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3 April 2009

Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Safety
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Dunne

RE: Inquiry into *Crimes (Murder) Amendment Bill 2008*

Thank you for your letter of 23 February 2009 in which you sought Civil Liberties Australia's (CLA's) comment on the *Crimes (Murder) Amendment Bill 2008*, which was tabled in the ACT Legislative Assembly on 11 December 2008 and that was subsequently referred to the Committee for consideration.

I note that the Attorney General did seek CLA's views on the Bill, but did so after tabling which, in CLA's view, did not fulfil a commitment to consultation. Rather, the tabling of the Bill signified the Government's legislative intent, and its consultation approach was aimed more at garnering community favour in an attempt to blunt a more considered approach to the legislative outcome sought in the Bill. Consultation could be best described as illusory and CLA would urge the Committee to encourage the Government to in future engage in constructive dialogue – with interests representing all sectors of potential impact – before drafting instructions are prepared for a Bill.

In a letter to CLA dated 13 December 2008, the Attorney General erroneously described "the policy of amending the offence of murder in the Territory as an important measure to modernise the offence of murder in the Territory consistent with other States and Territories". Invariably, as you may be aware, the *Crimes Act 1900* (ACT) is based on the NSW *Crimes Act* as it applied in the Territory through Commonwealth ordinances.

The NSW Crimes Act has always defined murder to include a *mens rea* of intent to cause grievous bodily harm, and has also included the 'felony' or 'constructive' murder rule. In 1990 the offence of murder was deliberately amended in the ACT to remove the rule on felony murder, and also to remove intent to cause grievous bodily harm as a head of *mens rea* for murder. These amendments were a clear and deliberate repudiation of the NSW (and common law) approach to defining the offence of murder.

At that time, and up until now, the ACT has been heralded amongst legal academics and many in the legal fraternity as being the most progressive jurisdiction in terms of how it defines the offence of murder. Indeed, law reform commissions and advisory bodies that have considered this issue since the 1960s have concluded that intent to cause grievous bodily harm as a head of *mens rea* for murder is anachronistic, and does not accord with modern conceptions of criminal culpability. Consequently, all these law reform bodies have

recommended that the offence of murder be amended to remove intent to cause grievous bodily harm as a head of *mens rea* for murder.[1]

In light of this legislative history, the amendments to the Bill can hardly be described as having the claimed "*modernising*" effect. Instead, they seek to undo the 1990 reforms and return the ACT to the retrograde state of the law as it had existed up until 1990. In so doing, the Bill runs contrary to the weight of scholarly consensus and learned opinion on this issue. The Bill does not elevate the ACT to the superior position of the law in other states; rather, it drags the ACT back to a position that it has previously sought to move away from.

Of particular relevance is the recommendation of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, which was responsible for drafting the Model Criminal Code; the ACT has committed itself to incrementally implementing the core chapters of the model code, which would include the 'model' offence of murder. The Model Criminal Code Officers Committee has recommended that the *mens rea* for murder should consist only of an intention to cause death, or reckless indifference as to whether death will result from a person's conduct.[2] In reaching this conclusion, the Committee recalled that the offence of murder as defined in other jurisdictions has failed to take into account the significant advancements in medical technology which allow a meaningful distinction to be drawn between injuries occasioning grievous bodily harm, and injuries which will likely result in death. The Committee also observed that:

> the notion of reckless killing has since been developed. This is said to be capable of subsuming the serious harm category of murder. Critics also argue that the notion of serious harm is too vague, leading to inconsistent verdicts and unacceptably uncertain results.[3]

It is unfortunate that, if enacted, the Bill would see the ACT depart from it's commitment to implement the model criminal code which has been the subject of much more rigorous, national consideration than has been given to this Bill.

It is noted that the Government contends some virtue in its intended departure from the Code on the basis '*no other Australian jurisdiction has adopted the recommendations of MCCOC[4]'.* The fact that no other Australian jurisdiction has adopted the Code's recommendation does not mean that there is anything in principle that is wrong or obnoxious with the Code — it may simply mean that no other legislature has turned its mind to amending its law on this matter.

I also note that the Government's intention of amending the offence of murder was announced not long after the ACT Supreme Court rendered its verdict in the matter of *R v Porritt* [2008] ACTSC 33 and also during the 'heat' of an election campaign. Given the timing of these events, it would appear that the Government's policy has been influenced, in whole or in part, by the Supreme Court's decision in that matter. Without venturing any opinion on the correctness of that decision, CLA would suggest that it does not bode well for the development of ACT law that major reforms to the criminal law are based on knee-jerk reactions to individual cases.

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[1] Mitchell Committee (1977), the Victorian Law Reform Commission (1974, 1984), the English Law Commission (1966, 1989), the English Criminal Law Revision Committee (1980), two English Royal Commissions (one on Capital Punishment (1949-1953) and the other on Murder and Life Imprisonment (1989)), and the Law Reform Committee of Canada (1984).

[2] Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, Discussion Paper, Model Criminal Code, Chapter 5 – Fatal Offences Against the Person, June 1998, p. 53.

[3] Ibid, p. 53.

[4] Attorney General's letter of 10 February 2009 to the Committee

I also note that the Justice and Community Safety Human Rights Unit has provided a detailed legal advice which was tabled with the Bill. That advice concluded that the Bill is consistent with the *Human Rights Act 2004.* That advice was in turn scrutinised by the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)[5].

CLA commends both the Government and the Scrutiny Committee for their thoughtful and detailed analysis on the human rights questions involved.

After having the benefit of reading the Human Rights Unit advice, the Scrutiny of Bills Committee's comments, and the Attorney General's response, CLA has little more to add to the subject other than to say that, with all due respect to the Committee, CLA agrees with the Attorney's view that the key question is whether imprisonment for murder under the Bill can be considered 'arbitrary' for the purpose of section 18(1) of the HRA. To this end, CLA agrees that in light of section 31 of the HRA and the definition of 'international law', the comments of the United Nations Human Rights Committee are relevant. CLA also agrees that the approach to applying section 18(1) of the HRA which seemed to be suggested by the Committee, namely to see if any provision could result in a person being detained, and if so, applying the 'proportionality test', is overly simplistic and does not take proper account of the concept of arbitrariness which is central to that provision.

CLA also notes the distinction drawn by the Human Rights Unit between the mandatory penalty of life imprisonment for murder in Canada, and the discretionary life sentence available in the ACT. Whilst accepting the merit of this distinction, CLA points to the comment of the Canadian Supreme Court in *R v Logan* [1990] 2 SCR 731 where it stated that:

> ...the principles of fundamental justice require a minimum degree of *mens rea* for only a very few offences. The criteria by which these offences can be identified are, primarily, the stigma associated with a conviction and, as a secondary consideration, the penalties available.
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> **It should be noted that, as a basis for a constitutionally required minimum degree of *mens rea*, the social stigma associated with a conviction is the most important consideration, not the sentence.** Few offences have a high minimum sentence such as that for murder. For some offences, there is a high maximum and a low minimum penalty available; for other offences, the maximum penalty is much reduced and there is no minimum imposed whatsoever. In either situation, the fact that a lesser sentence is available or imposed, by statute or through the exercise of judicial discretion, in no way ends the inquiry. The sentencing range available to the judge is not conclusive of the level of *mens rea* constitutionally required. Instead, t**he crucial consideration is whether there is a continuing serious social stigma which will be imposed on the accused upon conviction.**

It is clear from the Canadian jurisprudence that, concerning the principle issue in assessing whether a particular *mens rea* is sufficiently high, particular attention should be paid to the stigma attaching to conviction, not the penalty. As such, CLA does not believe the Canadian jurisprudence can be as readily dismissed as the Human Rights Unit might seem to suggest on the basis of differences in penalties.

Although the Bill might be technically compatible with the Human Rights Act 2004, it by no means follows that it can be considered 'best practice'. Just because legally the government can amend the offence of murder in the manner that this Bill seeks, it does not follow that it should.

As a matter of legal policy, CLA agrees with the comments of the Canadian Supreme Court in *R v Martineau* [1990] 2 S.C.R. 633, which were quoted in the tabled legal advice, where it held that:

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[5] Scrutiny Report, 3 February 2009

> …in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death. The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. Murder has long been recognized as the "worst" and most heinous of peace time crimes. It is, therefore, essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death.

As the Canadian Supreme Court has held, murder is recognised as the "worst" crime, and therefore should only be reserved for those who cause the death of another in circumstances where they posses a particularly high level of criminal culpability. By lowering the threshold for murder you would, in effect, be "cheapening" the offence of murder — you would be branding those who cause someone's death without any desire to see this occur as being guilty of the same offence, and thus having a commensurate level of culpability and being the moral equivalent as someone who, for example, makes a premeditated, deliberate and calculated decision to take a human life.

CLA agrees with the ACT Law Society's position that, instead of amending the offence of murder, if the Government is concerned about decisions such as that handed down in the case of *R v Porritt,* it should consider increasing the penalty for manslaughter.

I suggest that the issue of what the *mens rea* for murder should be and whether the penalty for manslaughter should be increased could be referred to the newly established ACT Law Reform Advisory Council — I am sure that the Government, the members of the Legislative Assembly and the community at large would benefit from the Council's considered input. Indeed, I would question the utility of such a body if it is not tasked with considering and advising on important and controversial issues such as this.

I would be concerned if the Government's approach to improve murder convictions by abandoning the intent to kill as a key element of murder is an attempt to remedy some perceived failing that is not about the success of a conviction but to mask a more fundamental failure of the executive arm of government to conduct its investigation and appreciation of the facts that would lead to the laying of the most appropriate charge in the circumstances.

A successful prosecution of the charge is underpinned by a sound understanding of the circumstances of the death that leads to laying the charge of murder or manslaughter. There needs to be a competent appreciation of the facts to determine what the most appropriate charge will be and for the Crown then to successfully lead the evidence to provide a jury with the facts to bring about a conviction. If one or more of these steps is not performed well, then the jury may not bring about the outcome desired by the Crown.

CLA has commented in other fora about the lack of experience within ACT Policing when considered against other jurisdictions. The contractual relationship between ACT Policing and the Australian Federal Police (AFP) results in community policing experience not being grown or imported into ACT Policing, but rather exported to the AFP by ACT Policing. This results in ACT Policing having some 60% of its force with less than five years experience across most ranks; NSW Police for example have a far better ratio of some 40% of its force with similar experience. Given the low prevalence of murder in the ACT and the actual experience of officers investigating such matters, a less than optimal appreciation of the facts could arise.[6]

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[6] Australian Federal Police Annual Report 2007-08 Table 13 p.145 (note the variance in total sworn officers [754] to that in the ACT Policing Annual Report 2007-08 [692.1] Table C.2 p.89.

Similarly, anecdotal comment has been made through the *Canberra Times* on a number of occasions about the high workloads and high turnover of officers employed in the Office of the Director of Public Prosecutions (DPP). I am unaware of any publicly available information that would clarify whether experience in the DPP's Office has been a limiting factor in its assessments and opinions on the most appropriate charge to lay before a Court and the conduct of the subsequent case. However, it is an issue the Committee may wish to consider.

I also reiterate that a failure in a conviction of murder does not in itself mean a person walks free as the Court has the ability to find a conviction of manslaughter proved instead; justice is still served in all the circumstances of a crime.

Yours sincerely

Dr Kristine Klugman
President
Civil Liberties Australia