

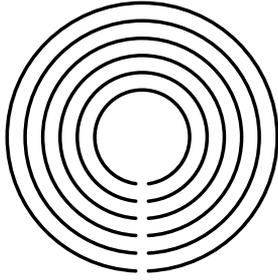


LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

HOMICIDE: MURDER AND INVOLUNTARY MANSLAUGHTER

[LRC 87 – 2008]



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

HOMICIDE: MURDER AND INVOLUNTARY MANSLAUGHTER

[LRC 87 – 2008]

© COPYRIGHT
Law Reform Commission 2008

FIRST PUBLISHED
January 2008

ISSN 1393-3132

THE LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 130 documents containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002*, where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to all legislative changes. After the Commission took over responsibility for this important resource, it decided to change the name to Legislation Directory to indicate its function more clearly.

MEMBERSHIP

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

The Commissioners at present are:

President:

The Hon Mrs Justice Catherine McGuinness,
former judge of the Supreme Court

Full-time Commissioner:

Patricia T. Rickard-Clarke, Solicitor

Part-time Commissioner:

Professor Finbarr McAuley

Part-time Commissioner:

Marian Shanley, Solicitor

Part-time Commissioner:

Donal O'Donnell, Senior Counsel

LAW REFORM RESEARCH STAFF

Director of Research:

Raymond Byrne BCL, LLM (NUI),
Barrister-at-Law

Legal Researchers:

Áine Clancy BCL, LLM (NUI)
Kate Dineen LLB, LLM (Cantab)
Philip Flaherty BCL, LLM (NUI), Diop sa Gh (NUI)
Eleanor Leane LLB, LLM (NUI)
Margaret Maguire LLB, LLM (NUI)
Richard McNamara BCL, LLM (NUI)
Jane Mulcahy BCL (Law and German), LLM (NUI)
Gemma Ní Chaoimh BCL, LLM (NUI)
Verona Ní Dhrisceoil BCL (Dlí agus Gaeilge), LLM (NUI)
Jane O'Grady BCL, LLB (NUI), LPC (College of Law)
Charles O' Mahony BA, LLB (NUI), LLM (Lond), LLM (NUI)
Nicola White LLB, LLM (Dub) Attorney-at-Law (NY)
Joanne Williams LLB, LLM (NUI), Barrister-at-Law

STATUTE LAW RESTATEMENT

Project Manager for Restatement:

Alma Clissmann, BA (Mod), LLB, Dip Eur Law (Bruges), Solicitor

Legal Researchers:

John P. Byrne BCL, LLM (NUI), Barrister-at-Law
John Kenny LLB, LLM (Cape Town), Barrister-at-Law
Eimear Long LLB, Barrister-at-Law

LEGISLATION DIRECTORY

Project Manager for Legislation Directory:

Deirdre Ahern LLB, LLM (Cantab), Dip E-Commerce
(Law Society), Solicitor

Legal Researchers:

Eóin McManus BA, LLB (NUI), LLM (Lond)
Tina O' Reilly BCL (Law and German), LLM (NUI)

ADMINISTRATION STAFF

Secretary/Head of Administration:

John Quirke

Higher Executive Officer:

Alan Heade

Executive Officers:

Emma Kenny
Darina Moran
Peter Trainor

Legal Information Manager:

Conor Kennedy BA, H Dip LIS

Cataloguer:

Eithne Boland BA (Hons), HDip Ed, HDip LIS

Clerical Officers:

Ann Browne
Ann Byrne
Liam Dargan
Sabrina Kelly

PRINCIPAL LEGAL RESEARCHER FOR THIS REPORT

Jane Mulcahy BCL (Law and German), LL.M (NUI)

CONTACT DETAILS

Further information can be obtained from:

Secretary/Head of Administration
Law Reform Commission
35-39 Shelbourne Road
Ballsbridge
Dublin 4

TELEPHONE:

+353 1 637 7600

FAX:

+353 1 637 7601

EMAIL:

info@lawreform.ie

WEBSITE:

www.lawreform.ie

ACKNOWLEDGEMENTS

The Commission would like to thank the following people who provided valuable assistance:

Senator Ivana Bacik, Reid Professor TCD
The Hon Mr Justice Robert Barr, Former Judge of the High Court
The Hon Mr Justice Declan Budd, Judge of the High Court
Mr Conal Boyce, Solicitor, Boyce, Burns & Co
Mr Noel Brett, CEO Road Safety Authority
Mr Tom Cahill, Bar Council, Barrister-at-Law
Ms Collette Carey, Criminal Law Committee, Law Society of Ireland
The Hon Mr Justice Paul Carney, Judge of the High Court
The Hon Mr Justice Peter Charleton, Judge of the High Court
Ms Siobhán Dunne,
Mr Peter W Ferguson, Advocate, Scotland
Mr Maurice Gaffney SC
The Hon Mr Justice Hugh Geoghegan, Judge of the Supreme Court
The late Mr Brendan Grogan SC
Mr James Hamilton, Director of Public Prosecutions
Dr John Harbison, former State Pathologist
The Hon Mr Justice John Hedigan, Judge of the High Court
Mr Brendan McArdle, formerly Detective Sergeant of an Garda Síochána
His Honour Judge Pat McCartan, Judge of the Circuit Court
Professor Paul McCutcheon, Head of School of Law UL
Mr Paul Anthony McDermott, Barrister-at-Law
Mr Patrick McEntee SC
The Hon Mr Justice Aindreas Ó Caoimh, Court of Justice of the European Communities
The Hon Mr Justice Kevin O'Higgins, Judge of the High Court
Mr Caoimhín O'hUiginn, formerly Assistant Secretary at the Department of Justice, Equality and Law Reform
Mr Simon P O'Leary, Former Law Reform Commissioner
Mr Paul O'Connor, School of Law UCD
Mr Stephen Pye, Office of Parliamentary Counsel
Mr Dara Robinson, Criminal Law Committee Chairman, Law Society of Ireland
Dr John Stannard, Senior Lecturer in Law, Queen's University Belfast
Mr Kieron Wood, Barrister-at-Law
Professor Stanley Yeo, National University of Singapore

However, full responsibility for this publication lies with the Commission.

TABLE OF CONTENTS

Table of Legislation	xi
Table of Cases	xiii
INTRODUCTION	1
CHAPTER 1 THE MURDER/MANSLAUGHTER DISTINCTION AND THE LABELLING OF CRIMINAL OFFENCES	5
A Labelling and moral culpability	5
B Maintaining the murder/manslaughter distinction	6
C The mandatory life sentence for murder	12
CHAPTER 2 MURDER: THE CURRENT LAW AND ISSUES	25
A Introduction	25
B Murder in Ireland	25
C Murder in England and Wales	35
D Issues relating to murder	41
(1) Are there morally culpable killings currently outside the definition of murder, which ought to be punished as murder?	41
(2) Should intention to cause serious injury continue to form the mens rea for murder?	43
(3) Should “serious injury” be defined?	47
CHAPTER 3 MURDER: PROPOSALS FOR REFORM	51
A Introduction	51
B Incorporating recklessness into the mental element in murder	51
C Retaining implied malice murder	62
D Implied malice: recklessness as to serious injury?	64
E Defining “serious injury”	65
F The Commission’s recommended definition of murder	68
CHAPTER 4 INVOLUNTARY MANSLAUGHTER: THE CURRENT LAW AND ISSUES	75
A Introduction	75
B Manslaughter in Ireland	75
C Unlawful and dangerous act manslaughter: the present law	79
D Issues relating to unlawful and dangerous act manslaughter	80
(1) Should low levels of violence, which unforeseeably result in death be treated as unlawful and dangerous act manslaughter or as assault?	80
E Gross negligence manslaughter: the present law	84

	F	Issues relating to gross negligence manslaughter	88
		(1) Should the capacity of the accused to advert to the risk or meet the expected standard be a relevant consideration in gross negligence manslaughter cases?	88
		(2) Should the risk be raised to one of “death” or “death or serious injury” in the gross negligence manslaughter test?	89
		(3) Should gross negligence manslaughter be abolished and replaced by a lesser homicide category such as negligent homicide?	92
	G	Motor manslaughter and the related driving offences: the current law	93
CHAPTER 5		INVOLUNTARY MANSLAUGHTER: OPTIONS FOR REFORM	95
	A	Introduction	95
	B	Unlawful and dangerous act manslaughter	95
		(1) Low levels of deliberate violence which unforeseeably cause death	96
		(2) Manslaughter by drug injection	106
	C	Gross Negligence Manslaughter	108
	D	Motor manslaughter and the related driving offences	112
CHAPTER 6		SUMMARY OF RECOMMENDATIONS	117
APPENDIX		DRAFT HOMICIDE BILL 2008	121

TABLE OF LEGISLATION

Canadian Criminal Code 1985	1985, c. C-46	Can
Children Act 2001	2001, No. 24	Irl
Corporate Manslaughter and Corporate Homicide Act 2007	2007, c. 19	Eng
Criminal Justice (Temporary Release of Prisoners) Act 2003	2003, No. 34	Irl
Criminal Justice Act 1951	1951, No. 2	Irl
Criminal Justice Act 1964	1964, No. 5	Irl
Criminal Justice Act 1990	1990, No. 16	Irl
Criminal Justice Act 2003	2003, c. 44	Eng
Criminal Justice Act 2006	2006, No. 26	Irl
Criminal Law (Insanity) Act 2006	2006, No. 11	Irl
European Convention on Human Rights Act 2003	2003, No. 20	Irl
Homicide Act 1957	1957, 5 & 6 Eliz. II c. 11	Eng
Indian Penal Code Act 1860	1860, No. 45	India
Maritime Safety Act 2005	2005, No. 11	Irl
Merchant Shipping Act 1981	1981, No. 33	Irl
Model Penal Code 1985		USA
Non-Fatal Offences Against the Person Act 1997	1997, No. 26	Irl
Offences Against the Person Act 1861	1861, 24 & 25 Vict. c. 100	Eng
Safety, Health and Welfare at Work Act 1989	1989, No. 7	Irl
The Criminal Code Act 1902 (WA)	1902, 1 and 2 Edw. VII No. 14	Aus

TABLE OF CASES

Andrews v DPP	[1937] AC 576	Eng
Bouhey v The Queen	[1986] 161 CLR 10	Aus
Cawthorne v H.M. Advocate	[1968] JC 32	Scot
Cullen v Toibín	[1984] ILRM 577	Irl
Cunliffe v Goodman	[1950] 1 All ER 720	Eng
DPP v Hull	Court of Criminal Appeal 8 July 1996	Irl
DPP v Jackson	Court of Criminal Appeal 26 April 1993	Irl
DPP v Newbury and Jones	[1976] 2 All ER 365	Eng
DPP v Smith	[1960] 3 All ER 161	Eng
Hyam v DPP	[1974] 2 All ER 41	Eng
La Fontaine v R	[1976] 11 ALR 507	Aus
Nettleship v Weston	[1971] 2 QB 691	Eng
People v Jernatowski	[1924] (New York) 238 NY 188	USA
People v Murray	[1977] IR 360	Irl
R v Adomako	[1995] 1 AC 171	Eng
R v Allen	[2005] EWCA Crim 1344	Eng
R v Caldwell	[1981] 1 All ER 961	Eng
R v Church	[1965] 2 All ER 72	Eng
R v Cunningham	[1981] 2 All ER 863	Eng
R v Dias	[2001] EWCA Crim 2896	Eng
R v Hancock and another	[1986] 1 All ER 641	Eng
R v Holzer	[1968] VR 481	Aus
R v Janjua and Choudury	[1999] 1 Cr App Rep 91	Eng
R v Kennedy	[1999] Crim LR 65	Eng
R v Lawrence	[1981] 1 All ER 974	Eng
R v Misra	[2005] 1 Cr App R 21	Eng
R v Moloney	[1985] 1 All ER 1025	Eng
R v Nedrick	[1986] 3 All ER 1	Eng
R v Powell	[1997] 4 All ER 545	Eng
R v Prentice	[1993] 4 All ER 935	Eng
R v Rogers	[2003] 1 WLR 1374	Eng
R v Secretary of State for the Home Department	[2002] UKHL 46	Eng

R v Seymour	[1983] 2 AC 493	Eng
R v Simmonds	[1999] 2 Cr App R 18	Eng
R v Smith	[1960] 2 All ER 450	Eng
R v Stone and Dobinson	[1977] QB 354	Eng
R v Woollin	[1998] 4 All ER 103	Eng
State v Dow	[1985] (New Hampshire) 489 A2d 650	USA
The People (AG) v Crosbie and Meehan	[1966] IR 490	Irl
The People (AG) v Dunleavy	[1948] IR 95	Irl
The People (AG) v Dwyer	[1972] IR 416	Irl
The People (DPP) v Bambrick	[1996] 1 IR 265	Irl
The People (DPP) v Cullagh	ITLR 31 May 1999	Irl
The People (DPP) v Dillon	Court of Criminal Appeal 17 December 2003	Irl
The People (DPP) v Douglas and Hayes	[1985] ILRM 25	Irl
The People (DPP) v Kirwan	[2005] IECCA 136	Irl
The People (DPP) v Nally	[2006] IECCA 128	Irl
The People (DPP) v O'Donoghue	[2006] IECCA 134	Irl
The People (DPP) v Roseberry Construction Ltd	[2003] 4 IR 338	Irl
The People v Conroy (No 2)	[1989] IR 160	Irl
The Queen v Crabbe	[1985] 156 CLR 464	Aus
Visra Singh v State of Punjab	AIR [1958] SC 465	India
Whelan v MJELR	[2007] IEHC 374	Irl
Wilson v R	(1992) 107 ALR 257	Aus

INTRODUCTION

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*¹ and brings together the material from two Consultation Papers. The Report will complement the Commission's related work on defences in the criminal law.²

2. In March 2001, the Commission published its *Consultation Paper on Homicide: The Mental Element in Murder*.³ The Commission received numerous submissions on the Consultation Paper and held a Seminar on Murder at the Department of the Taoiseach on 11 July 2001.

3. In March 2007, the Commission published its *Consultation Paper on Involuntary Manslaughter*.⁴ The Commission received many submissions on this Consultation Paper and held a Seminar on Involuntary Manslaughter at the Commission's offices on 6 November 2007.

4. The *Consultation Paper on Homicide: The Mental Element in Murder* examined the current law of murder in Ireland. It also set out the legal position on the mental element in murder in England, Canada, Australia, India and Scotland. It questioned whether there are morally culpable killings currently outside the definition of murder which ought to be punished as murder and whether an intention to cause serious injury should continue to form the *mens rea* for murder. The Commission stated that the label of murder should cover the most heinous killings and provisionally recommended that the current definition of murder should be expanded to include the *Model Penal*

¹ See Law Reform Commission *Third Programme of Law Reform 2008-2014* (LRC 86-2007). Item 17 of the Third Programme commits the Commission to examine the law of homicide. This item involves the completion of work on this area which the Commission began under its *Second Programme of Law Reform 2000-2007*.

² Item 18 of the Third Programme commits the Commission to examine the defences of provocation, duress and necessity and legitimate defence. The Commission has published Consultation Papers on each of these areas: *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003), *Consultation Paper on Duress and Necessity* (LRC CP 39-2006) and *Consultation Paper on Legitimate Defence* (LRC CP 41-2006). The Commission is currently preparing a Report on these defences.

³ (LRC CP 17-2001).

⁴ (LRC CP 44-4007).

*Code*⁵ formulation of extreme indifference to the value of human life. The Commission accepted that the “serious injury” head of murder was deeply entrenched in the criminal law and therefore provisionally recommended that an intention to cause serious injury should remain part of the mental element for murder. The Commission still holds these views and so this Report follows on from and develops those provisional recommendations.

5. The *Consultation Paper on Involuntary Manslaughter*⁶ set out the law governing involuntary manslaughter in Ireland. It also reviewed the law in a number of other jurisdictions, most notably England and Wales, Australia and Germany and analysed the homicide provisions of the *Indian Penal Code*⁷ and the *Model Penal Code*.⁸ It questioned whether low levels of violence which unforeseeably result in death should be treated as unlawful and dangerous act manslaughter rather than assault. The Commission provisionally recommended excluding (a) low levels of violence which unforeseeably cause death and (b) fatalities due to drug injections from the scope of unlawful and dangerous act manslaughter.

6. A number of issues regarding gross negligence manslaughter were raised, such as whether the capacity of the accused to advert to the risk or meet the expected standard should be a relevant consideration in gross negligence manslaughter cases. The Commission also discussed whether the risk posed by the accused’s negligent act or omission should be raised to one of “death” or “death or serious injury” in the gross negligence manslaughter test. Consideration was also given to the abolition of this form of manslaughter and to its replacement with a lesser homicide category such as negligent homicide. The Commission provisionally recommended that the capacity of the accused to advert to the risk or to attain the expected standard should be relevant to liability for gross negligence manslaughter.

7. In its *Consultation Paper on Involuntary Manslaughter*, the Commission also looked at the current law governing motor manslaughter and the related driving offences. The Commission provisionally opted to maintain the legal status quo whereby the statutory road traffic offences would continue to operate alongside manslaughter and also recommended that judges be permitted to take the occurrence of death into account in careless driving cases.

⁵ See American Law Institute *Model Penal Code and Commentaries* (2nd ed American Law Institute 1980) Part II § 210.2(b).

⁶ (LRC CP 44-2007).

⁷ See *Indian Penal Code 1860*.

⁸ See American Law Institute *Model Penal Code and Commentaries* (2nd ed American Law Institute 1980) Part II § 210.0-210.6.

8. The Commission still holds most of the views articulated in the *Consultation Paper on Involuntary Manslaughter* and therefore this Report builds on the provisional recommendations relating to unlawful and dangerous act manslaughter, gross negligence manslaughter and the treatment of road-deaths. The Report is divided into six chapters.

9. Chapter 1 considers the descriptive labels of murder and manslaughter and explores arguments for and against maintaining the murder/manslaughter distinction as well as the difficulties associated with the mandatory life sentence.

10. Chapter 2 deals with the current law of murder in Ireland and England and revisits various issues raised in the 2001 Consultation Paper, such as:

- whether there are morally culpable killings currently outside the definition of murder, which ought to be punished as murder;
- whether intention to cause serious injury should continue to form the *mens rea* for murder, and, if so;
- whether “serious injury” should be defined.

11. Chapter 3 deals with the Commission’s provisional recommendations for murder, as well as other reform options identified in the Consultation Paper. The Commission discusses the desirability of incorporating recklessness into the mental element of murder, sets out submissions received on “extreme indifference murder” and responds to such submissions before setting out the Commission’s final recommendation at paragraph 3.40. The retention of implied malice murder is also explored and the Commission sets out its final recommendation on this matter at paragraph 3.45. The possibility of including recklessness as to serious injury is also addressed and the Commission sets out its final recommendation at paragraph 3.49. The Commission raises issues relating to the definition of “serious injury” and discusses submissions received on this point before stating its final recommendation at paragraph 3.61. The Commission’s recommended definition of murder, as contained in the *Consultation Paper on Homicide: The Mental Element in Murder* is addressed and submissions on the wording of the proposed definition are analysed. The Commission’s draft definition on murder is located at paragraph 3.78 of the Report.

12. Chapter 4 outlines the law of manslaughter in Ireland and discusses the impact which expansion of the mental element of murder would have on the current scope of involuntary manslaughter. The present law of unlawful and dangerous act manslaughter is set out and issues pertaining to the existing configuration are raised, *eg* whether low levels of violence, which unforeseeably result in death should be treated as unlawful and dangerous act manslaughter or as assault.

13. The Commission also examines the present law of gross negligence manslaughter in Chapter 4 and explores issues such as:

- whether the capacity of the accused to advert to the risk or to meet the expected standard should be a relevant consideration in gross negligence manslaughter cases;
- whether the *Dunleavy* test should be amended so that the risk relate to “death” or “death or serious injury”;
- whether gross negligence manslaughter should be abolished and replaced by a lesser homicide category such as negligent homicide.

14. Finally, the Commission discusses the current law of motor manslaughter and the related driving offences.

15. In Chapter 5 the Commission returns to its provisional recommendations for involuntary manslaughter, as well as other reform options identified in the *Consultation Paper on Involuntary Manslaughter*. The Commission discusses the possibility of excluding low levels of deliberate violence which unforeseeably result in death from the scope of unlawful and dangerous act manslaughter, addresses submissions received on this issue and responds to such submissions. The Commission states its final recommendation on unlawful and dangerous act at paragraph 5.38 and on low levels of violence which unforeseeably result in death at paragraph 5.46. The Commission considers manslaughter by drug injection and sets out its final recommendation at paragraph 5.52.

16. Regarding reform of gross negligence manslaughter the Commission discusses the proposal of amending the *Dunleavy* test to make the capacity of the accused to advert to risk or to attain the expected standard relevant to liability. The Commission analyses submissions received on the issue of capacity and responds to such submissions before stating its final recommendation on this point at paragraphs 5.68-5.69. The Commission considers whether the statutory offences of dangerous driving causing death and careless driving should continue to exist alongside the more serious offence of manslaughter and states its final recommendation at paragraph 5.80. Finally, the Commission discusses the relevance of death in careless driving cases and puts forward its final recommendation at paragraphs 5.87-5.88.

17. Chapter 6 provides a summary of the recommendations contained in the Report. The Appendix to this Report contains a draft *Homicide Bill* to give effect to the Commission’s recommendations on murder, involuntary manslaughter and related matters.

CHAPTER 1 THE MURDER/MANSLAUGHTER DISTINCTION AND THE LABELLING OF CRIMINAL OFFENCES

A Labelling and moral culpability

1.01 Homicides are committed in a wide range of circumstances. Morally, and as a matter of proper labelling, the category of murder should be reserved for the most heinous or culpable killings. In its *Consultation Paper on Homicide: The Mental Element in Murder*,¹ the Commission recommended that murder should encapsulate both the intention to kill or cause serious injury and the American *Model Penal Code 1985* definition of recklessness which amounts to extreme indifference to human life. Expanding the mental element of murder to cover the *Model Penal Code (MPC)* formulation of recklessness would capture an accused who fired a gun at a moving vehicle but claims that he neither intended to kill or cause serious injury to anyone, nor foresaw death as a probable consequence of his actions. The Commission takes the view that a person who is as bad as an intentional killer should be treated as such.

1.02 Murder and manslaughter are related, but morally distinct, categories of killing and this difference should continue to be recognised.² The Commission strongly believes that the legal distinction between murder and manslaughter is of great importance in relation to the “appropriate labelling” of criminal offences. Those who advocate abolition of the murder/manslaughter distinction neglect the labelling aspect of homicide law reform. The Commission also notes that murder is generally understood as being a more serious offence than manslaughter. People who are convicted of manslaughter are considered by members of society to be less culpable and therefore less blameworthy than those convicted of murder.³

¹ (LRC CP 17-2001).

² See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001), Chapter 1 and Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007), Chapter 1 for a discussion of malice aforethought and the historical distinction between murder and manslaughter.

³ See Mitchell “Public Perceptions of Homicide and Criminal Justice” [1998] 38 Brit J Criminol 453 and Mitchell “Further Evidence of the Relationship Between Legal and

B Maintaining the murder/manslaughter distinction

(a) Arguments favouring retention of the distinction

1.03 The Commission is completely opposed to the idea of abolishing the distinction between murder and manslaughter. There is a moral principle at stake. Most intentional killings are in a class of their own and are more heinous than unintentional killings.

1.04 First, the murder/manslaughter distinction is rooted in the historic principle that criminal liability presupposes an intention to commit the relevant *actus reus*. Since Coke's time this principle has been regarded as central to criminal liability so that offences which do not conform with it are regarded as deviations from the normal pattern of liability.⁴

1.05 Second, the law should differentiate between particularly heinous killings and those which are less serious, such as those caused during the commission of lawful acts due to gross negligence. Even within involuntary manslaughter where the accused unintentionally kills the deceased, there are great divergences in culpability. Arguably, it is inappropriate to label an accused who was "unlucky" - in the sense that a single punch led to the death of a man - with the same crime as someone who repeatedly kicked his victim in the head or stabbed him in the chest.

1.06 Third, a murder conviction carries a unique stigma which highlights the gravity of the offence and arguably acts as a deterrent. In its 2001 Consultation Paper the Commission observed that the word *murder* "has a very important symbolic and declaratory effect, and serves to convey the seriousness of the particular killing and to indicate to society the nature and quality of the offender's crime."⁵ The Commission believes that differentiating between homicide offences - *ie* between murder and manslaughter - underlines the differing stigma attaching to each category of killing. If murder ceased to be a distinct offence, the criminal law would fail to convey the degree of stigma and revulsion society attaches to the most heinous killings.

Public Opinion on the Law of Homicide" [2000] Crim LR 814. These surveys were, however, conducted in England.

⁴ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 9.

⁵ *Ibid* at paragraph 11. In its Report on *Offences Against the Person* (Cmnd 7844 14th Report 1980) at paragraph 15, the Criminal Law Revision Committee recognised this point and recommended that the distinction between murder and other unlawful killings be retained.

1.07 Fourth, if there were a single offence of unlawful homicide the focus of homicide trials would shift to the sentencing stage.⁶ This would marginalise the role of the jury in the criminal process. The right to trial by jury is one of the most important rights of the defendant. Under the current law, significant questions of fact - such as whether the defendant was provoked or acted in self-defence - are decided by the jury prior to verdict, based on all the available evidence. If the murder/manslaughter distinction were abolished and replaced by a single offence of unlawful homicide, the judge would decide the impact of provocation or self-defence on the defendant's culpability at the sentencing stage. Shifting important questions of fact to the judge alone would effectively nullify the role of the jury in homicide cases.

1.08 Abolition of the murder/manslaughter distinction would mean an end to a legal distinction which has existed for hundreds of years, and which is "deeply imbedded in our social and legal culture."⁷ It is likely that the public would be hostile to any move to abolish the distinction. In 1980 the Criminal Law Revision Committee stated:

"As far as we have been able to judge from the memoranda submitted to us the public generally wants murder to be retained as a separate offence. If we were to propose the abolition of the separate crime of murder and its incorporation into a wider offence of unlawful homicide, many people would certainly find it hard to appreciate that the proposal was not meant to weaken the law and would be likely to think that the law no longer regarded the intentional taking of another's life as being especially grave. We recommend that murder should continue to be a separate crime."⁸

1.09 There is evidence from other jurisdictions where homicide reform has been considered that there is considerable public support for the murder/manslaughter distinction. The Victorian Law Reform Commission did not receive any submission on its homicide report favouring the unlawful homicide approach.⁹ The suggestion of the New Zealand Criminal Law Reform Committee to replace the term "murder" with that of "culpable

⁶ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 12.

⁷ Law Reform Commission of Victoria *Homicide* (Discussion Paper No 13 March 1988) at paragraph 108.

⁸ Criminal Law Revision Committee of England and Wales *Offences against the Person* (Cmnd 7844 14th Report 1980) at paragraph 15.

⁹ See Law Reform Commission of Victoria *Homicide* (Report No 40 1990-1991) at paragraph 119.

homicide” was met with scathing criticism¹⁰ so much so that some years later the New Zealand Crimes Consultative Committee accepted that there was widespread support for continued legal use of the word “murder”.¹¹

1.10 In its *Consultation Paper on Homicide: The Mental Element in Murder*¹² the Commission noted that public support for the murder/manslaughter distinction might be a factor to be taken into account so as to preserve public confidence in the criminal justice system. The Commission also noted the fact that most common law jurisdictions have retained the distinction.

1.11 In its *Seminar Paper on Homicide: The Mental Element in Murder*¹³ the Commission addressed various arguments in favour of abolishing the murder/manslaughter distinction. While the Commission recognised the phenomenon of over-inclusiveness, it was firmly of the opinion that the abolition of the murder/manslaughter distinction would “entail unnecessary violence to the essential architecture of the criminal law”¹⁴ and undermine the principle that criminal liability will only attach where the relevant *mens rea* is proven. The Commission is still of the view that abolition of the murder/manslaughter distinction would damage the architecture of the criminal law.

1.12 In response to the moral diversity argument, the Commission observed at the Seminar on *Homicide: The Mental Element in Murder*, that within the categories of rape, arson and theft there is considerable variation in the gravity of offending behaviour and that this is taken into account by the courts at the sentencing stage. The Commission does, however, acknowledge that the abolitionist argument has gained favour within the legal profession because moral variability cannot be taken into account when sentencing the person convicted of murder due to the mandatory life sentence. In the Commission’s view most of the difficulties associated with the murder/manslaughter distinction can be met by abolishing the mandatory life sentence and carefully expanding the existing grounds of exculpation.¹⁵ The mandatory life sentence will be discussed in part C below.

¹⁰ Criminal Law Reform Committee New Zealand *Report on Culpable Homicide* (July 1976).

¹¹ The New Zealand Crimes Consultative Committee *Crimes Bill, 1989: Report of the Crimes Consultative Committee* (April 1991) at 43-45.

¹² (LRC CP 17-2001). See paragraph 14.

¹³ (LRC SP 1-2001).

¹⁴ Law Reform Commission *Seminar Paper on Homicide: The Mental Element in Murder* (LRC SP 1-2001) at 4.

¹⁵ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 15.

(b) Arguments favouring abolition of the distinction

1.13 In *Hyam v DPP*¹⁶ Lord Kilbrandon argued that there was no reason for maintaining the murder/manslaughter distinction following the English parliament's abolition of the death penalty for murder in 1965. He stated:

“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 of sentences downward from life imprisonment. It is no longer true, if it ever was true, to say that murder, as we now define it, is necessarily the most heinous example of unlawful homicide.”¹⁷

1.14 Lord Kilbrandon's call for an end to the murder/manslaughter distinction has found favour in many lofty quarters. Those who argue that the labelling of a particular crime is a mechanistic device for slotting a criminal event into the criminal calendar believe that the focus should be on the event itself. In homicide cases, the event is the unlawful causing of death.

1.15 Arguably, the murder/manslaughter distinction might in some situations appear arbitrary from a moral viewpoint. In *People v Conroy (No 2)*¹⁸ Finlay J stated that regarding the many, varied factors which must be considered when sentencing a particular accused for homicide, there are no grounds for a general presumption that the crime of manslaughter may not, depending on its individual facts, be in many cases as serious as, or more serious than, the crime of murder, from a sentencing viewpoint.¹⁹

1.16 There is a body of opinion which contends that *mens rea* should not be relevant to criminal responsibility, but should only have an impact on punishment. Abolitionists maintain that creating a single unlawful homicide category would eliminate the prominence of fault in determining guilt under the current system. It would not be necessary to prove a “guilty mind” in order to prove that a murder had been committed. It has also been suggested that abolition would be a means of overcoming the reluctance of juries to convict for murder in the face of the mandatory life sentence and the difficulty of proving an intention to kill in certain circumstances.²⁰

¹⁶ [1974] 2 All ER 41.

¹⁷ *Hyam v DPP* [1974] 2 All ER 41, 72-73.

¹⁸ [1989] IR 160.

¹⁹ *Ibid* at 163.

²⁰ See Coulter “Divided opinion on manslaughter or murder in mind” *The Irish Times*, 12 July 2001.

1.17 Instead of charging a person with murder or manslaughter, he/she would simply be charged with unlawful homicide which would cover the whole gamut of killings, including domestic killings, mercy killings, bombings and fatal arson attacks.

1.18 Mr Justice Paul Carney, a judge of the Central Criminal Court, is one of the leading Irish proponents of merging murder and manslaughter into the single crime of unlawful homicide. Carney J maintains that in almost every murder case coming before the Central Criminal Court it is accepted that the accused unlawfully killed the deceased.²¹ The sole area of contention is whether the accused is guilty of murder or manslaughter. Carney J states that merging the two homicide categories would mean that the contested murder trial would become a thing of the past. There would be no reason why there should not be a guilty verdict in nearly every case.²² Having a single category of unlawful homicide would be advantageous, Carney J claims, because it would significantly reduce the backlog of cases,²³ cut down on legal and other administrative costs²⁴ and reduce the suffering for victims' families. Carney J states that relatives of victims often feel that the case has been lost if a verdict of manslaughter rather than murder is returned and that justice has not been done.²⁵

1.19 Carney J claims that retentionists place the murder/manlaughter distinction on a pedestal because they believe that the word "murder" has become synonymous with the word "heinous" in our language and culture and also because they want the mandatory life sentence attaching to murder to remain intact. Carney J argues that this is a diplomatic way of saying that judges cannot be trusted.²⁶

²¹ See Buckley "Judge proposes merger of murder and manslaughter into one crime" *Irish Examiner* 30 October 2003. In 2002 there was no outright acquittal for murder.

²² See Donaghy and Walsh "Top judge calls for rethink on use of murder charges at trial" *Irish Independent* 30 October 2003.

²³ See Coulter "Judge calls for single charge of unlawful killing" *The Irish Times* 30 October 2003. When Carney J proposed the abolition of the murder/manlaughter distinction in a talk to the Law Society in NUI Galway in 2003, he stated that the average length of a contested murder trial in 2002 was 11 days. In his view the backlog in the Central Criminal Court would be reduced if homicide cases could be shortened to one day or half-day pleas.

²⁴ Contested murder trials involve on average 100 witnesses.

²⁵ See Coulter "Judge calls for single charge of unlawful killing" *The Irish Times* 30 October 2003 and Buckley "Judge proposes merger of murder and manslaughter into one crime" *Irish Examiner* 30 October 2003. See also "Either way it is murder most foul" *Irish Examiner* 30 October 2003.

²⁶ See Donaghy and Walsh "Top judge calls for rethink on use of murder charges at trial" *Irish Independent* 30 October 2003.

1.20 Professor Ivana Bacik also supports merging manslaughter and murder into the single crime of unlawful homicide. Bacik questions whether having a separate offence of murder is a true reflection of reality, or is instead about social stigma.²⁷ Bacik subscribes to the abolitionist view that a “baseline” offence of homicide would be preferable due to over-inclusiveness and the moral diversity of killings designated as murder on the basis that the spectrum of intentional killing (which includes contract killings, mercy killings, revenge killings, child killings and domestic killings) is too wide and that certain intentional killings *eg* mercy killings ought not to be branded as murder.

(c) Submissions received on the murder/manslaughter distinction

1.21 While the Commission received a few submissions in favour of abolishing the murder/manslaughter distinction based largely on moral diversity, cost-cutting, and administrative efficiency arguments, the majority of submissions were broadly supportive of retention because the labelling of offences is important and labelling is the basis of the distinction between murder and manslaughter. Most consultees believed that the creation of a composite crime would seriously devalue the gravity of murder in the criminal law calendar. Though the reverse could in rare circumstances be the case, the great majority of murders are on their facts substantially more grievous in nature than those relating to most manslaughters and many have a profoundly greater element of blameworthiness.

1.22 Several submissions were also received expressing unease that the creation of a single crime of unlawful homicide would mean that the degree of culpability would henceforth be determined by the sentencing judge instead of by the jury as finders of fact. The result would be an emasculation of the defendant’s right to a trial by jury. The Commission also received submissions which questioned whether having a single crime of homicide would in fact lead to shorter trials given that the evidential hearing may simply give way to a lengthy and complex sentencing stage.

1.23 The Commission is of the view that the murder/manslaughter distinction should be retained.

(d) Report Recommendation

1.24 *The Commission recommends that the murder/manslaughter distinction should be retained.*

²⁷ See Breen “Issue is for politicians not judges, says reform commission” *The Irish Times* 30 October 2003.

C The mandatory life sentence for murder

1.25 This Report deals with fault in relation to murder and involuntary manslaughter and as such the mandatory life sentence for murder is a separate issue. Nonetheless, the Commission believes that it is necessary to give the matter some consideration, since any proposal to expand the definition of murder will necessarily have implications for the mandatory penalty. Any recommendations made by the Commission as regards expanding the mental element of murder in order to capture the most heinous killings are not, however, dependent on the abolition of the mandatory life sentence for murder.

1.26 The issue of the mandatory life sentence cropped up repeatedly during the Seminar on Murder and the Commission briefly mentioned it in both the *Consultation Paper on Homicide: The Mental Element in Murder*²⁸ and the Seminar Paper.²⁹ The removal of the mandatory life sentence and its replacement with a discretionary life sentence was raised in the context of providing an answer – other than abolition of the distinction between murder and manslaughter – to the problem of heterogeneity in the crime of murder, so that account could be taken of moral variability at the sentencing stage.

1.27 In its 1996 *Report on Sentencing*³⁰ the Commission recommended that the mandatory life sentence for murder be abolished. The Commission still subscribes to this view. Opinion on this issue was divided at the Seminar on Sentencing.³¹ Some contributors thought that since murder was usually considered to be the most serious crime it was accordingly appropriate to mark the seriousness of the offence by imposing the mandatory sentence. To remove the mandatory aspect of the penalty would reduce respect for the law. Other contributors believed that the mandatory sentence was “an inflexible, blunt instrument not worthy of respect.”³²

1.28 Custodial sentences, should as a matter of justice and morality, be for such a term as the sentencing judge believes is commensurate with the seriousness of the offence, save in special circumstances. The penalty should be fashioned to meet the needs of the individual case. Yet, as Lord

²⁸ (LRC CP 17-2001). See paragraph 6 and paragraph 15.

²⁹ See Law Reform Commission *Seminar Paper on Homicide: The Mental Element in Murder* (LRC SP 1-2001) at 5.

³⁰ (LRC 53-1996). See Recommendation 12 where the Commission recommended that mandatory and minimum sentences of imprisonment for indictable offences be abolished.

³¹ See Law Reform Commission’s *Report on Sentencing* (LRC 53-1996) at paragraph 5.11.

³² *Ibid.*

Bingham of Cornhill observed in a lecture in 1998,³³ “the penalty, far from being individualised, is generalised to the ultimate degree.”³⁴

(a) Arguments for maintaining the mandatory life sentence

1.29 First, because murder is the most heinous crime in the criminal calendar, it is perhaps appropriate that the punishment is life imprisonment in every case. The *Criminal Justice Act 1990* abolished the death penalty for murder but provided instead for the imposition of a mandatory life sentence.³⁵ In 2001 the Constitution was amended at Article 15.5.2 to impose a constitutional ban on the death penalty.³⁶ Since the abolition of the death penalty in Ireland, life imprisonment is the most severe penalty permissible. Arguably, no other penalty would mark the revulsion with which society views the crime of murder.³⁷ From a retributive viewpoint, a mandatory life sentence for murder is the only appropriate punishment. Society cannot tolerate the intentional taking of life and therefore demands that the wrongdoer forfeit his or her liberty to the State for the duration of his/her life (at least in theory).

1.30 In October 2007 two convicted murderers lost their High Court challenge to the constitutionality of the mandatory life sentence for murder.³⁸ The men claimed that the mandatory penalty in section 2 of the *Criminal*

³³ This lecture took place prior to the successful challenge by convicted murderer, Anthony Anderson, to the Home Secretary’s powers to set minimum terms for life sentence prisoners. See *R v Secretary of State for the Home Department* [2002] UKHL 46. On 25 November 2002, the House of Lords (including Lord Bingham) ruled that it was incompatible with Article 6(1) of the European Convention of Human Rights for politicians to set minimum terms for life sentence prisoners.

³⁴ See Lord Bingham of Cornhill’s *Newsam Memorial Lecture on “The Mandatory Life Sentence for Murder”* 13 March 1998 at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mansent_130398.htm. Lord Bingham’s speech is very helpful in setting out various arguments for and against the mandatory life sentence and these arguments form much of the basis of the Commission’s discussion of the issues here.

³⁵ The death penalty was imposed by section 1 of the *Offences Against the Person Act 1861* which provided: “Whosoever shall be convicted of murder shall suffer death as a felon.” Section 2 of the 1861 Act required the trial judge to pronounce a death sentence on the convicted murderer and section 5 provided that an individual convicted of manslaughter would be liable, at the discretion of the court, to imprisonment for life.

³⁶ Article 15.5.2 of the Constitution provides: “The Oireachtas shall not enact any law providing for the imposition of the death penalty.”

³⁷ See *Report of the House of Lords Select Committee on Murder and Life Imprisonment*, HL Paper 78-1, 1989 at paragraph 108A.

³⁸ *Whelan v MJELR* [2007] IEHC 374. See “Challenge to life term for murder denied” *The Irish Times* 6 October 2007.

Justice Act 1990 violated the separation of powers by infringing upon judicial independence as enshrined in the Constitution and also breached the constitutional doctrine of proportionality by requiring the same punishment in every case regardless of the individual circumstances or the gravity of the killing. They also claimed that their rights under the European Convention of Human Rights (*ECHR*) were breached because they had no way of knowing how or when they might be released.

1.31 According to the plaintiffs, decisions made by the Minister for Justice to commute or remit punishment, following a report of the Parole Board, amount to a sentencing exercise on the part of the Executive contrary to Article 5(1) of the *ECHR*. They argued further that the mandatory life sentence in Ireland contains both a penal and preventative component, the former being a period of retribution for the offence committed and the latter being a period of detention justified on the basis of protecting the public against the dangerousness of the offender. The plaintiffs also claimed that Articles 5(4) and 6(1) of the *ECHR* guarantee offenders who have served the retributive part of their sentences a right to have their continued detention reviewed regularly by an independent body so that the circumstances and factors relating to their continued dangerousness can be assessed.

1.32 The defendants argued that the Minister for Justice has powers to commute or remit punishment³⁹ or alternatively to grant the person convicted of any offence temporary release from prison.⁴⁰ Accordingly, in releasing a convicted murderer from prison early, the Minister was not exercising a judicial function. The defendants also contended that the mandatory life sentence was punitive and did not contain any preventative aspect.

1.33 Irvine J found that section 2 of the 1990 Act breached neither the Constitution nor the *European Convention on Human Rights Act 2003*. She stated:

³⁹ The Minister's power has its origins in Article 13(6) of the Constitution, section 23(1) of the *Criminal Justice Act 1951* as amended by section 9 of the *Criminal Justice Act 1990*. Article 13(6) of the Constitution provides: "The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities". Under section 23(1) of the *Criminal Justice Act* the Government may commute or remit, in whole or in part, any punishment imposed by a Court exercising criminal jurisdiction, subject to such conditions as they think proper.

⁴⁰ Temporary release of prisoners is provided for in section 2 of the *Criminal Justice Act 1960* as amended by the *Criminal Justice (Temporary Release of Prisoners) Act 2003* and section 110 of the *Criminal Justice Act 2006* and is designed to cover a specific period when the prisoner is allowed to remain at large subject to compliance with conditions which, if broken, will lead to revocation of such release. The Minister acts on the advice of the Parole Board but is not bound by such advice.

“there can be nothing offensive in the Oireachtas promoting the respect for life by concluding that any murder even at the lowest end of the scale, is so abhorrent and offensive to society that it merits a mandatory life sentence and the question of proportionality can never arise so as to weigh the right of the offender to liberty above the right of the legislature to forfeit liberty as a penalty for the lowest order of murderous activity. Proportionality as between sentences of the same nature does not in the opinion of this court apply to those convicted of murder.”⁴¹

1.34 Irvine J also observed that the mandatory sentence was designed to reflect the significance of the right to life as enshrined in Article 40 of the Constitution. She stated that the plaintiffs failed to distinguish between the Minister for Justice’s role in relation to remission of a mandatory life sentence and the identical role he plays regarding other lengthy determinate sentences and noted that if the plaintiffs’ arguments were taken to their logical conclusion then the foreshortening of any sentence imposed by the court by any third party would constitute an interference with the role of the judiciary.⁴² Irvine J took the view that in exercising his right to commute or remit punishment, the Minister for Justice merely fulfils the role afforded to him in Article 13(6) of the Constitution and in no way offends the separation of powers.⁴³

1.35 While noting that the State accepted that the Parole Board, which is consulted by the Minister for Justice when reviewing life sentences, was not “an independent and impartial” tribunal within the meaning of Article 5.4 of the European Convention on Human Rights, Irvine J held that the men had no right to a review of their detention by an independent body, given that the life sentence for murder is “wholly punitive” and contains no element of preventative detention.

1.36 A second argument in favour of maintaining the mandatory life sentence for murder is that its replacement with a discretionary life sentence would blur the distinction between murder and manslaughter, for which life is the discretionary maximum penalty.⁴⁴

⁴¹ *Whelan v MJELR* [2007] IEHC 374 at 14. See McCutcheon and Coffey *Report into Determination of Life Sentences* IHRC 2006.

⁴² *Whelan v MJELR* [2007] IEHC 374 at 16.

⁴³ *Ibid.*

⁴⁴ See Lord Bingham of Cornhill’s *Newsam Memorial Lecture on “The Mandatory Life Sentence for Murder”* 13 March 1998 at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mansent_130398.htm.

1.37 Third, the mandatory penalty is arguably necessary to protect the public against the threat of a convicted killer killing again upon release. The public, should, as far as practicable, be protected against the risk of unlawful violence.

1.38 Fourth, if the penalty for murder became discretionary public confidence in the administration of criminal justice might well be undermined. Although powerful arguments against the fixed mandatory penalty for murder have been advanced by judges and academic lawyers in Ireland and elsewhere (and will be discussed in section (b) below), arguably the public does not share these concerns. Intentional homicide is the most heinous crime known to law. Now that the death penalty can no longer be imposed statutorily without another referendum, murder attracts the most severe penalty that the law can impose, namely life imprisonment.

1.39 In its *Report on Sentencing*⁴⁵ the Commission recognised “the great emotional appeal” of the mandatory life sentence for murder to the public even though the mandatory penalty is illusory due to the Minister for Justice’s power and practice of granting early release.⁴⁶ Between 1996 and 2006 the average period a convicted murderer served in prison was thirteen and a half years.⁴⁷ The Commission noted:

“In spite of public awareness of the early release policy for persons sentenced to life imprisonment ... there is continued support for mandatory and minimum sentences ...”⁴⁸

1.40 Admittedly, it would be difficult for any government to agree to the removal of the fixed penalty in the case of intentional homicide. When the Commission recommended the abolition of the mandatory and minimum sentences for indictable offences in its *Report on Sentencing*⁴⁹ in 1996, the

⁴⁵ (LRC 53-1996). See paragraph 5.8.

⁴⁶ See Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 5.6.

⁴⁷ See *Whelan v MJELR* [2007] IEHC 374 at 16. On 24 March 2006, prior to leaving office as Minister for Justice, Equality and Law Reform, Michael McDowell pledged that convicted murderers would have to serve a minimum of 12-14 years imprisonment in the future.

⁴⁸ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 5.9. Regarding sexual offences the Commission noted that public support for mandatory or minimum sentences “is fuelled by distrust of judges, whose sentencing is perceived to be preoccupied to such an extent with mitigating factors that the deserts element, merited in the light of the offences committed, is significantly displaced in the sentences ultimately imposed. This is a particularly galling perception for rape victims who undergo the ordeal of a rape trial in order to ensure that rapists are seen to get the sentence they deserve.”

⁴⁹ See Law Reform Commission *Report on Sentencing* (LRC 53-1996) at Recommendation 12.

then Minister for Justice, Nora Owen observed that this would mean in practice that the mandatory life sentence for murder and the minimum 40 year sentence for the murder of a Garda would be abolished. The Minister stated that although she respected the views that led to that conclusion, she was conscious that there are very cogent arguments why the status quo should be maintained.

1.41 Although prisoners serving life sentences for murder will generally not stay in prison until the end of their natural lives, the fact that they are serving life sentences means that their release is conditional on their good behaviour, they are monitored by the Probation and Welfare Service when released and can be returned to prison if necessary.⁵⁰ For example, a person serving a life sentence could be granted temporary release after 12 years imprisonment but can thereafter be lawfully returned to prison if he or she breaks a condition of release.⁵¹ A person given a determinate sentence released at the end of 12 years (less one quarter earned remission for good behaviour) cannot be returned to prison on foot of the original conviction if he or she misbehaves.

1.42 A further argument put forward in support of the mandatory penalty is that sentencing judges would be faced with difficult sentencing problems if it were abolished. Fixing the appropriate penalty for a murderer in the absence of the mandatory penalty would demand a great deal of skill, insight and prudence on the part of the judge. In the absence of clear, principled sentencing guidelines in relation to murder, affording judges with unfettered sentencing discretion would only increase uncertainty and inconsistency.

1.43 Finally, proponents of the mandatory life sentence for murder argue that it acts as a valuable deterrent. Deterrence, both general and personal, is a recognised goal of punishment and the imposition of a sentence which will discourage other potential murderers from killing is beneficial to society.

⁵⁰ A number of submissions in favour of retaining the mandatory life sentence for murder emphasised this point.

⁵¹ See section 1 of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*. All prisoners irrespective of the duration of their sentences can apply for temporary release on the grounds specified in the Act, such as section 1(d), where the Minister believes the prisoner has been rehabilitated and would, upon release be capable of reintegrating into society. In *Whelan v MJELR* [2007] IEHC 374 Irvine J stated at 7: “Even though the wording of s. 1 seems to envisage that temporary release will be granted for a definitive period, there does not appear to be anything offensive in the Minister [for Justice Equality and Law Reform] granting temporary release for a period up to an[d] including the remaining lifetime of an individual subject to their continued compliance with any given set of conditions.”

(b) Arguments favouring abolition of the mandatory life sentence

1.44 First, all murders are not equally heinous. There is considerable moral variability in this category of homicide, just as there is in manslaughter. Some murderers display a level of appalling depravity or sadistic violence, but most murders occur in an emotional context. They are often the product of provocation or are fuelled by drink or obsession rather than greed or careful planning.

1.45 Where there is variation in blameworthiness and culpability it is arguably unjust that there is parity of punishment.⁵² The mandatory life sentence is difficult to reconcile with the principle of proportionality because it cannot take account of the culpability of the particular offender.⁵³ Although, Carney J advocates the total abolition of the murder/manslaughter distinction, he has suggested that a half-way house would be to leave the structure of homicide as it stands, but give judges discretion in relation to the sentence. This would, he believes, increase the number of murder pleas.⁵⁴

1.46 Ivana Bacik states that the penalty distinction between murder and manslaughter has led to much esoteric debate on the meaning of “intention” and, like Carney J, she claims that more defendants would plead guilty to murder if it did not carry a mandatory sentence.⁵⁵ In her view, the mandatory life sentence gives rise to injustice as it does not reflect the varying degrees of culpability in the crime of murder. Some murders are more heinous than others and differing levels of heinousness should be reflected in sentencing.⁵⁶

1.47 In its *Report on Sentencing*⁵⁷ the Commission acknowledged that there are degrees of seriousness in the crime of murder, just as there are

⁵² See *Report of the Committee on Penalty for Homicide*, commissioned by the Prison Reform Trust, 1993 at 20. In 1993 Lord Lane chaired an independent committee on the penalty for homicide. The Committee stated: “It is fundamentally wrong in principle that a judge should be required to pass upon the wife who has been maltreated for years by a brutal husband and eventually kills him, precisely the same sentence as that a judge passes upon the ruthless shotgun robber who kills in cold blood. The two cases are extremes: but they help illustrate that the area of culpability in murder cases is a very wide one.”

⁵³ McCutcheon and Coffey *Report into Determination of Life Sentences* IHRC 2006 at 6.

⁵⁴ See Coulter “Judge calls for single charge of unlawful killing” *The Irish Times* 30 October 2003.

⁵⁵ See Coulter “Divided opinion on manslaughter or murder in mind” *The Irish Times* 12 July 2001.

⁵⁶ See Breen “Issue is for politicians not judges, says reform commission” *The Irish Times* 30 October 2003.

⁵⁷ (LRC 53-1996) at paragraph 5.12.

degrees of seriousness in manslaughter. The Commission also noted in its *Seminar Paper on Homicide: The Mental Element in Murder*⁵⁸ that:

“it is the existence of the fixed penalty, rather than the fact of moral variability, that makes murder seem inherently unstable as an offence category and that makes the abolitionist option favoured by so many in the profession appear so compelling. If the fixed penalty were removed, as the Commission believes it should ... the problem of heterogeneity within offence categories could be seen in its proper perspective: as a normal feature of the criminal law.”⁵⁹

1.48 In 1989 Lord Irvine of Lairg QC stated:

“A mercy killing is of a different moral order from a sadistic sex-based child murder. Where murder has a much more extended definition so that the mental element is satisfied by an intention to cause serious bodily harm, combined if need be with an awareness of the possibility of death, I would suggest that it is beyond argument that murder embraces such a multitude of diverse sins that the single mandatory life sentence must be inappropriate.”⁶⁰

1.49 If we asked a reasonably well-informed member of the public for his/her understanding of murder, he/she would probably say it meant the “deliberate”, “intentional” or “premeditated” taking of a human life. However, section 4 of the *Criminal Justice Act 1964* covers situations where there is no intention to kill, provided there is an intention to cause serious injury. Most cases of murder do not actually involve an intention to kill. Arguably, it does not make sense to equate the two situations by requiring the same penalty to be passed.⁶¹

⁵⁸ (LRC SP 1-2001).

⁵⁹ *Ibid* at 5.

⁶⁰ HL Hansard, 6 November 1989, Col. 521.

⁶¹ See Lord Bingham of Cornhill *Newsam Memorial Lecture on “The Mandatory Life Sentence for Murder”* 13 March 1998 at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mansent_130398.htm. Lord Bingham discusses attempted murder where the prosecution are required to prove that the accused had a specific intention to kill. The maximum sentence for attempted murder is life imprisonment, but it is discretionary, not mandatory. While Lord Bingham appreciates that the fact of death adds a dimension of seriousness to a case, even where death is not intended, he states that it is “anomalous that a death which is unintended should carry a mandatory sentence of life imprisonment when a result which is intended but not achieved, very probably through no fault of the offender, should leave the judge with the discretion to impose whatever sentence he judges appropriate.”

1.50 A second major reason militating against the continued existence of the mandatory life sentence for murder is that life does not mean life.⁶² Although notionally the convicted murderer is supposed to spend life behind bars, this is in fact an absolute fiction. As Lord Bingham of Cornhill observed:

“the sentence pronounced by the court is a formula, not a meaningless formula, but a formula which gives no real clue to the offender, to the victim, to the media or to the public at large, what in practical terms - that is, in years to be served in prison – the sentence means. That is decided later.”⁶³

1.51 The retributive argument that the mandatory life sentence is the only suitable punishment for murder would only be unassailable (1) if all murders were of equal gravity and heinousness which they are not and (2) if all murderers received the same punishment in practice which they do not. It is difficult to understand what retributive purpose is served by pronouncing a formulaic sentence in open court if that sentence bears no relationship to the punishment which the murderer will actually undergo in the vast majority of cases.

1.52 Third, not only is the duration of the term which the murderer will spend in prison determined after the mandatory penalty is pronounced in court, but the decision is not made by the trial judge who is an experienced, impartial professional trained to weigh up all the aspects of the offence and the offender in question. Instead, the term of imprisonment is decided behind closed doors by the current Minister for Justice, Equality and Law Reform in Ireland following advice of the non-statutory Parole Board, which the Minister may or may not heed.⁶⁴ The murderer has no right to appeal

⁶² See McCutcheon and Coffey *Report into the Determination of Life Sentences* IHRC 2006 at 4-5.

⁶³ Lord Bingham of Cornhill *Newsam Memorial Lecture on “The Mandatory Life Sentence for Murder”* 13 March 1998 at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mansent_130398.htm.

⁶⁴ Up until the *Criminal Justice Act 2003* (see Schedule 21) the Home Secretary in England invited the trial judge and the Lord Chief Justice to offer advice on the “tariff” but he/she was free to reject this advice in favour of a longer or shorter term without giving reasons for the decision, which was incapable of being appealed. Since 2003, the trial judge sets the minimum period to be served and that minimum period is subject to a defence appeal or to an Attorney General’s reference on the basis that it is unduly lenient. See *R v Secretary of State for the Home Department* [2002] UKHL 46 where the House of Lords held that the power then exercised by the Home Secretary to decide how long they should spend in prison for the purposes of punishment was incompatible with Article 6(1) of the European Convention of Human Rights because the Home Secretary was exercising a sentencing function in fixing the tariff.

against the decision, nor has the Attorney-General any right to make an application on the grounds of undue leniency.

1.53 The Irish Human Rights Commission's *Report into the Determination of Life Sentences*⁶⁵ stated that current Irish law does not comply with the European Convention of Human Rights (*ECHR*). Under Article 5(4) of the *ECHR*, which guarantees the right to liberty and security, a person enjoys the right to have the lawfulness of his/her detention reviewed by a court and to be released if the detention is held to be unlawful. Life sentence prisoners are entitled to a frequent and speedy review of their cases by a court or "court like" (*ie* quasi-judicial) body. If a "court like" body conducts the review it must be invested with the power to determine the lawfulness of the prisoners detention. It is not enough that the "court like" body acts in an advisory capacity.⁶⁶ The review body must be independent of the executive and adopt appropriate procedures in its hearings.

1.54 According to the *Report into Determination of Life Sentences*, current Irish law breaches the European Convention on Human Rights in a number of respects.

"Firstly, the question of release in Ireland is an executive matter whereas the European Convention of Human Rights guarantees a right of review by a court or "court like" body. Secondly, the Parole Board is not a "court like" body, as that concept is understood in European human rights law. The Parole Board's role is merely advisory but the Convention demands that the review body has the power to determine cases. Thirdly, the Irish courts will quash an executive decision on release on the limited grounds that it is arbitrary, capricious or unreasonable; the Convention requires a broader form of review that is not satisfied by the domestic remedy of judicial review".⁶⁷

1.55 Fourth, the argument that replacement of the mandatory life sentence with a discretionary life sentence would erode the distinction between murder and manslaughter is far from convincing. Altering the punishment for murder would not alter the ingredients of the two homicide offences. Not all convicted murderers would be sentenced more severely than some offenders convicted of manslaughter if judges had sentencing discretion for both homicide categories, but under the current system many juries acquit killers of murder and convict them of manslaughter on grounds of sympathy.

⁶⁵ IHRC 2006.

⁶⁶ *Ibid* at 2.

⁶⁷ *Ibid* at 3.

1.56 Fifth, while the criminal justice system must protect the public from killers who are likely to kill again, the mandatory life sentence is not the only way of affording such protection. The discretionary life sentence would afford just as much protection as the mandatory life sentence. Indeed, the main reason for imposing a discretionary life sentence in other jurisdictions is the perception that the offender poses a continuing threat to the public. However, Irish courts have rejected the possibility that a sentence may have a preventative component. The Court of Criminal Appeal has ruled that it is not acceptable to impose a discretionary life sentence on an offender on the grounds that he or she represents a continuing threat to the public.⁶⁸ Most murders are the product of a specific set of circumstances which are highly unlikely to recur, *eg* “[a]n offender cannot kill an imbecile child, an insane wife, or a long-married brutal husband a second time.”⁶⁹

1.57 Sixth, abolition of the mandatory life sentence for murder would not necessarily be a blow to public confidence in the criminal justice system. If the public do not have confidence in the system as it presently operates, it is perhaps because the sentence passed is couched in terms which are false, giving no meaningful information to the murderer, the victim’s family, the media or the public as to what the sentence really means.

1.58 The public would have confidence in the criminal justice system if the sentence pronounced on a convicted murderer is “intelligible, transparent and certain.”⁷⁰ The mandatory life sentence is none of these things. The sentence does not mean what it says. In 1994, *Victim Support* and *Support after Murder and Manslaughter* gave evidence to the House of Lords Select Committee that the mandatory life sentence was far less important to the

⁶⁸ See *DPP v Jackson* Court of Criminal Appeal 26 April 1993. Carney J had imposed a discretionary life sentence on the defendant who was a serious sex offender, but the Court of Criminal Appeal subsequently overturned that sentence on the basis that it constituted one of preventative detention. Rejecting the concept of preventative detention the court stated that “The Court is satisfied that preventative detention is not known to our juridical system and that there is no form of imprisonment for preventative detention.” See also *The People (DPP) v Bambrick* [1996] 1 IR 265 which applied the *Jackson* decision. In refusing to impose a sentence of preventative detention Carney J stated at 276-277 that “he was precluded from approaching the case on the basis that over and above any considerations of punishment this dangerous accused should be preventatively detained until in the opinion of the most qualified experts he is safe to be let back into the community.”

⁶⁹ Lord Bingham of Cornhill *Newsam Memorial Lecture on “The Mandatory Life Sentence for Murder”* 13 March 1998 at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mansent_130398.htm.

⁷⁰ *Ibid.*

people whom they represented than was the issue of certainty as to how long the killer would actually serve in prison before he or she could be released.⁷¹

1.59 The public will have confidence in the criminal justice system if convicted murderers are given terms of imprisonment commensurate with their criminality and also if the most serious murderers are required to remain in prison for very long terms, perhaps for the duration of their natural lives. However, the public are not insensitive to differing levels of moral culpability among killers and they would not want a person who committed a mercy killing to undergo the same punishment as a serial sex killer like Fred West.⁷²

1.60 Seven, judges would not encounter insurmountable sentencing difficulties if the mandatory life sentence were abolished. Judges are already familiar with discretionary life sentences. They are well able to use skill, insight and judgment in sentencing serious offenders such as drug barons, serial rapists, child abusers, blackmailers, armed robbers etc. Deciding the appropriate sentence for a murderer should not prove any more difficult.

1.61 Eight, the deterrent effect of the mandatory life sentence for murder is highly questionable. Since the majority of murders are the result of drunken fury, sudden anger, miscalculation, desperation or obsession rather than careful, premeditated planning, the deterrent effect of any punishment must be minimal.

(c) *Submissions received on the mandatory life sentence*

1.62 The Commission received submissions on its 2001 *Consultation Paper on Homicide: The Mental Element in Murder*,⁷³ which stressed the value of the State's right to recall released murderers to prison. If the mandatory life sentence were abolished, then the State would no longer be entitled to order the return of released murderers to prison if they breached a term of their release. It was submitted that this factor alone would mean that any government looking at reform of the law of homicide would be very slow to tamper with the mandatory life sentence for murder.

1.63 The Commission received submissions that the mandatory life sentence should remain due to its deterrent effect. While many murders are first-time offences and may be the product of sudden rage provoked by the victim, rather than long-term premeditation, many more are indeed directly

⁷¹ Lord Bingham of Cornhill *Newsam Memorial Lecture on "The Mandatory Life Sentence for Murder"* 13 March 1998 at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mansent_130398.htm.

⁷² *Ibid.*

⁷³ (LRC CP 17-2001).

or indirectly premeditated in a long-term sense. For example, an accused may decide to poison his wife. Such a killing is likely to be the result of planning over a significant period of time (“long-term” as opposed to murder unplanned and committed in “the heat of the moment”). A murder may be indirectly premeditated as part of the planning relating to a particular intended criminal activity such as, for example, when a planned robbery includes the use of firearms which may be used to kill if the accused perceives that it is necessary to do so in the events which transpire in the course of the robbery. The mandatory life sentence may have a bearing on criminal activities which include the risk of murder.

1.64 Most submissions received by the Commission however, strongly supported the abolition of the mandatory life sentence due to the moral variability of the crime and the inappropriateness of punishing offenders with differing levels of blameworthiness as though they were all the same, that is, all equally culpable.

1.65 As stated at the beginning of this section, the Commission previously recommended the abolition of the mandatory life sentence for murder.⁷⁴ The Commission is still of the view that the fixed penalty for murder should be removed.

(d) Report Recommendation

1.66 *The Commission recommends that the mandatory life sentence for murder be abolished and replaced with a discretionary maximum sentence of life imprisonment.*

1.67 *The Commission recommends that the continued existence of the mandatory life sentence should not, however, preclude expansion of the mental element of murder.*

⁷⁴ See Law Reform Commission *Report on Sentencing* (LRC 53-1996) at Recommendation 12; See also Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 15 and Law Reform Commission *Seminar Paper on Homicide: The Mental Element in Murder* (LRC SP 1-2001) at 5.

CHAPTER 2 MURDER: THE CURRENT LAW AND ISSUES

A Introduction

2.01 In this chapter the Commission discusses the law governing the mental element in murder. In part B the Commission addresses murder in Ireland and in part C sets out the relevant law in England where there has been considerably more case-law on the meaning of “intention”. Part D addresses issues related to murder such as whether there are morally culpable killings currently outside the definition of murder, which ought to be punished as such. Part D also examines whether an intention to cause serious injury should continue to form the mens rea for murder, and, if so, whether “serious injury” should be defined.

B Murder in Ireland

2.02 In Ireland the mental element for murder is laid down by section 4 of the *Criminal Justice Act 1964*, which provides:

“4(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.”

2.03 By virtue of section 4(2) the test of intention is subjective. Section 4 was introduced specifically to rule out an objective test for intention in murder cases, following the controversial House of Lords decision in *DPP v Smith*¹ which will be discussed later in the chapter.

2.04 Charleton states:

“Intent necessarily involves a conscious choice to bring about a particular state of affairs. If one consciously chooses not to bring about a state of affairs one cannot intend it. In all but the rarest

¹ [1960] 3 All ER 161.

circumstances choosing to do something will mean that one also actively desires it. That rare exception may occur where the desire of the accused is to bring about a result knowing, albeit with regret, that another consequence will, in the ordinary course of events, follow from it or necessarily involve it. That state of mind is nonetheless intent.”²

2.05 There are very few Irish cases on the meaning of “intention”. As will be discussed later, intention has been interpreted in England as including situations where it is the actor’s conscious object or purpose to kill, as well as situations where he foresees death as a virtually certain consequence of his actions, although it may not have been his object or purpose to kill.³ In England, therefore, no matter how culpable the taking of the risk in question was, it will not be murder unless the defendant foresees death as a virtually certain consequence of his actions. Many forms of socially unacceptable risk-taking which fall short of virtual certainty would, therefore, be excluded from the definition of murder.⁴

2.06 Intention may, however, bear a wider meaning in Irish law than it does in England.⁵ A major problem with the law governing “intention” is that the legal meaning of the word is so uncertain. It is not clear what exactly “intention” means in Ireland. As well as conscious object or purpose, “intention” may extend to foresight of a probability of death,⁶ or it may be confined to foresight of a virtual certainty.⁷ This lack of clarity is

² Charleton *Offences Against the Person* (Round Hall 1992) at paragraphs 2.19-2.21.

³ *R v Woollin* [1998] 4 All ER 103. See also Smith and Hogan *Criminal Law* (9th ed Butterworths 1999) at 55.

⁴ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP17-2001) at paragraph 3.

⁵ *Ibid* at paragraph 4.

⁶ See McAuley “Modelling Intentional Action” (1987) *The Irish Jurist* 179, at 191 where the author suggests that courts should adopt the term “legal intention” to make it clear that what is meant is “a technical and non-standard use of a familiar everyday word.” McAuley states at 192 that there would be 3 recognised species of *mens rea* in murder: “direct intention (or *dolus directus*, as the civilians style it), which would cover cases in which the defendant carries out a prior intention or gives effect to a contemporaneous intention; indirect intention (*dolus indirectus*), which would cover cases in which the performance of the prohibited result was the only way of carrying out a prior intention or giving effect to a contemporaneous intention; and legal intention, which would cover cases in which the contemplated result was virtually certain to occur (and could be made to cover cases in which the likelihood of its occurrence falls somewhere in the range from highly probable through probable to possible).”

⁷ See Newman “Reforming the Mental Element on Murder” 5 (1995) *Irish Criminal Law Journal* 194-219, at 199. Newman states: “The law in Ireland may, it is submitted, be summarised thus: “A result is intended when: (a) it is the defendant’s

unsatisfactory. Murder is the most serious offence on the statute books and clarity on the meaning of the necessary mental element is of paramount importance. In the *Consultation Paper on Homicide: The Mental Element in Murder*⁸ the Commission recommended that the term “intention” be defined by statute in order to introduce clarity and certainty into this area of the law.

2.07 The first Irish case to discuss the meaning of “intention” was *People v Murray*.⁹ The accused were a married couple who took part in an armed bank robbery and were pursued by an off-duty, plain-clothes Garda after their get-away car narrowly missed crashing into his vehicle. When the appellants’ car stopped and they got out and ran away, the Garda stopped his car and ran after them, overtaking the husband. Following the Garda’s attempt to seize the unarmed husband, the wife shot and killed the Garda. The accused were convicted of capital murder and were sentenced to death. They appealed against their convictions on the basis that when the wife shot the Garda she did not know that he was a police officer acting in the course of his duty and, therefore, did not have the *mens rea* for the offence of capital murder.

2.08 Section 1 of the 1964 Act abolished the death penalty in Ireland except where there was a conviction for treason or capital murder. Capital murder involved the murder of a member of an Garda Síochána or prison officers acting in the course of their duty, as well as politically motivated intentional killings or those where the victim was a foreign head of state or foreign diplomat.¹⁰ In allowing the appeals and substituting murder convictions for those of capital murder because the evidence of *mens rea* was assessed on the wrong basis, the Supreme Court held that the offence of

purpose to cause it; or (b) the defendant foresees that his act will certainly cause it.” Newman continues to state at 200 that the main difference in the Irish and English legal positions on intention is that in English law “proof that the defendant foresaw a consequence as certain (and ‘virtually’ is just to account for the fact that nothing in life is certain) is only the basis for an inference of intent. In Ireland it is intent.”

⁸ (LRC CP 17-2001) at paragraph 5.01.

⁹ [1977] IR 360.

¹⁰ The death penalty was abolished entirely by section 1 of the *Criminal Justice Act 1990*. Capital murder was replaced by section 3, a special provision relating to certain murders and attempts such as those of a member of the Garda Síochána acting in the course of his duty or prison officers or politically motivated murders or attempts. Where an accused is convicted of section 3 murder a minimum term of 40 years imprisonment applies. Although the penalty for manslaughter is discretionary, the life penalty for murder under section 2, and the 40 years term of imprisonment for murder to which section 3 of the *Criminal Justice Act 1990* applies, is mandatory. Where a person is under 17 years when he/she commits a murder, the sentence is not mandatory life imprisonment, but is at the discretion of the court. The court may either apply a determinate sentence or impose a sentence that the convicted young person be detained at the pleasure of the government.

capital murder in section 3 of the *Criminal Justice Act 1964* was a new statutory offence which required proof of *mens rea* in relation to each of its constituent elements.¹¹

2.09 The court stated that the required *mens rea* for capital murder could be established by proof of (a) the specific intention to kill or cause serious injury in section 4 of the *Criminal Justice Act 1964* and (b) proof that the accused adverted to the possibility that his victim was a policeman but nevertheless killed his victim in reckless disregard of that possibility.¹²

2.10 Although the *Murray* case dealt with the capital murder offence in section 3 of the *Criminal Justice Act 1964*, the Supreme Court addressed the changes made to the law of murder by section 4 of the 1964 Act.¹³ Walsh J remarked that the section introduced a new definition of murder and a major consequence of that definitional change was that some homicides which would have been considered murder prior to the 1964 Act were transferred to the category of manslaughter.

“The effect of the abolition of the doctrine of constructive malice was to make it impossible to have anyone convicted of murder on the basis of a test of malice which used as its criterion not what the accused contemplated but what the ordinary reasonable man would have contemplated as the probable result of the criminal act.”¹⁴

2.11 Griffin J stated that section 4 was intended to retain the doctrine of transferred malice (which made it murder to kill a person intending to kill or seriously injure another person) and to abolish the doctrine of constructive malice. Griffin J observed that a person who intended to resist arrest or inflict a slight injury on a Garda, but whose act resulted in the death of the Garda, would no longer be guilty of murder because there now needed to be an intention to kill or cause serious injury to the person killed.¹⁵

2.12 Regarding the concept of intention in the context of killing a person not knowing that they were a member of the Garda Síochána acting in the course of their duty, Walsh J remarked:

¹¹ Henchy, Griffin and Parke JJ held that the appellant wife should be retried on the capital murder charge. Both appellants were ultimately convicted of ordinary murder.

¹² Henchy, Griffin, Kenny and Parke JJ. Walsh J dissented.

¹³ Prior to the enactment of the *Criminal Justice Act 1964* any person convicted of murder had to be sentenced to death.

¹⁴ *The People (DPP) v Murray* [1977] IR 360, 377.

¹⁵ *Ibid* at 409.

“To intend to murder, or to cause serious injury ... is to have in mind a fixed purpose to reach that desired objective. Therefore, the state of mind of the accused person must have been not only that he foresaw but also willed the possible consequences of his conduct. There cannot be intention unless there is also foresight, and it is this subjective element of foresight which constitutes the necessary mens rea. Therefore, where a fact is unknown to the accused it cannot enter into his foresight and his cannot be taken to be intentional with regard to it.”¹⁶

2.13 Later in his judgment he drew a sharp distinction between the mental elements of intention, foresight of consequences and recklessness. He stated:

“... it is, I think, accepted that a person who does not intend to kill and does not intend to cause serious injury but nevertheless does an act which exposes others to the risk of death or serious injury would not be guilty of murder when the mens rea required is an intent to kill or intent to cause serious injury. Even if the specified and specific intent can be established not only when the particular purpose is to cause the event but also when the defendant has no substantial doubt that the event will result from his conduct, or when he foresees that the event will probably result from his conduct, the test is still based on actual foresight. Even on that basis, foresight of probable consequences must be distinguished from recklessness which imports a disregard of possible consequences.”¹⁷

2.14 Walsh J proceeded to say that the fundamental difference between intention/foresight and recklessness is the difference between advertence and inadvertence as to the probable result. He noted that some statutory offences are established by proving recklessness, which is a lesser degree of criminal responsibility than intention.¹⁸

2.15 Henchy J was of the view that while the shooting was clearly intentional, the evidence did not support a finding that it was intentional in respect of the deceased’s membership of the Garda Síochána. He stated that it was important that the test of the wife’s guilt for capital murder as well as murder be a subjective one. The trial court was not permitted to judge her by what a reasonable person would have done in the circumstances, but was entitled to consider what she did “in the light of what she must have adverted

¹⁶ *The People (DPP) v Murray* [1977] IR 360, 386.

¹⁷ *Ibid* at 387.

¹⁸ *Ibid*.

to at the time.”¹⁹ Regarding the *mens rea* as to the victim’s occupation and activity in capital murder cases, Henchy J stated that intention, or alternatively recklessness would suffice. He stated that an accused may be found guilty of capital murder of a Garda if it is shown (a) that he murdered the Garda (*ie* caused death with the intention of killing or causing serious injury) and (b) that he was reckless as to whether his victim was a Garda in the course of his duty.²⁰

2.16 Henchy J stated that the test of recklessness in this context is that of section 2.02(2)(c) of the American Law Institute’s *Model Penal Code* which provides:

“A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves culpability of high degree.”

2.17 He did, however, stress that the recklessness at issue in this case related to a concomitant circumstance of an act, *ie* the deceased’s occupation as a Garda, and not to the consequences of an act (the probable result of shooting a person at close range).²¹

2.18 Griffin J agreed with Henchy J that recklessness as to consequences was irrelevant on the facts of this case. He observed that the “natural and probable consequences” of firing a shot at close range is to kill or cause serious injury and under section 4(2) of the 1964 Act there is a presumption of intention. Since the Special Criminal Court found as a fact that the shooting of the deceased was intentional, Griffin J was satisfied that no issue of recklessness was raised.²²

2.19 In Griffin J’s opinion the specific intent required by section 4 did not extend to the aggravated ingredients of section 1, subsection 1(b)(i), and knowledge that the deceased was a Garda was, therefore, not an ingredient of the offence of capital murder, otherwise the murder of a plain-clothes Garda could never be capital murder unless it was proved that the accused knew his occupation. Griffin J stated that there must be *advertence* on the part of the accused as to the fact that the deceased was a Garda because

¹⁹ *The People (DPP) v Murray* [1977] IR 360, 402.

²⁰ *Ibid* at 403.

²¹ *Ibid*.

²² *Ibid* at 415.

recklessness involves foresight of the possibility and the taking of a risk.²³ The state of a person's mind can only be gathered from the known facts and all the surrounding circumstances.²⁴ In holding that both the appellants should be retried on the capital murder charges, Griffin J stated that at trial there was sufficient evidence for the Special Criminal Court to hold that in all the circumstances the wife must have adverted to the fact that there was a risk that their pursuer was a member of the Garda Síochána, and that, in shooting him while he held her husband, she disregarded that risk. If the Special Criminal Court so found, it would follow that she would have had the necessary mens rea to support a conviction for capital murder.²⁵

2.20 In Kenny J's view, in order to prove a person was recklessly indifferent:

“it must be established that there were facts which indicated to the person concerned the possibility that the forbidden consequences might occur.”²⁶

2.21 Kenny J stated that the wife was not guilty of capital murder because she did not know that the deceased was a member of the Garda Síochána and she did not know anything from which she could infer or advert to the fact that he was a policeman, and she was not recklessly indifferent to whether he was or not. Therefore, Kenny J thought it was appropriate to substitute a verdict of murder against both appellants for the verdicts of guilty of capital murder.²⁷

2.22 Parke J stated that *mens rea* can be “recklessness in the sense that it motivates conduct with a total disregard to the legal or other consequences which may follow.” He therefore shared the view expressed by Henchy, Griffin and Kenny JJ that recklessness could constitute the necessary element of mens rea in the instant case.²⁸

2.23 It appears from the above discussion of *People v Murray* that the mental element for murder *simpliciter* is limited to a specific intention to either kill or cause really serious injury. The Supreme Court judges seem to understand intention in this context as a “purpose” to kill or “willingness” to kill. It does not appear that foresight that one's action will probably kill is the same as intention. Walsh J's remark regarding knowledge or foresight

²³ *The People (DPP) v Murray* [1977] IR 360, 415.

²⁴ *Ibid* at 417.

²⁵ *Ibid* at 418.

²⁶ *Ibid* at 422.

²⁷ *Ibid* at 424.

²⁸ *Ibid* at 426.

that an intended act will cause death suggests that a killing would not amount to murder unless the death is the wrongdoer's desired objective.

2.24 The observations of Henchy, Griffin and Kenny JJ on reckless indifference were limited to recklessness regarding the concomitant circumstances of the appellant wife's act of shooting the deceased Garda – *ie* they related to her advertence to the probable occupation of the deceased and her decision to shoot in reckless disregard of that forbidden circumstance. Even Henchy J's subscription to the *Model Penal Code* formulation of reckless indifference is specific to recklessness as to circumstances rather than consequences.

2.25 In *The People (DPP) v Douglas and Hayes*²⁹ the Court of Criminal Appeal briefly considered the meaning of "intention". The Court's remarks in relation to murder are, strictly speaking, *obiter* as the defendant was charged with "shooting with intent to commit murder" contrary to section 14 of the *Offences Against the Person Act 1861*. The appellants argued that the Special Criminal Court did not consider the matter of an intention to commit murder on the proper basis. It was submitted that the court relied on the following propositions³⁰:

- if someone had actually been killed, the appellants would have been guilty of murder and were thus guilty of an intent to murder;
- that an intention to murder would be established if it were shown that it must have been apparent to the appellants that the natural consequence of the shooting would be to cause death or serious personal injury to one or more of the guards;
- that an act done with reckless disregard of the risk of killing is done with an intent to murder;
- that it is not necessary to establish an intention to kill that such death should be the desired outcome, but that it need only be a likely outcome; and
- that the act was done with reckless disregard of that outcome.

2.26 The Court of Criminal Appeal observed that unless an accused has actually expressed an intent to kill, his intent can only be ascertained from a consideration of his actions and the surrounding circumstances.³¹ Regarding proof of intention, a general principle has evolved so that an accused is taken to intend the natural and probable consequences of his/her own acts. The

²⁹ [1985] ILRM 25.

³⁰ *Ibid* at 26.

³¹ *Ibid* at 27.

Court referred to the 41st edition of *Archbold* where it is stated that in law a man intends the consequences of his voluntary act when he foresees that it will probably happen, whether he desires it or not.³²

2.27 The Court considered that English decisions on the meaning of intention in the context of murder were applicable to section 14. The Court held that foresight and recklessness could not be equated with intention, although they might, in certain circumstances, be evidence from which an inference of intention could be drawn. In summarising the law on intention, the Court stated:

“In the circumstances of any particular case evidence of the fact that a reasonable man would have foreseen that the natural and probable consequence of the acts of an accused was to cause death and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to cause death may or should be drawn, but the court must consider whether either or both of these facts do establish beyond a reasonable doubt an actual intention to cause death...”³³

2.28 The Court of Criminal Appeal proceeded to state that death need not be the desired outcome of an accused’s act in order to constitute an intention to kill.³⁴ However, a reckless disregard of the likely outcome is not of itself proof of an intention to kill, but is merely one of the facts to be considered in deciding whether the correct inference is that the accused intended to kill.³⁵

2.29 In *DPP v Hull*³⁶ the applicant was convicted of murder for killing a man by shooting at a closed door, behind which the deceased was standing. The applicant had pleaded guilty to manslaughter, so the case turned on the issue of the mental element in murder. In relation to section 4(2) of the *Criminal Justice Act 1964*, the trial judge instructed the jury to approach their verdict in two stages:

³² Archbold *Criminal Pleading, Evidence and Practice*, (41st edition 1982) at 995.

³³ *The People (DPP) v Douglas and Hayes* [1985] ILRM 25, 28.

³⁴ See Newman “Reforming the Mental Element of Murder” 5 (1995) *Irish Criminal Law Journal* 194-219, at 199 where the author interprets McWilliam J’s comments to mean “that foresight of a consequence as being anything *less* than certain to result from one’s actions is not *itself* intention to bring it about, but is *evidence* from which intention may be inferred. Foresight of a consequence as certain to occur as a result of one’s actions *is* intent to bring that consequence about.”

³⁵ *The People (DPP) v Douglas and Hayes* [1985] ILRM 25, 29.

³⁶ Court of Criminal Appeal 8 July 1996 (Lexis).

- (1) to decide whether the natural and probable consequences of the defendant's firing at the door was to cause death or serious injury; and
- (2) if they decided this in the affirmative, they should proceed to consider whether the firing had been deliberate or accidental.

2.30 The Court of Criminal Appeal approved the trial judge's interpretation of the section 4(2) presumption. In oblique intention cases, it was correct to direct the jury to approach their verdict in two stages. The Court stated that if the jury decided that the natural and probable consequences of firing at the door was to cause death or serious injury, then the presumption arose that this was the appellant's intention. Nonetheless, the question remained as to whether the presumption had been rebutted. The matter of rebuttal should be decided by considering whether the firing had been deliberate or accidental. In dismissing the appeal, the Court observed that:

“in instructing the jury to acquit the applicant if the firing was accidental, the learned trial judge was in effect correctly telling them that, if they took this view, it meant that the presumption that the applicant intended to cause death or serious injury had been rebutted and so he was entitled to be acquitted.”³⁷

2.31 Thus, in summary, murder will be proved in Ireland if the prosecution establishes that the accused caused the death of the deceased with the intention of (a) killing or (b) causing serious injury. In the absence of an express intention to kill on the part of the accused, intention will be established by considering the accused's actions and all the surrounding circumstances. If the accused “desired” or “willed” death or serious injury to result from his/her conduct, then he/she had the necessary mental element for murder.

2.32 Charleton, McDermott and Bolger state that people who kill are generally driven to the extreme of passion unless they are sociopaths or are trained to pursue killing to earn money or in pursuit of a political ideal. They state that:

“[i]ntention is a simple word which, when it is used in the definition of a criminal offence, requires that a person be proved to have acted with the purpose of causing the harm or circumstance outlawed. In other words, that he meant to do what he did.”³⁸

³⁷ Court of Criminal Appeal 8 July 1996 (Lexis).

³⁸ Charleton, McDermott and Bolger, *Criminal Law* (Butterworths 1999) at paragraph 1.67.

However, as the Court of Appeal stated in *The People (DPP) v Douglas and Hayes*, in order to establish an intention to kill the prosecution need not prove that the desired outcome of the accused's act was death or serious injury.³⁹ Reckless disregard of the risk of death is one of the facts to be considered by the jury in deciding whether they should correctly infer that the accused intended to kill. A reckless disregard of the likely outcome of the accused's conduct will not of itself amount to proof of an intention to kill.

2.33 Under section 4(2) of the *Criminal Justice Act 1964* an accused is presumed to have intended the natural and probable consequences of his/her actions, but the accused may rebut this presumption, for example by raising a defence of accident. In relation to the presumption the jury must be instructed to approach their verdict in two stages. The jury must first decide whether the natural and probable consequence (*eg* of firing at a closed door behind which a person was known to be standing) was to cause death or serious injury. If they decide this in the affirmative then they must consider whether the accused had successfully rebutted the presumption (*ie* had convinced them that the firing of the gun at the closed door had been accidental). If the jury believes the accused's version of events or thinks that in all fairness it might be true, then they must give the accused the benefit of the doubt and acquit him/her of murder.

C Murder in England and Wales

2.34 The House of Lords considered the mental element in murder in *DPP v Smith*.⁴⁰ While driving a car containing stolen property, the defendant refused to stop at a police officer's request. The police officer jumped on to the front of the car, the accused drove for about 100 yards, gaining speed and pursuing an erratic course until the officer fell in front of oncoming traffic and died from his injuries. The defendant was charged with and convicted of capital murder.

2.35 The Court of Appeal overturned the conviction and substituted a verdict of manslaughter, holding that the trial judge had erred in applying an objective test as to the defendant's intention. Byrne J stated that the presumption of intention means that:

“as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. Although, however, that is an inference which may be drawn, and on the facts in certain

³⁹ [1985] ILRM 25, 29.

⁴⁰ [1960] 3 All ER 161.

circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn.”⁴¹

2.36 In other words, because a person can usually predict the likely outcome (the natural consequences) of his conduct, it is usually fair and reasonable to infer that he did indeed predict and expect that outcome. However, while such an inference must be drawn in some cases, if it is not the correct inference to draw in a particular situation (such as where an accused raises a plausible defence of accident), then it should not be drawn.

2.37 The House of Lords reversed the decision of the Court of Appeal, and reinstated the capital murder conviction. It rejected a subjective test as to intention. According to Viscount Kilmuir, it did not matter what the accused contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, *ie*, was a man capable of forming an intention, not insane within the M’Naghten Rules and not suffering from diminished responsibility. Assuming that he is so accountable for his actions, the only issue is whether grievous bodily harm was the natural and probable result of the unlawful and voluntary act in question. The test for establishing this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.⁴²

2.38 In other words, the defendant’s subjective awareness regarding the natural and probable outcome of his conduct and the risk of death or serious injury posed is irrelevant. Provided he had the mental capacity to form an intention, he will be held legally responsible for his actions on the basis that death or serious injury was the natural and probable consequence of his voluntary criminal act. An ordinary reasonable person’s foresight of the likely outcome of the accused’s behaviour will be the relevant marker.

2.39 The decision in *DPP v Smith* provoked huge criticism. All that was necessary to establish the mental element for murder was to show that the accused intended to do *some* unlawful act which was likely to cause death or serious injury, regardless of whether the accused realised it or not.⁴³ Despite the English parliament’s intention to abolish constructive malice in the English *Homicide Act 1957*, the decision in *DPP v Smith* had effectively reintroduced it.⁴⁴

⁴¹ *R v Smith* [1960] 2 All ER 450, 453.

⁴² *DPP v Smith* [1960] 3 All ER 161, 167.

⁴³ See JC Smith, “Case and Comment: *DPP v Smith*” (1960) Crim LR 765.

⁴⁴ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 1.14. Section 4 of the Irish *Criminal Justice*

2.40 In *Hyam v DPP*⁴⁵ the accused poured petrol through the letterbox of a house where a woman and her children were sleeping, in order to frighten away the woman. The accused then set the petrol alight and the fire led to the death of two of the children. The trial judge told the jury that the necessary intent would be established if they were satisfied that the accused knew that it was highly probable that death or serious bodily harm would result when she set fire to the house.

2.41 The House of Lords considered whether proof that the accused knew that it was highly probable that her actions would result in death or serious bodily harm would suffice to establish malice aforethought in the crime of murder. The House of Lords, by a majority, upheld the murder conviction. All five judges held that malice aforethought was present if the accused carried out an act knowing that it was highly probable that death or grievous bodily harm would result.

2.42 Since this state of mind was deemed to be a species of malice aforethought, it was not essential that the House of Lords decide whether the accused actually intended to kill or cause grievous bodily harm. Numerous views were nonetheless expressed on the issue of whether foresight of probable consequences would amount to intention in the strict sense.

2.43 Lord Hailsham invoked the definition of intention laid down by Asquith L.J. in the civil case of *Cunliffe v Goodman*:⁴⁶

“an ‘intention’, to my mind, connotes a state of affairs which the party ‘intending’ ... does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition.”

Act 1964 was introduced specifically to rule out an objective test for intention in murder cases.

⁴⁵ [1974] 2 All ER 41. The facts of this case are very similar to those in *The People (DPP) v Cullen* Central Criminal Court 17 November 1982; Court of Criminal Appeal 11 March 1985, where the jury convicted the accused of murder and malicious damage based largely on the uncorroborated evidence of his accomplice, Lyn Madden. She was a prostitute who watched the defendant throw a fire bomb through the window of a house belonging to a woman called Dolores Lynch. Ms Lynch and two other women died in the blaze. Cullen was a pimp who claimed he wanted to frighten Dolores Lynch, who had also previously worked as a prostitute and who had attempted to get women away from Cullen’s influence. See *Cullen v Toibín* [1984] ILRM 577. See also “Court rejects killer’s appeal” in *The Irish Times* 12 March 1985.

⁴⁶ [1950] 1 All ER 720, 724.

2.44 Lord Hailsham was of the view that foresight of probable consequences was not the same state of mind as intention. While foresight of probable consequences was an essential factor that should be placed before the jury in determining whether the consequences were intended, foresight and intention were distinct.

2.45 Viscount Dilhorne inclined towards the view that knowledge of a high probability of death or serious injury did constitute the necessary intention. Lord Diplock considered that no distinction was to be made in the law of murder between doing an act with the object of causing death or grievous bodily harm and doing an act knowing that it may well cause death or grievous bodily harm.

2.46 In *R v Moloney*⁴⁷ the victim was killed by his stepson during a foolish contest involving loaded shotguns. The men wanted to establish who was quicker on the draw. Following a taunt to pull the trigger, the defendant fired the shotgun at the deceased's head. The House of Lords held that foresight of probable consequences was not equivalent, or alternative to, intention in crimes requiring specific intent. In rare cases where it may be necessary to direct a jury by reference to foresight of consequences, two questions arise:

- (1) Was death or very serious injury a natural consequence of the defendant's voluntary act?
- (2) Did the defendant foresee that consequence as being a *natural* consequence of his act?

Where the answer to both questions was in the affirmative, an *inference* could be drawn that the defendant had intended that consequence.

2.47 Lord Bridge stated that "natural" is the key word in this formulation because it communicates the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it.⁴⁸ He went on to say that if a consequence is natural, it is in fact "otiose to speak of it as being probable."⁴⁹ In order for foresight to establish intent:

"the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent".⁵⁰

⁴⁷ [1985] 1 All ER 1025.

⁴⁸ *R v Moloney* [1985] 1 All ER 1025, 1039.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at 1036.

2.48 Foresight must be of such a level as to amount to a “moral certainty”.⁵¹ Thus, according to the House of Lords in *R v Moloney*, the probability that death or very serious injury would be a natural consequence of the defendant’s act must be a very high probability before an inference of intention may be drawn in relation to the accused’s foresight.

2.49 In *R v Hancock and another*⁵² two striking miners pushed a concrete block off a bridge onto a taxi transporting a miner to work. The block killed the taxi driver. The miners argued that they only wanted to frighten the miner and did not mean to hurt anyone. They claimed further that they had intended to push the block onto a different lane of the motorway to the one in which the taxi was travelling. Although the trial judge directed the jury in accordance with *R v Moloney*, the House of Lords unanimously disapproved of the *Moloney* guidelines and affirmed the Court of Appeal’s decision to quash the murder conviction and substitute it for one of manslaughter. It was held that where it was necessary to direct the jury on intent by reference to foresight of consequences of the accused’s acts, reference should be made not only to the *natural consequences* of the accused’s acts, but also to the *probable consequences* of his acts, which together may amount to convincing evidence that the result was intended. Lord Scarman stated that the jury should be instructed that the greater the probability of a consequence the more likely it is that it is foreseen, and if it is foreseen the greater the probability that it is also intended.⁵³

2.50 In *R v Nedrick*,⁵⁴ the appellant, after threatening to “burn out” a woman against whom he bore a grudge, poured paraffin through the letter box of her home and set it alight. The woman’s child died in the blaze and the appellant was charged with and convicted of murder. The appellant claimed that the trial judge had misdirected the jury by instructing them to find the accused guilty of murder if they were satisfied that he knew that it was highly probable that his act would cause serious bodily injury to somebody inside the house. In granting the appeal and substituting a conviction of manslaughter, the Court of Criminal Appeal held that the trial judge was wrong to equate foresight with intent. Foresight of consequences was only evidence of intent to commit murder. Lord Lane CJ summarised the law on intention in murder in the following terms:

“... if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his

⁵¹ *R v Moloney* [1985] 1 All ER 1025, 1037.

⁵² [1986] 1 All ER 641.

⁵³ *Ibid* at 651.

⁵⁴ [1986] 3 All ER 1.

voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result.”⁵⁵

2.51 Thus, in the rare cases of murder involving oblique intention where the simple direction will not suffice, the jury should be instructed that they may not infer intention unless they are convinced that death or serious bodily harm was a virtually certain consequence of the defendant’s conduct (barring some unforeseen intervention) and that the defendant was aware that such was the case.

2.52 The use of the word “infer” attracted much academic criticism so much so that in *R v Woollin*⁵⁶ the House of Lords approved Lord Lane CJ’s formulation in *R v Nedrick* subject to one significant modification. According to Lord Steyn, the word “find” should be substituted for “infer”.⁵⁷ The accused in *R v Woollin* threw his son onto a hard surface in a fit of temper, killing him. However, it had not been the accused’s purpose to kill the child – he was simply venting his anger. The issue was whether the appellant had intended to cause serious harm to the child. The trial judge followed *Nedrick* and gave the “virtual certainty” direction on intention. However, the appellant successfully argued that the trial judge had diluted the test by instructing the jury to convict if they found that the appellant must have appreciated when he threw the child on the ground that there was a *substantial risk* that he would cause injury. The House of Lords recognised that the *Nedrick* formula was tried and tested, but held that the trial judge’s phrase “substantial risk” blurred the line between intention and recklessness, and therefore also between murder and manslaughter, with the result that the scope of the mental element in murder had been enlarged. The House of Lords therefore overturned the conviction for murder and substituted a conviction for manslaughter.⁵⁸

2.53 In summary, the English law of murder is that a jury is not entitled to find the necessary intention, unless they are satisfied that death or serious bodily harm was a virtually certain outcome of the defendant’s conduct and the defendant was aware of the risk posed.

⁵⁵ [1986] 3 All ER 1, 3-4.

⁵⁶ [1998] 4 All ER 103.

⁵⁷ *Ibid* at 113.

⁵⁸ See the English case of *R v Allen* [2005] EWCA Crim 1344 where the appellant’s murder conviction was upheld in similar circumstances. The appellant’s baby son died due to violent shaking. The *Woollin* direction was followed and affirmed.

D Issues relating to murder

(I) *Are there morally culpable killings currently outside the definition of murder, which ought to be punished as murder?*

2.54 The meaning of “intention” in Ireland is far from clear. As in England, it may well be that “intention” is restricted to purposeful killings and those committed with foresight of a virtual certainty of death. Alternatively, it may bear a wider meaning, covering other lesser categories of foresight such as “probability”⁵⁹ or “likelihood” of death resulting.⁶⁰ In Ireland, section 4(2) of the *Criminal Justice Act 1964* provides that an accused is presumed to have intended the natural and probable consequences of his/ her acts. An accused may, however, successfully rebut this presumption *eg* by raising a plausible defence of accident. Regarding the presumption of intention, Irish courts have not attempted to quantify the level of probability required - they have not demanded that death be a “moral” or a “virtual certainty” of the accused’s act. Unlike their English counterparts, they have not stipulated a specific level of foresight on the part of the accused as to the inherent risk of death or serious injury.

2.55 In Ireland the accused is simply presumed to have intended the natural and probable consequences of his/her conduct. For example, the jury must simply consider whether death or serious injury was the natural and probable result – the likely outcome – of the accused’s act, *eg* of shooting at a closed door, behind which a person is standing. The jury must first decide whether the accused would have foreseen death or serious injury as a natural and probable consequence of the accused’s unlawful and voluntary act. The test is subjective and takes into account the accused’s “mentality, his state of intoxication, his age and all the other personal circumstances and idiosyncrasies which shape his approach to the decision.”⁶¹ Once the jury

⁵⁹ Indeed, the House of Lords affirmed the existence of this head of murder in English law as recently as *Hyam v DPP* [1974] 2 All ER 41, before it was abandoned in *R v Moloney* [1985] 1 All ER 1025. A foresight of probability test is also applied in Australia.

⁶⁰ See McAuley “Modelling Intentional Action” (1987) *The Irish Jurist* 179, at 190 where the author suggests that it might be better to abandon the concept of intention as incorporating results foreseen by the actor as a virtually certain consequence of his actions and return to some version of the “malice aforethought” which comfortably included foresight of a virtual certainty. McAuley states that the association malice aforethought had with moral turpitude “was a very effective way of signalling why a defendant who foresees that death (or serious injury) is a virtually certain consequence of his actions has always been – and should continue to be – regarded as a murderer: for even if we accept, as we must, that he does not intend to kill his victim, his act is *morally* indistinguishable from that of a defendant who does.”

⁶¹ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at paragraph 7.94.

decides that death or serious injury was the natural and probable consequence of the accused's conduct, they must then consider whether the accused has adduced any evidence capable of rebutting the presumption. If the jury finds that the accused has indeed rebutted the presumption, *eg* if they think it was possible that the firing of the gun at the closed door was accidental, rather than deliberate, then a verdict of acquittal on the charge of murder should be entered.

2.56 Charleton, McDermott and Bolger state:

“The terrorist who places a bomb in a plane carrying military equipment may actively hope that the pilot and crew will escape. If they do not, the natural and probable consequence of the explosion is the death of the crew and passengers. The more likely an event is, the stronger becomes the conclusion that the accused intended it. Yet, even in the most glaringly obvious circumstances the accused may escape liability for murder, if not manslaughter. This is because the test is purely subjective. However hard it is for the ordinary person to do something and intend something else, or to divide their mind between intending one action, and knowing that another consequence will, in all probability occur, an accused is, in our law, entitled to be judged by the state of his or her own mind.”⁶²

2.57 In its *Consultation Paper on Homicide: The Mental Element in Murder*⁶³ the Commission explored whether there were morally culpable killings which fall outside the current definition of murder, but which ought to be punished as murder. If the mental element in murder is confined to intention, many killings that the Commission believes ought to be properly punishable as murder will be excluded.⁶⁴ In 2001, the Commission expressed the view that it is unsatisfactory that a murder conviction would not arise under a *Woollin*-type definition of intention where a terrorist planted a bomb in a public building, intending to cause criminal damage though not to kill, but aware that it is highly probable that death will result.⁶⁵ Although the terrorist may not have intended to kill, he nonetheless was willing to act with reckless disregard for human life in consciously discounting a high probability that death would be a consequence of his actions. McAuley and McCutcheon state that:

⁶² Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at paragraph 7.96.

⁶³ (LRC CP 17-2001).

⁶⁴ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.006.

⁶⁵ *Ibid.*

“the presence or absence of intention in the English sense should not be allowed to trump the underlying moral issue of whether the defendant deserves to be branded as a murderer...”⁶⁶

2.58 In its *Consultation Paper on Homicide: The Mental Element in Murder* the Commission was of the opinion that some reckless killings are as heinous as intentional ones and deserve to be treated as murder rather than manslaughter.⁶⁷ However, under the English test where the mental element runs no further than foresight of a virtual certainty, highly culpable killers such as those who set fire to occupied buildings, or who shoot firearms into occupied houses,⁶⁸ or moving vehicles,⁶⁹ or who drive heavy trucks into public houses from which they were thrown out,⁷⁰ might well (if the judge’s directions on intention were followed) be acquitted of murder unless the jury was satisfied that the defendants in question failed to rebut the section 4(2) presumption that they intended the natural and probable consequences of their conduct.

2.59 In the *Consultation Paper on Homicide: The Mental Element in Murder*⁷¹ the Commission provisionally recommended that the fault element for murder be broadened to embrace reckless killing manifesting an extreme indifference to human life. The Commission will revisit this reform option in Chapter 3.

(2) *Should intention to cause serious injury continue to form the mens rea for murder?*

2.60 Under section 4 of the *Criminal Justice Act 1964*, an intention to cause serious injury is enough to give rise to a murder conviction, even where the accused does not actually intend to kill. The term “serious injury” is not defined by the 1964 Act and the applicable test is objective in nature. The related term “grievous bodily harm” has been interpreted by the English courts as meaning “really serious bodily harm”. However, English trial judges need not always use the prefix “really” before “serious bodily harm” when instructing the jury.⁷²

⁶⁶ McAuley and McCutcheon, *Criminal Liability* (Round Hall Press 2000), 308.

⁶⁷ (LRC CP 17-2001) at paragraph 4.008.

⁶⁸ *People v Jernatowski* [1924] (New York) 238 NY 188.

⁶⁹ *Hill v Commonwealth* [1931] (Kentucky) 239 Ky 646.

⁷⁰ *The Queen v Crabbe* [1985] 156 CLR 464.

⁷¹ (LRC CP 17-2001) at paragraph 4.075.

⁷² In the *R v Janjua and Choudury* [1999] 1 Cr App Rep 91 it was held not to be necessary to use the word ‘really’ before ‘serious injury’ where the act was stabbing with a five and half-inch blade.

2.61 The fact that an intention to cause serious injury can ground a murder conviction has been much criticised. In *Hyam v DPP*⁷³ a minority of the House of Lords,⁷⁴ wanted to see the rule limited to an intention to cause grievous bodily harm where the accused realised that his act was likely to endanger life. The majority of the House however,⁷⁵ held that the *mens rea* for murder would be established if it were proven that the accused knew it was probable that his acts would result in grievous bodily harm, even though he did not intend to bring about that result. In *R v Cunningham*,⁷⁶ the House of Lords confirmed this rule. However, in *R v Powell*⁷⁷ Lord Steyn was highly critical of the remnants of implied malice, stating:

“The fault element does not correspond to the conduct leading to the charge, *ie* the causing of death. A person is liable to conviction for a more serious crime than he foresaw or contemplated ... The present definition of the mental element of murder results in defendants being classified as murderers who are not in truth murderers.”⁷⁸

Andrew Ashworth, Glanville Williams and Lord Goff have all argued that the rule violates the correspondence principle.⁷⁹

2.62 Several law reform bodies, including the Victorian Law Reform Commission,⁸⁰ the Law Commission of England and Wales,⁸¹ and the Law Reform Commission of Canada⁸² have recommended that intention to cause serious injury should be abolished as a form of *mens rea* for murder.

⁷³ [1974] 2 All ER 41.

⁷⁴ Lords Diplock and Kilbrandon.

⁷⁵ Lord Hailsham of St. Marleybone, Viscount Dilhorne and Lord Cross of Chelsea.

⁷⁶ [1981] 2 All ER 863.

⁷⁷ [1997] 4 All ER 545.

⁷⁸ *Ibid* at 551-552

⁷⁹ See Ashworth *Principles of Criminal Law* (3rd ed Clarendon Press 1995) 260-265), Glanville Williams (*Textbook of Criminal Law* (2nd ed Stevens & Sons 1983) 250-251) and Lord Goff “The Mental Element in the Crime of Murder” (1988) 104 LQR 30, 48.

⁸⁰ *Homicide* (Report No 40 1990-1991) at paragraphs 122-131.

⁸¹ *Imputed Criminal Intent* (Director of Public Prosecutions v Smith) (1967) at paragraphs 15-17.

⁸² *Recodifying Criminal Law* (Report 31 1987) at 57-58.

2.63 A number of reform bodies have recommended that the existing rule be modified to include a subjective awareness of the risk of death.⁸³ The House of Lords Select Committee on Murder and Life Imprisonment recommended that the rule be changed so that a person would be guilty of murder if he caused the death of another “(b) intending to cause serious personal harm and being aware that he may cause death.”⁸⁴ The Criminal Law Revision Committee⁸⁵ recommended that it should be murder “if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death.” The New Zealand Consultative Committee⁸⁶ recommended that it should be murder when the accused inflicts “any injury knowing it to be likely to cause death”.

2.64 Recently the Law Commission of England and Wales revisited the area of homicide⁸⁷ and recommended a fundamental restructuring of the law of homicide. The Law Commission envisioned a ladder-like configuration of homicide with first degree murder at the top of the ladder attracting a mandatory life penalty. First degree murder would arise where a person (a) killed intentionally or (b) killed where there was an intention to do serious injury, coupled with an awareness of a serious risk of causing death. Second degree murder would have a discretionary life maximum penalty and would arise where (a) the offender killed with the intention of causing serious injury, or (b) where he or she intended to cause some injury or a risk of injury, and was aware of a serious risk of causing death or (c) where there is a partial defence to what would otherwise be first degree murder.⁸⁸

2.65 The following⁸⁹ are some arguments in favour of abolishing the “serious injury” rule.⁸⁹

- Under the ordinary doctrine of *mens rea*, the mental element should envisage death. Where an accused merely intends to cause serious injury, the fault element does not correspond with the outcome.

⁸³ Under section 300(2) of the *Indian Penal Code* a murder conviction is possible if the offender acted with the intention of causing such bodily injury as he or she “knows to be likely to cause death.”

⁸⁴ The Nathan Committee (*Report of the Select Committee on Murder and Life Imprisonment* (HL Paper 78-1 1989) at paragraph 195.

⁸⁵ *Offences against the Person* (Cmnd 7844 14th Report 1980) at 14.

⁸⁶ *Crimes Bill, 1989: Report of the Crimes Consultative Committee* (April 1991).

⁸⁷ Law Commission for England and Wales *Murder, Manslaughter and Infanticide* (2006) Law Com No 304.

⁸⁸ *Ibid* at paragraph 1.67.

⁸⁹ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.083.

- The offence of murder should mark out the most heinous killings. There is an important moral difference between an accused who intends to cause death, and one who only intends to cause injury. By placing the intentional killer and the killer who neither intends nor foresees death in the same homicide category, the law fails to differentiate between their differing levels of moral culpability.
- The crime of manslaughter is adequate to deal with the intentional causing of serious injury resulting in death as it has a maximum life sentence.
- The concept of “serious injury” may be too uncertain. One jury may find that an intention to break the deceased’s nose was sufficiently serious for the purposes of murder, while a different jury may think that such an injury would not generally be considered life-threatening.
- The rule gives the prosecution too much discretion in deciding whether to charge murder or manslaughter. A person’s conviction for murder might depend to some degree on the fact that the prosecutor decided to opt for murder rather than the lesser charge.
- Juries may be reluctant to bring convictions under this head of murder in practice. The Victorian Law Commission referred to submissions it received that juries were often reluctant to convict under the rule.⁹⁰

2.66 Arguments in favour of retaining an intent to cause serious injury as part of the mental element in murder are as follows:⁹¹

- The human body is fragile. It is impossible to predict whether death will result from serious injury. Therefore, people who intentionally inflict serious injury, thereby endangering the victim’s life, deserve to be convicted of murder if death results. Those who willingly inflict serious injury on other human beings possess a degree of moral culpability comparable to an intentional killer. In deliberately inflicting serious injury on another person defendants cross a moral threshold and demonstrate sufficient disregard for life to justify a conviction of murder if death results.⁹²

⁹⁰ Law Reform Commission of Victoria *Homicide* (Report No 40 1990-1991) at paragraph 131.

⁹¹ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.084.

⁹² In *Visra Singh v State of Punjab* AIR [1958] SC 465 the Indian Court stated at 467: “No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If

- A defendant who intentionally inflicts serious injury must be taken to know that he is endangering life in view of the inherent vulnerability of the human body. That death may occur is a basic element of the body of knowledge of ordinary human experience and an accused cannot meaningfully claim not to know or believe that his/her conduct could have such a fatal result. Defendants who knowingly engage in serious violence must take the consequences of it, even if they did not advert to these consequences at the time of the assault.
- If the rule were abolished it would become more difficult for a prosecution to establish a conviction for murder. An accused who in fact intended to kill could simply claim that he or she only intended to cause serious injury.

2.67 The Commission provisionally recommended that an intention to cause serious injury should be retained as part of the fault element for murder.⁹³ This issue will be discussed further in Chapter 3.

(3) *Should “serious injury” be defined?*

2.68 In its 1994 Report on *Non-Fatal Offences against the Person*, the Commission recommended defining “serious harm” as:

“injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ”.⁹⁴

2.69 The *Non-Fatal Offences against the Person Act 1997* which substantially implemented in the recommendations contained in the Commission’s 1994 Report, includes a definition of “serious harm”. Section 1(1), which is virtually identical to the Commission’s proposed definition, states:

“ ‘serious harm’ means injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.”

they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.”

⁹³ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.101.

⁹⁴ (LRC 45-1994) at paragraph 9.66.

2.70 In *The People (DPP) v Kirwan*⁹⁵ the court considered the meaning of “serious harm” in section 1 of the 1997 Act. In reviewing the origins of the Act the court noted that it involved the implementation in large part of the Commission’s *Report on Non-Fatal Offences against the Person*⁹⁶ in which the Commission endeavoured to simplify and clarify the law on assault by replacing sections 18, 20 and 47 of the *Offences against the Person Act 1861* with clearer and more straightforward definitions. The court observed that section 1 of the 1997 Act defined “harm” as “harm to body or mind and includes pain and unconsciousness”⁹⁷ and defined serious injury as set out in the previous paragraph.

2.71 The court remarked that the 1997 Act:

“does not contain either the words “permanent”² or “protracted”, from which one may infer that the Oireachtas was quite consciously abstracting or removing requirements of permanence or even long term consequences from the definition of ‘serious harm’, requirements which, had they been enacted, might have been seen as requiring that proof of such matters was necessary to constitute the offence of ‘assault causing serious harm’.”

2.72 In dismissing the defendant’s appeal the Court of Criminal Appeal held that there was sufficient evidence from which the jury could have formed the view that the injured person suffered a substantial impairment to the function of his left eye amounting to serious harm as defined by section 1 of the *Non-Fatal Offences Against the Person Act, 1997*.

2.73 The first benefit of defining “serious injury” is that the constructive nature of the liability would be minimised. Certain injuries such as a broken arm, which although serious, do not normally prove fatal, would be excluded. Secondly, if the term were defined, juries would be given some explanation as to the term’s proper meaning and scope and the risk of inconsistent jury verdicts in similar fact cases would therefore be lessened.⁹⁸

⁹⁵ [2005] IECCA 136.

⁹⁶ (LRC 45-1994).

⁹⁷ See Law Reform Commission *Report on Non-Fatal Offences against the Person* (LRC 45-1994) paragraph 9.65 where the Commission stated: “We are not disposed to define “harm” as the law operates satisfactorily without a definition at the moment. However, the word “bodily” is superfluous and its use is not conducive to a definition which includes mental “hurt”. If it were felt necessary, the formula in the English Draft Code could be used. There, “personal harm” is defined as “harm to body or mind including pain and unconsciousness.” The use of the word “actual” is also superfluous.”

⁹⁸ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 5.19.

2.74 On the other hand, defining the term “serious injury” might prove disadvantageous⁹⁹ if it resulted in long, complicated definitions, which jurors might find confusing. Glanville Williams proposed a definition of “serious injury” which was criticised due to its complexity. He stated that an injury should be considered serious if it:

- causes serious distress, and also
- involves loss of a bodily member or organ, or permanent bodily injury or permanent functional impairment, or serious impairment of mental health, or prolonged unconsciousness; and an effect is permanent whether or not it is remediable by surgery.¹⁰⁰

2.75 A second disadvantage associated with defining serious injury is that the seriousness of an injury frequently depends on the particular circumstances, including the availability or lack thereof of swift medical assistance. Determining whether an injury is serious is a matter of judgment and the jury should be able to bring their experience and common sense to bear in deciding whether an injury is a serious one or a minor one. Moreover, finding a suitable definition of serious injury is problematic.¹⁰¹ It is not easy to draft a definition to cover every eventuality.

2.76 The definition of serious injury provisionally favoured by the Commission in 2001 was that of the Codes of Western Australia and Queensland, which define grievous bodily injury as “any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause, or be likely to cause permanent injury to health.”¹⁰²

2.77 In the following chapter the Commission will revisit its provisional recommendations as well as various other options for reforming the mental element in murder identified in the *Consultation Paper*. The Commission will also discuss submissions received from interested parties before setting out its final recommendations.

⁹⁹ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 5.20.

¹⁰⁰ Glanville Williams “Force, Injury and Serious Injury” (1990) Vol 140 New LJ 1227, 1229.

¹⁰¹ See The Criminal Law Revision Committee *Offences against the Person* (Cmnd 7844 14th Report 1980) at paragraph 154 where the Committee explained their reasons for leaving serious injury undefined.

¹⁰² See section (1) of the Western Australian *Criminal Code*.

CHAPTER 3 MURDER: PROPOSALS FOR REFORM

A Introduction

3.01 The proposals as set out in the Commission’s *Consultation Paper on Homicide: The Mental Element in Murder*¹ and the submissions received since its publication form the basis for the discussion of reform in this chapter. Most of the provisional recommendations contained in the Consultation Paper remain, but the Commission has made a few changes and has also explored some additional reform options, such as the possibility of introducing a homicide degree structure. However, the underlying basis for reform of the mental element in murder is the Commission’s belief that there may be morally culpable killings currently outside the definition of murder which ought to be punished as murder.

B Incorporating recklessness into the mental element in murder

(a) *Consultation Paper Recommendation*

3.02 The Consultation Paper recommended that the fault element for murder be broadened to embrace reckless killings manifesting an extreme indifference to human life. This recommendation was based on §210.2(b) of the *American Model Penal Code*.²

(b) *Discussion*

3.03 The Consultation Paper was provisionally in favour of introducing foresight of a risk of death into the mental element in murder and recommended the adoption of a provision like §210.2(b) of the *American Model Penal Code (MPC)*. The Commission is still of the view that the current definition of murder in Ireland should be broadened to include “extreme indifference” killings. §202.2(b) of the MPC provides that criminal homicide constitutes murder when “it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.” §202.2(c) provides that a person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and

¹ (LRC CP 17-2001).

² See American Law Institute *Model Penal Code and Commentaries* (2nd ed American Law Institute 1980) Part II.

unjustifiable risk that the material element exists or will result from his conduct. The risk must be of “such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves culpability of a high degree.” This definition was approved by Henchy J in *The People v Murray*³ in the context of recklessness as to circumstances, rather than consequences. Recklessness in this context is clearly subjective - the accused must advert to the risk.

3.04 In its commentary on the Code, the American Law Institute explained that this provision “reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly.”⁴ Ordinary recklessness is sufficient for manslaughter under the *MPC*. However, in a prosecution for murder the jury must be instructed that the brand of recklessness, which can “fairly be assimilated to purpose or knowledge” should be treated as murder and less extreme recklessness should be punished as manslaughter.⁵

3.05 Adopting a provision along the lines of the *MPC* would bring within the scope of murder killers such as arsonists or terrorists wishing to damage property, who did not intentionally cause death but who were indifferent as to whether or not their conduct would result in a fatality. By focusing on “a substantial and unjustifiable risk” a broader enquiry into the moral culpability of the killer is permissible, whereby an assessment of the degree of risk, the social utility of the killer’s conduct, as well as the gravity of the potential harm can be carried out. Moreover, the *MPC* phrase “substantial and unjustifiable risk” does not fix any minimum mathematical degree of foresight. Levels of foresight which do not amount to virtual certainty of death such as probability might therefore suffice where there is evidence of extreme indifference.

3.06 In its 2001 Consultation Paper the Commission identified the following advantages of the *Model Penal Code* approach:

- Certain heinous killings where the defendant had no purpose to kill would be covered, *eg* a terrorist who plants a bomb in a public building or an arsonist who sets fire to an occupied house. Such killers would probably fall outside the present test of intention in England as determined by the House of Lords in *R v Woollin*⁶ if

³ [1977] IR 360, 403.

⁴ American Law Institute *Model Penal Code and Commentaries* (2nd ed American Law Institute 1980) Part II at 21.

⁵ *Ibid* at 21-22.

⁶ [1998] 4 All ER 103.

they did not foresee death as a virtually certain consequence of their conduct;

- By requiring the risk in question to be “substantial and unjustifiable” it allows for an assessment of the culpability of the risk in question, and avoids confining it to any fixed mathematical percentage.⁷

3.07 The Consultation Paper identified the following disadvantage of the *MPC* approach:

- Its inherently flexible formulation might lead to uncertainty in practice, giving rise to the risk of inconsistent jury verdicts, or verdicts based on irrelevant or discriminatory factors, such as the defendant’s background, allegiance etc.⁸

3.08 Since the fault element for many other serious offences is intent or recklessness, the Commission believes that that there is no reason why both these fault elements should not apply to murder also.⁹ Recklessness suffices to ground murder convictions in most other legal systems.

- In the common law jurisdictions of Australia¹⁰ foresight of probability of death is sufficient for murder.¹¹
- In Canada foresight of a likelihood of death is sufficient for murder.¹²
- In Italian law, under the concept of *dolus eventualis*, proof of foresight of a possibility of death may suffice, so long as the defendant accepted or reconciled himself to that risk.¹³

⁷ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.045.

⁸ *Ibid* at paragraph 4.046.

⁹ *Ibid* at paragraph 4.009.

¹⁰ Victoria and South Australia.

¹¹ See *The Queen v Crabbe* [1985] 156 CLR 464 which established that there must be foresight of a probability, and not a mere possibility, that death or grievous bodily harm will result. See also Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraphs 3.35-3.38 for a discussion of recklessness as a mental element in murder in Australian common law.

¹² See the Canadian *Criminal Code* 1985 section 229(a). See also Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraphs 3.24-3.26 for an analysis of the meaning of intention in Canadian law.

- In South Africa, under the concept of *dolus eventualis*, foresight of a possibility of death will be sufficient for murder.¹⁴
- In the United States, under the *Model Penal Code*, reckless killings manifesting an extreme indifference to human life are punishable as murder.¹⁵
- In Scotland a murder conviction may be established by an intention to kill or by evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.¹⁶

3.09 Unlike the Italian and South African homicide structures which embrace *dolus eventualis*, a murder conviction in Australia can only arise where there is foresight of a probability, as opposed to a mere possibility, of death. According to the High Court of Australia in *La Fontaine v R*, “there is a great difference in moral and social content”¹⁷ between an accused who foresees death as a probable consequence of his conduct and an accused who merely foresees death as a possibility. A death in the latter situation might give rise to a manslaughter conviction, but “it would be draconian to call it murder.”¹⁸ The Commission believes that the distinction between murder and manslaughter would be difficult to maintain if knowledge of a possibility of death sufficed to ground a murder conviction.¹⁹

¹³ See Article 43 of the *Italian Penal Code* (Codice Penale). See also Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraphs 3.84-3.85 for a discussion of “dolo eventuale” in Italian law.

¹⁴ See *Naidoo v The State* [2002] The Supreme Court of Appeal of South Africa, Case No 231, paragraph 28: “The crime of murder cannot be said to have been committed unless the act or omission which caused death was intentionally committed or omitted and death was the desired result, or, if not the desired result, at least actually foreseen as a possible result the risk of occurrence of which the accused recklessly undertook and acquiesced in. In short, *dolus* in one or other of its manifestations (*directus, eventualis, indeterminatus, etc*) is the kind of *mens rea* which must have existed.” See also Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraphs 3.78-3.83 for a discussion of *dolus eventualis* in South African law.

¹⁵ See American Law Institute *Model Penal Code* (American Law Institute 1985) §2.02(2)(c) at 21. See also Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraphs 3.69-3.77 for a discussion of reckless indifference to human life under the *MPC*.

¹⁶ *Cawthorne v H.M. Advocate* [1968] JC 32, 35.

¹⁷ [1976] 11 ALR 507 (Lexis).

¹⁸ *Boughey v The Queen* [1986] 161 CLR 10, 14-15.

¹⁹ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.014.

3.10 In its 2001 *Consultation Paper on Homicide: The Mental Element in Murder* the Commission also considered expanding the mental element of murder by including foresight of a probability of death alongside intention.

3.11 The advantages of an approach based on foresight of probability of death are that it would offer a clear and definite test of liability and would capture killings where the defendant had no purpose to kill but where such killings are nonetheless heinous, for example the arsonist who sets fire to an occupied building.²⁰

3.12 A disadvantage of a foresight of probability approach is that focusing on foresight of the probability of death resulting would exclude culpable risk-taking which falls short of a probability of death resulting. Second, defendants do not compute a precise mathematical percentage for any given risk. In many cases, precise or even approximate calculation will be difficult or impossible. Third, the inter-relationship between the justification for taking a particular risk and the degree of risk required to ground a murder conviction is ignored by such an approach. Arguably, in the case of completely anti-social acts, *eg* shooting into a car or an occupied house, even a relatively low degree of risk may justify a murder conviction.²¹

3.13 The Commission is still of the opinion that the *MPC* affords a superior means of incorporating foresight into the mental element of murder than a foresight of probability approach.

3.14 In its Consultation Paper the Commission also discussed the possibility of incorporating recklessness into the mental element of murder by adopting a provision similar to “wicked recklessness” in Scotland where a murder conviction can arise if there is “evidence of a deliberate intention to kill or by satisfactory evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.”²² A defendant’s conduct must pass a high threshold of culpability before it will be deemed “wicked”. It must involve such gross recklessness that it shows “a state of mind which is as wicked and depraved as the state of mind of a deliberate killer.”²³ The test is objective in nature.²⁴

²⁰ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.027.

²¹ *Ibid* at paragraph 4.028.

²² *Cawthorne v H.M. Advocate* [1968] JC 32, 35.

²³ Gordon *Criminal Law* (2nd ed W Green & Son Ltd 1978) at paragraphs 23-17.

²⁴ Scots law does not have any doctrine of implied malice however. An intention to cause serious injury will not necessarily give rise to a murder conviction, but it is a factor from which an inference of wicked recklessness may be drawn. Therefore, wicked recklessness in Scots law may serve a similar function to implied malice in Irish and English law.

3.15 The Commission provisionally favoured the *MPC* formulation of extreme indifference murder over the Scottish wicked recklessness test. The Commission was concerned that the objective nature of the latter test could be overly harsh in practice and also opposed use of the word “wicked” which has emotive undertones.²⁵

3.16 The Commission is still of the view that the best way of incorporating foresight into the mental element of murder is to adopt a provision like the *MPC* formula. The major reason why the Commission favoured and continues to favour the *MPC* model is that the test for liability is subjective. Liability under the Scottish model is determined objectively, and the Commission is of the view that there would not be support for any murder test that had an objective test for liability.

(c) Submissions on “extreme indifference murder”

3.17 At the Seminar on murder there was a divide as between practitioners and academics regarding the Commission’s provisional recommendation that the mental element in murder be expanded to encapsulate *MPC* “extreme indifference” killings.

(d) Submissions in favour of the Commission’s proposal

3.18 A number of submissions were received expressing support for the Commission’s recommendation to extend the definition of murder. The House of Lords’ jurisprudence on intention was deemed to be unhelpful in determining the meaning of intention in Ireland because the reasoning was “twisted and knotted”. As the House of Lords have interpreted intention as including foresight of a virtual certainty of death, it was submitted that it is too easy for a defendant to avoid liability by simply saying that he did not mean to kill the victim. An accused could, for example, claim that he only meant to scare the victim or make a political statement and did not foresee death as a moral certainty. In the case of a terrorist who kills in a situation manifesting indifference to the value of human life, the label of murder is the appropriate one.

3.19 It was argued that English law on intention in murder has struggled over the last 60 years (from *DPP v Smith*²⁶ to *R v Woollin*²⁷) with the complexity of trying to achieve two things: 1) to maintain the concept of intentional murder, and (2) to include within that concept “wicked recklessness” killings. It was submitted that it is necessary to adopt a formula such as the *MPC* formula or the Scottish “wicked recklessness” test

²⁵ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.062.

²⁶ [1960] 3 All ER 161.

²⁷ [1998] 4 All ER 103.

if the Commission wishes to include the reckless killer within murder. Alternatively, reckless killers should be guilty of manslaughter, rather than pretending that they fall within the concept of intentional killing.

3.20 Several consultees agreed that the labelling of offences is important, especially for victims. Regarding the example of the defendant who plants a bomb in a crowded street and subsequently sends a warning which for some reason is misunderstood, or not acted upon, submissions were received stating that it is wrong that such a person might be only guilty of manslaughter and not murder. The person on the street would, it was claimed, be unpleasantly surprised if a terrorist in such a situation was acquitted of murder. Moreover, if such a case was heard before a jury, the jury would most likely be reluctant to accept that the perpetrator of such an incident did not in fact have an intent to cause, at the least, serious injury. Although such a heinous killing deserves to be categorised as murder, it might not come within the current definition. It was therefore argued that the Commission's proposal would be a welcome development in affording juries with a means of placing into the correct homicide category those heinous categories of killers who might escape murder liability at present.

3.21 It was submitted that a restructured and simplified murder provision based on section 4(2) of the *Criminal Justice Act 1964* might be as follows: "Where a person kills another unlawfully, it shall be murder if and only if: (1) The accused person intended to kill or cause serious bodily harm to some person whether the person actually killed or not or where reckless disregard to the value of human life is evident from his conduct; (2) The accused person shall be presumed to have intended the natural and probable consequences of his actions. (3) The presumption in sub-section (2) may be rebutted." It was further suggested that the probable question to the jury in such cases is "would the Accused have acted as he did even if he had known that it would cause death? If the answer is yes, the accused placed no value on human life and should be convicted of murder."

3.22 A number of submissions argued that a second category of murder could be introduced to encompass cases involving extreme indifference, where moral culpability could be reflected at the sentencing stage, the mandatory sentence being retained for the first category of murder only. If it were thought that the terms first degree and second degree are not sufficiently descriptive, it was suggested that an alternative degree structure for homicide could include the following labels:

- Murder (which would continue to attract the mandatory life sentence);
- Murder in Mitigating Circumstances (which would attract a discretionary life sentence);

- Manslaughter or Negligent Killing.

(e) *Submissions opposing the Commission's proposal*

3.23 Most practitioners disagreed with the Commission's provisional recommendation to include "extreme indifference" killings in the category of murder. They took the view that the present system was working fine and that expansion of the mental element in murder was unnecessary because section 4 of the *Criminal Justice Act of 1964* was wide enough already. It was argued that juries have no difficulty in bringing the "extreme indifference" type case within section 4 by virtue of the concept of implied intention. In addition, it was contended that the English test of foresight of a virtual certainty goes beyond strictly intentional killing. According to opponents of the Commission's provisional recommendation, it would be dangerous to extend the definition of murder beyond the English test.

3.24 It was argued that the common sense of juries can be relied on to deal with situations where defendants put forward fanciful arguments that they did not in fact intend the obvious consequences of their acts. Regarding the example of the accused who fires a gun into a moving car and asserts that he did not intend to kill or cause serious injury, it was submitted that modern juries are intelligent and sophisticated and will be sceptical of the claim that there was no foresight of a virtual certainty of the consequences. Reference was also made to the case of *State v Dow*²⁸ where a conviction for extreme indifference murder was affirmed in circumstances where the defendant struck the deceased with a log, strangled her and broke bones in her face, neck and shoulders before poking pine needles and leaves down her throat with a stick, causing asphyxiation.²⁹ It was submitted that any Irish jury would return a verdict of murder under section 4 as it stands. It would not be necessary to extend the definition to incorporate an "extreme indifference" test to attain a conviction in a case such as *State v Dow*.³⁰

3.25 The strongest argument against the Commission's proposal to include "extreme indifference" killings in the category of murder is that it adds a further layer of complication to a situation that is already quite complicated. It was submitted that juries might not be able to understand the Commission's proposed definition. There would be a possible tension between the two concepts of intention and non-intention to kill within the Commission's proposed definition of murder. The jury would, under the Commission's proposal, have to be told in many cases that there are different bases on which they have to consider whether the case is one of murder or

²⁸ [1985] (New Hampshire) 489 A2d 650.

²⁹ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.055 where the case is discussed.

³⁰ [1985] (New Hampshire) 489 A2d 650.

manslaughter. It was suggested that an overlap between one mental element and another (eg between murder under section 4(2), “extreme indifference murder” and reckless manslaughter) would only increase confusion.

3.26 The complexity of the “extreme indifference” test lies in the fact that it does not give the jury a “yes or no” question and instead poses a multiplicity of alternatives for the jury to determine. It was argued that the process of determining whether an accused had the necessary mental element for murder should be straightforward and capable of being understood by the ordinary person on the street.

3.27 Concern was voiced that expansion of the definition of murder would create new categories which go beyond the public perception of murder *simpliciter*. It was submitted that juries see murder as intentional killing and will bring in a murder verdict when they believe that the accused is culpable. Where juries feel the culpability is absent however, they will bring in verdicts of manslaughter, even if the act is strictly speaking murder. The public perception is that a defendant who unintentionally causes a bad outcome such as death is morally less culpable than a defendant who set out to cause death deliberately. If the ordinary person on the street thinks that murder is a very simple concept, namely deliberate killing, then the more glosses we add to that concept the further way we get from what the ordinary person understands.

3.28 The addition of a philosophical element to the definition of murder would lead to an increase in the difficulties faced by judges and juries. Although it is important to have logical definitions for lawyers, it must not be forgotten that judges have to explain such definitions to juries. According to consultees, it is very difficult for judges to give a clear, comprehensible charge to a jury regarding section 4(2). Juries often come back to the trial judge looking for guidance on the meaning of “intention”. If the concept of “extreme indifference” were introduced, juries would have difficulty comprehending all the different mental elements.

3.29 In relation to the issue of foresight, section 4(2) of the *Criminal Justice Act 1964* reflects the proposition that the more likely it was that a particular result would occur as a result of a person’s actions, the more likely that it was foreseen and therefore intended. The bottom line is that without foresight there cannot be intention. It was, however, submitted that if the definition of murder were changed to incorporate “extreme indifference killings” or if a new category of murder were created to cover such killings, there might be a new problem as to where the dividing line lay between “extreme indifference” recklessness and lesser forms of recklessness. The “extreme indifference” test was also criticised for involving a moral judgment on the part of the jury. Arguably it is not the place of law reformers or judges to make decisions about public morality.

3.30 Some consultees who believed that no change should be made to section 4 of the *Criminal Justice Act 1964* apart from phrasing the provision in positive terms, nonetheless suggested that if there were to be a proposal to make some new provision to cover “extreme indifference” killings, a new offence of “reckless murder” would be conceivable to deal with any cases not amounting to murder under section 4 where it is established that the accused took a substantial and unjustifiable risk involving a high degree of culpability.

3.31 To distinguish “reckless murder” from intentional murder it was suggested that the penalty could be fixed at a maximum of life imprisonment in the expectation that life would be imposed in the very serious cases, thus distinguishing it from manslaughter where life sentences are extremely rare. An issue that would arise is the question of alternative verdicts. For instance, while it would be logical to allow a verdict of reckless murder on a charge of murder, should a verdict of manslaughter also be available as alternatives to murder? Should both “reckless murder” and manslaughter be available as alternatives to murder?

3.32 As between reckless murder and manslaughter, while the maximum penalties would be the same the labelling would be different - *ie* a situation similar to that pertaining to the “rape under section 4” and “aggravated sexual assault” offences which both attract the same penalty, a maximum of life imprisonment. However, while this approach would follow the logic applied to the “rape under section 4” offence, it does not take account of a fundamental difference between the two situations. Section 4 behaviour is a distinctive form of aggravated sexual assault, readily distinguishable from rape and other forms of sexual assault and so it lends itself more easily to the public need for labelling. It was submitted that this would not be the case with “reckless murder” which may not be readily distinguishable from intentional murder and manslaughter in the public mind. It may be, therefore, that the creation of such a label, while it would be understandable to academics, would only create further confusion in the public mind.

(f) *The Commission’s response*

3.33 The Commission realises that there will always be criticism of any proposals to extend the definition of murder which strays too far from intentional killings. That said, there are very few practitioners who would disagree with the fact that implied malice is *real* murder. The Commission does not accept the contention that it is acceptable that in difficult cases juries ignore the trial judge’s direction on intention but still achieve the morally correct answer. The Commission believes that it is better to put the legal test to the jury in frank terms.

3.34 In the Commission's view, the point is to filter the category of murder to include the most heinous killings in that category. It is not a case of having a *kind* of murder. Rather, some extreme indifference killings are more heinous than some intentional killings, and therefore deserve to be called murder *proper*. Comparatively, the broad global view is that extreme indifference killings *are* murder.³¹

3.35 Regarding opposition to the Commission's provisional recommendation on the basis that introducing an "extreme indifference" test along the lines of the *MPC* formula would make the law more complicated, it can be answered that juries in Idaho and Indiana, where the extreme indifference test is used, understand the definition without apparent difficulty. The Commission believes that sceptics of the "extreme indifference" test confuse complexity with unfamiliarity. Perhaps the resistance towards the *MPC* test can be explained by the fact that it is not part of the furniture of this jurisdiction.

3.36 The Commission does not believe that Irish juries would have more difficulty understanding a *MPC*-type formula than juries in other jurisdictions where such a test applies. The *MPC* model was chosen because the Commission wanted to address the issue of "extreme indifference" and did not want to invent a test, but rather thought it prudent to adopt one that worked well in practice. The Commission is more concerned with the principle embodied by the *MPC* model rather than with the exact phraseology. Although some commentators might think that the *MPC* model is inelegantly worded, it was chosen because it is a tried and tested formula – it has the dust of jurisprudence on its boots.

3.37 On the possibility of introducing a new homicide structure based on degrees of culpability which was raised by numerous consultees, the Commission notes that the Law Commission of England and Wales recommended a fundamental restructuring of the law of homicide in 2006.³² The Law Commission envisioned a ladder-like configuration of homicide with first degree murder at the top of the ladder attracting a mandatory life penalty. First degree murder would arise where a person (a) killed intentionally or (b) killed where there was an intention to do serious injury, coupled with an awareness of a serious risk of causing death. Second degree murder would have a discretionary life maximum penalty and would arise

³¹ See McAuley "Modelling Intentional Action" (1987) *The Irish Jurist* 179, at 192 where the author observes that criminal lawyers who read the decisions of the House of Lords are in danger of unlearning that "*mens rea* in murder is a moral rather than a psychological concept. Or, as a civilian might put it, that pure intention is only one form of *dolus*."

³² Law Commission for England and Wales *Murder, Manslaughter and Infanticide* (2006) Law Com No 304.

where (a) the offender killed with the intention of causing serious injury, or (b) where he or she intended to cause some injury or a risk of injury, and was aware of a serious risk of causing death or (c) where there is a partial defence to what would otherwise be first degree murder.³³

3.38 The Commission is of the view that it would be too radical a move to restructure homicide along the lines of the proposals of the Law Commission for England and Wales. The Commission believes in taking the law and the system that we have and working with it, refining aspects of it where necessary. It would be unwise to jettison the current configuration of homicide for something entirely new and unknown such as a degree structure.

3.39 Nonetheless, the Commission wishes to ensure that the most heinous killings fall within the category of murder, whether they are committed intentionally or with reckless indifference to the value of human life. The Commission therefore remains of the view that the fault element for murder should be broadened to embrace reckless killing manifesting an extreme indifference to human life.

(g) Report Recommendation

3.40 *The Commission recommends that the fault element for murder be broadened to embrace reckless killing manifesting an extreme indifference to human life.*

C Retaining implied malice murder

(a) Consultation Paper Recommendation

The Commission provisionally recommended that an intention to cause serious injury should be retained as part of the fault element for murder.³⁴

(b) Discussion

3.41 No opposition was expressed on the Commission's provisional recommendation to retain an intention to cause serious injury as part of the fault element for murder, either in written submissions received by the Commission or at the Commission's Seminar on *Homicide: The Mental Element in Murder*.

3.42 In the 2001 Consultation Paper the Commission noted that in relation to an intention to cause serious injury there are four main options for

³³ Law Commission for England and Wales *Murder, Manslaughter and Infanticide* (2006) Law Com No 304 at paragraph 1.67.

³⁴ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.101.

reform. Firstly, the existing rule could be abolished in its entirety. Secondly, the rule could be retained but the meaning of the term “serious injury” could be clarified to exclude slight or trivial injuries or those which are not generally life-threatening such as broken noses or arms. Thirdly, the rule could be modified to require that, in addition to intending to cause serious injury, the offender was aware of the risk of death at the time of the killing. Arguably, those who inflict serious injury while aware of the risk of death are as morally culpable, or almost as culpable as intentional killers. The correspondence principle would be satisfied in that the accused must have foreseen that his or her conduct could lead to death.³⁵ The fourth option would be to replace the existing rule with the concept of reckless killings manifesting an extreme indifference to the value of human life, in line with the provision contained in the *American Model Penal Code*.³⁶ Under the *MPC* an intention to cause serious injury may be of relevance in determining whether an accused acted with extreme indifference to human life for murder or recklessly for manslaughter.³⁷

3.43 The Commission provisionally recommended that an intention to cause serious injury should be retained as part of the mental element of murder because people who deliberately inflict serious injury cannot disavow “back of the mind awareness” that the human body is inherently vulnerable and are therefore sufficiently morally culpable to deserve murder convictions. As the Commission noted:

“insisting on conscious advertence on the part of a defendant to the risk of death may exclude certain types of egregiously culpable misconduct by a defendant. A defendant who acts in a temper ‘without thinking’, or who fails to advert to the consequences out of sheer indifference to them, or who claims he was so preoccupied in what he was doing that he gave no thought to any particular result of his actions, would escape liability on this approach. It seems socially undesirable that defendants who act in an uninhibited bad temper or with sheer indifference as to whether their victim lives or dies should escape liability for murder on this ground of lack of actual realisation of the imminent likely result of their misconduct.”³⁸

³⁵ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.091.

³⁶ *Ibid* at paragraph 4.082.

³⁷ See American Law Institute *Model Penal Code and Commentaries* (2nd ed American Law Institute 1980) Part 1, § 213.2(1)(b) and § 213.3(1)(a).

³⁸ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.100.

3.44 The Commission still believes that those who intentionally inflict serious injury on others cannot deny the latent knowledge they possess about the fragility of the human body. These defendants display a moral culpability very close to the culpability of intentional killers. Therefore, they deserve to be guilty of murder if death results from the serious injuries they inflicted with intent. Accordingly, the Commission recommends that an intention to cause serious injury should be retained as part of the fault element for murder.

(c) Report Recommendation

3.45 *The Commission recommends that an intention to cause serious injury should be retained as part of the fault element for murder.*

D Implied malice: recklessness as to serious injury?

(a) Consultation Paper Recommendation

3.46 The Commission provisionally recommended that the fault element for murder should not be expanded to embrace recklessness as to serious injury.

(b) Discussion

3.47 As already indicated, the provisional view expressed by the Commission in the Consultation paper was that no explicit reference to recklessness as to serious injury should be incorporated into the *mens rea* for murder. The Commission reasoned that these killings could be dealt with under the more general head of reckless killings manifesting extreme indifference to human life.³⁹ No contrary view was expressed in either the written submissions received by the Commission or at the Commission's seminar on the mental element in murder.

3.48 The Commission still believes that killings which occur where the defendant recklessly committed serious injury could be dealt with under reckless killings manifesting extreme indifference to human life. Therefore the fault element for murder should not be expanded to embrace recklessness as to serious injury.

(c) Report Recommendation

3.49 *The Commission recommends that the fault element for murder should not be expanded to embrace recklessness as to serious injury.*

³⁹ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.109.

E Defining “serious injury”

(a) Consultation Paper Recommendation

3.50 In relation to the term “serious injury” the Commission considered that there were two main options. One option would be to leave the term undefined in order to preserve the scope of the current rule. The Commission stated that if this were felt to be unsatisfactory, a second option would be to define serious injury as “any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health”. The Commission welcomed submissions from practitioners and other interested persons as to which approach should be preferred.⁴⁰

(b) Discussion

3.51 Following the consultation process, the Commission is now of the opinion that there is no need to define “serious injury”, because it is a term readily understood by juries in murder cases.

3.52 In its *Consultation Paper on Homicide: The Mental Element in Murder* the Commission noted that the term “serious injury” could be defined in three ways.⁴¹ It could be defined by reference to:

- the impact or effect of the particular injury on the body, *eg* “injury which causes serious permanent disfigurement or protracted loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.”⁴²
- the risk of death it creates.

eg (i) serious injury is a “substantial” injury or one which creates a “more than merely trivial risk of death”.⁴³ Such a definition would exclude injuries such as the breaking of an arm, which although serious, does not normally pose a risk of death.

(ii) An alternative formulation would be section 300(3) of the *Indian Penal Code* which states that culpable homicide is murder if the act causing death is done with the intention of causing such bodily

⁴⁰ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraphs 5.39-5.42.

⁴¹ *Ibid* at paragraph 5.21.

⁴² Section 1(1) of the *Non-Fatal Offences against the Person Act 1997*.

⁴³ See Charleton *Offences Against the Person* (Round Hall Press 1992) at paragraph 2.35.

injury to a person which is “sufficient in the ordinary course of nature to cause death.”⁴⁴

(iii) Section 1 of the Code of Western Australia could also be used as a model. Grievous bodily harm is defined as “any bodily injury of such a nature as to endanger or be likely to endanger life, or cause, or be likely to cause permanent injury to health”.⁴⁵

- a hybrid test which could be satisfied both by the risk of death created or the effect of the particular injury on the body. Section 1(1) of the *Non-Fatal Offences against the Person Act 1997* is a hybrid test which states that serious harm is:

“injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.”⁴⁶

3.53 The definition of serious injury provisionally favoured by the Commission in 2001 was that of the Codes of Western Australia and Queensland, which define grievous bodily injury as “any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause, or be likely to cause permanent injury to health”.⁴⁷ The Commission noted that such a definition would mean that the rule would only extend to particularly

⁴⁴ The test is objective in nature and requires a level of injury which is sufficient in the ordinary course of nature to cause death. In *Ghana Padhan* [1979] 47 Cut LT 575 it was held that “ordinary course of nature” means “in the usual course of events”. This approach entails the possible disadvantage of excluding serious injury which creates a substantial risk of death, but which might not prove fatal “in the ordinary course of nature”. Indian law requires the jury to find a high probability of death before a murder conviction can be returned under this head. The Commission noted in *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 5.29 that this would most likely exclude injuries posing a substantial possibility or mere probability of death.

⁴⁵ This test is objective. See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 5.19, where the Commission noted that if it was thought that the definition was too broad, the second clause could be omitted so that serious injury would be “bodily injury of such a nature as to endanger or be likely to endanger life.”

⁴⁶ The benefit of adopting a hybrid test such as that in the *Non-Fatal Offences against the Person Act 1997* is that the jury is given concrete assistance as to what amounts to serious harm.

⁴⁷ See section 1 of the Western Australian *Criminal Code*.

serious injuries. Less serious injuries such as broken arms would not be covered. Moreover, the objective aspect of the definition would ensure that the prosecution would not be required to show that the defendant was aware that the injuries he or she was inflicting were life-endangering at the time of the assault. It would be very difficult for the prosecution to prove the necessary awareness of risk in situations where the defendant claimed that he acted while intoxicated or enraged.⁴⁸

(c) ***Submissions on whether the term “serious injury” should be defined***

3.54 The Commission received a small number of submissions in favour of defining the term “serious injury” on the basis that its legal meaning should not be left to the discretion of judges and juries, particularly when the offence at issue is murder, the most serious offence on the statute books. Nonetheless, the dominant opinion on the desirability of defining “serious injury” in the context of murder was that the term would be better left undefined. Most consultees stated that it should be left to the trial judge to put the phrase into the context of the particular case bearing in mind the whereabouts of the offence, the nature of the injury and other relevant circumstances such as the proximity of medical attention.

3.55 Definition of “serious injury” was considered unnecessary since juries had no trouble understanding the concept. In the experience of practitioners, juries do not typically ask for further direction on the meaning of “serious injury”. One person submitted that juries take a pragmatic view and do not accept trivial injuries as serious injury.

3.56 Several submissions were received questioning the distinction which the Commission sought to draw between injuries endangering life and injuries likely to endanger life, and also raised the issue of how a judge was meant to describe this distinction to a jury.

3.57 A further submission on the desirability of defining “serious injury” stated that although there is a temptation to define legal concepts, the more definitions there are, the greater the danger that if a jury comes back and asks for further direction there is nowhere for the judge to go, in that the judge can only read out the same definition again and again. It was argued that the longer the charge to the jury, the more complicated it becomes and the harder it is for the jury to understand. Therefore, before adding to any jury charge law, reformers must be fully convinced that it is the right thing to do.

⁴⁸ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 5.41.

3.58 An academic commentator agreed that “serious injury” was better left undefined but suggested that if the term had to be defined, it would be better to be consistent with the definition of serious injury in the *Non-Fatal Offences Against the Person Act 1997*. Otherwise difficulties would arise in cases where the accused was charged both with murder and causing serious injury under the 1997 Act.

(d) The Commission’s Response

3.59 The Commission believes that it was appropriate to raise the issue of defining “serious injury” in the context of murder in the *Consultation Paper on Homicide: The Mental Element in Murder*⁴⁹ given that a definition of serious injury was included in the *Non-Fatal Offences Against the Person Act 1997*. However, the bulk of submissions expressed the view that juries have no trouble understanding the term “serious injury” in the murder context and do not accept trivial injuries as serious injury.

3.60 In retrospect, the Commission agrees that it is wiser to leave well enough alone at present. The Commission is satisfied that, until the law of homicide is codified, it would be better not to define “serious injury” so that the trial judge can put the killing in perspective for the jury on foot of the specific facts of the case. However, in the wider context of codification of the criminal law it will be necessary to define the term “serious injury,” since in the nature of things (in order to promote clarity and consistency), Criminal Codes typically include definitions of all key legal terms used in the Code instrument.

(e) Report Recommendation

3.61 *The Commission recommends that the term “serious injury” should remain undefined.*

F The Commission’s recommended definition of murder

(a) Consultation Paper Recommendation

3.62 In its *Consultation Paper on Homicide: The Mental Element in Murder* the Commission provisionally recommended expanding the mental element for murder to embrace certain types of reckless killings and suggested the following draft formulation as a possible statutory provision to define the mental element in murder.

“Where a person kills another unlawfully it shall be murder if:

⁴⁹ (LRC CP 17-2001) at paragraphs 5.18-5.41.

(1) The accused person intended to kill or cause serious injury to some other person, whether that other person is the person actually killed or not; or

(2) The killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.”⁵⁰

3.63 The Commission proceeded to say that:

“a person acts ‘recklessly’ with respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”⁵¹

3.64 The Commission provisionally recommended that:

“A result is intended if:

- (i) It is the defendant’s conscious object or purpose to cause it; or
- (ii) He is aware that it is virtually certain that his conduct will cause it, or would be virtually certain to cause it if he were to succeed in his purpose of causing some other result.”⁵²

3.65 The accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted.⁵³

⁵⁰ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (CP 17-2001) at paragraph 5.44. See Newman “Redefining the Mental Element of Murder” 5 (1995) *Irish Criminal Law Journal* 194-219, at 218 where the author offers a potential statutory provision of murder. “A person is guilty of murder when he causes the death of another: (a) intending to cause death; or (b) acting in conscious disregard of the substantial risk that he will cause death. This disregard must, considering the nature and degree of the risk, the nature and purpose of his conduct and all the circumstances, involve an extreme deviation from the standard of conduct that a law-abiding person would observe in the situation. The accused must be conscious that his disregard involves such a deviation.” Newman also defines the meaning of “intention” for all offences. “A person acts intentionally with respect to a result when: (a) he wants to cause it; or (b) he knows or believes that he will cause it; or (c) he knows or believes that it will occur if he succeeds in causing some other result which he wants to cause.”

⁵¹ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (CP 17-2001) at paragraph 5.45.

⁵² *Ibid* at paragraph 5.46.

⁵³ *Ibid* at paragraph 5.47.

3.66 In paragraph 5.53 the Commission stated that if the draft clause were deemed to be unsatisfactory or too verbose, it could be simplified as follows:

“Where a person kills another unlawfully it shall be murder if: (1) the accused person intended to kill or cause serious injury to some person whether the person actually killed or not; or (2) The killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.”

Paragraph 5.54 then explains that:

“a person acts ‘recklessly’ with respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur.”

(b) Discussion

3.67 As stated previously, the Commission’s proposal concerning recklessness is based on the American *Model Penal Code* which Henchy J approved in *The People (DPP) v Murray*.⁵⁴ Charleton, McDermott and Bolger submit that this definition constitutes the definition of recklessness in Irish law.⁵⁵

3.68 Under the Commission’s proposed definition, highly culpable killers such as those who set fire to occupied buildings or who shoot into occupied houses or moving vehicles or at closed doors behind which a person is standing⁵⁶ would most likely be found guilty of murder under either the extreme indifference head of murder or under the natural and probable consequences presumption contained in section 4(2) of the *Criminal Justice Act 1964* (unless the presumption is rebutted). Arguably, killers such as the accused in *DPP v Smith*,⁵⁷ *Hyam v DPP*⁵⁸ and *R v Woollin*⁵⁹ could be convicted under the current structure of murder in Ireland.

3.69 In a *Smith*-type situation a jury could find that the accused had the necessary intent to be guilty of murder if they decided that death or serious

⁵⁴ [1977] IR 360, 403. The Commission recommended this same definition of recklessness in previous reports on *Receiving Stolen Property* (LRC 23-1987) and *Malicious Damage* (LRC 36-1988).

⁵⁵ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at paragraph 1.85.

⁵⁶ See *DPP v Hull* Court of Criminal Appeal 8 July 1996.

⁵⁷ [1960] 3 All ER 161.

⁵⁸ [1974] 2 All ER 41.

⁵⁹ [1998] 4 All ER 103.

injury was the natural and probable consequence of driving a car erratically at speed with a police officer clinging to the bonnet - provided that the accused did not rebut the presumption. In a *Hyam*-type scenario, if the jury were of the view that (1) the natural and probable consequence of setting fire to an occupied house was death or serious injury, (2) and the accused did not rebut the presumption under section 4(2) of the *Criminal Justice Act 1964* (for example by raising a defence of accident or claiming intoxication), they could find that the accused had intended the outcome of his/her actions and convict him/her of murder. Similarly, in a *Woollin*-type case where the furious accused threw his infant on a hard surface, a jury might well find that death or serious injury was the natural and probable consequence of such a violent action. Unless the accused rebuts the section 4(2) presumption that he had intended the natural and probable consequences of his acts, the jury would be entitled to convict him of murder.

3.70 However, in the event of juries finding the terminology of section 4(2) confusing and difficult to apply, the Commission's inclusion of reckless indifference to the value of human life as an alternative mental element to intention in its proposed definition of murder would provide them with a different avenue of reaching a murder conviction for certain highly culpable killers who might fall outside the current scope of murder in England which requires a subjective awareness that the defendant's act posed a virtual certainty of death.

(c) ***Submissions on the wording of the proposed definition***

3.71 The Commission received many submissions supporting its proposal to rephrase section 4(1) of the *Criminal Justice Act 1964* in positive terms, *ie* to change:

“Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not”

to

“Where a person kills another unlawfully it shall be murder if:

The accused person intended to kill or cause serious injury to some other person, whether that other person is the person actually killed or not.”

Consultees agreed that the Commission's provision was an improvement upon section 4(1) as juries often have difficulty understanding the double negative in the existing formulation.

3.72 In relation to the wording of the Commission's section on “extreme indifference murder”, it was submitted that it was perhaps unnecessary to include the word “substantial” as well as “unjustifiable” to

describe the risk. It was argued that “unjustifiable” would be clear enough for a jury to understand. It was also suggested that the expression “extreme indifference to human life” was of dubious merit, given the Commission’s subsequent explanation of recklessness in the murder context.

3.73 The Commission disagrees that the expression “extreme indifference to human life” is rendered redundant by the definition of recklessness provided. The Commission believes that the expression may be valuable in highlighting the moral culpability of an accused who set fire to an occupied house with the main purpose of frightening an occupant or damaging property, though criminally indifferent as to whether anyone suffered serious injury or death as a result.

3.74 Moreover, the Commission did not invent the expression “extreme indifference to human life”. It follows the *MPC* formula of “extreme indifference murder”, a formula which is tried and tested and has not given rise to interpretational difficulties in American States which apply it. It is important to keep in mind the fact that judges must be able to explain legal terms to a jury. The Commission is satisfied that in conjunction with the definition of recklessness, the phrase “extreme indifference to human life” will help juries determine whether a particular killing was sufficiently heinous to deserve the label of murder.

3.75 The Commission is, however, of the view that the word “consciously” should be dropped from the definition of recklessness in the context of “extreme indifference murder.” This is because the Commission believes that the inclusion of the word might place too much focus on whether the accused was actually aware of the risk of death posed by his/her conduct to a particular person or persons. Defence lawyers would be in a position to assert that the risk of death never entered into the mind of their client who *eg* fired a shot from his gun into a crowded room when refused admission to a party or drove a car at high speed through the front of a busy Starbucks café in a fit of rage.

3.76 By removing the word “consciously” from the definition the Commission is not seeking to objectivise the test for “extreme indifference murder”. The Commission is committed to having a subjective test for this variety of murder. The jury should simply be directed to look at the circumstances as the accused knew them to be at the time of the conduct causing death and decide whether his/her disregard of the risk of death involved a gross deviation from the standard of conduct that a law-abiding person would observe in the accused’s situation.

3.77 Apart from removing the word “consciously” from the *MPC*-based definition of “recklessness”, the Commission is of the view that the

longer definition of murder provided in its 2001 *Consultation Paper on Homicide: The Mental Element in Murder* should stand.⁶⁰

(d) Report Recommendation

3.78 *The Commission recommends that the following definition of murder be adopted.*

- (1) *Where a person kills another unlawfully it shall be murder if:*
 - (a) *The accused person intended to kill or cause serious injury to some other person, whether that other person is the person actually killed or not; or*
 - (b) *The killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.*
- (2) *A person acts “recklessly” with respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”*
- (3) *A result is intended if:*
 - (i) *It is the defendant’s conscious object or purpose to cause it; or*
 - (ii) *He is aware that it is virtually certain that his conduct will cause it, or would be virtually certain to cause it if he were to succeed in his purpose of causing some other result.*
- (4) *The accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted.*

⁶⁰ See (LRC CP 17-2001) at paragraphs 5.44-5.47.

CHAPTER 4 INVOLUNTARY MANSLAUGHTER: THE CURRENT LAW AND ISSUES

A Introduction

4.01 In this chapter the Commission looks at the law of involuntary manslaughter - unlawful and dangerous act manslaughter and gross negligence manslaughter - and the law governing road traffic offences. In part B the Commission sets out the present configuration of manslaughter in Ireland and discusses the impact which the Commission's provisional recommendations on murder¹ would have on the homicide category of involuntary manslaughter. Part C deals with the present law of unlawful and dangerous act manslaughter, while part D focuses on related issues, *eg* whether low levels of violence, which unforeseeably result in death should be treated as unlawful and dangerous act manslaughter or as assault.

4.02 The Commission discusses the present law of gross negligence manslaughter in part E and explores related issues in part F, such as whether the capacity of the accused to advert to the risk or to meet the expected standard should be a relevant consideration in gross negligence manslaughter cases. Other issues considered by the Commission in part F are whether the risk in the *Dunleavy* test² should be raised to one of "death" or "death or serious injury" as well as the more radical option of abolishing gross negligence manslaughter and replacing it with a lesser homicide category such as negligent homicide. In part G the Commission looks at the current law of motor manslaughter and the related road traffic offences.

B Manslaughter in Ireland

4.03 Across the common law world there has been the unfortunate tendency to define murder and to leave manslaughter as an undefined, residual category encapsulating all other unlawful killings. This lack of definition has led to some confusion: for example some judges in the UK have erred in adopting the language of recklessness when dealing with

¹ See Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001).

² *The People (AG) v Dunleavy* [1948] IR 95.

manslaughter by gross negligence. However, in *R v Adomako*³ Lord Mackay stated that *Caldwell/Lawrence* recklessness had no application in manslaughter by gross negligence cases, notwithstanding *R v Seymour*.⁴

4.04 The following is an outline of the current categories of manslaughter in Ireland.

(i) ***Voluntary Manslaughter***

- (a) Where all the elements of murder are established by the prosecution but the jury is satisfied that the accused was acting under provocation when he/she killed the deceased;⁵
- (b) Where the prosecution establishes all the elements for murder but death is inflicted by *excessive force* in self-defence - see *The People (AG) v Dwyer*⁶ where it was held that if the defendant honestly believed that the force used was necessary, then he could not be guilty of murder; and also *The People (DPP) v Nally*⁷ where the defendant was convicted of manslaughter and was sentenced to 6 years imprisonment for using excessive force in defence of his property against an intruder.⁸
- (c) Under section 6 of the *Criminal Law (Insanity) Act 2006*, if an accused successfully pleads diminished responsibility in answer to a charge of murder or infanticide, a conviction for manslaughter will be recorded with the sentence, at the courts discretion, being any term of imprisonment up to life.

(ii) ***Involuntary manslaughter:***

- (a) Manslaughter by *unlawful and dangerous act* ie the act must be a criminal offence, carrying with it the risk of bodily harm to another – a tort will not suffice (dangerousness is judged objectively);
- (b) Manslaughter by gross negligence involving a high risk that substantial personal injury will follow the accused's negligent act or omission.

³ [1995] 1 AC 171.

⁴ [1983] 2 AC 493.

⁵ See the Law Reform Commission's *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003).

⁶ [1972] IR 416.

⁷ [2006] IECCA 128. His conviction was quashed in October 2006 and, in December 2006, he was found not guilty of manslaughter.

⁸ See the Law Reform Commission's *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

4.05 The Commission discussed the possibility of codifying the law of involuntary manslaughter without reform in its *Consultation Paper on Involuntary Manslaughter*.⁹ Codification of unlawful and dangerous act manslaughter without reform would mean that convictions could follow where the act was a criminal offence, carrying with it the risk of bodily harm to another. Dangerousness would continue to be judged objectively and the fact that an accused did not foresee, or that a reasonable person in that position would not have foreseen, death as a likely outcome of the unlawful conduct would be irrelevant to a finding of guilt. Liability would continue to be *constructive* because an accused's intention to inflict some trivial injury to another person would make it justifiable for the law to hold him accountable for the unexpected result (death) of his behaviour.

4.06 Codification of gross negligence manslaughter without reform would mean that a person would face conviction if the prosecution successfully proved that the accused was (a) by ordinary standards, negligent, (b) that the negligence caused the death of the victim, (c) was of a very high degree and (d) involved a high degree of risk or likelihood of substantial personal injury to others.¹⁰

4.07 The Commission invited submissions on the possibility of codifying the law of involuntary manslaughter without reform. There was no support for leaving the law unchanged. While there was wide agreement that the law of involuntary manslaughter functioned quite well in practice, it was accepted that certain aspects of both unlawful and dangerous act manslaughter and gross negligence manslaughter were in need of reform. Reform options and submissions received will be discussed in Chapter 5.

4.08 Charleton, McDermot and Bolger state that unlawful and dangerous act manslaughter and gross negligence manslaughter are:

“the only examples in our criminal law where the accused may be found guilty of a serious criminal offence without the necessity of the prosecution proving that the accused was aware that his conduct might bring about the external element of a crime.”¹¹

4.09 Lord Atkin in *Andrews v DPP* observed that manslaughter was perhaps *the* most difficult crime to define, because it encompasses homicide in so many forms.¹² While the law views murder as being based primarily on an intention to kill, manslaughter is based mainly, though not exclusively,

⁹ (LRC CP 44-2007) at paragraphs 5.26-5.28.

¹⁰ *Ibid* at paragraph 5.27.

¹¹ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 7.121.

¹² [1937] AC 576, 581.

on the absence of intention to kill, “but with the presence of an element of ‘unlawfulness’ which is the elusive factor.”

4.10 The Commission’s *Consultation Paper on Involuntary Manslaughter* was prepared with a view to determining whether the existing configuration of involuntary manslaughter should be retained as it is, or whether the scope of involuntary manslaughter should be readjusted.

4.11 The Commission noted that any reform of manslaughter must take account of its provisional proposals for reform of murder. As discussed in the previous chapter, in its *Consultation Paper on Homicide: The Mental Element in Murder*, the Commission provisionally recommended broadening the fault element for murder to embrace reckless killings manifesting an extreme indifference to human life.¹³ The Commission believes that murder should include “extreme indifference” killings and it is necessary to discuss the impact such expansion of the mental element might have on the category of involuntary manslaughter.

4.12 Expanding murder to include reckless killings manifesting extreme indifference to the value of human life means that the current scope of involuntary manslaughter would shrink.¹⁴ Arsonists or terrorists who do not intend to kill but foresee a risk of death could currently be convicted of unlawful and dangerous act manslaughter, but might be found guilty of murder under the Commission’s recommendations. People who kill by indiscriminately discharging a firearm at another person could find themselves convicted of extreme indifference murder rather than unlawful and dangerous act manslaughter, as could those killers who stab their victims or strike them with dangerous weapons. Similarly, people who drink, drive and kill in circumstances of very high culpability might find themselves prosecuted for extreme indifference murder rather than manslaughter or dangerous driving causing death and those who inflict fatal physical abuse on children could also possibly face charges for murder rather than gross negligence manslaughter or wilful neglect under section 246 of the *Children Act 2001*.

¹³ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraph 4.075.

¹⁴ See the Law Reform Commission’s *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001) at paragraphs 4.049-4.057 for a discussion of several American “extreme indifference” murder cases. See also the Law Reform Commission’s *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.05-5.13.

C Unlawful and dangerous act manslaughter: the present law

4.13 In establishing unlawful and dangerous act manslaughter in Ireland, dangerousness is judged objectively and liability is constructive. The fact that an accused did not foresee, or indeed that a reasonable person in his or her position would not have foreseen death as a likely outcome of the unlawful conduct is irrelevant to a finding of guilt. Most cases of unlawful and dangerous act manslaughter involve assaults. An accused's intention to inflict some minor injury on another person makes him legally accountable for the unexpected result of his behaviour, that is, death.

4.14 In *The People (AG) v Crosbie and Meehan*¹⁵ the victim died from a knife-wound inflicted during the course of a fight at the docks. The accused were acquitted of murder, but convicted of manslaughter. The Court of Criminal Appeal held that the act must be both unlawful *and dangerous*. Here the act was unlawful and dangerous because the knife was brandished in order to frighten or intimidate, and not in self-defence.

4.15 In *The People (DPP) v O'Donoghue*¹⁶ the accused caught the deceased boy in a headlock and forcibly grasped his neck. The Court of Criminal Appeal noted that the trial judge's description of the act as being at the "horseplay end of things" did not mean that the act could not also be justly described as "dangerous". In that respect, the Court affirmed that the death was capable of amounting to unlawful and dangerous act manslaughter.

4.16 Assault manslaughter may involve varying degrees of culpability due to the varying degrees of violence which may be employed. The more brutal the assault (*ie* if several punches or kicks are applied to the head or if the accused brandishes a knife), the more foreseeable death or serious injury are and the more reprehensible the criminal conduct. Different levels of culpability are reflected in sentencing decisions. O'Malley states:

"Of those imprisoned for manslaughter in 1993 and 1994, exactly 50% got five years or less and 50% got five to ten years. Sentences in excess of 10 years are rare, though not unknown, and are generally reserved for manslaughters which in terms of gravity are bordering on murder. The general trend seems to be that the more deliberate and gratuitous the assault or violence leading to the victim's death, the heavier the punishment deserved."¹⁷

¹⁵ [1966] IR 490.

¹⁶ [2006] IECCA 134.

¹⁷ O'Malley *Sentencing Law and Practice* (Roundhall Sweet and Maxwell 2000) at 403.

4.17 In *The People (DPP) v Dillon*¹⁸ the Court of Criminal Appeal addressed the issue of sentencing defendants convicted of manslaughter by killing someone with a knife. The Court held that the trial judge, Judge White, was wrong in principle to state that in manslaughter cases where a knife is used there should be a minimum sentence of 20 years, before taking into account the accused's personal circumstances. The Court stated that Judge White seemed to put manslaughter by killing with a knife in a different position from any other form of manslaughter which was also an error in principle. The Court stated that judges "cannot or should not divide up elements to impose a minimum in relation to a particular category."

D Issues relating to unlawful and dangerous act manslaughter

(1) *Should low levels of violence, which unforeseeably result in death be treated as unlawful and dangerous act manslaughter or as assault?*

4.18 Over the years there has been much debate as to whether moral importance should be placed on bad consequences a person accidentally brings about by committing an unlawful act. Subjectivists believe that the accused should not be held legally responsible for the consequences of conduct beyond his control unless he intended or adverted to the possibility of causing such consequences – otherwise he would not be representatively labelled in relation to those consequences.¹⁹ The principle of fair labelling demands as close a match as possible between the name or "label" of a crime, such as "murder" or "manslaughter", and the nature and gravity of the defendant's conduct.²⁰

4.19 It is arguably unfair to impose such a stigmatic label as manslaughter on an attacker who only intended a minor battery. Where death was unforeseen and unforeseeable, there is powerful force to the argument in favour of sentencing the accused only on the basis of what he intended, for example for assault, and not on the basis of the unfortunate death which occurred.²¹ Attaching moral or legal blame for causing death to the attacker who did not foresee the fatal consequences of his or her unlawful act is perhaps overly severe.

¹⁸ Court of Criminal Appeal 17 December 2003.

¹⁹ See Horder "A Critique of the Correspondence Principle in Criminal Law" [1995] Crim LR 759, at 761.

²⁰ *Ibid.*

²¹ Ashworth "Taking the Consequences" in *Action and Value in Criminal Law* in Shute Gardner and Horder (eds) (Clarendon Press 1996) 107-124 at 117-118.

4.20 Those who focus on the moral importance of consequences argue that if a person falls following a punch and fatally hits his head off the ground, it is appropriate that the perpetrator may be found guilty of manslaughter regardless of the lack of intention or foresight regarding death or serious injury. They argue that the termination of a life by an unlawful act should be marked. In identifying the communicative aspect of the criminal law as one of the main purposes of punishment, Duff claims that a system which failed to differentiate between completed offences and mere attempts would give the impression that causing actual harm to people did not matter. As this would be a morally irresponsible message to transmit, it follows that the presence or absence of harmful consequences should be taken into account.²²

4.21 In its 1994 consultation paper on involuntary manslaughter the Law Commission for England and Wales argued that unlawful and dangerous act manslaughter should be abolished completely and not simply modified or replaced. Recognising that there was a strong feeling among the general public that, where a fatality is the unforeseen result of a wrongful act the law ought to mark the fact that death has occurred,²³ the Commission discussed the possibility of introducing an offence such as “assault causing death”. The Commission suggested that, if the majority of consultees supported the “emotional argument” that death should be marked,²⁴ then a new, separate and lesser offence of “causing death” could be enacted to deal with cases where an accused caused death while intending to inflict harm upon another. The Commission thought that a maximum penalty of three years imprisonment might be appropriate for this offence.²⁵

4.22 The traditionally subjectivist Law Commission for England and Wales addressed “moral luck” arguments in its Report on involuntary manslaughter.²⁶ Because many consultees supported the retention of some form of unlawful and dangerous manslaughter the Law Commission proposed that a modified form of unlawful act manslaughter be incorporated in its suggested new offence of killing by gross carelessness. Provided the conduct causing the injury constituted an offence, a conviction for killing by gross carelessness could apply where a defendant intentionally caused some

²² Duff *Intention, Agency and Criminal Liability* (Oxford 1990) at 191-192.

²³ Law Commission for England and Wales *Criminal Law: Involuntary Manslaughter* (1994) Consultation Paper No 135 at paragraph 5.8.

²⁴ *Ibid* at paragraph 5.13.

²⁵ *Ibid* at paragraph 5.15.

²⁶ See Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 at paragraphs 4.30 – 4.42.

injury, or was aware of the risk of such injury, and unreasonably took the risk.²⁷

4.23 At the Seminar on Involuntary Manslaughter in November 2007 the Commission explained how the offence of unlawful and dangerous act manslaughter has become narrower over the years and therefore asked attendees who perhaps wished to maintain the legal status quo, whether they would support the introduction of reforms returning the law of constructive manslaughter to its original position *ie* there would no longer be any dangerousness requirement and the wrongful act could include a tort. Most attendees thought it would be an error to return the law to the nineteenth-century position. It was suggested that the judiciary would reject any such reform on the basis that some form of *mens rea* is necessary for serious offences, of which involuntary manslaughter is one. One attendee did however express support for returning the law to the nineteenth-century position on the basis that people deserve to be punished if they do a wrongful act and kill someone, albeit unforeseeably.

4.24 It seems that members of the Irish public perceive variations in culpability for homicide and may be uncomfortable that the criminal law punishes people for accidents, even those caused by low levels of violence. In *The People (DPP) v Byrne*²⁸ the accused was tried for the manslaughter of his sister's boyfriend having punched him once on the face at a family wedding, causing him to fall and hit the back of his head off the ground. The State Pathologist gave evidence that the deceased died from respiratory distress caused by head injuries he received from a "mild punch" and the subsequent fall to the ground. The jury unanimously found the accused not guilty of manslaughter.

4.25 In its *Consultation Paper on Involuntary Manslaughter*²⁹ the Commission referred to a public opinion survey conducted by Barry Mitchell in England and Wales where respondents ranked eight homicide scenarios in order of severity using a scale of 1 to 20,³⁰ including a "thin skull scenario" where a man gently pushed a woman during the course of an argument in the supermarket queue, with the result that she unexpectedly tripped and bumped her head against a wall. Because the woman had an unusually thin skull she died from her injuries. This scenario was rated

²⁷ See Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 at paragraph 5.34.

²⁸ See "Wicklow man acquitted of manslaughter of his sister's boyfriend" *The Irish Times* 6 July 2004.

²⁹ (LRC CP 44-2007).

³⁰ Mitchell "Public Perceptions of Homicide and Criminal Justice" [1998] 38 *Brit J Criminol* 453. 20 stood for the worst possible scenario.

sixth³¹ in order of gravity. Respondents viewed the homicide to be of relatively low severity³² because the death was accidental, there was no fault on the part of the killer, no intent to kill - the killer could not have foreseen the consequence of his actions.

4.26 People who punch others and accidentally kill them due to an unforeseen physical weakness, such as a thin skull or enlarged spleen should be convicted of some offence for their damaging, anti-social conduct. However, where deliberate wrongdoing is concerned such acts are at the bottom of the scale of culpability. The label of manslaughter is perhaps overly severe for these accidental killings, since the accused would have been charged with a minor assault at most had a person not been unexpectedly killed.³³

4.27 In the *Consultation Paper on Involuntary Manslaughter*³⁴ the Commission discussed whether it would be sufficient in cases where a person dies as a result of a low level of violence to charge the perpetrator with assault rather than manslaughter and to take the fact that a death was caused into account when imposing a sentence.³⁵ The label of assault would

³¹ Mitchell "Public Perceptions of Homicide and Criminal Justice" [1998] 38 Brit J Criminol 453. The other seven scenarios consisted of a killing in the course of a burglary, a mercy killing, making no attempt to save a drowning woman, a duress killing, a necessity (duress of circumstances) killing, a battered spouse killing, and killing in self-defence. Respondents gave the burglary killing a rating of 15 out of 20, which made it the most serious scenario out of the 8 homicide scenarios in Mitchell's survey. Only 14 out of the 822 respondents chose the burglary killing as representing their idea of the worst homicide however, which suggests that for many people there are other, worse forms of homicide. Mercy killings, on the other hand were rated 4 out of 20, as the least serious homicide scenario of the eight examples.

³² Mitchell "Public Perceptions of Homicide and Criminal Justice" [1998] 38 Brit J Criminol 453. 20 stood for the worst possible scenario at 467. Respondents viewed premeditated killings, or those involving children or other particularly defenceless/vulnerable victims, such as elderly or handicapped people as the most serious homicides.

³³ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.32.

³⁴ *Ibid.*

³⁵ See Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 at paragraph 5.34. The proposed new offence of killing by gross carelessness would be committed if: (1) a person by his or her conduct causes the death of another; (2) a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position; (3) he or she is capable of appreciating that risk at the material time; and (4) *either* (a) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, *or* (b) he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, *and* the conduct causing (or intended to cause) the injury constitutes an offence." The Law

possibly be more appropriate than that of manslaughter considering the low level of culpability involved. The fact that a life was lost as a result of the wrongdoer's unlawful conduct obviously gives the offence of assault a more serious dimension and the Commission noted in the *Consultation Paper* that a more severe sentence might therefore be justified than in the case of a minor assault where no fatality results.³⁶

4.28 Alternatively, the Commission observed that if there is support for maintaining some form of constructive manslaughter in order to mark the fact of death, then perhaps liability for unlawful and dangerous act manslaughter should be restricted to deliberate assaults. A new offence such as "assault causing death" could be introduced to capture the wrongdoing in the offence label, with similar penalties to regular assault.³⁷

4.29 The Commission provisionally recommended that low levels of deliberate violence which unforeseeably cause death should be excluded from the scope of unlawful and dangerous act manslaughter and instead prosecuted as assaults.³⁸ This recommendation and other reform options will be discussed further in Chapter 5.

E Gross negligence manslaughter: the present law

4.30 Manslaughter is the only serious crime capable of being committed by inadvertence. The only mental element necessary for gross negligence manslaughter is an intention to do the act which causes death or, where there is a special duty to act, an omission to do something which would prevent death from occurring. Professor J.W.C. Turner argued that a person should not be held criminally responsible unless he had in his mind the idea of causing bodily harm to someone. Turner found the notion of imposing criminal liability for inadvertence most unappealing since in his view the law would be resorting to strict liability if it punished the accused for having a blank mind. He reasoned that if a man is blind to the consequences, he has no realisation of their possibility and there are no different degrees of nothing.³⁹

Commission intended thin skull scenarios to fall outside the scope of the proposed offence.

³⁶ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.33.

³⁷ *Ibid.*

³⁸ *Ibid* at paragraph 5.88.

³⁹ Turner "The Mental Element in Crimes at Common Law" in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261 at 211.

4.31 According to Hart, the adverb “inadvertently” does little more than describe the agent’s mental state whereas the word “negligently”, both in law and everyday life, refers to an omission to do what is required and is not just a descriptive psychological expression like “his mind was a blank”.⁴⁰ Describing someone as having acted inadvertently does not necessarily imply that his or her behaviour fell below any expected standard. If we negligently fail to examine the situation before embarking on a course of conduct or pay improper attention while acting, we may not realise the potentially harmful consequences posed by our behaviour. In relation to these consequences our mind is in a sense a “blank” but in Hart’s opinion, negligence does not consist in this blank state of mind but rather in the failure to take precautions against harm by carefully examining the situation.⁴¹

4.32 Where a person is under a positive duty to act, an omission to so act may justify a manslaughter conviction if it results in the death of another. Duties to act arise in a variety of situations such as where there is a special (usually family) relationship between the parties or where a contractual, often employment-related responsibility exists.

4.33 The objective test for gross negligence manslaughter was laid down in *The People (AG) v Dunleavy*⁴² where the accused, a taxi driver, drove his unlit car on the wrong side of the road and killed a cyclist when he hit him. In quashing his conviction for manslaughter, the Court of Criminal Appeal held that a conviction for gross negligence manslaughter will not arise unless the prosecution proves that the negligence was of a very high degree and involved a high degree of risk or likelihood of substantial personal injury to others.

4.34 Convictions for gross negligence manslaughter are extremely rare in Ireland. Indeed prosecutions for this form of manslaughter are generally much less frequent than prosecutions for unlawful and dangerous act manslaughter due to the reluctance of prosecutors to invoke the criminal law to deal with the negligent or incompetent discharge of lawful acts. The dearth of gross negligence cases in this jurisdiction can also be partly explained by the relatively small population in Ireland.

4.35 In *The People (DPP) v Cullagh*⁴³ the defendant was convicted of manslaughter where the victim died after her chair became detached from a

⁴⁰ Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1970) at 148.

⁴¹ *Ibid.*

⁴² [1948] IR 95.

⁴³ See “Man found guilty of funfair death” *The Irish Times* 15 May 1998.

“chairplane” ride at a funfair. The ride was 20 years old at the time of the accident and had lain in an open field for three years before the defendant purchased it. The trial judge directed the jury that the defendant had owed a duty of care both to the deceased and to members of the general public using the chairplane. Although the defendant did not know about the rust in the inside of the machine which caused the accident, he was generally aware of the decrepit state of the ride. The Court of Criminal Appeal refused the defendant’s application for leave to appeal and affirmed the conviction for gross negligence manslaughter.

4.36 People whose jobs involve dangerous activities, which may threaten the lives or safety of others if improperly performed, have a duty to perform those activities with care and attention or must give sufficient warning if they cannot perform them. The essence of the duty in contractual duty cases is closely linked to the prevention of harm. For example, a construction foreman may be convicted of manslaughter because he was present at the time of the fatality and had an identifiable role in preventing the occurrence of harm. The contract of employment distinguishes the accused from passersby and casual callers.

4.37 In *The People (DPP) v Roseberry Construction Ltd*,⁴⁴ the defendant company was fined almost £250,000 for offences under the *Safety, Health and Welfare at Work Act 1989*, which led to the deaths of two men employed by a sub-contractor on a building site in 1998. One of the defendants, an employee of the sub-contractor in question who had been supervising the two men directly, was given an 18 month suspended sentence for endangerment under section 13 of the *Non-Fatal Offences Against the Person Act 1997* and was fined £7,000. Initially, the managing director of the construction company, the supervisor and another person had been charged with manslaughter, but these charges were dropped and the defendants pleaded guilty to the lesser charges.

4.38 The two deceased were killed when the 12-foot deep trench in which they were working collapsed. The sub-contractor was legally obliged to provide supports for a trench of that size. The fact that there was equipment on site in the form of a trench box which could have provided support for a trench was an aggravating circumstance. Construction workers had brought the matter of the trench size to the attention of the sub-contractor but nothing was done and the trial judge thought that the sub-contractor’s inaction amounted to “casualness of an extreme nature”.

⁴⁴ [2003] 4 IR 338. See Donnellan “Building firm and director fined £240,000 for men’s death” *The Irish Times* 22 November 2001.

4.39 In *The People (DPP) v Barden*⁴⁵ the skipper of the Pisces fishing boat was charged with five counts of manslaughter, one count of endangerment contrary to section 13 of the *Non-Fatal Offences Against the Person Act 1997* and one count of being the master and owner of a dangerously unsafe ship contrary to section 4 of the *Merchant Shipping Act 1981*. Five people drowned in 2002 when the defendant's unseaworthy boat took in excessive amounts of water and capsized.

4.40 Although there were ten people on board, there were only two life-belts and one life-jacket. The defendant was aware that the Pisces was a boat that took in water. He had to pump out water every ten minutes. An engineer with the Marine Casualty Investigation Board gave evidence at trial saying that the boat was overloaded, unstable and insufficiently equipped with life-preserving equipment. He also said that modifications had been made to the boat before the defendant purchased it, including the construction of a deck and the introduction of freeports (holes cut in the sides of the boat to allow water on deck to flow out). Tests found that if the boat was depressed on one side by three inches, the freeports would be level with the sea and if it was depressed further, the water could flow in through them. The engineer said that if a life raft had been on board, lives would have been saved.⁴⁶

4.41 Significantly, the defendant was “no beginner, no learner” where the sea was concerned, but rather was a man of many years sea-faring experience. He worked for 27 years in the merchant navy and then in small-time fishing until 2002. Despite all the evidence against the defendant who owed a duty of care to the people he took out on his fishing boat, the jury found him not guilty of manslaughter on all five counts and not guilty of reckless endangerment. He was convicted of running an unsafe vessel under section 4 of *The Merchant Shipping Act 1981* and fined €1000, which was the maximum fine permissible under the legislation. This Act was replaced by regulations in the *Maritime Safety Act 2005* and the new maximum penalty for such an offence is €250,000 and/or two years imprisonment.

⁴⁵ See Siggins “Much done, but much remains to be done for safety on water” *The Irish Times* 24 November 2005.

⁴⁶ See Gartland “Witness says boat was overloaded, unseaworthy” *The Irish Times* 17 November 2005. Counsel for the Defence argued that the legislation which was in force at the time would not have required the boat to have a life raft.

F Issues relating to gross negligence manslaughter

(1) *Should the capacity of the accused to advert to the risk or meet the expected standard be a relevant consideration in gross negligence manslaughter cases?*

4.42 Under the current test, the capacity of the accused to appreciate the risk at the time when the negligent act or omission causing death took place is not relevant to liability. Arguably, a person should only be found guilty of a crime such as manslaughter by gross negligence if he or she was capable of advertent to the risk or attaining the expected standard but simply did not do so.

4.43 In the English case of *R v Stone and Dobinson*⁴⁷ the defendants were of very low intelligence and may have been unable to appreciate the likely consequences of their failure to summon a doctor to attend to the deceased woman, who suffered from anorexia nervosa. The issue of capacity was not argued before the Court of Appeal, however. It was perhaps unjust to find the defendants guilty of gross negligence manslaughter if they were unable to recognise the risks posed by their omission to act or did not have the capacities for thought and action necessary to take necessary precautions against harm.

4.44 Hart argued that people should only be held legally responsible for their actions if they were capable of meeting the law's expectations, had a fair opportunity to do so and can therefore be deemed to have made the choice not to meet the expected standard.⁴⁸ He supported the extension of the idea of "*mens*" beyond the cognitive element of knowledge or foresight to include the capacities of normal people to think about and regulate their behaviour.⁴⁹

4.45 Where an accused failed to exercise his capacity in relation to a risk of harm, he may have given no thought to the risk or may have mistakenly thought or presumed there was no risk. Whether the accused's failure to advert to the risk was caused by drink, drugs, medication or simply absentmindedness, the argument for holding him criminally responsible for inadvertence is that he could have recognised that there was an unjustifiable

⁴⁷ [1977] QB 354.

⁴⁸ See Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1970) especially Chapters 2 and 6.

⁴⁹ *Ibid.* at 140.

risk, he ought to have exercised the capacity to recognise it and should not have taken the risk.⁵⁰

4.46 Charleton argues that if a person with a physical or mental incapacity is prosecuted for manslaughter, the elements of the test of provocation could be applied. The accused's act or omission would be judged objectively but the standard against which he or she would be judged would be that of a reasonable person with the accused's characteristics such as sex, age or handicap.⁵¹

4.47 In its 1996 Report on involuntary manslaughter the Law Commission for England and Wales stated that a person cannot be said to be morally at fault "in failing to advert to a risk if she lacked the capacity to do so."⁵² Thus, the Law Commission recommended changing the law so that liability for gross negligence manslaughter would arise where the accused was capable of appreciating the material risk at the time of the negligent act or omission.⁵³ In its 2005 Consultation Paper on *A New Homicide Act for England and Wales* the Law Commission reiterated the importance of assessing the "grossness" of the negligence in relation to the accused's individual capacity to appreciate the nature and degree of risks, which may be affected by disability or youth.⁵⁴

4.48 In its *Consultation Paper on Involuntary Manslaughter* the Commission provisionally recommended that the current test for gross negligence manslaughter as set down in *The People (AG) v Dunleavy*⁵⁵ should be amended so that the capacity of the accused to advert to the risk or to attain the expected standard is relevant to liability. The Commission will return to this reform option in Chapter 5.

(2) ***Should the risk be raised to one of "death" or "death or serious injury" in the gross negligence manslaughter test?***

4.49 Under the current test for gross negligence manslaughter, the risk posed by the defendant's negligent conduct need only be one of "substantial

⁵⁰ See Mitchell "In Defence of a Principle of Correspondence" [1999] Crim LR 195, at 196.

⁵¹ Charleton *Offences Against the Person* (Round Hall 1992) at paragraph 3.12. Personal idiosyncrasies and transient factors such as drunkenness would, however, be excluded.

⁵² The Law Commission for England and Wales *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 at paragraph 4.22.

⁵³ *Ibid* at Recommendation 4.

⁵⁴ The Law Commission for England and Wales *A New Homicide Act for England and Wales* (2005) Consultation Paper No 177. See paragraph 10.12.

⁵⁵ [1948] IR 95.

personal injury”. Arguably, the risk of “substantial personal injury” should be raised to a risk of “death” (or “death or serious injury” reflecting the death or serious injury structure of murder) which would bring the Irish law in line with the test established in *R v Adomako*.⁵⁶

4.50 In its 2005 *Report on Corporate Killing*⁵⁷ the Commission recommended that a corporation should be liable for manslaughter if the prosecution proved that: (a) the undertaking was negligent; (b) the negligence was of a sufficiently high degree to be characterised as “gross” and so warrant criminal sanction; and (c) the negligence caused the death.⁵⁸ The Commission recommended that negligence will be characterised as “gross” if it:

- (a) was of a very high degree; and
- (b) involved a significant risk of *death* or serious personal harm.⁵⁹

4.51 It would make sense if the degree of risk for the gross negligence manslaughter test and the Commission’s corporate killing test were the same. There does not appear to be any good reason for applying a lower test in the former, simply because it targets culpable negligence in individuals rather than corporate entities. Framing the risk in terms of “death or serious personal harm” is also clearer than “substantial personal injury”, a vague term which no doubt does little to help juries decide whether negligence is of a sufficiently high level to justify a conviction for gross negligence.

4.52 The English *Corporate Manslaughter and Corporate Homicide Act 2007* abolishes⁶⁰ the common law offence of gross negligence manslaughter in so far as it applies to companies and other bodies that are liable to the new offence of corporate manslaughter in England, Wales and Northern Ireland and corporate homicide in Scotland, as defined by section 1(1) of the Act. The offence builds on key aspects of the common law offence of gross negligence manslaughter, but is not contingent on the guilt of one or more individuals. Liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run.⁶¹

⁵⁶ [1995] 1 AC 171.

⁵⁷ (LRC 77-2005).

⁵⁸ Law Reform Commission *Report on Corporate Killing* (LRC 77-2005) at paragraph 2.10.

⁵⁹ *Ibid* at paragraph 2.63.

⁶⁰ See section 20 of the *Corporate Manslaughter and Corporate Homicide Act 2007*.

⁶¹ Section 1(2) of the *Corporate Manslaughter and Corporate Homicide Act 2007* provides that the organisations which could be liable for the new offence include

4.53 The offence is committed where an organisation owes a duty to take reasonable care for a person’s safety and the way in which activities of the organisation have been managed or organised amounts to a gross breach of that duty,⁶² causing the person’s death.⁶³ The manner in which the activities were managed or organised by senior management must be a substantial element of the gross breach. Section 1(4)(b) sets out the test for whether a particular breach is “gross”. Reflecting the threshold for the common law offence of gross negligence manslaughter, the test looks at whether the conduct that allegedly constitutes the breach falls far below what could reasonably have been expected.

4.54 Section 8 sets out a number of factors for the jury to take into account when considering whether the conduct that constitutes the breach fell far below the expected standard. Under section 8(2) the jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so (a) how serious that failure was and (b) *how much of a risk of death it posed*.⁶⁴

4.55 The Commission sought submissions on the desirability of bringing the Irish gross negligence manslaughter test in line with the English test by raising the risk posed by the negligence conduct to one of “death” or “death or serious injury”.

corporations, government or Crown departments or other bodies, police forces, as well as partnerships, trade unions or employers’ associations which are employers.

⁶² Section 2 of the *Corporate Manslaughter and Corporate Homicide Act 2007* deals with the meaning of “relevant duty of care”. Duties of care are owed: by organisations to its employees or to other people working for the organisation or performing services for it; by occupiers of premises; in connection with the supply of goods or services whether for consideration or not, or the carrying on of any construction or maintenance operations, or the carrying on by the organisation of any other activity on a commercial basis, or the use or keeping by the organisation of any plant, vehicle or other thing. People in custody at a police station or court and detained patients are also owed duties of care.

⁶³ The usual principles of causation in the criminal law apply to determine this issue. The alleged management failure need not have been the sole cause of death, rather it need only be *a* cause. Intervening acts may, however, break the chain of causation in certain situations.

⁶⁴ Under section 8(3) of the English *Corporate Manslaughter and Corporate Homicide Act 2007* the jury may also (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure or to have produced tolerance or it and (b) have regard to any health and safety guidance (*ie* any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued by an authority responsible for the enforcement of any health and safety legislation) that relates to the alleged breach.

(3) ***Should gross negligence manslaughter be abolished and replaced by a lesser homicide category such as negligent homicide?***

4.56 In the *Consultation Paper on Involuntary Manslaughter*⁶⁵ the Commission considered the possibility of abolishing gross negligence manslaughter and replacing it with a lesser homicide category such as negligent homicide. As a species of culpable fault, negligence arguably belongs to a less serious category of fault than recklessness. If subjective recklessness were to become the official *mens rea* for manslaughter under a scheme similar to the *Indian Penal Code* or the *Model Penal Code*, then any deaths caused by gross negligence should logically be placed in a lesser category of homicide.⁶⁶

4.57 The homicide ladders of the *Indian Penal Code* and the *Model Penal Code* position negligent, inadvertent killings in a less culpable category than manslaughter. The *Indian Penal Code* arranges the fault elements for homicide so that murder is top of the ladder, culpable killings amounting to manslaughter (the fault element for which is subjective reckless) are located in the middle of the homicide ladder and culpable killings falling short of manslaughter - negligent killings - are at the bottom of the ladder.⁶⁷ The *Model Penal Code* restricts the offence of manslaughter to cases of conscious risk-taking, that is, subjective recklessness. The American Law Institute which drafted the Code was of the opinion that a new, less culpable category called negligent homicide should deal exclusively with deaths caused by negligence.⁶⁸ Under the offence of criminally negligent homicide a higher level of negligence is demanded than in civil cases.

4.58 As negligence essentially involves an absence of *mens rea* rather than the presence of a guilty state of mind, killings which occur due to gross negligence arguably do not belong in so serious an offence category as manslaughter.

⁶⁵ (LRC CP 44-2007).

⁶⁶ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.127.

⁶⁷ Section 304 A of the *Indian Penal Code 1860* provides for causing death by negligence. A person who causes the death of any person by doing any rash or negligent act not amounting to culpable homicide can be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

⁶⁸ See also section 210.4 of the *Model Penal Code and Commentaries* (2nd ed American Law Institute 1980) Part II §§ 210.9-213.6 at 80 which deals with the offence of negligent homicide, which is below the grade of manslaughter.

4.59 The Commission sought submissions on whether gross negligence manslaughter should be abolished and replaced with a category of negligent homicide, which would be below manslaughter on the homicide ladder. The Commission will discuss this reform option in the following chapter.

G Motor manslaughter and the related driving offences: the current law

4.60 Although it is possible to prosecute people for manslaughter where they unlawfully kill others through their negligent, wanton or aggressive driving, most fatal road traffic instances of this nature lead to charges of dangerous driving causing death. This offence was introduced in the 1960s due to the perceived unwillingness of juries to convict drivers of an offence as serious as manslaughter.

4.61 In Chapter 4 of the *Consultation Paper on Involuntary Manslaughter* the Commission analysed various Irish and Australian cases involving road deaths in terms of descending culpability. *R v Spree and Keymark Services Ltd*⁶⁹ is a manslaughter case which occurred in the driving context, where the culpability of the defendant was extremely high. The defendant, a director of a trucking company, pleaded guilty to the manslaughter of two men and was sentenced to 7 years imprisonment. Keymark Services Ltd also pleaded guilty to manslaughter. One of Keymark's employee truck-drivers had fallen asleep at the wheel halfway through an 18-hour shift and crashed through a motorway crash barrier, killing himself and two motorists on the other side. It emerged that the director had organised a bonus scheme for employees who drove shifts longer than those prescribed by law.

4.62 Barry Mitchell carried out a small qualitative public opinion survey in the UK on various aspects of homicide and the criminal law. Many respondents stated that premeditation is a particularly aggravating feature in a homicide case. All respondents stated that a drink-driver who killed a pedestrian on his way home from the pub should be convicted of either murder or manslaughter. Respondents were opposed to calling this crime "causing death by dangerous driving" because it would "glorify" or "trivialise" what the driver had done. They also believed that the imposition of a heavy punishment was insufficient because the killer knew he had been drinking and was aware that drink driving is a dangerous and potentially lethal thing to do. In deliberately disregarding the possibility that he might harm or kill someone the intoxicated driver was prepared to run that risk. Respondents viewed his preparedness to risk causing death to another road-

⁶⁹ Winchester Crown Court 8 December 2004.

user as premeditated in the sense that the driver demonstrated “a contemptuous disregard for human life.”⁷⁰

4.63 In its *Consultation Paper on Involuntary Manslaughter*⁷¹ the Commission identified two radical reform proposals. The first would involve the removal of deaths caused by negligent driving from the scope of manslaughter altogether, so that a manslaughter conviction where a car is the instrument of killing could never arise, no matter how culpable the driver was in causing death.⁷² The second would entail the abolition of the statutory offences of dangerous driving causing death and careless driving and the prosecution of all cases of bad driving causing death as manslaughter.⁷³

4.64 However, the Commission provisionally recommended that the law governing road deaths should remain unchanged, *ie* dangerous driving causing death should continue to exist alongside the more serious offence of manslaughter.⁷⁴ Drivers who kill would only be prosecuted for manslaughter in extreme cases of very high culpability. The Consultation Paper also recommended that judges should be able to take the fact that a death occurred into account when imposing sentence in a case of careless driving where the culpability of the accused has been clearly established by the prosecution.

4.65 In Chapter 5 the Commission will discuss its provisional recommendations, as well as various other options for reform of unlawful and dangerous act manslaughter, gross negligence manslaughter and manslaughter and the related road traffic offences considered in the *Consultation Paper on Involuntary Manslaughter*.⁷⁵ Submissions received from practitioners and other interested parties will also be addressed.

⁷⁰ Mitchell “Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide” [2000] Crim LR 814, at 819. See footnote 32 where Mitchell states that this form of premeditation was viewed as being less serious than where a homicide arose out of a planned intention to kill.

⁷¹ (LRC CP 44-2007) at paragraphs 5.147-5.155.

⁷² Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.147-5.152.

⁷³ *Ibid* at paragraphs 5.153-5.155.

⁷⁴ *Ibid* at paragraphs 5.156-5.160.

⁷⁵ (LRC CP 44-2007).

CHAPTER 5 INVOLUNTARY MANSLAUGHTER: OPTIONS FOR REFORM

A Introduction

5.01 The proposals as set out in the Commission’s *Consultation Paper on Involuntary Manslaughter*¹ and the submissions received since its publication form the basis for the discussion of reform in this chapter. Most of the modest provisional recommendations contained in the *Consultation Paper* remain, but the Commission has made a few changes, such as recommending that low levels of deliberate violence which unforeseeably cause death be prosecuted under a new offence called “assault causing death” rather than unlawful and dangerous act manslaughter, or, as provisionally recommended in the *Consultation Paper*, as assault *simpliciter*. However, the underlying basis for reform of involuntary manslaughter is the Commission’s belief that, although the homicide category covers a wide range of culpability, the law in this area generally functions well in practice. Therefore, only a few minor amendments are necessary.

B Unlawful and dangerous act manslaughter

5.02 The Commission made two main provisional recommendations in relation to unlawful and dangerous act manslaughter. Firstly, it provisionally recommended that low levels of deliberate violence should be removed from the scope of unlawful and dangerous act manslaughter and be prosecuted as assaults instead.² Secondly, the Commission provisionally recommended that where a person assists another by supplying drugs, preparing a syringe containing heroin, holding a belt as a tourniquet or directly injecting a drug and death results, that person should not be charged with such a serious homicide offence as manslaughter.³

¹ (LRC CP 44-2007).

² Law Reform Commission’s *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.87-5.88.

³ *Ibid* at paragraphs 5.89-5.93.

(1) *Low levels of deliberate violence which unforeseeably cause death*

(a) *Consultation Paper Recommendation*

5.03 The Consultation Paper recommended that low levels of violence which unforeseeably cause death be removed from the scope of unlawful and dangerous act manslaughter and instead prosecuted as assaults.⁴

(b) *Discussion*

5.04 Under this proposal a person who pushed someone, causing them to fall and fatally hit their head off the ground would be charged with assault rather than manslaughter. In relation to punishment the Commission was of the view that the occurrence of death renders the assault more serious and therefore justifies the imposition of a more severe sentence than in a case of a minor assault where no fatality results.

5.05 In its *Consultation Paper* the Commission provisionally concluded that, in general, the current law of involuntary manslaughter is satisfactory, but that a number of specific amendments should be considered. As regards moderate reform of unlawful and dangerous act manslaughter, the Commission discussed the possibility of restricting this category of manslaughter to those who deliberately assault others.⁵ The Commission suggested that this offence could be named “causing death by assault” or “killing by attack” so as to describe the essence of the wrongdoing in the offence label. Such a reform would mean that people who supply drugs such as heroin where death results following a voluntary act of self-administration by the deceased would be exempted from this category of manslaughter due to the absence of violence, as would those who merely commit the base unlawful act of criminal damage. The Commission did not make a specific recommendation on this point, but invited submissions.⁶

5.06 At the Seminar on Involuntary Manslaughter, the prospect of confining unlawful and dangerous act manslaughter to assaults proved unpopular. It was submitted that a manslaughter charge should be available on the facts of a *DPP v Newbury and Jones*-type case⁷ where the defendants threw blocks from a bridge onto an oncoming train killing a person onboard. If a lesser offence than manslaughter were created and was thus available in these cases it may arise that the wrongdoer would only be charged with the

⁴ Law Reform Commission’s *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.88.

⁵ *Ibid* at paragraphs 5.35-5.40.

⁶ *Ibid* at paragraph 5.40.

⁷ See *DPP v Newbury and Jones* [1976] 2 All ER 365.

lesser crime and receive a softer penalty despite the objectively high culpability of the accused.

5.07 Written submissions received were also opposed to the idea of restricting unlawful acts for the purposes of unlawful and dangerous act manslaughter to assaults as it would mean that unlawful acts directed at property that unforeseeably cause death, would be excluded from the offence. It was submitted that the possibility of manslaughter liability should remain for serious offences other than assaults where death was a reasonably foreseeable consequence.

5.08 The Commission believes that the most problematic aspect of unlawful and dangerous act manslaughter is that it punishes very severely those who deliberately engage in low levels of violence. An accused who punches a person with a thin skull once in the face with fatal results, can be found guilty of manslaughter even though neither the accused nor a reasonable person in a similar situation would have foreseen death or serious injury as a likely outcome of the assault. A manslaughter conviction is possible because the act of deliberately harming someone renders the wrongdoer responsible for whatever consequences ensue, regardless of whether they were unforeseen or unforeseeable.⁸

5.09 The Commission observed that the severity of unlawful and dangerous act manslaughter might be tempered by moderate reform requiring the act to be unlawful and life-threatening, rather than simply “dangerous”.⁹ Such a reform would mean that people who unforeseeably cause death due to a minor act of violence would escape liability because the act of punching someone once in the face or pushing them in the supermarket queue are highly *unlikely* to end in death. However, a defendant, who in a moment of anger during a row kicked the deceased several times in the head, could not “disavow knowledge of the everyday world”.¹⁰

5.10 Everyone knows that kicking a person in the head can have fatal consequences - this is a taken-for-granted fact of the everyday world. Even if the defendant did not realise the enormity of what he or she was doing at the time of the kicking, common knowledge dictates that the act involved physical violence of a level that was *likely* to endanger life. By reforming the law of unlawful and dangerous act to require that the act be unlawful and

⁸ See Chapter 1 in Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 1.34-1.46 where constructive manslaughter, felony murder and foreseeability of consequences are discussed.

⁹ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.41-5.48.

¹⁰ McAuley and McCutcheon *Criminal Law* (Sweet and Maxwell 2000) at 311.

likely to endanger life, people such as the defendant in *R v Holzer*¹¹ and the man in Mitchell's "thin skull scenario"¹² would escape liability. Under the principle of common knowledge, the acts of punching someone once in the face or pushing them in the supermarket queue are not *likely* to endanger or threaten life. In fact, knowledge of the everyday world would lead reasonable people to protest that such acts are highly *unlikely* to end in death. Such cases would, therefore, be treated as the accidents they are and no longer amount to constructive manslaughter.¹³ The Commission welcomed submissions on this reform option.¹⁴

5.11 Alternatively, moderate reform of unlawful and dangerous act manslaughter might entail the introduction of a new offence such as "Bodily Injury resulting in Death" under the *German Criminal Code*.¹⁵ The Commission invited submissions on this reform option.¹⁶ In Germany, deaths which are an unforeseeable consequence of an act of violence might fall under section 227 of the Criminal Code which deals with *Körperverletzung mit Todesfolge* - "Bodily Injury resulting in Death". This offence is less serious than *Totschlag* which is the German version of manslaughter.¹⁷ Section 227 provides that if a person causes the death of another through the infliction of bodily injury (under sections 223 to 226 of the Code), then he or she will face a minimum of 3 years imprisonment. In less serious cases the perpetrator faces 1-10 years imprisonment.¹⁸ Death must be the consequence of a physical injury. The offence is capable of being satisfied by neglect. The basic crime must inherently pose a danger to life which is directly reflected in the fact of death.

¹¹ [1968] VR 481.

¹² See Mitchell "Public Perceptions of Homicide and Criminal Justice" [1998] *Brit J Criminol* 453, at 457.

¹³ Law Reform Commission's *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.46-5.47.

¹⁴ *Ibid* at paragraph 5.48.

¹⁵ *Ibid* at paragraphs 5.49-5.50.

¹⁶ *Ibid* at paragraph 5.50.

¹⁷ Section 212 of the German Criminal Code provides that: "(1) Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years. (2) In especially serious cases imprisonment for life shall be imposed." A translation of the section is available at the German Law Archive: <http://www.iuscomp.org/gla/>.

¹⁸ See Section 227 *Körperverletzung mit Todesfolge* in Tröndle and Fisher *Strafgesetzbuch und Nebengesetze* (49., neubearbeitete Auflage, Verlag CH Beck 1999) at 1257.

5.12 In cases where the accused punches the victim in the face and he falls and hits his head off the ground and dies, or where an elderly, dependent relative is callously neglected and dies due to an untreated illness, an offence similar to “Bodily Injury resulting in Death” under section 227 could be introduced. The advantage of having a broad homicide offence such as this, lower down the homicide ladder than manslaughter, is that it would not be restricted to deliberate assaults or other violent conduct, but could also apply to cases of fatal neglect. Rather than merely prosecuting someone for assault or for neglect where the fatal consequences are ignored in the label, such an offence would be a specific homicide offence and the fact of death would, therefore, be recognised and marked.

5.13 The Commission also looked at radical options for reform¹⁹ and invited submissions on the desirability of a dramatic overhaul of the law governing unlawful and dangerous act manslaughter.²⁰ It discussed the structure of homicide under the *Indian Penal Code*²¹ and the *Model Penal Code*²² and suggested that radical reform of involuntary manslaughter might involve making subjective recklessness the *mens rea* for the offence.

5.14 Under sections 299 and 300 of the *Indian Penal Code* recklessness covers foresight of consequences ranging in degree of risk from probability to virtual certainty of death occurring. Knowledge of a virtual certainty of causing death will attract a murder conviction in India while knowledge of a probability will give rise to a conviction of culpable homicide not amounting to murder. In its *Consultation Paper on Involuntary Manslaughter*²³ the Commission observed that such a schematic approach to recklessness and foresight of consequences could perhaps be adopted in Ireland. It would remove negligent killings from the scope of manslaughter and would remove the injustice currently arising from the unlawful and dangerous act doctrine.²⁴

5.15 The conception of subjective recklessness under section 2.02(2)(c) of the *Model Penal Code* applies so that a person will not be guilty of

¹⁹ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5-55-5.86.

²⁰ *Ibid* at paragraph 5.86.

²¹ See *Indian Penal Code 1860*.

²² See American Law Institute *Model Penal Code and Commentaries* (2nd ed American Law Institute 1980) Part II § 210.0 – 210.6.

²³ (LRC CP 44-2007).

²⁴ *Ibid* at paragraph 5.81.

manslaughter unless he or she consciously disregards a substantial and unjustifiable risk that his or her conduct will have fatal consequences.²⁵

5.16 Many commentators argue that an intention to commit a lesser crime should not be sufficient to result in a manslaughter conviction. They argue that positive *mens rea* in the form of subjective recklessness along the lines of that established in the *Indian Penal Code* or the *Model Penal Code* should be established. On this basis, therefore, before being held liable for manslaughter, a person who assaults another should be shown to have foreseen that death or serious injury is a probable (as opposed to a virtually certain) consequence of the assault.²⁶ The Commission did not provisionally recommend that subjective recklessness be the *mens rea* for involuntary manslaughter but invited submissions on the issue.

(c) ***Submissions on excluding low levels of deliberate violence which unforeseeably result in death from the scope of unlawful and dangerous act manslaughter***

5.17 Many submissions recognised that it is severe to prosecute for manslaughter where minor assaults unforeseeably result in death. In cases where a single punch or push has fatal consequences which could not reasonably have been foreseen, although the initial act is clearly antisocial and deserving of some punishment, it could not be considered to be likely to endanger or threaten life – in fact it would be highly unlikely to do so. It was submitted that prosecuting for manslaughter in these cases amounts to holding people responsible for “bad luck”.

5.18 On this basis, some consultees agreed with the Commission’s view that such acts are at the bottom of the scale of culpability and the label of manslaughter is too severe for these accidental killings, since the accused would have been charged with a minor assault at most, had a person not been unexpectedly killed. It was submitted that placing such killings in a new offence category lower down the homicide ladder such as “assault causing death” or “causing death by assault” might be advantageous as it would capture the essence of the wrongdoing in the offence label.

5.19 While there was considerable agreement that it would be more appropriate to prosecute minor assaults resulting in death as simple assault or “assault causing death” rather than manslaughter, many consultees were opposed to giving judges discretion to take the fact of death into account when sentencing. It was submitted that it would not be fair to hold someone accountable for a consequence that they could not reasonably have foreseen

²⁵ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.82.

²⁶ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.85.

in circumstances where it is accepted that the act is at the bottom of the scale of culpability. One submission put the issue in the following terms:

“Where two people commit the same minor assault in similar circumstances and one incident results in the death of the injured party and the other results in a minor bruise, should they face vastly differing sentences because of an unfortunate turn of events? Is one party more culpable than the other?”

5.20 As against that, it was submitted that society may question whether the fact that a life has been lost can be ignored and the issue was raised as to whether the deceased and his/her family are not entitled to have the fact of death marked.

5.21 At the involuntary manslaughter seminar a number of submissions emphasised the negative impact that excluding low levels of deliberate violence which unforeseeably cause death from the scope of unlawful and dangerous act manslaughter might have on victims and their families. One person posed the question “why do we prosecute crimes at all?” and suggested that, in reality, crime is prosecuted to satisfy a public desire to ensure that wrongful conduct is regulated.

5.22 It was submitted that while the Commission’s proposals are “entirely sensible”, the role of the victim in the criminal process is crucial and concern was expressed that the exclusion of low levels of deliberate violence which unforeseeably cause death from the ambit of unlawful and dangerous act manslaughter would create strong unease and disquiet among the relatives of victims. Whether one considers the greater prominence afforded to victims and their families in contemporary criminal proceedings to be a positive or negative development, it was stressed that the Commission should be mindful of the impact any suggested reforms of the criminal law might have on victims. The occurrence of death adds a serious dimension to the offence of assault which needs to be taken into account and brought into the open. Therefore, an explicit homicide charge is necessary.

5.23 Where death occurs, there is a greater desire to ensure that the conduct is punished. Family members of the deceased often have vengeful feelings towards the wrongdoer. Therefore, even where low levels of violence are involved, once death occurs there will be significant grieving and aggravation of loved ones. In recognition of the public need to understand the event and feel aggrieved, it was submitted that there is perhaps a public requirement to ensure that such cases are dealt with under a manslaughter charge.

5.24 It was also suggested that low levels of deliberate violence which unforeseeably result in death should be prosecuted as manslaughter in order to ensure an official investigation into what happened. Perhaps a public

investigation into the fatal event helps relatives of the victim to better cope with their loss, even where no conviction results.

5.25 An alternative approach to law reform in this area was put forward at the involuntary manslaughter seminar, based on a “degree” structure. It was suggested that there might be degrees of manslaughter and/or degrees of murder. Less violent and, therefore, less culpable conduct which unforeseeably causes death would still amount to manslaughter. However, if the offence were broken down into degrees then a lesser sentence could be imposed for lesser degrees of culpability. Using the label “manslaughter” would ensure that the fact of death is not lost sight of for the victims, but it was argued that the Commission’s reforms could still be introduced in the form of various degrees of manslaughter. Labelling deaths caused by low levels of violence as “assault” or “assault causing death” was not considered to be sufficient because the public would not perceive these labels as being as serious as the label of manslaughter.

5.26 On the issue of assaults causing death, submissions questioned whether the foreseeability of death or serious injury resulting from an assault would be judged objectively or from the point of view of the perpetrator. It was observed that it is now very common to see late-night drunken brawls resulting in death where it would be difficult for the prosecution to prove that the accused only threw a single punch. The difficulties for the prosecution would increase if it were also incumbent upon them to prove that the accused foresaw that the blow would have a particular result, *ie* death in this context.

5.27 Some submissions received called for the abolition of the current form of unlawful and dangerous act manslaughter and its replacement with a new offence called "assault manslaughter" where the mental element would comprise intention to cause serious injury or knowledge of the likelihood of causing death.

5.28 It was submitted that "assault manslaughter" is a more attractive name for this offence than "causing death by assault"²⁷ if it is thought that the term "manslaughter" better reflects the seriousness of the offence. The proposal for the mental element to be of intention to cause "serious injury" is conditional upon the mental element of murder being upgraded to an intention to cause "really serious injury".

5.29 Both these types of injury should, it was argued, be legislatively defined, using the discussion in the Commission’s *Consultation Paper on Homicide: The Mental Element in Murder*²⁸ at paragraph 5.41 on the concept

²⁷ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 6.04.

²⁸ (LRC CP 17-2001).

of “common knowledge” and life-threatening activity as a starting point. What matters is that the type of injury intended by an accused for murder must be more severe than for assault manslaughter.

5.30 If “serious injury” is to be retained for murder, the harm intended for manslaughter would be “injury which is not trivial in nature”. It was argued that this is not sufficiently culpable to warrant a manslaughter conviction. The majority of the High Court of Australia in *Wilson v R*²⁹ was also of this opinion with the result that it abolished “battery manslaughter” involving an intention to cause injury less than serious bodily harm.³⁰

5.31 The proposed alternative mental element of knowledge of the likelihood of causing death is akin to that stipulated in the *Indian Penal Code* for the offence of culpable homicide not amounting to murder, noted in paragraph 5.86 of the *Consultation Paper on Involuntary Manslaughter*.³¹ This submission assumes that the law will continue not to recognise advertent recklessness as a type of mental element for murder. That being the case, it is arguably appropriate for manslaughter to accommodate this type of fault.

5.32 The choice of “death” as the type of injury known to be likely is based on the assumption that the alternative form of mental element for this offence is an intention to cause “serious injury”. Equivalence of culpability is therefore achieved by having a more severe type of harm for advertent reckless manslaughter compared to intentional manslaughter.

5.33 The attraction of the above two forms of mental elements for assault manslaughter is that they make the *mens rea* for this offence entirely subjective, doing away with such objectively-based requirements as “dangerous act” and “likely to endanger life”. There is additionally no need for the requirement of an “unlawful act” as the element of unlawfulness will be confined to assaults of the kind described in the proposal.

5.34 At the involuntary manslaughter seminar the Commission sought feedback on legal terminology so that its suggested reforms could be effectively introduced as positive law. The Commission is aware that reforms must be capable of being translated into statute and is therefore eager to ensure that the best terms and structures are identified in drafting new laws.

²⁹ (1992) 107 ALR 257.

³⁰ The abolition of battery manslaughter in Australia in *Wilson v R* (1992) 107 ALR 257 was noted in the Law Reform Commission’s *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 2.116.

³¹ (LRC CP 44-2007).

5.35 As regards the terminology which should be used when drafting a new statutory offence of “assault causing death”, it was suggested that the language of “foreseeability” could be used, *ie* the offence would only apply where death was not a reasonably foreseeable consequence of the defendant’s action.

5.36 One consultee questioned how the Commission’s suggested reforms would fit into existing provisions namely section 2, 3 and 4 of the *Non-Fatal Offences Against the Person Act 1997*, considering the lack of *mens rea*.

(d) *The Commission’s Response*

5.37 The Commission believes that the existing parameters of unlawful and dangerous act manslaughter should be retained, *ie* a person commits the offence if (a) the act which causes death constitutes a criminal offence and poses a risk of bodily harm to another and (b) the act is one which an ordinary person would consider to be dangerous, that is, likely to cause bodily harm.³²

(e) *Report Recommendation*

5.38 *The Commission recommends the retention of the existing parameters of unlawful and dangerous act manslaughter in that a person commits unlawful and dangerous act manslaughter if:*

(1) the act which causes death constitutes a criminal offence and poses a risk of bodily harm to another; and

(2) the act is one which an ordinary reasonable person would consider to be dangerous, that is, likely to cause bodily harm.

5.39 However, the Commission is still of the opinion that the most problematic aspect of unlawful and dangerous act manslaughter is that it punishes very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim. The Commission thinks that minor acts of deliberate violence (such as the “shove in the supermarket queue” scenario) which unforeseeably result in fatalities should be removed from the scope of unlawful and dangerous act manslaughter because where deliberate wrongdoing is concerned they are truly at the low end of the scale. In many “single punch” type cases there would be no prosecution for assault had a fatality not occurred; prosecution for manslaughter following a minor assault hinges on an “accident” – the chance outcome - of death.

³² See *R v Church* [1965] 2 All ER72; See also *The People (AG) v Crosbie and Meehan* [1966] IR 490.

5.40 The Commission does, however, appreciate that the occurrence of death is a very serious consequence of unlawful conduct and should, therefore, be marked accordingly. It might well be traumatic for the families of victims who died as a result of deliberate assaults, albeit those which were minor in nature, if the perpetrator of the assault were only charged with, convicted of and sentenced for assault, rather than the more serious-sounding offence of manslaughter. Thus, the Commission believes that rather than prosecuting such defendants with assault, as was the provisional recommendation in the *Consultation Paper*,³³ it would be more appropriate to enact a new offence such as “assault causing death” which would be below involuntary manslaughter on the homicide ladder, but which would clearly mark the occurrence of death in the offence label.

5.41 As regards slotting “assault causing death” into the existing assault structure under the *Non-Fatal Offences Against the Person Act 1997*, arguably this new offence would not belong in an Act dealing with non-fatal offences. It would make more sense to treat this offence as a distinct new homicide offence below manslaughter. The fact of death should be captured within the label, as is the case in the road traffic offence of “dangerous driving causing death”. The offence should only be prosecuted on indictment and have a higher sentencing maximum than for assault *simpliciter*. The Commission does not believe that the occurrence of death necessarily increases the culpability of the accused, but a fatality does undoubtedly give a much more serious dimension to the offence. Consequences matter. Accordingly, judges should be able to take into account the fact that a death (rather than merely a cut lip) was caused by a punch when imposing sentence.

5.42 In order to establish “assault causing death” the prosecution would, of course, first have to establish the ordinary mental elements concerning assault. The most common way of doing this would be to establish intention. Second, it must be established that death was a wholly unforeseeable consequence of the accused’s assault. If a reasonable person would think that death was a likely consequence of the particular assault, then unlawful and dangerous act manslaughter should be charged and not this lesser offence.

5.43 For the new offence to come into play the culpability of the accused should be at the lowest end of the scale where deliberate wrongdoing is concerned. It is vital that a reasonable person in the defendant’s shoes would not have foreseen death as a likely outcome of the assault. The main purpose of introducing a new statutory offence of “assault causing death” would be to mark the fact that death was caused in the

³³ See (LRC CP 44-207) at paragraph 6.08.

context of a minor assault. Recognising the sanctity of life by marking the death may be of benefit to the victim's relatives in dealing with their grief.

5.44 Accordingly, the Commission is of the view that a new homicide offence called "assault causing death" should be enacted which would be below manslaughter on the homicide ladder. The offence would apply where a person caused death unforeseeably by committing a minor assault (eg by giving the victim a "single punch" to the face causing them to fall and fatally hit their head off the ground). Where a reasonable person would not have foreseen that death or serious injury was likely to result from the assault in question, the offence of "assault causing death" rather than unlawful and dangerous act manslaughter should be charged.

5.45 The Commission's suggested definition of the new offence is as follows:

Assault causing death occurs where an accused commits an assault which causes death and a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances.

(f) Report Recommendation

5.46 *The Commission recommends that a new offence called "assault causing death" should be enacted which would be below manslaughter on the homicide ladder. The Commission recommends the following definition of "assault causing death":*

Assault causing death occurs where an accused commits an assault which causes death and a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances.

(2) Manslaughter by drug injection

(a) Consultation Paper Recommendation

5.47 The Consultation Paper recommended that situations where death is caused by a drug injection should not form part of the scope of unlawful and dangerous act manslaughter.³⁴

(b) Discussion

5.48 The issue of causation and the nature of the "unlawful" aspect of an act for the purposes of constructive manslaughter has arisen in several problematic cases in the UK dealing with drug injections such as *R v*

³⁴ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.93.

Kennedy,³⁵ *R v Dias*³⁶ and *R v Rogers*.³⁷ The Commission carefully analysed these cases and others in the Consultation Paper.³⁸ The English courts have struggled to identify the unlawful act which would justify a conviction for unlawful and dangerous act manslaughter where a person dies due to a drug injection.

5.49 In the *Consultation Paper on Involuntary Manslaughter*³⁹ the Commission was firmly of the view that in cases where death occurred in the context of a drug injection it would be inappropriate to institute manslaughter charges in this jurisdiction. The Commission took this stance not simply because of the difficulties involved in identifying the base unlawful act for the purposes of causation in unlawful and dangerous act manslaughter, but because typical English drug-injections cases such as *R v Kennedy*⁴⁰ and *R v Dias*⁴¹ involved a free, deliberate and knowing act of the deceased.⁴²

5.50 The Commission received a submission praising its analysis of English cases of drug injection causing death. Given the fact that there are many cases in Ireland where death results after a person (who may or may not also be the supplier) assists the other in injecting drugs, it was submitted that the introduction of “drug-induced homicide,”⁴³ a specific offence operating in Illinois, might be the way forward.

5.51 The Commission still maintains that it is inappropriate to prosecute a person for manslaughter where they in some way facilitate another person to inject drugs and death is caused, because there is generally an absence of causation and more importantly, death results because of a free, deliberate and knowing act of the accused.

³⁵ See [1999] Crim LR 65.

³⁶ [2001] EWCA Crim 2896.

³⁷ [2003] 1 WLR 1374.

³⁸ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 2.75-2.89.

³⁹ (LRC CP 44-2007) at paragraphs 2.75-2.89.

⁴⁰ See [1999] Crim LR 65

⁴¹ [2001] EWCA Crim 2896.

⁴² Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.89.

⁴³ *Ibid* at paragraphs 5.90-5.92.

(c) **Report Recommendation**

5.52 *The Commission recommends that situations where death is caused by a drug injection should not form part of the scope of unlawful and dangerous act manslaughter.*

C Gross Negligence Manslaughter

(a) **Consultation Paper Recommendation**

5.53 The Consultation Paper recommended that the current test for gross negligence manslaughter as set down in *The People (AG) v Dunleavy*⁴⁴ should be amended so that the capacity of the accused to advert to risk or to attain the expected standard should be relevant to liability.⁴⁵

(b) **Discussion**

5.54 As regards reform of the law of gross negligence manslaughter, the Commission also explored arguments for abolishing this category of manslaughter⁴⁶ and placing deaths caused by gross negligence into a lesser category of killing, such as negligent homicide on the basis that negligence is arguably an absence of *mens rea*.⁴⁷ Professor J.W.C Turner was heavily opposed to finding people criminally responsible when their minds were a blank as regards the consequences of their highly careless or incompetent conduct.⁴⁸ The Commission therefore invited submissions on the possibility of abolishing gross negligence manslaughter on the basis that liability is wholly objective and the person accused of the negligence did not choose to risk or cause harm and, therefore, is not sufficiently culpable to be convicted of such a serious offence as manslaughter.⁴⁹

5.55 The Commission received a small number of submissions supporting the abolition of gross negligence manslaughter and the creation of a new, lesser offence such as “negligent homicide” because inadvertent killings are less culpable than intentional or subjectively reckless ones. It was argued that placing deaths which could currently sustain a conviction for gross negligence manslaughter into the lesser homicide category of

⁴⁴ [1948] IR 95.

⁴⁵ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.141.

⁴⁶ *Ibid* at paragraphs 5.127-5.137.

⁴⁷ *Ibid* at paragraphs 5.94-5.106.

⁴⁸ Turner “The Mental Element in Crimes at Common Law” in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261 at 207.

⁴⁹ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.106.

“negligent homicide” may be a fairer reflection of culpability involved in deaths caused by negligence as opposed to positive misdeeds. There are situations where the risk of action or inaction is obvious: where the behaviour requires a sanction, it should be proportionate. It was submitted that a conviction for gross negligence manslaughter with its attendant penalties may be too severe.

5.56 The Commission considered that moderate reform of gross negligence manslaughter could include making the capacity of the accused at the time of the alleged gross negligence relevant to the issue of culpability⁵⁰ and/or raising the level of risk from “risk or likelihood of substantial personal injury” to “risk of death” or “risk of death or serious injury.”⁵¹ Although the reference to “risk or likelihood of substantial personal injury to others” is a relic of implied malice murder (where an intention to cause serious injury can sustain a murder conviction), the current gross negligence manslaughter test arguably pitches the necessary risk at too low a level.⁵²

5.57 Since 1994, when the House of Lords upheld an anaesthetist’s manslaughter conviction in *R v Adomako*,⁵³ the English test for establishing gross negligence manslaughter has been stricter than the Irish one, by requiring that the risk posed by the defendant’s negligence be one of *death* only. In *R v Misra*⁵⁴ the English Court of Appeal affirmed that the risk must relate to death rather than mere bodily injury. The Commission invited submissions on whether the Irish gross negligence manslaughter test should be brought in line with the English test.

5.58 A small number of submissions were received in favour of raising the level of risk in the *Dunleavy* test. The *mens rea* for murder is an intention to cause death or serious injury and it was submitted that it is unjust therefore to convict of manslaughter where only a risk of “substantial personal injury” need be proven. It was argued that if gross negligence manslaughter is to remain, its application should be limited to cases where no other sanctions are deemed appropriate. However, it was thought that it might be too restrictive to confine the risk to one of death only, *ie* it should apply both to death or serious injury.

⁵⁰ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.107-5.111.

⁵¹ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.112-5.126.

⁵² *Ibid* at paragraph 5.113.

⁵³ [1994] 3 All ER 79.

⁵⁴ [2005] 1 Cr App R 21.

5.59 The current test for establishing liability for gross negligence manslaughter as set down in *The People (AG) v Dunleavy*⁵⁵ does not make any reference to the capacity of the accused to advert to risk or to attain the expected standard. To ground a conviction for gross negligence manslaughter in Ireland, it is necessary to prove four key things: that the accused was, by ordinary standards, negligent; that the negligence caused the death of the victim; that the negligence was of a very high degree; that the negligence involved a high degree of risk or likelihood of substantial personal injury to others.

5.60 The Law Reform Commission was provisionally in favour of amending the above test so that a fifth requirement would provide that the accused would only be liable for gross negligence if he or she was mentally and physically capable of averting to, and avoiding the risk of substantial personal injury at the time of the fatality.⁵⁶ The Commission was satisfied that criminal liability for negligence should only arise where a person was capable of meeting the law's expectations but failed to behave as a reasonable person in the same situation would.

(c) ***Submissions on amending the Dunleavy test to make the capacity of the accused relevant to liability***

5.61 There was overwhelming support for the Commission's provisional recommendation to amend the *Dunleavy* gross negligence manslaughter test to make the capacity of the accused a necessary feature of liability. Consultees agreed that it would be unjust to hold intellectually disabled people responsible for causing death by gross negligence in circumstances where they were incapable of assessing possible harm resulting from their actions or their failure to take appropriate precautions.

5.62 However, one consultee submitted that the meaning of "capacity" in paragraph 6.14 of the *Consultation Paper on Involuntary Manslaughter*⁵⁷ was somewhat unclear and asked:

"Is it confined to an accused's mental⁵⁸ and physical capacity, or does it extend to such other matters such as inexperience as arose in *R v Prentice*?⁵⁹ Of course, the problem created by recognising an accused's capacity is that it subjectivises the objective test for

⁵⁵ [1948] IR 95.

⁵⁶ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.138-5.141.

⁵⁷ (LRC 44-2007).

⁵⁸ See *R v Stone and Dobinson* [1977] QB 354.

⁵⁹ [1993] 4 All ER 935.

negligence so as to produce a fluctuating standard as was noted by Megaw J in *Nettleship v Weston*.⁶⁰

It was observed that it is for this reason that some commentators (eg the Victorian Law Commission in its Report on homicide⁶¹) would restrict “capacity” to the mental and physical kinds which are arguably more readily quantifiable than, say, that of inexperience.

5.63 In the context of liability for gross negligence manslaughter due to an omission, the question was raised about what type of test should be introduced. Two related examples were given and the Commission was asked where the line should be drawn between the two scenarios. In the first case a person watches a child drown in a three-inch-deep pond and in the second a person watches a child drowning in a stormy sea.

(d) *The Commission’s Response*

5.64 In the Commission’s view liability for gross negligence manslaughter will not arise unless the defendant owed the deceased a duty of care. Duties of care normally occur where there is a pre-existing relationship between the accused and the deceased, eg between parents and their children, spouses, employers and employees etc.

5.65 The Commission is still in favour of amending the *Dunleavy* test to make the capacity of the accused to advert to the risk or to attain the expected standard a necessary feature of liability. As stated above, there was enormous support for this proposal at the involuntary manslaughter seminar and in submissions received.

5.66 The Commission suggests that “capacity” in this context should be understood as the defendant’s mental and physical ability (or lack thereof) to appreciate the risk or to attain the expected standard. Capacity, should therefore not be understood as inexperience eg in administering cytotoxic drugs by lumbar puncture as was the case in *R v Prentice*.⁶²

5.67 The Commission accordingly recommends that the *Dunleavy*⁶³ gross negligence test be amended so that the capacity of the accused to advert to risk or to attain the expected standard is relevant to liability.

⁶⁰ [1971] 2 QB 691, 707.

⁶¹ See Law Reform Commission of Victoria *Homicide* (Report No 40 1990-1991) at paragraph 270.

⁶² [1993] 4 All ER 935.

⁶³ [1948] IR 95.

(e) Report Recommendation

5.68 *The Commission recommends that the current test for gross negligence manslaughter as set down in The People (AG) v Dunleavy should be amended so that the capacity of the accused to advert to risk or to attain the expected standard is relevant to liability.*

5.69 *Therefore, to ground a conviction of gross negligence manslaughter in Ireland it would be necessary to prove:*

- *that the accused was, by ordinary standards, negligent;*
- *that the negligence caused the death of the victim;*
- *that the negligence was of a very high degree;*
- *that the negligence involved a high degree of risk or likelihood of substantial personal injury to others;*
- *that the accused was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence.*

D Motor manslaughter and the related driving offences

(a) Should the law governing road deaths remain unchanged?

(i) The Consultation Paper recommendation

5.70 The Consultation Paper recommended that there should be no change to the law governing road deaths. Both the statutory offences of dangerous driving causing death and careless driving should continue to exist alongside the more serious offence of manslaughter. The Commission invited submissions on this matter.

(ii) Discussion

5.71 As noted in the previous chapter, most fatal road traffic cases caused by negligent or aggressive driving lead to charges of dangerous driving causing death. This offence was introduced in the 1960s after juries persistently acquitted drivers who had been charged with manslaughter. Regarding motor manslaughter and the related offences of dangerous driving causing death and careless driving, the Commission firstly considered the possibility of simply maintaining the legal status quo so that the statutory offences of dangerous driving causing death and careless driving would continue to exist alongside manslaughter.⁶⁴ Drivers who kill would only be charged with manslaughter in extreme cases of very high culpability where there was a combination of serious factors, for example, where the accused

⁶⁴ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 5.143-5.146.

stole a vehicle and a high speed police chase resulting in death and destruction ensued.

5.72 The Commission identified two more radical reform proposals in the *Consultation Paper on Involuntary Manslaughter*.⁶⁵ The first would involve the removal of deaths caused by negligent driving from the scope of manslaughter altogether, so that a manslaughter conviction could never arise where a car is the instrument of killing, no matter how culpable the driver was in causing death.⁶⁶ The Commission also considered the possibility of abolishing the statutory offences of dangerous driving causing death and careless driving and instead prosecuting all cases of bad driving causing death as manslaughter as was the case up until the 1950s.⁶⁷

5.73 The Commission provisionally recommended that the law governing road deaths should remain unchanged, *ie* dangerous driving causing death should continue to exist alongside the more serious offence of manslaughter.⁶⁸ Drivers who kill would only be prosecuted for manslaughter in extreme cases of very high culpability. Prosecutions for manslaughter might be appropriate in extreme road-deaths cases of very high culpability where joy-riding or high alcohol consumption in conjunction with speeding are factors. A manslaughter prosecution would also be fitting in case such as *R v Spree and Keymark Services Ltd*.⁶⁹ In *Spree* the director of a trucking company who encouraged employees to falsify their driving records so as to drive for longer periods, putting countless road-users at risk of serious injury and death, was convicted of manslaughter when one of his employees fell asleep at the wheel during a shift, killing himself and two other motorists.

5.74 The Commission thought that it would be inappropriate to remove road deaths entirely from the scope of manslaughter simply because the killing occurred on a public road rather than in a hospital operating theatre or a building site.⁷⁰ If the culpability of an accused is high, the context in which the killing occurred should not preclude a manslaughter prosecution.

5.75 The Commission considered that it would be too radical a move to abolish the statutory offences and to prosecute all deaths which are caused by bad driving as manslaughter in the future because juries may still prove to

⁶⁵ (LRC CP 44-2007) at paragraphs 5.147-5.155,

⁶⁶ *Ibid* at paragraphs 5.147-5.152.

⁶⁷ *Ibid* at paragraphs 5.153-5.155.

⁶⁸ *Ibid* at paragraphs 5.156-5.160.

⁶⁹ Winchester Crown Court December 8 December 2004

⁷⁰ Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraph 5.151.

be unwilling to convict a negligent driver of such a serious homicide offence.

5.76 One consultee pointed out that there have been an increasing number of incidents where people have deliberately rammed police cars and injured or killed members of the Garda Síochána. It was submitted that juries are more likely to get stricter and be more willing to convict such drivers who cause death with the offence of manslaughter.

5.77 There was broad support for maintaining the law governing road traffic offences as it is. Submissions were in favour of the continued existence of both the statutory offence of dangerous driving causing death alongside the more serious offence of manslaughter. Consultees acknowledged that manslaughter is hardly ever charged where death occurs in the driving context. In order for a manslaughter charge to ensue, the culpability of the driver would have to be extremely high, as where death occurred during a joyriding spree or after the accused consumed high levels of alcohol.

5.78 Given the existence of significant latent knowledge amongst Irish road users in relation to appropriate driving behaviour and the implications of non-adherence to legislation and good practice, it was submitted that latent knowledge in the context of motoring offences should be afforded greater significance.⁷¹ Finally it was suggested that sentencing guidelines be issued to the courts on manslaughter and the related driving offences and these guidelines would be kept under regular review. There was no support the introduction of mandatory sentencing for these offences.

5.79 The Commission is confident that the best course of action regarding deaths which occur in the driving context is to maintain the statutory offences of dangerous driving causing death and careless driving alongside the more serious offence of manslaughter. Drivers who kill would only be prosecuted for manslaughter in extreme cases of very high culpability.

(iii) Report Recommendation

5.80 *The Commission recommends that both the statutory offence of dangerous driving causing death and that of careless driving should continue to exist alongside the more serious offence of manslaughter.*

⁷¹ See Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007) at paragraphs 4.151-4.164 where the Commission addressed the concept of being a “criminal” and latent knowledge in relation to road fatalities.

(b) *The relevance of death in careless driving cases*

(i) *Consultation Paper Recommendation*

5.81 The Consultation Paper recommended that judges should be able to take the fact that a death occurred into account when imposing sentence in a case of careless driving where the culpability of the accused has been clearly established by the prosecution.

(ii) *Discussion*

5.82 The Commission received a small number of submissions on its recommendation that judges should be able to take into account the fact that a death occurred when imposing sentence in a case of careless driving where the culpability of the accused has been clearly established by the prosecution. Opinion was divided on this issue.

5.83 A few consultees supported the proposal on the basis that the occurrence of death makes the offence more serious. It was submitted that where death occurs in the driving context often the victim's family will feel very let down if careless driving is charged rather than the more serious offence of dangerous driving causing death due to a perceived lack of culpability or evidence. It was also suggested that where deaths are caused by careless (as opposed to dangerous driving), it might be more appropriate to rename the offence "careless driving causing death" to acknowledge the fact of death in the label.

5.84 Other consultees disagreed with the Commission's provisional recommendation to allow judges to take into account the fact of death when sentencing people for careless driving as it could result in vastly differing penalties even though the event occurred in similar circumstances. For example, where one driver's inadvertence causes a death because of the frailty of an injured pedestrian, he/she might face a tougher penalty than another driver whose behaviour is the same, or indeed more culpable, simply because in the second case the injured party is stronger and survives.

5.85 The Commission recognises that there is a great deal of truth in Henry LJ's statement in *R v Simmonds*:

"Whether sentencing courts should take into account criminality alone or both the criminality and the consequences of an offence – and in the latter even in what proportions – is ultimately a question of choice and policy."⁷²

Clearly, the occurrence of death is a very serious consequence of committing a criminal offence and there is a powerful argument that, regardless of whether death occurs unforeseeably as a result of a deliberate minor assault

⁷² *R v Simmonds* [1999] 2 Cr App R 18, 23.

or due to careless driving, the fact of death should be marked in the offence label. Marking the death of a loved one is very important to victims. Loss should be recognised in the offence label, *eg* “careless driving causing death”.

5.86 The Commission believes that a new offence of “careless driving causing death” should be enacted and that judges should be able to take the fact that a death occurred into account when imposing sentence in a case of careless driving where the culpability of the accused has been clearly established by the prosecution. A separate offence label is justifiable on the basis that it explicitly marks the occurrence of death as a consequence of the careless driving in question. Section 52 of the *Road Traffic Act 1961* could be amended to provide that a driver should be prosecuted on indictment for “careless driving causing death” rather than “careless driving” *simpliciter* where a death occurs. A higher maximum penalty should be available for “careless driving causing death” than for careless driving that did not cause death. Although the objective level of culpability may be comparable, the consequence of death makes the careless driving in question more serious.

(iii) Report Recommendation

5.87 *The Commission recommends that a new offence of “careless driving causing death” be created in order to mark the occurrence of death.*

5.88 *The Commission suggests that section 52 of the Road Traffic Act 1961 be amended by the insertion of the following subsections after subsection (2).*

(3) A person commits the offence of careless driving causing death if he or she causes the death of another person by driving a vehicle in a public place without due care and attention.

(3) Prosecutions for the offence of careless driving causing death shall be on indictment.

CHAPTER 6 SUMMARY OF RECOMMENDATIONS

6.01 The Commission recommends that the murder/manslaughter distinction should be retained. [Paragraph 1.24]

6.02 The Commission recommends that the mandatory life sentence for murder be abolished and replaced with a discretionary maximum sentence of life imprisonment. [Paragraph 1.66]

6.03 The Commission recommends that the continued existence of the mandatory life sentence should not, however, preclude expansion of the mental element of murder. [Paragraph 1.67]

6.04 The Commission recommends that the fault element for murder be broadened to embrace reckless killing manifesting an extreme indifference to human life. [Paragraph 3.40]

6.05 The Commission recommends that an intention to cause serious injury should be retained as part of the fault element for murder. [Paragraph 3.45]

6.06 The Commission recommends that the fault element for murder should not be expanded to embrace recklessness as to serious injury. [Paragraph 3.49]

6.07 The Commission recommends that the term “serious injury” should remain undefined. [Paragraph 3.61]

6.08 The Commission recommends that the following definition of murder be adopted.

(1) Where a person kills another unlawfully it shall be murder if:

(a) The accused person intended to kill or cause serious injury to some other person, whether that other person is the person actually killed or not; or

(b) The killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.

(2) A person acts “recklessly” with respect to a killing when he disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard

involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.”

(3) A result is intended if:

- (i) It is the defendant's conscious object or purpose to cause it; or
- (ii) He is aware that it is virtually certain that his conduct will cause it, or would be virtually certain to cause it if he were to succeed in his purpose of causing some other result.

(4) The accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted. [Paragraph 3.78]

6.09 The Commission recommends the retention of the existing parameters of unlawful and dangerous act manslaughter in that a person commits unlawful and dangerous act manslaughter if:

(1) the act which causes death constitutes a criminal offence and poses a risk of bodily harm to another; and

(2) the act is one which an ordinary reasonable person would consider to be dangerous, that is, likely to cause bodily harm. [Paragraph 5.38]

6.10 The Commission recommends that a new offence called “assault causing death” should be enacted which would be below manslaughter on the homicide ladder. The Commission recommends the following definition of “assault causing death”:

Assault causing death occurs where an accused commits an assault which causes death and a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances. [Paragraph 5.46]

6.11 The Commission recommends that situations where death is caused by a drug injection should not form part of the scope of unlawful and dangerous act manslaughter. [Paragraph 5.52]

6.12 The Commission recommends that the current test for gross negligence manslaughter as set down in *The People (AG) v Dunleavy* should be amended so that the capacity of the accused to advert to risk or to attain the expected standard is relevant to liability.

Therefore, to ground a conviction of gross negligence manslaughter in Ireland it would be necessary to prove:

- that the accused was, by ordinary standards, negligent;
- that the negligence caused the death of the victim;

- that the negligence was of a very high degree;
- that the negligence involved a high degree of risk or likelihood of substantial personal injury to others;
- that the accused was capable of appreciating the risk or meeting the expected standard at the time of the alleged gross negligence. [Paragraphs 5.68-5.69]

6.13 The Commission recommends that both the statutory offence of dangerous driving causing death and that of careless driving should continue to exist alongside the more serious offence of manslaughter. [Paragraph 5.80]

6.14 The Commission recommends that a new offence of “careless driving causing death” be created in order to mark the occurrence of death.

The Commission suggests that section 52 of the *Road Traffic Act 1961* be amended by the insertion of the following subsections after subsection (2).

(3) A person commits the offence of careless driving causing death if he or she causes the death of another person by driving a vehicle in a public place without due care and attention.

(3) Prosecutions for the offence of careless driving causing death shall be on indictment. [Paragraphs 5.87-5.88]

APPENDIX A DRAFT HOMICIDE BILL 2008¹

¹ The Commission is conscious that it likely that sections 2 to 5 of the draft Bill would be inserted into the proposed Criminal Code which would arise from the deliberations of the Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*.

DRAFT HOMICIDE BILL 2008

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
2. Murder
3. Unlawful and dangerous act manslaughter
4. Gross negligence manslaughter
5. Assault causing death
6. Careless driving causing death
7. Repeal

ACTS REFERRED TO

Criminal Justice Act 1964

1964, No.5

Road Traffic Act 1961

1961, No.24

DRAFT HOMICIDE BILL 2008

BILL

Entitled

AN ACT TO SET OUT IN CODIFIED FORM THE MENTAL ELEMENTS OF THE OFFENCES OF MURDER, UNLAWFUL AND DANGEROUS ACT MANSLAUGHTER AND GROSS NEGLIGENCE MANSLAUGHTER, TO CREATE THE OFFENCES OF ASSAULT CAUSING DEATH AND CARELESS DRIVING CAUSING DEATH AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title and commencement

1.—(1) This Act may be cited as the Homicide Act 2008.²

(2) This Act comes into force on such day or days as the Minister for Justice, Equality and Law Reform may by order appoint.

²

The Commission is conscious that it likely that sections 2 to 5 of the draft Bill would be inserted into the proposed Criminal Code which would arise from the deliberations of the Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*. In preparing this draft Bill, the Commission has used a drafting formula which includes the name of the offence in the statutory provision. The Commission notes that, in the context of eventual codification, a consistent drafting formula must be used but that the precise nature of that formula is for the drafters of the code.

Murder

2.—(1) Where a person kills another unlawfully it shall be the offence of murder if:³

- (a) the accused person intended to kill or cause serious injury to some other person, whether that other person is the person actually killed or not; or
 - (b) the killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.
- (2) A person acts recklessly with respect to a killing when he or she disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering the circumstances known to him or her, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the accused person's situation.
- (3) A result is intended if:
- (a) it is the accused person's conscious object or purpose to cause it; or
 - (b) the accused person is aware that it is virtually certain that the conduct will cause it, or would be virtually certain to cause it if the accused person were to succeed in his or her purpose of causing some other result.
- (4) The accused person shall be presumed to have intended the natural and probable consequences of his or her conduct, but this presumption may be rebutted.

Explanatory note

Section 2 implements the recommendations in paragraph 3.78.

³

This section follows the drafting formula in the *Criminal Justice Act 1964*.

Unlawful and dangerous act manslaughter

3.—Where a person kills another unlawfully it shall be unlawful and dangerous act manslaughter if:⁴

- (a) the act which causes death constitutes a criminal offence and poses a risk of bodily harm to another; and
- (b) the act is one which an ordinary reasonable person would consider to be dangerous, that is, is likely to cause bodily harm.

Explanatory note

Section 3 implements the recommendations in paragraph 5.38.

Gross negligence manslaughter

4.—Where a person kills another unlawfully it shall be gross negligence manslaughter if:⁵

- (i) the accused person was, by ordinary standards, negligent;
- (ii) the negligence caused the death of the victim;
- (iii) the negligence was of a very high degree;
- (iv) the negligence involved a high degree of risk or likelihood of substantial personal injury to others; and
- (v) the accused person had the mental or physical capacity to appreciate the risk or meet the expected standard at the time of the alleged gross negligence.

Explanatory note

Section 4 implements the recommendations in paragraph 5.69.

⁴ This section follows the drafting formula in the *Criminal Justice Act 1964*.

⁵ This section follows the drafting formula in the *Criminal Justice Act 1964*.

Assault causing death

5.—(1) A person commits the offence of assault causing death if:

- (a) the accused person commits an assault which causes death, and
 - (b) a reasonable person would not have foreseen that death or serious injury was, in the circumstances, likely to result.
- (2) Prosecutions for the offence of assault causing death shall be on indictment.

Explanatory note

Section 5 implements the recommendations in paragraph 5.46.

Careless driving causing death

6.—Section 52 of the *Road Traffic Act 1961* is amended by the insertion of the following subsections after subsection (2):

- “(3) A person commits the offence of careless driving causing death if he or she causes the death of another person by driving a vehicle in a public place without due care and attention.
- (4) Prosecutions for the offence of careless driving causing death shall be on indictment.”

Explanatory note

Section 6 implements the recommendations in paragraph 5.88.

Repeal

7.—Section 4 of the *Criminal Justice Act 1964* is repealed on the coming into force of section 2.



The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to all legislative changes.

€15

ADDRESS

35-39 Shelbourne Road Dublin 4 Ireland

TELEPHONE

+353 1 6377600

FAX

+353 1 6377601

EMAIL

info@lawreform.ie

WEBSITE

www.lawreform.ie

The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975