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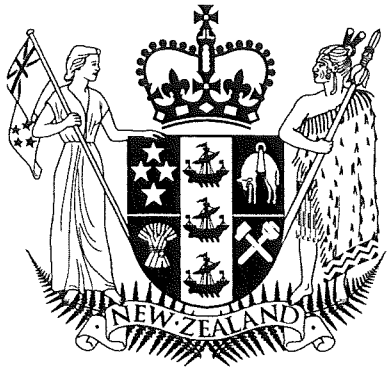

Report of the

ATTORNEY-GENERAL

on the Degrees of Murder Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 258 of the Standing Orders of the House of Representatives.

VETTING FOR CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: THE DEGREES OF MURDER BILL

Background

1 The Degrees of Murder Bill, a Member's Bill introduced in the House of Representatives on 29 February 1996, by Brian Neeson MP, has been vetted for consistency with the New Zealand Bill of Rights Act 1990. I have concluded that, for the reasons set out below, clause 6 of the Bill, in so far as it specifies a mandatory non-parole sentence of life imprisonment for the proposed offence of murder in the first degree, is inconsistent with section 9 of the New Zealand Bill of Rights Act. The inconsistency arises from the imposition of a "disproportionately severe punishment" in terms of section 9 and cannot be treated as a reasonable limit in terms of section 5 of that Act.

2 There are some elements of unclarity in the interrelationship between the various measures proposed in the Bill. The proposed new section 172 appears to be intended to provide for "mandatory imprisonment for natural life, without the possibility of parole or release" as suggested in the explanatory note, and that is the basis on which I have proceeded. It is, however unclear, what purpose is to be served by allowing a jury to make a statement in relation to the "sentence" of a person found guilty of "first" degree murder (see clause 9). One purpose of such a provision might be to enable the jury to recommend a lighter sentence than that prescribed in proposed new section 172 (i.e. to allow for some relief from the mandatory regime of imprisonment for natural life, in cases where the jury considers such a punishment to be overly harsh). However, such an interpretation is inconsistent with a plain reading of proposed section 172, and accordingly this report proceeds on the assumption that clause 9 has no such mitigating effect.

3 There is also a degree of uncertainty as to the circumstances in which it is proved that a homicide is committed in a particularly sadistic, heinous, malicious or inhuman manner. Expressions such as "sadistic" "heinous" and "inhuman" lack precision and are not commonly employed in New Zealand legislation for that very reason. It is assumed that the clause is designed to capture "culpable homicides" carried out in a manner with sufficiently aggravating features to distinguish them from "ordinary" homicides (proposed new section 167(b) of the Crimes Act). The primary focus of the subclause appears to be the "manner" of commission of the offence, not the offender's

state of mind at the time of commission of the offence. Similarly the context in which the offence is committed appears to be irrelevant, as do the personal circumstances, age, and characteristics of the offender. There does appear to be a suggestion that illegality in the method of arrest may be in some way relevant (see proposed new section 170 of the Crimes Act).

4 Finally the precise delineation of responsibilities between Judge and Jury in determining whether a charge of murder in the first degree is proved is not described, but this report proceeds on the assumption that the decision is one for a Jury, subject to proper direction on the applicable law by the presiding Judge.

Overseas Authorities

5 Case law from overseas jurisdictions (in particular with respect to the right not to be subjected to "cruel and unusual treatment or punishment", under section 12 of the Canadian Charter of Rights) has been reviewed.

6 There are numerous Canadian decisions, including judgments handed down by the Supreme Court of Canada, which consider section 12 of the Charter with respect to indeterminate or minimum sentences imposed.

7 Section 12 of the Canadian Charter does not contain the element of "disproportionately severe treatment or punishment" contained in section 9 of the Bill of Rights Act. However it is clear that the phrase "cruel and unusual" includes two classes of treatment or punishment, in the Canadian context: (1) those that are barbaric in themselves, and (2) those that are grossly disproportionate to the offence.

8 With respect to otherwise indeterminate sentences, the Canadian Supreme Court has held that the availability of parole ensures that incarceration is imposed for only as long as the circumstances of the individual case requires, thus precluding the legislation in question being successfully challenged under section 12 of the Charter (eg: *R v Lyons* (1987) 37 C.C.C. (3d) 1, 44 D.L.R (4th) 193).

9 The Canadian Supreme Court has also placed a great deal of emphasis upon the need to establish whether the sentence is appropriate, having regard to the particular circumstances of the offender. The effect of the sentence imposed is also assessed by the Court (eg: *Smith v The Queen* 34 C.C.C. (3d) 97, 40 D.L.R (4th) 435).

10 Under Canadian law it seems clear that minimum sentences per se do not constitute "cruel and unusual treatment" (eg: *R v Goltz* [1991] 3 S.C.R 485; *R v Luxton* [1990] 2 S.C.R 711). However, the Canadian Supreme Court has in several cases held that the constitutionality of such sentences can be assessed by measuring the proportionality of the sentence by reference to a hypothetical example.

11 In summary, the Canadian Courts in assessing whether there is an inconsistency with Section 12 of the Canadian Charter of Rights and Freedoms which prohibits "cruel and unusual treatment or punishment" consider whether the punishment or treatment is so excessive as to outrage standards of decency. In considering whether this test is applicable the Courts examine whether or not the punishment is grossly disproportionate to what would have been appropriate. In making that assessment the Court will consider not only the case before it (including the particular circumstances of the offender and the effect of any sentence imposed) but hypothetical cases, excluding cases which are unreasonable or far fetched.

12 With regard to other overseas authorities, the recent decision of the South African Constitutional Court in declaring that the death penalty is contrary to South Africa's interim constitution, on the grounds that it amounts to "cruel, inhuman or degrading treatment or punishment", is instructive. In that decision it is apparent that of the Justices who expressed a view on the desirability of life imprisonment as an alternative to the death penalty, such a penalty is only considered appropriate in the context of offences involving recidivist murderers or rapists. The United States authorities have also been reviewed but have provided no great assistance in resolving the particular issues raised by the Degrees of Murder Bill.

Application

13 Having reviewed the appropriate authorities, it is considered that there are a number of relevant factors in determining whether clause 6 of the Degrees of Murder Bill is inconsistent with section 9 of the New Zealand Bill of Rights Act. These are:

(a) There is a significant lack of clarity as to the likely operation and scope of the offence of murder in the first degree;

(b) It appears that in the application of proposed new section 167(b) of the Crimes Act little or no allowance may be made in respect of the accused's state of mind

at the time of commission of the offence, the context in which the offence occurred or the personal characteristics and circumstances of the offender;

(c) The proposed sentence, as framed, contains no discretion for the Court to impose a sentence other than an indeterminate sentence which is incapable of review;

(d) There is no review by any authority to ensure that incarceration is imposed for only as long as the circumstances of the individual case requires;

(e) There is no account taken whether the incident constituting the offence is isolated or forms a pattern of violent conduct or whether the pattern of conduct is intractable;

(f) There is no evidence, of which I am aware, that a mandatory life sentence with no prospect of parole better serves the objective of the proposed legislation than a less severe punishment;

(g) The nature of an indeterminate sentence is such that there is no possibility of release. The inmate faces incarceration for the rest of his or her natural life;

(h) No assessment as to whether the offender presents a danger or substantial risk to society at any time during the sentencing or incarceration process is required.

Conclusion

14 Having regard to the above considerations and noting the Canadian Supreme Court's view that "the effect of that [state imposed] punishment must not be grossly disproportionate to what would have been appropriate", it is considered that the proposed penalty for murder in the first degree, as defined in the bill, is inconsistent with section 9 of the New Zealand Bill of Rights Act. This conclusion is not reached on the basis that a mandatory penalty of imprisonment for life without possibility of parole or release must inevitably or invariably constitute a breach of section 9. Rather, this conclusion is reached upon the basis that the offence provision and mandatory penalty, as drafted, cover an overly broad range of situations and conduct, including persons acting in situations of "diminished responsibility" and persons acting in circumstances in which a mandatory penalty of life imprisonment without possibility of parole or release would constitute "an affront to common decency" (whether by reason of the context in which the offending occurred or other considerations such as the age of the offender). In other words it is the particular drafting of the provisions of this Bill relating to murder in the first degree, and the resultant capacity for disproportionately severe treatment

or punishment, which is critical to the conclusion that there is a breach of section 9 of the Bill of Rights Act.

15 Having regard to Canadian case law, it is not considered that a penalty of mandatory life imprisonment with no possibility of parole, in the context of the offence of murder in the first degree, as defined in this Bill, constitutes a justified limitation under section 5 of the New Zealand Bill of Rights Act.

16 Assuming that the objective of the legislation is of sufficient importance to warrant overriding a constitutionally protected right or freedom, it is considered that the proposed penalty for the offence of murder in the first degree as defined in this Bill, cannot be treated as a justified limitation applying the following criteria (recognised under Canadian case law): (1) The measure does not impair as little as possible on the right or freedom in question; (2) The limitation is so deleterious to outweigh the substantive justification for the limitation; (3) The proposed measure is not rationally connected to the objective.

Dated this 19th day of March 1996.

Paul East.

Attorney-General

WELLINGTON, NEW ZEALAND:
Published by Order of the House of Representatives—1996
69658—96PT