With Malice Aforethought: A Study of the Crime & Punishment for Homicide, Louis Blom-Cooper and Terence Morris, Hart Publishing, Oxford & Portland, Oregon, 2004

This is a book that mounts a double-barrelled attack on the English law of homicide and proposes major reforms. The first barrel is discharged against the crime of murder as long since formulated by the common law and the consequential distinction between murder and manslaughter. The reforming proposal here is that all types of murder and manslaughter be replaced by a single offence of criminal homicide, the penalty for which, initially in the hands of the judge, would be 'at large'. The second or reserve barrel, to be resorted to if the first fails in its objective and the reforming proposal is not adopted, is discharged against the present law requiring a mandatory life sentence on conviction for murder. The reforming proposal there is that the sentencing judge should have a discretion, subject to legislated 'guidelines', as to sentence on conviction of murder having regard, broadly, to the seriousness of the offence and the personal characteristics, particularly dangerousness, of the offender.

Both authors have had long involvement with criminal justice issues. Blom-Copper as a barrister, judge and author, Morris as an academic and sitting Justice of the Peace, and both as advisors to government on such issues. They both campaigned over a period of years for the abolition of capital punishment in Great Britain (achieved in 1965).

As to the proposal to replace murder and manslaughter with a single offence of criminal homicide it may be noted that this suggestion has been around for some time. The most oft-cited example (cited also by the authors) is probably Lord Kilbrandon's call in *Hyam* ([1975] AC 55 at 98) for the substitution of a single crime of 'unlawful homicide' for murder and manslaughter. The authors' essential argument for a single offence of criminal homicide is that justice and a 'sound intellectual base' (or rationality) dictate recognition that the considerable range of homicides treated by the law should no longer be subjected to the anomalies, fictions and complexities of the law of murder and manslaughter. As examples of the range of homicides the authors refer to killings by battered women, 'mercy' killings, killings by householders of intruders, suspicious cot deaths, ferry disaster deaths, motorised killings and corporate killings. This disparate range, it is suggested, calls into question the appropriateness of the old murder/manslaughter categorisation. If these types of killings and deaths, along with all the others, fell within the definition of criminal homicide there would be convictions for that offence and appropriate penalties could be fixed by trial judges. The authors acknowledge that difficult issues could arise with what are now complete or partial defences to murder. The authors suggest that necessity (despite *Dudley & Stephens*) and self-defence should be complete defences to a charge of criminal homicide while duress, diminished responsibility and provocation would no longer be partial defences but simply go to mitigation of penalty. This of course would remove the jury from the consideration of those partial defences which could reduce murder to manslaughter and leave their consideration to the trial judge as a mater of penalty. The authors see no need to designate the most heinous killings as murder, despite the continuing attachment of politicians, the media and public opinion to such designation, their position being that such attachment is misconceived and irrational having regard to the variety of killings which fall within that designation. It may however be noted hat, in addition to

England, the Australian states, Canada, the American Law Institute in its Model Penal Code and France (murder, pre-meditated murder, involuntary homicide) have preserved that legal designation and the distinction between murder and manslaughter. It might finally be noted that no matter how criminal homicide is defined the drawing of appropriate indictments in particular cases is not likely to be easy and could require considerable particulars.

The second (reserve) proposal is that, if murder is retained, the sentence should no longer be the indeterminate mandatory life (which can be but is rarely the 'whole of life') but within the discretion of the trial judge, though subject to 'guidelines'. This would allow the trial judge to sentence 'at large' and in response to the particularities of each case. Sentences would range from life imprisonment (but not 'whole of life'), through fixed terms, suspended sentences (wholly or partially), and down to non-custodial sanctions where appropriate. The authors see the continuance of mandatory life for murder, despite the recommendations of a number of commissions and committees of inquiry that are referred to, as the consequence of a number of factors. The first is because of a 'deal' that was supposedly done at the time of the abolition of the death penalty in 1965 under which decisive support for abolition was obtained on the basis that the punishment for murder would be confined to mandatory life and that it would show bad faith towards the retentionists to renege on that 'deal'. The evidence for such a 'deal' is investigated by the authors who conclude that it is a 'myth'. A second factor is the repressive, 'law and order' criminal justice policies of the Thatcher government and now of New Labour. Another factor is the public conception of murder as a crime of unique heinousness. The *Criminal Justice Act* 2003, s269 and Schedule 21, has in fact now dealt in some detail with the mandatory life sentence for murder and particularly how any minimum term is to be determined by the trial judge. The legislation specifies 'appropriate starting points' for fixing minimum terms ranging from 'whole life' to 12 years. Also specified are aggravating and mitigating factors which may impact on a minimum term. Insofar as these legislative provisions dealing with minimum terms are based on the mandatory life sentence for murder, the authors are reluctant to engage with them, except to note that the minimum terms specified are not particularly short and that in retaining 'whole life' orders there can still be sentences of 'entombment for life', something which ought to be repugnant to any civilised society (p 132).

Two other matters treated by the book are worthy of note. One is an excursus into how expert evidence should be treated in the criminal justice system (although in the book treated in the context of cot death cases). The authors propose that controversial expert evidence should be within the province of the judge and not the jury, that the experts should attend pre-trial meetings among themselves to reduce areas of conflict and that the experts should give evidence in succession. The role of expert witnesses in adversarial systems of criminal justice is a big topic the subject of considerable literature and if it called for treatment in this book that treatment could have been in greater depth. The other matter has to do with appeals. The authors rightly note that if murder and manslaughter were replaced with criminal homicide the fine distinctions between murder and manslaughter, and the availability of partial defences to murder would no longer be agitated on appeals, nor at trials in relation to liability. This would produce big savings in time and money. However with any abolition of the mandatory sentence of life imprisonment for murder and the advent of generally fixed terms of imprisonment or less for criminal homicide as proposed appeals in relation to sentence could be plentiful. It would be interesting to see what any ultimate gains or losses in time and money might be.

The arguments in this book have been well made, with an intimate knowledge of the territory and an understanding of the positions and motivations of the opposing forces, although with little sympathy or respect for those positions or motivations. In support of

their attacks and proposals the authors base themselves upon the desiderata of rationality and justice in relation to homicide and its punishment. It is, however, certainly arguable that the established distinctions between murder and manslaughter and between voluntary and involuntary manslaughter on the basis of degrees of culpability plus the traditional role of the jury in determining those degrees of culpability are no less rational than lumping those different types of homicide into a single offence and leaving degrees of culpability to be dealt with by trial judges by way of penalty. It is no less arguable that the retributiveness of a mandatory life sentence for murder (now made apparent by the lengthy minimum terms regarded as 'appropriate' under s269 and Schedule 21 of the *Criminal Justice Act* 2003) is closer to justice as generally understood than shorter fixed terms and lesser sanctions as argued for by the authors for the purposes of rehabilitation and deterrence. Perhaps the status and relevant experience of the authors could attract the attention of the politicians and at least lead to reconsideration of the requirement of mandatory life for murder, despite its recent confirmation in the *Criminal Justice Act* of 2003.

The title of the book, *With Malice Aforethought*, is somewhat enigmatic. Apart from complaint that the Lord Coke formulation of the *mens rea* for murder has somehow persisted in the common law for nearly 400 years, the authors have little interest in how the *mens rea* for murder should be formulated. Is it then that the authors are writing with 'malice aforethought' in the sense of a premeditated intent to have introduced an offence of criminal homicide instead of murder and manslaughter, and/or to have the mandatory life sentence for murder done away with? Or is it that the opponents of these changes are acting with 'malice aforethought', perhaps in the original sense of those words?

The book would have benefited from a thorough proof-reading to avoid, for example, the full-text repetition of section 3 of the *Homicide Act* on pp 53-4 and the misnumbering of the sections of statutes in Annexures 2 and 5.

Bron McKillop
Law School, University of Sydney