

Murder: discussion of proposed changes, ACT

Barrister Shane Gill has this to say about the proposed changes to the law of murder in the Australian Capital Territory.

In summary, Mr Gill argues that:

- murder should require clear intent, or clearly-demonstrated recklessness as to causing death: anything less may be manslaughter, but it is not ‘murder’;
- murder should be reserved to the most serious cases of causing death, and ought not be watered down;
- changing the law to make it more complex, and harder for juries to understand, is not a positive move; and
- the ACT Government’s proposed changes would depart from the Model Criminal Code.

Re: Proposed amendment to the elements of murder

Barristers express concern at the proposal to amend the elements of murder. These concerns flow from a number of different but important considerations.

Firstly, the offence of murder ought be directed to the most serious cases of the causing of death, being those cases that are inherently serious due to the culpability which attaches to them. The current state of the offence of murder reflects such a position, being directed to either the intentional causing of death or recklessness as to the causing of death. These states of mind reflect the most serious forms of culpability. The offence of murder ought not be watered down to encompass less culpable acts, particularly noting that such less culpable acts are covered by the broad offence of manslaughter.

Barristers are concerned that the extension suggested will cover matters that the community at large would not regard as murder, being acts that are likely to cause significant and longstanding harm, but which in no way were accompanied by any considerations of the causing of death. These acts are currently covered under the broad and flexible offence of manslaughter.

Secondly, the proposed amendment carries with it a high degree of complexity. A serious offence such as murder ought to have clear-cut elements, capable of ready expression to a jury. The proposed amendment adds uncertainty and confusion to the elements for murder, particularly as it incorporates the definitions of harm and serious harm from the Code. The amended offence would incorporate intention, recklessness and a third species of intent relating to the concept “likely”. Such complexity and confusion is undesirable, not only from the perspective of clarity in explanation to a jury, but also in providing unintended extensions to the offence.

Thirdly, the Territory has for many years now pursued codification of the criminal law based upon the recommendations of MCCOC*. The proposals are a marked and serious

departure from the recommendations of MCCOC, whereas the current terms of murder in the Territory reasonably reflect the recommendations of MCCOC.

Fourthly, it is difficult to see either any significant deficit in the offence as it currently stands, nor any pressing need that the amendments would fulfill. The development of law on the basis that it will increase convictions for a particular offence is not an appropriate paradigm for the development of the criminal law.

– Shane Gill is an ACT barrister

** Model Criminal Code Officers Committee (the cumbersomely-named mechanism for drafting what would become the agreed basis for future national legislation)*