented in parts, as follows:

Part I	Provocation
Part II	Manslaughter

PART I

PROVOCATION

Introduction

5. In the five years of its existence the Committee has spent more time in discussion and debate on the subject of provocation in the criminal law than on any other topic. This fact will illustrate two points - that in our opinion the law requires reform and that a satisfactory solution has not been easy to find. The solution we now propose will be regarded by some as a radical approach, but whether radical or not, the recommendation is made as being the best way of removing the criticisms that now surround the law on this subject.

6. The proposal we favour and recommend is that provocation should no longer be a defence to a charge of murder and should be relevant only on sentence. We also recommend that there should be created one offence of unlawful killing in which will be combined those cases which now constitute the crime of murder and those instances which would have been murder had they not been reduced to manslaughter by reason of provocation. We further recommend that the present mandatory life sentence for murder be replaced by a maximum term of imprisonment for life.

7. One consequence of this will be that the term "murder" will disappear from the technical language of

the law. Whether the combined offence be called "murder" or "unlawful killing" is a matter of terminology and does not affect the substance of what is proposed. We recognize, however, that "murder" has a special significance and reflects the abhorrence and condemnation of deliberate or reckless killing. But under our proposed amendment "unlawful killing" would include killing under provocation. In view of the pejorative quality of the term "murder" it is unacceptable that that name should be applied to cases of killing under provocation. Consequently we propose the name "unlawful killing". We expect, nevertheless, that one who kills without provocation and receives a long sentence for unlawful killing will still in common parlance be called a murderer. (Compare extortion under s.238 which is still commonly referred to as blackmail although not so called in the Crimes Act itself.)

The problem of provocation

8. Provocation developed in the common law at a time when the penalty for murder was death. The law recognised that in certain circumstances almost any man could be driven to kill, and it came to be the law that if the accused lost his self-control in circumstances where any reasonable man might also have lost control the accused should be convicted not of murder, but of manslaughter. This change in the nature of the crime has never been extended to any other offence; New Zealand authorities are at variance whether provocation can be pleaded as a defence to attempted murder, and it cannot be pleaded in answer to a charge of wounding with intent to injure, nor to assault, in each of which cases the accused might well have been provoked by his victim. But in the event of conviction on such charges the Court has taken provocation into account when imposing a penalty on the offender, and there is no reason to think that this practice has been unreasonable or unjust. On the contrary, a plea in

mitigation of penalty can include reference to and even evidence of the provocation given to the accused, and the Judge sentencing will decide the penalty in the light of those facts. Provocation as a defence to a charge of murder has therefore become something of an anomaly in the law, and we think that with the abolition of the death penalty its original reason for existence has almost evaporated.

9. Provocation at common law became restricted in several ways. If a man found his wife in the act of committing adultery he could plead provocation if charged with the murder of either wife or lover. But if she merely confessed to her husband that she was an adulteress, and as a result he lost his self-control and killed her, he could not raise the defence, and would be guilty of murder. Other anomalies developed until our Criminal Code Act of 1893 gave the defence statutory recognition in s.165, by which the scope of provocation was somewhat widened. This became s.184 of the Crimes Act 1908 (see Appendix II Working Paper paras. 16, 22.)

10. But there remained several limitations upon it, and criticism of illogical results led to a further complicated change in the Crimes Act of 1961. By s.169 of that Act provocation was widened in one way and kept narrow in another. The section reads:

> Provocation - (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
>
> (2) Anything done or said may be provocation if -
>
> (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Whether there is any evidence of provocation is a question of law.

(4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

(5) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

(7) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it."

Anything that had been said or done could thus be provocation if the offender lost his self-control and if an ordinary person would similarly have done so. But while the standard of self-control was to be regarded as that of an ordinary man, the "characteristics" of an offender were to be taken into account in assessing the force of the provocative behaviour. Hence there came into existence a "hybrid man" - one who by definition was to be regarded as capable of exercising the self-control of an ordinary man, but one upon whom provocative behaviour might have a special effect because of his characteristics as distinguished from an ordinary man lacking those characteristics. This has led to judicial interpretation in several cases and has again produced anomalies. (See Appendix II Working Paper, paras. 18 - 20.)

11. The present law on provocation does not do justice to some accused persons. For one thing, an offender who is simple-minded but not so mentally defective as to be legally insane is to be regarded as if he were an ordinary man - which plainly he is not. Then again certain people react differently from others in given situations - some take a long time to react, others are more volatile. The more slow the reaction the less likely will it be for an offender to be able to plead provocation, because the time element may lead a Judge to direct that the offender's reaction was too distant from the provocative act for the plea to be raised. The increasing proportion of Polynesian people in our community is beginning to reveal instances where the culture and upbringing of a Polynesian evoke a response that the ordinary man of Anglo-Saxon origins would not see as being reasonable; and sometimes a person can be provoked into violence not because of any special characteristic, but because, at the instant of provocation, he might be more sensitive than usual - in time of depression, fatigue, emotional distress, or when suffering some physical pain.

12. In most if not all of these cases it may be difficult or even impossible to plead provocation, yet the accused could not fairly be regarded as being on the same plane as a cold-blooded deliberate killer. Nevertheless in each case the special features of his case must be disregarded. The mandatory penalty of life imprisonment must be imposed even in cases where there are great differences in culpability between different offenders. This does not allow justice to be seen to be done, and from time to time it may actually prevent justice from being done.

13. The problem of the simple-minded man might be thought to be one that could be met by altering the law

relating to the defence of insanity. The absence of any marked change in that defence for nearly a hundred years has led to some dissatisfaction with its provisions, but the uncertain boundaries of psychiatry make it difficult for a lawyer to frame any alteration that is satisfactory. On the other hand by amending the law on provocation it will be possible to deal in a just and realistic way with some proportion of the cases that call for special treatment but which do not lie within the bounds of the defence of insanity as defined in s.23 of the Crimes Act 1961.

14. We began our examination of the problem aided by a study prepared with great thoroughness by our secretary Mr J.C. Pike, and after much discussion circulated widely the working paper in which we suggested a number of alternative proposals for amendment of the existing law. Several of the Judges replied to the effect that in their view the law needed no alteration, but the Wellington and Canterbury District Law Societies thought that it did. Most of the Judges who commented on the paper, but not all, expressed the view that there was no special difficulty in directing juries on provocation, and some expressed their objection to the alternatives in the working paper, particularly that which proposed solely a subjective test - i.e. that if the accused acted under provocation which caused him to lose self-control (without reference to any "reasonable man" standard of behaviour) he should be convicted not of murder but of manslaughter. These opinions, while helpful, did not dispose of the problem for us. We could not ignore the many other opinions that the law is unsatisfactory and should be changed, and that is clearly our view also.

15. The law on the subject is most complex, probably unnecessarily complex. It is doubtful whether juries comprehend the substance let alone the nuances of s.169(2)(a).

Instances have been witnessed by and reported to members of the Committee where Judges have done little more than put the words of s.169 to juries or have added to that kind of skeletal direction by citing portions of the judgment of the Court of Appeal in R. v. McGregor [1962] NZLR 1069. These explanations may be lucid to lawyers but, we are convinced, are frequently too difficult for jurymen to comprehend fully.

16. We have asked ourselves why provocation that leads to homicide should be dealt with differently from provocation in any other case, for example where the violence is not homicidal as in wounding or assault. In these latter cases provocation goes not to guilt but in mitigation of penalty, receiving such weight as the Court thinks fit. So long as the prescribed punishment for murder is a mandatory sentence of life imprisonment the Judge can make no allowance for provocation unless killing under provocation is excluded from murder, as it is at present. We therefore considered whether the sentence of life imprisonment for murder should not cease to be mandatory, so eliminating the need for the legal definition of provocation which we regard as unsatisfactory. We concluded that on balance this change should be recommended. We now set out these proposals in more detail, giving reasons in support of our recommendations and examining a number of objections that may be raised.

A crime of "unlawful killing"

17. Culpable homicide as defined in s.160(2) of the Crimes Act 1961 consists in the killing of any person -

(a) By an unlawful act; or

(b) By an omission without lawful excuse to perform or observe any legal duty; or

(c) By both combined; or

(d) By causing that person by threats or fear of violence, or by deception, to do an act which causes his death; or

(e) By wilfully frightening a child under the age of sixteen years or a sick person.

This is in turn divided into murder (defined in ss. 167, 168) and manslaughter (culpable homicide not amounting to murder). Infanticide (s.178) and being party to a death under a suicide pact (s.180(2)) are special exceptions.

18. The elimination of the present division between provoked and unprovoked killing (one being manslaughter and the other murder) would mean that ss. 169 and 170 with regard to provocation could be repealed. A single offence of unlawful killing would cover both.

19. We propose that where a person is convicted of unlawful killing the sentence of the Court should be -

(a) that he be imprisoned for life; or

(b) that he be imprisoned for a fixed term, and, where the term exceeds two years, that he be liable for the rest of his life to be recalled to prison; or

(c) such lesser sentence as the Court may now impose for manslaughter.

20. At the present time a sentence of life imprisonment must be imposed for murder and may be imposed for manslaughter in cases where murder is reduced by reason of provocation. The power to impose such a sentence would remain unaffected. But it would cease to be a mandatory sentence and would be imposed only in the worst of cases. In all cases the Court would do what it now does in cases of manslaughter and in criminal cases generally - i.e. fix

a sentence which it deems appropriate having regard to the offence, the offender, the public interest and all other relevant considerations.

21. The change would not be as great as at first appears. All persons sentenced to imprisonment - whether the sentence is a life sentence or one for a term of years - are eligible for release before the expiry of the sentence, and all of them except those whose sentence is for less than a year are on probation for a period after release and liable to recall for at least a part of that period. The distinguishing features of a life sentence, as opposed to a finite one, are

(1) that in the former case the Court has no control whatever over the period for which the offender is actually detained, and

(2) that unless formally discharged by Executive action the person released from such a sentence is liable to recall for the rest of his life and not merely for the balance of the term of years fixed by the Court.

The first difference does not appear to us to be justified; the second is taken care of by our recommendations as to recall.

22. If the Court imposed a sentence of imprisonment for life we recommend that the same conditions should apply as now apply on a conviction for murder in respect of

(a) the period prescribed for the first appearance of the offender before the Prisons Parole Board;

(b) release on probation;

(c) formal discharge (only by the Governor-

General acting on the advice of the Minister of Justice).

23. If, at the other extreme, the Court imposed a sentence of two years' imprisonment or any other sentence of less severity, that would be the final disposition of the case in the sense that on the expiry of the sentence the offender's liability to detention would cease.

24. Where, however, the Court imposed a sentence of a fixed term of imprisonment of more than two years we recommend that the offender should also be sentenced to be liable to recall for life. This liability already exists where a person is convicted of murder but not where he has been convicted of manslaughter on the ground of provocation and sentenced to a term of years. In this respect our proposal involves a change in the law which we think is justified in the public interest provided that arbitrary or oppressive use of the power of recall can be eliminated. To this end we recommend that the procedural provisions set out in the next paragraph be embodied in a separate Criminal Justice Amendment Act.

Provisions for recall

25. (a) Recall

(i) A person convicted of unlawful killing who had been sentenced to a fixed term of imprisonment exceeding two years with the stated liability to recall, would on his release from detention be liable to be so recalled to prison by direction of the Minister of Justice.

(ii) The person so recalled would be entitled to make application to the Supreme Court

if he considered that there was no sufficient justification for the recall. The Minister of Justice would be called upon to show cause. If the Court were not satisfied that the recall was justified it would direct that the applicant be discharged from custody.

(iii) The hearing should be in open court.

(iv) An appeal should lie from the decision to the Court of Appeal.

(v) This procedure should apply whenever the Minister invoked the power of recall, which he could do whenever and as often as he deemed necessary subject to the provisions for termination of the power of recall set out below.

(vi) A person in prison as the result of recall should have his case considered annually by the Prisons Parole Board.

(b) Termination of liability to recall

(i) The Minister of Justice should have power at any time to terminate the liability to recall.

(ii) At any time after the expiry of two years from his last release from prison a person liable to recall should be entitled to apply to the Minister to have the liability terminated.

(iii) If the Minister declined the application the applicant should be entitled to make application to the Supreme Court for an order terminating his liability to recall. The Minister of Justice would be made a party to the proceedings. The onus

would be on the applicant to satisfy the Court that the liability should be terminated.

(iv) The hearing should be in open court.

(v) The decision to make or refuse an order should be appealable to the Court of Appeal.

(vi) These provisions would not apply where a person was sentenced to life imprisonment. If released on probation he would remain liable for recall throughout his life unless discharged by the Governor-General acting on the advice of the Minister of Justice in accordance with the present law applicable to murder.

(c) Exemption from liability to recall

There should be no liability to recall unless the offender was initially sentenced to more than two years' imprisonment.

26. These changes in the law would eliminate what may legitimately be described as an anomaly, in that Judges who are entrusted with the task of saying what custodial element is necessary for the purpose of prevention and deterrence in every other case play virtually no part at all, as the law now stands, in determining the period which convicted murderers spend in prison. By imposing, in exceptional cases, a sentence of life imprisonment for unlawful killing, or fixing a set term of years for the crime the trial Judge would be able to indicate clearly the gravity of the particular offence and the weight of any extenuating circumstances as revealed at the trial. Broadly speaking he would exercise his sentencing function

in exactly the same way as with every other crime in respect of which this task is entrusted to him.

27. A direct consequence of these changes would be that provocation and other mitigating circumstances would be dealt with as matters of fact, untrammelled by artificial legal rules and definitions. If it be asked, how should a Judge weigh a plea of provocation, we would answer that he should do exactly as he does in other cases - looking at all the relevant circumstances, both of the offender and of the offence, and then imposing a proper sentence. This would mean that the Court could do justice to the accused without being constricted by any formal definition of provocation. We have given thought to possible conditions that might be required to be satisfied before a mitigation plea of provocation could be accepted, but have rejected that idea. We think that any statutory conditions might produce more anomalies, and prefer to leave the matter to the wisdom and experience of the Judges without fettering their power to impose a just and proper sentence. This they do now in cases other than murder where provocation is relied on in mitigation of guilt.

28. Concentration on the question of the penalty for an unlawful killing could well mean that the Judge imposes sentence with a clearer picture of the offender's responsibility than is presently attainable. If there is some but not sufficient evidence of provocation or some but not sufficient evidence of automatism, and the jury, following the directions given in the summing-up, rejects these defences the evidence of the accused's mental state has no further bearing on the case and he receives the mandatory life sentence for murder. On this point we refer to the Canadian case of Perrault [1970] D.L.R. (3d) 486. In our view an offence of unlawful killing, to which provocation could be pleaded only as a

factor in mitigation of sentence, would be far more satisfactory.

29. Any person accused of unlawful killing who wished to advance any of the other defences would still plead them as before - self-defence, insanity, automatism, accident or a general denial. But we think that where the accused admits homicidal behaviour there could well be an increase in the number of cases where a plea of guilty is entered, and more concentration on the plea in mitigation which in our opinion is where the emphasis ought often to lie.

30. If our recommendations are accepted there will clearly be no need to resolve the conflict in the Supreme Court decisions of Smith [1964] NZLR 834 and Laga [1969] NZLR 417 which concern the question of the availability of provocation on a charge of attempted murder. Nor will it be necessary to discuss its general availability on charges other than murder. With the abolition of provocation as a plea in answer to a charge of murder the place of provocation is dealt with consistently throughout the criminal law as a question going to penalty alone.

Views expressed in England and Scotland

31. In support of the position that our recommendation is not as radical as it might seem to be at first glance, we wish to mention that while our deliberations were in progress the subject of a single offence of unlawful killing was touched upon in the United Kingdom. In the recent case of Hyam v. Director of Public Prosecutions [1975] A.C. 55, [1974] 2 All E.R. 42, the House of Lords was divided on the matter of constructive malice on a charge of murder. A woman had burned down the house of her rival and two lives were lost in the blaze. She pleaded that she had intended no bodily harm, and that her crime was manslaughter not murder, of which she had been convicted. Lord Kilbrandon, at p.98 (All E.R.

p.72), included in his speech the following observations:

> "My Lords, it is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and the distinguishing from it of the crime of manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to. I believe this to show that a more radical look at the problem is called for, ... There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation in sentences downwards from life imprisonment."

32. A different view has been taken by the Criminal Law Revision Committee for England and Wales in their Twelfth Report (Cmnd 5184). The views they express are provisional only, but they command the most serious consideration. They are of the opinion that there should be a separate offence of murder as at present, and that the mandatory life sentence for murder should remain. It behoves us to explain why we believe that in New Zealand the latter course should not be followed.

33. The first point stressed in the Report just cited is the deterrent aspect of the penalty for murder. They believe that the stigma which, in the public mind, attaches to a conviction of murder rightly emphasises the seriousness of the offence and may have significant deterrent value. If this be so it could well be a merely transitory aspect of a change from "murder" to "unlawful killing". In any event the sentence imposed on a convicted person may be more important from the point of view of deterrence than the label given to the crime. Murder ranges from cold-blooded poisoning to mercy killing. The mandatory penalty for murder, applied as it now is to murder of whatever type or degree, is widely known to be in practice very different from the "imprisonment for

life" which it is stated to be. It is a crude and ineffective instrument for emphasising the gravity of the crime in those cases where the maximum possible condemnation is justified. If, under the scheme we propose, a sentence of, say, twenty years' imprisonment were imposed for unlawful killing we believe the deterrent effect would be considerably greater than that of a sentence of life imprisonment for murder under the existing law.

34. The Committee in England considered that the criticisms of the mandatory life sentence were unconvincing and its advantages overwhelming. In reaching these conclusions it may be observed that they at no time considered the law of provocation, dissatisfaction with which led us to look into these questions. They reached their conclusions by comparing the mandatory life sentence with various alternatives that had been proposed. The point which weighed with the Committee more than anything else was that the mandatory life sentence, unlike the alternatives which were considered, entailed a lifelong liability to be recalled to prison as an integral part of the original sentence. It does not appear to us that the imposition of a mandatory life sentence is essential in order to achieve this result. On the contrary we believe that the scheme outlined in paragraphs 19 to 25 of our report does this and more, in that it also provides scope for the maximum flexibility in sentencing with greater participation of the Judge who has tried the case.

35. The English Committee further stated that the mandatory life sentence was needed because the trial Judge could not always foresee how long a murderer would need to be deprived of his liberty, and it was essential that there be a power of recall in the event of deterioration after release. Neither of these points constitutes a valid objection to the scheme we have outlined. This

scheme, in our view, is much better designed than a system of mandatory life sentences to achieve the desired aim of affording due protection to the public while ensuring just treatment of offenders. *

36. In Scotland the Committee on the Penalties for Homicide, in its report (Cmnd 5137) also turned attention to these same questions. This Committee also opposed the fusion of murder and manslaughter into one offence and favoured the continuance of the mandatory life sentence for murder. This was for substantially the same reasons as those given by the Committee in England: the stigma attaching to "murder", the imperative necessity for a power of recall, and the inability of the Judge to identify at the date of the trial those who ought to be subject to indeterminate detention for reasons of public safety. We have commented on each of these points and need not repeat what has been said already. But some further comments by the Committee in Scotland may also be noted. In the first place the main question before the Committee was, in their own words (para. 90):

> "Whether it is possible to devise, within our terms of reference, a penalty for murder which provides greater safety to the public and carries a greater deterrent value than the present mandatory life sentence."

The Committee mentioned their terms of reference because those terms precluded the Committee from considering whether or not the restoration of capital punishment was desirable. For our part we did not set out with the object of securing greater deterrence or allaying public disquiet, but we see no reason to think that the public interest will be in any way detrimentally affected if our proposals are implemented. Rather we think that public anxiety will be allayed to the extent that our proposals have the impact we believe they will have.

* See page 53.

37. The Committee in Scotland referred, in paragraph 55 of their report, to the absence of judicial discretion in sentencing for murder. They said:

> "It has been suggested to us that because of the mandatory life sentence the trial judge is deprived of the power (i) to make a distinction between some murderers and others, (ii) to operate a unifying influence upon the periods spent in prison by persons convicted of murder and by persons convicted of other serious offences and (iii) to impose a sufficiently deterrent sentence on an offender convicted of a particularly horrible murder. The position with regard to murder has been compared unfavourably with that pertaining to virtually every other common law crime in respect that in those others a High Court judge has complete discretion with regard to sentence and varies the quantum of punishment - normally the length of prison sentence - according to all the circumstances of the offence and the offender."

This criticism, they said, would be substantially met by wider use of the power which exists in both England and Scotland to recommend a minimum period of detention before release. They proposed that in sentencing a murderer to life imprisonment the court should be required, save in exceptional circumstances, to declare the period of imprisonment which it recommended as the minimum to be served before the offender's release on licence could be authorised. This, they said, (para. 93), would remove two weaknesses in the present system:

> "Its effect would be that at the end of almost all trials which result in a conviction for murder the Court, in addition to imposing the mandatory life sentence, would recommend, in the light of its assessment of the offence and the offender, a minimum period of years for which the offender should be initially detained. The making of such a recommendation would enable a distinction to be made in public, by the Court, between one murderer and another. The convicted person and the public would thereby be made aware of the gravity with which the Court viewed the case and any potential offender would be made aware, in a more direct way than is possible with the present sentence, of the likely consequences of a similar crime. At the end of a murder trial which

> attracted considerable publicity the pronouncement of a life sentence coupled with a recommended minimum period would usefully sharpen the deterrent value of the sentence."

They went on to point out that it would also remove the weakness arising from the fact that otherwise the trial Judge plays virtually no part in determining the period the offender spends in prison.

38. The Criminal Law Revision Committee in England, however, strongly dissented from this recommendation. To recommend that the offender never be released could mean that he had nothing to lose from a violent attack on a prison officer. On the other hand, to recommend that he serve a minimum of three or four years would do nothing to increase the deterrent effect of the life sentence, besides which it would be likely to create a sense of grievance in a prisoner who was detained much longer on grounds of public safety. It would often be difficult if not impossible for the Judge to assess in advance the appropriate minimum period. Disparity in the minimum periods recommended in different cases would be undesirable but unavoidable.

39. There is some analogy between the system recommended by the Committee in Scotland and our own recommendations, and the advantages claimed for the proposals of that Committee can certainly be claimed for our own. But is it also true that our proposals suffer from the defects pointed out by the Criminal Law Revision Committee? For the most part we think not. Under our scheme the Court imposing a sentence of life imprisonment does not recommend that the offender never be released. When imposing a comparatively short sentence it does not recommend that this be the minimum period to be served before release but expressly imposes at the same time the liability to further imprisonment. The distinction is a fine one but we consider it to be real and significant.

We concede, however, that rightly or wrongly some prisoners who have served short initial terms of imprisonment will consider themselves unjustly treated if recalled and held for long periods thereafter. The other points made by the Criminal Law Revision Committee do not, we think, weigh against our proposals. The Court would not be expected to attempt to estimate in advance the total period of deprivation of liberty that might prove necessary in the public interest; and disparity in sentences, though inevitable, should present no more insuperable problem than in the case of manslaughter or rape under the present law.

40. The Scottish Committee rejected one proposed alternative to the mandatory life sentence on the ground that it would, if implemented, constitute a departure from the constitutional position whereby the maximum period of deprivation of liberty is fixed once and for all by judicial determination in open court. We subscribe to this principle, and we think that a sentencing formula drafted on the basis of paragraph 19 of our report would fully comply with it.

41. We should add that on this particular topic, one of our members is still of the view, based on his Police experience, that the mandatory nature of the life sentence does act as a special deterrent, particularly among criminals where it is most important. He considers that the new proposal would detract a little from this and he would prefer to see the mandatory life sentence for the new crime of unlawful killing retained except where the Judge was satisfied that certain specified mitigating factors were present, e.g. in cases of mercy killing, or where provocation was present, and possibly where an offender was not the principal offender. However, in the interests of unanimity and in deference to the opinion of the rest of our Committee he endorses the recommendation subject to the reservations just expressed.

Specific statutory amendments

42. For the reasons given in the preceding pages we recommend:-

(1) That the following amendments be made to the Crimes Act 1961 along the lines of the draft bill set out in Appendix I of this report:

(a) That s.160(2) (which defines culpable homicide) continue to apply, subject to the clarification of the words "unlawful act" in s.160(2)(a), as recommended in paragraph 50 in Part II of this report:

(b) That the definitions of murder in ss. 167 and 168 become definitions of unlawful killing:

(c) That s.172 (which prescribes the mandatory penalty of life imprisonment for murder) be redrafted to prescribe a maximum penalty of life imprisonment for the crime of unlawful killing; and also to provide that where a sentence of imprisonment for more than 2 years is imposed it be part of the sentence that the offender may, after his release, be recalled and detained for the rest of his life in accordance with and subject to the Criminal Justice Act 1954:

(d) That ss. 169 and 170 (which relate to provocation by which culpable homicide that would otherwise be murder may be reduced to manslaughter) be repealed:

(e) That all necessary consequential amendments be made.

(2) That the Criminal Justice Act 1954 be amended to bring in the procedural provisions relating to recall set out in paragraph 25 of this report.

PART II

MANSLAUGHTER

43. Having considered the case of murder reduced to manslaughter by provocation the Committee proceeded to consider the remaining instances of manslaughter and examined the law under three main headings:

(a) the effect of "chance" (e.g. where an act caused death but there was no reasonably foreseeable risk that death would follow);

(b) the scope of the "unlawful act" referred to in the definition of homicide;

(c) the scope of the omissions referred to in that definition, and the degree of negligence that must be proved in order to establish manslaughter by negligence.

44. It is convenient first to set out some of the relevant sections of the Crimes Act 1961:

> 158. Homicide defined - Homicide is the killing of a human being by another, directly or indirectly, by any means whatever.
>
> 160. Culpable homicide - (1) Homicide may be either culpable or not culpable.
>
> (2) Homicide is culpable when it consists in the killing of any person -
>
> (a) By an unlawful act; or
>
> (b) By an omission without lawful excuse to perform or observe any legal duty; or

(c) By both combined; or

(d) By causing that person by threats or fear of violence, or by deception, to do an act which causes his death; or

(e) By wilfully frightening a child under the age of sixteen years or a sick person.

(3) Except as provided in section 178 of this Act, culpable homicide is either murder or manslaughter.

(4) Homicide that is not culpable is not an offence.

Section 178 deals with infanticide.

171. Manslaughter - Except as provided in section 178 of this Act, culpable homicide not amounting to murder is manslaughter.

177. Punishment of manslaughter - Every one who commits manslaughter is liable to imprisonment for life.

190. Injuring by unlawful act - Every one is liable to imprisonment for a term not exceeding three years who injures any other person in such circumstances that if death had been caused he would have been guilty of manslaughter.

145. Criminal nuisance - (1) Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.

(2) Every one who commits criminal nuisance is liable to imprisonment for a term not exceeding one year.

The effect of "chance"

45. Obviously a main purpose of the provisions just cited is to reduce the risk of serious injury or death by

prohibiting and punishing the creation of unjustifiable risks. But in the measures adopted to that end the Act introduces a series of discriminations based on the actual outcome, which may be quite fortuitous. Under the existing provisions some persons are exonerated by a lucky stroke of chance, while others are made liable to severe penalties through some unforeseeable turn of events. If, for example, a victim is saved from death by a miraculous piece of surgery and a charge has to be brought under s.190 instead of s.171 the maximum sentence is three years instead of life imprisonment, a reduction that has no conceivable connection with the conduct of the accused. If, on the other hand, a motorist thoughtlessly opens a car door without first looking back, in the path of an oncoming cyclist, he commits either a minor offence, or manslaughter, according to the outcome; but his blameworthiness is the same in both cases. We consider that the sanctions at present provided are quite inadequate for grossly negligent conduct that does not happen to result in death; and that they are unsatisfactory in imposing liability for manslaughter where some minor wrongdoing has led to death but the risk of a grave result was not reasonably foreseeable.

46. The present policy of the Act - grading liability according to consequences - can be traced back to medieval times. It still found expression in the nineteenth century when it was supported by Sir James Fitzjames Stephen. He was one of the Commissioners from whose report and draft code of 1879 our own Criminal Code was derived. In his History of the Criminal Law of England (1883) Vol. III, 311, he wrote:

> "The scheme of the Indian Penal Code thus excluded the crime of manslaughter by negligence. This appeared to me to involve neglect of a matter which ought to be taken into account in penal legislation, - the effect which an offence produces on the feelings and imagination of mankind. I accordingly

> carried through the Legislative Council an act which added a section (304A) to the Code, punishing specifically the causing of death by negligence. If two persons are guilty of the very same act of negligence, and if one of them causes thereby a railway accident, involving the death and mutilation of many persons, whereas the other does no injury to any one, it seems to me that it would be rather pedantic than rational to say that each had committed the same offence, and it should be subjected to the same punishment. In one sense each has committed an offence, but the one has had the bad luck to cause a horrible misfortune, and to attract public attention to it, and the other the good fortune to do no harm. Both certainly deserve punishment, but it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm, and the effect in the way of preventing a repetition of the offence is much the same as if both were punished."

47. Readers a century later will not accord so high a place to the desire to gratify what Stephen supposed to be a natural public feeling. We find his reasoning unattractive and reject it as a justification of the scheme of criminal liability embodied in the present Act. As Judges have from time to time noted, statutes enacted on that foundation fail to equate liability with culpability. In Creamer [1966] 1 Q.B. 72, 82; [1965] 3 W.L.R. 583, 592, Lord Parker C.J., delivering the judgment of the Court of Criminal Appeal, said:

> "A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence such as assault, or, in the present case, abortion. This can no doubt be said to be illogical, since the culpability is the same, but nevertheless it is an illogicality which runs throughout the whole of our law, both common law and the statute law."

Smith and Hogan, Criminal Law (3rd ed. 1973) 257, n.16, remark:

> "It is not a crime to cause non-fatal injuries by gross negligence. It seems illogical to make liability depend on the fact of death and not on the nature of the negligence. But this lack of logic runs through the whole of manslaughter."

This would not be an accurate summary of the law in New Zealand (see, for example, ss. 145, 151-153) but it is still the case that under the Crimes Act the extent of liability depends on the actual result, whether or not it was foreseen or foreseeable.

48. We consider that this branch of law is unsatisfactory from two points of view. In the first place a minor offence may become a major crime as the result of unusual and unforeseeable consequences. Secondly, grossly negligent conduct is treated as a minor matter if for any reason harm does not actually occur, e.g. if it is averted by the action of others. We think that the lack of logic above referred to should not be permitted to continue as a feature of our law, and that an act or omission should be punishable by reference only to its inherent danger. If the proscribed act has a low maximum penalty (presumably because there is negligible risk of consequential harm) the relative seriousness of the act is not affected by the chance result of death. To increase the penalty for such an offence from, say, three months' imprisonment to imprisonment for life in such circumstances is virtually to place the offender under strict liability for the consequences of his act. If there is, however, a significant element of danger in the accused's acts, it is that element of danger that ought to be taken into account in proscribing such conduct and setting a penalty in respect of it. The potential harm rather than the actual harm provides the proper measure of liability. It is recognised that the actual harm may be cogent evidence of the degree of risk created. For the reasons given we are unanimously of opinion that

the criminal law in this area should be directed against dangerous conduct, and that liability should be neither increased nor decreased according to chance results. This change in the law should be achieved, we suggest, by substituting new offences for the offence of manslaughter, and adopting or retaining some recent developments in the case law of England and New Zealand discussed in the succeeding paragraphs of our report.

Manslaughter by "unlawful act"

49. The first instance of culpable homicide under s.160(2) is killing "by an unlawful act".

50. Sir James Stephen, op. cit. 16, thought that "unlawful act" included not only all crimes but also "all torts, and all acts contrary to public policy or morality, or injurious to the public; and particularly all acts commonly known to be dangerous to life". This view has been rejected in the United Kingdom: Franklin (1883) 15 Cox 163; Lamb [1967] 2 Q.B. 981, [1967] 2 All E.R. 1281; Andrews v. D.P.P. [1937] A.C. 576. Although there is no direct authority on the point it is not likely to find acceptance in New Zealand. It is recommended that this be put beyond doubt by an amendment to s.160(2) stipulating that the unlawful act must be an "offence" (as defined in s.2(1)).

51. Recent decisions have established that in England an unlawful act, for the purposes of manslaughter, must be not merely a criminal offence but an act creating a reasonably foreseeable risk of harm to some person. In the passage already cited from Creamer (supra) Lord Parker said:

> "A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended." (Emphasis added.)

In the slightly later case of Church [1966] 1 Q.B. (C.C.A.) Edmund Davies J. said (p.70):

> "... the conclusion of this court is that an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

Under these decisions the question is not whether the accused appreciated the risk but whether a reasonable person would have done so: Lipman [1969] 3 All E.R. 410, 415. In other words, they limit the types of act from which a charge of manslaughter may result. If death occurs through an act which would not have been thought to entail the likelihood of harm to anyone there can be no conviction for manslaughter. This is completely in line with the views we have already expressed on the effect of chance, and though the Crimes Act does not itself impose any such restriction it is probably the law in New Zealand. In Grant [1966] NZLR 968 (C.A.) reference was made to the unreported decision of the Court of Appeal in Faigan in 1927. In this case the Court of Appeal, without giving reasons, quashed a conviction for manslaughter based on the unlawful act of the accused in driving a motor vehicle without a driver's licence. Turner J., delivering the judgment of the Court of Appeal in Grant, said with reference to Faigan's case:

> " We ... prefer to think that its foundation lies in the fact that it was impossible for the prosecution to contend that the unlawful act upon which reliance was placed was one likely to do harm to the deceased or to some class of persons of whom he was one."

In support of this interpretation he cited the statement of Lord Parker in Creamer set out above.

52. The question must next be asked whether the scope

of manslaughter should not be still further restricted by requiring proof that the accused realised the risk of harm from his unlawful act. According to Lipman (supra) this is not the law of England, but statements to the contrary may certainly be found. According to some judicial pronouncements it must be proved, in a case of manslaughter by an unlawful act, that the accused realised the possible harmful consequences. In Gray v. Barr [1971] 2 Q.B. 554, 568, [1971] 2 All E.R. 949, 956, Lord Denning M.R. said:

> "In the category of manslaughter relating to an unlawful act, the accused must do a dangerous act with the intention of frightening or harming someone, or with the realisation that it is likely to frighten or harm someone, and nevertheless he goes on and does it, regardless of the consequences."

(This was a civil case. Lipman (supra) was cited in argument but was not mentioned by Lord Denning in his judgment.) In Howell [1974] 2 All E.R. 806, 809 Wien J. cited this passage from Gray v. Barr and said:

> "So far as any form of manslaughter is concerned that is unrelated to intoxication, I would respectfully agree and adopt what Lord Denning said ..."

In Longley [1962] V.R. 137, 141, Sholl J. said:

> "But more recently, as e.g. in R. v. Parmenter [1956] V.L.R. 312, at pp. 314-5 ... and R. v. Helen Clark (unreported, 1961) I have directed the jury that it is manslaughter if in the course of an unlawful assault upon another, of a character which the accused must have realised involved an appreciable danger of death or serious injury to the other, the accused unintentionally caused his death. And I have given a similar direction with regard to other forms of unlawful acts not amounting to felony; i.e. that before there can be manslaughter the accused must have realised the danger of death or serious injury."

53. The view that commends itself to the Committee may be described as a middle course between Lipman and Longley. We think that the prosecution should be required to prove

either that the accused realised that his act might cause harm or that he was grossly negligent in failing to appreciate and guard against the risk. In both of these cases he may be said to have acted with reckless disregard of the consequences. Church and Lipman, in our assessment, are too severe in adopting the wholly objective test of what a sober and reasonable person would have realised, for the accused who did not fully appreciate the danger may have done little more than make an understandable error of judgment. On the other hand, under the subjective test of Longley one would acquit a person whose failure to advert to the risk indicated an utter disregard for the safety of others. We would adopt the view expressed by Sachs L.J. in Lamb (supra):

> "It would of course have been fully open to a jury, if properly directed, to find the accused guilty because they considered his view as to there being no danger was formed in a criminally negligent way."

Our proposal is in line with the observations made later in this report regarding manslaughter by negligence.

Manslaughter by negligent omission

54. Where death is caused by criminal negligence it is well established as a matter of common law that such negligence must be something beyond the civil standard before a verdict of manslaughter can be found. The usual qualifying adjectives applied to such negligence are "culpable", "criminal", "gross" and "wicked".* All these descriptions were used by the

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* Some writers maintain that there should be no criminal liability at all for negligence, even for gross negligence. The main reasons given are that a person should not be punished for inadvertence, and that punishment cannot be shown to have the effect of reducing or preventing negligent conduct. Reference may be made to Hall, General Principles of Criminal Law (2nd ed. 1960) 137; "Negligent

House of Lords in Andrews v. D.P.P. (supra) without any one of them being used in preference to the others, but in giving the judgment of their Lordships Lord Atkin said (p.583):

> "For the purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case ... but it is probably not all-embracing for 'reckless' suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it, and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction."

55. In Dawe (1911) 30 NZLR 673 (C.A.) and Storey [1931] NZLR 417, [1931] G.L.R. 105 (C.A.), most of the Judges considered it was not necessary for the prosecution to prove gross negligence in cases alleging breach of the duty of care laid down by s.171 of the Crimes Act 1908 (now s.156 of the Crimes Act 1961). Indeed some thought that the section was enacted for the express purpose of disposing of the distinction between "negligence" and "gross negligence" in cases coming within the purview of the section. In both cases it was held that "civil"

Behaviour Should Be Excluded from Penal Liability" (1963) 63 Col. L.R. 632; Turner, Modern Approach to Criminal Law (1945) 195; Williams, Criminal Law: The General Part (2nd ed. 1961) para. 43; Hart, "Negligence, Mens Rea and Criminal Responsibility", in Punishment and Responsibility (Clarendon Press, 1968). The Committee does not share the view that gross negligence is insufficient as a ground for criminal liability. Since the Committee does not recommend any change in the law in this respect it does not consider it necessary to elaborate its reasons.

negligence - the mere breach of the legal duty imposed by the section to take reasonable care - would suffice. In Storey Myers C.J. said:

> "It seems to me that s.171 means exactly what it says and that no attempt should be made to whittle it down. It is part of our Criminal Code ... The test under both ss. 170 and 171 is that of 'reasonableness'. This term cannot be defined, but the standard must be set in each particular case by the jury by applying their commonsense to the evidence as to the facts of the case ... The standard should be neither too high nor too low: it should be a 'reasonable' standard, the standard of skill and care which would be observed by a reasonable man. I desire, however, expressly to say that, while I think, having regard to s.171 of the Crimes Act and to what was said in Dawe's case (30 NZLR 673), there is no distinction in New Zealand between negligence as the foundation of criminal liability and negligence as the foundation of civil liability, it follows that, under that section as under s.170, a mere mistake or error of judgment which should in a civil action prevent an act or omission from being imputed as negligence is equally a good defence in a criminal charge involving negligence."

56. A similar view of the effect of such legislation was taken by some of the five members of the Supreme Court of Canada in McCarthy (1921) 59 D.L.R. 206. Idington J. said that the statute

> "leaves no room for the refined distinctions between negligence and gross negligence. It imposes an absolute duty on the part of him having charge of that which in its use may endanger human life in the absence of precaution or care. It should not ... be frittered away by any refinement on the part of the Judges."

Bordour J. likewise held that under this statutory provision (corresponding to s.156 of the Crimes Act 1961) gross negligence did not have to be proved. The writer of the headnote thought that the decision of the Supreme Court could be summarised as follows:

> "A person driving an automobile in a public street is under a legal duty to use reasonable care and

> diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences. Section 247 of the Criminal Code has done away with the fine distinction between negligence and gross negligence in such cases."

This is the view taken later in Storey's case in regard to the corresponding section in the Crimes Act. But in Baker (1929) 2 D.L.R. 282 the Supreme Court of Canada held that McCarthy did not decide as stated in the headnote set out above. On the contrary, the law of Canada under s.247 of their Criminal Code was held to be the same as the common law on the point that mere negligence sufficient to found civil liability was not sufficient to support a conviction for manslaughter. The case came on appeal to the Supreme Court of Canada from the decision of the Appellate Division of the Supreme Court of Ontario reported in [1929] 1 D.L.R. 785. This Court had endorsed an earlier ruling that s.247 was "a statutory restatement of the common law, neither abridging it nor enlarging it in any respect". The Court cited with approval the following passage from Greisman [1926] 4 D.L.R. 738, 743:

> "I think the great weight of authority goes to show that there will be no criminal liability unless there is gross negligence, or wanton misconduct. To constitute crime there must be a certain moral quality carried into the act before it becomes culpable. In each case it is a question of fact, and it is the duty of the Court to ascertain if there was such wanton and reckless negligence as in the eye of the law merits punishment. This may be found where a general intention to disregard the law is shown, or a reckless disregard of the rights of others."

Reference was also made to Bateman [1925] 19 Cr. App. R. 8 and to other English and New Zealand cases. The judgment of the Ontario court proceeded as follows:

> "In applying these legal principles to the facts of the case under appeal, it must be borne in mind that statutory provisions and regulations, having as their object the preservation of the lives of mine workers and their protection from

> injury, ought not to be given a merely restricted interpretation. On the other hand, the Courts would not be justified in designating as a criminal offence that which is not made such by law.
>
> The law, as it stands, must serve as the basis upon which, in the particular state of facts, the conviction or acquittal of an accused person shall rest. It is therefore incumbent upon this Court to inquire and determine whether or not, in the case at bar, there was on the part of the accused that negligence, going beyond a matter of compensation as between subjects, and which 'showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment'.
>
> After a careful perusal of the evidence, and consideration of the law, and not being unmindful of the duty devolving upon the Court to avoid any whittling away of a salutary law designed for the protection of the public against injury from 'dangerous things' in the hands or under the control of others, I have come to the conclusion that this conviction ought not to stand. Whether the negligence in any case is of such a character as to justify conviction upon a criminal charge must depend upon the particular facts of the case itself. In order to found a criminal charge, there must be present such a degree of want of care as to involve a moral element; such a wanton or reckless indifference to the lives and safety of others as would lead one to say 'The State should punish that man'."

An appeal to the Supreme Court of Canada from this decision was dismissed. The appeal was based on the wording of s.247 and the decision in McCarthy (supra). But the Court said that that decision did not attempt to lay down an abstract rule for determining the incidence of criminal liability for negligence. They saw no reason to differ from the view that s.247 was a "mere statutory statement of the common law".

57. The High Court of Australia reached a similar conclusion in regard to the corresponding legislation of Western Australia and declined to follow Storey. In Callaghan (1952) 87 C.L.R. 115, [1952] Argus L.R. 941 the

High Court held that in applying similar provisions in the Criminal Code of Western Australia regard was to be had to their context in a Code dealing with major crime involving grave moral guilt; that the standard of negligence applicable was that set by the common law in cases where negligence amounts to manslaughter; and that a conviction under those provisions was not warranted in a case where the degree of negligence involved was no greater than that which would give rise to civil liability.

58. In Burney [1958] NZLR 745 the Court of Appeal was dealing with an alleged breach of the duty imposed by s.166 of the Crimes Act 1908 (now s.151 of the Crimes Act 1961). In the course of its judgment the Court said:

> "We have considered this second ground of appeal on the basis that the negligence to be shown must be of a high degree, for we think, we think as counsel submitted, that R. v. Storey ... is not to be treated as of general application, but it is to be confined to cases where the statute itself defines the standard of care, as s.171 of the Crimes Act 1908 did in that case."

59. Whether the degree of negligence required under ss. 155 - 157 of the Crimes Act should continue to constitute an exception to the general rule requiring gross negligence is no easy matter to determine. If it is regarded (as it was by most of the Judges in Dawe and Storey) as a simple question of the literal construction of the Act the conclusion they reached may be inevitable. But there is no equally simple explanation why these cases should not come within the rule applicable to criminal negligence in general. In Callaghan the difficulty of interpretation was overcome in this way:

> "The question obviously is one of difficulty but in the end it appears to depend upon a choice between two courses. One is to treat the omission to perform the duty to use reasonable care and take reasonable precautions as a description of negligent conduct to be applied according to a

> single and unvarying standard no matter what the purpose for which the description is employed. The other is to recognize that it may have different applications when it is a description of fault so blameworthy as to be punishable as a crime and when it is used to describe a basis of civil responsibility for harm that is occasioned by the omission."

60. This Committee is not concerned to weigh the respective merits of Baker, Callaghan and Storey as decisions on the construction of particular legislation but is concerned with the respective merits of the results. If a change is needed the legislation can be amended to achieve that purpose. On this question of the merits of the case we think the Canadian and Australian decisions reach the right result, namely, that gross negligence is what is required. There does not appear to us to be any convincing reason why the general requirement of gross negligence for major criminal offences should not apply to activities coming within ss. 155 - 157. Less serious cases are already covered by a multitude of penal provisions. When we are considering grave crimes the ratio of the general rule seems to us to apply with full force. We therefore propose, in the recommendations we make, to put these cases on the same footing as others and in the result to abrogate the decision in Storey on this point.

61. We note that the report of the Working Party on Territorial Criminal Law presented in 1975 to the Attorney-General of Australia contains, in clause 21 of its draft Criminal Code, the following clause:

> "Involuntary manslaughter is not committed unless the accused caused death being at least reckless as to causing grievous bodily harm to some person or grossly negligent as to causing the death of some person."

62. Acceptance of the recommendations our report would necessarily involve further study o ther legislation,

such as the Transport Act 1962 and the Arms Act 1958. Special attention would need to be paid to the distinction now drawn between acts which do and acts which do not result in actual harm, and the differences in penalty. The maximum punishment in the case of reckless conduct which does not happen to cause death would probably be found to be inadequate, while the chance consequences of minor wrongdoing would, we suspect, be found to have been given undue weight. Some re-definition of offences might be expected to follow from such studies.

63. Confining our attention to the provisions of the Crimes Act we think the law should be as follows:

> Dangerous act or omission - (1) Every one is liable to imprisonment for a term not exceeding 14 years who -
>
> (a) does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to cause grievous bodily harm to any other person; or
>
> (b) with reckless disregard for the safety of any person or of the public, does any act or omits without lawful excuse to perform or observe any legal duty, such act or omission being one likely to cause grievous bodily harm.
>
> (2) This section applies whether or not the act or omission results in death.
>
> Injurious act or omission - (1) Every one is liable to imprisonment for a term not exceeding 5 years who -
>
> (a) does any act, or omits without lawful excuse to perform or observe any legal duty with intent to injure any other person; or

(b) with reckless disregard for the safety of any other person or of the public, does any act or omits without lawful excuse to perform or observe any legal duty, such act or omission being one likely to cause injury or endanger safety or health.

(2) This section applies whether or not the act or omission results in death.

64. These sections, which incorporate and replace s.188 of the Crimes Act 1961 (wounding with intent) and s.189 (injuring with intent), apply irrespective of the result of death or even of harm. Unless harm was intended the nature of the act itself and its inherent danger are the major determinants of liability. The sections would supplant the present provisions relating to manslaughter (other than ss. 169, 170, which are covered by our proposals regarding murder). There would cease to be a crime so named.

65. Consequential amendments include the following:

151. Duty to provide the necessaries of life

The words "and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission" in subs. (1), and the whole of subs. (2), would be repealed, being unnecessary in view of the draft provision set out in paragraph 63.

152 Duty of parent or guardian to provide necessaries

This section, which does not itself create a duty, would be repealed, being covered by the new draft offences.

153. Duty of employer to provide necessaries

This would be amended in the same way as s.151, and for the same reason. The words "and is criminally responsible ... by such omission" in subs. (1), and the whole of subs. (2), would be repealed.

155. Duty of persons doing dangerous acts
156. Duty of persons in charge of dangerous things
157. Duty to avoid omissions dangerous to life

Each of those sections would be amended by omitting, as no longer necessary, the words "and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty".

145. Criminal nuisance

This section would be repealed, being replaced by the more severe provision included in the draft proposals.

66. Section 359 of the Crimes Act 1961 deals with "second accusation". Subsection (2) would require consequential amendment to read as follows:

> (2) A previous conviction or acquittal on an indictment for unlawful killing or infanticide shall be a bar to a second indictment for the same homicide charging it as either of those crimes.

67. Section 359(3) is as follows:

> If on the trial of an issue on a plea of previous acquittal or conviction to an indictment for murder or manslaughter or infanticide it appears that the former trial was for an offence against the person alleged to have been now killed, and that the death of that person is now alleged to have been caused by the offence previously charged, but that the death happened after the trial on which the accused was acquitted or convicted, as the case may be, then, if

> it appears that on the former trial the accused might if convicted have been sentenced to imprisonment for three years or upwards, the Court shall direct that the accused be discharged from the indictment before it. If it does not so appear the Court shall direct that he plead over.

We recommend that this provision be retained, substituting "unlawful killing" for "murder or manslaughter". At first sight this appears to make criminal liability depend on the chance outcome, contrary to the view for which we have argued earlier in this report. But if the section is used as we would wish to see it used the sentence of the Court, in the event of conviction at the second trial, would still be based on the inherent danger of the act and the intention or recklessness of the accused. A more thorough police investigation follows when death supervenes. Enquiries may be intensified, disclosing that the circumstances were far more serious than at first appeared. The occurrence of death is not in itself an aggravation, but new facts may emerge from these enquiries, and what had appeared to be a relatively minor assault may be revealed as an attack of a very different nature (though if nothing of this kind is revealed the mere fact of the occurrence of death would not justify a second accusation). The possibility of bringing the graver charge should, we think, be preserved.

PART III

SUICIDE PACTS

MAJORITY VIEW

68. As the Committee, in its deliberations on provocation and manslaughter, has reached the conclusion that the offence of manslaughter should disappear from the technical language of the law, the law relating to suicide pacts in s.180 of the Crimes Act 1961, whereby the survivor of a suicide pact who has killed another party to the pact is guilty of manslaughter, obviously requires examination. Section 180 provides that -

> (1) Every one who in pursuance of a suicide pact kills any other person is guilty of manslaughter and not of murder, and is liable accordingly.
>
> (2) Where two or more persons enter into a suicide pact, and in pursuance of it one or more of them kills himself, any survivor is guilty of being a party to a death under a suicide pact contrary to this subsection and is liable to imprisonment for a term not exceeding five years; but he shall not be convicted of an offence against section 179 of this Act.
>
> (3) For the purposes of this section the term "suicide pact" means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life; but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.
>
> (4) It shall be for the person charged to prove that by virtue of subsection (1) of this section he is not liable to be convicted of murder, or that by virtue of subsection (2) of this section he is not liable to be convicted of an offence against section 179 of this Act.
>
> (5) The fact that by virtue of this section any person who in pursuance of a suicide pact has killed

another person has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of a third person who is a party to the homicide and is not a party to the suicide pact.

69. Although the broad question of suicide was not before the Committee it was felt that it was generally accepted that any individual acting alone was entitled to decide for himself, free of the constraints of the criminal law, whether to live or die and we do not question the current law relating to suicide or attempted suicide by an individual.

70. As the Committee has been asked to report on the question of suicide pacts the matter concerning the Committee has been both the criminal liability of the survivor of a suicide pact who killed another party to the pact and who under the present law would be liable to be found guilty of manslaughter, and the liability of a survivor of a pact in which another party had killed himself and who would be liable to five years imprisonment. The first view, which is that advanced in a minority report on this topic, is that the survivor of a suicide pact, irrespective of whether he had actually killed the other party and survived or whether he had survived where the other party had killed himself, should not be guilty of any offence. The second view, which is held by a majority of the members of the Committee, is that the survivor of a suicide pact, whether he had killed the other party or not, ought to be guilty of an offence.

71. In holding this view the majority accepts that the existence of such an offence will not act as a deterrent to one who has firmly resolved to take his life in concert with another. In genuine cases it is unlikely at such a time of emotional stress, when the thought of survival could not be further away from the participants' minds, that the possibility of a survivor being guilty of a crime

would in any way affect the parties' commitment to die. It is thought rather that the effect of such an offence is to deter, in a general way, people from agreeing in concert to take their lives by placing the weight of the law behind the disapproval of agreements to die in concert. Without the support of the law there could arguably be a weakening of this attitude which in turn would make suicide pacts a more acceptable last resort and so more likely to be embarked upon.

72. There is also, in the view of the majority, the danger that a person who would not otherwise have decided to die may have done so only through his involvement in a suicide pact. Although, as the Committee has already accepted, an individual acting alone may choose to end his life, when an individual decides to die in concert with another his choice may well be less free than if he was acting alone. Especially in the case of those who are likely to be overborne by the will of another there may well be emotional and other pressures brought to bear to persuade such a person, who may otherwise have been reluctant to do so, to take his life. The majority of the Committee sees this as a result that should be avoided and considers that retaining the criminal liability for the survivor of a suicide pact may go some way towards doing this.

73. The Committee accordingly recommends by a majority that the survivor of a suicide pact should be guilty of an offence punishable by a maximum of five years' imprisonment irrespective of whether the other party to the pact died by his own hand or by that of the survivor. To prevent the anomalous situation arising whereby a person who inflicts less than fatal injuries on the other party to the pact could be liable to greater penalty (for example 14 years for inflicting grievous bodily harm or for attempted unlawful killing) it is proposed that the maximum penalty of five years should apply irrespective of whether anyone died pursuant to the pact.

74. The majority of the Committee recognise that in any particular case the penalty actually imposed by the Court on any survivor of a suicide pact may not be particularly severe. This is quite consistent with their view that the primary purpose of the sanction is to persuade people not to join a suicide pact rather than to punish them for having done so.

MINORITY VIEW (Professor Brown, Mr Gazley, Ms Webb)

75. The minority are in agreement with the majority that, if it is to remain an offence to survive a suicide pact, there should be no difference in maximum penalty according to whether it was the survivor who actually killed any person dying in pursuance of the pact, or whether that person committed suicide or was killed by someone else, or even whether the other party or parties also survived.

76. We do not agree however that the offence should remain in any form. Our arguments are based first on the ground of its inhumanity and second on the ground that it serves no useful purpose: and we suggest that, though this question has been considered in the context of the Committee's deliberations on provocation and manslaughter, the topic merits consideration independently and the offence should be abolished regardless of whether anything, and if so what, is done in respect of the other two.

77. Under the common law in force in New Zealand prior to the enactment of our first Criminal Code Act in 1893, suicide was murder. Accordingly where a person killed himself in pursuance of a pact entered into with another that other, if he survived, was liable to conviction for murder as a party to the dead person's offence. If the survivor actually killed the other person he was of course guilty of murder directly.

78. Under the Criminal Code Act 1893 murder became a statutory offence for the first time as the more serious form of culpable homicide, and suicide was taken out of its scope by reason of the definition of homicide as the killing of a human being "by another". A specific offence of attempted suicide was created, however, and remained in our law until 1961.

79. The definition of homicide did not alter the liability of a person who killed another or others in pursuance of a suicide pact entered into between them: but since the term as defined no longer encompassed suicide the survivor of a pact as a result of which someone else killed himself could not be convicted of murder. However he became liable to conviction under the specific offence of counselling, procuring, aiding or abetting the commission of suicide.

80. The situation in relation to suicide pacts remained the same until the coming into force of the Crimes Act 1961, which expressly reduced the liability to penalty of any survivor as set out in the report of the majority.

81. The removal of the offence of attempted suicide from the ambit of the criminal law in 1961 indicates a change in attitude towards the taking of one's own life - a change that we think reflects not only a greater understanding of and sympathy for other people and their attitudes and feelings, but also a growing persuasion that decisions on moral matters should be left to the persons concerned.

82. We suggest that there is no justification for a refusal to show the same compassion and tolerance in relation to those whose decision to give up this life is taken in concert.

83. We were impressed by the information given in an article that appeared in the Medico-Legal Journal in 1961 (Cohen, A Study of Suicide Pacts, 29 Medico-Legal Journal, 144). The author's analysis of 57 of the 58 cases of successful suicide pacts occurring in England and Wales in the 4 years 1955-58 presents some interesting facts. The average age of the people concerned was 55.2 years, by far the greater number of them being between 50 and 69. Only 7 were under 30 and only 8 between 30 and 39. 42 of the pacts were made by husband and wife and only 5 by lovers.

84. Among the married couples, at least 16 of the husbands were out of work, unoccupied or retired. In 17 of the pacts both partners were seriously ill and about 70 of the people concerned were victims of some disability, physical or mental.

85. The author reported that he was "struck by the care taken by the deceased to cope with the detailed domestic and other problems that would be created by their death", and that in nearly every case relatives acquaintances and neighbours were all taken by surprise. He commented also that religious considerations hardly seemed to enter the minds of the people concerned.

86. Our first point then may be simply stated. In our view it is cruel to subject to criminal proceedings a person who has just come through the harrowing experience of surviving a suicide attempt in which someone else - probably someone very close - has died.

87. It is no answer to say that the person charged would be unlikely to suffer a substantial punishment. The ordeal of a Court appearance, with all that it entails, is punishment enough and we consider it inhumane to punish the person at all.

88. We think it unlikely that the removal of the threat of penalty would lead to an increase in the number of pacts entered into. Deterrence or dissuasion by the prospect of criminal conviction and punishment is an illusion. The mind of the genuine party to a suicide pact is concentrated on dying, not on what the courts might do to him if he fails to make a proper job of it. The majority of the Committee concede that direct deterrence is an unarguable proposition in the context, but put forward the view that the disapproval of others expressed through the criminal law could help to prevent people reaching the point in which a joint suicide is possible. We doubt it.

89. We cannot think the attitude of people generally would be at all relevant in the sort of situation we are discussing, still less the existence of a law of which the people concerned are probably ignorant. It is quite possible that if they think about the legal position at all they think it is the same whether there are 2 or more people involved or whether there is only one.

90. It is open to question how many people in the community view a joint suicide decision with disapproval, but whether they are a majority or not we question their right, in a matter that involves the safety of only the consenting parties, to impose their own moral viewpoint on those who do not support it.

91. It remains to consider one other argument canvassed in the Committee deliberations - namely, that some provision for an offence is necessary to prevent a murder being dressed up to look like an unsuccessful attempt to carry out a suicide pact. We point out that what the present provision relates to, and what we are suggesting should exempt the survivor from liability, is a <u>genuine</u> pact, clearly defined in the section, and that the onus of proving that such a pact was formed lies on the person alleging it - the person charged.

92. We do not suggest that the definition of a pact is incapable of improvement (in particular to deal with the situation feared by the majority, that one party's agreement may be obtained by something like duress), or that it would be impossible for a successful murder to be perpetrated in the guise of a pact. We do suggest that the chances of that happening are slight, in face of the heavy onus placed on the survivor (who starts under the handicap of a jury's natural suspicion of his story in the light of his own survival): and also that it is bad in principle to impose criminal liability for conduct that does not deserve it, in order to be sure of catching conduct that does.

93. We consider also, and in this Professor Campbell agrees with us, that the offence of aiding and abetting suicide (paragraph (b) of s.179 of the Crimes Act) should be abolished. Since suicide is not an offence we do not think it should be an offence to assist a person to do it, so long as the assistance falls short of the active encouragement or persuasion encompassed by any of the words "incites", "counsels" or "procures", which together form the offence set out in paragraph (a) of the same section.

94. We recommend therefore

(a) that the present provisions regarding the survivor of a suicide pact be repealed;

(b) that it be made a defence to any charge arising out of a killing or attempted killing in pursuance of a suicide pact as defined that the death occurred or the attempt was made pursuant to that pact; and

(c) that the offence of aiding and abetting suicide (but, except where there is a pact, not of inciting, counselling or procuring it) be abolished.

A suggested draft follows.

Alternative to clause 5 of draft Crimes Amendment Bill

5. Inciting counselling or procuring a person to commit suicide - The principal Act is hereby further amended by repealing section 179, and substituting the following section:

"179. Every one is liable to imprisonment for a term not exceeding 14 years who incites, counsels, or procures any person to commit suicide, if that person commits or attempts to commit suicide in consequence thereof."

5A. Suicide pacts - the principal Act is hereby further amended by repealing section 180, and substituting the following section:

"180. (1) A person shall not be liable to be convicted of any offence by reason of his having killed, or attempted to kill, another person in pursuance of a suicide pact.

(2) A person shall not be liable to be convicted of any offence by reason of his having been a party to a suicide pact in pursuance of which another person has killed or attempted to kill himself, or has killed or attempted to kill a third person.

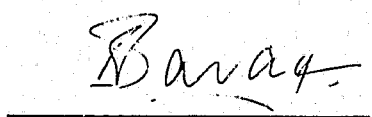
(3) For the purposes of this section the term 'suicide pact' means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life; but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

(4) It shall be for the person charged to prove that by virtue of this section he is not

liable to be convicted of the offence with which he is charged.

(5) The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is not a party to the suicide pact is guilty of an offence by reason of his having been a party to a killing or attempted killing in pursuance of the pact."

For the Committee:



Chairman
July 1976

MEMBERS:

Mr R.C. Savage Q.C. (Chairman)
Associate Professor B.J. Brown
Professor I.D. Campbell
Mr W.V. Gazley
Inspector R. McLennan
Mr P.G.S. Penlington
Mr K.L. Sandford
Mr P.B. Temm Q.C.
Mr D.A.S. Ward
Ms P.M. Webb
Mr J.C. Pike (Secretary)

* After this part of our report had been completed we received a copy of the Report of the Committee on Mentally Abnormal Offenders (the Butler Committee Report) (Cmnd 6244, October 1975). This Committee did not support the Criminal Law Revision Committee's interim report. For reasons summarised in paragraph 19.11 of its own report it proposed that there be complete discretion for the judge in a murder case to impose a life sentence or some other sentence. "Our own decided preference" they said "would be for the abolition of the mandatory life sentence for murder and abolition of diminished responsibility".

APPENDIX I

CRIMES AMENDMENT BILL

EXPLANATORY NOTE

This Bill amends the Crimes Act 1961 to give effect to the Report of the Criminal Law Reform Committee on Culpable Homicide (1976). In that report the Committee recommends -

(a) that there be a single offence of unlawful killing to cover what is now comprised in the offence of murder and those cases where murder is reduced to manslaughter by reason of provocation:

(b) that a person convicted of this offence be liable to a maximum penalty of life imprisonment and be automatically subject to liability to recall after release except where the sentence imposed is one of imprisonment for 2 years or less:

(c) that provocation be consequently a matter of fact to be taken into account by the Judge at the time of sentencing:

(d) that, except in certain specifically defined cases, a person causing a death that he neither intended nor knew to be likely to result - the present manslaughter cases - be no longer punishable under the homicide provisions, but where his act or omission was intended to cause harm or showed reckless disregard for others he be liable accordingly:

(e) that the present sections defining the offences of wounding or injuring someone with intent to cause grievous bodily harm or injury or with reckless disregard for the safety of others be redefined so as to apply regardless of whether harm is caused:

(f) that the law on suicide pacts be substantially amended.

No change is recommended on infanticide.

Clause 1 relates to the Short Title and commencement of the Bill.

Clause 2: Section 160 of the principal Act defines culpable homicide. This clause substitutes a new section 160. In paragraph (a) it is made clear that the term "unlawful act" means an act that is punishable as an offence. Subsections (1), (3), and (4) of the existing section are omitted as being no longer necessary.

Clause 3: The effect of the amendments made by this clause is that the separate offence of manslaughter is abolished; the present definitions of murder become definitions of unlawful killing; and the provisions relating to the reduction of murder to manslaughter by proof of provocation are repealed.

Subclause (1): The cross-heading above sections 167 to 181 is altered to "Unlawful Killing".

Subclauses (2) and (3): References to murder in the definition sections (167 and 168) are altered to "unlawful killing". In other respects the definitions are unaltered.

Subclause (4) is a consequential amendment to section 168(2).

Subclause (5) repeals sections 169 (provocation), 170 (illegal arrest as evidence of provocation), 171 (manslaughter), and 177 (punishment of manslaughter).

Clause 4: At present, under section 172 of the principal Act, every one convicted of murder must be sentenced to imprisonment for life. This clause substitutes a new section 172, under which every one who commits unlawful killing is liable to a maximum sentence of imprisonment for life. If on conviction he is sentenced to imprisonment for life or for a term exceeding 2 years it is to be part of his sentence that at any time after his release he may be recalled and detained for the rest of his life in accordance with and subject to the Criminal Justice Act 1954.

It is proposed to include in a Criminal Justice Amendment Bill the procedural provisions recommended in the Criminal Law Reform Committee's Report.

Clause 5: Under section 180 of the principal Act, where a person kills another pursuant to a suicide pact (as defined in the section), he is guilty of manslaughter and not of murder; and the maximum sentence is therefore life imprisonment. But where pursuant to a suicide pact one party kills himself, the survivor is liable to a maximum of only 5 years' imprisonment.

This clause substitutes a new section 180 under which any survivor of a suicide pact, whether the other party is killed by him or kills himself, is liable to a maximum of 5 years' imprisonment. The same penalty will also apply where all parties survive, so long as there has been an attempt by one of them to kill himself or another.

Clause 6: Under section 145 of the principal Act a person commits "criminal nuisance" and is liable to a maximum of 1 year's imprisonment if he does an unlawful act or omits to discharge a legal duty, knowing that his act or omission will endanger the lives, safety, or health of the public or of any individual.

Under section 188 a person is liable to imprisonment for up to 14 years if, with intent to cause grievous bodily harm, he wounds or causes grievous bodily harm to any one; and to 7 years if, with intent to injure, or with reckless disregard for the safety of others, he wounds or causes grievous bodily harm to any one.

Under section 189, a person is liable to imprisonment for up to 10 years if, with intent to cause grievous bodily harm, he injures any one; and to 5 years if, with intent to injure, or with reckless disregard for the safety of others, he injures any one.

Under section 190, a person is liable to imprisonment for up to 3 years if he injures any one in such circumstances that if death had been caused he would have been guilty of manslaughter.

This clause replaces all those sections with 2 new sections 188 and 189 which will apply whether or not death or harm results from the offender's conduct. Unless harm is intended, it is the reckless nature of the conduct and its inherent danger that determines the liability.

The new section 188 prescribes a maximum of 14 years' imprisonment for a person who -

(a) Does an act, or omits without lawful excuse to perform or observe a legal duty, with intent to cause grievous bodily harm to any other person; or

(b) With reckless disregard for the safety of any other person or of the public, does an act or omits without lawful excuse to perform or observe a legal duty, if the act or omission is one likely to cause grievous bodily harm.

The new section 189 prescribes a maximum of 5 years' imprisonment for a person who -

(a) Does an act, or omits without lawful excuse to perform or observe a legal duty, with intent to injure any other person; or

(b) With reckless disregard for the safety of any other person or of the public, does an act or omits without lawful excuse to perform or observe a legal duty, if the act or omission is one likely to cause injury or endanger safety or health.

Clause 7: Under section 339(2) of the principal Act, on a charge of murder the accused may, if the evidence does not prove murder but proves attempted murder or manslaughter, be found guilty of either of those offences; but he may not be found guilty of any other offence. This is subject to the exception that a woman may be found guilty of infanticide, instead of murder or manslaughter, if she kills a child of hers that is under 10 years of age.

This clause rewrites the subsection to substitute a reference to attempted unlawful killing for the reference to attempted murder; to omit the references to manslaughter; and to provide that the accused may be found guilty of a dangerous or injurious act or omission under either of the new sections 188 and 189 (as inserted by clause 6 of the Bill). The provision for an infanticide verdict is retained.

Clause 8: Subclause (1) consequentially amends the principal Act in the manner indicated in the Schedule.

Subclause (2) relates to other enactments.

Subclause (3) is a consequential repeal.

Schedule: The amendments to section 24 (compulsion) are consequential partly on clause 3 and partly on clause 6.

The amendments to sections 68 (party to murder outside New Zealand), 69 (party to any other crime outside New Zealand), 92 (piracy), and 94 (punishment of piratical acts) are consequential on clause 3.

The amendments to sections 151, 152, 153, 155, 156 and 157 (all of which deal with legal duties) are consequential on clause 6.

The amendments to sections 173 (attempt to murder), 174 (counselling or attempting to procure murder), 175 (conspiracy to murder), 176 (accessory after the fact to murder), 178 (infanticide), and 182 (killing unborn child) are consequential on clause 3.

The amendments to section 319 (rules as to granting bail) are consequential on clause 6.

The amendments to section 359 (second accusation), and to form 4 in the Second Schedule to the principal Act (indictment), are consequential on clause 3.

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CRIMES AMENDMENT

ANALYSIS

A BILL INTITULED

An Act to amend the Crimes Act 1961

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement -

(1) This Act may be cited as the Crimes Amendment Act 1976, and shall be read together with and deemed part of the Crimes Act 1961 (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 1st day of January 1977.

2. Culpable homicide - The principal Act is hereby amended by repealing section 160, and substituting the following section:

"160. Culpable homicide is the killing of any person -

"(a) By an unlawful act, being an act that is an offence as defined in section 2(1) of this Act; or

"(b) By an omission without lawful excuse to perform or observe any legal duty; or

"(c) By both combined; or

"(d) By causing that person by threats or fear of violence, or by deception, to do an act that causes his death; or

"(e) By wilfully frightening a child under the age of 16 years or a sick person."

3. Unlawful killing - (1) The principal Act is hereby further amended by omitting the heading "Murder, Manslaughter, etc." above section 167, and substituting the heading "Unlawful Killing".

(2) Section 167 of the principal Act is hereby amended by omitting the word "murder", and substituting the words "unlawful killing".

(3) Section 168(1) of the principal Act is hereby amended by omitting the word "murder", and substituting the words "unlawful killing".

(4) Section 168(2) of the principal Act is hereby amended by repealing paragraph (g), and substiuting the following paragraph:

"(g) Section 167 (unlawful killing):".

(5) Sections 169 to 171 and 177 of the principal Act are hereby repealed.

4. Punishment of unlawful killing - The principal Act is hereby further amended by repealing section 172, and substituting the following section:

"172. (1) Every one who commits unlawful killing is liable to imprisonment for life.

"(2) Where any one is convicted of unlawful killing and is sentenced to imprisonment for life or for a term exceeding 2 years it shall be part of his sentence that at any time after his first release from detention, and from time to time thereafter, he may be recalled and detained for the rest of his life in accordance with and subject to the Criminal Justice Act 1954; and the Court shall so inform him. No sentence shall be invalid on the ground that the accused has not been so informed."

5. Suicide pact - The principal Act is hereby further amended by repealing section 180, and substituting the following section:

"180. (1) For the purposes of this section, the term 'suicide pact' means a common agreement between 2 or more persons having for its object the death of all of them, whether or not each is to take his own life; but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

"(2) Every one who in pursuance of a suicide pact kills any other person is guilty of causing a death under

a suicide pact, and not of unlawful killing, and is liable to imprisonment for a term not exceeding 5 years.

"(3) Where in pursuance of a suicide pact any person kills himself or is killed, any survivor is guilty of being a party to a death under a suicide pact, and is liable to imprisonment for a term not exceeding 5 years; but he shall not be convicted of an offence against section 179 of this Act.

"(4) Where in pursuance of a suicide pact any person attempts to kill himself or any other person, but no one dies, every one who is a party to the pact is guilty of attempting to cause a death under a suicide pact and is liable to imprisonment for a term not exceeding 5 years; but he shall not be convicted of an offence against section 179 of this Act.

"(5) It shall be for the person charged to prove that by virtue of subsection (2) of this section he is not liable to be convicted of unlawful killing, or that by virtue of subsection (3) or subsection (4) of this section he is not liable to be convicted of an offence against section 179 of this Act.

"(6) The fact that by virtue of this section any person who in pursuance of a suicide pact has killed another person has not been or is not liable to be convicted of unlawful killing shall not affect the question whether the homicide amounted to unlawful killing in the case of a third person who is a party to the homicide and is not a party to the suicide pact."

6. New sections (relating to dangerous or injurious acts or omissions) substituted - (1) The principal Act is hereby further amended by repealing sections 188 to 190, and substituting the following sections:

"188. Dangerous act or omission - (1) Every one is liable to imprisonment for a term not exceeding 14 years who -

"(a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to cause grievous bodily harm to any other person; or

"(b) With reckless disregard for the safety of any other person or of the public, does any act or omits without lawful excuse to perform or observe any legal duty, such act or omission being one likely to cause grievous bodily harm.

"(2) This section applies whether or not the act or omission results in death.

"189. Injurious act or omission - (1) Every one is liable to imprisonment for a term not exceeding 5 years who -

"(a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to injure any other person; or

"(b) With reckless disregard for the safety of any other person or of the public, does any act or omits without lawful excuse to perform or observe any legal duty, such act or omission being one likely to cause injury or endanger safety or health.

"(2) This section applies whether or not the act or omission results in death."

(2) Section 145 of the principal Act is hereby repealed.

7. Part of charge proved - Section 339 of the principal Act is hereby amended by repealing subsection (2) (as substituted by section 8 of the Crimes Amendment Act 1973), and substituting the following subsection:

"(2) On a count charging unlawful killing, the jury may -

"(a) In accordance with section 337 of this Act, find the accused guilty of an attempt to commit unlawful killing; or

"(b) Find the accused guilty of an offence against section 188 (dangerous act or omission) or section 189 (injurious act or omission) of this Act -

but shall not on that count, except in accordance with section 178(2) of this Act (which relates to infanticide), find the accused guilty of any other offence."

8. Consequential amendments and repeal - (1) The principal Act is hereby consequentially amended in the manner indicated in the Schedule to this Act.

(2) Every reference in any other enactment to murder shall, unless the context otherwise requires, be hereafter read as a reference to unlawful killing.

(3) Section 8 of the Crimes Amendment Act 1973 is hereby consequentially repealed.

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SCHEDULE Section 8(1)

AMENDMENTS TO THE PRINCIPAL ACT

Provision of Act	Amendment
24(2)	By repealing paragraphs (e) to (h), and substituting the following paragraphs: "(e) Sections 167 and 168 (unlawful killing): "(f) Section 173 (attempt to unlawfully kill):

	"(g) Section 188 (dangerous act or omission):"
68(1) and (2)	By omitting from each subsection the word "murder", and substituting in each case the words "unlawful killing".
69(3)	By omitting the word "murder", and substituting the words "unlawful killing".
92(1)(a) and 94(a)	By omitting from each paragraph the words "murders, attempts to murder", and substituting in each case the words "unlawfully kills, attempts to unlawfully kill".
151(1)	By omitting the words "and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission".
151(2)	By repealing this subsection.
152	By repealing this section.
153(1)	By omitting the words "and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that servant or apprentice is caused, or if his life is endangered or his health permanently injured, by such omission".
153(2)	By repealing this subsection.
155, 156 and 157	By omitting from each section the words "and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty".
173	By omitting the word "murder", and substituting the words "unlawful killing".
174	By omitting the words "to murder", and substituting the words "to unlawfully kill".

	by omitting the words "that murder" and substituting the words "that unlawful killing".
175(1)	By omitting the words "to murder", and substituting the words "to unlawfully kill".
	By omitting the words "the murder", and substituting the words "the unlawful killing".
175(2)	By omitting the words "the expression 'to murder'", and substituting the words "the expression 'to unlawfully kill'".
	By omitting the word "murder" and substituting the words "unlawful killing".
176	By omitting the word "murder," and substituting the words "unlawful killing".
178(1), (2), (3), (7) and (8)	By omitting the words "murder or manslaughter", wherever they appear in these subsections, and substituting in each case the words "unlawful killing".
178(2)	By omitting the words "Subsection (2) of section 339 of this Act shall be read subject to the provisions of this subsection, but nothing in this subsection shall affect the power of the jury under that section to return a verdict of manslaughter".
182(1)	By omitting the word "murder", and substituting the words "unlawful killing".
319(3)	By repealing paragraphs (b), (c), (d), and (g).
359(2)	By omitting the words "murder or manslaughter", and substituting the words "unlawful killing".
	By omitting the words "any one" and substituting the word "either".
359(3)	By omitting the words "murder or manslaughter" and substituting the words "unlawful killing".
Second Schedule, Form 4	By omitting from paragraph (a) the word "murdered", and substituting the words "unlawfully killed".

APPENDIX II

WORKING PAPER ON HOMICIDE UNDER PROVOCATION

PART I

INTRODUCTION

1. Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused death did so under provocation. Until 1962 the essential conditions for the application of this rule in New Zealand were that the provocation deprived the offender of his self-control and that it would have deprived an ordinary person of his self-control. In this respect the provisions contained in s.184 of the Crimes Act 1908 followed the Common Law. They embodied a subjective element (the effect of the provocation on the person now charged with murder) and an objective test (what effect the provocation would have had on an ordinary person). The objective test was intended to set limits to the scope of the defence and was effective for this purpose.

2. In accordance with the normal division of functions in jury cases it was for the judge to rule whether there was any evidence of provocation and for the jury to determine its sufficiency. Furthermore it was the duty of the judge to give some guidance to the jury on the law of provocation, and in doing so the judge would make reference to such matters as the period of time between the giving of provocation and the killing, and the relationship between the nature of the provocation and the mode of retaliation.

3. These provisions were generally regarded as satisfactory, but some thought they tended to be too rigid in application and a few would have eliminated the objective test completely. Such criticisms remained ineffective until the decision of the House of Lords in Director of Public Prosecutions v. Bedder (1954) 38 Cr. App.R. 133; [1954] 1 W.L.R. 1119. It was held in this case that in assessing the effect of provocation the jury was to take no account of the physical characteristics of the accused, such as impotence, blindness or the colour of his skin, even if the provocation was directed at this personal feature of the accused, because it would have constituted no provocation if addressed to an "ordinary" person (one not having those characteristics).

4. The decision in Bedder was thought by many to be both unjust and absurd, and in the revision of the Crimes Act in 1961 the law was altered to ensure that the decision could not be followed in this country. The subjective element previously required remained unaltered, but the objective test was modified to enable the jury to take account of the characteristics of the accused except insofar as they might reduce his power to control himself under provocation. Section 169(2) of the Crimes Act 1961 is as follows:

> (2) Anything done or said may be provocation if -
>
> (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
>
> (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

5. This new provision was interpreted and applied by the Court of Appeal in several cases, notably McGregor [1962] NZLR 1069 and Anderson [1965] NZLR 29. In these decisions the Court held that "characteristics" in this section must be something definite and relatively permanent and of sufficient significance to make the offender a different person from the ordinary run of mankind; that the provocation must have been directed at some particular characteristic of the offender; and that the jury are still to consider such matters as "time for passion to cool" and any disproportion between the provocation and the response to it.

6. The Committee has turned its attention to the following questions:

(a) Whether the section so interpreted is satisfactory in its results;

(b) Whether it provides a formula that is satisfactory for the purposes of trial by jury;

(c) Whether ss. 169 and 170 contain any other provision that ought to be amended;

(d) Whether express provision should be made regarding the effect of provocation where a person is charged with attempted murder.

To assist its deliberations the Committee is circulating this Working Paper and inviting suggestions and comments before proceeding further.

PART II

COMMENTS ON THE PRESENT LAW

The Effect of Including Some Objective Test

7. The effect of including an objective test is that persons who have lost control of themselves under provocation and have caused death may be convicted of murder. This occurs where, for example, the accused was abnormally sensitive to criticism, or where the words or conduct of the deceased, though grievously provocative to the accused, would not have provoked an "ordinary" person for the simple reason that they would not be applicable. The words "you black bastard", for instance, could not be held to be racially provocative if no account may be taken of the colour of the accused's skin. The question is whether provisions that lead to this result are satisfactory. Bearing in mind that the alternative would be a conviction for manslaughter with a maximum sentence of life imprisonment what is achieved by this limitation on the scope of the doctrine of provocation? Having regard to the reason why this offender lost his self-control can such provisions be justified?

8. When a person reacts with sudden violence it may be that he has lost his self-control or merely that he is failing to exercise the self-control of which he is capable. This distinction, however, is too metaphysical to be made the subject of examination in a jury trial. It will frequently be impossible to determine, for example, whether the impulse to assail the deceased was controllable or uncontrollable. If it was uncontrollable, how has this come about? In the course of human development most people acquire a reasonable measure of self-control. How is it that this man, if he does not possess ordinary self-control, has come to fall short in this respect? On the psychology of the last century it was because he failed to make the necessary effort to develop self-restraint, which is something we are not born with and must cultivate. If this be the correct view does it justify regarding the man as a murderer when he loses his self-control and kills? Is his crime greater than manslaughter?

9. There are other reasons why in a given situation a person may be unable to exercise normal self-control -

reasons which have nothing to do with previous failure to curb bad temper. In some cases of illness, over-tiredness, pregnancy or recent bereavement, for example, a person may fly off the handle at little things. Under more serious provocation he (or she) may completely lose self-control although this would not have occurred but for the unusual state of stress. Furthermore, should an excitable and hot-blooded Italian (if this is not an imaginary stereotype) be penalised for not being a phlegmatic Englishman?

10. Apart from this question of self-control there is the question of the degree of anger produced in different individuals. The emotional disturbance produced by provocative conduct may be far greater than in normal cases

(a) because of an individual's physiological make-up, or

(b) because of some other circumstance peculiar to himself.

As to the first point, anger and rage are accompanied by physiological processes which may not be the same in timing or intensity in all individuals. Any variations in this respect are beyond their control. The second point is that it is impossible to say what provocation was received without taking account of matters personal to the accused. Grossly insulting words in English may be completely unprovocative to a person who does not understand English. An insult in Maori may be no provocation to an Englishman and infuriating to a Maori. If, as was held in Bedder's case, the ordinary man may lack some of the physical and mental attributes of the accused, conduct that quite naturally led to an outburst of rage by the accused must in many cases be held to fall outside the scope of provocation.

11. These consequences of the adoption of an objective test as one of the conditions for admitting a defence of provocation have revived and strengthened the proposal that the test be eliminated or at least modified.

12. The proposal that the test be eliminated was considered by the Royal Commission on Capital Punishment 1949-53, at which time the death penalty was in force. In its Report (Cmd.8932) the Commission discussed the proposal that in considering whether there is provocation sufficient to reduce the crime to manslaughter the sole test should be whether the accused was in fact deprived of self-control and that the jury should not also be required to consider whether a "reasonable man" would have been so deprived. This proposal, they said, was prompted by the feeling that objective tests of provocation are unsatisfactory and inequitable, and that the question

whether a crime is murder or manslaughter ought to depend only on whether the accused did in fact commit it in ungovernable passion caused by sudden provocation of whatever kind. The Report proceeds as follows:

> The test of the "reasonable man"
>
> 141. As we have mentioned in paragraph 137, the courts have laid down in a series of cases [R. v. Alexander (1913) 9 Cr.App.R.139: R. v. Lesbini: Mancini v. D. of P.P.] that, in considering a plea of provocation, the jury must consider not only whether the accused was deprived of self-control, but also whether a reasonable man would have been so deprived, and that a person who is mentally deficient or mentally abnormal or is "not of good mental balance" or who is "unusually excitable or pugnacious" is not entitled to rely on provocation which would not have led an ordinary person to act as he did. The only witnesses who suggested that this test of the "reasonable man" should be abolished were Mr Basil Nield, K.C.,M.P., and the representatives of the Society of Labour Lawyers and the Institute of Psycho-Analysis. Their argument was simple and direct. This test, it is said, is inequitable. If the accused is mentally abnormal or is of subnormal intelligence or is a foreigner of more excitable temperament or is for some other reason peculiarly susceptible to provocation, it is neither fair nor logical to judge him by the standard of the ordinary Englishman. As Mr Nield put it, "the jury should be permitted to determine the effect of the provocation on this particular man whom they have seen and may have heard and whose whole circumstances have probably been described to them". [p.232(15).]
>
> 142. This proposal was strongly opposed by the Judges who gave evidence before us, including the Lord Chief Justice and the Lord Justice General. Lord Cooper observed that if the existing rule was changed, "there might be circumstances in which a bad-tempered man would be acquitted and a good-tempered man would be hanged, which, of course, is neither law nor sense". [Q.5367] Lord Goddard objected that if the jury were allowed to take into account the fact that the accused was a peculiarly excitable person, it would let in considerations which do not apply to any other branch of the law and which are really imponderable. [Q.3153]
>
> 143. We recognise the force of the Judge's objections. It is a fundamental principle of the criminal law that it should be based on a generally

accepted standard of conduct applicable to all citizens alike, and it is important that this principle should not be infringed. Any departure from it might introduce a dangerous latitude into the law. Those idiosyncrasies of individual temperament or mentality that may make a man more easily provoked, or more violent in his response to provocation, ought not, therefore, to affect his liability to conviction, although they may justify mitigation of sentence. We think that this argument is in principle sound, at least so far as minor abnormalities of character are concerned ...

144. Nevertheless we feel sympathy with the view which prompted the proposal that provocation should be judged by the standard of the accused. The objections of the Judges take no account of that fundamental difference between the law of murder and the law applicable to all other crimes which lies at the root of our inquiry and to which Lord Simon drew attention in the concluding words of his judgment in the Holmes case. In the case of other crimes the court can and does take account of extenuating circumstances, which in the case of lesser crimes, as Lord Simon pointed out, does not alter the nature of the offence, but is allowed for in the sentence. The rule of law that provocation may, within narrow bounds, reduce murder to manslaughter, represents an attempt by the courts to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness, but it suffers from the common defects of a compromise. The jury might fairly be required to apply the test of the "reasonable man" in assessing provocation if the Judge were afterwards free to exercise his ordinary discretion and to consider whether the peculiar temperament or mentality of the accused justified mitigation of sentence. It is less easy to defend the application of the test in murder cases where the Judge has no such discretion.

145. We have indeed no doubt that if the criterion of the "reasonable man" was strictly applied by the courts and the sentence of death was carried out in cases where it was so applied, it would be too harsh in its operation. In practice, however, the courts not infrequently give weight to factors personal to the prisoner in considering a plea of provocation, and where there is a conviction of murder such factors are taken into account by the Home Secretary and may often lead to commutation of the sentence. The application of this test does not therefore lead to any eventual miscarriage of justice. At the same time, as we have seen there are serious objections of principle to its abrogation.

In these circumstances we do not feel justified in recommending any change in the existing law.

13. Should one accept the reasoning by which the Commission reached this conclusion?

(a) The Commission "recognised the force" of the Judges' objections, but how valid are they? Lord Cooper, repeating one of the stock objections, says that with a wholly subjective test there might be circumstances in which a bad-tempered man would be acquitted and a good-tempered man would be hanged. (Acquittal and hanging are not in fact the alternatives, but let that pass.) A "good-tempered man" presumably means one who exercises normal self-control. If a wholly subjective test is adopted, and the provocation would not have caused an ordinary person to lose his self-control, the result would be

(i) that the "bad-tempered man" would be convicted of manslaughter, and

(ii) the good-tempered man would not have caused death and would not be standing trial for murder.

He would, of course, be rightly convicted of murder if he killed deliberately and not as the result of uncontrollable anger. Whether a "bad-tempered man" is allowed the defence or not, a wholly subjective test does no injustice to a good-tempered man. (Compare Samuels in (1971) 34 Modern L.Rev. 163, 166.)

Lord Goddard objects that a subjective test will let in considerations which are "really imponderable". Under the objective test it has to be determined whether a hypothetical reasonable man, in a situation not completely identical with the situation that in fact arose, would have lost his self-control. Some might say that that involves some imponderable considerations. Under every formulation of the defence it is necessary to establish that the accused lost his self-control, and for that purpose it is obviously relevant to discover whether he is an excitable or phlegmatic person. It is very difficult to see how a subjective test will introduce matters that are any more imponderable than those which must be considered under the law as it is.

(c) The Commission regards it as fundamental that the criminal law should be based on a generally accepted standard of conduct applicable to all

citizens alike. But if this principle is applied without proper discrimination it ceases to be either sound policy or good sense. Why do we have a crime of infanticide if this "infringes" the principle? Where provocation is concerned why must the law be blind to the obvious facts of human personality? As Samuels says (op. cit. 166):

> "Each man has a different level of tolerance, or threshhold of uncontrollable anger, in respect of each and every given situation. An assault, a sexual overture, a family or personal insult, a racial discrimination, a moral aspersion, cruelty to a child, or anything imaginable, will at a certain level of intensity break self-control."

And if the same standard is to be exacted why does the Commission concede that if the criterion of the "reasonable man" were strictly applied it would be too harsh in its operation? The Commission appears to approve the practice of giving weight to "factors personal to the prisoner", at least as justifying mitigation of sentence, but that is the whole point of eliminating the objective test. If they may properly justify mitigation of sentence why should this not be achieved by replacing a conviction for murder (with its mandatory life sentence) with a conviction for manslaughter (with its range of sentences up to life imprisonment)?

14. If the objective test were eliminated the subjective test need not necessarily stand alone. It could be provided, for example, that murder under provocation could be reduced to manslaughter if the jury in all the circumstances consider it to be just and fair for the offence to be reduced from murder to manslaughter. An additional qualifying condition of this kind would enable the jury to reject a plea of provocation where they considered the loss of self-control to be inexcusable. But it would present new problems. In determining what was "just and fair" the behaviour of the reasonable man might become the major criterion, thus depriving the subjective test of its distinctive features. It would raise the possibility of value judgments and individual prejudices entering unduly into the jury's deliberations. Judges might use it as a means of re-establishing the ordinary person test or the composite test of s.169. The jury might be told that provocation should not be regarded as justly and fairly reducing murder to manslaughter unless it was grave and substantial, and that to be grave and substantial it should be sufficient to cause an ordinary person to lose his self-control and kill. Similar reasoning has been used in cases on the Indian Penal Code

and its derivatives, e.g. Dhula (Madhya Bharat) A.I.R. (1956) M.B. 94; Muhammad Siddique (West Pakistan) (1958) P.L.R. 2 W.P. 1089. Consistency of verdicts could well be substantially reduced in the absence of guidelines for the application of any formula of this kind.

15. The adoption of a wholly subjective test need not involve any departure from the requirement of a causal link between the provocation and the killing. On the contrary there might be closer scrutiny of the subjective element than there is now. The meaning of loss of self-control might come under more critical examination. Proof that the accused lost his self-control, being the central issue, would be more clearly demanded than at present. Consequently the rules of practice as to directing the jury on the effect of lapse of time, the nature of the weapon used or mode of killing, and the relative gravity of the provocation and the response to it, could continue to apply. One might still ask whether an ordinary or a reasonable man would have acted as the accused did, but the significance of the question would be changed. It would be used only to assist in assessing the credibility of the accused's plea and determining whether he was in fact so provoked that he lost his self-control and was thereby induced to commit the act of homicide.

Modifications of the Objective Test

16. If an objective test is retained the question is what form it should take. In the Crimes Act 1908, s.184, it appeared in the following form:

> (2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.

As mentioned in para. 4 above this provision was amended in the Crimes Act 1961. Under s.169(2) of this Act the expression "an ordinary person" is replaced by "a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender". As a result Bedder's case (supra) is not one that will be followed in New Zealand. But it has been suggested that the new clause is unsatisfactory

(i) because of difficulties in interpretation (illustrated by McGregor's case, supra);

(ii) because juries have a problem in understanding and applying the rule;

(iii) because in retaining an objective test by

referring to the self-control of an ordinary person the amendment did not go far enough.

This third point has been considered in paras. 7 to 15. We proceed to discuss the other two.

17. But for the decision in McGregor's case we would have thought that the modification effected by s.169(2) was plain enough. The jury were to form the best judgment they could of the probable reaction of a person identical with the accused in all respects save one. The hypothetical person whom they were to consider was to be endowed with the self-control of an ordinary person. If, for whatever reason, the offender lacked ordinary self-control this was to be disregarded. In every other respect the sufficiency of the provocation was to be determined in the light of all the facts of the particular case, whether relating to the offender himself or the surrounding circumstances. Had he possessed the same measure of self-control as is normally possessed by members of the community, and had he exercised this power, would the situation nevertheless have overwhelmed him and caused him to do what he did? This was substantially the view of Sir Francis Adams: see Criminal Law and Practice in New Zealand, 2nd Ed. (1971) paras. 1266-1269.

18. In McGregor's case, however the Court of Appeal found considerable difficulty in interpreting the section, being particularly troubled by the reference to the "characteristics" of the offender. The expression "an ordinary person" had been replaced, as we have pointed out, by the expression "a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender". In this phrase we think it inconceivable that "otherwise" could mean anything other than "in other respects". But the Court of Appeal concentrated on only some of the words which had been substituted and felt it necessary to decide what was meant by "an ordinary person but otherwise having the characteristics of the offender". With this mangled and ungrammatical fragment of the words of the section the Court proceeded to wrestle. "Otherwise", it was held, could not mean "in other respects". "Characteristics", it was held, must be subject to some limitation in order to achieve an integration of the allegedly "discordant notions" embodied in the section. "The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his self-control is weakened because of some peculiar characteristic possessed by him." The person referred to in the section is expressly described as one who has the self-control of an ordinary person, but by this process of construction the Court arrived at the conclusion that he need not be such a person at all. Although the section, at first glance, authorised no departure whatever from the previous requirement in respect of the power of self-control (and no such departure was necessary in order to avoid the

the consequences of Bedder's case) the Court found itself unable to interpret the reference to the characteristics of the accused without thus modifying the provisions as to self-control. Once on this road the question was where to stop. The total elimination of the objective test was avoided by an elaborate delineation of the qualities that might rank as "characteristics" for the purposes of the section and by enunciating the doctrine that the words or conduct must have been particularly provocative to the accused because of, and only because of, his characteristics.

19. We are of the opinion that as the words of s.169(2) bear the meaning attributed to them by the Court of Appeal it would be preferable to adopt some other formula if some objective test is to be retained.

20. On any view of the matter the concept of the hybrid person mentioned in s.169(2) is much less simple than the "ordinary man" of the Act of 1908. It may not readily be grasped by juries even after explanation and assistance from the judge in his summing-up. If the legislation could be expressed in such a way that the issues for the jury could be presented more simply and directly it seems highly desirable that this should be done. Some of the alternatives that might be considered are set out in Part IV of this Working Paper.

Mode and Time of Retaliation

21. As the law governing provocation evolved it was thought that it should not lead to the reduction of murder to manslaughter where there had been ample time for the offender's passion to cool or where the retaliation was grossly disproportionate to the provocation received. It was also thought that regard should be had to the mode of retaliation - whether, for example, it was a blow of the fist or a stab with a stiletto - as this evidence could be very relevant on the question whether the killing stemmed from the provocation and occurred during a sudden loss of self-control.

22. We understand the law of New Zealand at the present time to be that the jury are entitled to take these three matters into account, and that the judge should so direct them whenever the evidence in the case makes it appropriate to do so: McGregor (supra), Anderson [1965] NZLR 29, Dougherty [1966] NZLR 890.

23. In s.184 of the Crimes Act 1908 it was expressly stipulated that the person provoked must have acted "on the sudden and before there had been time for his passion to cool". This had been the position at common law. No doubt it was the view of judges and lawyers in England that provocation may produce a sudden flush of anger which

which sooner or later subsides, and that a killing after self-control has been regained is premeditated murder. But it has been suggested that there may be cases in which provocation, especially by words conveying information of an inflammatory kind, has a different time scale. It is said that the words used may not produce an immediate loss of self-control but may do so later. The metaphor frequently employed is that of a slow-burning fuse. It has also been suggested that such instances are more commonly found among Polynesians than Europeans, although the truth or otherwise of this statement is of little moment if any person who may be accused of murder falls into the category mentioned.

24. The words quoted above from s.184 of the Act of 1908 were not included in the revised version appearing in s.169 of the Act of 1961. The explanation was given by the Minister of Justice in the Second Reading debate on the Bill (328 NZ Parl. Debates 2681):

> For provocation to be successfully pleaded today in order to reduce murder to manslaughter, one must establish that the act of provocation was immediately prior to the commission of the offence. This disregards psychological reality for it may well happen that instead of blazing up at once a man may brood perhaps for hours over a provocation until his control snaps. It all depends on the type of person. In the Bill there is no such artificial restriction.

25. It still remains necessary, of course, under s.169 to show as is plainly stated in subs. (1), that the person who caused death did so under provocation; he must have lost the power of self-control when he did the act causing death. But the clear intention was to permit the defence to be raised although the offender had not acted "on the sudden". Whether the alteration in the wording of the section achieved this purpose was considered by the Court of Appeal in McGregor (supra) but did not have to be decided. North P. said (p.1078):

> The Solicitor-General submitted that ... it may have been thought desirable to ensure that juries might properly allow for the fact that reaction periods may vary with different persons. It is unnecessary, and perhaps undesirable, that we should express any concluded opinion on this submission, though we would point out that if he be right, caution would be called for at this point because the longer the lapse of time the greater the probability that the accused acted from feeling of vengeance and not while suffering from a lack of self-control.

26. That the mode of retaliation is a matter properly to

be taken into account we have no doubt. The weapon used, for example, may in all the circumstances be most cogent evidence on the question whether the killing was premeditated and carried out while the offender still had, or had regained, his self-control.

27. That there must be some reasonable "proportion" between the provocation and the response is a requirement that has been questioned. The legal doctrine was clearly stated by Viscount Simon, L.C., in Mancini [1942] A.C. 1, 9; the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. In Noel [1960] NZLR 212 (a decision on the Act of 1908) the Court of Appeal held that the relationship or proportion between the acts or words of provocation and the mode of retaliation was a factor, and a weighty factor, to be considered by the jury in determining whether the accused acted as he did by reason of the provocation. It was not, however, to be elevated into a matter of law. Nothing in the Act of 1961 could have the effect of converting this into a rule of law, but it remains a matter the jury may consider: Dougherty (supra).

28. That the mode of retaliation should thus be taken into account has been criticised on a variety of grounds:

(a) That it is illogical.

The essence of provocation is a loss of self-control. To require a reasonable relationship between the provocation and the response is to require that the person provoked remain in command of himself and behave rationally.

(b) That it is irrelevant.

If the accused lost his self-control, and if a reasonable man would have lost his self-control, the mode of resentment is immaterial.

(c) That it rests on an invalid theory of controllable rage.

It is alleged that the law is based on false views of human physiology and mistaken assumptions about human psychology. It is said that when anger is aroused to such a pitch as to produce a state of rage physiological changes automatically occur, adapting the body for fight or flight. The system producing these changes functions in such a way that they have an "all or nothing"

> quality about them. They are not nicely proportioned to the intensity of the stress that brought them about, and they are not within a person's conscious control.

29. The Committee acknowledges that rage may be accompanied by physiological changes as described but is uncertain whether to accept the interpretation placed upon the facts by these critics. We record the view expressed by Lord Diplock in Phillips [1969] 2 A.C. 130, 137:

> Counsel contended, not as a matter of construction but as one of logic, that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and accordingly he was no longer fully responsible for them in law whatever he did. This argument is based on the premise that loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships' view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon.

30. Nevertheless when dealing with homicide the law is not concerned with minor provocations, it is concerned with the results of loss of self-control. Is anything less than total loss of self-control sufficient? Is it practicable, and if so is it prudent, to provide for the partial loss of control that is to be found between icy detachment and going berserk? The Committee is not yet clear on these questions but thinks that juries not infrequently reduce murder to manslaughter where the evidence falls short of showing a total loss of self-control. To the extent that this is the case there is no force in the contention that the defence of provocation, or the means used for testing the defence, are infected by misconceptions of the nature of rage. But even in respect of total loss of self-control it appears to the Committee at present that the argument put forward by defence counsel and discussed by Lord Diplock in Phillips (supra) may not be sound. When the accused sets up in his defence that he was provoked to a state of rage a great disproportion between the provocation and the response has a bearing on the credibility of the defence. It certainly raises a doubt whether a person exercising normal self-control would have been sent berserk. The defence is not automatically excluded where there is this lack of proportion (see para. 27) and comment on this aspect appears to us to be unobjectionable.

Onus of Proof

31. It is not for the defence to prove provocation but for the prosecution to disprove it. One of the elements of the crime of murder is that the killing was unprovoked, and this element, like the killing itself, must be proved by the prosecution beyond reasonable doubt. But the prosecution need not address itself to this subject unless it is put in issue in the course of the trial. For this purpose it is sufficient for the defence to show that the killing may have been brought about by provocation. The offence is then reduced to manslaughter unless this possibility is excluded by the Crown. Reference may be made to Kahu [1947] NZLR 368; Woolmington [1935] A.C. 426; Anderson (supra); compare Cottle [1958] NZLR 999; Strawbridge [1970] NZLR 909, 915.

32. The Crown is thus faced with the task of "proving a negative", which is commonly regarded as presenting considerable difficulty. It cannot obtain a decision on the balance of probability, for the standard of proof is the higher standard which applies to all matters requiring to be established by the Crown. These difficulties are accentuated by the fact that the matter in issue involves a determination of the state of mind of the accused, which is often harder to establish than facts of a less subjective nature. It is therefore proper to consider

(a) whether the onus of proving provocation should not rest on the defence;

(b) whether it should suffice, if the onus is to remain on the prosecution, that the absence of provocation be established on the balance of probabilities.

33. We do not think that the difficulties to which we have referred justify changing the law in this respect. We note that the difficulty of showing the state of mind of the accused would still exist if the onus were changed, and we think that if the matter be left in doubt the Crown ought not to be regarded as having established that it was a case of murder.

34. We have considered whether a change would be justified if the objective test of provocation were removed, leaving a purely subjective requirement. It does seem to us that a purely subjective test would be more acceptable if the accused were required to establish provocation (on the balance of probabilities), for this would reduce the risks entailed in doing away with an objective test. But at the present stage of our deliberations we have not examined this question thoroughly since the majority of the Committee does not wish to abandon an objective test of some kind.

Functions of Judge and Jury

35. Subsections (3) and (4) of s.169 of the Crimes Act 1961 are as follows:

> (3) Whether there is any evidence of provocation is a question of law.
>
> (4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

36. These provisions enable the judge to withdraw the issue of provocation from the jury if he considers there is no evidence that the offender lost his self-control or no evidence on which it could justifiably be held that the provocation would have brought about a loss of self-control in a person "having the power of self-control of an ordinary person but otherwise having the characteristics of the offender". If in the judge's view there is such evidence its sufficiency is a matter for the jury. The judge is thus given a measure of control which enables him in appropriate cases to direct the jury as a matter of law that there is no evidence of provocation and that it is not open to them to return a verdict of manslaughter on the ground of provocation. In Anderson (supra), for example, the trial judge withdrew the issue from the jury and the Court of Appeal affirmed his decision, holding that there was no evidence fit for the consideration of the jury which might have been held by them to raise a doubt as to whether the homicide was murder or manslaughter.

37. Although this division of functions is in accord with the division generally applicable in jury cases, whether civil or criminal, the question may be raised whether it is desirable that it should thus be applied where the issue of provocation is to be determined in a murder trial. Does it imply a lack of confidence in juries, and if so, is that lack of confidence warranted? Does it place too much power in the hands of the judge, enabling him to withdraw the issue from the jury where he thinks that an ordinary man would not have been provoked but the jury may think otherwise? Is there a real risk that juries may be swayed into returning a verdict of manslaughter on the ground of provocation where no evidence of provocation has been produced? On the other hand, may not the jury's estimate of the likely reactions of an ordinary man provide a better basis for the decision than that of a judge?

38. If the judge has directed the jury that there is no evidence of provocation but the jury disagrees and thinks, moreover, that the evidence was sufficient for the

purposes of the section, it would be within their power to return a verdict of manslaughter without assigning reasons, and this could not be effectively challenged. We think, however, that the question whether subsections (3) and (4) should be retained in their present form should be decided on the footing that juries will accept the judges' directions.

39. In favour of retaining the present provisions it may be said that by making the jury the sole judge of the sufficiency of the evidence of provocation ample scope is allowed for the opinion of the jury, who can reduce murder to manslaughter on evidence that no judge would have considered sufficient. Only the most perverse decisions are checked. The power conferred on the judge may do something to assist in maintaining uniformity of decision. As the judge's directions are recorded and are subject to appeal the system leads to the creation of a body of doctrine which can be examined and improved and is generally accessible, whereas jury decisions provide no guide-lines for the future.

40. The opposing view is that because of the nature of "provocation" the whole issue should be left to the jury, without restriction. Whether the test is to be partly subjective and partly objective, or wholly subjective, the issues presented for decision involve such an amalgam of fact and opinion that they are preeminently matters for the jury. In Anderson's case, for example, would it not have been better if the jury had been left to decide whether a brutal and long-sustained attack might possibly have been the reaction of an ordinary person under provocation? One does not mean to imply that on the facts of that case the decision would have been different.

As far as uniformity of decision is concerned guide-lines can at best cover only a small part of the infinite variety of circumstances in murder trials, and flexibility may be more important than uniformity. If judge and jury differ the opinion of the jury is not necessarily perverse and wrong. If homicide that amounts to murder is to be singled out for the law's supreme disapprobation it may be argued that there should be no verdict of murder where the jury, had they been free to do so, would have returned a verdict of manslaughter.

Exercising a Power Conferred by Law

41. The above heading is chosen for the sake of brevity, but s.169(5) deals not only with this but also with acts which the offender incited a person to do. The subsection reads:

> (5) No one shall be held to give provocation to another by lawfully exercising any power conferred

by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

42. We see no occasion to reconsider the provision relating to incitement. If the offender was put into an ungovernable fury by conduct that he had incited for the purpose mentioned in the subsection this cannot be recognised as a mitigating circumstance on a charge of murder.

43. The other part of subsection (5) is designed primarily to afford protection to those who are administering the law and who unquestionably are entitled to such protection as the law can give. Police, bailiffs, health inspectors and others are required to carry out many duties which bring them into a situation of actual or potential physical conflict. The subsection is in the nature of a deterrent to those who might assault them when they are merely doing what the law authorises and requires them to do. It relates only to persons acting within the due limits of their powers, and in this respect is to be distinguished from s.170 which makes quite different provision in regard to the effect of an illegal arrest. It is the duty of citizens not to assault others are are acting lawfully, even if what they are doing is seizing their furniture, evicting them, or arresting their children. But good citizens are not exempt from feeling irate when such things happen. Similarly a good citizen who recognizes that force may have to be used to suppress a riot may yet be outraged on seeing an innocent bystander shot. The question is whether these reactions must be disregarded if, enraged by what has occurred, he kills. At present this is the case even though a person with ordinary self-control would have been similarly affected. To exclude the possibility of pleading provocation in such cases can be justified only if it is an effective deterrent and affords real protection to those for whose benefit the provision is enacted. We do not see how it could be discovered whether the subsection actually operates to give such protection, but while there may be some doubt as to whether it helps to restrain those who are incensed by what occurs we incline to believe that some general restraining effect is achieved.

Misdirected Response to Provocation

44. Section 169 further provides:

(6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

45. We see no reason to reconsider this subsection so far as it relates to accident or mistake, but we have asked ourselves whether it should be confined to these two cases. Taken as a whole s.169 is construed as not being applicable where the accused, for any other reason, killed a person who had not given provocation. In McGregor (supra) counsel submitted that the deeds or words referred to in s.169(2) could emanate from any source, and that subsection (6) was ambiguous. The Court of Appeal did not agree. In the Court's opinion subsection (6) "makes quite plain what in any event is inherent in the use of the word 'provocation', namely that the law shows a measure of indulgence to a person who kills another who has provoked him." The Court was not dealing with a case of accident or mistake, to which subsection (6) plainly applies.

46. In Simpson [1915] Cr.App.R. 218 the Court said it could not be maintained that upon provocation by one person the killing of another could be reduced to manslaughter. But that was more of a case of mercy killing than killing under provocation. A soldier was visiting his dying child. On learning that his wife had committed adultery, that she was frequently drunk and that she had neglected the child he killed the child. In Twine (1967) Crim. L.R. 710 - a decision under the Homicide Act 1957, - the judge left the defence of provocation to the jury where the conduct of the offender's girl-friend allegedly caused him to lose his self-control and strike and kill her companion. On provocation given by a group see Hall (1928) 21 Cr. App. R. 48. In Scriva (No. 2) [1951] V.L.R. 298 it was held that a plea of provocation was available where the victim was, or was believed to be, one of a party who gave provocation but not where the accused intentionally wounded some other person. In this case the accused had just seen his child knocked down and apparently killed by a motor car. He approached the driver, brandishing a knife. A bystander attempted to restrain him but was stabbed by the accused and died. The issue of provocation was withdrawn because of the disproportionate manner of retaliation, but the Court expressed the view, obiter (p.310), that the killing of the third person fell outside the scope of the defence.

47. We think it should perhaps be left to the jury in such cases to say whether the accused lost his self-control and thereby was induced to kill the third party (and, if an objective test be retained, whether an ordinary person would have done so). Where the offender is fully aware that he is attacking an innocent person no doubt it is a case of murder; but in the heat of passion caused by sudden provocation this awareness may be blurred, and the crime may lack the black quality of pre-meditated murder. The existing provision relating to mistake would probably not cover such cases.

Acts Directed Against Third Parties

48. A person may well lose his self-control on seeing what B is doing to C. This is so whether or not there is any relationship between A and C, though loss of self-control may be more likely to occur where this relationship exists. Loss of self-control may also occur - though again it may be less likely in this case - where A merely received a report of what B has done to C. Section 169 speaks merely of "anything done or said" and is wide enough to cover such situations. In McGregor (supra) and Duffy [1949] 1 All E.R. 932 there are expressions suggesting that provocation consists of something said or done by the deceased to the accused. This, indeed, is the normal case; but we do not take it to have been intended that acts directed against third parties may not constitute provocation. Pape J. in Terry [1964] V.R. 248 left open the question whether an attack on a non-relative could constitute provocation, but dicta in Fisher (1837) 8 C. & P. 18 and Harrington (1866) 10 Cox C.C. 370 support the wider view at common law. We do not think that s.169 has been or should be interpreted more restrictively. Words might be inserted in s.169 to ensure the wider construction, e.g. the section might be amended so as to refer to anything said or done "either to the offender or to any other person".

Notice of Defence of Provocation

49. Although a criminal trial is not an exercise in historical research it is still an attempt to discover the truth. Should the defence be required to signify in advance the intention to plead provocation? To reduce the opportunities for employing the tactics of surprise and ambush moves have been made to require prior notice of the defence of alibi and insanity, and it may be asked whether notice of the defence of provocation ought to be given. Possibly it would result in fuller police investigation, better preparation for trial, and a verdict more in conformity with the real facts. But the circumstances in which a killing has occurred usually make it reasonably predictable whether a defence of provocation may be raised. Police investigation normally reveals enough of the circumstances to show whether provocation is a possible defence and gives adequate warning of the course the trial may take. Moreover, where several alternative defences may be open it may constitute an unreasonable embarrassment to the accused and his counsel if a decision to plead provocation must be made in advance of the trial.

PART III

PROVOCATION AS A DEFENCE TO CHARGES OTHER THAN MURDER

A. Attempted Murder

50. Differing conclusions have been reached by the Courts on the question whether provocation is available as a defence to a charge of attempted murder. Reference may be made to Cunningham [1959] 1 Q.B. 288; Falla [1964] V.R. 78; Smith [1964] NZLR 834; and Laga [1969] NZLR 417. We are concerned with the question whether the defence should be available, and if so, whether this should be expressly stated in legislation.

51. The view that the defence is not available in New Zealand rests largely on the arguments

(i) that it is applicable only where the effect is to change the nature of the offence (as in reducing murder to manslaughter);

(ii) that the provision made for this defence is specifically confined by s.169 to the case of murder;

(iii) that it is unnecessary in other cases as it may be taken into account in sentencing;

(iv) that if attempted killing under provocation is not attempted murder there is no appropriate provision in the Act defining the offence.

52. The opposing view takes the line

(i) that since killing under provocation is not murder attempted killing under provocation cannot as a matter of logic be attempted murder;

(ii) that s.169 is not to be read in isolation, and that taking s.72 with ss. 167-173 provocation affords a defence to both murder and attempted murder;

(iii) that it is undesirable that a person should suffer the stigma of a conviction for attempted murder where he acted under provocation which would have been sufficient to reduce murder to manslaughter;

(iv) that the appropriate verdict is either attempted manslaughter or injuring by an unlawful act in such circumstances that if death had been caused the offender would have been guilty of manslaughter (Crimes Act 1961, s.190).

53. At present the Committee considers that provocation should in some way be recognised in the case of attempted murder by analogy with the law of murder and subject to the same limitations. So long as provocation reduces murder to manslaughter under s.169 we think that provocation similarly defined should reduce attempted murder to some other offence. It is true that provocation may now be taken into account on sentence, but a conviction for attempted murder seems too grave where, if the victim had died, it would not have been murder.

54. To provide in such cases that the accused be convicted under s.190 of injuring by an unlawful act would be appropriate only where the attempt resulted in an injury, but this will not always be the case. To provide that the accused may be convicted of attempted manslaughter would cover all instances. An intentional killing may be manslaughter (e.g. under s.169 or s.180). There is therefore no incongruity in making provision for attempted manslaughter. The maximum penalty, by virtue of ss. 177 and 311(1), would be ten years imprisonment, compared with fourteen years for attempted murder.

B. Other Offences

55. At present provocation in regard to other offences affects sentence only. We do not think a case has been made out, or could be made out, to show that this situation leads to unfairness or injustice. Moreover, the provocation that is taken into consideration is much more than comes within s.169. In sexual cases, for example, provocative conduct short of actual consent may have a bearing on the sentence. To extend the application of the defence of provocation over a wide range of offences, either as a complete defence or as admitting of a verdict of "guilty under provocation", seems to us to be unnecessary and impracticable.

PART IV

POSSIBLE STATUTORY AMENDMENTS

56. A number of possible amendments of the Crimes Act are set out in this part of the Working Paper. They

cover a wide spectrum and illustrate the ways in which various policies might be embodied in legislation. They are intended to be considered along with the discussion of principles in earlier Parts of the paper.

57. First proposal: Provocation as a complete defence

> In lieu of providing that provocation may reduce murder to manslaughter provide that it constitutes a defence leading to acquittal.

Comment:

1. Recent research in the physiology of anger indicates that the actions of a person who has lost his self-control can be viewed from the standpoint of involuntariness: see paras. 28(c), 29. If his conduct was involuntary he should be entitled to a verdict of acquittal.

2. This argument is untenable unless provocation is strictly confined to total loss of self-control.

3. There is inherent danger in such a reform unless supplemented by non-penal measures enabling restraint to be imposed on persons whose conduct showed them to be quick to lose their self-control and prone to violent action under provocation.

58. Second proposal: Abolition of defence of provocation and of mandatory sentence for murder

> Amend s.172 (mandatory sentence of life imprisonment for murder) to provide that everyone who commits murder is liable to imprisonment for life. Repeal the provisions relating to provocation.

Comment:

1. Under this proposal provocation would not be relevant to the question "murder or manslaughter?" but to the question of sentence. The offence would be murder, but if it had been committed under provocation (which would not be narrowly defined as in s169) this could be taken into account in mitigation of sentence.

2. Under the present law a successful plea of provocation has a similar effect in the end: it reduces murder to manslaughter, where the Court has a discretion as to sentence. This proposal, however,

widens the scope for such a plea and achieves that result more directly.

3. The proposal enables provocation in regard to homicide to be placed on the same footing as provocation in regard to other offences. The explicit provisions of s.169 are essential only because of the fixed sentence for murder.

4. It does, however, deprive the accused of the benefit of having his offence called manslaughter rather than murder.

5. The repeal of s.169 might not altogether eliminate the problems that have arisen in its interpretation. In particular, the courts would have to decide to what extent, if at all, they would take account of the fact that an ordinary person in the same situation would not have lost his self-control (if that be the case).

6. The jury would no longer have any function in the assessment of provocation except to the extent that they exercised their privilege of adding a rider to their verdict. The law as to provocation would be determined by the judges with no statutory limits or guidelines such as are to be found in s.169 and with no effective participation of the jury in the determination of the question whether there was provocation.

7. As provocation would not be a matter in issue in the determination of guilt evidence of provocation would not be strictly relevant in the course of the trial before verdict given. This might create an unsatisfactory situation in practice, although on less grave charges provocation is already so death with. The problem could be overcome by calling witnesses as to provocation before sentence is imposed.

8. The proposed change would alter the present burden of proof and standard of proof of provocation. For the present law see para. 31. Under this proposal it would be for the defence to establish, in mitigation, that the killing was provoked, but the Court would not require that this be established "beyond reasonable doubt". In other words, provocation would be dealt with in exactly the same way as any other matter raised in mitigation of sentence, whether it be on conviction for murder or in respect of any other offence.

9. The abolition of the fixed sentence for murder would have effects far beyond the scope of provocation. Judges would be required to assess

the relative gravity of every murder, whether or not there was evidence of provocation.

59. Third proposal: Abolition of mandatory sentence for murder; amalgamation of murder and manslaughter

Eliminate the division of culpable homicide into murder and manslaughter. Repeal the provisions relating to provocation. Provide that everyone who commits culpable homicide is liable to imprisonment for life.

Comment:

Most of the remarks made on the second proposal are also applicable here, but the amalgamation of murder and manslaughter would have more far-reaching consequences. The homicides which are singled out in ss. 167 and 168 as the gravest of crimes would no longer be so defined and designated. The relative gravity of homicides would be entirely a matter for judges to decide when passing sentence. The special stigma of "murder" or "murderer" could no longer be attached (a change that might have both advantages and disadvantages). Consequential changes would follow in regard to suicide pacts and in many other areas.

60. Fourth proposal: Restatement of the objective test in s.169(2)

Substitute the following for s.169(2):

(2) Anything said or done, either to the offender or to any other person, may be provocation if -

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Where pursuant to paragraph (a) of subsection (2) of this section it is alleged that the provocation was connected with any characteristic of the offender such characteristic except where it is temporary or transitory may be taken

into account in regard to the offender's sensitivity to the provocation but not in regard to his self-control.

Comment:

1. This suggested modification is proposed in an attempt to avoid some of the difficulties mentioned in McGregor (supra). On the interpretation of the existing s.169(2) see paras.16-20.

2. The words "either to the offender or to any other person" are inserted (in this and later proposals) for the reason given in para. 48.

3. The proposed wording gains nothing in brevity or directness and may not simplify the task of judge or jury. Possibly the reverse would be the case.

4. The standard of the ordinary person is retained, and perhaps reinforced, in regard to the power of self-control. In determining what provocation was received individual characteristics may be taken into account but are not to be considered as excusing failure to exercise normal self-control.

5. Clause (3) expressly excludes characteristics that are temporary or transitory. This is in line with McGregor's case. But it may be questioned whether this is a logical or desirable restriction, and it may be asked how transitory characteristics differ from those that are temporary.

61. Fifth proposal: Modification of the objective test in s.169(2)

Substitute the following for s.169(1) (2) and (4):

(1) If the person who caused death did so under provocation culpable homicide shall amount to murder only if he did not exercise such self-control as was reasonable on all the facts of the case and death would not have occurred if he had exercised such self-control.

(2) For the purposes of this section anything done or said may be provocation if it tended to cause a loss of self-control by the person who caused death.

(4) Whether, if there is evidence of provocation, the offender exercised such self-control as was reasonable

and whether death would have been caused if he had exercised such self-control are questions of fact.

Comment:

1. This formulation incorporates a substantially subjective test. It may be thought to fling the doors wide open, but it is intended to be kept within bounds by the stipulation that the accused must have exercised such self-control as was reasonable.

2. It omits reference to the "characteristics" of the offender and so may avoid the complications stemming from the judicial interpretation of that word in s.169(2).

3. On the face of it the language of clause (1) is relatively simple and direct and such as would be readily understood by juries. It would not appear to require elaborate explanation from the judge.

4. The simplicity of this draft may, however, conceal real difficulties of interpretation. The court and the jury may be left without necessary guidance on the meaning of the words "such self-control as was reasonable on all the facts of the case". No indication is given, for example, whether the jury should allow for the fact that because of his physical or psychological peculiarities the accused was particularly vulnerable to provocation.

62. Sixth proposal: An alternative modification of the objective test in s.169(2)

Substitute for s.169(2) and (3) the following:

(2) Anything done or said, either to the offender or any other person, may be provocation if it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) (As now)

(3A) In deciding whether or not culpable homicide shall be reduced to manslaughter on the ground of provocation there shall be taken into account:

(a) All the circumstances of the offence, of the persons concerned

therein, and of such provocation, including -

(i) The nature, mode, and time of the provocation, and the nature, mode and time of the act which caused death;

(ii) The offender's conduct and state of mind in the interval between the provocation and the act which caused death.

(b) Whether or not, in all the circumstances, the provocation was sufficient to deprive a person having the self-control of an ordinary person of the power of self-control; and

(c) Whether or not, in all the circumstances, it was reasonable for the offender to have lost his self-control.

Comment:

1. As with the previous proposal this eliminates any reference to "characteristics". It employs different language, a wider scope, in describing the matters that are to be taken into account in determining whether the provocation was sufficient to reduce murder to manslaughter. It may perhaps be described as a modification of the common law doctrine designed to mitigate its harshness while retaining both subjective and objective tests.

2. It includes express provision on the subject of the time factor and the mode of retaliation, treating both of these as relevant facts, but it does not reinstate the earlier reference to acting "on the sudden". (See paras. 21-30).

3. The proposed formulation could probably be more readily understood and applied than that at present contained in s.169(2), but as with the fifth proposal the difficulties may be concealed rather than resolved. What, for example, is to be the result of "taking into account" an infirmity such as Bedder's?

4. If it was not reasonable for the offender to have lost his self-control is the defence automatically excluded? If the provocation would not have deprived an ordinary person of self-control is the defence excluded? Are these two different tests?

CONTINUED

1 OF 2

If they are, this proposal is somewhat more restrictive than the fifth proposal.

63. Seventh proposal: A purely subjective test

Substitute for s.169(1)(2) and (5) the following:

(1) Culpable homicide that would otherwise be murder shall be reduced to manslaughter if -

(a) The person who caused death did so while deprived of the power of self-control by anything said or done, either to the offender or to any other person; and

(b) The thing said or done induced him to commit the act of homicide.

(2) In deciding whether the person who caused death did so while deprived of the power of self-control and whether the thing said or done induced him to commit the act of homicide the jury shall take into account all the circumstances of the offence and of the persons concerned, and what was alleged to have led to the offence, including -

(a) The offender's conduct during any interval between anything said or done that was alleged to have led to the offence and the act that caused death;

(b) Any other circumstances tending to show the offender's state of mind during any such interval; and

(c) The nature of the act that caused the death.

Comment:

1. All reference to objective standards of self-control or reasonable conduct is eliminated. For discussion of the issues involved in excluding an objective test see paras. 7-15.

2. Clause (2) of this draft is not an essential part of it. If retained it would follow any subsections dealing with the respective functions of judge and jury. Its insertion might have the effect, which is clearly not intended, of opening the way for

comment (e.g. on the nature of the act that caused death) tending to detract from a fully subjective test.

3. In this proposal the word "provocation" is nowhere used. The heading of the section would be changed from "Provocation" to "Homicide caused by loss of self-control" or some similar words, and corresponding changes would be made in other subsections. Section 170 would be consequentially amended or repealed. The object of these changes in phraseology would be to reduce the risk that objective criteria would be introduced in the process of interpretation of the section.

4. As under most of the foregoing proposals the person who killed under provocation would be liable to be convicted of manslaughter, with a possible life sentence. The practical effect of the proposal would consequently depend mainly on juridical attitudes. If it were regarded as a mitigating circumstance that the accused had actually lost his self-control, whether or not he "ought" to have done so, a term of years might be imposed where there would at present be a mandatory life sentence. On the other hand, if it were not regarded as a mitigating factor that he lost his self-control when he "ought not" to have done so he might be sentenced as severely as if he had committed murder.

5. The complete elimination of the objective test could be expected to result in more thorough application of the subjective test, i.e. there might be more critical scrutiny of evidence tendered to prove that the accused lost his self-control, and of evidence that this led to the killing (see para. 15).

6. Judicial control of the verdict, and judicial review on appeal would be substantially affected. Juries could not be kept within the bounds set by the "ordinary person" test. On the other hand, if they rejected the defence and returned a verdict of murder the task of counsel for the appellant, and of the Court of Appeal, would be concentrated on a narrower range of issues. It might well prove more difficult for the appellant but easier for the Court.

7. If s.169(5) (exercise of a power conferred by law) and s.170 (effect of illegal arrest) were repealed the risk of homicide might be increased, but see paras. 41-43. These provisions might be retained, leaving a subjective test with defined exceptions.

64. Eighth Proposal: A qualified subjective test

Substitute for s.169(1) (2) and (5) the following:

(1) Culpable homicide that would otherwise be murder shall be reduced to manslaughter if -

(a) The person who caused death did so while deprived of the power of self-control by anything said or done, either to the offender or to any other person; and

(b) The thing said or done induced him to commit the act of homicide; and

(c) The jury in all the circumstances consider that the offence should be reduced from murder to manslaughter.

(alternative form of subclause (c) :

(c) The jury in all the circumstances consider it to be just and fair for the offence to be reduced from murder to manslaughter.)

Comment:

1. The addition of subclause (c) in either of the alternative forms set out above is designed to narrow the scope of the purely subjective test by enabling the jury to reject the plea of provocation where, for example, the loss of self-control or the violence of the attack appeared inexcusable. On the possible results of giving the jury this power see para. 14.

2. In this variant, clause (2) of the seventh proposal is omitted as unnecessary.

65. Ninth proposal: Functions of judge and jury

Omit s.169(3). Omit s.169(4) or amend it to accord with other alterations in the section.

Comment:

An amendment on these lines might be made if it were thought desirable that the question of provocation should be left entirely to the jury. (see paras. 35-40).

66. Tenth proposal: Misdirected response to provocation

Amend s.169(6) by deleting the words "by accident or mistake".

The subsection would then read:

(6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, killed another person.

Comment:

This amendment might be made if s.169(6) were thought to be too restrictive. The matter is discussed in paras. 44-47.

67. Conclusion

The Committee deliberated upon this paper for a very lengthy period. It discussed the desirability of giving an indication, with reasons, of the proposals that it most favoured of those canvassed. It decided for various reasons that it would not do so; there was, apart from any other consideration, a wide variety of views expressed, and while further discussion would probably have narrowed the field of difference, it was felt preferable to defer further discussion until comments on the paper from outside sources were received and considered. Nevertheless, in order to give some indication of its thinking it may be noted that of the first eight proposals, and not necessarily in their order of acceptability, the following commended themselves to the Committee: second, third, fifth, sixth and seventh.

68. Appendix

To assist readers of the Working Paper the following material is appended:

Crimes Act 1908, ss. 184, 185
Crimes Act 1961, ss. 169, 170
Crimes Act 1961, ss. 169, 170, as they might be amended to give effect to proposals 4 to 8 in Part IV of the Working Paper.

For the Committee:

R.C. Savage
Chairman

30 July 1973

APPENDIX

CRIMES ACT 1908

184. Provocation - (1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.

(3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact.

(4) No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

185. Illegal arrest may be evidence of provocation - An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal; but if the illegality was known to the offender it may be evidence of provocation.

(Note: the above sections re-enact s.165 of the Criminal Code Act 1893)

CRIMES ACT 1961

169. Provocation - (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.

(2) Anything done or said may be provocation if -

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Whether there is any evidence of provocation is a question of law.

(4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

(5) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

(7) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

170. Illegal arrest may be evidence of provocation - An illegal arrest shall not necessarily reduce the offence from murder to manslaughter; but if the illegality was known to the offender it may be evidence of provocation.

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FOURTH PROPOSAL

169. Provocation - (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.

(2) Anything said or done, either to the offender or to any other person, may be provocation if -

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Where pursuant to paragraph (a) of subsection (2) of this section it is alleged that the provocation was connected with any characteristic of the offender such characteristic except where it is temporary or transitory may be taken into account in regard to the offender's sensitivity to the provocation but not in regard to his self-control.

(4) Whether there is any evidence of provocation is a question of law.

(5) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

(6) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(7) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

(8) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

Cf. 1908, No. 32, s.184.

170 Illegal arrest may be evidence of provocation - An illegal arrest shall not necessarily reduce the offence from murder to manslaughter; but if the illegality was known to the offender it may be evidence of provocation.

Cf. 1908, No. 32, s.185.

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FIFTH PROPOSAL

169. Provocation - (1) If the person who caused the death did so under provocation culpable homicide shall

amount to murder only if he did not exercise such self-control as was reasonable on all the facts of the case and death would not have been caused if he had exercised such self-control.

(2) For the purposes of this section anything done or said may be provocation if it tended to cause a loss of self-control by the person who caused the death.

(3) Whether there is any evidence of provocation is a question of law.

(4) Whether, if there is evidence of provocation, the offender exercised such self-control as was reasonable and whether death would have been caused if he had exercised such self-control are questions of fact.

(5) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

(6) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(7) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

(8) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

170. Illegal arrest may be evidence of provocation - An illegal arrest shall not necessarily reduce the offence from murder to manslaughter; but if the illegality was known to the offender it may be evidence of provocation.

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SIXTH PROPOSAL

169. Provocation - (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.

(2) Anything done or said, either to the offender or to any other person, may be provocation if it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Whether there is any evidence of provocation is a question of law.

(4) In deciding whether or not culpable homicide shall be reduced to manslaughter on the ground of provocation there shall be taken into account:

(a) All the circumstances of the offence, of the persons concerned therein, and of such provocation, including -

(i) The nature, mode, and time of the provocation and the nature, mode, and time of the act which caused death;

(ii) The offender's conduct and state of mind in the interval between the provocation and the act which caused death.

(b) Whether or not, in all the circumstances, the provocation was sufficient to deprive a person having the self-control of an ordinary person of the power of self-control; and

(c) Whether or not in all circumstances, it was reasonable for the offender to have lost his self-control.

(5) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

(6) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(7) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

(8) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

170. Illegal arrest may be evidence of provocation - An illegal arrest shall not necessarily reduce the offence from murder to manslaughter; but if the illegality was known to the offender it may be evidence of provocation.

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SEVENTH PROPOSAL

169. Homicide caused by loss of self-control - (1) Culpable homicide that would otherwise be murder shall be reduced to manslaughter if -

(a) The person who caused death did so while deprived of the power of self-control by anything said or done either to the offender or to any other person; and

(b) The thing said or done induced him to commit the act of homicide.

(2) Whether there is any evidence that the person who caused death did so while deprived of the power of self-control and that the thing said or done induced him to commit the act of homicide as aforesaid is a question of law.

(3) Whether, if there be such evidence, the evidence is sufficient is a question of fact.

(4) In deciding whether the person who caused death did so while deprived of the power of self-control and whether the thing said or done induced him to commit the act of homicide the jury shall take into account all the circumstances of the offence and of the persons concerned, and what was alleged to have led to the offence, including -

(a) The offender's conduct during any interval between anything said or done that was alleged to have led to the offence and the act that caused death;

(b) Any other circumstances tending to show the offender's state of mind during any such interval; and

(c) The nature of the act that caused the death.

(5) This section shall apply whether the thing was said or done by the person killed or by any other person.

(6) The fact that by virtue of this section one

party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

(Note: Section 169(5) and s.170 are not re-enacted.)

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EIGHTH PROPOSAL

169. Homicide caused by loss of self-control - (1) Culpable homicide that would otherwise be murder shall be reduced to manslaughter if -

(a) The person who caused death did so while deprived of the power of self-control by anything said or done, either to the offender or to any other person; and

(b) The thing said or done induced him to commit the act of homicide; and

(c) The jury in all the circumstances consider that the offence should be reduced from murder to manslaughter.

(alternative form of subclause (c):

(c) The jury in all the circumstances consider it to be just and fair for the offence to be reduced from murder to manslaughter.)

(2) Whether there is any evidence that the person who caused death did so while deprived of the power of self-control and that the thing said or done induced him to commit the act of homicide as aforesaid is a question of law.

(3) Whether, if there be such evidence, the evidence is sufficient is a question of fact.

(4) This section shall apply whether the thing was said or done by the person killed or by any other person.

(5) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

(Note: Section 169(5) and s.170 are not re-enacted.)

END