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Law Reform Commission

Report

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Complicity

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NSW Law Reform Commission
Justice & Attorney General

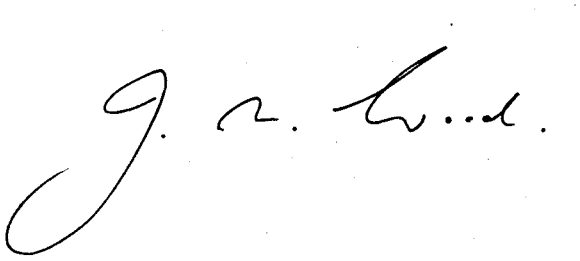
Letter to the Attorney General

To the Hon J Hatzistergos MLC
Attorney General for New South Wales

Dear Attorney

Complicity

We make this report pursuant to the reference to this Commission received 3 July 2007.



The Hon James Wood AO QC
Chairperson
December 2010

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The recommendations in this report are those of the Commission and do not necessarily reflect the views of the academic advisory panel.

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Terms of Reference

Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to review the common law of complicity. In undertaking this inquiry, the Commission should have regard to:

- Arguments for and against codification of this area of the law;
- Developments in other Australian and international jurisdictions, including those of the Model Criminal Code;
- The desirability of a uniform legislative approach in Australia;
- Issues raised by the High Court and the Court of Criminal Appeal decisions in *R v Taufehema*; and
- Any other related matter.

[Reference received 3 July 2007]

Executive summary

This Report reviews the principles relating to complicity by which a person (a secondary offender) may be found liable for offences committed by another (the primary offender). In NSW, these principles are currently governed by the common law. The principles considered include those that attach secondary or derivative liability to accessories before the fact, principals in the second degree, parties to a joint criminal enterprise, and parties to an extended joint criminal enterprise.

Also included in this review are the related inchoate offences of conspiracy and incitement which can fix primary liability on people for actions which, if carried to completion, would potentially involve them in some of the forms of secondary liability.

The offence of being an accessory after the fact is also considered, as it involves assistance offered to the primary offender after the commission of a crime.

Finally, constructive (or felony) murder under the *Crimes Act 1900* (NSW) is also considered, in so far as it can attach secondary liability to a person for a killing committed by another.

The inconsistent doctrinal bases for these various heads of liability, and the gaps or uncertainties in the common law, have left the law in an unsatisfactory state. In order to deal with these problems, the Commission recommends a "codification" of the relevant principles to supersede those that currently exist at common law.

The recommended provisions do not represent a complete codification, as the general principles of criminal liability, that form a backdrop to the principles considered in this Report, will continue to be governed by the common law. It is, however, hoped that these general principles will be the subject of a more general review of the criminal law in NSW. This more general review could also allow consideration of the abolition of the remaining common law offences and their replacement with appropriate statutory offences.

The Commission's general approach

In making the recommendations, we have aimed to:

- ensure greater certainty in the processes of charge and trial, by clarifying the elements necessary for each form of liability and any relevant defences;
- encourage the harmonisation of the elements of each form of liability so that there is a consistency in the basis upon which an offender can be held liable under the form of liability most relevant to the facts of the case;
- replace archaic expressions with modern expressions; and
- frame the recommended provisions, wherever appropriate, in a way that is compatible with the relevant provisions of the *Criminal Code* (Cth).

Accessorial liability

In relation to the liability of **accessories before the fact** and **principals in the second degree**, we have replaced the archaic terms "aiding", "abetting", "counselling" and "procuring" with the plain English terms "encouraging" and "assisting". A person will, therefore, be liable for committing an offence where he or she assists or encourages another person to commit that offence and the person commits it. [Recommendation 3.1]

In relation to the liability of **accessories after the fact** we have sought to clarify the forms of conduct that give rise to liability as an accessory after the fact. A person will be liable if he or she provides assistance to another to escape apprehension or prosecution in respect of a serious indictable offence or to obtain, keep or dispose of the proceeds of that offence. [Recommendation 3.3]

Joint criminal enterprise

Liability for **joint criminal enterprise** arises where a person agrees with at least one other to commit an offence and that offence (or an offence of the same type) is committed. We have recommended the retention of joint criminal enterprise liability as a separate head of liability to accessorial liability in order to deal effectively with situations involving group criminal activity. Importantly, it will allow for the aggregation of conduct that, taken together, would amount to an offence and will be especially useful in situations where the precise role of each of the parties to the criminal activity is not clear. [Recommendation 4.1]

The recommended principles of **extended joint criminal enterprise** impose liability on a person in certain circumstances where another party to the joint criminal enterprise commits an additional offence, that is, one that is different from the agreed offence. In such a case, other than homicide, a person will be liable for the additional offence committed by another where he or she foresaw (at the time of, or immediately before, the commission of the additional offence) that, in the course of carrying out the joint criminal enterprise, there was a substantial risk that the other person would commit the additional offence.

This will overcome some of the criticisms of the doctrine as it exists at common law, in particular, that it fails to align the moral and criminal responsibility of the secondary participant, and that it risks exposing the secondary participant to a conviction for a more serious offence than that for which the primary participant could be convicted.

Separate provision is made for cases of homicide, so as to account for the different subjective and objective mental elements involved in murder and manslaughter. This is intended to avoid the possible outcome at common law whereby a person may be convicted of murder for foreseeing the possibility of another party to the joint criminal enterprise committing the offence, yet that other party may be acquitted because he or she lacked the necessary mental state for conviction for the offence. [Recommendation 4.3]

Constructive murder

We recommend the amendment of the provisions of s 18 of the *Crimes Act 1900* (NSW) that deal with constructive murder, so that liability for murder by this doctrine will only attach to the person whose act caused the death. The liability for an accessory in these circumstances will be determined according to our recommendations in relation to extended joint criminal enterprise.

We have also limited the remaining field of operation for the doctrine by recommending that the act causing death must be one that, in all the circumstances, was likely to endanger human life. [Recommendation 5.1]

Conspiracy

We recommend the replacement of the common law offence of conspiracy (which covers agreements to commit "unlawful acts") with a statutory offence that is limited to agreements to commit criminal offences. Our recommendation departs from the *Criminal Code* (Cth) by not limiting the offences which may be the subject of a conspiracy and by not adopting the requirement of an overt act pursuant to the agreement. [Recommendation 6.1]

We are also recommending the abolition of the common law offence of conspiracy to cheat and defraud. The general conspiracy provisions which we recommend can be employed in relation to relevant existing offences, including NSW's recently codified fraud offences. Any gaps in the law can be overcome by the enactment of specific offence provisions to which the conspiracy provisions can relate. [Recommendation 6.3] In this regard, we have a separate current reference in relation to the laws concerning cheating at gambling, in which attention will be given to the introduction of a specific provision, which would apply to the case where two or more parties agreed to manipulate the outcome of a match, or an incident within a match, with a view to profiting from a gambling transaction.

Incitement

We have recommended the extension of the inchoate offence of incitement to cover acts of assistance as well as of encouragement. This will overcome the anomaly at common law that acts of encouragement can be charged as incitement if the offence encouraged does not take place, but acts of assistance cannot be charged if the offence assisted does not take place. [Recommendation 7.1]

We have also recommended the repeal of the *Crimes Prevention Act 1916* (NSW) as our incitement recommendations will render its provisions unnecessary. [Recommendation 7.3]

Defences

The Commission has sought to standardise the defences available to the various forms of liability.

Particular attention is drawn to the **defence of withdrawal**, which is available for accessorial liability and joint criminal enterprise liability. We have adopted the

formulation contained in the *Criminal Code* (Cth) so that a person cannot be liable for involvement in a criminal offence if that person terminated his or her involvement in the offence and took all reasonable steps to prevent the commission of the offence. This formula goes further than the common law which requires that the person do what can reasonably be done to undo the effect of his or her assistance.

We have also recommended a standardised formula, to apply in cases of accessorial liability and joint criminal enterprise liability as well as incitement and conspiracy, which states that a person cannot be liable for involvement in an offence where he or she is **a person for whose benefit or protection that offence exists**.

Implementation

Our recommendations provide a complete framework for the extension of criminal liability under the principles outlined above. However, given the inconsistent ways in which conduct amounting to complicity, in one or more of its forms, is currently dealt with in NSW statutes, we consider that, the implementation of this outcome is best achieved by a staged implementation. The program should commence with offences arising under the *Crimes Act* and at common law, followed by an extension to the other core criminal statutes (including the *Drug Misuse and Trafficking Act 1985* (NSW), the *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW)), and finally by a review and extension, as appropriate, to the regulatory and other offences arising under the various other NSW statutes. [Recommendation 8.1]

Our purpose is to achieve a consistent basis, and form of expression, in relation to ways in which complicity, in its several forms, is dealt with in the core criminal statutes, and in the many other statutes of a regulatory kind which contain provisions giving rise to statutory offences.

Recommendations

	Chapter 3 – Accessorial Liability	page
3.1	The principles concerned with the criminal responsibility of accessories before the fact, and of principals in the second degree, should be the subject of a statutory provision to the following effect: (1) Where D assists or encourages P to commit an offence, then D is taken to have committed that offence. Encourage includes command, request, propose, advise, incite, induce, persuade, authorise, urge, and threaten or place pressure on another to commit an offence. (2) For D to be guilty, P must have committed the offence. (3) For D to be guilty, he or she must have intended to assist or encourage the commission of the offence or an offence of the same type, knowing or believing in the existence of the facts and circumstances that in law constitute respectively the offence or an offence of the same type [A legislative note and the second reading speech should state that the question of whether an offence is capable of being "of the same type" should be an issue of law for the judge but it should remain an issue for the jury to determine whether on the facts of the case the offence intended was of the same type. They should also state that the phrase "of the same type" is intended to mean the same thing as the phrase "of the type" in the *Criminal Code* (Cth) and should pick up any relevant judicial interpretation of that phrase.] (4) D may be found guilty under these recommendations (a) whether or not any other person alleged to be involved in the offence has been prosecuted or has been convicted; and (b) whether or not D was physically present when P committed the offence. (5) D may be found guilty even if P has been convicted of a lesser offence because of a defence or partial defence available to P but not available to D. (6) D cannot be found guilty of assisting or encouraging the commission of an offence if, before the offence was committed: (a) D terminated his or her involvement; and (b) D took all reasonable steps to prevent the commission of the offence. (7) D is not guilty of assisting or encouraging an offence if D is a person for whose benefit or protection the offence exists. (8) D may be found guilty if the trier of fact is satisfied beyond reasonable doubt that D is either guilty as a principal offender or as an accessory, but is not able to determine which. (9) An alternative verdict of guilty of incitement may be returned if the requirements for proving the commission of the substantive offence by P have not been met, but the other elements required for an offence of incitement are present. (10) D should be liable to the same punishment as if he or she had committed the substantive offence.	47
3.2	The liability of a person who assists or encourages a non-responsible person to commit an offence should be governed by a statutory provision which incorporates the following elements: (1) A person (D) who assists or encourages another person (P) to commit the physical elements of an offence is to be taken to have committed that offence, and is punishable accordingly, even though P is not responsible in law for the offence, where: (a) P has committed the physical elements required for an offence; (b) D has, in relation to that offence, the mental element required for its commission; and (c) P's conduct (whether or not together with D's conduct) would have constituted an offence on the part of D if D had engaged in it. (2) D shall be liable for the offence even though P is not responsible in law for the relevant conduct by reason of duress, mental illness, age, lack of knowledge of the true facts, honest but mistaken belief, or otherwise.	58

having regard to the nature and scope of the agreement, necessarily incidental to its commission or that is of the same type as that agreed to.

(6) The parties must have intended that the offence would be committed pursuant to their agreement.

(7) A party to the agreement may be found guilty of the offence, even if:

(a) another party to the agreement has not been prosecuted or has been found not guilty or has been convicted of a lesser offence by reason of a defence or qualified defence that is available to that party but that is not available to him or her (that is, the first-named party); or

(b) he or she was not present when any of the conduct constituting the physical elements of the joint offence occurred.

(8) Any limitation provisions or defences that apply in relation to the offence apply in relation to each party respectively for the purpose of determining whether that party is guilty of that offence or of a lesser or other offence by reason of the operation of these provisions.

(9) A party to the agreement cannot be found guilty of an offence by reason of the operation of these provisions if, before the conduct constituting any of the physical elements of that offence was engaged in, he or she:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent that conduct from being engaged in.

(10) A party to the agreement cannot be found guilty of an offence by reason of the operation of these provisions if he or she is a person for whose benefit or protection the offence exists, and he or she is the person in respect of whom it is committed.

(11) Where the trier of fact is satisfied beyond reasonable doubt that a party to the joint agreement committed an offence because of the operation of these provisions or committed an offence otherwise than because of the operation of these provisions, but cannot determine which, the trier of fact may find that party guilty of the offence.

[Note: In relation to recommendation 4.1, a legislative note and the second reading speech should state that the question of whether an offence is capable of being "incidental to" the commission of an offence or is of the same type is an issue of law for the judge, and that otherwise any relevant question is one of fact for the jury.]

4.2 (1) Where two or more people carry out the physical elements that, in combination, constitute an offence, then each person who had the mental elements required for that offence is taken to have committed the offence and is punishable accordingly as a principal offender, even though it may not be established otherwise that they were party to a joint criminal enterprise. 125

(2) A person may be found guilty of the offence even if another person alleged to have committed the offence has not been prosecuted or not found guilty or has been convicted of a lesser offence by reason of a defence or qualified defence available to that person.

(3) Any limitation provisions or defences that apply in relation to the offence apply in relation to each person for the purpose of determining whether he or she is guilty of that offence by reason of the operation of these provisions.

(4) Where the trier of fact is satisfied beyond reasonable doubt that a person committed an offence, because of the operation of these provisions or committed an offence otherwise than because of the operation of these provisions, but cannot determine which, the trier of fact may find such person guilty of the offence.

4.3 The principles concerned with extended joint criminal enterprise should be the subject of a statutory provision which would render a secondary party to a joint criminal enterprise (D) liable for an additional offence committed by another party to the enterprise (P) in the circumstances, and subject to the provisions, which are set out as follows: 128

(1) D and at least one other person, P, enter into an agreement giving rise to a "joint criminal enterprise" to commit an offence (the "agreed offence").

(2) The agreement giving rise to the joint criminal enterprise may consist of an express agreement or a non-verbal understanding between D and P to commit the agreed offence.

(3) The existence of the joint criminal enterprise and the nature of the agreed offence may be inferred from the conduct of the parties.

(4) The agreed offence shall be taken to include the precise offence agreed to, as well as any offence that is, having regard to the nature and scope of the agreement, necessarily incidental to its commission or that is of the same type as that agreed to.

(5) D and P intend that the agreed offence be committed.

(6) In the course of carrying out the joint criminal enterprise or in attempting to do so, P does an act with the mental elements that would support a conviction of P for an offence ("the additional offence") that differs from the agreed offence.

(7) Save for a case of homicide (which is subject to recommendation 4.3(8), D foresaw that, in the course of carrying out the joint criminal enterprise, there was a substantial risk that P would commit the additional offence (such foresight being present at the time of, or immediately before, the commission of the additional offence).

(8) Where P causes a death in the course of carrying out a joint criminal enterprise (other than one in which there was a common intention to kill or cause grievous bodily harm, being a joint criminal enterprise within the meaning of and subject to the provisions contained in recommendation 4.1) then, D will be liable for:

(a) murder if D foresaw that it was probable (that is, likely) that a death would result from an act of P that was done with intent to kill or cause grievous bodily harm, in the course of carrying out the joint criminal enterprise in which D was participating; or

(b) if not satisfied of (8)(a), then manslaughter if D foresaw that there was a substantial risk that a death would result from an unlawful act that was done by P in the course of carrying out the joint criminal enterprise in which D was participating,

such foresight on the part of D being respectively present at the time of (or immediately before) the act causing the death.

(9) D will be guilty of the additional offence even if, at the time of its commission by P, he or she was absent from the place of its commission.

(10) D may be convicted of the additional offence, even if P has not been prosecuted or has been found not guilty of the additional offence, unless in a case where P has been acquitted of the additional offence, a conviction of D for that offence would involve the return of an inconsistent verdict or offend against the rule of incontrovertibility.

(11) D may be convicted of the additional offence even if P has been convicted of a lesser offence because of a defence or qualified defence available to P but not available to D.

(12) Otherwise any defences or qualifying provisions that would apply to the additional offence and be personal to D will apply for the purpose of determining D's guilt for the additional offence.

(13) D will not be guilty of the additional offence if, before the act of P constituting that offence, D:

(a) terminated his or her involvement as a party to the joint criminal enterprise; and

(b) took all reasonable steps to prevent the joint criminal enterprise being carried out.

(14) D will not be guilty of the additional offence if D is a person for whose benefit or protection that offence exists.

Note: In relation to recommendation 4.3, a legislative note and the second reading speech should state that the question of whether an offence is capable of being "incidental to" the commission of an offence or is of the same type is an issue of law for the judge, and that otherwise any relevant question is one of fact for the jury.

	Chapter 5 – Felony or constructive murder	page
5.1	So much of s 18(1) of the *Crimes Act 1900* (NSW) as relates to constructive murder should be repealed, and replaced by a statutory provision that provides as follows:	160

(1) A person (P) shall be liable for murder and punishable accordingly, where:

(a) P commits an act that causes the death of V;

(b) P's act was done in an attempt to commit an offence or in the course of or during or immediately after the commission of an offence for which provision is made in the laws of NSW that is punishable by imprisonment for life or for a term of imprisonment of 25 years or more (the foundational offence);

(c) P's act was one that, in all of the circumstances, including the nature of the foundational offence, [viewed objectively] was likely to endanger human life.

(2) The foundational offence shall not include common law offences where the penalty is at large, or manslaughter.

(3) The foundational offence shall include one in respect of which P was a principal offender, as well as one in which P was providing assistance in relation to its commission or attempted commission by

another person.

(4) P shall be liable to be convicted of murder and sentenced accordingly in the circumstances outlined, whether or not:

(a) P intended to kill V or to cause V bodily harm;

(b) P knew or foresaw that by his or her act he or she was likely to do so; or

(c) P knew or foresaw that his or her act was likely to endanger human life.

5.2 Section 18(2)(a) of the *Crimes Act 1900* (NSW) should be amended by deletion of the words "which was not malicious, or". 161

	Chapter 6 – Conspiracy	page

6.1 The offence of conspiring to commit an offence should be the subject of a statutory provision to the following effect: 209

(1) A person (D) who agrees with one or more other parties (P) to commit an offence (the substantive offence) is guilty of conspiracy to commit the substantive offence, and is punishable accordingly.

(2) For D to be guilty, he or she and at least one other party to the agreement must have intended that the substantive offence would be committed.

(3) To the extent that the commission of the substantive offence would depend on the existence of certain facts or circumstances, it is sufficient to establish in D a belief in, or expectation of, the existence of those facts or circumstances.

(4) D may be found guilty of conspiracy whether or not the substantive offence is committed.

(5) D may be found guilty of conspiracy to commit a substantive offence even if:

(a) facts or circumstances exist which make commission of the offence by the agreed course of conduct impossible; or

(b) the only other party to the agreement is a body corporate, unless D is the sole director or controller of that body corporate; or

(c) each other party to the agreement is one of the following:

(i) a person who is not criminally responsible or otherwise amenable to justice;

(ii) a person for whose benefit or protection the substantive offence exists, or

(d) no other party to the agreement has been prosecuted or has been found guilty.

(6) Any defences, limitations as to time, or qualifying provisions that apply to the substantive offence apply also for the purposes of determining whether a party to the agreement is guilty of conspiring to commit that offence.

(7) D cannot be found guilty of conspiracy to commit an offence if:

(a) he or she is a person for whose benefit or protection the substantive offence exists; or

(b) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal.

(8) If the substantive offence is to be carried out in another jurisdiction (that is, entirely outside NSW) it must be:

(a) an offence under the laws of NSW if it were committed in NSW; and

(b) an offence under the laws of the other jurisdiction.

(9) If, at the time when the agreement is made, the parties to it are all in a jurisdiction other than NSW, then the substantive offence to which it relates must be one that is to take place in NSW and at least one party to the agreement must commit at least one act in pursuance of the agreement in NSW.

(10) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a party to a conspiracy may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence of conspiracy before the necessary consent has been given.

(11) The court may dismiss a charge of conspiracy if it thinks that it is in the interests of justice to do so.

(12) A person who is found to be guilty of conspiracy to commit an offence or offences is liable to the same penalty as that which is applicable for the substantive offence or offences (if the conspiracy is

7.4	The offence contained in *Crimes Act 1900* (NSW) s 351A be reviewed and amended or replaced so as to give effect to its intended objectives.	252

	Chapter 8 – Implementation	page
8.1	Legislative action should be taken in a series of stages: (1) to ensure that the recommendations in this Report, concerning complicity, are ultimately made applicable to all offences in NSW, by applying the recommendations: (a) initially to offences arising at common law, and under the *Crimes Act 1900* (NSW); (b) then to offences arising under predominately criminal statutes such as the *Drug Misuse and Trafficking Act 1985* (NSW), the *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW); (c) finally, to offences arising under the remaining NSW statutes, with suitable amendment in each case, in relation to the inclusion of any extended definition required for the effective implementation of the statute in question; and (2) consequently to repeal so much of Part 9 of the *Crimes Act 1900* (NSW) as will then become redundant (save for s 347A).	260

1. Introduction

Background to this report

1.1 The Commission's inquiry originated in a letter received on 3 July 2007 from the then acting Attorney General, the Hon John Watkins MP, requesting a review of the common law of complicity.

1.2 In undertaking this inquiry, the Commission was asked to have regard to:

(1) Arguments for and against codification of this area of the law;

(2) Developments in other Australian and international jurisdictions, including those of the Model Criminal Code;

(3) The desirability of a uniform legislative approach in Australia;

(4) Issues raised by the High Court and the Court of Criminal Appeal decisions in *R v Taufahema*;[1] and

(5) Any other related matter.

1.3 In response, the Commission published Consultation Paper 2 (CP 2), *Complicity*, in January 2008.

1.4 Following the publication of CP 2, the Commission decided that, because of the overlapping ways in which the complicity of those involved in criminal activity arise, it was not practicable to confine its inquiry to the common law principles concerning joint criminal enterprise and extended joint criminal enterprise. As a consequence, the common law principles concerned with the several forms of accessorial liability that exist have been examined with a view to their possible reform, including those relating to the common law inchoate offences of incitement and conspiracy. Consideration has also been given to the offence of felony murder (hereafter referred to as "constructive murder"), and in particular to the potential extension of

1. *Taufahema v The Queen* [2007] NSWCCA 33; *R v Taufahema* (2007) 228 CLR 232.

that form of murder to a person who is an accessory to the offence committed by the co-offender, in the course of the commission of which, an unintended death occurs.

1.5 Attention has also been given to a number of other Acts which have created omnibus offences, some of a regulatory kind, embracing, in the one provision, the several alternative forms of conduct involving direct participation in the relevant *actus reus,* as well as those comprising aiding and abetting, soliciting, inciting, counselling, conspiring, knowingly taking part in, knowingly being concerned in, as well as being party to or causing the commission of the prohibited conduct. While some Acts have created an offence including each of these concepts, other Acts have taken up only some of them, resulting in a significant inconsistency in legislative approach that is not explained by the subject matter with which each Act is concerned. Moreover the result has been to combine, in the one offence, conduct that might potentially depend on direct liability as well as derivative liability, without regard to the differences in their relevant jurisprudential bases.

1.6 For completeness we note (although without recommending any reform):

- the specific statutory offences that exist in NSW, which deal with participation in criminal group activity, arising under:
  - the *Crimes (Criminal Organisations Control) Act 2009* (NSW); and
  - the *Crimes Act 1900* (NSW) (concerned with, riot, affray, participation in criminal groups and recruiting persons to engage in criminal activity);[2] and
- the statutory offences of aiding or inciting suicide which have replaced the common law.[3]

1.7 In our decision to consider complicity in each of its potential forms,[4] we were influenced by the extensive reviews undertaken by the Law Commission of England and Wales between 2006 and 2009,[5] and by the fact that the law of complicity, in NSW is largely dependent on common law principles that are not necessarily consistent, yet involve a considerable degree of overlap. We were also influenced by the emergence of problems in the application of the Model Criminal Code principles concerning the extension of criminal responsibility[6] to cases of joint criminal enterprise, which, even after recent amendment, continue to attract criticism.[7]

Complicity in law

1.8 "Complicity" is a legal term which broadly embraces the principles of law that extend criminal liability, beyond the direct perpetrator of a crime (the "principal participant")

2. *Crimes Act 1900* (NSW) s 93B, 93C, 93T and 351A.
3. *Crimes Act 1900* (NSW) s 31C.
4. See ch 2 for a broad overview of the various forms of complicity.
5. See para 1.23-1.25.
6. *Criminal Code* (Cth) ch 1 pt 2.4.
7. S Odgers, "Joint Commission of Commonwealth Offences" (2010) 34 *Criminal Law Journal* 146.

to another person (the "secondary participant"), who assists or encourages the principal participant to commit (or attempt to commit) the crime, who or is in some way involved jointly with that offender, in its commission, or planned commission.

1.9 Typically, what is under consideration is a circumstance in which one person, commonly referred to as a primary or principal or direct participant, commits the physical act (the *actus reus*); and another person, commonly referred to as a secondary or indirect participant, provides some form of assistance or encouragement without any personal physical contribution to the *actus reus*.

1.10 The criminal law has found it necessary to respond to the wide variety of circumstances, in which primary and secondary participants engage in group criminality, or encourage such activity. Potentially problematic are those cases where:

- each is present at the scene, but it is not known which member of the group committed the *actus reus* for a crime, or
- only some members of the group are physically present at the time of the *actus reus*, or
- the concert between the participants evolves beyond the particular crime which was its planned object, to another offence, either of a similar type or one of a quite different type.

1.11 Depending on the facts of the case, the liability of the secondary participant may be:

- derivative, that is, dependent on the primary participant committing the offence, as in the case of an accessory before the fact or at the fact, or
- primary, as in the case of a party to a joint enterprise to commit a particular crime, in which case a conviction of the secondary participant does not depend on the primary participant being guilty of the offence.[8]

1.12 Added to the complexity of the criminal law, when courts are faced with group crimes, is the fact that a case may be presented to a jury in reliance on more than one of the potential ways in which liability may arise under the common law of complicity.[9]

1.13 Although the three most common categories — accessorial liability, basic joint criminal enterprise, and extended joint criminal enterprise — are expressed as separate branches of the law of complicity, there is considerable overlap between them in principle, and in their factual application.[10] The facts of the High Court case

8. See: D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, Federation Press, 2006) [11.4.1]; D Lanham, "Primary and Derivative Criminal Liability: An Australian Perspective" [2000] *Criminal Law Review* 707.
9. In relation to whether there is an overlap between joint criminal enterprise and accessorial liability see A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, 2007) 228-229.
10. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, Federation Press, 2006) [11.4.1].

of *Clayton v The Queen* illustrate this point. Three friends in collective outrage at the behaviour of a neighbour, armed themselves with household weapons, including poles and a large carving knife, and invaded the neighbour's home. The neighbour was detained, beaten and stabbed, one of the wounds causing death. The prosecution argued that, although it could not identify which of the three applicants inflicted the fatal stab wound, each applicant was guilty of murder on the basis either of "joint criminal enterprise", "extended joint criminal enterprise" or "accessorial liability".[11]

1.14 The common law offences (in relation to an accessory) of incitement and conspiracy, as well as the offences of constructive murder and aiding suicide which have a statutory basis, can also be seen as categories of a wider form of participatory liability, as each involves some form of encouragement or assistance, or activity, involving more than one person, that can overlap with the more traditional forms of complicity involving liability as an accessory, or as a party to a joint criminal enterprise. Counselling the commission of an offence will attract culpability on the part of the person offering the incitement: if the offence incited is committed, as an accessory; and if the offence is not committed, as an inciter. Conduct giving rise to an offence of conspiracy can be indistinguishable from an agreement constituting a joint criminal enterprise, while the liability of an accessory in relation to constructive murder can be addressed, alternatively, under extended joint criminal enterprise principles.

1.15 The nuanced definitions, overlaps, similarities and differences among the various ways in which group criminal behaviour, can be addressed are potentially confusing for those engaged in the administration of criminal justice. They also present a significant challenge for any attempt to redefine, or to codify, the law in a more coherent and consistent form.

1.16 The need for some redefinition or codification of the law has arisen from the difficulties, which prosecutors and judges have experienced, in establishing the appropriate basis for a trial involving group activity, and in settling the issues and explaining them to the jury in a clearly comprehensible way. Unsurprisingly jury directions in these cases have been a fruitful source of grounds for appeal.[12] Justice Kirby of the High Court has spoken more than once of the difficulties for trial judges, in explaining the principles of secondary liability to juries:

> This distinction [between different forms of secondary liability] introduces a needless disparity and complexity that must be extremely confusing to juries, as well as difficult for trial judges who have the responsibility of explaining secondary criminal liability to a group of lay citizens performing jury service. What jurors must make of the disparity, and the nuances of difference between the distinct modes of possible reasoning to their conclusion, is best not thought about.
>
> The unreasonable expectation placed upon Australian trial judges (affirmed by appellate courts) to explain the idiosyncrasies of differential notions of secondary liability to a jury is something that should concern this court. …Its [the

11. *Clayton v The Queen* (2006) 81 ALJR 439 [11]. Kirby J (dissenting) highlighted the overlapping nature of secondary liability in this case, at [113].
12. *Clayton v The Queen* (2006) 81 ALJR 439 [114] (Kirby J, dissenting).

> law of secondary criminal liability] present shape can only cause uncertainty for trial judges and confusion to juries.[13]

1.17 A further problem of complicity arises from the conflicting values underpinning the applicable legal tests - between fairness for the accused and justice for the victim. The subjective approach, that a person is only responsible for his or her own moral wrongdoings and shortcomings, and not for those of others, is reflected in the fundamental principle of criminal liability: that criminal actions (*actus reus*) and intentions (*mens rea*) must normally coincide.[14] This has led, for example, to the criticism of the liability arising from extended joint criminal enterprise, and from constructive murder, that they cast the net too widely when they catch secondary participants, who did not perform the critical act giving rise to the additional offence or a death (in the case of constructive murder), and who did not share with the primary participant the intention with which that act was done.[15] It has also raised questions of fairness in those cases where an offender becomes criminally liable for agreeing to, or for inciting another to, commit an offence which does not proceed, or where, for reasons particular to one member of a joint venture, the primary participant escapes liability or becomes liable for a lesser offence.

Codification of complicity

1.18 Dissatisfaction with the common law of complicity, and related areas involving group participation in crime, is not new or isolated. One commentator has observed that the English law of complicity:

> betrays the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence.[16]

1.19 To similar effect, is the comment of Lord Justice Toulson that the law of complicity is:

> an example of the common law running wild – there are so many decisions on complicity, so that courts (and/or counsel) tend to pick and choose among the many precedents; and there is no settled set of principles, which means the judicial development of the law does not always conduce to coherence.[17]

1.20 Necessarily, this calls for consideration of the possibility of reducing the relevant principles to a statutory form that would have a general application in relation to the criminal law. It is a matter which we are specifically required by the terms of reference to address, when asked to have regard to "the arguments for and against

13. *Clayton v The Queen* (2006) 81 ALJR 439 [113]-[114] (Kirby J, dissenting). See also *Gillard v The Queen* (2003) 219 CLR 1 [50] (Kirby J); and see *Likiardopoulos v The Queen* [2010] VSCA 344 [46]-[48] where the Victorian Court of Appeal noted the recurring problems in nomenclature which have arisen in dealing with complicity.
14. *Gillard v The Queen* (2003) 219 CLR 1 [47] (Kirby J).
15. *Gillard v The Queen* (2003) 219 CLR 1 [62] (Kirby J).
16. A Ashworth, *Principles of Criminal Law* (5th ed, OUP, 2006) 440.
17. R Toulson, "Forty Years On: What Progress in Delivering Accessible and Principled Criminal Law?" (2006) 27(2) *Statute Law Review* 61, 68.

codification of this area of the law". For the purposes of this reference we understand that expression to mean the enactment of law in such a way, and to such an extent, that it "becomes within its field an authoritative, comprehensive and exclusive source of that law".[18]

Relevant codification projects

Model Criminal Code

1.21 The Commonwealth, the ACT and NT have enacted similar comprehensive Criminal Codes that regulate the principles of criminal responsibility, including that applicable to complicity, and that also define a substantial body of substantive offences. These Codes arose out of the work of the Gibbs Committee, which published a major report in 1990 on the general principles of criminal responsibility and associated topics, together with a Draft Codifying Bill[19], and that of the Model Criminal Code Officers Committee (MCCOC), later renamed the Criminal Law Officers Committee (CLOC), which was established as a result of the 1991 meetings of the Standing Committee of Attorneys-General.

1.22 The codification exercise, that was undertaken, involved a staged process commencing with the introduction, by the *Criminal Code Act 1995* (Cth), of Chapter 2 of the *Criminal Code* (Cth) which provided the general principles of criminal responsibility. That Code has been progressively supplemented by provisions dealing with a large body of substantive offences, in response to further Reports of the Committee, and it has effectively replaced the common law and previous statute law in relation to those offences.

England and Wales

1.23 A similar long-term exercise can be seen in England and Wales, where the Law Commission has had a codification project dating back to a 1968 working paper.[20] Since then, numerous working papers and more than 30 reports, on different aspects of the criminal law and procedure, have been published by the Law Commission. They have included reports specific to the Law Commission's long-term codification project, initially in the form of a report to the Commission in 1985 by the Committee headed by Professor J C Smith, which included a Draft Criminal Code Bill.[21] It was followed, in 1989, by another report in two volumes which comprised a Draft Criminal Code Bill and Commentary on the Bill,[22] and in 1993 by

18. L G Scarman, "Codification and Judge-made Law: A Problem of Co-existence" (1967) 42 *Indiana Law Journal* 355, 358.
19. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990).
20. England and Wales, Law Commission, *Codification of the Criminal Law: General Principles. The Field of Inquiry*, Working Paper 17 (1968).
21. England and Wales, Law Commission, *Criminal Law: Codification of the Criminal Law - A Report to the Law Commission*, Report 143 (1985).
22. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Report 177 (1989).

a further report directed at legislating aspects of a general criminal code.[23] Among the published working papers and reports are several that relate to aspects of complicity, to which we make more detailed reference later in this report.[24]

1.24 A number of the reports have been implemented by legislation specific to the matters considered.[25] A large number of offences have now been restated in statutory form. The long-term objective of combining all of the different parts of a new statutory criminal law, into a simple unified criminal code[26], has not yet been achieved. That this remains a long term goal of the Government and of the Law Commission can be seen from a Home Office publication in 2001 "Criminal Justice the Way Ahead",[27] and from the most recent annual report of the Law Commission which noted that, in its *Tenth Programme of Law Reform*, the Commission had expressed its intention to embark on a project for the simplification of the criminal law, which work it noted could be preparatory to a later codification.[28]

1.25 Parallel developments can be seen in Scotland and Ireland, that have led to the progressive reform of areas of the criminal law, including those concerned with criminal responsibility.

Ireland

1.26 In Ireland, an Expert Group on Codification of the Criminal Law, which had been established in 2002, delivered a report on its deliberations in 2004. Following widespread consultation, it made a recommendation for a program of phased codification, commencing with the general principles of criminal responsibility and core criminal offences, to be followed by legislation that would bring, into a Code, the remainder of the criminal statute law and common law.[29] This led to the establishment of a Criminal Law Codification Advisory Committee, under Part 14 of the *Criminal Justice Act 2006* (Ire), comprising representatives of the justice agencies, the judiciary, the legal profession and academia.

Scotland

1.27 In 2003, following a similar course, the Scottish Law Commission published, for the purpose of consultation, a Draft Criminal Code and Commentary that had been

23. England and Wales, Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles*, Report 218 (1993).
24. For example England and Wales, Law Commission, *Fraud*, Report 276 (2002); England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006); England and Wales, Law Commission, *Murder, Manslaughter and Infanticide*, Report 304 (2006); and England and Wales, Law Commission, *Conspiracy and Attempts,* Report 318 (2009).
25. *Criminal Law Act* 1967 (Eng); *Criminal Law Act* 1977 (Eng); *Criminal Attempts Act* 1981 (Eng); *Fraud Act* 2006 (Eng); and *Serious Crime Act* 2007 (Eng).
26. Acknowledged as such and said to be achievable in the Law Commission's Report, England and Wales, Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles*, Report 218 (1993).
27. United Kingdom, Home Office, *Criminal Justice: The Way Ahead*, CM 5074 (2001) [3.59]; United Kingdom, *Justice for All*, CM 5563 (2002) [7.16].
28. England and Wales, Law Commission, *Annual Report 2009-2010*, Report 232 (2010) [2.38].
29. Ireland, Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (2004).

prepared by a group of law professors.[30] It did not purport to be a complete code. An analysis of the responses is of interest in so far as the respondents identified the advantages and disadvantages of codification and gave consideration to the process which should be followed in delivering a code.[31]

Arguments for codification

1.28 The several reports mentioned, and academic commentary in relation to the projects with which they are concerned, reveal a considerable degree of unanimity as to the arguments for codification in a common law jurisdiction.[32] In summary they include its capacity to:

- have the law democratically determined by parliament, rather than by the courts, although reserving to the courts the power to interpret the provisions of the Code;
- have the law written down in an organised form in an Act, rather than deriving it from a series of Acts and case decisions;
- reduce the law to clear and coherent statements employing modern language that is accessible to the average citizen and can be understood by jurors;
- facilitate bringing the law up to date, in accordance with current social, political and economic circumstances, and maintaining its currency through amendment as required;
- avoid repetition and duplication, both between and within legislative instruments;
- allow for the repeal of offences that are obsolete;
- reduce the need for reference to precedent and resolution of conflicting authorities, thereby minimising the incidence of appeals;
- resolve those areas of law that are obscure or controversial in their application; and
- provide a more consistent and rational doctrinal base than that which currently exists.

1.29 In general the advantages are seen to lie in the introduction of a comprehensive set of criminal laws and principles that are more accessible, more understandable,

30. E Clive, P Ferguson, C Gane, and A Smith, *A Draft Criminal Code for Scotland with Commentary* (Scottish Law Commission, 2003).
31. See E Clive, "Codification of Scottish Criminal Law" (2008) *Scottish Criminal Law* 747.
32. See for example A Ashworth, *Principles of Criminal Law* (5th ed, OUP, 2006) 8, 57-60; M Goode, "Codification of the Australian Criminal Laws" (1992) 16 *Criminal Law Journal* 5; M Goode, "Constructing Criminal Law Reform and the Model Criminal Code" (2002) 26 *Criminal Law Journal* 152; M Gani, "Codifying the Criminal law: Implications for Interpretation" (2005) 29 *Criminal Law Journal* 264.

more coherent and easier of application than the current system, under which much of the law is complex, difficult to comprehend and, in some respects, inconsistent.

1.30 Balanced against these considerations, it has been variously argued that codification can result in a law that:

- is too rigid;
- can have gaps;
- can become out-of-date;
- involves an unduly conservative approach that tends to entrench existing principles, without rationalising any differences; and
- cannot obviate the need for subsequent commentary and judicial interpretation.[33]

Codification for NSW

1.31 Within Australia, further progress on the codification project, that was commenced as a result of the 1991 meetings of the Standing Committee of Attorneys General, has largely stalled. While the Commonwealth, ACT and Northern Territory have largely implemented the Model Criminal Code, the three Griffith Code States (Queensland, Western Australia and Tasmania) have maintained their Criminal Codes. The criminal laws in force in the three common law states (NSW, Victoria and South Australia) continue to be a mixture of common law, and statute law in the form of core criminal statutes and multiple regulatory statutes.

1.32 In NSW, amendments to the *Crimes Act 1900* (NSW) have given rise to a limited form of codification to the extent that they have replaced aspects of the common law concerned with criminal responsibility, for example, in relation to intoxication[34] and self defence.[35] In relation to substantive offences, there has been a form of codification, in the enactment of specific provisions concerned with fraud[36] and computer-related offences.[37] The process however has been ad hoc, rather than one involving any coherent or coordinated approach for a codification specific to NSW, or one that might achieve uniformity or consistency with the Model Criminal Code.

1.33 Our current terms of reference do not extend to a consideration of the desirability and practicability, or otherwise, of a broad codification of the criminal laws of NSW, for which the competing arguments noted would be relevant. Nevertheless they have some force in the context of a reference, in which we need to consider

33. M Goode "Codification of the Australian Criminal Law" (1992) 16 *Criminal Law Journal* 5, 16-19; and *Boughey v The Queen* (1986) 161 CLR 10, 21.
34. *Crimes Act 1900* (NSW) s 428D-428I.
35. *Crimes Act 1900* (NSW) s 418.
36. *Crimes Act 1900* (NSW) pt 4AA.
37. *Crimes Act 1900* (NSW) pt 6, which provisions are based on and parallel those contained in the *Criminal Code* (Cth) pt 10.7.

whether the current mixture of statute law and case law in relation to complicity, is in such a state of disarray, or complexity, as to warrant its replacement by Statute. In undertaking that task we are not unmindful of the possibility that a wider codification project may be undertaken in NSW in the future, or of the desire of the Standing Committee of Attorneys General, for cross jurisdictional uniformity, or at least voluntary consistency, in the criminal laws in force in Australia.[38]

1.34 While this would be a long-term project, that would almost certainly need to be undertaken in stages commencing with the general principles of criminal responsibility, it would reflect the modern trend for codification. While acknowledging the arguments against codification generally, none of which seems to present an insurmountable obstacle, we believe that it is appropriate, at this time, to address the several areas of criminal liability concerned with complicity that are considered in this Report.

Our approach

1.35 Having regard to the lack of coherence in the principles concerning complicity, and the complexity in their application, as examined in more detail in the later chapters of this Report, we are of the view that their codification is highly desirable. While cognisant of the benefits of cross jurisdictional consistency in the criminal laws of Australia we have not approached this reference, or come to our conclusion as to the need for reform, on the basis that uniformity or consistency should be pursued for its own sake. Rather, having taken into account the submissions received in response to CP 2,[39] and with the benefit of consultations with members of the legal profession, government departments[40] and senior academia, we are of the view that the case for reform is compelling.

1.36 We do not see any alternative other than statutory intervention that will restate, in a coherent and principled way, the law in this context which is currently to be found in a complex set of overlapping and, at times, inconsistent rules.

1.37 The recommendations which follow in this report are accordingly intended to give effect to a statutory codification of the laws of complicity. In developing these proposals we have aimed for consistency with the provisions of the *Criminal Code* (Cth) where that has appeared to be appropriate.

1.38 We have also made recommendations that would require the abolition and statutory replacement of the common law offences of conspiracy and incitement. In the course of the examination of these offences and of the decisions concerned with complicity, our attention has been drawn to a number of common law offences that have escaped abolition. When referring to offences in this report, our intention is to include common law offences along with those for which statutory provision is made. We do observe, however, that their continued existence is unsatisfactory in

38. M Goode, "Constructing Criminal Law Reform and the Model Criminal Code" (2002) 26 *Criminal Law Journal* 152, 163.
39. See Appendix A.
40. See Appendix B.

many respects, not least of which is the fact that, apart from a few exceptions, the penalties for their breach are at large. They also offend against the idea that people should know what the law is, and stand opposed to the certainty that a code could be expected to provide. Ideally they should be reviewed as part of any general criminal codification exercise which may follow.

1.39 Finally, while our concern has been primarily to address the principles of complicity in relation to core criminal offences,[41] it will be necessary, in any implementation of this Report, to give consideration, at least in the longer term, to the regulatory and other Acts in the criminal calendar that rely in a variety of ways on the principles of complicity dealt with by this Report. These other offences are considered in chapter 8.

41. Such as those arising under the *Crimes Act 1900* (NSW); the *Drug Misuse and Trafficking Act 1985* (NSW); and the *Firearms Act 1996* (NSW).

2. Overview of current law

2.1 In this chapter we describe, in overview, the law of complicity and the related laws where we intend to recommend reform. We also establish some terminology and set out some related areas that we are not reforming.

2.2 The law of complicity is a complex web. Each form of complicity has a particular role to play. However, they overlap and, in a given case, one set of facts may give rise to a number of possible theories of criminal liability. The challenge for law reform is to establish the categories of liability in the clearest way possible – recognising that overlap is inevitable, but that broad consistency of principle is desirable.

Traditional forms of complicity

2.3 In Australia two sources of complicity exist depending on the jurisdiction in which the offence is committed: common law or legislative code. In NSW,[1] South Australia, and Victoria, complicity is based on the common law. In Queensland, Western Australia, the NT, Tasmania, the ACT, and the Commonwealth, the elements of the relevant offences are codified.[2]

1. See *McAuliffe v The Queen* (1995) 183 CLR 108 as applied in *Gillard v The Queen* (2003) 219 CLR 1. Statutory provisions that deal with accessorial liability include *Crimes Act 1900* (NSW) pt 9 s 345-351B.
2. *Criminal Code* (Qld) s 7, 8, 9; *Criminal Code* (WA) s 7, 8, 9; *Criminal Code* (NT) s 8, s 9, s 10, s 12, s 43AK, s 43BG; *Criminal Code* (Tas) s 3, s 4, s 5; *Criminal Code* (ACT) s 20, s 45; *Criminal Code* (Cth) s 5.4, s 11.2.

2.4 Although the factual situations in which complicity can occur are extremely diverse, criminal liability can attach to a secondary participant under traditional complicity principles either as:

- a principal in the second degree (accessory at the fact);
- an accessory before the fact;
- an accessory after the fact;
- a party to a basic joint criminal enterprise, also known as "acting in concert", "common design", "traditional common purpose"; or "simple" or "straightforward joint criminal enterprise"; or
- a party to an extended joint criminal enterprise, also known as "extended common purpose", "collateral offence/s", "accessory principle", or "parasitic accessory liability".

Principal in the first degree

2.5 In general terms, a ***principal in the first degree*** is the person who commits the whole, or at least some of the physical acts that constitute the *actus reus* for the offence, with the necessary mental state.[3] The liability of a principal in the first degree is primary.

Principal in the second degree

2.6 A ***principal in the second degree*** (sometimes referred to as an aider or abettor or as an accessory at the fact) is one who is present, aiding and abetting the person who commits the offence, that is one who intentionally aids or gives encouragement to that person, but who does not commit the physical acts constituting the *actus reus* of the offence.[4] Mere presence at the scene of the offence will not be enough, although the requirement of presence is met when the principal in the second degree is within the sight and sound of the commission of the offence or in the near vicinity, and when it is shown that he or she was ready and able to come to the assistance of the principal in the first degree, if and when required.[5]

2.7 For a person to be guilty as a principal in the second degree in relation to an offence committed by a principal in the first degree, the prosecution must show that:

- the principal in the first degree in fact committed the offence;

3. *Osland v The Queen* (1998) 197 CLR 316 [15], [70], [72], [93], [174].
4. *Osland v The Queen* (1998) 197 CLR 316 [71]*; R v Phan* (2001) 53 NSWLR 480 [69]; *Giorgianni v The Queen* (1985) 156 CLR 473, 493.
5. *R v Dunn* (1930) 30 SR (NSW) 210, 211-212; *R v Doorey* [1970] 3 NSWR 351, 354. The elasticity of the concept of presence was noted in *Likiardopoulos v The Queen* [2010] VSCA 344 [73].

- the principal in the second degree knew of all the facts and circumstances which make up that offence (or perhaps, more accurately, knew or was aware of the principal offender's intention to do an act with a particular state of mind[6]); and
- with that knowledge, the principal in the second degree intentionally provided assistance to the principal in the first degree.[7]

2.8 Such a person is commonly referred to as an aider and abettor, and his or her liability is derivative, in the sense that he or she can only be convicted if the jury is satisfied that the offence, for which the principal in the first degree is charged, was committed.[8]

2.9 There is no requirement at common law for there to be a causal connection between the assistance or encouragement given and the commission of the offence[9], although there must, in some way, be a link in purpose between the accessory and the principal in the first degree.[10] This does not necessarily require a meeting of the minds of the parties, as illustrated by the case where a defendant laced the drinks of a driver of a motor vehicle with alcohol, unbeknown to the driver. The defendant was held liable, as a secondary party, for procuring the driver to drive his motor vehicle with excess alcohol in his body, even though the driver was unaware of its presence and had not intended to drive the vehicle in that state.[11] In most instances, however, there will have been some communication between those parties and an understanding of what is passing through their minds. This means that accessorial liability may be an alternative theory for the prosecution in joint enterprise cases (which involve primary liability).[12]

2.10 A principal in the second degree to a serious indictable offence[13] is liable to the same punishment to which he or she would have been liable if he or she were a principal in the first degree.[14] Such an offender will normally be charged in the indictment as a principal, rather than as an accessory.

2.11 When the prosecution can establish that two people were present at the crime scene, and that they were either the person who committed the offence or an aider and abettor, it will not matter that it cannot prove into which category each falls.[15]

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6. *Stokes v The Queen* (1990) 51 A Crim R 25, 38.
7. *Stokes v The Queen* (1990) 51 A Crim R 25, 37.
8. *Osland v The Queen* (1998) 197 CLR 316 [14], [71], [93].
9. *Thambiah* v *The Queen* [1966] AC 37; see B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 329; and see *Likiardopoulos v The Queen* [2010] VSCA 344 [107]-[111].
10. *R v Lam* [2008] VSCA 109 [92] and see the observations of Cussen ACJ in *R v Russell* [1933] VLR 59, 67 to this effect cited in *Giorgianni v The Queen* (1985) 156 CLR 473, 480 (Gibbs CJ and Mason J); *R v Phan* (2001) 53 NSWLR 480.
11. *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773.
12. See para 2.20-2.25 below.
13. A serious indictable offence is an "indictable offence that is punishable by imprisonment for life or for a term of 5 years or more": *Crimes Act 1900* (NSW) s 4.
14. *Crimes Act 1900* (NSW) s 345; and see *Crimes Act 1900* (NSW) s 546 in relation to offences punishable on summary conviction.
15. *Mohan v The Queen* [1967] 2 AC 187, 195; *R v Phan* (2001) 53 NSWLR 480; *Stokes v The Queen* (1990) 51 A Crim R 25, 35; and *R v Clough* (1992) 28 NSWLR 396, 384-400.

Accessory before the fact

2.12 An ***accessory before the fact*** is a person who is not present when an offence is committed, but who counsels or procures or encourages or otherwise assists another person to commit the offence.[16]

2.13 At common law, for a person to be guilty as an accessory before the fact to an offence committed by another person (the principal in the first degree):

- the other person must have committed the offence;[17]
- the accused must have known the essential facts or circumstances, which must be established in order to prove the commission of the offence, by the other person,[18] including the necessary state of mind for that person[19] (recklessness on the part of the accessory will not suffice, but proof that the accessory deliberately abstained from inquiry can provide a basis for an inference of actual knowledge[20]); and
- the accused must have intentionally provided advice or encouragement to the other person to commit the offence, or assisted in the preparation for it, or have otherwise taken steps through persuasion or otherwise to cause its commission.

2.14 The accused will not be guilty, if he or she does not honestly believe the commission of the offence is a possibility.[21]

2.15 There is no requirement, at common law (except arguably in the case of an offence involving the element of procuring),[22] for there to be a causal connection between the assistance or encouragement given and the commission of the offence,[23] although there must in some way be a link in purpose with the person actually committing the offence.[24]

16. *Giorgianni v The Queen* (1985) 156 CLR 473, 481, 493.
17. *R v Glennan* [1970] 91 WN (NSW) 609, 615; *Giorgianni v The Queen* (1985) 156 CLR 473, 491, although it is not necessary that the principal in the first degree be convicted: *King v The Queen* (1986) 161 CLR 423 as, eg, where there is a difference in the evidence admissible against each offender; or where the identity of the principal offender is unknown, so long as the offence is shown to have occurred.
18. *Giorgianni v The Queen* (1985) 156 CLR 473, 481, 488, 500.
19. Although not necessarily the result of the act which the accessory understood was to be committed: *Stokes v The Queen* (1990) 51 A Crim R 25, 37-38; and see *Likiardopoulos v The Queen* [2010] VSCA 344 [81]-[82] and [99].
20. *Giorgianni v The Queen* (1985) 156 CLR 473, 487-8, 495, 505, 507-508.
21. *R v Harding* [1976] VR 129; *R v Truong* (Unreported, NSWCCA, 22 June 1998); or, if he or she had countermanded or withdrawn their assistance or encouragement for its commission: *Tietie v The Queen* (1988) 34 A Crim R 438; *R v Croft* [1944] KB 295.
22. *Attorney-General's Reference (No 1 of 1975)* [1975] 1 QB 773, 779. The suggestion to this effect by Sir John Smith in *Reshaping the Criminal Law* has been held to be inapplicable under Australian law by reason of the acceptance that the collocation of expressions traditionally employed convey a single composite concept: *Likiardopoulos v The Queen* [2010] VSCA 344 [107]-[111].
23. *R v Calhaem* [1985] QB 808, see B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 329.
24. *R v Russell* [1933] VLR 59, 67 (Cussen ACJ); *Giorgianni v The Queen* (1985) 156 CLR 473, 480.

2.16 Generally, the criminal liability of an accessory before the fact is derivative, and depends upon the principal offender committing the substantive offence.[25] However, in some cases, conduct of this kind may constitute an inchoate offence of incitement or conspiracy or involve a substantive offence in its own right — for example, the offence of soliciting or inciting another to commit murder[26] — each of which is complete and punishable, whether or not the person solicited or incited goes ahead and commits that offence or any other offence.[27]

2.17 An accessory before the fact to a serious indictable offence may be indicted, tried and sentenced as a principal offender, and is liable to the same punishment to which he or she would have been liable as a principal offender.[28] In addition, the *Crimes Act 1900* (NSW) provides that, where an offence is by the Act punishable on summary conviction, any person who aids, abets, counsels or procures its commission, will, on conviction by the Local Court, be guilty in the same degree and liable to the same punishment as the principal offender.[29]

Accessory after the fact

2.18 An ***accessory after the fact*** is one who provides assistance to a principal offender, who has already committed an offence, or to his or her accessory, for example by concealing the proceeds of the offence, or by hindering police investigations, with the intention or purpose of assisting that principal or his or her accessory, to avoid arrest or punishment.[30]

2.19 The conduct of an accessory after the fact strictly does not fall within the concept of complicity. It involves a separate or stand-alone offence, and is punishable according to the provisions of the *Crimes Act 1900* (NSW) and subject to the prescribed maximum penalties, which differ according to the seriousness of the offence for which the assistance was provided.[31]

Basic joint criminal enterprise

2.20 At common law, a basic joint criminal enterprise or common purpose exists when two or more people ***agree*** to commit a particular offence, and do so.[32]

2.21 Each of the participants in the basic joint criminal enterprise is guilty of the offence committed, regardless of the part he or she played in its commission.[33] Unlike accessorial liability which is derivative, the liability of a party to a joint criminal enterprise is primary. That is, the offence does not have to be proved against the principal participant first.

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25. *R v Glennan* (1970) 91 WN (NSW) 609, 615.
26. *Crimes Act 1900* (NSW) s 26.
27 See para 2.58-2.66.
28. *Crimes Act 1900* (NSW) s 346.
29. *Crimes Act 1900* (NSW) s 546.
30. *R v Young* (Unreported, NSWCCA, 31 October 1995).
31. *Crimes Act 1900* (NSW) s 348, s 349, s 350.
32. *McAuliffe v The Queen* (1995) 183 CLR 108, 114.
33. *R v Tangye* (1997) 92 A Crim R 545, 557.

2.22 Where the Crown can prove that the accused was present at the scene, and was assisting the principal participant, then it can pursue its case against him or her alternatively as an aider and abettor or as a party to a joint criminal enterprise.[34]

2.23 A secondary party who is not present at the scene of the offence, but who nevertheless was a party to the concert to commit the offence, can be prosecuted by reference to his or her participation in the joint criminal enterprise.[35]

2.24 In some formulations, the concept of a basic joint criminal enterprise has been extended to apply, not only to the particular offence which had been agreed, if committed, but also to one which falls within the "scope of the enterprise", that is one which can be regarded as a "possible incident" in the execution of the agreed offence.[36]

2.25 Determining what is within the "scope" of a joint criminal enterprise can present something of a difficulty, with the result that the boundary between this form of complicity and extended joint criminal enterprise is not easy to draw.

Extended joint criminal enterprise

2.26 Under the common law concept of an extended joint criminal enterprise, a participant to the arrangement or understanding constituting the basic joint criminal enterprise, can also be held liable for an additional offence (sometimes referred to as an "ancillary offence") outside its scope, which another participant commits while carrying out that enterprise.

2.27 The secondary participant becomes liable for this additional offence[37] because, as one of the parties to the original joint criminal enterprise, he or she foresaw the possibility of the additional offence occurring, and with that knowledge continued his or her participation in the joint criminal enterprise.[38]

2.28 This form of extended joint criminal enterprise is potentially controversial, because the secondary participant is held liable for a criminal offence, without having the *mens rea* (criminal intent) required of the primary participant, and without committing the *actus reus* (physical act) which is a necessary element of the offence.

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34. *Stokes v The Queen* (1990) 51 A Crim R 25, 35-37.

35. *Johns v The Queen* (1980) 143 CLR 108; and *Likiardopoulos v The Queen* [2010] VSCA 344 [56]-[59], where it was confirmed that what is required is participation in the enterprise at the time of the commission of the act or acts constituting the offence, presence being relevant only so far as it may assist in establishing participation.

36. *R v Surridge* (1942) 42 SR (NSW) 278, 282; *Markby v The Queen* (1978) 140 CLR 108, 113; *Johns v The Queen* (1980) 143 CLR 108, 131; *Miller v The Queen* (1980) 55 ALJR 23, 26.

37. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, Federation Press, 2006) [11.4.1].

38. *Chan Wing-Siu v The Queen* [1985] AC 168, 175; *McAuliffe v The Queen* (1995) 183 CLR 108, 115-118 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ): See also *Gillard v The Queen* (2003) 219 CLR 1 [112]; A P Simester and R G Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, 2007) 222-223.

2.29 It has been argued that the liability of the secondary participant, in an extended joint criminal enterprise case, is derivative being dependent on the liability of the principal participant having committed the additional offence, in contrast with that arising in a basic joint criminal enterprise case, where the liability of the secondary participant is equated to that of a principal participant.[39]

Potential for overlap

2.30 The potential for an overlap between the several heads of complicity that exist, and for confusion on the part of jurors, can be illustrated by the following example:

Example

A lends B a handgun knowing it is to be used in an armed robbery. C drives B to a hotel where the robbery is to occur and waits for him in the hotel car park. D, who had planned the robbery with B and is also armed, joins B in the hotel and threatens the security guard with his gun, while B demands money from the hotel manager. When B and the manager go to the hotel safe there is a scuffle in the course of which B, who has panicked, shoots the manager fatally with the gun which he has borrowed. B takes money from the safe and with D runs to C's car. They are driven to C's home where E, who previously had no involvement in the planned offence, is informed of what had occurred. E agrees to take B and D's guns away, and he then throws them into a river.

2.31 In these circumstances, **Offender A** is an accessory before the fact to armed robbery, provided that the prosecution proves that A knew the purpose to which the gun was to be put, and that B then committed the offence of armed robbery. The offence is derivative rather than primary, being dependant on the armed robbery occurring.[40]

2.32 **Offender B** is a principal in the first degree to armed robbery, and also to the offence of murder simpliciter if the prosecution proves that he had one of the mental elements required for that offence; or otherwise, of felony murder, if the prosecution proves that the shooting occurred in an attempt to commit an armed robbery or during the commission of that offence. The liability for each offence is primary.

2.33 **Offender C** is a principal in the second degree to armed robbery, being present at the scene of the offence, ready to assist in its commission. C's guilt in this sense is derivative, being dependent on knowledge of what B was doing and on proof that B committed an armed robbery. If C did not know what B's purpose was until after the armed robbery was committed, then C would be liable as an accessory after to the fact to that offence if, with the knowledge of its commission, he drove B and D from the scene in order to assist them to escape arrest. Again, C's liability on this basis would be derivative dependent on B and D, or either of them having committed the armed robbery.

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39. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, Federation Press, 2006) [11.4.1], and see D Lanham, "Primary and Derivative Criminal Liability: An Australian Perspective" [2000] *Criminal Law Review* 707.
40. *Osland v The Queen* (1998) 197 CLR 316 [14].

2.34 **Offender D** could be convicted as a principal in the first degree to armed robbery, either on the basis of participation in a joint criminal enterprise with B to commit that offence, or on the basis that, by threatening the security guard with his gun, he committed some of the physical elements of that offence.[41]

2.35 As noted in the following chapters of this Report, D could also be convicted of extended joint enterprise murder, provided that it could be shown that he foresaw the possibility of B using the weapon (with the mental element required for murder) to shoot someone, in the course of their enterprise to commit an armed robbery. Alternatively, D could be convicted of constructive (or felony) murder[42] on the basis of his participation in an offence (armed robbery with a dangerous weapon) carrying a sentence of 25 years imprisonment,[43] during the commission of which his accomplice fatally shot the hotel manager.[44]

2.36 **Offender E** is an accessory after the fact to armed robbery and also to murder, subject to proof that he knew that B and D committed those offences and that, by disposing of the guns, he intended to assist them to escape justice. In each case, E's liability is derivative, being dependent on B and D having committed the offences, although E would be convicted of the separate offence(s) applicable to an accessory after the fact, rather than the offence(s) of which B and D stand to be convicted.

2.37 It may be noted that C could also be convicted of murder under extended joint enterprise principles, in accordance with the decision in *Johns v The Queen*.[45]

2.38 In the above circumstances, B, C and D might also have committed an offence of conspiracy to commit an armed robbery, for which the penalty would be at large, since this is a common law offence under NSW law. Although in the circumstances outlined, conspiracy is theoretically available as a separate offence giving rise to a primary liability in each party, there would be little point in pursuing a conspiracy charge, unless there was an evidentiary advantage to the prosecution in doing so.

2.39 Where offenders falling into these various categories are placed on trial together,[46] the potential for complexity and appellable error in directing the jury is considerable.[47]

Aiding or inciting suicide

2.40 The rule of law that it is a crime for a person to commit, or to attempt to commit, suicide has been abrogated in NSW.[48] However, it is still an offence for a person to

41. *Osland v The Queen* (1998) 197 CLR 316 [70]; *R v Lowery* (No 2) [1972] VR 560, 561.
42. See chapter 5.
43. *Crimes Act 1900* (NSW) s 97(2).
44. *R v Solomon* [1959] Qd R 123, 126-127.
45. *Johns v The Queen* (1980) 143 CLR 108.
46. As is permitted by the *Crimes Act 1900* (NSW) s 346-347, 351.
47. For a recent example see *R v Nguyen* [2010] VSCA 23 where directions were required in relation to murder and manslaughter upon each of the bases of joint enterprise, extended joint enterprise and aider and abettor.

"aid or abet" another to commit, or to attempt to commit suicide;[49] or to incite or counsel another person to commit suicide, when that other person proceeds to take his or her own life or attempts to do so, as a consequence of the incitement or counselling.[50]

2.41 In circumstances where the deceased did not voluntarily participate in the termination of his or her life – for example, through lack of capacity, or as a result of misrepresentation – a party assisting or arranging for that event could, notwithstanding the foregoing, be convicted of an offence of murder,[51] or of an offence of conspiracy or soliciting to commit murder, where others are involved in the events leading to the death.[52]

Innocent or non responsible agency

2.42 The doctrine of innocent or non-responsible[53] agency allows the primary participant, who carries out the physical act required for an offence, to be found free of criminal responsibility, while preserving responsibility for the offence in the secondary participant, who assisted or encouraged the primary participant's act.

2.43 An illustration can be seen in *R v Cogan.*[54] Leak tricked Cogan into having sexual intercourse with Leak's wife against her will. Cogan was convicted of sexual assault by the jury, which also returned a special verdict that Cogan had believed, although without reasonable grounds, that she had been consenting. Leak was convicted of rape, as an aider and abettor, on the basis that he had acted through Cogan as his innocent agent. Cogan's appeal was allowed, by reason of the decision of the House of Lords in *Director of Public Prosecutions v Morgan*[55] delivered between the date of the trial and appeal, that his belief as to consent was sufficient to provide a defence. Leak's appeal was dismissed by the Court of Appeal on the basis of his admission that he had persuaded Cogan to have intercourse with his wife in order to punish her. The Court observed that, while he had been charged as an aider and abettor (which would have required proof of an offence by the other participant) it would have been an affront to justice for him to have been acquitted. In this respect the Court observed that he could have been charged as a principal offender.[56]

2.44 This form of responsibility was acknowledged in *White v Ridley,*[57] although it is a case in which the majority dismissed an appeal against the conviction of the

48. *Crimes Act 1900* (NSW) s 31A.
49. *Crimes Act 1900* (NSW) s 31C(1), carrying a maximum sentence of imprisonment for 10 years.
50. *Crimes Act 1900* (NSW) s 31C(2), carrying a maximum sentence of imprisonment for 5 years.
51. See *R v Justins* [2008] NSWSC 1194, discussed at para 8.40-8.51.
52. *Crimes Act 1900* (NSW) s 26.
53. A more appropriate expression suggested by McHugh J in *Osland v The Queen* (1998) 197 CLR 316 [85]-[86].
54. *R v Cogan* [1976] QB 217.
55. *Director of Public Prosecutions v Morgan* [1976] AC 182.
56. *R v Cogan* [1976] QB 217, 223.
57. *White v Ridley* (1978) 140 CLR 342.

appellant/applicant for importing drugs into Australia.[58] The case was one in which drugs concealed in a stereo receiver were carried into the country by an airline, which was unaware of their presence. The appellant remained outside Australia during the time of their carriage and had tried unsuccessfully to halt their passage when he suspected that he had come to notice.

2.45 Justice Gibbs described the applicable principle as follows:

> However it is well settled at common law that a person who commits a crime by the use of an innocent agent is himself liable as a principal offender. That is so not only where the agent lacks criminal responsibility, as, for example, when he is insane or too young to know what he is doing, but also where the agent, although of sound mind and full understanding, is ignorant of the true facts and believes that what he is doing is lawful.[59]

2.46 Justice Stephen (with whose reasons Justice Aickin agreed) described the airline as an "innocent instrument" by which the appellant effected the importation, that is an instrument which he set in motion for the purpose of committing the offence.[60] His Honour treated the matter as one of causation, rather than one dependent on complicity principles, as can be seen from the consideration which was given[61] to whether there had been an intervention of some new cause for the importation for which the appellant would not be responsible, and which displaced the original arrangement as the event to which the importation could be causally assigned. The appellant's unsuccessful steps to halt the carriage of the goods were held insufficient to break the chain of causation.

2.47 Justice Gibbs and Justice Aickin similarly supported the availability of this principle, in *Matusevich v The Queen* acknowledging that if A incited B to kill C, in circumstances where B was legally insane and entitled to a special verdict of not guilty by reason of mental illness, then A could still be convicted of murder on the basis that B was his innocent agent.[62]

2.48 The case of *R v Bourne*[63] provides another example. It was a case in which the Court of Appeal upheld the conviction of a husband for aiding and abetting his wife to commit an offence of bestiality. It was assumed by the Court that had she been charged, she would have had a complete defence of duress. In deciding that the husband was nevertheless guilty, the Court approached the matter on the basis of causation rather than on the basis of innocent agency. This was the course also followed by the Court of Appeal in Victoria in *R v Hewitt*.[64]

2.49 The outcome may well be different if the accused is charged with aiding and abetting the participant who commits the *actus reus* for the offence, rather than as a

58. *White v Ridley* (1978) 140 CLR 342 (Gibbs, Stephen and Aickin JJ; Jacobs and Murphy JJ dissenting).
59. *White v Ridley* (1978) 140 CLR 342, 346.
60. *White v Ridley* (1978) 140 CLR 342, 353.
61. *White v Ridley* (1978) 140 CLR 342, 354-359.
62. *Matusevich v The Queen* (1977) 137 CLR 633, 637 (Gibbs ACJ), 663 (Aickin J).
63. *R v Bourne* (1952) 36 Cr App R 125.
64. *R v Hewitt* [1997] 1 VR 301, leave to appeal to the High Court refused.

principal. An example can be seen in *Thornton v Mitchell,*[65] where a bus driver acting on the negligent instructions of his conductor, accidentally reversed over two pedestrians. The bus driver was found not to have committed the offence of careless driving, having reasonably relied on his conductor's instructions and, as a consequence, the conductor was found not guilty of "aiding and abetting" that offence. It seems however that consideration was not given to the possibility of placing reliance on the innocent agency approach.

2.50 In *Schultz v Pettitt,*[66] an appeal was, however, successfully brought by the owner of a power boat against his conviction for having operated the boat without due care. He had instructed his five year old daughter to push the hand throttle down. She pushed it too far, and as a result the boat took off quickly, collided with another boat and then ran on to the river bank. Justice Cox held that the conviction was not one that could be sustained on the basis of innocent agency, or by treating the boat owner as an accessory before the fact, because of a lack of the *mens rea* on his part.

2.51 The issue that arises, in the context of innocent agency, concerns the somewhat imprecise basis on which cases falling within this category are to be decided.[67]

2.52 The Code States and the Commonwealth have each adopted a statutory version of the innocent agency principle,[68] referred to in the Commonwealth Code as "commission by proxy". This formulation does not create an offence. Rather it specifies a way in which an indirect participant can commit an offence through the use of an innocent agent.[69] It is available to the prosecution in circumstances where it could not establish the guilt of the indirect participant as an accessory.[70] In relying on this provision, the prosecution must show that the indirect participant had, in relation to the physical element of the offence, a relevant fault element and, additionally, that the conduct constituting the *actus reus* would have constituted an offence on the part of the indirect participant, if he or she had engaged in it.

Constructive or felony murder

2.53 The common law offence of felony murder, now more aptly referred to as constructive murder, has been restated in statutory form in NSW. It currently applies where the act of the accused causing the death was done in an attempt to commit, or during or immediately after the commission by the accused, or some accomplice

65. *Thornton v Mitchell* [1940] 1 All ER 339.
66. *Schultz v Pettitt* (1980) 25 SASR 427.
67. The several devices for attributing liability to indirect participants, and the implications for a coherent theory, are examined by D Lanham, "Primary and Derivative Criminal Liability: An Australian Perspective" [2000] *Criminal Law Review* 707.
68. *Criminal Code* (Qld) s 7; *Criminal Code* (WA) s 7; *Criminal Code* (Tas) s 3; *Criminal Code* (Cth) s 11.3.
69. *R v Kaldor* (2004) 150 A Crim R 271 [81].
70. *R v Kaldor* (2004) 150 A Crim R 271 [7], [28]-[29], [82].

with him or her, of an offence (the foundational offence) that is punishable by imprisonment for life or for 25 years.[71]

2.54 Constructive murder has the effect of extending the reach of murder to cases where the killing was inadvertent or unintended — that is, where the person whose act caused the death lacked the mental state otherwise required for murder (involving an intent to kill or to cause grievous bodily harm or reckless indifference to human life).

2.55 The offence of constructive murder also extends to a person who is an accomplice to the foundational crime, even though it was not his or her act that brought about the death, and even though he or she lacked the mental state required for murder.[72]

2.56 The foundational offence in NSW need not be an offence involving violence or dangerousness, and the extension of the category of foundational offence, to offences involving an available maximum penalty of imprisonment for 25 years, has potentially expanded its application well beyond its reach at common law.

2.57 Constructive murder also has the potential of extending the liability of a co-participant in a criminal enterprise, beyond that which would arise under the doctrine of extended joint criminal enterprise. For this reasons we intend to review and recommend reforms in this area.

Inchoate offences

2.58 Three common law "inchoate" or "preliminary" offences exist in NSW: attempt, conspiracy and incitement, of which two, conspiracy and incitement, presuppose the involvement of two or more people. An inchoate offence criminalises conduct which is one step removed from the commission of the principal offence, that is, which is working towards, or leading up to, the completion of a crime;[73] not because such conduct involves actual harm, but because it enhances the prospect of actual harm occurring.[74] In each case, criminal liability does not depend on the principal offence being committed.[75]

2.59 We have taken into account the offences of conspiracy and incitement for two reasons. First, they are offences, the purpose of which is to include or to engage another person in the commission of a substantive offence or also, in the case of conspiracy, in the commission of a tort or other civil wrong constituting an unlawful act. As a result, they can overlap with other bases for complicity. Secondly, while there are some offences of conspiracy or incitement for which criminal legislation

71. *Crimes Act 1900* (NSW) s 18(1)(a).

72. *Sharah v The Queen* (1992) 30 NSWLR 292; *R v Spathis* [2001] NSWCCA 476; *R v Jacobs* (2004) 151 A Crim R 452.

73. Ireland, Law Reform Commission, *Inchoate Offences*, Consultation Paper 48 (2008) [B.3]; England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [1.14].

74. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [1.11].

75. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [1.14].

makes specific provision,[76] there are omnibus provisions in some Acts which include soliciting and inciting another, or conspiring with another, as elements of an offence, alongside elements of aiding, abetting or counselling as well as other elements such as being knowingly concerned in a prohibited act.[77]

Conspiracy

2.60 Subject to certain specific classes of unlawful conduct for which a statutory offence of conspiracy exists under NSW law,[78] the law of conspiracy in this State continues to be governed by the common law. In this respect it differs from the Code States;[79] and from the model adopted by the Criminal Codes of the Commonwealth, Australian Capital Territory, and Northern Territory.[80] It also differs from the position in Victoria where the common law offence has been substantially replaced by a statutory offence.[81]

2.61 At common law, a conspiracy consists of a compact or agreement between two or more people to do an unlawful act, or to do a lawful act by unlawful means.[82]

2.62 The offence is complete once the agreement is made, the *actus reus* being the fact of its making, the *mens rea* being the intention to achieve the unlawful purpose in association with the other parties. As an inchoate offence, liability does not depend upon the agreement being converted into performance of the agreed unlawful act or unlawful purpose.[83]

2.63 As conspiracy is an offence of duration (that is, a continuing offence), the parties to it may change over time so long as there are, at any given time, at least two parties agreeing in combination to achieve the same criminal objective.[84]

2.64 There are several advantages for the prosecution in relying on a charge of conspiracy, instead of a substantive offence, or by way of an alternative or additional count. However, the offence is not without its difficulties, and its use has been criticised when combined with a substantive offence, or charged where a substantive offence within its reach has been committed and would have been available to the prosecution.

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76. For example, *Crimes Act 1900* (NSW) s 26, s 61N, s 61O; *Drug Misuse and Trafficking Act 1985* (NSW) s 26.
77. For example, *Drug Misuse and Trafficking Act 1985* (NSW) s 27, 28; *Fair Trading Act 1987* (NSW) s 62; and see para 8.14-8.23.
78. For example, *Drug Misuse and Trafficking Act 1985* (NSW) s 26; *Firearms Act 1996* (NSW) s 51C; *Crimes Act 1900* (NSW) s 26.
79. *Criminal Code* (Qld) s 541, 542, 543; *Criminal Code* (NT) s 282-286, 288, 289, 293; *Criminal Code* (WA) s 558, 560; *Criminal Code* (Tas) s 297. See also *Criminal Code* (Qld) s 131, 132, 221; *Criminal Code* (WA) s 134, 135.
80. *Criminal Code* (Cth) s 11.5; *Criminal Code* (ACT) s 48; *Criminal Code* (NT) s 43BJ.
81. *Crimes Act 1958* (Vic) s 321-321F.
82. *Mulcahy v The Queen* (1868) LR 3 HL 306, 317; *Shaw v Director of Public Prosecutions* [1962] AC 220; *R v Barbouttis* (1995) 37 NSWLR 256; *Gerakiteys v The Queen* (1984) 153 CLR 317.
83. *R v Aspinall* (1876) 2 QBD 48, 58.
84. *R v Masters* (1992) 26 NSWLR 450, 458; *Savvas v The Queen* (1995) 183 CLR 1.

Incitement

2.65 At common law, incitement occurs where a person encourages or urges another person to commit an offence. It differs from the derivative offence of assisting the other person to commit the offence, since it does not depend on the party incited committing or attempting to commit the offence. This is because the act of encouragement, if undertaken with a guilty intention, is a criminal offence in itself and is complete as soon as the encouragement comes to the attention of the other party.[85] If the offence incited is in fact committed, then the party inciting the offence can be convicted as an accessory to that offence, by reason of having counselled its commission. A charge of incitement can be preferred as a back up or alternative offence.

2.66 There is no comprehensive statutory definition in NSW of the forms of conduct that are included within the common law offence of incitement. Nor is there any specific statutory offence which would replace the common law offence, although there are several statutory offences which embrace expressions such as incite, solicit, encourage and persuade another to commit an offence, often in conjunction with conduct that is of an accessorial or primary nature.[86]

Other forms of joint participation in criminality

2.67 In NSW, there are some specific statutory offences directed at punishing an offender's participation in a criminal association, or in a joint criminal activity, or assisting criminal activity. These offences do not depend on complicity principles, but are noted here for completeness. We have not given specific consideration to whether or not they should continue to be offences, as that is outside our terms of reference. We draw attention to their existence in order to ensure that any reform of the law, in response to our recommendations, does not inadvertently limit or qualify their application.

Participation in a criminal group or in a declared organisation

2.68 The *Crimes Act 1900* (NSW) makes provision for a series of statutory offences that attach criminal liability to a person, who participates in a criminal group, knowing it is a criminal group, and knowing or being reckless as to whether his or her participation in it contributes to the occurrence of any criminal activity; or who assaults another person, or destroys or damages property, or assaults a law

85. *R v Assistant Recorder of Kingston-Upon-Hull; Ex parte Morgan* [1969] 2 QB 58, 62. (Lord Parker CJ); *R v Haines* (2001) 80 SASR 363 [33]. See also D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4th ed, Federation Press, 2006) 1163; D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 456; P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 662; England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [1.13](2).

86. For example, under *Crimes Act 1900* (NSW) s 26 it is an offence to solicit, encourage, persuade, endeavour to persuade, or propose to any person to commit murder. See para 8.14-8.23 for an examination of offences which include, within the one provision, elements encompassing multiple bases for complicity.

enforcement officer while in the execution of his or her duty[87] — in each case intending by his or her action to participate in a criminal group's criminal activity. A criminal group is defined as a group of three or more people who have as an objective obtaining material benefits from conduct that constitutes a serious indictable offence, or committing serious violence offences.[88]

2.69 The *Crimes (Criminal Organisations Control) Act 2009* (NSW) permits control orders to be made against a member of a declared organisation, preventing that person from associating with other members of the organisation. It provides that such a person commits an offence if he or she associates with another controlled member of that organisation,[89] or if he or she recruits another person to become a member of that organisation.[90] It does not otherwise affect the criminal responsibility of that person, for the acts of another person within that organisation. An eligible judge may declare an organisation as such, for the purposes of this Act, if he or she is satisfied that its members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and the organisation represents a risk to public safety and order in the State.[91]

Recruitment to carry out or assist in a criminal activity

2.70 Independently of the criminal offence of a controlled member of a declared organisation recruiting another person to be a member of that organisation,[92] it is an offence, under the *Crimes Act 1900* (NSW), for any person (not being a child) to recruit another person to carry out or to assist in carrying out a criminal activity (that is, conduct that constitutes a serious indictable offence).[93] For the purpose of this offence, "recruit" means "counsel, procure, solicit, incite or induce".[94] What is potentially left ambiguous is whether an offence is committed where A solicits or incites B to carry out, or assist in carrying out, a criminal activity, but the activity is not carried into fruition, or whether the offence is only complete once the criminal activity occurs. In the second reading speech the offence was said to be directed to a different activity than that constituting an offence of incitement, being "less about the crime itself than about corrupting a potential member and drawing him or her into a criminal gang".[95] The speech in reply in the Legislative Council also referred specifically to the importance of punishing attempts to recruit young people, particularly those from specific ethnic groups, "into a violent, dishonest and often tragically short life of crime". Specific reference was also made to protecting "people—especially school students—from intimidation to join youth gangs".[96] The

87. *Crimes Act 1900* (NSW) s 93T.
88. *Crimes Act 1900* (NSW) s 93S(1).
89. *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 26(1) and s 26(1A).
90. *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 26A(1).
91. *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 9(1).
92. *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 26A; compare with the terrorism recruiting offence in *Criminal Code* (Cth) s 102.4.
93. *Crimes Act 1900* (NSW) s 351A.
94. *Crimes Act 1900* (NSW) s 351A(3).
95. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 19 September 2006, 1735.
96. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 19 September 2006, 1759.

relevant provision imposes a greater maximum penalty (10 years, instead of 7 years) where the person recruited in under the age of 18 years.[97]

Membership of a terrorist organisation

2.71 Although, for the most part, terrorism related offences are dealt with under the Model Criminal Code,[98] intentional membership of a terrorist organisation is also an offence under NSW law.[99]

Riot and affray

2.72 Riot and affray are now statutory offences under the *Crimes Act 1900* (NSW),[100] the common law offences of riot and affray having been abolished.[101] A riot involves 12 or more people being present together, and using or threatening unlawful violence[102] towards people or property for a common purpose. Their collective conduct must be such that, when committed in a public or private place, it would cause a person of "reasonable firmness" (who is actually or hypothetically present at the scene) to fear for his or her personal safety.[103]

2.73 An affray involves one or more people using or threatening[104] violence[105] towards another person (not property).[106] The conduct[107] must be such that, when committed in a public or private place, it would cause a person of "reasonable firmness" (who is actually or hypothetically present at the scene) to fear for his or her personal safety.[108] A person is guilty of affray only if he or she intends to use or threatens violence, or is aware that his or her conduct may be violent or threaten violence.[109]

Aggravating circumstances – offence in company

2.74 There are a number of offences[110] for which it will be an aggravating circumstance if the offence is committed in the company of another. The presence of the

97. *Crimes Act 1900* (NSW) s 351A(2).
98. *Criminal Code* (Cth) ch 5 pt 5.3.
99. *Crimes Act 1900* (NSW) s 310J.
100. *Crimes Act 1900* (NSW) s 93B (Riot) and s 93C (Affray).
101. *Crimes Act 1900* (NSW) s 580H, and sch 3.
102. Either intending to use violence or is aware that his or her conduct is violent: *Crimes Act 1900* (NSW) s 93D(1). Violence is broader than conduct causing or intending to cause injury or damage: see *Crimes Act 1900* (NSW) s 93A definition (b) of "violence".
103. *Crimes Act 1900* (NSW) s 93B.
104. *Crimes Act 1900* (NSW) s 93C(3): with affray, a threat cannot be made by words alone.
105. Either intending to use violence or is aware that his or her conduct is violent: *Crimes Act 1900* (NSW) s 93D(2). Violence is broader than conduct causing or intending to cause injury or damage: see *Crimes Act 1900* (NSW) s 93A definition (b) of "violence".
106. *Crimes Act 1900* (NSW) s 93A definition (a) of "violence" does not include violence towards property under s 93C.
107. If more than one person, collective conduct: *Crimes Act 1900* (NSW) s 93C(2).
108. *Crimes Act 1900* (NSW) s 93C.
109. *Crimes Act 1900* (NSW) s 93D(2).
110. Those included in the *Crimes Act 1900* (NSW) s 61J, 61JA, 61M, 61O, 66A, 66C, 86, 97, 109, 111, 112, 113 and 154C.

aggravating circumstance is relevant for sentencing purposes, since it opens the way for an increase in the maximum sentence available. Although it is necessary to charge the accused with the aggravated form of offence, this does not give rise to any wider concept of complicity. What is required, for such an offence, is that there be a physical presence of more than one participant, in such proximity as to enable the inference to be drawn that the coercive effect of their presence operated to embolden, or reassure, the offender in committing the crime, or to intimidate the victim into submission.[111]

2.75 Parties to a joint criminal enterprise and principals in the second degree potentially fall within the reach of such provisions, thereby qualifying themselves for an increased sentence. Alternative verdicts will be available, in such cases, for the unaggravated form of the offence, if the necessary elements of the offence, save for the aggravating circumstances, are established.[112]

2.76 Since these provisions do not extend the net of complicity, but are relevant primarily for the purposes of sentencing, they will not be the subject of further consideration in this Report.

111. *R v Button* (2002) 54 NSWLR 455 [125]; and see *R v Jacobs* (2004) 151 A Crim R 452 and *R v Leoni* [1999] NSWCCA 14.

112. *Crimes Act 1900* (NSW) s 61Q and s 115A.

3. Accessorial Liability

3.1 In Chapter 2, we set out the forms of complicity and defined them. In the first part of this chapter, we deal with those offenders who fall into the category either of:

- a principal in the second degree; or
- an accessory before the fact.

3.2 Next, we deal with the responsibility of an offender who provides encouragement or assistance to an innocent or non-responsible agent, whose conduct constitutes the *actus reus* for an offence.

3.3 Finally, we deal with accessories after the fact. Although the liability of accessories after the fact does not strictly constitute complicity, it is dealt with in this chapter for completeness.

3.4 The potential for overlap in this area of the law was noted in chapter 2. The key point to keep in mind in this chapter is the overlap between the two forms of accessorial liability which give rise to derivative liability. Overlap also arises potentially with complicity involving joint criminal enterprise, which, at least in its "basic form", gives rise to primary liability. They are different in their elements and implications. But it is not uncommon for a case to be pursued on both bases,[1] this having the advantage of allowing offenders to be convicted where the evidence shows that each was involved in the offence, but does not permit a finding as to the precise roles they performed.[2]

3.5 There is also a potential for overlap with the inchoate offences of incitement and conspiracy, which are dealt with later in this Report, although these tend to be offences that are pursued where there is doubt or difficulty concerning the proof of the principal offender's commission of the relevant offence.

1. *R v Hore* [2005] NSWCCA 3 [81].
2. E Griew, "It must have been one of them" [1989] *Criminal Law Review* 129; *Mohan v The Queen* [1967] 2 AC 187; *R v Sperotto* (1970) 71 SR (NSW) 334; *R v Tangye* (1997) 92 A Crim R 545.

Accessories before the fact and principals in the second degree

3.6 Whether an offender is criminally responsible as an accessory before the fact, or as a principal in the second degree, turns upon the time when that offender provides assistance or encouragement to the principal offender. The liability of each is derivative, and each may be indicted, convicted and punished as a principal. Save for the requirement of presence, which is necessary in the case of a principal in the second degree, the elements concerned with the *actus reus* and the *mens rea* are the same. It is observed that "presence", in contemporary conditions, is a somewhat elastic concept. In the light of modern technology, assistance or encouragement can be given at the end of a telephone, or computer terminal, without the element of physical presence upon which the authorities have focused. This raises for consideration the desirability of treating the two forms of accessorial liability as one. For that reason, they are dealt with together in this part of the chapter.

The conduct element

3.7 As defined in chapter 2, to be liable as a principal in the second degree, or as an accessory before the fact, a defendant "D" must intentionally provide assistance, advice or encouragement to another person, "P", to commit the offence. While P must have committed the offence, no causal connection needs to be proved between D's actions and P's offence.

Omissions giving rise to secondary liability

3.8 The statute law in some of the Australian jurisdictions recognises that an omission to perform an act can give rise to secondary liability.[3] The common law also recognises that this is the case, so long as the defendant had a legal power and duty to intervene to prevent the offence.[4]

3.9 Examples can be seen in the case of a man who stood by while his wife murdered their children and then killed herself;[5] and in the case of an employee who failed to prevent the theft of his employer's property.[6] Liability on this basis can extend to owners of property who have a duty and power to control its use and to prevent it being put to some unlawful purpose,[7] and to those in charge of licensed premises who may have a duty in relation to the service of alcohol to patrons, or in relation to the control of their behaviour within those premises.[8]

3.10 More problematic are those cases involving a bystander at the scene of a crime, such as an unlawful fight, the occurrence of which he or she may have approved

3. *Criminal Code* (Qld) s 7(1)(b); *Criminal Code* (NT) s 12(1)(b); *Criminal Code* (WA) s 7(b); *Criminal Code* (Tas) s 3(1)(b); and in the Commonwealth, ACT and NT by reason of their definition of conduct to include an omission to perform an act: *Criminal Code* (Cth) s 4.1(2); *Criminal Code* (ACT) s 13; *Criminal Code* (NT) s 43AD.
4. D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 496-499.
5. *R v Russell* [1933] VLR 59.
6. *Ex parte Parker; Re Brotherson* (1957) 57 SR (NSW) 326.
7. *Du Cros v Lambourne* [1907] 1 KB 40.
8. *Tuck v Robson* [1970] 1 WLR 741.

although without announcing his or her support. A distinction has been drawn, in such cases, between disinterested and accidental presence on the one hand,[9] and, on the other hand, deliberate presence from which an inference can be drawn of encouragement or willingness to assist.[10] It has been suggested that, in such a situation, cheering or applause might suffice for aiding and abetting.[11]

The mental element: Giorgianni v The Queen

The Decision

3.11 In *Giorgianni,*[12] the High Court definitively dealt with the mental element required of an accessory. It was a case in which a prime mover with a trailer, with dangerously defective brakes and laden with coal, ran down a sharply inclined road at Mount Ousley, out of control and at an increasing speed after its brakes failed. It struck some other vehicles killing five people and causing serious injuries to another.

3.12 The driver of the vehicle was acquitted of five counts of manslaughter but convicted of six counts of culpable driving causing grievous bodily harm, an offence of strict liability that was complete, so far as he was concerned, on proof that at the time of the collision he was driving the vehicle in a manner or at a speed dangerous, and that did not require knowledge on his part of any deficiency in its brakes.[13] Giorgianni as owner of the truck, and employer of the driver, was initially convicted as an accessory before the fact to five counts of manslaughter, and one count of accessory before the fact to culpable driving, for having procured the employee to drive the vehicle in a manner dangerous to the public. The convictions of Giorgianni were set aside on appeal, in relation to manslaughter because the driver had not been shown to have committed that offence, and in relation to culpable driving because of a jury misdirection.[14]

3.13 At his retrial, Giorgianni was convicted of being an accessory before the fact to five counts of culpable driving causing death and one count of culpable driving causing grievous bodily harm.

3.14 The case was presented to the jury on the basis that, by reason of the work which Giorgianni had undertaken on the vehicle some two weeks before the accident, including on its brakes, he had actual knowledge of their defective state and of the consequent danger to the public if the vehicle were driven in that condition, heavily laden on a public road with steep gradients, or that, had he exercised reasonable care and diligence, he would have known of those facts, yet he either ignored those facts or acted recklessly in not caring about them.

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9. *R v Allan* [1965] 1 QB 130; *R v Adam* [1999] NSWCCA 189 [74]-[77].
10. *R v Coney* (1882) 8 QBD 534; *Wilcox v Jeffery* [1951] 1 All ER 464; see A Ashworth, *Principles of Criminal Law* (5th ed, OUP 2006) 416-417.
11. A Ashworth, *Principles of Criminal Law* (5th ed, OUP 2006) 416. See *R v Coney* (1882) 8 QBD 534; *R v Clarkson* [1971] 1 WLR 1402 as to the need for actual encouragement.
12. *Giorgianni v The Queen* (1985) 156 CLR 473.
13. *Crimes Act 1900* (NSW) s 52A(3).
14. *Giorgianni v The Queen* (1981) 7 A Crim R 204.

3.15 His appeal against the convictions at this trial was dismissed by the Court of Criminal Appeal,[15] which noted that it was not necessary for the appellant to have had actual knowledge of the defective state of the vehicle,[16] citing an earlier decision of the Court in *R v Glennan* where it had been said:

> The element of knowledge or intention required of an aider and abettor might perhaps be more accurately expressed by saying that it must be shown that he either knew or suspected the existence of facts which would constitute the commission of the offence or, perhaps, that he acted recklessly not caring whether the facts existed or not.[17]

3.16 On appeal to the High Court, the convictions were set aside and a new trial was ordered.[18] The Court held that a person can be convicted as a secondary party to an offence committed by a principal participant, only if he or she had both actual knowledge of the essential circumstances constituting that offence, and an intention to aid, abet, counsel or procure its commission.[19] Recklessness as to assistance or encouragement would not suffice; nor would recklessness as to the essential ingredients of the principal participant's offence.

3.17 As a consequence, in his case, unlike that for the driver, the prosecution needed to prove that Giorgianni had actual knowledge of the defective condition of the vehicle. Although this decision was concerned with an offence of strict liability, the observations of the Court were of application to accessories generally. This means that a higher degree of fault was required in that case of the accessory than of the principal participant.

3.18 While accepting that actual knowledge was required, Chief Justice Gibbs and Justice Mason held that wilful blindness, the deliberate shutting of one's eyes to what is going on, is or can be equivalent to actual knowledge and will be sufficient to support a conviction of a secondary party as an accessory.[20] However the difference between that state of mind, and one of merely neglecting to make such inquiries as a reasonable person would make, was noted.[21] They held, as did the majority, that the dicta in *Glennan* could not be supported.[22]

3.19 Chief Justice Gibbs observed:

> My view of the law may be summed up very shortly. No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal

15. *Giorgianni (No 2) v The Queen* (1984) 11 A Crim R 315.
16. *Giorgianni (No 2*) *v The Queen* (1984) 11 A Crim R 315, 317.
17. *R v Glennan* (1970) 91 WN (NSW) 609, 614.
18. *Giorgianni v The Queen* (1985) 156 CLR 473.
19. *Giorgianni v The Queen* (1985) 156 CLR 473, 482 (Gibbs CJ), 494-495 (Mason J), 500 (Wilson, Deane and Dawson JJ).
20. *Giorgianni v The Queen* (1985) 156 CLR 473, 486-488 (Gibbs CJ), 495 (Mason J).
21. *Giorgianni v The Queen* (1985) 156 CLR 473, 483.
22. *Giorgianni v The Queen* (1985) 156 CLR 473, 486-487, 495, 507.

> offender. Wilful blindness, in the sense that I have described, is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient.[23]

3.20 The majority agreed in relation to recklessness, but differed in relation to the significance of wilful blindness, observing:

> although it may be a proper inference from the fact that a person has deliberately abstained from making an inquiry about some matter that he knew of it and, perhaps, that he refrained from inquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed.[24]

And later:

> The fact of exposure to the obvious may warrant the inference of knowledge. The shutting of one's eyes to the obvious is not, however, an alternative to the actual knowledge which is required as the basis of intent to aid, abet, counsel or procure.[25]

3.21 Earlier they had observed that, for Giorgianni to be convicted, he "must have intentionally participated in the principal offences and so must have had knowledge of the essential matters which went to make up the offences".[26]

3.22 The summing up was accordingly held to have been defective, to the extent that it had referred to recklessness as a possible state of mind that would engage the appellant as an accessory,[27] and a new trial was ordered.

Issues that arise

3.23 The decision in *Giorgianni* does not mean that accessorial liability will never be available in relation to offences of strict or absolute liability. *Giorgianni* will not stand in the way of the conviction of an accessory where the accessory provides assistance with the knowledge or awareness that the principal offender intends to do an act with whatsoever state of mind is required for that offence. It has, however, attracted criticism from several quarters, for example, that it risks resulting in unjust acquittals, and that it is inconsistent with other case law, such as *DPP for Northern Ireland v Maxwell*.[28]

3.24 In an exhaustive review of the decision, Simon Bronitt has identified several issues that arise.[29] They include the following matters.

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23. *Giorgianni v The Queen* (1985) 156 CLR 473, 487-488.
24. *Giorgianni v The Queen* (1985) 156 CLR 473, 505.
25. *Giorgianni v The Queen* (1985) 156 CLR 473, 507-508.
26. *Giorgianni v The Queen* (1985) 156 CLR 473, 500.
27. *Giorgianni v The Queen* (1985) 156 CLR 473, 488, 495, 508-509.
28. *Director of Public Prosecutions for Northern Ireland v Maxwell* [1978] 1 WLR 1350 as discussed in B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 326-327 and 330-337; and see D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 502.
29. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242; S Bronitt, "Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305.

3.25 **The scope of the intention required of the accessory.** Bronitt drew attention to the observation, in the majority judgment, concerning the accessory's mental attitude:

> aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence.[30]

and noted that:

> ... the formulation itself sheds no light on whether the common law requires a specific intent to bring about the perpetrator's crime, or is satisfied by a broader notion of oblique intent,[31] that is foresight that the perpetrator is likely to commit the crime.

3.26 While, on one view both might be embraced, Bronitt suggests that what the judgment would require is that the accessory's assistance, or encouragement, be accompanied by a specific intent that the perpetrator will commit the offence.[32]

3.27 **Scope of the knowledge required.** Two issues were identified in respect of the knowledge required. The first concerns the "essential matters" constituting the principal participant's offence, of which the accessory must have knowledge. Specifically, does the accessory need to know the factual ingredients of the offence, or is it sufficient for the accessory to know of the principal participant's intention to do an act with a particular state of mind, at the time that the assistance or encouragement is given?[33]

3.28 Bronitt suggests that, of the two alternatives noted, the latter view is correct, citing *Stokes v R*[34] in support.[35] Any other view, he noted, would result in an unduly restrictive scope for accessorial liability.[36] This requirement would accordingly be satisfied by knowledge, either of the factual elements of the offence, or alternatively by knowledge of the offender's intention to commit the offence. If correct, this would cover the position of an accessory whose participation occurs before the principal offender commits the offence.[37]

3.29 The second question that Bronitt raises in this context is:

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30. *Giorgianni v The Queen* (1985) 156 CLR 473, 505 (Wilson, Deane and Dawson JJ).
31. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 248.
32. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 249.
33. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 254-255.
34. *Stokes v R* (1990) 51 A Crim R 25, 38.
35. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 255; and see *Likiardopoulos v The Queen* [2010] VSCA 344 [81]-[82] and [99].
36. See the approach suggested by B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 322 cited in *Re Pong Su* (2005) 159 A Crim R 300 [32].
37. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 255-256.

> must an accessory have knowledge of the *specific* crime to be committed by the perpetrator, or will knowledge of the *type* of crime [to be] committed by the perpetrator suffice?[38]

3.30 Although earlier cases[39] had accepted that it was sufficient for the accessory to possess knowledge of "the general type of crime afoot", it was suggested that, on one interpretation of *Giorgianni*, the accessory must provide the assistance or encouragement with an intention that the principal participant commit the actual offence which is committed.[40]

3.31 The *Criminal Code* (Cth) has dealt with this issue in requiring, as one element, that the accessory intend that his or her conduct would aid, abet, counsel or procure the commission of an offence *of the type* the other person committed.[41]

3.32 However, as Bronitt notes,[42] this might result in over-criminalisation, giving rise to accessorial liability for crimes that were not intended or foreseen.

3.33 The extension to an offence "of the type" the primary participant committed raises a potential issue as to what will be encompassed within that expression.[43] The Law Commission of Canada recommended a provision under which the accessory would not be liable, if there is a difference between the offence actually committed and the one which the accessory intended to promote, unless the difference relates only to the victim's identity or to the degree of harm occasioned.[44]

3.34 Also of relevance in this context, is the suggestion of another commentator that the decision in Giorgianni would excuse a person who rendered aid or assistance in advance of the commission of an offence which, at the time of the assistance or encouragement, remained no more than a likelihood or strong possibility.[45]

3.35 It has been suggested that provisions in the code States, to which we refer later in this chapter and which apply a probability principle,[46] address circumstances of this kind,[47] that is, so long as the facts constituting the offence actually committed are a probable consequence of the advice, counselling, or assistance provided.

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38. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 254.
39. *R v Bainbridge* [1960] 1 QB 129; *Director of Public Prosecutions for Northern Ireland v Maxwell* [1978] 1 WLR 1350.
40. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 256.
41. *Criminal Code* (Cth) s 11.2(3)(a).
42. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 257; S Bronitt, "Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305, 317-318.
43. *Bruce v Williams* (1989) 46 A Crim R 122; *R v Ancuta* (1990) 49 A Crim R 307 for examples of cases where this question has arisen.
44. Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31 (1987) 47.
45. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 332.
46. *Criminal Code* (Qld) s 9; *Criminal Code* (Tas) s 5; and *Criminal Code* (WA) s 9.
47. D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 507-509.

3.36 **Relationship between knowledge of the essential facts and intention.** A related issue, identified by Bronitt,[48] concerns the relationship between knowledge of the essential facts of the offence being promoted and intention, as mental elements for accessorial liability, and in particular whether they are distinct elements,[49] or whether proof of knowledge should be treated as evidence from which the necessary intention could be inferred.[50] Bronitt has suggested that the latter approach is consistent with earlier decisions in other areas.[51]

3.37 **Recklessness as an element.** Bronitt identified some of the problems that could arise if the mental element for complicity was enlarged to embrace recklessness. For example, it could unfairly penalise merchants or others who supply advice, or sell equipment, which they foresee might be used to commit a crime, or who are reckless as to its use.[52] This problem is potentially exacerbated if the advice or equipment is used to commit more than one crime of the same type.

3.38 Bronitt criticised the suggested solution of defining recklessness to require a conscious disregard of a substantial or unjustifiable risk,[53] as creating a test that is partly objective and partly subjective, that would not be supported by authority in Australia, and that would arguably conflate recklessness with negligence.[54]

3.39 Bronitt[55] further suggested that an extension of *Giorgianni* might cause problems, by giving rise to liability where a person does an act that assists in the commission of an offence by another, but which he or she does merely by the performance of a legal duty, for example in returning property that he or she suspects will be used to commit an offence. Although the English Court of Criminal Appeal quashed a conviction in a case of this kind in *R v Lomas*,[56] Bronitt argues that the scope of the *Lomas* defence remains unclear, being dependent upon subtle distinctions relating to enforceable rights to have the property restored and belief as to their existence.[57]

48. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 257-259.
49. *Giorgianni v The Queen* (1985) 156 CLR 473, 487-488 (Gibbs CJ).
50. As the majority judgment seems to suggest: *Giorgianni v The Queen* (1985) 156 CLR 473, 503.
51. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 259 citing *Kural v The Queen* (1987) 162 CLR 502 and *Churchill v Walton* [1967] 2 AC 224.
52. S Bronitt, "Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305, 306-307.
53. Compare the *Criminal Code* (Cth) s 5.4 definition of recklessness which also refers to "substantial" or "unjustifiable" risks.
54. S Bronitt, "Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305, 309.
55. S Bronitt, "Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305, 311.
56. *R v Lomas* (1913) 9 Cr App R 220.
57. S Bronitt, "Defending Giorgianni – Part Two: New Solutions for Old Problems in Complicity" (1993) 17 *Criminal Law Journal* 305, 313.

Models for reform

Model Criminal Code

3.40 Although the Model Criminal Code Committee initially proposed that *Giorgianni* be reversed[58] this was not the position taken in the final report[59] or in the *Criminal Code* (Cth) which provides, in relation to aiders and abettors:

> **11.2 Complicity and common purpose**
> (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
>
> (2) For the person to be guilty:
>
> (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
>
> (b) the offence must have been committed by the other person.
>
> (3) For the person to be guilty, the person must have intended that:
>
> (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
>
> (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed. [60]

3.41 This provision is silent in relation to knowledge but instead focuses, in relation to both of its possible areas of application,[61] on the intention required of the accessory, and to that extent resolves some of the issues raised by *Giorgianni*.

3.42 The basis of complicity, to which s 11.2(1) refers, embraces the traditional, and arguably dated, words "aids, abets, counsels or procures", which have been given the same separate meanings that they acquired under the common law.[62] The potential formula of "being knowingly involved or concerned in an offence" was not favoured,[63] nor was the adoption of a compendious concept.

3.43 The complicity provisions do not create an offence; rather they state the way in which a person (D) other than the principal offender (P) may commit an offence.[64]

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58. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility,* Discussion Draft (1992) [77-81].
59. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 86-89.
60. *Criminal Code* (Cth) s 11.2(1)-(3).
61. That is, *Criminal Code* (Cth) s 11.2(3)(a) and (b).
62. *Campbell v The Queen* [2008] NSWCCA 214 [155].
63. *Campbell v The Queen* [2008] NSWCCA 214 [121].
64. *R v Kaldor* (2004) 150 A Crim R 271 [77].

The distinction, which exists at common law between accessories who were present at the scene of the crime and those who were not, has disappeared. This overcame the difficulty noted earlier of requiring the principal in the second degree to be physically present at the crime scene.

3.44 The Code requires that D must actually have aided, abetted, counselled or procured the commission of the offence.[65] However, it remains silent as to whether D must know of the encouragement or assistance.[66] The contentious question whether there needs to be a causal connection between the encouragement or assistance offered by the accessory, and the commission of the substantive offence,[67] remains alive so far as the Code is concerned.[68]

3.45 It has been held that s 11.2(3)(a) mirrors the common law as decided in *Giorgianni*, and that recklessness is not included as a fault element of complicity for the purpose of that section, although it is a fault element for the purpose of s 11.2(3)(b).[69]

3.46 It has been held that s 11.2 of the Code is, by its terms, confined to cases involving aiding and abetting.[70]

3.47 In other words, s 11.2(3)(b) has been held to be incapable of catching those cases where two or more people agreed to commit an offence together, and an offence is committed under that agreement. The common law principles relating to offenders, who act together in the commission of an offence, were not picked up in the Code as originally enacted, since the codifying provisions operate to the exclusion of the common law. This apparent lacuna has been addressed by the introduction of the joint commission provisions in s 11.2A of the Code[71] discussed in the following chapter of this Report. They reflect the joint responsibility of those who are party to a joint criminal enterprise, and classify them as joint offenders rather than as accomplices. The provisions differ from the common law, in relation to extended joint criminal enterprise, by substituting, as the mental or fault element, the statutory meaning of recklessness for the foreseeable possibility test.

3.48 Paragraph 11.2(3)(b) may still have work to do in a case where:

- D provided assistance to P, intending that what he did would aid, abet, counsel or procure P's commission of offence A;

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65. *Criminal Code* (Cth) s 11.2(2)(a).
66. This has also been observed of the provisions in Queensland, WA, Tasmania, and NT: B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 329. See *Criminal Code* (WA) s 7(b); *Criminal Code* (Qld) s 7(1)(b); *Criminal Code* (Tas) s 3(1)(b); *Criminal Code* (NT) s 12(1)(a).
67. J Dressler, *Understanding Criminal Law* (Matthew Bender, 1987) 419; K J M Smith, "Complicity and Causation" [1986] *Criminal Law Review* 663; B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 329.
68. The Criminal Law Officers Committee declined to enter the debate on the "vexed question": Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 87.
69. *Re Pong Su* (2005) 159 A Crim R 300 [41] and [47].
70. *Criminal Code* (Cth) s 5.4; see I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 263 and para 4.170-177.
71. Inserted by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

- P committed offence B; and
- D was aware that there was a substantial risk that P would commit offence B with its fault elements, and it was unjustifiable for him, in providing the assistance, to take that risk.

3.49 The *Criminal Code* (ACT) has been amended to conform with s 11.2A of the *Criminal Code* (Cth).[72] No such amendment has yet been made to the *Criminal Code* (NT).

Provisions in other Australian jurisdictions

3.50 The statutory provisions, in the other Australian jurisdictions, embrace a number of formulations in relation to accessorial liability, some of which either overlap with, or make separate provision for, those circumstances that would constitute a joint enterprise.

3.51 The Criminal Codes of Queensland, Tasmania and Western Australia employ a common formula deeming those people, who would fall within the several categories of accessories at common law, to be principal offenders. For example, the *Criminal Code* (Qld) provides:

> **7 Principal offenders**
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
>
> (2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.
>
> (3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> (4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission.[73]

72. *Criminal Code* (ACT) s 45A.

73. See also *Criminal Code* (Tas) s 3; *Criminal Code* (WA) s 7.

3.52 Each adopts a similar formula applicable to a charge dependent on counselling, where the offence committed differs from that counselled, or where it is committed in a different way from that counselled. For example, the *Criminal Code* (Qld) provides:

> **9 Mode of execution immaterial**
> (1) When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled, or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.
>
> (2) In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by the other person.[74]

3.53 The ACT and NT provisions in respect of "complicity and common purpose", to a large extent, mirror the provisions of s 11.2 of the *Criminal Code* (Cth).[75] The *Criminal Code* (ACT), however, includes in this provision those who are "knowingly concerned in or a party to" the commission of the offence by another party.

3.54 As noted above, the Commonwealth and ACT criminal codes have now introduced separate provisions for "joint commission" (joint criminal enterprise) offences.[76] The NT has not yet introduced a separate provision of this type in its provisions based on the Model Criminal Code. However, the NT's former provision (currently superseded in relation to schedule 1 offences and declared offences) that relates to offences committed in the prosecution of a common purpose takes a different form. While embracing the concept of foreseeable possibility adopted by the common law for extended joint criminal enterprise, it departs significantly from the common law, by placing the onus on the defendant to show that he or she did not foresee that the commission of the offence in fact committed, was a possible consequence of prosecuting the common unlawful purpose.[77]

3.55 The *Criminal Code* (NT) also contains an older provision (now being superseded by provisions based on the Model Criminal Code), not seen in the other codes, dealing with the situation where a person counsels another to commit an offence, and an offence is committed by the person counselled that is different from that counselled, or is committed in a different way from that counselled. In such a situation, the person giving the counsel is presumed to have counselled the offence committed, unless he or she proves that the conduct giving rise to the offence committed was not foreseen as a possible consequence of giving such counsel.[78]

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74. See also *Criminal Code* (Tas) s 5; *Criminal Code* (WA) s 9.
75. *Criminal Code* (ACT) s 45; *Criminal Code* (NT) s 43B which applies to schedule 1 offences and declared offences.
76. *Criminal Code* (Cth) s 11.2A; *Criminal Code* (ACT) s 45A.
77. *Criminal Code* (NT) s 8(1).
78. *Criminal Code* (NT) s 9.

Law Commission for England and Wales

3.56 In two reports in 2006 and 2007, the Law Commission of England and Wales recommended a suite of changes to the common law of secondary liability and inchoate liability.[79]

3.57 The 2006 Report focused on inchoate liability for assisting or encouraging crime.[80] In that report, the Law Commission recommended that the common law offence of incitement be abolished, and that provision be made by way of specific offences to include both assisting and encouraging an offence, whether that offence was eventually committed or not. Previously, at common law, where P, in the event, did not commit a proposed offence, D could be liable for encouraging P to commit that offence (by way of an offence of incitement), but not for assisting in its proposed commission.

3.58 The Law Commission argued that the common law position on inchoate and accessorial liability had been directly connected historically; the scope of one form of liability demarcating the limits of the other form of liability. It noted that "the common law has compensated for the limited scope of inchoate liability, by over-extending the scope of secondary liability".[81]

3.59 The substance of this report, with several changes, was implemented by the *Serious Crime Act 2007* (UK) which abolished the common law offence of incitement,[82] and created inchoate offences of:

- intentionally encouraging or assisting an offence;
- encouraging or assisting an offence believing it will be committed; and
- encouraging or assisting offences believing one or more will be committed.[83]

3.60 Provision is made for a reasonableness defence,[84] and for a limitation on liability in relation to protective offences.[85] The Act also deals with the procedural aspects concerned with the prosecution of these offences,[86] and specifies what must be proved in relation to each form of offence.[87]

3.61 In the 2007 report, the Law Commission argued that, as a result of the implementation of its recommendations in the first Report, through enactment of the specific inchoate offences of encouraging or assisting another to commit an offence, it could now recommend narrowing the ambit of accessory liability ("secondary

79. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006); England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007).
80. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006).
81. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [1.3].
82. *Serious Crime Act 2007* (Eng) s 59.
83. *Serious Crime Act 2007* (Eng) s 44-46.
84. *Serious Crime Act 2007* (Eng) s 50.
85. *Serious Crime Act 2007* (Eng) s 51.
86. *Serious Crime Act 2007* (Eng) s 51-58.
87. *Serious Crime Act 2007* (Eng) s 47.

liability") in which the secondary participant would be convicted of the same offence as the principal participant.[88]

3.62 The Law Commission noted that, taken together, the recommendations in the two Reports would, if implemented, result in a scheme whereby inchoate and secondary liability would support and supplement each other in a way that is rational and fair.[89] Two Bills were proposed to give effect to its recommendations, the Participating in Crime Bill, and the Participating in Crime (Jurisdiction, Procedure and Consequential Provisions) Bill.

3.63 The Participating in Crime (Jurisdiction, Procedure and Consequential Provisions) Bill provided for the abolition of the rules of common law relating to aiding, abetting, counselling or procuring the commission of an offence, as well as the common law relating to liability for an offence committed through an innocent agent.[90]

3.64 The Participating in Crime Bill set out the circumstances in which a person may become liable for assisting or encouraging another person, who has committed an offence. It also made provision in relation to criminal acts committed within the scope of a joint criminal venture. Specifically, the Bill provided:

> **1 Assisting or encouraging an offence**
> (1) Where a person (P) has committed an offence, another person (D) is also guilty of the offence if –
>
> (a) D did an act with the intention that one or more of a number of other acts would be done by another person,
>
> (b) P's criminal act was one of those acts,
>
> (c) D's behaviour assisted or encouraged P to do his criminal act, and
>
> (d) subsection (2) or (3) is satisfied.
>
> (2) This subsection is satisfied if D believed that a person doing the act would commit the offence.
>
> (3) This subsection is satisfied if D's state of mind was such that had he done the act he would have committed the offence.
>
> **2 Participating in a joint criminal venture**
> (1) This section applies where two or more persons participate in a joint criminal venture.
>
> (2) If one of them (P) commits an offence, another participant (D) is also guilty of the offence if P's criminal act falls within the scope of the venture.
>
> (3) The existence or scope of a joint criminal venture may be inferred from the conduct of the participants (whether or not there is an express agreement).

88. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [1.3].
89. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [1.4].
90. Participation in Crime (Jurisdiction, Procedure and Consequential Provisions) Bill (Eng) cl 8.

(4) D does not escape liability under this section for an offence committed by P at a time when D is a participant in the venture merely because D is at that time –

(a) absent,

(b) against the venture's being carried out, or

(c) indifferent as to whether it is carried out.

3.65 The Bill also made provision in relation to that form of criminality which the common law has addressed through the doctrine of innocent agency. In that respect the Bill provides:

4 Using an innocent agent

(1) If a person (D) uses an innocent agent (P) to commit an offence, D is guilty of that offence.

(2) P is an innocent agent in relation to an offence if –

(a) he does a criminal act, and

(b) he does not commit the offence itself for one of the following reasons –

(i) he is under the age of 10,

(ii) he has a defence of insanity, or

(iii) he acts without the fault required for conviction,

and there is no other reason why he does not commit it.

(3) D uses P to commit an offence if –

(a) D intends to cause a person (whether or not P) to do a criminal act in relation to the offence,

(b) D causes P to do the criminal act, and

(c) Subsection (4) or (5) is satisfied.

(4) If a particular state of mind requires to be proved for a conviction of the offence that D uses P to commit, D's state of mind must be such that, were he to do the act that he intends to cause to be done, he would do it with the state of mind required for conviction of the offence.

(5) If the offence which D uses P to commit is a no-fault offence, D must know or believe that, were a person to do the act that D intends to cause to be done, that person would do it –

(a) in the circumstances (if any), and

(b) with the consequences (if any),

proof of which is required for conviction of the offence.

3.66 The scheme employed for these Bills adopts the verbs "assist" and "encourage" in the place of "aid, abet, counsel or procure," as they were thought to be "simpler and

clearer," and to "capture what is the core of D's conduct, namely helping and seeking to influence [another] to commit an offence".[91]

3.67 The Bills proposed by the 2007 report have not been enacted and have been the subject of a degree of criticism,[92] although they do have their supporters.[93]

3.68 It may be noted that the 2006 and 2007 models for reform followed the release of the Law Commission's proposal, in a 1993 consultation paper, that secondary liability be entirely abolished. That paper argued that an accessory's culpability must centre on the actions and state of mind of the accessory, and not on the consequential actions of the principal offender:

> An accessory's legal fault is complete as soon as his act of assistance is done, and acts thereafter by the *principal*, in particular in committing or not committing the crime assisted, cannot therefore add to or detract from that fault.[94]

3.69 The paper further proposed that accessories should be liable for separate offences of assisting or encouraging crime, irrespective of whether the crime was eventually committed or not. Following this model, an accessory would never have been liable for the primary offence (eg murder, burglary), and instead would only be liable for an offence of assisting or encouraging its commission.

3.70 The Law Commission's 2006 and 2007 reports abandoned the 1993 proposals because, it was said that:

- mere inchoate liability offences do not sufficiently recognise the culpability of accessories in certain circumstances, especially where D instigates or assists P with an intention that P should commit the principal offence; and
- removing secondary liability altogether takes away the important forensic advantage on which prosecutors rely where two people are involved in the commission of an offence, and it is not clear which should be charged as the principal and which as the accessory.[95]

Reform: Liability for assisting or encouraging the commission of an offence

3.71 The recommendations in this part of the Report deal with the criminal responsibility of those who, at common law, have been treated as accessories before the fact or as principals in the second degree.

3.72 We are here dealing with situations involving D's derivative liability for an offence that P commits, as opposed to direct responsibility where D and P jointly commit an offence, which is dealt with in the next chapter. We consider that it is appropriate to

91. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [3.9].
92. See, eg, R Taylor, "Procuring, Causation, Innocent Agency and the Law Commission" [2008] *Criminal Law Review* 32; R Buxton, "Joint Enterprise" [2009] *Criminal Law Review* 233.
93. W Wilson, "A rational scheme of liability for participating in crime" [2008] *Criminal Law Review* 1.
94. England and Wales, Law Commission, *Assisting and Encouraging Crime,* Consultation Paper 131 (1993) [4.24].
95. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [2.20]-[2.26].

preserve the distinction between the primary liability of parties to a joint criminal enterprise, and the derivative liability of accessories before the fact and of principals in the second degree.

3.73 The High Court has recently recognised the utility of providing a distinction between accessorial liability and concert (including that form of concert answering the description of extended joint criminal enterprise).[96] In particular, it can assist in identifying for the jury the essential factual issues and in settling appropriate directions on the law.[97] We similarly consider it appropriate to preserve the distinction between each form of liability and that of incitement, which is also dealt with later in this Report.

3.74 We propose the adoption of a statutory provision in accordance with the following recommendation.

Recommendation 3.1

The principles concerned with the criminal responsibility of accessories before the fact, and of principals in the second degree, should be the subject of a statutory provision to the following effect:

(1) Where D assists or encourages P to commit an offence, then D is taken to have committed that offence.

Encourage includes command, request, propose, advise, incite, induce, persuade, authorise, urge, and threaten or place pressure on another to commit an offence.

(2) For D to be guilty, P must have committed the offence.

(3) For D to be guilty, he or she must have intended to assist or encourage the commission of the offence or an offence of the same type, knowing or believing in the existence of the facts and circumstances that in law constitute respectively the offence or an offence of the same type

[A legislative note and the second reading speech should state that the question of whether an offence is capable of being "of the same type" should be an issue of law for the judge but it should remain an issue for the jury to determine whether on the facts of the case the offence intended was of the same type. They should also state that the phrase "of the same type" is intended to mean the same thing as the phrase "of the type" in the *Criminal Code* (Cth) and should pick up any relevant judicial interpretation of that phrase.]

(4) D may be found guilty under these recommendations

(a) whether or not any other person alleged to be involved in the offence has been prosecuted or has been convicted; and

(b) whether or not D was physically present when P committed the offence.

96. *Nguyen v The Queen* [2010] HCA 38 [47].

97. For other recent cases where it was seen to be preferable for the prosecution to pursue a charge based on accessorial liability, without clouding the issue by resorting additionally, or alternatively to concert: *E v NC* [2010] NSWSC 1178; *R v Guthridge* [2010] VSCA 132.

(5) D may be found guilty even if P has been convicted of a lesser offence because of a defence or partial defence available to P but not available to D.

(6) D cannot be found guilty of assisting or encouraging the commission of an offence if, before the offence was committed:

(a) D terminated his or her involvement; and

(b) D took all reasonable steps to prevent the commission of the offence.

(7) D is not guilty of assisting or encouraging an offence if D is a person for whose benefit or protection the offence exists.

(8) D may be found guilty if the trier of fact is satisfied beyond reasonable doubt that D is either guilty as a principal offender or as an accessory, but is not able to determine which.

(9) An alternative verdict of guilty of incitement may be returned if the requirements for proving the commission of the substantive offence by P have not been met, but the other elements required for an offence of incitement are present.

(10) D should be liable to the same punishment as if he or she had committed the substantive offence.

The act of assistance or encouragement

3.75 Recommendation 3.1(1) adopts the proposition that a person, who does anything that assists or encourages another person to commit an offence, is also guilty of that offence. It is based, with some modifications, on s 11.2(1) of the *Criminal Code* (Cth). Framed in this way, the provision operates as a means of proving D's guilt in relation to P's offence, rather than as an offence in its own right. This makes the derivative nature of D's liability clear.

3.76 **Assistance or encouragement.** "Assists or encourages" is intended to be synonymous with the common law expression "aids, abets, counsels or procures," which is also used in the Commonwealth Code. "Assist" and "encourage" draw on the proposals of the Law Commission for England and Wales[98] which considered that the terms "assist" and "encourage" were simpler and clearer than the common law terms.[99] Others have also preferred the use of the simpler terms:

> This "plain language" approach is preferable to the arcane terminology of the Victorian era statutes, and would greatly assist juries in understanding the types of conduct giving rise to accessorial liability.[100]

3.77 We consider, as did the Law Commission, that "encouragement" should have the same broad meaning as the term "incitement" does for the inchoate offence of incitement.[101] "Encouragement" should, therefore, also encompass the terms "threaten" or "otherwise put pressure on" along with the other formulations

98. Participating in Crime Bill (Eng) cl 1 proposed in England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007).

99. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [3.9].

100. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) 387.

101. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [3.12].

mentioned in the recommendation. It is necessary to make express provision to this effect because the word "encouragement" does not normally carry the connotations involved in the concepts of threatening, or otherwise putting pressure on a person to do an act"[102].

3.78 "Assistance" or "encouragement" might legitimately consist in "concurrence" or "agreement". However, any liability that is based on agreement to commit the offence can be picked up by the provisions relating to joint criminal enterprise.[103]

3.79 The proposed formulation would apply to assistance or encouragement given by D both "before" or "during" P's commission of the offence and does not require D's presence when the offence is committed by P. It would overcome the somewhat artificial distinction that has been dependant on when the encouragement or assistance is given, which can give rise to a factual issue as to whether a person physically removed from the crime scene was nevertheless available and ready to assist if required. Effectively it equates the position of an accessory before the fact to that of a principal in the second degree. Assistance given after the crime is committed is left to be dealt with by the principles applicable to the culpability of an accessory after the fact. Otherwise the nature and timing of the assistance and encouragement can be taken into account at the sentencing stage, when an assessment as to D's objective criminality is made.

3.80 **The act - commission or omission?** The relevant Commonwealth provision refers to the "conduct" of the accused.[104] Under the *Criminal Code* (Cth), "conduct" means "an act, an omission to perform an act or a state of affairs".[105] The common law recognises that an omission to perform an act can give rise to secondary liability, so long as D has a legal power and duty to intervene to prevent the offence.[106]

3.81 The Codes in some other Australian jurisdictions specifically refer to acts or omissions in the context of accessorial liability.[107] We consider it unnecessary to do so in our recommendations, preferring to leave the provision of any such definition to a future codification of the general law, on the assumption that, in the interim, the common law will continue to apply.

P must commit the substantive offence

3.82 Recommendation 3.1(2) restates the existing common law in relation to accessories before the fact and principals in the second degree, namely that P must have committed the offence.[108] The *Criminal Code* (Cth) makes similar provision.[109]

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102. See Participating in Crime Bill (Eng) cl 8(1) proposed in England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007).
103. See ch 4.
104. *Criminal Code* (Cth) s 11.2(2).
105. *Criminal Code* (Cth) s 4.1(2).
106. D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 496-499.
107. Compare *Criminal Code* (Tas) s 3(1)(b) and (2); *Criminal Code* (WA) s 7(b); *Crimes Act 1961* (NZ) s 66(1)(b) and (2).
108. See para 2.7, 2.13.
109. *Criminal Code* (Cth) s 11.2(2)(b).

3.83 This recommendation, in requiring that the offence be committed, renders unnecessary any provision that ensures that any defences available to P, other than partial offences applicable to that party alone, are also available to D.[110] In other words, what is required is that P commit the *actus reus* of the offence, with the mental element that is required for its commission.

3.84 As discussed later, the Commission considers that it is sufficient for an offence of incitement to continue to be available that will attribute liability to D, when P does not commit the substantive offence. The expanded reach of incitement, which is proposed, will cater for conduct on the part of D which was intended to assist or encourage P to commit an offence, but of which P was unaware. As the common law currently applies in NSW, conduct designed to facilitate the commission of an offence by P, that does not amount to an incitement, will go unpunished if P does not commit the offence.[111]

3.85 **Causal connection between D's act and P's commission of the crime.** The question of a causal connection between D's act of assistance or encouragement and P's commission of the offence presents some difficulty.

3.86 The general position at common law would appear to be that there need not be a causal connection, between the assistance and encouragement given and P's commission of the offence.[112] It has been suggested, but now rejected for Australia, that a causal link may be required in some cases of procuring.[113]

3.87 We have decided not to adopt a provision such as that contained in the ACT, NT and Commonwealth Criminal Codes, which expressly require that D's conduct "must have *in fact* aided, abetted, counselled or procured the commission of the offence" by P,[114] although whether that provision was intended to introduce a causation link or was merely intended to flag the need for a positive act by D is, perhaps, debatable. We consider that this should not remain open for argument, and prefer to preserve the common law. There can be cases where the assistance or encouragement offered is not strictly causative of the substantive offence, especially if a "but for" test is applied. We also note the observation that such a causal element "may be difficult to prove, to the requisite standard of proof, in cases where the principal offender cannot be identified or has not been found guilty". Justice Redlich has observed that requiring a causal connection would impose "an impossible burden upon the prosecution, who would rarely be in a position to place evidence before a jury on the effect of the secondary participant's conduct on the

110. We are omitting the "special liability" provision in *Criminal Code* (Cth) s 11.2(6) because the term is only relevant to the *Criminal Code* (Cth) and does not apply in the NSW context.

111. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime,* Report 300 (2006) [3.2]-[3.8].

112. See para 2.9, 2.15. But see S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) 386.

113. *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773. Compare *Likiardopoulos v The Queen* [2010] VSCA 344 [107]-[111].

114. *Criminal Code* (Cth) s 11.2(2)(a); *Criminal Code* (ACT) s 45(2)(a); *Criminal Code* (NT) s 43BG(2)(a).

principal offender's state of mind".[115] This is particularly so in the case of a signal or verbal encouragement given at a crime scene.[116]

3.88 We also note that the Criminal Law Officers Committee looked at the possibility of introducing a requirement that D's acts "substantially and/or materially" contributed to the commission of the substantive offence. The Committee, however, decided not to adopt such a formulation.[117] We agree with this conclusion. Our recommendation, is intended to continue to include people who are happy to provide assistance, if required, but who are not called upon to do so, including those whose mute presence (and shared intention that the offence be committed) is sufficient to encourage the substantive offence.[118] It will encompass the situation where P has already decided to commit the offence, it being sufficient for D to have indicated encouragement or a willingness to assist.

D's intention

3.89 Recommendation 3.1(3) deals with two things, D's intention with respect to D's act of encouragement or assistance (implied), and D's intention with respect to P's commission of the offence.

3.90 **Intention about the act of encouragement or assistance.** The requirement, that D intend his or her encouragement or assistance, can be found in the proposition that D must intend to aid, abet, counsel or procure the commission of the relevant offence.

3.91 This approach, which is based on s 11.2(3) of the *Criminal Code* (Cth), is consistent with the current law in NSW that there must, in some way, be a link in purpose between the accessory and the principal in the first degree,[119] as well as an act on the part of D which is a conscious and voluntary act.

3.92 **Intention about P's commission of the offence.** Recommendation 3.1(3) covers the range of scenarios in which D can be taken to have intended to assist and encourage P's commission of an offence. It is derived in part from s 11.2(3)(a) of the *Criminal Code* (Cth), but differs in some important respects.

3.93 This formulation differs from the *Criminal Code* (Cth) in omitting reference to D's "conduct". This is because we are not recommending an entire code. Any definition of the elements, that would be of general application, needs to be dealt with in a more comprehensive codification of the kind seen in the *Criminal Code* (Cth).

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115. *R v Lam* (2005) 159 A Crim R 448 [77].
116. For examples of such cases, see *R v Brown* [1968] SASR 467; *Giannetto v R* [1996] Crim LR 722; and *R v Coney* (1882) 8 QBD 534 where it was accepted that deliberate presence at a crime scene could be taken as evidence of an intention to assist or encourage the commission of a crime.
117. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 87.
118. See *R v Clarkson* [1971] 1 WLR 1402; B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 327.
119. See para 2.9, 2.15.

3.94 Recommendation 3.1(3), in referring to "the offence or an offence of the same type", covers:

(1) the basic situation where D intends to assist or encourage P in the commission of an offence and P commits that specific offence; and

(2) the situation where P's act gives rise to an offence that differs in some degree from that which D had in mind, but which bears sufficient similarity to fall within the provision.

3.95 We have decided not to provide further guidance on what is meant by an "offence of the same type". Such a question must be assessed on a case by case basis.[120] The question whether the offence committed is capable of being "of the same type" as that which D intended to assist or encourage, is one of law for the judge to determine. The trial judge would then instruct the jury that it is for them to determine whether D intended to assist P to commit "the offence" (and whether P, in fact, committed it).[121]

3.96 The expression "of the same type" is intended to have the same operation as the expression "of the type" contained in s 11.2(3)(a) of the *Criminal Code* (Cth). Its purpose is to make it clear that it is not necessary for the prosecution to prove that D had in mind the specific offence committed, it being sufficient to show that the offence committed had sufficient or substantial proximity to that which D had in contemplation (that is, with the necessary knowledge or belief in the existence of the facts and circumstances that would constitute such an offence).[122]

3.97 For example, under the recommended formulation, if D provides assistance or encouragement to P with the intention of encouraging or assisting P to commit an armed robbery,[123] D will be guilty of robbery from the person[124] if P commits that offence without resort to arms.

3.98 Examples of the application of such a provision can be seen in the common law. For example, in *Director of Public Prosecutions for Northern Ireland v Maxwell*[125] D was held liable as an accessory to an offence of doing an act with intent to cause an explosion of a nature likely to endanger life or to cause serious injury to property, by guiding a group of men to a public house where they left an explosive device, even though he was unaware of the precise form of the attack which they intended. It was sufficient that he contemplated the commission by P of one of a limited number of offences that were of the type charged and intentionally lent his assistance.

3.99 Similarly, in *R v Bainbridge*[126] it was held sufficient to prove the guilt of D as an accessory to an offence of office breaking, when he supplied oxy-cutting equipment

120. See *Bruce v Williams* (1989) 46 A Crim R 122, 129.
121. Based on the suggested directions on dishonesty in *Peters v The Queen* (1998) 192 CLR 493 [28], [29].
122. *Thambiah v The Queen* [1966] AC 37.
123. *Crimes Act 1900* (NSW) s 96.
124. *Crimes Act 1900* (NSW) s 94.
125. *Director of Public Prosecutions for Northern Ireland v Maxwell* [1978] 1 WLR 1350.
126. *R v Bainbridge* [1960] 1 QB 129.

to thieves who used it to break into a bank, even though he was unaware of the precise offence for which the equipment was to be used.

3.100 Other examples can be seen in Australian law. For example, in *R v Ancuta*,[127] D's supply of motor vehicle compliance plates to P which were later applied to a stolen Holden Commodore, gave rise, on D's part, to liability as an accessory even though he had no knowledge of P's intention to affix them to that particular vehicle. In *Bruce v Williams*[128] it was held that an offence of driving under the influence of alcohol was of the same type as an offence of driving with a high range prescribed quantity of alcohol, and that D could be held liable as an accessory to P's lesser offence without having knowledge of the actual concentration of alcohol which led to P's conviction for the more serious offence.

3.101 Recommendation 3.1(3) does not displace the decision in *Giorgianni*, nor will it extend liability to a person whose knowledge does not extend beyond a suspicion that the person assisted might have in mind the commission of some unspecified offence.

Factors that do not affect D's liability

3.102 **P is not prosecuted or found guilty.** While recommendation 3.1(2) requires that P must have committed the offence, it does not necessarily follow that P must have been prosecuted or found guilty of committing the offence. Recommendation 3.1(4) clarifies this point.

3.103 The *Criminal Code* (Cth) contains a provision to like effect.[129]

3.104 Where P is acquitted, for example, because of mental illness or because he or she was too young to form the necessary intent (*doli incapax*), then D may still be liable under the doctrine of innocent agency.

3.105 **P is found guilty of a lesser offence.** Recommendation 3.1(5) proposes a new provision, aimed at dealing with a situation where P is convicted of a lesser offence because of the availability of a complete or partial defence that is not available to D. We consider that in such circumstances, it should be possible for D to be convicted of the offence that he or she assisted or encouraged.

3.106 This essentially provides for the same outcome as that proposed by the Law Commission for England and Wales, with respect to liability for assisting or encouraging crime. For the purposes of establishing D's liability for an offence committed by P, it is immaterial that P can establish a defence personal to himself or herself, so long as P has the necessary mental element required for the offence, is at least 10 years of age, and is mentally capable according to law.[130] Innocent agency remains available to deal with situations where P does not meet these requirements.

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127. *R v Ancuta* (1990) 49 A Crim R 307.
128. *Bruce v Williams* (1989) 46 A Crim R 122.
129. *Criminal Code* (Cth) s 11.2(5).
130. Participating in Crime Bill (Eng) cl 10 in England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007). See also [A.54] of that Report.

3.107 This provision is consistent with a similar provision proposed in relation to joint criminal enterprise, and it is consistent with the common law which recognises that different verdicts may be returned in relation to P and D, depending on the evidence, it being immaterial, for example, that P may have been convicted of a lesser offence following an acceptance of a plea of guilty to that offence.[131]

Termination of involvement

3.108 Recommendation 3.1(6) allows D to avoid liability for assisting or encouraging crime if D withdraws his or her involvement in accordance with the requirement of the provision. The Commonwealth, ACT and NT criminal codes make similar provision.[132]

3.109 It is accepted that permitting termination or withdrawal, in cases of accessorial liability, can be justified by reference to the derivative nature of the offence.[133] Allowing the defence can be seen as a recognition of the reduction of the culpability of a person who seeks to extricate himself or herself from a planned criminal activity, by acknowledging the redemptive quality of such action.[134]

3.110 It can also be justified as a crime prevention strategy, by providing an opportunity for those who are involved in the preliminary stages of assisting or encouraging an offence, but who change their mind, to take steps that could prevent its commission.[135]

3.111 There appears to have been an acceptance, in Australia at least, that withdrawal at common law requires, first, that there be a timely and clear countermand by D, and, secondly, that D do or say whatever was reasonably possible for D to do or say in order to counteract the effect of his or her earlier conduct, that is, to "undo the effect of" what he or she had done.[136]

3.112 The proposed provision goes further than the common law,[137] in that it requires D to take "all reasonable steps" to prevent the commission of the offence, in lieu of a requirement that D accompany his or her withdrawal with such action that he or she could "reasonably take to undo the effect" of his or her previous assistance or encouragement.

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131. *Likiardopoulos v The Queen* [2010] VSCA 344 [121]-[122].
132. *Criminal Code* (Cth) s 11.2(4); *Criminal Code* (ACT) s 45(5); *Criminal Code* (NT) s 43BG(5); which, in turn, were modelled on the US Model Penal Code s 2.06(6)(c) and *Criminal Code* (WA) s 8(2).
133. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) 394.
134. See K J M Smith 'Withdrawal in Complicity: A Restatement of Principles' [2001] *The Criminal Law Review* 769, 772-773; Law Commission of England and Wales, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.52].
135. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) 394.
136. *White v Ridley* (1978) 140 CLR 342, 350-351. Stephen and Jacobs JJ decided the case by examining causation, but later cases adopted and applied Gibbs J's reasoning: *R v Tietie* (1988) 34 A Crim R 438, 447, 453; *R v Menniti* [1985] 1 QdR 520, 522, 527-528, 534-535. See *R v Whitehouse* [1941] 1 DLR 683, 685 and *Atkinson v R* (unreported, WA CCA, 14 October 1997) 23-24 which emphasises the need for the communication to provide unequivocal notice to the other party that if he or she proceeds they will be doing so without his or her aid or assistance.
137. R v *Croft* [1944] KB 295; *R v Becerra* (1975) 62 Cr App R 212.

3.113 The Criminal Law Officers Committee considered that what would count as taking "all reasonable steps" would:

> vary according to the case but examples might be discouraging the principal offender, alerting the proposed victim, withdrawing goods necessary for committing the crime (eg a getaway car) and/or giving a timely warning to an appropriate law enforcement authority.[138]

3.114 Despite the existence of differing views as to the jurisprudential basis of a "defence of withdrawal",[139] we believe that the test proposed constitutes a more certain and appropriate test than one that depends on D taking reasonable steps or doing what reasonably can be done "to undo the effect" of the prior assistance. A test formulated in those terms inevitably invites a factual and potentially elusive inquiry into the actual effect that the assistance had on P's resolve to commit the offence, and also raises questions of causation that are otherwise irrelevant for accessorial liability. This is particularly so when the question needs to be asked at the time of the attempted withdrawal, since other considerations may have emerged by then which influence P's decision to ignore D's attempted countermand.

3.115 Where D has given assistance of the kind that could potentially attract accessorial liability on the part of D, then from a public interest point of view it seems more realistic, if D is to escape liability by withdrawing his support, that D take whatever reasonable steps are available to prevent the offence occurring. In that respect, the examples provided by the Criminal Law Officers Committee are, in our view, appropriate. Furthermore, a similar provision already exists in some regulatory offences in NSW.[140]

3.116 What will constitute reasonable steps to prevent the commission of the crime will depend on such matters as:

- the significance of the assistance or encouragement previously given;
- the seriousness of the offence in contemplation and its likely consequence;
- whether or not D can be satisfied, on reasonable grounds, by P's response that the offence will not occur;
- any element of risk or duress posed by P; and
- D's age and maturity.

The test proposed will allow consideration to be given to these and other relevant circumstances, as well as the timeliness of D's attempted countermand.

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138. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992).
139. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Law Book Company, 2010) 394.
140. For example, *Road Transport (General) Act 2005* (NSW) s 81(5) and *Prevention of Cruelty to Animals Act 1979* (NSW) s 33C(3). A large number of provisions in various NSW statutes extend a corporation's liability to individuals who are related to that corporation, for example, directors, employees, or managers, by deeming them to have contravened the same provision as the corporation. In such cases, defences are invariably provided, including that the accused was not "in a position to influence the conduct of the corporation" in relation to the corporation's contravention or, being in such a position, "used all due diligence" to prevent it: para 8.20-8.21.

3.117 Where D is able to point to evidence that could support a "defence" of withdrawal, it will be necessary for the Crown to negate that defence as part of its general onus of establishing D's guilt.[141]

3.118 A person who successfully terminates his or her involvement, as an accessory, may still be liable for conspiracy or incitement to commit the offence. It is accepted that D could be seen to have a Pyrrhic victory, if he or she were to escape conviction as an accessory, but be convicted of incitement or conspiracy. However, while we consider that D should not be legally absolved of inciting or conspiring to commit an offence, the fact of D's withdrawal could be appropriately reflected when sentenced for that offence. The availability of a likely reduction in any sentence for such an offence, and the probability that an accessory who attempted to withdraw, unsuccessfully, would, in any event, be given an indemnity or a non-prosecution undertaking in return for agreeing to become a prosecution witness in a case against P, would tend to assist in the administration of justice.

Protected people

3.119 Recommendation 3.1(7) mirrors similar provisions that we have recommended in the context of conspiracy and incitement. It deals with the same problem, namely that of victims of crime being prosecuted or threatened with prosecution for their complicity in relation to the commission of offences under statutory provisions designed for their protection.[142] This provision is consistent with Justice Mason's view of the way in which the "doctrine of secondary participation" at common law should develop, so that it would be "inapplicable to a person of a class whom the substantive offence is designed to protect".[143]

3.120 The NSW legislature has already accepted a similar approach in the context of domestic violence, so that a person who is a protected person under an apprehended violence order is not to be found guilty as an accessory to a knowing contravention of such an order.[144] We consider that this protection should be made available for other circumstances where criminal offences have been created for the protection of certain classes of victims.

Principal or accessory?

3.121 Recommendation 3.1(8) deals with the procedural realities involved in prosecuting D for assisting or encouraging an offence believed to have been committed by P, especially where the exact nature of the prosecution case, or of the defence, may not become clear until part way through the trial. The intention of the recommended provision is to allow a person to be charged with the substantive offence, and to leave it to the fact finder, depending on the evidence, to determine whether the accused was a principal in the first degree (that is, the primary participant), or an accessory.

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141. *White v Ridley* (1978) 140 CLR 342, 349.
142. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) 405.
143. *Giorgianni v The Queen* (1985) 156 CLR 473, 491.
144. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(7).

3.122 Recommendation 3.1(8) accordingly provides guidance for the situation where it is possible to find D liable, either as an accessory or as a principal offender, but it is not possible to determine which. It is based on s 11.2(7) of the *Criminal Code* (Cth) which was inserted in 2004[145] to clarify the operation of s 11.2.

3.123 The existing situation in NSW is partially governed by s 346 of the *Crimes Act 1900* (NSW). While the indictment of an accessory as a principal may be sufficient in law, it is acknowledged that the fairness of a trial is enhanced by the provision of particulars, in the indictment or otherwise, as to the basis on which the prosecution is pursued.[146] The recommendation is not intended to detract from that proposition.

3.124 **Incitement as an alternative.** The purpose of Recommendation 3.1(9) is to allow an alternative verdict of guilty of incitement to be returned where the prosecution fails to prove the commission of the substantive offence, and hence accessorial liability on the part of D, but can prove assistance or encouragement provided by D amounting to incitement as later discussed in this Report.

3.125 Such a provision is desirable, because the inchoate offence of incitement (as recommended in this Report) applies to a person who assists or encourages another to commit an offence, whether the offence incited is committed or not. The prosecution should, therefore, be able to seek an alternative verdict for incitement without the need to charge that offence separately. The evidence led to make good the liability of D as an accessory would be the same as that led in support of a charge of incitement. The elements would also be the same, save for the requirement in relation to accessorial liability, that P committed the offence, an element which is not required for an offence of incitement.

Penalty

3.126 The current position in NSW is that accessories before the fact, and principals in the second degree, are generally liable to the same punishment as if they were principal offenders.[147]

3.127 The *Criminal Code* (Cth) achieves the same result by providing that D "is taken to have committed [the substantive] offence and is punishable accordingly."

3.128 In proposing, in Recommendation 3.1(10), that the penalty for the substantive offence should apply, we expect that ordinary sentencing principles will apply to determine the punishment appropriate to the individual case, that is, by reference to the objective criminality of D's actions and his or her subjective circumstances. In some instances an accessory, D, can have a greater moral culpability than the principal offender, P; whereas, in other circumstances, D's involvement or contribution will be of limited significance. The proposed formulation will preserve a full sentencing discretion to accommodate the circumstances of each case.

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145. Inserted by *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth) Sch 4 pt 1.

146. See, however, *King v The Queen* (1986) 161 CLR 423, 436 where Dawson J observed "the section was not intended to give rise to a form of pleading different to that used at common law in which the proper course was to specify the degree of participation of each accused—whether as principal or accessory — when they were joined in the same indictment for the same offence."

147. *Crimes Act 1900* (NSW) s 345, s 346, s 546.

Innocent agency or instrument

3.129 The doctrine of innocent agency or instrument allows a person, who might otherwise have been regarded as an accessory or inciter, to be held liable, as a principal, in relation to the acts of an innocent person which constitute the physical elements of an offence. Although the doctrine is accepted by the common law, as a means of attributing responsibility, for the offence, to the person who procured, encouraged or assisted its commission by the other party, differences persist concerning its theoretical basis.[148]

3.130 We consider that the doctrine should now be placed on a statutory footing, and entitled "Commission by proxy".

Recommendation 3.2

The liability of a person who assists or encourages a non-responsible person to commit an offence should be governed by a statutory provision which incorporates the following elements:

(1) A person (D) who assists or encourages another person (P) to commit the physical elements of an offence is to be taken to have committed that offence, and is punishable accordingly, even though P is not responsible in law for the offence, where:

(a) P has committed the physical elements required for an offence;

(b) D has, in relation to that offence, the mental element required for its commission; and

(c) P's conduct (whether or not together with D's conduct) would have constituted an offence on the part of D if D had engaged in it.

(2) D shall be liable for the offence even though P is not responsible in law for the relevant conduct by reason of duress, mental illness, age, lack of knowledge of the true facts, honest but mistaken belief, or otherwise.

3.131 This recommendation is broadly consistent with the commission by proxy provision contained in the *Criminal Code* (Cth).[149] It is in a different form from that which the Law Reform Commission of England and Wales proposed in its Report *Participating in Crime*,[150] and that was incorporated in the Participating in Crime Bill,[151] although the elements are similar.

3.132 It overcomes the problems that would otherwise arise from an application of the derivative theory of accessorial liability, which would excuse both D and P, if P lacked the *mens rea* or capacity to commit the offence that would otherwise have arisen from P's "wrongful" conduct. It also overcomes the limitation that would, otherwise, have precluded liability on the part of D, arising from the requirement for

148. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 325.

149. *Criminal Code* (Cth) s 11.3; see also *Criminal Code* (ACT) s 46 and *Criminal Code* (NT) s 43BH.

150. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007).

151. Participating in Crime Bill, cl 4.

accessorial liability that D know the essential elements of the offence, including P's mental element.

3.133 The effect of the recommendation is to ensure that D is held responsible for the offence which, by his or her conduct, D encouraged or assisted, and cannot escape liability by using a non-responsible agent to carry out the physical element required for an offence. In substance it converts a person, who might otherwise have been an accessory, into a principal offender and renders that person liable for the offence and punishable accordingly.

3.134 It provides a more appropriate approach to the situation where D has assisted or encouraged P to commit an offence, than would be provided by reliance on an offence of incitement. That offence is a separate offence, and arguably might not be available where D knows that P lacks the mental element required for the "incited offence".[152]

Accessories after the fact

3.135 Any reform or codification of the law, in the area of complicity, will also need to take account of the principles applicable to the liability of an accessory after the fact. Accordingly we have addressed this area of the law in the final part of this chapter.

The law in NSW

3.136 Of the Australian States and Territories, NSW is alone in not providing a statutory definition of an accessory after the fact, or in providing a specific offence, in relation to the conduct of a person that is directed to assisting another person to escape punishment, or to dispose of the proceeds of a crime. In NSW, the culpability of the accessory in such a case continues to depend on the common law.

3.137 In accordance with the classic common law formulation of this form of criminal liability, an accessory after the fact to a felony is one who "receives, comforts, maintains or assists" (that is, "harbours") the principal offender who has committed the felony.[153] The assistance must be for the purpose of helping the principal offender to escape justice.[154]

3.138 At common law, a person (D) will be guilty as an accessory after the fact, in relation to an offence committed by another person (P) where:

- P committed that offence;[155]
- D intentionally provided some positive assistance for the purpose of helping P to escape apprehension, trial or punishment;[156] and

152. A Ashworth, *Principles of Criminal Law* (5th ed, Oxford UP, 2006) 435.
153. M Hale, *The History of the Pleas of the Crown* (1786) vol 1, 618.
154. *R v Reeves* (1892) 13 LR (NSW) 220; *R v Phelan* [1964] Crim LR 468.
155. *R v Williams* (1932) 32 SR (NSW) 504, 507.

- at the time of providing such assistance, D was aware of the essential facts and circumstances that made up P's offence.[157]

3.139 The position of D is strictly not one of complicity since D is not convicted of the offence committed by P. D's offence is a stand-alone offence, and is punishable as such.

3.140 The relevant case law has established that the assistance provided by D need not be successful;[158] it does not matter that D also stood to gain personally from providing the assistance;[159] nor does it matter that the primary intention of D is to assist another accessory after the fact and only indirectly to assist P.[160]

3.141 Traditionally, at common law, the offence committed by P had to be a felony.[161] The position in NSW is not clear in the wake of the abolition of the distinction between felonies and misdemeanours,[162] although Parliament, by the retention of the provisions dealing with the trial and punishment of accessories after the fact, clearly intended that there would continue to be an offence of being an accessory after the fact, at least in relation to serious indictable offences.[163]

3.142 An accessory after the fact to a serious indictable offence[164] is indicted as such, and is liable to punishment as specified in the *Crimes Act 1900* (NSW), the maximum terms available being less than those which would have applied had the accessory been the principal offender, and varying according to the category of offence for which the assistance has been given.[165]

3.143 An accessory after the fact may be tried and sentenced either before, together with, or after, the trial of the principal participant and his or her accessory, and whether they have been tried or not, or are, or are not, amenable to justice.[166]

3.144 It may be observed that the common law principles are not entirely settled. For example, views have differed as to whether it is necessary for the prosecution to show that the defendant intended that his or her conduct would in fact assist the principal offender to escape justice (or to dispose of the proceeds of the crime),[167] or whether it would be sufficient to show that the relevant conduct was carried out

156. *R v Levy* [1912] 1 KB 158, 160-161; *R v Andrews* [1962] 1 WLR 1474; *R v Tevendale* [1955] VLR 95.
157. *R v Tevendale* [1955] VLR 95; *R v Stone* [1981] VR 737, 739-740.
158. *R v Dawson* [1961] VR 773, 774.
159. *R v Tevendale* [1955] VLR 95, 97.
160. *R v McKenna* [1960] 1 QB 411.
161. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 353.
162. *Crimes Act 1900* (NSW) s 580E.
163. *Crimes Act 1900* (NSW) s 347, s 349 and s 350.
164. A serious indictable offence is one punishable by life or for a term of five years or more: *Crimes Act 1900* (NSW) *s* 4(1), 580E(4).
165. *Crimes Act 1900* (NSW) s 347-350.
166. *Crimes Act 1900* (NSW) s 347.
167. *R v Tevendale* [1955] VLR 95; *Hurley v The Queen* [1967] VR 526, 540-541.

with the knowledge that it was capable of having that result.[168] The authorities in NSW, however, tend to favour the former view.[169]

3.145 Opinions have also differed as to the specificity of the knowledge that is required of the accessory after the fact, concerning the offence committed by the principal offender. On one view, knowledge of the precise offence is required.[170] On another view, knowledge of an offence of the same type as that committed is sufficient.[171]

Provisions in other Australian jurisdictions

3.146 There is a lack of consistency in the approach which has been adopted by the States and Territories in legislating for the liability of an accessory after the fact,[172] in that:

- The South Australian, Western Australian, Victorian and Australian Capital Territory offence applies both where the accessory *knows* of the commission of the offence by the principal offender, and also where he or she *believes* that it has been committed.
- Most States confine the offence to assistance to that which is given to help the principal offender escape justice; the South Australian and the Commonwealth offences, however, expressly extend to assistance given in disposing of the proceeds of the crime; while the ACT offence extends to assistance given in disposing of the proceeds of the crime and also in allowing the offender to obtain and keep those proceeds.
- The South Australian and ACT offences apply, not only in relation to assistance given by the accessory in relation to offences which he or she knew or believed the principal offender had committed, but also in relation to offences committed in the same, or partly in the same circumstances.
- The common law spousal immunity of a wife has been preserved and extended to a husband in Tasmania, Western Australia and in Victoria; but abolished in the Northern Territory, NSW[173] and, it is suggested, by the *Crimes Act 1914* (Cth) in relation to assistance given in relation to those who commit offences under Commonwealth law. The Tasmanian and Victorian Acts, however, extend the immunity even further than the common law, by including assistance given to a partner of the spouse in the crime.
- The Tasmanian Code expressly excludes liability for an attempt to commit the offence.
- The range of available penalties, and the basis on which they are prescribed, differs significantly between jurisdictions.

168. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 354.
169. For example, *R v Young* (unreported, NSW CCA, 31 October 1995).
170. *R v Tevendale* [1955] VLR 95, 96 (Herring CJ), 98 (Sholl J); *R v Stone* [1981] VR 737, 739-740.
171. *R v Tevendale* [1955] VLR 95, 97 (Martin J).
172. *Crimes Act 1914* (Cth) s 6; *Criminal Code* (ACT) s 717; *Criminal Code* (NT) s 13; *Criminal Code* (Qld) s 10; *Criminal Law Consolidation Act 1935* (SA) s 241; *Criminal Code* (Tas) s 6; *Crimes Act 1958* (Vic) s 325; *Criminal Code* (WA) s 10.
173. *Crimes Act 1900* (NSW) s 347A.

- Some States confine the offence to assistance given in relation to serious indictable or indictable offences (Victoria and Tasmania), whereas in the other jurisdictions the offence applies to assistance given in relation to any offence.

3.147 The *Criminal Code* (Cth) does not deal with accessories after the fact to an offence. This was apparently left to be addressed under the *Crimes Act 1914* (Cth), which extends the reach of common law, in that it applies to all offences, and provides for a maximum sentence of two years imprisonment, irrespective of the offence in respect of which the assistance is provided by the accessory after the fact.[174]

Provisions in England and Wales

3.148 The common law relating to accessories after the fact was repealed by the *Criminal Law Act 1967* (Eng), and replaced with an offence of a person (D) acting with intent to impede the apprehension or prosecution of a person (P), who has committed a "relevant offence", where D knew or believed P to be guilty of the offence, or "of some other relevant offence" and, in so acting, without lawful authority or reasonable excuse. A "relevant offence" is one for which a person of at least 18 years of age may be sentenced to a term of imprisonment of at least five years. On being found guilty, D is liable to one of four possible maximum terms (three, five, seven or ten years) depending on the sentence available for P's offence.[175]

Reform: Accessories after the fact

3.149 Although the basis for liability of an accessory after the fact differs from the basis applicable to the other forms of complicity considered in this Report, we consider it desirable, in the interests of establishing a coherent statutory scheme, that such scheme also address this aspect of criminal responsibility.

3.150 The opportunity of legislating for a specific offence, in this context, would have the advantage of clarifying any existing uncertainties. It would take its place alongside the concealment offence which has replaced the common law offence of misprision of felony,[176] and the offence of receiving;[177] as well as alongside those offences that are concerned with hindering investigations,[178] assisting prisoners to escape from custody[179] or harbouring an escapee.[180]

Recommendation 3.3

The liability of an accessory after the fact should be governed by a statutory provision which incorporates the following elements:

(1) An accessory after the fact (D) commits an offence, and is punishable as such, where:

174. *Crimes Act 1914* (Cth) s 6.
175. *Criminal Law Act 1967* (Eng) s 4.
176. *Crimes Act 1900* (NSW) s 316; compare with *Crimes Act 1958* (Vic) s 326.
177. *Crimes Act 1900* (NSW) s 187-193.
178. *Crimes Act 1900* (NSW) s 315.
179. *Crimes Act 1900* (NSW) s 310C.
180. *Crimes Act 1900* (NSW) s 310G.

(a) another person (P) has committed a serious indictable offence (whether prosecuted summarily, or otherwise);

(b) D provides assistance to P with the intention (although it may not be D's sole intention) of enabling P to:

(i) escape apprehension or prosecution in respect of that offence, or

(ii) obtain, keep or dispose of the proceeds of that offence;

(c) D provides that assistance either:

(i) knowing or believing that P committed the offence, or

(ii) believing that P committed a related offence.

(2) An offence that D believes P committed is a related offence to that which P actually committed, if the circumstances in which D believes the offence to have been committed are the same, or partly the same, as those in which the actual offence was committed.

(3) D shall be liable as an accessory after the fact irrespective of whether the assistance D provides is successful or not in enabling P to escape apprehension or prosecution, or to obtain, keep or dispose of the proceeds of the offence.

(4) D shall not be liable if there is lawful authority or reasonable excuse for D's actions.

(5) D may be found guilty under these provisions whether or not P has been prosecuted or convicted of the serious indictable offence, unless P has been acquitted and a finding of guilt on the part of D would be inconsistent with P's acquittal.

(6) Subject to recommendation 3.3(7), D, if found liable as an accessory after the fact, shall be liable to imprisonment according to the gravity of the offence that P had committed at the time that D provided the relevant assistance, as follows:

(a) in relation to an offence of murder, imprisonment for 25 years;

(b) in relation to offences of robbery with arms or in company, or kidnapping, imprisonment for 14 years;

(c) in relation to treason related offences arising under s 12 of the Crimes Act 1900 (NSW), imprisonment for 5 years;

(d) in relation to any other serious indictable offence, imprisonment for 5 years unless otherwise specifically enacted;

(e) in relation to any minor indictable offence, imprisonment for 2 years, unless otherwise specifically enacted.

(7) If the offence that D believes P committed is a related offence (under recommendation 3.3(1)(c)(ii)), the maximum penalty for which D may be sentenced is the lesser of:

(a) the maximum penalty applying under recommendation 3.3(6); and

(b) the maximum penalty that would apply under recommendation 3.3(6) if the principal offender had committed the related offence.

Qualifying offence

3.151 Recommendation 3.3(1)(a) deals, first, with the potential issue as to whether, under the current law, a person can be charged as an accessory after the fact only in relation to assistance provided in connection with a serious indictable offence. Save for Victoria,[181] no equivalent restriction applies under the statutory provisions in force in the other States or Territories. The position in NSW is clouded by the historical origins of the offence, which could only be committed where the assistance was given to P in connection with a felony (but not in connection with a misdemeanour or common law offence committed by P).[182]

3.152 The fact that the *Crimes Act 1900* (NSW) expressly deals with the penalties that are available for accessories after the fact to ***serious indictable offences*****,** but is silent in relation to any penalty for an offence of being an accessory after the fact to minor indictable offences, does suggest a current understanding that the reach of the offence committed by an accessory after the fact is confined to assistance provided to a person who has committed a serious indictable offence.

3.153 The division, which now exists in NSW, of offences into serious indictable offences and minor indictable offences, depending solely on whether they attract sentences of imprisonment for five years or more,[183] and the identification of some offences as strictly indictable offences, do not necessarily provide an answer. Their purpose is primarily procedural in determining which offences must be tried on indictment, and which may be tried summarily. There continue to be some offences that are only triable summarily,[184] but there are a significant number of indictable offences, of varying seriousness, that may be tried either on indictment or summarily, depending upon whether an election is made for trial on indictment.[185]

3.154 We consider it more appropriate to confine the liability of an accessory after the fact to assistance that is provided in connection with serious indictable offences. As a consequence it would not apply to minor indictable offences, summary offences which involve relatively trivial forms of criminality, or generally to the residual common law offences, or to the statutory or regulatory offences (unless otherwise provided).

3.155 If a regulatory offence is of sufficient severity to warrant such an extension, this could be achieved by way of express inclusion in the relevant Act. As noted elsewhere, we consider it desirable that attention be given, in due course, to codifying the substantive criminal law in force in NSW, in a way that would, amongst other things, apply the complicity provisions across the board, to include all offences under the laws of NSW, and that would replace the residual common law offences. However, we have not attempted that exercise, in the course of this reference, other than by indicating the common principles which we consider should govern complicity.

3.156 Accordingly, at this stage, we have recommended that the provision apply to assistance given by D, after P's commission of any serious indictable offence.

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181. *Crimes Act 1958* (Vic) s 325(1).
182. *Field v The Queen* (1943) 29 Cr App R 151; P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 819; B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 353.
183. *Crimes Act 1900* (NSW) s 4.
184. *Criminal Procedure Act 1986* (NSW) s 6(1).
185. *Criminal Procedure Act 1986* (NSW) s 6(2) and s 260.

Assistance

3.157 It has been suggested that, at common law, liability as an accessory after the fact will not attach to D if his act was confined to assisting P to realise the fruits of his offence, that is unless (as will very often be the case) the assistance was directed at helping P to escape justice.[186] To avoid any doubt in this respect we consider it appropriate to follow the lead taken in other jurisdictions, by making it clear, in recommendation 3.3(1)(b)(ii), that the provision will also catch assistance that is designed to help P to obtain, keep or dispose of the proceeds of the offence.[187]

3.158 Although in most instances there will be little by way of an issue in relation to whether D has provided some form of positive act of assistance to P,[188] it is not entirely clear, at common law, whether a person who attempts to provide assistance, which, in the particular circumstances of the case, is ineffective, can be held liable as an accessory after the fact. An illustration of such a case is provided by *R v Maloney*.[189] There, police intercepted a package of clothing, which D mailed to a fugitive offender P. It was held that, as the clothing did not and could not reach P, D could not be held liable as an accessory after the fact, although he could have been convicted of an attempt to provide assistance.[190]

3.159 It is noted that the *Criminal Code* (ACT) specifies that it is not an offence to attempt to commit an offence of being an accessory after the fact.[191] Similarly, it is not an offence in England and Wales to attempt to commit the offence for which statutory provision is now made in relation to accessories after the fact.[192]

3.160 The reason why the offence of attempt does not apply in England and Wales is explicable by the fact that s 4 of the *Criminal Law Act 1967* (Eng) makes it an offence for D, in the relevant circumstances, to do an "***act*** with intent" to impede the apprehension or prosecution of P.[193] Phrased in this way, the offence is complete once D performs the ***act*** with the relevant intent, and without any need to consider whether that act provided, or was capable of providing, assistance to P. In those circumstances the view was taken that there was no need to preserve an offence of attempt as an alternative.[194]

3.161 It is clear at common law that the assistance provided by D does not have to be successful in enabling P to escape justice or to obtain, keep or dispose of the proceeds of the offence.[195] Recommendation 3.3(3) recognises this.

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186. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 821.
187. *Crimes Act 1914* (Cth) s 6; *Criminal Code* (ACT) s 717(1)(c)(ii); *Criminal Law Consolidation Act 1935* (SA) s 241(1)(b).
188. Cf *R v Ready* [1942] VLR 85 where D's act was held not to be sufficiently active to constitute the necessary form of assistance.
189. *R v Maloney* (1901) 18 WN (NSW) 96a.
190. *R v Maloney* (1901) 18 WN (NSW) 96a, under the former *Crimes Act 1900* (NSW) s 427 (now replaced by *Criminal Procedure Act 1986* (NSW) s 162) applicable to attempts to commit indictable offences for which the available penalty is determined pursuant to the *Crimes Act 1900* (NSW) s 344A.
191. *Criminal Code* (ACT) s 717(4).
192. *Criminal Attempts Act 1981* (Eng) expressly does not apply to the offence created by *Criminal Law Act 1967* (Eng) s 4:see *Criminal Attempts Act 1981* (Eng) s 1(4)(c).
193. *Criminal Law Act 1967* (Eng) s 4(1).
194. England and Wales, Law Commission, *Criminal Law: Attempt, and impossibility in relation to attempt, conspiracy and incitement*, Report 102 (1980) [2.125].
195. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 820; *R v Dawson* [1961] VR 773, 774.

3.162 The recommended provision makes it clear that, for D to be an accessory after the fact, D must provide actual assistance with the necessary intention, for example, by concealing a weapon used by P or by collecting and holding the proceeds of the offence for P, or by providing P with a means of escape, or by providing misleading information to police concerning P. Where D's conduct amounts to acts that are merely preparatory to providing assistance of this kind, it will not qualify as an offence under the recommendation, nor will it qualify as an attempt.[196]

3.163 We do not see any necessity to include within the recommendation any specific provision in relation to attempt, or to exclude its availability in the rare case where D's act would meet the requirements for an attempt at common law.[197]

Intention

3.164 Consistently with the common law, and with the legislative provisions in other jurisdictions, we do not seek to depart from the requirement that D must have, as one of his intentions in providing the assistance, an intention to help P to escape justice or to obtain, keep or dispose of the proceeds of the offence.[198] It need not, however, be D's sole intention at common law.[199] For clarity we consider it desirable that recommendation 3.3(1)(b) deal with this aspect.

Knowledge or belief

3.165 Recommendations 3.3(1)(c) and (2) extend, or at least clarify, the common law in two respects, in relation to D's *mens rea*. First, it is proposed that D's state of mind should embrace both knowledge or belief as to the commission by P of an offence. Secondly, it is proposed that the knowledge or belief should not be confined to the precise offence that P commits, but should extend to a related offence, as defined in recommendation 3.3(2). In *R v Tevendale*,[200] different views were expressed, *obiter*, in relation to what was required by the common law in this respect.[201]

3.166 Each of these matters has been addressed in some of the jurisdictions that have introduced a statutory offence in place of the common law. Three Australian jurisdictions have included ***belief*** in addition to knowledge,[202] as has England and Wales.[203]

3.167 The question whether the knowledge or belief, required of D, can relate to an offence other than the specific offence of P, being one that is committed in the same or in partly the same circumstances, has been answered in the affirmative in

196. *Britten v Alpogut* [1987] VR 929, 938; *McMillan v Reeves* (1945) 62 WN (NSW) 126.

197. As outlined, eg, in *R v Mai* (1992) 26 NSWLR 371, 381-382.

198. At common law liability would not attach if D's assistance was provided solely to avoid his own arrest or prosecution: *R v Jones* [1949] 1 KB 194, 198; and see *R v Andrews* [1962] 1 WLR 1474 where it was held to be insufficient to constitute an offence as an accessory that D intended by his assistance to profit from the receipt of stolen goods and not to assist the thief.

199. *R v Tevendale* [1955] VLR 95; *R v Reeves* (1892) 13 LR (NSW) 220; *R v Andrews* [1962] 1 WLR 1474, 1477.

200. *R v Tevendale* [1955] VLR 95.

201. Herring CJ, 96 and Sholl J, 98-99 favouring knowledge of the precise felony; Martin J, 97 expressing some reservations in this regard. The view of the majority was upheld in *R v Stone* [1981] VR 737; but see B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 355 where the view of the majority was questioned.

202. *Criminal Code* (ACT) s 717(1)(b)(ii); *Criminal Law Consolidation Act 1935* (SA) s 241(1); *Crimes Act 1958* (Vic) s 325(1).

203. *Criminal Law Act 1967* (Eng) s 4(1).

England and Wales,[204] Victoria,[205] South Australia[206] and the Australian Capital Territory.[207]

3.168 We consider the extension or clarification of the common law, in the way adopted in these jurisdictions, to be desirable. From a practical view point, it will be a rare case where D has ***actual knowledge*** of the facts or circumstances constituting P's offence. Normally D's understanding will not extend beyond belief as to what occurred that is derived from hearsay evidence or media reporting.

3.169 In some instances, D may be aware, before providing any assistance, that P has committed an offence, but may be uncertain of its precise nature or of the details of what occurred. The circumstances in which D comes to learn of P's offending, and the haste with which assistance may be provided, makes this inevitable. What is intended by paragraph 3.3(1)(c)(ii), for example, is the capacity to cater for the case where D provides assistance to P by concealing a weapon which he knew or believed P had used in committing an armed robbery. If, in the course of carrying out that armed robbery, P killed the victim, then D should be liable as an accessory after the fact to the armed robbery, if, when providing that assistance, it was that lesser offence that D believed P to have committed; but not as an accessory after the fact to the murder if he was unaware that P had killed the victim. It is also intended to continue the current case law that allows D to be convicted of being an accessory after the fact to manslaughter, or to a malicious wounding, where he believed that P had committed a murder, yet in fact P's offence fell into either of those lesser forms of criminality.[208]

3.170 Where D elects to provide assistance to P, in the belief that he has committed some form of serious indictable offence, it is difficult to see why his moral fault is any less than that of a person who has actual knowledge of the precise offence committed by P. Bringing to justice those who deliberately seek to assist a person who is known, or believed, to have committed a serious indictable offence, either for the purpose of enabling that person to escape justice, or to obtain, keep or dispose of the proceeds of the offence, is a matter of significant public interest. The extension proposed would assist in satisfying that objective.

3.171 Necessarily, as recognised in recommendation 3.3(1)(a), P must have committed the offence in respect of which D provides the relevant assistance.[209] However, P's acquittal would not matter if there were sufficient evidence admissible in D's trial, to show that P did commit the offence,[210] although subject to any argument as to inconsistency of verdicts,[211] or incontrovertibility. Consistently with the common law, it should be possible for D to be tried as an accessory after the fact for assistance given to an offender, who is yet to be identified, or placed on trial or who is not amenable to justice.[212] Recommendation 3.3(5) recognises this.

3.172 If P did not commit any offence, then assistance provided by D in the mistaken belief that he committed an offence, should not render D liable for being an

204. *Criminal Law Act 1967* (Eng) s 4(1).
205. *Crimes Act 1958* (Vic) s 325(1).
206. *Criminal Law Consolidation Act 1935* (SA) s 241(2)(ii).
207. *Criminal Code* (ACT) s 717(1)(b)(ii) and s 717(3).
208. *Hurley v The Queen* [1967] VR 526; *R v Richards* [1877] 2 QBD 311.
209. *Dawson v The Queen* (1961) 106 CLR 1.
210. *R v Williams* (1932) 32 SR (NSW) 504; *R v Carter* [1990] 2 Qd R 371.
211. *R v Breen* (1990) 47 A Crim R 298, 303-304.
212. *R v Brindley* [1971] 2 QB 300.

accessory after the fact, or of any attempt to commit that offence. This is consistent with the common law.[213]

Procedural aspects

3.173 It should continue to be possible for D to be convicted as an accessory after the fact in circumstances where, having been charged as a co-offender in relation to the principal offence, D was acquitted of that offence yet found to have provided assistance to P after the offence, with the intention of enabling P to escape justice or to obtain, keep or dispose of the proceeds of his offence.

3.174 This could be best achieved by way of including an alternative count, in the indictment, charging P as an accessory after the fact. It would not seem necessary for the proposed provision to address this possibility.

Defences

3.175 While lawful excuse would continue to be available as a common law defence,[214] pending any wholesale codification, we consider that it would be desirable for its availability to be expressly recognised, in recommendation 3.3(5), as is the case in some other jurisdictions.[215]

3.176 We do not see any justification for reviving the spousal immunity that previously existed at common law, which has already been abolished in NSW,[216] but has been preserved in Tasmania,[217] and in Western Australia,[218] or for its extension in any way.

Other offences

3.177 We have not sought, in this part of the chapter, to reduce or alter the availability of the several other offences that may apply, where D provides assistance to P, following P's commission of an offence. For example, in appropriate circumstances, it may be preferable to charge D with receiving,[219] or a money laundering offence.[220] It might also be preferable to charge D with concealing a serious indictable offence,[221] hindering investigations,[222] assisting a prisoner to escape from custody;[223] or harbouring an escapee.[224] Charges relating to one of the public justice offences,[225] or of conspiracy to commit any such offence could also be available. This will preserve the prosecution discretion that will allow a charge to be

213. *Haughton v Smith* [1975] AC 476.
214. *Crafter v Kelly* [1941] SASR 237, 243.
215. For example, *Criminal Law Act 1967* (Eng) s 4(1); *Criminal Law Consolidation Act 1935* (SA) s 241(1)(b); *Crimes Act 1958* (Vic) s 325(1).
216. *Crimes Act 1900* (NSW) s 347A.
217. *Criminal Code* (Tas) s 6(2).
218. *Criminal Code* (WA) s 10(2).
219. *Crimes Act 1900* (NSW) s 188-192.
220. *Crimes Act 1900* (NSW) s 193B.
221. *Crimes Act 1900* (NSW) s 316.
222. *Crimes Act 1900* (NSW) s 315.
223. *Crimes Act 1900* (NSW) s 310C.
224. *Crimes Act 1900* (NSW) s 310G.
225. *Crimes Act 1900* (NSW) pt 7.

brought that most appropriately reflects the criminality involved in the individual case.

Penalty

3.178 Under the current law of NSW, the penalties for an offence of being an accessory after the fact vary according to the principal offence, that is:

- in relation to an offence of murder, the maximum available penalty is imprisonment for 25 years;[226]
- in relation to offences of robbery with arms or in company, or kidnapping, it is imprisonment for 14 years;[227]
- in relation to treason related offences arising under s 12 of the *Crimes Act 1900* (NSW), it is imprisonment for 2 years;[228] and
- in relation to any other serious indictable offence it is imprisonment for 5 years unless otherwise specifically enacted.[229]

3.179 In order to provide for the situation where the offence committed by P is more serious than the related offence which D believed P to have committed, recommendation 3.3(7) provides for a reduction in the maximum sentence available. Otherwise, we are of the view that it is appropriate for the available penalty to be fixed by reference to the offence that P knew or believed had actually been committed, at the time that the assistance was given. There is a proper basis for making that the point of reference in order to cater for the situation where, at the time of the assistance, D knew or believed P's offence to be one of malicious wounding of a victim, who dies some months later, with the consequence that P's offence then becomes one of murder or manslaughter. In such a case, recommendation 3.3(7) would ensure that D is sentenced as an accessory after the fact to malicious wounding, but not to murder or manslaughter.

3.180 While we accept that the selection of a maximum penalty, for an offence of accessory after the fact, by reference to a table, necessarily involves a somewhat arbitrary exercise, on balance we prefer to duplicate the existing approach.

3.181 Similarly, we consider it desirable to increase the maximum penalty for the s 12 treason-related offences, bearing in mind the nature and breadth of the offences that are encompassed within that somewhat archaic provision, which carry a maximum sentence of imprisonment for 25 years. Although it is outside our terms of reference, it is a provision that would justify review, particularly in the light of the question whether the conduct, to which it would potentially attach, should be left to be charged under the *Criminal Code* (Cth) offences of treason and sedition.[230]

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226. *Crimes Act 1900* (NSW) s 349(1).
227. *Crimes Act 1900* (NSW) s 349(2).
228. *Crimes Act 1900* (NSW) s 348.
229. *Crimes Act 1900* (NSW) s 350; there do not appear to be any offences where a specific penalty for this form of accessorial liability is enacted that would attract a term of imprisonment other than set out above.
230. *Criminal Code* (Cth) s 80.1 (treason); s 80.2 (sedition).

Spousal immunity

3.182 We do not consider that there should be any change in relation to abolition of the common law immunity under which a wife could not be accessory after the fact to a felony committed by her husband. In our view s 347A of the *Crimes Act 1900* (NSW) should continue to be the law.

4. Joint criminal enterprise complicity

4.1 In this chapter, we canvass the law of joint criminal enterprise which depends on the existence of an underlying agreement to commit an offence. The participants to such an agreement are jointly liable as principals for the offence that is agreed and committed. This constitutes a basic joint criminal enterprise. A variant, extended joint criminal enterprise, makes a secondary participant liable for additional offences committed by another participant. It is this doctrine that has become complex and difficult to apply in the common law, particularly as there is disagreement as to its doctrinal basis. Its application in the context of international trials of war crimes and

crimes against humanity has also become controversial.[1] Reform to clarify and simplify its scope is perhaps the most complex question covered by this Report.

Basic joint criminal enterprise

4.2 Basic joint criminal enterprise is relatively straightforward and uncontroversial. It is founded on two or more people mutually embarking on a specific criminal enterprise giving rise to a primary criminal liability on the part of each participant. It requires their ongoing participation. It differs from extended joint criminal enterprise and accessorial liability, which involve derivative forms of criminal liability. Because joint criminal enterprise involves primary criminal liability, some legal commentators do not consider it a form of complicity. It has been suggested:

> There is …a fundamental doctrinal obscurity: are there simply two forms of liability, that of principals and of accomplices, or is there a third and separate doctrine of "joint enterprise"? Judicial and academic opinions are divided, but this branch of criminal law is so malleable that it is unlikely that the outcome of any case would be held to depend on whether or not "joint enterprise" exists as a separate set of rules.[2]

4.3 There would not appear to be any difficulty in the application of this doctrine, or in its explanation to a jury. What is required is proof of the existence of an agreement, understanding or arrangement to participate, as a member of a group, with the common intention of committing a specific offence. That agreement, understanding or arrangement need not be express. Its existence may be inferred from all the circumstances.[3] It need not be reached at any time before the offence is committed.[4] It can be established "then and there to commit that crime",[5] or it can emerge while carrying out the offence.[6] The co-conspirators' evidentiary rule in *Tripodi*[7] applies once there is independent evidence of the involvement of the several parties to the joint enterprise.[8]

4.4 Basic joint criminal enterprise includes the situation where a victim is killed in a group attack and it is not known who, among the group, was responsible for the fatal blow. For example, all members of a group are liable to be convicted of murder where they were engaged in a common plan of attacking someone with dangerous

1. Differing views in relation to its application have been expressed by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Tadic* (United Nations, International Criminal Tribunal for the former Yugoslavia, IT-94-1-T, 7 May 1997) [692]; *Prosecutor v Tadic* (United Nations, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, IT-94-1-A, 15 July 1999) [181]-[229]; and by the Extraordinary Chambers of the Courts of Cambodia in *Case File No 001/18-07-2007/ECCC/TC* (Extraordinary Chambers in the Courts of Cambodia, 26 July 2010) [1521]-[1542].
2. A Ashworth, "General Principles of Criminal Law" in D Feldman (ed), *English Public Law* (OUP, 2004) [24.58].
3. *McAuliffe v The Queen* (1995) 183 CLR 108, 114; *R v Tangye* (1997) 92 A Crim R 545, 556.
4. *R v Tangye* (1997) 92 A Crim R 545, 556.
5. *R v Tangye* (1997) 92 A Crim R 545, 557.
6. A P Simester and R G Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, 2007) 221-222.
7. *Tripodi v The Queen* (1961) 104 CLR 1.
8. *Ahern v The Queen* (1988) 165 CLR 87, 99; *R v Lam* (2005) 191 FLR 272.

weapons with the shared intention of causing grievous bodily harm, regardless of which member of the group inflicted the fatal wound.[9]

Extended joint criminal enterprise at common law

4.5 Extended joint criminal enterprise cases essentially involve a joint enterprise to commit a foundational offence, such as an armed robbery or an assault on a victim, in the course of which one participant (the "principal participant" or "P") goes beyond the original collaborative purpose and commits a separate or more serious offence, that is variously referred to in the cases as an additional, incidental or ancillary offence, for example, murder. We will call this the "additional offence". Sometimes this will involve the use of a more serious or deadly weapon or form of attack or threat than that which was originally contemplated. This form of liability is also sometimes, inaccurately, referred to as "common purpose".

4.6 What is at issue in these cases is the test that should be applied in determining whether the secondary participant to the enterprise, or any of them, if there is more than one such participant, is liable for P's additional offence, **as well as** for the foundational offence. Since liability is considered from the point of view of the secondary participant, we will usually refer to this person as "D" (defendant).

4.7 The present test, at common law, is a subjective one of what might succinctly (but loosely) be termed "foreseeable possibility", that is, foresight by the secondary participant of the possibility that P will commit the additional offence.[10] It covers any additional offence that D foresees as a possible consequence of the basic joint criminal enterprise, hence the term "extended joint criminal enterprise" to describe this situation.

4.8 This test is potentially controversial, because the secondary participant is held liable for a criminal offence, without having the *mens rea* (the relevant mental element) required for it, and without committing the *actus reus* (the physical act) which is a necessary element of the offence. As a consequence, it has been described as a "legal fiction".[11]

4.9 Peter Gillies, in his 1980 text on the law of criminal conspiracy, suggested that this type of factual situation perhaps need not have developed its own complicated "doctrine of common purpose", because the facts could have been developed under more general principles of complicity - as to whether the additional offence was an express or implied term of the conspiracy for the foundational offence. Gillies surmised that the reason "the courts have repeatedly enunciated a doctrine of common purpose, both in instructing juries and in reviewing convictions at the appellate level", was either an "historical accident", or a "convenient and even

9. *Mohan v The Queen* [1967] 2 AC 187, 191, 194.

10. *Johns v The Queen* (1980) 143 CLR 108, 122, 130-131; *Chan Wing-Siu v The Queen* [1985] AC 168, 176; *McAuliffe v The Queen* (1995) 183 CLR 108, 115-118; *Gillard v The Queen* (2003) 219 CLR 1 [23]-[25].

11. *Gillard v The Queen* (2003) 219 CLR 1 [47] (Kirby J).

graphic basis for focusing attention upon the essential issues of liability in a fact situation of this type".[12]

4.10 Other commentators have suggested that the factual situations, which have arisen in this context, could be accommodated within the principles applicable to the secondary liability of accessories, and that there may be no need to treat extended joint enterprise as having a separate doctrinal basis.[13]

4.11 This chapter examines the issues that exist in this area of the law and its complexities.

The earlier law - agreement

4.12 In earlier common law decisions, the courts focussed on the original *agreement* in order to determine what additional offence, if any, was part of it and what additional offence went beyond it.[14] D was liable for the additional offence if he or she had agreed to it in some way, either expressly or impliedly, as an extension of the original joint criminal enterprise. Thus, the additional offence could be described as one that was committed in pursuance of the joint criminal enterprise, so long as D had "tacitly" authorised it.[15]

4.13 An example of this earlier form of judicial reasoning is found in *R v Anderson.*[16] Anderson ("A") and Morris ("M") went in search of Welch ("W") after an incident involving A's wife, with the implication that they were looking for a fight with W. M was unaware that A was carrying a knife. When they found W, A proceeded to punch and then stab W with the knife causing wounds from which W later died. M apparently did not take any active part in the fight. The Court of Criminal Appeal (CCA) quashed M's conviction for manslaughter, holding that the jury was misdirected when instructed that it could convict M of manslaughter for taking part in the common design to attack W. The Court accepted the submission of M's counsel:

> that where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the *agreed* joint enterprise but (and this is the crux of the matter) that, if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act.[17]

4.14 The CCA noted a line of authority to the effect that parties involved in a joint criminal enterprise are liable for the acts pursuant to that *agreed* unlawful enterprise, except where one of the parties:

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12. P Gillies, *The Law of Criminal Complicity* (Law Book Company, 1980) 92.
13. S Gray, "'I didn't know, I wasn't there': Common purpose and the liability of accessories to crime" (1999) 23 *Criminal Law Journal* 201; and see B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 337-343.
14. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) 428.
15. *R v Anderson* [1966] 2 QB 110, 118.
16. *R v Anderson* [1966] 2 QB 110.
17. *R v Anderson* [1966] 2 QB 110, 118 (emphasis added).

> departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect…[18]

In this situation, the CCA noted the other party is not liable for consequences of the unauthorised act.[19]

Emergence of a foresight test

4.15 In the years subsequent to *R v Anderson*, the common law shifted its focus from analysing what was tacitly authorised by the original *agreement,* to analysing whether D *foresaw* the *possibility* that P's act would be carried out, as an incident of what was originally contemplated by the parties to the agreement. In *R v Powell,* Lord Hutton explained why he supported this shift:

> the test of foresight is a simpler and more practical test for a jury to apply than the test of whether the act causing the death goes beyond what had been tacitly agreed as part of the joint enterprise.[20]

4.16 *Simester and Sullivan's Criminal Law* noted the practical implications of this shift:

> There is a difference between the contemplation of possibility and (tacit or express) authorisation. Suppose S participates in a burglary knowing P has both a knife and a propensity for violence. S, however, makes it clear to P that she is opposed to his using the knife. If P, confronted during the burglary, stabs his victim, the stabbing is foreseen but unauthorised.[21]

4.17 Two decisions of ultimate courts of appeal, *Johns* and *Chan Wing-Siu*,[22] are commonly cited in later cases,[23] and in academic texts,[24] as being turning points in the adoption of a test based on foreseeability rather than agreement. Although both cases also use the earlier language of "agreement", in ascertaining whether the scope of the common purpose would embrace the additional offence, they focussed more on whether or not D subjectively contemplated the additional offence, as a possible incident of the originally agreed offence.[25]

4.18 In *Johns*, the appellant (Johns) agreed to drive another man (Watson) to a location from where Watson would change cars and proceed in the company of a third man (Dodge) to rob the victim (Morriss). This arrangement was duly carried out. However, in the course of the struggle by Watson and Dodge to rob Morriss, Morriss was shot dead by Watson. On appeal Johns challenged the direction given

18. *R v Anderson* [1966] 2 QB 110, 120.
19. *R v Anderson* [1966] 2 QB 110, 120.
20. *R v Powell* [1999] 1 AC 1, 31C (Lord Hutton).
21. A P Simester, JR Spencer, G R Sullivan and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart Publishing, 2010) 237.
22. *Johns v The Queen* (1980) 143 CLR 108; and *Chan Wing-Siu v The Queen* [1985] AC 168.
23. See, eg, *McAuliffe v The Queen* (1995) 183 CLR 108.
24. See, eg, B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 338-340, S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Law Book Co, 2010) [7.140], A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, 2007) 223.
25. *Johns v The Queen* (1980) 143 CLR 108, 122, 130-131; *Chan Wing-Siu v The Queen* [1985] AC 168, 176.

to the jury that he (Johns) was liable as an accessory before the fact, for the crime of murder, if it were "within the contemplation of the parties as an act done in the course of carrying out the particular venture upon which they had embarked".[26]

4.19 The High Court unanimously upheld Johns' conviction for murder on extended joint criminal enterprise principles, even though he was not present at the crime scene, and had agreed to a robbery only, although evidence showed Johns expected that Watson, whom he knew to be quick-tempered and capable of violence, would carry a loaded gun.[27] The High Court agreed with Chief Justice Street's conclusion, in the NSW Court of Criminal Appeal, that there was no difference between being an accessory before the fact (Johns) and a principal in the second degree (Dodge) in this context.[28] It based this liability for extended joint criminal enterprise on both the foreseeability of murder as a possible consequence of the planned robbery,[29] and on "agreement" grounds.

4.20 Justices Mason, Murphy and Wilson agreed with the conclusion of Chief Justice Street:

> "an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was *within the contemplation of both himself and the principal* in the *first degree* as an act which might be done in the course of carrying out the primary criminal intention – an act contemplated as a possible incident of the originally planned particular venture". Such an act is one which falls within the parties' own purpose and design precisely because it is *within their contemplation and is foreseen as a possible incident* of the execution of their planned enterprise.
>
> …In the present case there was ample evidence from which the jury could infer that the applicant gave his *assent* to a criminal enterprise which involved the use, that is the discharge, of a loaded gun, in the event that Morriss resisted or sought to summon assistance. …The jury could therefore conclude that the common purpose involved resorting to violence of this kind, should the occasion arise, and that the violence contemplated amounted to grievous bodily harm or homicide.[30]

4.21 Chief Justice Barwick also observed:

> The participants in a common design are liable for all acts done by any of them in execution of the design which can be held fairly to fall within the ambit of the common design. In deciding upon the extent of that ambit, all those contingencies which can be held to have been in the contemplation of the participants, or which in the circumstances ought necessarily to have been in such contemplation, will fall within the scope of the common design.[31]

26. *Johns v The Queen* (1980) 143 CLR 108, 124.
27. *Johns v The Queen* (1980) 143 CLR 108, 111.
28. *R v Johns* [1978] 1 NSWLR 282, 289-290.
29. Rather than on "probable" consequences of the common purpose: *Johns v The Queen* (1980) 143 CLR 108, 118-122 (Stephen J) and 131 (Mason, Murphy and Wilson JJ).
30. *Johns v The Queen* (1980) 143 CLR 108, 130-132 (Mason, Murphy and Wilson JJ) (emphasis added).
31. *Johns v The Queen* (1980) 143 CLR 108, 113 (Barwick CJ).

4.22 In the Privy Council case of *Chan Wing-Siu v The Queen*,[32] the agreed offence (armed robbery) did not in fact occur, but it was held that the secondary participants could foresee the offence that *did* occur (murder) as a possible consequence of the agreed armed robbery.

4.23 Three men (including Chan Wing-Siu) all armed with knives invaded a flat belonging to the victim and his wife. One participant detained the wife, while the other two participants went into the kitchen where the victim was stabbed to death. They asserted that their intention in going to the flat with knives was to collect a debt from the victim, and not to kill him or assault his wife. Two of the three men said they knew the other participants were carrying knives as well as themselves, allegedly for self-protection, while one participant said he did not know the others were carrying knives. He did not admit to carrying one himself, although three bloodied knives were found in the flat after the assault.

4.24 In deciding this case, Sir Robin Cooke referred to *Johns*[33] as a suitable precedent, widening and consolidating the approach of the common law to secondary participant's liability for an additional offence.[34] The Privy Council decided that some form of agreement (express or implied), to commit the additional offence on the part of all the participants, was not necessary to establish their liability for that offence. Rather, such liability was based on the foresight, by the secondary participants, that an act causing grievous bodily harm was a possible incident of the armed robbery. As Sir Robin Cooke explained:

> The case must depend rather on the wider principle whereby a secondary participant is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.
>
> That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.[35]

4.25 Sir Robin Cooke's use of the word "authorisation" (described in the above quotation as interchangeable with the word "contemplation")[36] resonates confusingly with the earlier focus on the original agreement in cases such as *R v Anderson*.[37] However its use in *Chan Wing-Siu* was later clarified by the Privy Council in *Hui Chi-Ming v The Queen,* which concluded that the D's liability was to be determined by reference to the foresight of D alone:

> Their Lordships consider that Sir Robin used this word [authorisation]…to emphasise the fact that mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may

32. *Chan Wing-Siu v The Queen* [1985] AC 168.
33. *Johns v The Queen* (1980) 143 CLR 108.
34. *Chan Wing-Siu v The Queen* [1985] AC 168, 176.
35. *Chan Wing-Siu v The Queen* [1985] AC 168, 175. "…and that is so whether the foresight is that of an individual party or is shared by all parties": *McAuliffe v The Queen* (1995) 183 CLR 108, 118 referring to Sir Robin Cooke's quote above.
36. See discussion on this point in *McAuliffe v The Queen* (1995) 183 CLR 108, 117.
37. *R v Anderson* [1966] 2 QB 110.

> commit ***as a possible incident of the common unlawful enterprise*** and must, with such foresight, still have participated in the enterprise. The word 'authorisation' explains what is meant by contemplation, but does not add a new ingredient. That this is so is manifest from Sir Robin's pithy conclusion to the passage cited: 'The criminal culpability lies in participating in the venture with that foresight.'[38]

4.26 In *Johns*, it was assumed that liability under extended joint criminal enterprise required a *consensus* or *joint contemplation,* between the participants, as to the commission of the additional offence as a possible consequence of setting out to commit the primary offence, whereas, in *Chan Wing-Siu*, liability under joint enterprise was expressed more broadly, as being "based solely upon what is foreseen by the secondary party".[39]

4.27 It has been argued that the differently expressed views are not inconsistent:

> In *Chan Wing-Siu*, the focus on the contemplation of the secondary party *alone* would seem to indicate a departure from the approach taken in *Johns*, where common purpose required *joint* contemplation between the parties as to the commission of the incidental crime. However, since both judgments are couched in terms of "contemplation", the inconsistency between *Chan Wing-Siu* and *Johns* is not readily apparent.[40]

4.28 With the common law's acceptance of the subjective test of foreseeable possibility in cases such as *Johns*, *Chan Wing-Siu* and *McAuliffe*, one academic writer has argued that the "doctrine of common purpose may be a pointless complication of the mental element of complicity",[41] going on to explain:

> Conceivably, the question…might simply be whether the principal offence committed was intentionally or recklessly assisted or otherwise promoted by [the secondary participant], with recklessness defined in terms of the unjustified taking of a risk foreseen as substantial.

Acceptance of the foreseeability of possibility test in Australia

4.29 The cases of *Johns* and *Chan Wing-Siu* in the 1980s consolidated foreseeable possibility as the test for liability at common law in extended joint criminal enterprise cases. Since then, the courts have had to consider *specifically* the liability of the secondary participant who foresees the possibility of the use of a particular form of violence, which he or she has clearly *not* agreed to, and was not planned by any of the participants, but who nevertheless continues to participate in the enterprise regardless of the consequences. Referring to *Johns*, the High Court in *McAuliffe v The Queen* commented*:*

> In *Johns* the Court confined its attention to the scope of the common purpose arising from the understanding or arrangement between the parties…The Court

38. *Hui Chi-Ming v The Queen* [1992] 1 AC 34, 53 (emphasis in original). See also S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 261.
39. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 260.
40. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 260-261.
41. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 340.

> did not consider the situation in which the commission of an offence which lay outside the scope of the common purpose was nevertheless contemplated as a possibility in the carrying out of the enterprise by a party who continued to participate in the venture with that knowledge.[42]

4.30 *McAuliffe v The Queen* is an example of such a factual situation, where what actually happened was not part of the original plan and was not, at that point, intended by any of the participants, but where the possibility that the offence in fact committed by P was subjectively foreseen by the secondary participants, as a possible incident of their plan.

4.31 A group of three young men (including two brothers, Sean and David McAuliffe) decided to go to a park one night to bash and rob someone. One of the group carried a hammer and another a stick. They found a victim in the park who was kicked and hit with the stick. Then one of the group kicked the victim in the chest causing him to fall into a puddle three to five metres from the edge of an ocean cliff. The next day, the victim was found dead in the sea at bottom of the cliff. The direct cause of victim's death was his falling off the edge of the cliff and drowning. The McAuliffe brothers contended that, although the common purpose of the group was to rob the victim, there was no common intention to inflict grievous bodily harm on him, an element which they asserted was necessary if they were to be convicted of murder.

4.32 The High Court unanimously upheld the convictions of the brothers for murder. It specifically recognized two types of joint criminal enterprise. First, it recognised what we call "basic" joint criminal enterprise.[43] Secondly, it recognised that form of "extended" joint criminal enterprise pursuant to which a party can be found guilty of an offence, which falls *outside* the "scope of the common purpose" observing:

> In *Johns* this Court was concerned with the common purpose of a joint criminal enterprise. In particular, it was concerned with whether the scope of the common purpose extended to possible as well as probable incidents of the venture. The scope of the common purpose is no different from the scope of the understanding or arrangement which constitutes the joint enterprise; they are merely different ways of referring to the same thing. Whatever is comprehended by the understanding or arrangement, expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement. That is why the majority in *Johns* in the passage which we have cited above spoke in terms of an act which was in the contemplation of both the secondary offender and the principal offender. There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose.[44]

42. *McAuliffe v The Queen* (1995) 183 CLR 108, 115.
43. *McAuliffe v The Queen* (1995) 183 CLR 108, 114.
44. *McAuliffe v The Queen* (1995) 183 CLR 108, 117.

4.33 The test of this "foreseeability", the Court said, is "to be determined by what was contemplated by the parties sharing that purpose [and] … extend[s] to the possible consequences of the criminal venture".[45]

4.34 This decision confirmed an important departure from *Johns,* in its acceptance that D may become liable for the additional offence, where it was contemplated as a possibility by D ***alone*****,** whereas *Johns* spoke of an act that was within the contemplation of ***both*** D and P (and as a consequence was assumed to be within the scope of the common purpose).

4.35 An opportunity to reconsider *McAuliffe* arose in the case of *Gillard v The Queen*.[46] In *Gillard* the question before the High Court was whether D, who foresees the possibility of the use of a particular form of violence which he or she has not agreed to, and was not planned by him or her (although it was privately intended by the P), but who nevertheless continues to participate in the enterprise, is liable for the death of the victim if it results from that form of violence, and if so on what basis?

4.36 Two men disguised in hoods (Gillard ("G") and Preston ("P")) drove in a stolen van to a car repair workshop of the victim (Knowles, a drug dealer), who had a large amount of cash on site. G had stolen the van at P's request. G remained in the stolen van while P walked into the workshop with a gun, and shot the victim and another man dead. He also wounded a third man. P returned to the van, where G was waiting, and they drove away. Although G was not present at the killing by P, there was evidence that G had known that P went into workshop with a loaded gun, and had seen P load the gun. The prosecution argued that G had been a party to an agreed plan for P (who was well known to be violent) to kill the victim, and had been aware of P's intention to do so. In contrast, G argued that the plan between P and G had only been to participate in an armed robbery, and that he had not been aware of P's intention to kill the victim.

4.37 The High Court quashed the conviction, and ordered a retrial, because it found that the trial judge had misdirected the jury when instructing it that G should be either found guilty of murder, on joint criminal enterprise principles, or acquitted. It held that the possibility of manslaughter should have been left to the jury. However, in arriving at its decision, supporting the availability of different verdicts for the principal participant (murder) and the secondary participant (manslaughter), the majority of the High Court[47] affirmed the principles established in *McAuliffe*.

4.38 Chief Justice Gleeson and Justice Callinan in a joint judgment addressed the issue as follows:

> It is established that, consistently with the principles stated in *McAuliffe*…where death results from a joint enterprise involving violence, and the level of violence

45. *McAuliffe v The Queen* (1995) 183 CLR 108, 114, considering *Johns v The Queen* (1980) 143 CLR 108 and *Chan Wing-Siu v The Queen* [1985] AC 168.
46. *Gillard v The Queen* (2003) 219 CLR 1.
47. *Gillard v The Queen* (2003) 219 CLR 1 (Gleeson CJ, Hayne and Callinan JJ; Gummow J agreeing and Kirby J doubting).

> contemplated by one participant exceeds that contemplated by another, one may be guilty of murder and the other guilty of manslaughter…[48]
>
> According to the principles stated in *McAuliffe*, the culpability of the appellant [Gillard] in the event that Preston shot and killed Knowles would depend upon the scope of their common design, and what he foresaw as a possible incident of the design. If he foresaw, as a possible incident of carrying out the common design, that Preston might shoot Knowles with intent to kill or cause grievous bodily harm, then he would be guilty of murder. If he foresaw, as a possible incident, that [Preston] might shoot [Knowles] but without foreseeing such intent, then he would be guilty of manslaughter. That need not depend upon whether Preston decided on the spur of the moment to kill Knowles, or whether the killing was premeditated.[49]

4.39 Justice Hayne affirmed the principles outlined in *McAuliffe v The Queen* as follows:

> As *McAuliffe* reveals, the contemplation of a party to a joint enterprise includes what that party foresees as a possible incident of the venture. If the party foresees that another crime might be committed and continues to participate in the venture, that party is a party to the commission of that other, incidental, crime even if the party did not agree to its being committed…To hold the individual liable for the commission of the incidental crime, when its commission is foreseen but not agreed, accords with the general principle that "a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it." The criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight.[50]

4.40 The foreseeable possibility test was more recently affirmed in *Clayton v The Queen*[51], as being part of the common law in Australia.

Issues arising

Participation in a joint enterprise where the other participants are not convicted

4.41 Where two or more people participate in a basic joint criminal enterprise, both have primary liability since they embark on a common purpose to commit a particular offence. If P who committed the *actus reus* for the offence is found not guilty, it does not mean that D cannot be held liable for the offence. For example, P may have died before trial or may be acquitted at trial by reason of mental illness, or by reason of some difference in the evidence led at that participant's trial. D can still be held guilty of the offence,[52] either on the basis of his or her own participation; or on the "innocent agent basis"; or by reference to concert, so long as P's mental illness

48. *Gillard v The Queen* (2003) 219 CLR 1 [15] (Gleeson CJ and Callinan J), see also [129] (Hayne J).
49. *Gillard v The Queen* (2003) 219 CLR 1 [19] (Gleeson CJ and Callinan J).
50. *Gillard v The Queen* (2003) 219 CLR 1 [112] (Hayne J).
51. *Clayton v The Queen* (2006) 81 ALJR 439 [3] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) where the High Court was invited, but refused to reconsider *McAuliffe v The Queen* (1995) 183 CLR 108 and *Gillard v The Queen* (2003) 219 CLR 1. See also *Nguyen v The Queen* [2010] HCA 38.
52. *Matusevich v The Queen* (1977) 137 CLR 633, 637-638 (Gibbs J), 663-664 (Aickin J).

does not have the effect of disabling P from entering into the necessary agreement, arrangement or understanding to commit the offence.

4.42 An example of this principle is found in the case of *Osland v The Queen*[53]. A wife and her son (the stepson of her husband) planned to murder their abusive husband/stepfather and dug a grave for him. The wife put a sedative in the husband's dinner, and later the stepson killed him in bed with an iron pipe, in the presence of the wife. Both the wife and the stepson admitted to killing the deceased, but claimed self-defence and provocation because he had been violent to them both over many years. The wife was convicted of murder. The jury were unable at the joint trial to reach a verdict in relation to the stepson. At his retrial, he was acquitted. The wife appealed to the High Court on a number of grounds, including the ground of an asserted inconsistency between the verdicts. That is, the person who had actually administered the fatal blows in the bedroom, the step-son, had been acquitted; while the wife, who did not administer the fatal blows, had been convicted of murder. The appeal was dismissed by majority (3:2).[54]

4.43 It is important to note that Mrs Osland was not tried as an accessory before the fact. Nor was it the prosecution case that her son killed the victim as her "innocent or non responsible agent". Rather, she was tried as a person present at the time of the killing acting in joint concert with her son, with the consequence that her potential liability was primary rather than derivative.

4.44 As Justice McHugh pointed out, citing *R v Tangye,*[55] each party to a joint concert to commit a crime, who is present when it is committed, is equally liable for *the acts* that constitute the *actus reus* for that crime.[56]

4.45 His Honour (with whose analysis Justices Kirby and Callinan agreed)[57] noted that it is settled in England, at all events, that:

> …it is the acts, and not the crime, of the actual perpetrator which are attributed to the person acting in concert. If the latter person has the relevant *mens rea*, he or she is guilty of the principal offence because the *actus reus* is attributed to him or her by reason of the agreement and presence at the scene. It is irrelevant that the actual perpetrator cannot be convicted of that crime because he or she has a defence such as lack of *mens rea*, self-defence, provocation, duress or insanity.[58]

He continued:

> The principle that those who act in concert and are present at the scene are responsible for the acts of the actual perpetrator operates to make a person guilty of the principal crime, even though the actual perpetrator is acquitted completely. Thus, the person who did the act may be legally insane. Yet as long as that person had sufficient mental capacity to enter into the arrangement

53. *Osland v The Queen* (1998) 197 CLR 316.
54. McHugh, Kirby and Callinan JJ; Gaudron and Gummow JJ dissenting.
55. *R v Tangye* (1997) 92 A Crim R 545, 556-557.
56. *Osland v The Queen* (1998) 197 CLR 316 [73].
57. *Osland v The Queen* (1998) 197 CLR 316 [174] (Kirby J), [257] (Callinan J).
58. *Osland v The Queen* (1998) 197 CLR 316 [75] (McHugh J).

> or common understanding, the other participant present at the scene will be guilty of committing the principal crime if he or she has the relevant mens rea.[59]

4.46 Two issues potentially arise. The first concerns whether it is correct, in the light of the decision in *Johns*[60] and of the observations of Justices Gaudron and Gummow in *Osland*[61] to confine this principle to cases of joint enterprise where D is physically present.[62] As we have noted, in the preceding chapter, a requirement of physical presence does not sit happily with contemporary circumstances, in which those involved in a basic joint criminal enterprise can be in communication with each other by internet, or by phone, during the course of the commission of an agreed offence, as well as during planning for its commission.

4.47 The second concerns whether similar principles should apply to cases of extended joint enterprise, where P is acquitted of the additional offence, or convicted of some lesser or alternative offence, by reason of some defence available to him or her, such as mental illness, self-defence, provocation, or substantial impairment by abnormality of mind.

4.48 If so, then a further question arises as to the relevance of any knowledge which D may have of facts or circumstances giving rise to these defences, when determining whether D had the foresight necessary for criminal complicity under extended joint enterprise principles.

4.49 Resolution of this additional issue might depend on whether liability under extended joint enterprise principles is to be categorised as derivative,[63] or whether it operates as an exception to the situation generally applicable to secondary liability, and is primary.

Search for a "foundational crime"

4.50 With the foreseeable possibility test in extended joint criminal enterprise established as part of the common law in Australia through cases such as *McAuliffe*, *Gillard* and *Clayton*, attention has turned to the question whether it is necessary to identify a "foundational crime" on which to base the extended joint criminal enterprise, or whether it is enough if the offending group has a common involvement in some undefined activity which is of a criminal nature. This issue came to the fore in the case of *R v Taufahema*.[64]

4.51 A group of four men (including the respondent Motekiai Taufahema and his brother John Taufahema), all being on parole, were occupants in a stolen car. It was pulled over by a police officer after it had been reported as being driven erratically and

59. *Osland v The Queen* (1998) 197 CLR 316 [79] (McHugh J), [174] (Kirby J), and [257] (Callinan J), agreeing with McHugh J's analysis.
60. *Johns v The Queen* (1980) 143 CLR 108.
61. *Osland v The Queen* (1998) 197 CLR 316 [27].
62. As McHugh J stated the law, citing additionally D Lanham, "Complicity, Concert and Conspiracy" (1980) 4 *Criminal Law Journal* 276, 282.
63. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4th ed, Federation Press, 2006) [11.4.1].
64. *R v Taufahema* (2007) 228 CLR 232 [23], [72].

found to have been stolen. The four men left the car, each carrying a loaded gun. One of the men (neither of the Taufahema brothers) fired shots at the police car killing the police officer. The four men then ran from the scene. The defence called evidence at the trial to show that three of the men (but not Motekiai Taufahema) had been part of a plan to commit an armed robbery with guns, but not to murder a police officer. The purpose of this evidence, which did not form any part of the prosecution case at trial, was to explain the presence of the weapons and other items, comprising additional ammunition, a mask and gloves that were found in the stolen vehicle.

4.52 The prosecution struggled to find a joint criminal enterprise to commit a foundational offence to which the members of the gang were parties and which would provide a basis for the requisite foresight of the possibility that one of their gang would discharge a weapon in its pursuit, with the mental state required for a charge of murder.

4.53 The case against Motekiai Taufahema, who was tried separately from the other members of the group, was opened on the basis of an agreement, between the participants, to use a firearm to prevent their lawful arrest (an offence under s 33B of the *Crimes Act 1900* (NSW)).[65] Ultimately, it was left to the jury on the basis that the respondent was party to a joint criminal enterprise to evade arrest, and foresaw the possibility that one of the group might fire his weapon at the police officer, in the course of an attempted arrest, with the risk of the officer being killed or seriously injured.[66]

4.54 The respondent was convicted of murder and appealed to the Court of Criminal Appeal ("CCA") which quashed the conviction. The CCA held that the foundational offence upon which the prosecution had relied, of a joint criminal enterprise to evade lawful arrest, was not an offence known to law. In order to overcome this problem, the prosecution had sought to argue in the CCA that the foundational offence was more correctly one arising under s 546C of the *Crimes Act 1900* (NSW), namely a joint criminal enterprise to resist or hinder a police officer in the execution of his duty. The Court noted, however, that there was a major obstacle in the way of this submission, in that such a case was not put at trial. Additionally, it found that any agreement reached by the group to run away, when stopped by the police officer, would not constitute a "hindering", within the meaning of s 546C of the *Crimes Act 1900* (NSW). As a result, the prosecution was unable to establish a foundational offence of the kind that would have been necessary for an application of the extended joint criminal enterprise principles.[67]

4.55 Errors were also found in relation to the directions which were given concerning the commonality of purpose that was required for a joint criminal enterprise, and in the failure to leave an alternative verdict of manslaughter.[68] As a consequence of these errors, the Court quashed the conviction, declined to order a new trial and directed the entry of a verdict of acquittal.

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65. *R v Taufahema* (2007) 228 CLR 232 [12].
66. *R v Taufahema* (2007) 228 CLR 232 [13]-[19], [46].
67. *Taufahema v The Queen* [2006] NSWCCA 152 [22]-[27].
68. *Taufahema v The Queen* [2006] NSWCCA 152 [28], [37].

4.56 In a majority decision[69] the High Court granted the prosecution special leave to appeal from the decision of the CCA, and allowed the appeal. In these proceedings the prosecution identified the case, which it would wish to present in a retrial, as one of extended joint criminal enterprise, founded on a joint criminal enterprise to commit an armed robbery.[70] In order to make out a case of murder against the respondent on this basis, the jury would have to be satisfied that he continued his participation in that enterprise, with the foresight of the possibility that another person might be assaulted with the intention to kill or to cause really serious injury to that person.[71]

4.57 It does not appear that consideration was given, at any stage of the proceedings, to the possible identification of the foundational offence as one involving the unlawful possession of firearms,[72] or of being armed with intent to commit an indictable offence,[73] involving each of the several members of the group. At the time of the events in *Taufahema*, the offences of being in possession of a loaded firearm in a public place, or of being in possession of an unregistered firearm in a public place[74] would not have been available, as the result of a decision of the Court of Appeal,[75] to the effect that possession of a firearm, in a motor vehicle, standing in a public place, did not amount to possession of the firearm in a public place. The decision has since been overcome by amendment of the *Crimes Act.*[76] The offence of being armed with intent, which was available at the time of the shooting, would seem to have provided a more substantial basis for an operation of the joint criminal enterprise principle, in this case.

4.58 Although counsel for the respondent contended that the prosecution ought not to be given the opportunity of making a new case which had not been made at the trial,[77] the majority in the High Court allowed the appeal observing:

> what the prosecution proposes to do is rely on the same evidence as was called at the first trial, but to seek to characterise the facts which that evidence may establish in a different way, but not in a radically different way. At the first trial the criminal enterprise revealed by the evidence was not called "armed robbery", but the evidence was capable of supporting the inference that it was. All the prosecution proposes to do at the second trial is to rely on an inference which could have been drawn in the first trial. The evidence that the four men were on parole, which was held relevant at the first trial as showing that the accused had a strong motive to adhere to a joint enterprise of avoiding apprehension by the police, will not necessarily be held irrelevant at the second trial.[78]

69. *R v Taufahema* (2007) 228 CLR 232 (Gummow, Hayne, Heydon and Crennan JJ; Gleeson CJ, Callinan and Kirby JJ dissenting).
70. *R v Taufahema* (2007) 228 CLR 232 [14].
71. *R v Taufahema* (2007) 228 CLR 232 [29].
72. Contrary to *Firearms Act 1996* (NSW) s 7 or s 7A.
73. *Crimes Act 1900* (NSW) s 114 and s 114A.
74. *Crimes Act 1900* (NSW) s 93G and s 93I.
75. *Hardman v Minchan* (2003) 57 NSWLR 390.
76. *Crimes Act 1900* (NSW) s 93F(2).
77. *R v Taufahema* (2007) 228 CLR 232 [57]; a proposition with which Gleeson CJ, Callinan and Kirby JJ agreed.
78. *R v Taufahema* (2007) 228 CLR 232 [68] (Gummow, Hayne, Heydon and Crennan JJ).

4.59 Accordingly, the verdict of acquittal was set aside with an order for a new trial. The possibility of a retrial on this basis led to the matter being finalised by a plea to manslaughter.

4.60 In their dissenting decision, Chief Justice Gleeson and Justice Callinan observed:

> Where a case of murder is based upon the form of culpability described as "extended common purpose", the identification of the joint criminal enterprise, participation in which results in the accused's secondary liability, is an important particular of the case which the accused must meet. That is not to say that the prosecution must be able to identify the joint criminal enterprise with complete specificity. However, the judge and the jury must know enough about the enterprise to enable a decision to be made, first, as to whether it is criminal, and, secondly, as to whether the shooting was within the scope of the common purpose reflected in that joint criminal enterprise in that it was foreseen as a possible incident of the enterprise as explained in cases such as *McAuliffe* and *Clayton*. The judge must know enough about the enterprise to rule on questions of admissibility of evidence. Counsel for the accused must know enough about the enterprise to decide how to conduct the defence case.[79]

4.61 Justice Kirby similarly noted the importance of a clear specification of the foundational offence, and criticised the undue focus which had been placed on the additional offence at the expense of the foundational offence.[80]

4.62 This case raises an important question as to the need to identify a specific joint criminal enterprise, as a foundation for the doctrine of extended joint criminal enterprise, as distinct from showing that the participants were involved in some joint activity (whether currently criminal or not)[81] with foresight arising, for example, from knowledge that one of their number was armed with a gun and had a violent disposition and might use the weapon to shoot another person with the intention or state of mind required for murder.

Foresight of the mental element required for the additional offence

4.63 In an earlier trial involving John Taufahema (the brother of Motekiai Taufahema), the prosecution had relied on the s 33B offence[82] as the foundational offence for the joint criminal enterprise. He was similarly convicted of murder, but between the time that the Motekiai Taufahema case was argued in the High Court and judgment delivered, the CCA also quashed his conviction.[83]

4.64 Consideration was not given, in that appeal, to the foundational offence or to an alternative case pursued by the prosecution of felony murder.[84] The appeal was allowed on the basis of a failure to direct the jury sufficiently on the mental element required of the secondary participant for extended joint enterprise murder, namely that he contemplated the possibility that the principal participant might use his

79. *R v Taufahema* (2007) 228 CLR 232 [31].
80. *R v Taufahema* (2007) 228 CLR 232 [119]-[120].
81. It being insufficient to say that the four men were up to no good and that it looked as though they were equipped for crime: *R v Taufahema* (2007) 228 CLR 232 [39] (Gleeson CJ and Callinan J).
82. *Crimes Act 1900* (NSW) s 33B, ie, the use of a firearm to prevent lawful arrest.
83. *Taufahema v The Queen* [2007] NSWCCA 33.
84. The relevant felony being that arising under *Crimes Act 1900* (NSW) s 33.

firearm to shoot at the police officer *with the intention of* killing him or causing him really serious bodily harm.[85]

4.65 In addition, it was found, relying on *Gillard v The Queen*[86] that manslaughter should have been left to the jury, as a verdict that would have been available, had it been satisfied that the appellant foresaw the possibility that the principal participant might fire a shot at the police officer, but had not foreseen that he would use the weapon with the intention of killing him or causing him really serious harm.[87] As a consequence the conviction was quashed and a new trial ordered.[88] Subsequently, as was the case for Motekiai Taufahema, the appellant pleaded guilty to manslaughter.

4.66 In accordance with the line of authority represented by *McAuliffe*, *Gillard* and *Clayton*, this appeal focussed on the extent of the foresight required of D concerning P's conduct or, more precisely, his or her intention or mental state. The decision recognised that what is necessary is D's subjective contemplation, not just of the possibility of P committing the *actus reus* required for the additional offence (for example, in the case of murder, shooting the victim), but also of the possibility that P would act with the mental element necessary for that offence (for example, in the case of murder, discharging the weapon with an intent to kill or to cause grievous bodily harm, or with reckless indifference to human life).

4.67 This raises the question of how it is, in the absence of any admissions, that a jury could be expected to satisfy themselves that D subjectively foresaw the possibility of P having the mental or fault element required for the additional offence, that is, where it is an offence of specific intent. This is particularly likely to be problematic in circumstances where it is accepted that D did not intend its commission,[89] or was in fact opposed to it, yet continued to participate in the joint enterprise to commit the foundational offence.

4.68 Quite apart from any issue concerning the time at which such subjective foresight needs to be fixed – a complicating factor in a fast moving or evolving scenario – a question arises whether the substitution of an objective test for the subjective test would provide a more certain basis for the jury's deliberations, as is the case under the Queensland, Western Australian and Tasmanian Codes. Alternatively, a question arises whether it would be preferable to confine the application of the doctrine in a way that would preserve the possibility of D being convicted of an offence of basic intent, but not of a more serious offence requiring specific intent on the part of P? For example, in a case where D foresaw the possibility of P doing an act that might result in the death of, or grievous bodily harm to, another, such an approach would expose D to a conviction for manslaughter but not for murder, if death ensued; or to a conviction for causing grievous bodily harm[90] rather than one

85. *Taufahema v The Queen* [2007] NSWCCA 33 [27]-[30].

86. *Gillard v The Queen* (2003) 219 CLR 1 [19], [25]-[26] (Gleeson CJ and Callinan J), [78] (Kirby J) and [128] (Hayne J).

87. *Taufahema v The Queen* [2007] NSWCCA 33 [35] and [43].

88. *Taufahema v The Queen* [2007] NSWCCA 33 [44].

89. If he did intend its commission, then there would be no need for the prosecution to rely on extended joint criminal enterprise.

90. *Crimes Act 1900* (NSW) s 54.

of causing grievous bodily harm with intent,[91] if the victim suffered such a degree of harm.

The "fundamental difference" qualification

4.69 It has been held that an additional offence, which is fundamentally different from that which D foresaw as a possible incident of the joint criminal enterprise, does not attract criminal liability on the part of D under extended joint criminal enterprise principles.[92]

4.70 Several cases from England and Northern Ireland, over the last two decades, have tested the outer limit of the foreseeable possibility test in this respect. That limit has been described as being reached when the additional offence becomes "fundamentally different" from the original or foundational offence, which was the subject of the joint criminal enterprise, so that there is no connection between the two offences from the subjective viewpoint of D.[93]

4.71 The difficulties in the application of the fundamental difference rule are, however, illustrated by the cases of *R v Gamble*,[94] the compendiously reported cases of *R v Powell* and *R v English,*[95] and *R v Rahman*.[96]

4.72 The *Gamble* case is one of the most generous[97] to secondary participants in excluding them from liability. The distinctive social-political environment of Northern Ireland at that time, and the use and tolerance in some local communities of a very specific method of punishment commonly employed by para-military groups (kneecapping), might, in part, explain this controversial decision.

4.73 Four members of a Northern Ireland para-military group agreed to punish a fellow member (Patton) for a perceived wrongdoing. In carrying out the punishment, Patton was shot, battered and had his throat cut. One of the four assailants (Gamble) pleaded guilty to murder, and another (Boyd) was found guilty of murder.

4.74 Counsel for the other accused (Douglas and McKee) contended that the perpetrators of the killing had gone beyond their joint criminal enterprise and had committed an altogether different offence from that agreed, namely a deliberate murder, when all that they had contemplated was that some degree of grievous bodily harm should be done to Patton up to and including kneecapping, or fracture of the limbs.[98]

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91. *Crimes Act 1900* (NSW) s 33.
92. A P Simester and R G Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, 2007) 223-225; *R v Powell* [1999] 1 AC 1.
93. *R v Powell* [1999] 1 AC 1, 28C-D, 31A (Lord Hutton); see also *R v Rahman* [2009] AC 129 [26], [65].
94. *R v Gamble* [1989] NI 268.
95. *R v Powell* [1999] 1 AC 1.
96. *R v Rahman* [2009] AC 129.
97. Lord Neuberger of Abbotsbury described the decision in *R v Gamble* as "a rather generous outcome for Douglas and McKee on the facts": *R v Rahman* [2009] AC 129 [92].
98. *R v Gamble* [1989] NI 268, 279F.

4.75 Justice Carswell of the Crown Court of Northern Ireland identified the issue in the case as:

> whether the actions of Gamble and Boyd went beyond what was expressly or tacitly agreed as part of the common enterprise, with the consequence that their acts go beyond the contemplation of the accessories and the authority given by them.[99]

Justice Carswell found this issue in favour of the appellants.[100]

4.76 In relation to the Crown's contention that murder was established on their part because they had contemplated the infliction of grievous bodily harm on the victim, Justice Carswell observed:

> Although the rule remains well entrenched that an intention to inflict grievous bodily harm qualifies as the *mens rea* of murder, it is not in my opinion necessary to apply it in such a way as to fix an accessory with liability for a consequence which he did not intend and which stems from an act which he did not have within his contemplation.[101]

Justice Carswell thus held that Douglas and McKee were guilty of wounding with intent to commit grievous bodily harm, but not guilty of murder.[102]

4.77 A curious consequence of this case is that if, instead of having his throat cut with a knife, the victim had been shot in the knee, as was the common objective of the group, and had then died of blood loss, or from an infection arising from the injury, each of the appellants would have been convicted of murder.

4.78 In the *Powell* case,[103] a group of three men (including the two appellants, Powell and Daniels) went to the home of a cannabis dealer. The purpose of their joint criminal enterprise was to buy drugs. When the drug dealer came to the door, one of the three men shot him dead. It was unclear which of the three had committed this act, but it was the Crown case that, if one of them fired the fatal shot, then the other two were guilty of murder because they knew he was armed with a gun, and realised that he might use it to kill or cause really serious injury to the cannabis dealer. They were each convicted of murder.

4.79 In the *English* case,[104] two men joined together in an attack the purpose of which was to injure a police officer with wooden posts. Unknown to the secondary participant (English), the principal participant (Weddle) had a knife which he used to stab the policeman to death. English was convicted of murder.

4.80 There was a difference between the latter two cases, in that it was common ground that Powell and Daniels were aware that the principal participant was carrying a gun, while in the case of English it was accepted that there was a reasonable possibility that he was unaware that the principal participant had a knife in his

99. *R v Gamble* [1989] NI 268, 282C-D.
100. *R v Gamble* [1989] NI 268, 284.
101. *R v Gamble* [1989] NI 268, 284B.
102. *R v Gamble* [1989] NI 268, 285.
103. *R v Powell* [1999] 1 AC 1.
104. *R v Powell* [1999] 1 AC 1.

possession. In each case Lord Hutton delivered the principal judgment, and the other members of the House agreed with his reasons.[105]

4.81 In the case of Powell and his co-accused Daniels, the following question was certified:

> Is it sufficient to found a conviction for murder for a secondary party to a killing to have realised that the primary party might kill with intent to do so or must the secondary party have held such intention himself?[106]

4.82 In the case of English, the questions certified were as follow:

> (i) Is it sufficient to found a conviction for murder for a secondary party to a killing to have realised that the primary party might kill with intent to do so or with intent to cause grievous bodily harm or must the secondary party have held such an intention himself?
>
> (ii) Is it sufficient for murder that the secondary party intends or foresees that the primary party would or may act with intent to cause grievous bodily harm, if the lethal act carried out by the primary party is fundamentally different from the acts foreseen or intended by the secondary party?[107]

4.83 In relation to the first of the certified questions Lord Hutton concluded, in the light of previous authority,[108] that:

> it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party *might* kill with intent to do so or with intent to cause grievous bodily harm.[109]

4.84 It is clear, from his Lordship's reasons, that this will be the case, even though D had not tacitly agreed to the act which he or she contemplated might be carried out by P,[110] and even though D did not share P's intention to kill or to cause really serious bodily harm.[111]

4.85 In so holding, Lord Hutton rejected the appellants' submission that, before a jury could convict D of murder, they had to be satisfied that he or she shared P's intention to kill or cause really serious bodily harm.

4.86 Lord Steyn, who agreed with Lord Hutton[112] observed:

> The foresight of the secondary party must be directed to a real possibility of the commission by the primary offender in the course of the criminal enterprise of the greater offence. The liability is imposed because the secondary party is assisting in and encouraging a criminal enterprise which he is aware might

105. *R v Powell* [1999] 1 AC 1, 10C (Lord Goff), 10D (Lord Jauncey of Tullichettle), 12B (Lord Mustill), 15H (Lord Steyn).
106. *R v Powell* [1999] 1 AC 1, 16E.
107. *R v Powell* [1999] 1 AC 1, 17B.
108. In particular *R v Smith (Wesley)* [1963] 1 WLR 1200; *McAuliffe v The Queen* (1995) 183 CLR 108; *Hui Chi-Ming v The Queen* [1992] 1 AC 34E.
109. *R v Powell* [1999] 1 AC 1, 27E (emphasis added).
110. *R v Powell* [1999] 1 AC 1, 20D.
111. *R v Powell* [1999] 1 AC 1, 24G-H.
112. *R v Powell* [1999] 1 AC 1,12D; as did Lord Goff at 10C and Lord Jauncey at 10D.

> result in the commission of a greater offence. The liability of an accessory is predicated on his culpability in respect of the greater offence as defined in law.[113]

4.87 In relation to the argument that it would be anomalous to impose a lesser form of culpability, in the case of D, namely foresight of the possible commission of the greater offence, than in the case of P, namely proof of the specific intent (or mental element) required for that offence, Lord Steyn added:

> If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminally liable for harm which he foresaw and which in fact resulted from the crime he assisted and encouraged. But it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases.[114]

The appeals of Powell and Daniels were dismissed by reference to these principles.

4.88 In relation to the second of the certified questions, Lord Hutton held, applying the principle stated by Lord Parker in *R v Anderson*,[115] and accepting the correctness of the decision in *Gamble*, that, for D to be guilty of the additional offence, he or she must foresee an act *of the type* which P committed.[116]

4.89 His Lordship, accordingly, held that the direction given in the *English* trial concerning the foresight required of D, of the possibility of really serious injury, had been defective. It had not been qualified by an explanation that, if P's use of the knife involved the use of a weapon, and an action on the part of that participant, which English had not foreseen as a possibility, then he could not be convicted either of murder or of manslaughter, the latter because the unforeseen use of the knife took the killing outside the scope of the joint enterprise.[117] As a consequence, the conviction of English was quashed, there being evidence on which the jury could have found that he was unaware that P had a knife.[118]

4.90 Lord Hutton acknowledged, however, that, in focusing on P's *act*, this was a type of case "giving rise to a fine distinction as to whether or not the unforeseen use of a particular weapon or the manner in which a particular weapon is used will take a killing outside the scope of the joint venture", noting that this will be an issue of fact for the common sense of the jury to decide.[119] This fine distinction, Lord Hutton observed, was based on the relative dangerousness of the weapon used:

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113. *R v Powell* [1999] 1 AC 1, 14B.
114. *R v Powell* [1999] 1 AC 1, 14E-F.
115. *R v Anderson* [1966] 2 QB 110, 120B.
116. *R v Powell* [1999] 1 AC 1, 29H-30B.
117. *R v Powell* [1999] 1 AC 1, 30B-D.
118. *R v Powell* [1999] 1 AC 1, 30D.
119. *R v Powell* [1999] 1 AC 1, 31E-F (Lord Hutton).

> if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa.[120]

4.91 Lord Hutton attached this emphasis to the *Chan Win-Siu* subjective foresight test:

> I am in respectful agreement with the judgment of the Privy Council in that case [*Chan Wing-Siu*] that the secondary party is subject to criminal liability if he contemplated the *act* causing the death as a possible incident of the joint venture, unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible.[121]

4.92 The Court of Appeal followed *English* in *R v Uddin*,[122] a case in which a number of men with bars or poles attacked the victim. One of this group produced a flick knife and fatally stabbed the victim. The appellant, who was convicted of murder as a secondary participant, appealed. The appeal was allowed and a retrial directed. It was held that the jury had not been appropriately directed as to the possibility that the use of the flick knife had been so different from the concerted actions of the group in striking the victim, as to have gone beyond their common purpose.

4.93 The Court noted the complexity in applying the principle to a case such as this one, involving an attack on a victim by a group, each member of which shared a common purpose of occasioning the victim serious harm and, in which one member acted spontaneously in inflicting a fatal wound. However it confirmed that each member of the group, in such a case, could be liable for murder, so long as the act of the principal participant was not *of a type that* was *entirely different* from the actions which they had foreseen as part of their common purpose. In applying this test, the Court highlighted the relevance of the weapon used, noting that, if those involved are using weapons which could be regarded as equally likely to inflict fatal injury (and had knowledge and hence foresight of their possible use), then the use of a different weapon will be immaterial.[123]

4.94 The Court observed additionally:

> If the jury conclude that the death of the victim was caused by the actions of one participant which can be said to be of a completely different type to those contemplated by the others, they are not to be regarded as parties to the death *whether it amounts to murder or manslaughter*. They may nevertheless be guilty of offences of wounding or inflicting grievous bodily harm with intent which they individually commit.[124]

4.95 The *Rahman* case,[125] which was next in point of time, is important both in its consideration of the foresight test, and of the fundamental difference qualification. It arose in a context of a history of conflict between two young male urban gangs from different ethnic groups, which led to some of their members meeting and engaging

120. *R v Powell* [1999] 1 AC 1, 30G (Lord Hutton).
121. *R v Powell* [1999] 1 AC 1, 30-31 (Lord Hutton). (Parenthesis and emphasis added.)
122. *R v Uddin* [1999] QB 431.
123. *R v Uddin* [1999] QB 431, 441.
124. *R v Uddin* [1999] QB 431, 441. (Emphasis added.)
125. *R v Rahman* [2009] AC 129.

in a fight. One group was armed with a variety of blunt weapons including baseball and cricket bats, a scaffolding pole, a metal bar, a table leg and pieces of wood. Clarke (the victim) and a friend armed themselves with wooden fence palings. As the fight ensued, Clarke and his friend ran away. However he was cornered by members of the rival group and assaulted with blunt weapons and kicks to his body. He died from three knife wounds. One member of the rival gang had been seen with a knife. No evidence existed that any of the four gang members, who were subsequently caught by police (and convicted of murder giving rise to the appeal), had inflicted the fatal knife wounds. The gang member who did inflict the fatal knife wounds was probably not caught.

4.96 The four who were convicted argued that they had joined the enterprise with the intention, at most, of causing really serious injury, without knowledge or foresight that any other member of their gang intended to kill the victim.

4.97 It was their case that the intention of the principal participant to kill, if found by the jury to have been present, took his acts outside the scope of any joint enterprise to inflict serious bodily harm to which they were party, and rendered it fundamentally different from anything they had foreseen or contemplated.[126]

4.98 The Court of Appeal certified the following point of law of general public importance:

> If in the course of a joint enterprise to inflict unlawful violence, the principal party kills with an intention to kill which is unknown to and unforeseen by a secondary party, is the principal's intention relevant, (i) to whether the killing was within the scope of a common purpose to which the secondary party was an accessory; and (ii) to whether the principal's act was fundamentally different from the act or acts which the secondary party foresaw as part of the joint enterprise?[127]

4.99 It was common ground between the parties to the appeal that:

- an accessory can only be criminally liable for a crime which the principal has committed, which in the present case involved an unlawful killing by him with an intention to kill or cause grievous bodily harm;[128] and
- the liability of the secondary participants under extended joint criminal enterprise is based on "foresight".[129]

However, the Crown and appellants disagreed on one crucial matter:

> "Foresight" of what? The appellants argued "foresight" of the principal participant's actual *intention*. The Crown argued "foresight" of what that participant might do, his undisclosed intention not being to the point.[130]

4.100 The House of Lords unanimously accepted the Crown's argument that, if P kills with the necessary intent for murder, Ds liability for murder will depend on what he or she foresaw P might *do,* and not on what he or she foresaw as *specifically intended*

126. *R v Rahman* [2009] AC 129 [5], [19] (Lord Bingham).

127. *R v Rahman* [2009] AC 129 [28].

128. In England and Wales, murder is a crime of specific intent, and reckless indifference is not an alternative mental element.

129. *R v Rahman* [2009] AC 129 [21].

130. *R v Rahman* [2009] AC 129 [21].

by P to be done. Knowledge of P's possession of a certain type of weapon was seen to provide practical evidence, for the jury to use, in determining D's foresight of what P might *do*. In answer to the second of the certified questions, it was held that an undisclosed, and unforeseen, intention to kill on the part of P was not relevant to whether P's act had been fundamentally different from the act or acts, which D had foreseen as part of the joint criminal enterprise.

4.101 Lord Bingham suggested a practical reason for the conclusion that incorrectly reading the mind of a murderer does not exclude a secondary participant, from being an accomplice to murder, namely:

> that the law of joint enterprise in a situation such as this is already very complex, as evidenced by the trial judge's direction and the Court of Appeal's judgment on these appeals, and the appellants' submission, if accepted, would introduce a new and highly undesirable level of complexity. Given the fluid, fast-moving course of events in incidents such as that which culminated in the killing of the deceased, incidents which are unhappily not rare, it must often be very hard for jurors to make a reliable assessment of what a particular defendant foresaw as likely or possible acts on the part of his associates. It would be even harder, and would border on speculation, to judge what a particular defendant foresaw as the intention with which his associates might perform such acts. It is safer to focus on the defendant's foresight of what an associate might do, an issue to which knowledge of the associate's possession of an obviously lethal weapon such as a gun or a knife would usually be very relevant.[131]

4.102 Read literally, this is capable of suggesting that, all that D has to foresee, to become liable for murder, is the possibility that P might kill another person.[132] However, read in its full context, it would appear that this observation was made against an assumed set of facts, in which the parties to the joint enterprise shared an object of occasioning the victim really serious bodily harm, and in which, accordingly, they could be taken to have foreseen the possibility that one of their number would act at least with that intent (being a sufficient fault element for murder).

4.103 On the issue as to whether P's secret intention to kill is relevant to D's use of the "fundamental difference" qualification, Lord Brown observed:

> The [fundamental difference] qualification established by *R v English* concerns simply the secondary party's foresight of possible *acts* by the principal constituting more serious offences than the secondary party himself was intending, acts to which he never agreed…I see no possible reason or justification for further complicating this already problematic area of the law by requiring juries to consider and decide whether the principal's *intent* when killing the victim was the full intent to kill or the usual lesser intent to cause [grievous bodily harm]. Whichever it was, the *act* was the act of killing and the only question arising pursuant to the *English* qualification is whether the possibility of killing in that way (rather than in some fundamentally different way) was foreseen by the accessory – whether the *act* which caused the death was…"of a type" foreseen by the secondary party.[133]

131. *R v Rahman* [2009] AC 129 [24] (Lord Bingham of Cornhill).

132. Compare N Phillips, "Reforming the Law of Homicide" (Speech delivered at Clifford Chance, London, 6 November 2008) 14.

133. *R v Rahman* [2009] AC 129 [65] (Lord Brown of Eaton-under-Heywood). (Emphasis added.)

4.104 In support of the Crown's argument that it must be foresight of P's act, and not foresight of his or her actual intention, Lord Brown observed additionally:

> At what point is it suggested that the killer's actual intention is to be determined? He may have embarked upon the venture intending at most to cause [grievous bodily harm] but later, in the heat of battle, for any one or more of a host of possible reasons, changed his mind and decided to kill or perhaps merely become reckless as to whether he killed or not. It is absurd that the criminal liability of secondary parties should depend upon such niceties as these.[134]

4.105 Lord Neuberger said:

> In a case such as the present, involving a concerted and relatively unplanned vicious attack, I consider that it would be unacceptable to most law-abiding people if B escaped conviction for murder, when he appreciated that A had a knife which would probably be used with a view to causing serious injury to V, purely because the jury thought it possible that, in the heat of the moment, A may have used the knife on V with the intention of killing, rather than seriously injuring, him. The essence of the matter is that B joined with A in attacking V with a view to causing V serious injury, and B knew that P had a knife for that purpose. It would seem unrealistic and over-indulgent to B, at least in the absence of other facts, if he were acquitted of murder on the ground that a jury concludes that he may have thought that A was bent on causing V serious injury (with the obvious risk of death) rather than killing him.
>
> In my view, this conclusion also has the merit of simplicity and clarity, which is plainly desirable, both in itself and from the standpoint of a jury. ... It would be unfortunate if juries in such trials also had routinely to consider precisely what B thought about A's intentions and precisely what A's intentions were at the time V was killed, and, if they differed, whether A's intention "completely departed" from what B had foreseen or intended.[135]

4.106 In relation to the fundamental difference rule, Lord Bingham observed that:

> The decision of the House in *R v Powell (Anthony)* did not lay down a new rule of accessory liability or exoneration. Its significance lies in the emphasis it laid (a) on the overriding importance in this context of what the particular defendant subjectively foresaw, and (b) on the nature of the acts or behaviour said to be a radical departure from what was intended or foreseen. The greater the difference between the acts or behaviour in question and the purpose of the enterprise, the more ready a jury may be to infer that the particular defendant did not foresee what the other participant would do.[136]

4.107 Although Lord Bingham accepted that *Gamble* had been correctly decided on its facts,[137] and Lord Rodger regarded it as a case turning on its very special facts,[138] other members of the Committee expressed doubts in relation to the decision.[139]

4.108 In its recent decision in *Mendez v R*,[140] the English Court of Appeal was again required to consider the adequacy of the directions given concerning the application

134. *R v Rahman* [2009] AC 129 [70] (Lord Brown of Eaton-under-Heywood).
135. *R v Rahman* [2009] AC 129 [85]-[86] (Lord Neuberger of Abbotsbury).
136. *R v Rahman* [2009] AC 129 [16] (Lord Bingham of Cornhill).
137. *R v Rahman* [2009] AC 129 [29] (Lord Bingham of Cornhill).
138. *R v Rahman* [2009] AC 129 [40] (Lord Rodger of Earlsferry).
139. *R v Rahman* [2009] AC 129 [31] (Lord Scott), [67]-[68] (Lord Brown), [92]-[93] (Lord Neuberger).

of the fundamental difference rule in yet another extended joint enterprise case involving a clash between two groups of young men, which had left one person dead as the result of being stabbed with a knife.

4.109 Having observed that the question whether P, in such a case, had gone beyond the common purpose was "one of degree", and that there is no "bright line" test,[141] it accepted the essence of the appellants' argument as follows:

> In cases where the common purpose is not to kill but to cause serious harm, D is not liable for the murder of V if the direct cause of V's death was a deliberate act by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D.[142]

Applied to a case such as the present, the Court concluded:

> This is not a difficult idea to grasp and it is capable of being explained to a jury shortly and simply. It does not call for expert evidence or minute calibration. In a case of spontaneous or semi-spontaneous group violence, typically fuelled by alcohol, it is highly unlikely that the participants will have thought carefully about the exact level of violence and associated injury which they intend to cause or foresee may be caused. All that a jury can in most cases be expected to do is form a broad brush judgment about the sort of level of violence and associated risk of injury which they can safely conclude that the defendant must have intended or foreseen. They then have to consider as a matter of common sense whether P's unforeseen act (if such it was) was of a nature likely to be altogether more life-threatening than acts of the nature which D foresaw or intended. It is a question of degree, but juries are used to dealing with questions of degree. There are bound to be border line cases, but if the jury are left in real doubt they must acquit. The shorter and simpler the general direction, the better. The judge will no doubt point out to the jury the factors relied on by the defence and by the prosecution for arguing that P's act should, or should not, be considered "in a different league" from what D intended or foresaw (to used the homely expression of the trial judge in *Rahman*, which the House of Lords approved). Those are matters of fact for the jury to weigh.[143]

4.110 The judgment, which resulted in the quashing of the murder convictions of the two appellants, is of interest for two observations. First, the Court noted its inclination to regard joint enterprise liability as an aspect of the "ordinary principles of secondary liability" (on the basis that the act of combining to commit an offence satisfied the aiding and abetting element required for secondary liability), rather than a form of liability that differed doctrinally from those principles.[144] The principle which underlies secondary liability was, accordingly, seen to underlie the limitation which had been accepted in those cases, where it was found that the conduct of P had involved a "total and substantial variation", from that encouraged by D.[145]

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140. *Mendez v R* [2010] EWCA Crim 516. See M Dyson, "More appealing joint enterprise" [2010] *Cambridge Law Journal* 425.
141. *Mendez v R* [2010] EWCA Crim 516 [40].
142. *Mendez v R* [2010] EWCA Crim 516 [45]; see also [47].
143. *Mendez v R* [2010] EWCA Crim 516 [48].
144. *Mendez v R* [2010] EWCA Crim 516 [17], citing D Ormerod, *Smith and Hogan Criminal Law* (12th ed, Oxford UP, 2008) 207. See also M Dyson, "More appealing joint enterprise" [2010] *Cambridge Law Journal* 425, 426.
145. *Mendez v R* [2010] EWCA Crim 516 [19]-[20].

4.111 Secondly, the Court observed that the decision of the House of Lords in *R v Powell*[146] had adopted an analysis of *R v Anderson,*[147] that excluded the possibility of a manslaughter verdict in the circumstances where that had been considered, in the case of *R v Reid,*[148] to have been available.[149]

4.112 Lord Justice Lawton, delivering the judgment of the Court, had observed in *Reid:*

> When two or more men go out together in joint possession of offensive weapons such as revolvers and knives and the circumstances are such as to justify an inference that the very least they intend to do with them is to use them to cause fear in another, there is, in our judgment, always a likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious injury. If such injury was not intended by the others, they must be acquitted of murder; but having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter.[150]

4.113 In such a case, the Court held the death of the victim could be regarded, in relation to those members of the group who had not carried out the fatal act, as "a mere unforeseen consequence" of the unlawful joint possession of the offensive weapons, and not "an overwhelming supervening event" that relegated into history "matters that would otherwise be looked on as causative factors".[151]

4.114 The dictum of Lord Justice Lawton was applied in *R v Stewart.* The appeals in that case were dismissed, but a question of law of general public importance was certified as follows:

> Where participant A, in a criminal joint enterprise contemplates that the carrying out of the joint enterprise may involve the victim suffering some bodily injury, but not a serious injury, and B, another participant in that joint enterprise, forms, independently of the others, an intention to kill or do serious bodily harm to the victim and, with that intention, B does an act which causes the death of the victim, are the jury precluded, as a matter of law, from finding as a fact that that act was done in the course of carrying out the joint enterprise and convicting A of manslaughter?[152]

The Appeal Committee of the House of Lords subsequently refused leave to appeal in relation to this question, so that the issue remained alive until the decision in *Powell*.

4.115 Current authority in Australia would seem to recognise the availability of a manslaughter conviction in such a situation. In *Markby v The Queen,*[153] Acting Chief Justice Gibbs (with whose reasons Justices Stephen, Jacobs and Aickin agreed)

146. *R v Powell* [1999] 1 AC 1.
147. *R v Anderson* [1966] 2 QB 110.
148. *R v Reid* (1975) 62 Cr App R 109.
149. *Mendez v R* [2010] EWCA Crim 516 [22].
150. *R v Reid* (1975) 62 Cr App R 109,112.
151. *R v Reid* (1975) 62 Cr App R 109, 112, citing the distinction which had been drawn in *R v Anderson* [1966] 2 QB 110, 120.
152. *R v Stewart* [1995] 3 All ER 159, 170.
153. *Markby v The Queen* (1978) 140 CLR 108; and see *Gillard v The Queen* (2003) 219 CLR 1 [19]; and *Nguyen v The Queen* [2010] HCA 38.

cited the dictum in *Reid* as correctly stating the relevant principle (so far as the inactive participant is concerned) observing, in relation to the case under appeal:

> If the jury were satisfied that the two accused men had planned to rob [V] and that a rifle should be carried but that no harm, or at least no grievous bodily harm, should be done to [V] and that [V's] death was, so far as the applicant was concerned, an unexpected consequence of the carrying out of the design a verdict of guilty of manslaughter would have been a proper one.[154]

Earlier, his Honour had observed:

> In some cases the inactive participant in the common design may escape liability either for murder or manslaughter. If the principal assailant has gone completely beyond the scope of the common design, and for example "has used a weapon and acted in a way which no party to that common design could suspect", the inactive participant is not guilty of either murder or manslaughter... If however the use of the weapon, even if its existence was unknown to the other party, is rightly regarded as no more than an unexpected incident in carrying out the common design the inactive participant may be convicted of manslaughter.[155]

4.116 The Court of Appeal in New Zealand has similarly accepted that the law is correctly stated in *Reid*.[156]

4.117 Although acknowledged, in substance, in *Markby*, the fundamental difference qualification does not appear to have arisen for specific consideration in later Australian cases.[157] This is possibly because of an acceptance that foresight of the possibility that the principal participant will act with an intention to occasion grievous bodily harm, will be sufficient to extend liability for murder to the secondary participant, irrespective of the nature of the weapon used or of the method of killing which is in fact employed. Knowledge of the presence of a lethal weapon, or of a tendency on the part of P to respond with violence, appears, in the Australian cases, to have been regarded as evidence from which the necessary foresight might be inferred, rather than raising an additional question for the jury as to whether what occurred amounted to a "fundamental difference," or a departure from the joint enterprise.

4.118 Additionally, it may be noted that attention does not appear to have been given, in these cases, to the possibility of the prosecution case being proved on the basis that D foresaw the possibility of P acting with reckless indifference to human life, that being an alternative mental element available for murder in NSW.[158] This may have been due to an appreciation of the additional complexity and, arguably, limitations arising from the fact that reckless indifference murder requires proof that death will ***probably*** result, from the act which would itself need to have been foreseen as a ***possibility***. The combination of these two concepts, in the one proposition, would be problematic for a jury, to say the least.

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154. *Markby v The Queen* (1978) 140 CLR 108, 113.
155. *Markby v The Queen* (1978) 140 CLR 108, 112, 113.
156. *R v Tomkins* (1985) 2 NZLR 253, 254-256.
157. See *Nguyen v The Queen* [2010] HCA 38 [51].
158. *Crimes Act 1900* (NSW) s 18.

4.119 The Australian approach does, however, face a practical difficulty in requiring the prosecution to establish foresight, by D, of the possibility that P would act with the ***intent or state of mind*** required for murder, or for whatever additional offence is charged.

4.120 While this will normally be a matter for drawing an inference from the surrounding facts, there are some conceptual difficulties in attributing foresight to one party of what may be in the mind of another. Particularly might this be so in the context of fast moving events such as a group assault on a victim by people wishing to inflict some degree of harm, but not necessarily death or grievous bodily harm. In such a scenario it needs to be recognised that what D foresees as a possible act, or state of mind, of P may change as the incident develops. This raises a question as to the point of time at which D's foresight is to be determined, in a continuing enterprise from which he or she has not withdrawn.

Does extended joint criminal enterprise have a life outside homicide?

4.121 The preceding discussion of the common law extended joint criminal enterprise doctrine demonstrates that it has developed mainly within the factual framework of homicide. There is no reason, however, why it cannot extend beyond homicide. Basic joint criminal enterprise does so extend. A recent NSWCCA case, in which an appeal against conviction for aggravated robbery[159] was dismissed, provides an example. The Court found that there was evidence of a joint enterprise to rob the victim to which the appellant had been a party. Additionally, it was found that there was evidence that the appellant foresaw "the possibility that actual bodily harm would be intentionally or recklessly inflicted upon the victim",[160] this being the circumstance of aggravation required for a conviction for aggravated robbery, a more serious offence than one of robbery by itself.[161]

4.122 It is possible to conceive of a number of other situations, where a participant to a joint enterprise to commit a particular offence commits a more serious offence short of homicide, which a secondary participant might foresee as a possibility. For example, a joint enterprise to break and enter a dwelling house, with intent to steal property, may well escalate to a situation in which one participant assaults a householder or wilfully destroys property in the house. A joint enterprise to take and use or steal a motor vehicle may result in a police pursuit, in which one participant drives dangerously, and crashes the vehicle occasioning serious injury to an innocent third party. In each instance the possibility of the additional offence, although not originally the subject of the concert, might well be foreseen as a possibility by the secondary participant.

4.123 The fact that the doctrine need not be confined to cases of homicide does, however, raise a question as to whether any statutory reformulation should be directed towards providing a formula that is applicable to all circumstances; or whether a specific provision should be adopted that is confined to homicide, in order to reflect the different mental elements required for murder and manslaughter, respectively.

159. *Crimes Act 1900* (NSW) s 95.

160. *Charlesworth v The Queen* [2009] NSWCCA 27 [43].

161. *Crimes Act 1900* (NSW) s 94.

Criticisms of the present test for extended joint criminal enterprise

4.124 Criticisms have been raised, over the years, concerning the common law "foreseeable possibility" test for extended joint criminal enterprise. Justice Kirby of the High Court was consistently a prominent critic of the test, outlining his objections to it in several decisions concerned with its application in cases of homicide.[162] The criticisms of this test, and the possible responses, may be noted.

Insufficient alignment with notions of moral culpability

4.125 A general criticism that has been raised is that the present test needs to align better with notions of moral culpability. The subjective approach that one is only responsible for one's own moral wrongdoings and shortcomings, and not those of others, is reflected in the fundamental principle of criminal liability: that criminal actions (*actus reus*) and intentions (*mens rea*) must normally coincide.[163] As a result, it has been contended that liability for extended joint criminal enterprise casts the net too widely, by catching co-participants who did not perform the critical *acts,* and who shared no *intention* concerning their consequences.[164]

4.126 Professor Sir John C Smith suggested that the law "could be modified so as to require intention (or even purpose) on the part of the accessory that, in the event which has occurred, the principal should act as he did".[165] Lord Phillips of Worth Matravers, then Senior Lord of Appeal in Ordinary,[166] agreed the law was "unfair"[167] and observed:

> The criminality of those who merely foresee the risk involved in the melee is markedly less than those who actually inflict injury with the intent of killing or causing serious physical harm. Justice would seem to call for some graduation of offence.[168]

4.127 Commenting on the Law Commission of England and Wales's proposals for provisions to replace the common law on joint criminal enterprise[169] as "essentially attempt[ing] to preserve the status quo", G R Sullivan pointed out:

> the joint venture doctrine has been used as a springboard for liability beyond agreed offences, under the current law and under the proposals in Law Com No

162. For example, *Gillard v The Queen* (2003) 219 CLR 1 [65]-[93]; *Clayton v The Queen* (2006) 81 ALJR 439 [97]; *R v Taufahema* (2007) 228 CLR 232 [112]-[116].
163. *Gillard v The Queen* (2003) 219 CLR 1 [47] (Kirby J).
164. *Gillard v The Queen* (2003) 219 CLR 1 [62] (Kirby J).
165. J C Smith, "Criminal liability of accessories: law and law reform" (1997) 113 *Law Quarterly Review* 453, 465. This view was later rejected in *R v Powell* [1999] 1 AC 1.
166. Now President of the Supreme Court of the United Kingdom.
167. N Phillips, "Reforming the Law of Homicide" (Speech delivered at Clifford Chance, London, 6 November 2008) 8.
168. N Phillips, "Reforming the Law of Homicide" (Speech delivered at Clifford Chance, London, 6 November 2008) 14.
169. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007). These are discussed at para 4.178-4.183.

> 305. This extensive approach leads too frequently to unwarranted liability or overly severe forms of liability, particularly in the context of murder…
>
> [W]e maintain that foresight of P's [primary participant's] crime does have implications for D's [secondary participant's] moral standing but as foresight of P's crime need not entail a commitment to that crime, it is an excessive response to make D fully responsible for it.[170]

4.128 The majority in *Clayton v The Queen* did not, however, find the criticism of the discrepancy between legal and moral responsibility of a secondary participant to be persuasive:

> A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder.[171]

The secondary participant in a murder has a lesser form of mens rea

4.129 A second criticism of the current test is that it potentially holds D liable for an additional offence, on a "lesser form of *mens rea*" than that required of P. For example, Ormerod observed that it is fundamentally unjust to hold D liable for murder on the foresight of a possibility.[172] Justice Kirby in *Gillard v The Queen* commented in this respect:

> If a *principal* offender were to kill the victim, foreseeing only the possibility (rather than the probability) that his or her actions would cause death or grievous bodily harm, that person would not be guilty of murder. Yet a *secondary* offender with a common purpose could, on the current law, be found guilty of murder of the same victim on the basis of extended common purpose liability if the jury were convinced that he or she had foreseen the possibility that one of the group of offenders might, with intent, cause grievous bodily harm and if, in the result, one of the group does indeed kill the victim with the intention to cause such grievous bodily harm.[173]

4.130 In *R v Powell* counsel for the appellants similarly argued that:

> [A]s a matter of principle there is an anomaly in requiring proof against a secondary party of a lesser mens rea than needs to be proved against the principal who commits the actus reus of murder. If foreseeability of risk is insufficient to found the mens rea of murder for a principal then the same test of liability should apply in the case of a secondary party to the joint enterprise…[I]t is wrong for the present distinction in mental culpability to operate to the disadvantage of a party who does not commit the actus reus and that there is a

170. G R Sullivan, "Participating in Crime: Law Com No 305 — Joint Criminal Ventures" [2008] *Criminal Law Review* 19, 28-29.

171. *Clayton v The Queen* (2006) 81 ALJR 439 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ). (Emphasis in original.)

172. D Ormerod, *Smith and Hogan Criminal Law* (12th ed, Oxford UP, 2008) 218.

173. *Clayton v The Queen* (2006) 81 ALJR 439 [100] (Kirby J). (Emphasis in original.)

> manifest anomaly where there is one test for a principal and a lesser test for a secondary party.[174]

4.131 Lord Hutton relied on the public policy argument of "deterrence" by way of a response as follows:

> I recognise that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs…[175]
>
> In my opinion there are practical considerations of weight and importance related to considerations of public policy which justify the principle…and which prevail over considerations of strict logic.[176]

Different forms of complicity require different subjective elements for murder

4.132 Thirdly, it has been suggested that the current test creates a "serious disparity" between the subjective element required in "aiding, abetting, counselling or procuring" a murder, and that required for "extended common purpose" liability in murder. In this respect, Justice Kirby in *Clayton v The Queen* asked:

> Why, in point of legal principle, should murder in consequence of acting in concert require proof by the prosecution of a specific intention on the part of the secondary offender when no specific intention at all was required for proof of murder in the course of carrying out a purpose held in common that did not include murder?[177]

4.133 Bronitt additionally makes the point that there is an obvious discrepancy between the mental element (foreseeable possibility) required for D under extended joint criminal enterprise principles, and the mental element (actual knowledge) required for D under accessorial liability principles. The former test is much wider (and hence easier for the prosecution to prove) than the latter. Bronitt explains the significance of this discrepancy:

> The lack of symmetry in the present law of complicity is a matter of considerable concern since the traditional approach is to treat the principles governing fault for common purpose as indistinguishable from those governing "aiding, abetting, counselling or procuring".[178]

4.134 He suggests two solutions for this "lack of symmetry" in the common law. One is to accept extended joint criminal enterprise and accessorial liability as "two distinct

174. *R v Powell* [1999] 1 AC 1, 23.
175. *R v Powell* [1999] 1 AC 1, 25 (Lord Hutton). See Lord Steyn's judgment which also supported "practical and policy considerations" at 14.
176. *R v Powell* [1999] 1 AC 1, 25F-H (Lord Hutton).
177. *Clayton v The Queen* (2006) 81 ALJR 439 [105] (Kirby J).
178. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 261.

forms of liability" with "separate and different fault elements".[179] The second solution is for the High Court to "reconsider the principles governing fault for common purpose and ... restrict the liability of participants in a common purpose to crimes which are within the joint contemplation of the parties (as evidenced by an agreement or authorisation)".[180]

4.135 The answer provided by the majority judgment in *Clayton,* however, is that there was a valid reason for the differing liabilities of secondary participants in aiding, and abetting, as compared with extended joint criminal enterprise:

> …liability as an aider and abettor is grounded in the secondary party's contribution to another's crime. By contrast, in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture.[181]

4.136 *Simester and Sullivan's Criminal Law* supports the public policy argument in favour of the present test of liability for secondary participants, even though it differs from the test of liability for secondary participants in accessorial liability cases:

> Aiding/abetting and joint enterprise are structurally unalike. In cases of aiding and abetting only one crime is at issue … In joint enterprise cases, the wrong is the agreement or confederacy.
>
> ... The law has a particular hostility to criminal groups…the rationale is partly one of dangerousness: "experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences."[182] Criminal associations are dangerous. They present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address…A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has set itself against the law and order of society at large … Thus concerted wrongdoing imports additional and special reasons for the law to intervene.[183]

Secondary participant more likely to be found guilty of murder rather than manslaughter

4.137 The fourth criticism offered is that the current test expands the potential for a secondary participant to be found guilty of murder, and lessens the ability of a jury to deliver the alternative verdict of guilty of manslaughter. Justice Kirby has argued:

> If a person [the secondary participant], who did not perform the acts causing the homicide [no *actus reus*] and did not actually intend the death of, or grievous bodily harm to the victim [no *mens rea*], can still be liable for the murder on the

179. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 261; this being the model Criminal Code approach.

180. S Bronitt, "Defending Giorgianni – Part One: The Fault Required for Complicity" (1993) 17 *Criminal Law Journal* 242, 261-262; this being the option which the author favours as being consistent with the decisions in *Giorgianni v The Queen* (1985) 156 CLR 473 and *Johns v The Queen* (1980) 143 CLR 108.

181. *Clayton v The Queen* (2006) 81 ALJR 439 [20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

182. *R v Powell* [1999] 1 AC 1, 14H (Lord Steyn).

183. A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart Publishing, 2010) 243-244.

> basis of the "traditional" or "extended" common purpose doctrine, it is difficult to identify the case that will somehow fall outside such joint liability, authorising the jury to return a verdict of manslaughter. If, within current doctrine, such a difficulty appears for this Court, it will also present itself to legal advisers, counsel at trial and trial judges in explaining the point of differentiation to the jury which has the responsibility of deciding the issue.[184]

4.138 Alternatively, because the test is so broad, Justice Kirby has argued that a jury might be tempted to return a "compromise" verdict of manslaughter, and not a verdict according to the law.[185]

4.139 Experience does not necessarily bear out this concern, at least in Australia, where manslaughter verdicts are available in this context, and have been returned against a secondary participant.[186]

Undesirable technicality and complexity

4.140 Finally, it has been suggested that the present test gives rise to an unacceptable difficulty in explaining the "technical and complex"[187] law to juries, and results in a significant number of appeals.

4.141 For example, it is of importance to the success or otherwise of establishing liability under "extended common purpose" for the prosecution to specify clearly the "foundational crime,"[188] or the "object of the joint criminal enterprise". The difficulty in doing so has been noted earlier in this chapter.

4.142 It is clear that the jury directions seen in cases of this type have been a frequent source of grounds for appeal, and judges have expressed their concerns as to whether the principles can be adequately explained to a jury.[189]

4.143 In a recent article,[190] Justice Eames acknowledged the validity of the concerns expressed by Justice Kirby in *Clayton* that:

> The unreasonable expectation placed upon Australian trial judges (affirmed by appellate courts) to explain the idiosyncrasies of differential notions of secondary liability to a jury is something that should concern this court. Especially so in the case of major points of difference in the governing legal principles (such as the absence of reference to specific intention in the explanation of extended common purpose liability). In my view it behoves this

184. *Gillard v The Queen* (2003) 219 CLR 1 [67] (Kirby J).

185. *Gillard v The Queen* (2003) 219 CLR 1 [70].

186. *R v Hung Duc Dang* [2001] NSWCCA 321; *R v Rees* [2001] NSWCCA 23, although a new trial was ordered because of a manslaughter direction which did not coincide with the test in *Wilson v The Queen* (1992) 174 CLR 313; and see *R v Spencer* [2007] NSWSC 1447 for an example where different verdicts were returned.

187. G R Sullivan, "Participating in Crime: Law Com No 305 — Joint Criminal Ventures" [2008] *Criminal Law Review* 19, 21.

188. *R v Taufahema* (2007) 228 CLR 232 [120] (Kirby J).

189. *Gillard v The Queen* (2003) 219 CLR 1 [50] (Kirby J). See also, S Gray, "'I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime" (1999) 23 *Criminal Law Journal* 201, 210; and G Eames, "Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?" (2007) 29 *Australian Bar Review* 161.

190. G Eames, "Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?" (2007) 29 *Australian Bar Review* 161.

> court to try harder to find a unifying principle for secondary criminal liability. After all, the object is to explain to a jury, on the basis of common facts, how they may reason to a single conclusion, namely guilty, or not guilty, of murder. The law should not be as unjust, obscure, disparate and asymmetrical as it is. Its present shape can only cause uncertainty for trial judges and confusion to juries.[191]

4.144 When determining what it was that D needed to foresee in order to find him liable under extended joint criminal enterprise principles for the additional offence committed by P, a potential area of complexity is that it will vary according to whether the additional offence was:

- one of specific or basic intent; or
- one of absolute liability that merely requires proof of the act; or
- one of strict liability which allows exclusion for an honest and reasonable mistake of fact.

4.145 The complexity of the task will potentially escalate when alternative verdicts need to be left to cater for the possibility of the jury holding D guilty of a lesser offence than that charged, by reason of its findings concerning his or her foresight.

4.146 In the case of a crime of specific intent, such as murder, there may only be a subtle difference between D's foresight of the possibility of P doing an act that is, for example, unlawful and dangerous amounting to manslaughter, or of P doing an act accompanied by the specific intent required for murder. The fact finding challenge for the jury, in this respect, can become even more complicated where there is an issue, as to whether the additional offence had the contemporaneity, or connection, with the joint criminal enterprise, that is necessary for it to be considered as an incident in its pursuit.

4.147 As a result, the jury can be required to consider a "cascading" list of possible verdicts ranging from guilty of murder, manslaughter, malicious wounding, possession of a weapon and so on, or not guilty, or to have their task further complicated where an alternative case of felony murder is pursued.

4.148 Some of these problems are illustrated in the case of *R v Hung Duc Dang*,[192] a case in which two participants engaged in a joint enterprise to commit a bag snatch robbery. Each carried a knife. After the robbery, they ran off and then split up. A bystander, who caught the principal participant some little distance from the scene of the robbery, was fatally stabbed by that offender.

4.149 It was common ground that neither accused had presented their weapons at the time of the robbery. It was also common ground that each was aware that the other was carrying a knife. The defence case was that the appellant, who was the secondary participant, and who was acquitted of murder, but convicted of manslaughter, had not contemplated the possibility of the co-offender using his knife to stab anyone. It was further contended that their joint criminal enterprise of

191. *Clayton v The Queen* (2006) 81 ALJR 439 [114].

192. *R v Hung Duc Dang* [2001] NSWCCA 321.

robbery had been a spur of the moment event, which had concluded before the deceased was stabbed.

4.150 The CCA rejected the last mentioned contention, on the basis that the only rational inference open was that the enterprise continued to be on foot while they were making their escape from the robbery. The conventional directions given in accordance with *McAuliffe* were held, otherwise, to have been correct, the Court observing:

> The Crown needed to prove, in this case, that the *accused* had in contemplation a substantial or real risk of Ton [principal participant] using his knife to stab a person minded to effect an arrest – either deliberately or inadvertently in the course of a struggle. In this regard, it is of significance that the jury acquitted the appellant of the offence of murder, which would have required proof that he had contemplated the use of the knife with the deliberate intention of killing or causing grievous bodily harm, but convicted him of manslaughter by an unlawful and dangerous act, for which the Crown only needed to prove that he contemplated its possible use to stab someone.[193]

4.151 As noted earlier, in these cases there will always remain a potential issue for the jury of some complexity, concerning the scope of the joint enterprise and whether what occurred went outside that scope (if the fundamental difference rule is applied) or was within the contemplation of the secondary participant.

4.152 We have already noted the lack of symmetry, to which reference has been made by legal commentators,[194] between criminal responsibility dependant on accessorial principles, and that dependant on joint enterprise principles, and to the resulting complexity of a trial where the liability of the accused falls to be determined on these alternative bases. It may be added that a similar lack of symmetry, and potential for complexity can be seen where reliance is placed by the prosecution, by way of an additional alternative case, that is, based on constructive (or felony) murder.

Joint criminal enterprise under the codes

4.153 In Victoria and South Australia, similarly to NSW, joint enterprise and extended joint enterprise cases continue to be governed by the common law. The remaining Australian jurisdictions are governed by code provisions.

Queensland, WA and Tasmania

4.154 Some of the States and Territories have adopted the Griffiths Code approach that differs from the common law, and from the *Criminal Code* (Cth).

193. *R v Hung Duc Dang* [2001] NSWCCA 321 [46] (Wood CJ at CL). (Emphasis in original.)

194. For example, S Gray, "I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime' (1999) 23 *Criminal Law Journal* 201; S J Odgers, "McAuliffe and McAuliffe" (1996) 20 *Criminal Law Journal* 43, where Odgers described the foreseeable possibility test in *McAuliffe* as a form of "reckless accessoryship".

4.155 For example, s 8 of the *Criminal Code* (Qld), which is substantially replicated by the WA and Tasmanian codes,[195] provides:

> When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

4.156 Its application has been the subject of contradictory decisions of the High Court in *R v Barlow*[196] and *R v Keenan.*[197]

4.157 In *R v Barlow,* the Court held that the "offence" referred to in s 8 should be understood to refer to an act done, or omission made, by the principal participant; thereby deeming a secondary participant, who fell within its terms, to have done that act or omission. It sheeted home to the secondary participant such conduct as rendered the principal participant liable, but only to the extent that such conduct occurred in such circumstances, or with such a result or state of mind, as was a probable consequence of the prosecution of the common unlawful purpose.[198]

4.158 The decision is otherwise of relevance in so far as the Court rejected a submission that, in circumstances where the principals to a gaol killing were convicted of murder, the section did not permit the jury to return a verdict of guilty of manslaughter against a secondary participant.[199]

4.159 The correct interpretation of s 8 arose for reconsideration in *Keenan*, a case in which the respondent and two other men were party to a common understanding to do serious harm to the victim, as revenge for a perceived wrong. There was evidence that the respondent knew one of the group had taken a baseball-type bat to the planned meeting with the victim, but no evidence to show that he knew another member was armed with a gun, or that the use of such a weapon had been discussed. At the scene, that member of the group used the weapon to shoot the victim in the spine rendering him a paraplegic. The respondent was convicted of unlawfully doing grievous bodily harm with intent.

4.160 The trial judge had left the issue for the jury by instructing them that it was necessary for them to be satisfied beyond reasonable doubt:

> (1) that there was a common intention to prosecute an unlawful plan ... ;
>
> (2) that the offence of attempted murder, or alternatively doing grievous bodily harm with intent, was committed in the prosecution or carrying out of that purpose ... ; and

195. *Criminal Code* (WA) s 8; *Criminal Code* (Tas) s 4.

196. *R v Barlow* (1997) 188 CLR 1.

197. *R v Keenan* (2009) 236 CLR 397.

198. *R v Barlow* (1997) 188 CLR 1 [11], [13] (Brennan CJ, Dawson and Toohey JJ), [43] (Kirby J), McHugh J dissenting.

199. *R v Barlow* (1997) 188 CLR 1 [10]-[11].

> (3) that any offence in fact committed was of such a nature that its commission was a probable consequence of the prosecution of that purpose.[200]

4.161 The Queensland Court of Appeal held that this constituted a misdirection as to the description of the "offence ... of such a nature", for the purpose of s 8, since applying *Barlow*, it was not the generic offence of doing grievous bodily harm with intent, but rather the *act* of the principal participant, which caused the grievous bodily harm, that was relevant.[201]

4.162 The High Court reversed the decision of the Court of Appeal, holding that, when determining the connection between the unlawful common purpose and the offence actually committed, for the purpose of determining the liability of the secondary participant in relation to it, the question for the jury was whether the conduct constituting the offence was an *offence of such a nature* that its commission was a probable consequence of the prosecution of the common purpose. The question was not whether the conduct was itself a probable consequence of the prosecution of the common purpose.[202]

4.163 Justice Kirby, in a dissenting judgment, observed that the approach of the majority would remove from any real decision, in the trial, a proper consideration of whether the primary participant had departed from the concerted action envisaged in the prosecution of the joint enterprise.[203] The following passages in the judgment of Justice Kiefel, however, dispose of this concern:

> Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended. An offence involving such harm may be a probable consequence of such purpose whatever means came to be used. It may be otherwise where the intended means suggest no serious harm was intended and the offence committed well exceeds such a purpose.
>
> The author of *Foster's Crown Law* contemplated that criminal responsibility would follow:
>
> > "... if the principal in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution ...".
>
> In *Markby v The Queen* and in *Varley* the use of the weapon in question was seen to be no more than an unexpected incident in carrying out the common purpose, even if its existence was not known to the secondary offender.
>
> ...
>
> There can be no difficulty, in such a case as the present, in describing the unlawful purpose as the infliction of serious physical harm. In such a case it is not correct to approach the determination of the common purpose by reference

200. *R v Keenan* (2009) 236 CLR 397 [106].

201. *R v Keenan* (2009) 236 CLR 397 [107].

202. *R v Keenan* (2009) 236 CLR 397 [83]-[84] (Hayne J), [115]-[117], [133] (Kiefel J), Kirby J dissenting.

203. *R v Keenan* (2009) 236 CLR 397 [68].

> to the means and thereby determine the connection to which the objective test in s 8 is directed. Further, the test to be applied under s 8 is as to the probable consequences of the common plan, not what the parties might have foreseen. Even if the respondent had not anticipated that a gun might be used, he may nevertheless be held criminally responsible where it was used and caused the very level of harm that had been intended. In a case involving an objective of this kind the means actually used may not assume importance in the determination of probable consequence.[204]

4.164 By way of clarification of the operation of s 8 of *Criminal Code* (Qld), the criminal responsibility of D is expressed to extend to any offence that, on the admissible evidence is a "probable consequence" of the prosecution of the common intention, regardless of what offence is proved to have been committed by P.[205]

4.165 This provision makes it clear that different verdicts can be returned, against P and D, without necessarily giving rise to an issue of inconsistency of verdict or of incontrovertibility. This arises, possibly, most critically in homicide cases, in that it allows the jury to return a verdict of murder against P, and of manslaughter against D, without having to rely, in the case of D, on the so called "constitutional power" of a jury to return a verdict of manslaughter (sometimes called a "merciful verdict"), even though the facts would support a case of murder.[206]

4.166 The High Court has held, that for an offence to be a "probable consequence" for the purpose of this provision, it must "be probable in the sense that it **could well have** happened in the course of the prosecution of the unlawful purpose".[207] Directions that describe the test in terms of "a real or substantial possibility or chance," or in terms of "a balance of possibilities", would not be correct.[208]

4.167 The *Criminal Code* (NT) contains a provision (currently being superseded by provisions based on the Model Criminal Code) which states that, where "two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed by one or some of them, the other or each of the others is presumed to have **aided or procured**" the perpetrator or perpetrators of the offence to commit the offence". The secondary participant can rebut the presumption, by proof that he or she did not foresee that its commission was a "**possible consequence** of prosecuting that unlawful purpose".[209]

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204. *R v Keenan* (2009) 236 CLR 397 [121]-[122], [124].
205. *Criminal Code* (Qld) s 10A – enacted to reflect the decision in *R v Jervis* [1993] Qd R 643 which was affirmed by the High Court in *R v Barlow* (1997) 188 CLR 1 in preference to a conflicting decision in *R v Hind* (1995) 80 A Crim R 105.
206. See *R v Frost* [1969] Tas SR 172 for an instance where this was raised as a possible justification for the return of different verdicts; and see *Gammage v The Queen* (1969) 122 CLR 444 and *R v Holden* [1974] 2 NSWLR 548 for a general review of the law in this regard, including the practice for jury directions where the possibility of a manslaughter verdict arises.
207. *Darkan v The Queen* (2006) 227 CLR 378, 398-399.
208. *Darkan v The Queen* (2006) 227 CLR 378, 398.
209. *Criminal Code* (NT) s 8.

Commonwealth Criminal Code

4.168 The *Criminal Code* (Cth), which was based on the Model Criminal Code, originally dealt with joint enterprise by treating D as one who "aids, abets, counsels or procures the commission of an offence" by P.[210] For D to have been found guilty under this provision:

- his or her conduct must have in fact aided, abetted, counselled or procured the commission of the offence by P;
- that offence must have been committed by P;[211] and
- D must have intended that his or her conduct would aid, abet, counsel or procure the commission either of *an offence* (including its fault elements) of the type that P committed, or of an offence, and have been reckless about the commission of *the offence* (including its fault elements) that P committed.[212]

4.169 Of immediate relevance was the adoption of "recklessness" as a fault element in the case of the secondary participant. "Recklessness", with respect to a result, is defined in the *Criminal Code* (Cth) as involving an awareness of a substantial risk that the result will occur and that, having regard to the circumstances known to the offender, it is unjustifiable to take the risk.[213] The question whether taking a risk is unjustifiable is one of fact.

4.170 The application of this provision to cases of basic joint criminal enterprise, and consequently to cases of extended joint criminal enterprise, has been called into question because joint criminal enterprise is a common law doctrine that gives rise to a form of direct liability, and as such, is incompatible with a Code which dealt with complicity by reference to accessorial principles, and which cannot be supplemented by common law principles.[214]

4.171 The difficulty that this imposed in a case where two offenders were charged jointly with the importation of the combined quantity of drugs, that each had individually brought into the country, was identified in a District Court case in 2003.[215] The jury was discharged when it was accepted that the presentation of an indictment containing one count, based on joint enterprise, could not be sustained under the then existing complicity provisions of the Code. This left the prosecution in a situation of presenting separate indictments, against each accused, variously as a principal for the amount which that accused imported, and as an accessory in relation to the other accused, or of having to pursue a case of conspiracy which may have been more difficult to prove.[216]

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210. *Criminal Code* (Cth) s 11.2(1); *Criminal Code* (ACT) s 45(1).
211. *Criminal Code* (Cth) s 11.2(2); *Criminal Code* (ACT) s 45(2)(a) and (3).
212. *Criminal Code* (Cth) s 11.2(3); *Criminal Code* (ACT) s 45(2)(b).
213. *Criminal Code* (Cth) s 5.4.
214. *Criminal Code* (Cth) s 2.1.
215. *R v Liu* (unreported, NSW District Court, Keleman DCJ, 10 June 2003).
216. The offence of conspiring to import prohibited substances under *Customs Act* (Cth) s 233B had been repealed and the Code was applied to drug offences.

4.172 The NSW Court of Criminal Appeal also noted the difficulties with the Code in relation to drug importations in the case of *Campbell v The Queen*, in which attention was drawn additionally to the consequences of deleting the element, previously found in s 5 of the *Crimes Act 1914* (Cth), which imposed liability for a person where he or she was "*knowingly concerned in or party to* the commission of any offence".[217]

4.173 The Commonwealth Code has now been amended, by the insertion of a provision directed at basic joint criminal enterprise and extended joint criminal enterprise cases,[218] as follows:

> **11.2A Joint commission**
> (1) If:
>
> (a) a person and at least one other party enter into an agreement to commit an offence; and
>
> (b) either:
>
> (i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or
>
> (ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));
>
> the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.
>
> **Offence committed in accordance with the agreement**
> (2) An offence is committed in accordance with the agreement if:
>
> (a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to; and
>
> (b) to the extent that a physical element of the joint offence consists of a result of conduct—that result arises from the conduct engaged in; and
>
> (c) to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.
>
> **Offence committed in the course of carrying out the agreement**
> (3) An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the joint offence) that another party in fact commits in the course of carrying out the agreement.

217. *Campbell v The Queen* [2008] NSWCCA 214 [120]-[122] (Spigelman CJ), [154]-[173] (Wienberg AJA).

218. *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

> **Intention to commit an offence**
> (4) For a person to be guilty of an offence because of the operation of this section, the person and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

4.174 The section provides, additionally, that the agreement may consist of a non-verbal understanding, and may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence.[219] It also makes provision for withdrawal (termination);[220] and permits a secondary participant to be found guilty, even if another participant (party to the agreement) has not been prosecuted or found guilty, and even if the secondary participant was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.[221]

4.175 A consequence of the amendment is that it will permit an aggregation of the criminality that is involved in those cases, where groups divide their criminal activities in the furtherance of a common criminal purpose. It expands the scope of a basic joint criminal enterprise to include the circumstance where the exact agreed joint offence was not committed, but one of the "same type" was committed.

4.176 A question does arise in relation to what is involved in determining whether the offence committed is of the "same type" as that agreed to. Presumably, this will require the trial judge to rule, in the first instance, whether the offence committed (B) is capable of being of the same type as that agreed (A), leaving it to the jury to determine whether the defendants agreed to commit an offence of that type, and also whether the conduct or physical elements of offence B were performed by one or more of the parties in accordance with the agreement.[222]

4.177 It has been suggested that this provision, while preserving the subjective nature of the common law test, potentially goes further than the common law in not requiring the continuing participation of the secondary participant, the existence of which had been regarded as a justification for the common law principle.[223] However, the presence of the termination (withdrawal) provision[224] suggests that the need for continuing participation by the secondary participant is implied.

Proposals in England and Wales

4.178 The possibility of "codification" in relation to secondary participation in crime was examined in the Law Commission's 2007 report, *Participating in Crime,*[225] and taken

219. *Criminal Code* (Cth) s 11.2A(5).
220. *Criminal Code* (Cth) s 11.2A(6).
221. *Criminal Code* (Cth) s 11.2A(7).
222. S Odgers, "Editorial: Joint Commission of Commonwealth Offences" (2010) 34 *Criminal Law Journal* 146.
223. S Odgers, "Editorial: Joint Commission of Commonwealth Offences" (2010) 34 *Criminal Law Journal* 146, 147.
224. *Criminal Code* (Cth) s 11.2A(6).
225. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007).

up further by the United Kingdom government in its 2008 consultation paper, *Murder, manslaughter and infanticide: proposals for reform of the law*.[226]

The Law Commission's Participating in Crime report

4.179 The Law Commission recommended, in its 2007 report, that the common law of complicity, including the doctrine of joint criminal enterprise, should be set out in a statutory scheme.[227] In exploring how best to describe secondary liability for a joint criminal venture (including basic and extended joint criminal enterprise) in a statutory form, it considered that there were two approaches:

> One approach would be to express the policy [on secondary liability] in a relatively open textured form, focusing on general principles. Under this approach, it would be for the courts, guided by our report feeding into Judicial Studies Board specimen directions to juries, to fill in the details in particular cases. The other approach would be a Bill which itself provided the details…[228]

4.180 Alternative Bills were prepared to reflect each of these approaches and circulated. Because of the concerns which were expressed, as to the complexity of the Bill which provided details of the elements required, the more open textured Bill was favoured.[229] It was to the following effect:

> **2 Participating in a joint criminal venture**
>
> (1) This section applies where two or more persons participate in a joint criminal venture.
>
> (2) If one of them (P) commits an offence, another participant (D) is also guilty of the offence if P's criminal act falls within the scope of the venture.
>
> (3) The existence or scope of a joint criminal venture may be inferred from the conduct of the participants (whether or not there is an express agreement).
>
> (4) D does not escape liability under this section for an offence committed by P at a time when D is a participant in the venture merely because D is at that time –
>
> (a) absent,
>
> (b) against the venture's being carried out, or
>
> (c) indifferent as to whether it is carried out.

4.181 The Bill did not define the term "joint criminal venture", or the expression "falls within the scope of the joint venture".

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226. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law*, Consultation Paper CP 19/08 (2008).
227. In so doing, the new statutory scheme would replace the common law and the *Accessories and Abettors Act 1861* (Eng). See Participating in Crime (Jurisdiction, Procedure and Consequential Provisions) Bill cl 8 and 9(1) in England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007), 166.
228. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [A.15].
229. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [A.15], [A.16].

4.182 In supporting the *Chan Wing-Siu* approach to extended joint criminal enterprise, the Law Commission recommended the following test in relation to the mental element required of the secondary participant:

> if P [primary participant] and D [secondary participant] are parties to a joint criminal venture, D satisfies the fault required in relation to the conduct element of the principal offence committed by P if:
>
> (1) D intended that P (or another party to the venture) *should* commit the conduct element;
>
> (2) D believed that P (or another party to the venture) *would* commit the conduct element; or
>
> (3) D believed that P (or another party to the venture) *might* commit the conduct element.[230]

4.183 This was not reproduced in the Bill. The development of any necessary rules and principles were left to be derived from the report, and from the guidance that judges and the Judicial Studies Board would provide.[231]

The Law Commission's Murder, Manslaughter and Infanticide report

4.184 Earlier, in its 2006 report, *Murder, Manslaughter and Infanticide*,[232] the Law Commission recommended the adoption of a three-tier structure of homicide offences, comprising:

- first degree murder, to encompass intentional killings and killings with intent to do serious injury, where the killer was aware that his or her conduct involved a serious risk of causing death;[233]
- second degree murder, to encompass killings intended to cause serious injury, or intended to cause injury or fear or risk of injury, where the killer was aware that his or her conduct involved a serious risk of causing death; or killings intended to kill or cause serious injury, where the killer was aware that his or her conduct involved a serious risk of causing death, but successfully pleads provocation, diminished responsibility, or that he or she killed pursuant to a suicide pact;[234] and
- manslaughter to encompass killing through gross negligence, or through the commission of a criminal act that was intended to cause injury, or that the defendant was aware involved a serious risk of causing some injury.[235]

4.185 In relation to complicity, the Law Commission recommended that:

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230. England and Wales, Law Commission, *Participating in Crime*, Report 305 (2007) [3.151]. (Emphasis added.)
231. J Horder and D Hughes, "Joint criminal ventures and murder: the prospects for law reform" (2009) 20 *King's Law Journal* 379, 387.
232. England and Wales, Law Commission, *Murder, Manslaughter and Infanticide,* Report 304 (2006).
233. England and Wales, Law Commission, *Murder, Manslaughter and Infanticide,* Report 304 (2006) [2.50].
234. England and Wales, Law Commission, *Murder, Manslaughter and Infanticide,* Report 304 (2006) [2.70].
235. England and Wales, Law Commission, *Murder, Manslaughter and Infanticide,* Report 304 (2006) [2.163].

> ... D should be liable to be convicted of P's offence of first or second degree murder (as the case may be) if
>
> (1) D intended to assist or encourage P to commit the relevant offence; or
>
> (2) D was engaged in a joint criminal venture with P, and realised that P, or another party to the joint venture, might commit the relevant offence.[236]
>
> ... D should be liable for manslaughter if the following conditions are met:
>
> (1) D and P were parties to a joint venture to commit an offence;
>
> (2) P committed the offence of first degree murder or second degree murder in relation to the fulfilment of that venture;
>
> (3) D intended or foresaw that (non-serious) harm or the fear of harm might be caused by a party to the venture; and
>
> (4) a reasonable person in D's position, with D's knowledge of the relevant facts, would have foreseen an obvious risk of death or serious injury being caused by a party to the venture.[237]

Government response to the Law Commission's reports

4.186 In July 2008, in response to the Law Commission's report on *Murder, Manslaughter and Infanticide,* but also taking into account the report on *Participating in Crime*, the United Kingdom government, through the Home Office and the Ministry of Justice, produced a consultation paper with proposals for specific reform of the law of murder, manslaughter and infanticide.[238] It noted that the principles set out by the Law Commission were "a sound basis for reforming the law of complicity as it applies to homicide cases".[239] The consultation paper targeted two problems in particular. The first was that the law of complicity, as applied to homicide, is complex and uncertain. The second was that the "fundamental difference rule"[240] is both too harsh and too lenient.[241]

4.187 Although the proposals were specifically directed at dealing with the problems arising in relation to complicity in homicide, it was made clear that they were also made with a view to reforming the law of complicity generally, at a later stage.

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236. England and Wales, Law Commission, *Murder, Manslaughter and Infanticide,* Report 304 (2006) [4.47].
237. England and Wales, Law Commission, *Murder, Manslaughter and Infanticide,* Report 304 (2006) [4.48].
238. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law*, Consultation Paper CP 19/08 (2008). The consultation period ended on 20 October 2008.
239. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law*, Consultation Paper CP 19/08 (2008) [77].
240. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law*, Consultation Paper CP 19/08 (2008) [72]. See our discussion on the fundamental difference rule: para 4.69-4.120.
241. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law*, Consultation Paper CP 19/08 (2008) [73].

4.188 The proposal dealt with conduct constituting "aiding or encouraging" homicide, by way of the following provisions:

1. Where a person ("P") has committed the offence of murder, another person ("D") is guilty of the offence if –

    a. D did an act which assisted or encouraged one or more other acts to be done by another person,

    b. P's criminal act was that act or one of those acts, and

    c. D's act was intended to assist or encourage a person to kill, or cause serious injury to, another person.

2. (1) This section applies where a person ("P") commits the offence of manslaughter in circumstances where P acts without the state of mind required for conviction of the offence of murder.

    (2) Another person ("D") is guilty of the offence of murder if –

        a. D did an act which assisted or encouraged one or more other acts to be done by another person,

        b. P's criminal act was that act or one of those acts, and

        c. D's act was intended to assist or encourage a person to kill, or cause serious injury to, another person.

4.189 Then, in relation to homicide in the context of a joint criminal enterprise, the following provisions were proposed:

Murder in the context of a joint criminal venture

1) Where –

    a. Two or more persons participate in a joint criminal venture, and

    b. One of them ("P") commits the offence of murder in the context of the venture, another participant ("D") is guilty of the offence of murder if subsection (2) or (3) applies.

2) This subsection applies if D foresaw that in the context of the venture a person might be killed by a participant acting with intent to kill, or to cause serious injury to, a person.

3) This subsection applies if –

    a. D foresaw that in the context of the venture, serious injury might be caused to a person by a participant acting with intent to cause such injury, and

    b. P's criminal act was within the scope of the venture.

4) P's criminal act was within the scope of the venture if it did not go far beyond that which was planned or agreed to, or which was foreseen by D.

5) The existence of a joint criminal venture, and that which was planned, agreed or foreseen as part of such a venture, may be inferred from the conduct of the participants (whether or not there is an express agreement).

6) D does not escape liability under this section for an offence of murder committed by P at a time when D is a participant merely because D is at that time –

   a. Absent,

   b. Against the venture's being carried out, or

   c. Indifferent as to whether it is carried out.

7) "Participant" means a participant in the joint criminal venture.

Manslaughter in the context of a joint criminal venture

1) Where -

   a. Two or more persons participate in a joint criminal venture, and

   b. One of them ("P") commits the offence of murder in the context of the venture, another participant ("D") is guilty of the offence of manslaughter if subsection (2) or (3) applies.

2) This subsection applies if D foresaw that, in the context of the venture, serious injury might be caused to a person by a participant acting with intent to cause such injury.

3) This subsection applies if –

   a. D foresaw that in the context of the joint criminal venture harm (other than serious harm), or the fear of harm, might be caused to a person by a participant, and

   b. A reasonable person in D's position with D's knowledge of the relevant facts would have foreseen an obvious risk of serious injury being caused to a person, or of a person being killed, by a participant in the context of the venture.

4) The existence of a joint criminal venture may be inferred from the conduct of the participants (whether or not there is an express agreement).

4.190 In its subsequent summary of the responses to these proposals, the Ministry of Justice noted the widespread concern that had been expressed, by academics and practitioners "about the proposal to reform the law of complicity in murder, without at the same time reforming the law on secondary liability more generally (that is, in relation to all offences)".[242]

4.191 In a passage, which reflects the conclusion which we have similarly reached, that it would have been inappropriate to confine the reform to the application of the extended joint enterprise principles, the Ministry noted:

> The main concern was that reform of secondary liability for murder alone would lead to complex jury directions in cases where other offences were also charged or there were possible alternative verdicts. This could mean that juries would have to be directed on the law of secondary liability twice, with perhaps only minor differences in the law. It was felt that the directions are already

242. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law. Summary of responses and Government position*, Response to Consultation CP(R) 19/08 (2009) [104].

> complicated for juries and that to add to the amount of information given to juries would be unhelpful.[243]

4.192 As a consequence of the strength of this concern, the government decided not to proceed with the proposed changes,[244] and accepted the weight of opinion expressed, in response to the consultation paper, that any legislation in this area should address the Law Commission's proposals for a comprehensive reform of the law on secondary liability.[245]

4.193 Lord Phillips of Worth Matravers has observed that the complex scheme proposed would achieve the "object of fairness" (in a case of extended joint enterprise), but "at the expense of the requirement that the law should be simple for the citizen to understand and for the jury to apply".[246] A possible solution that would achieve simplicity and leave it to the judge to reflect the precise culpability of the secondary participant in such a case, he suggested might be "something like":

> If a person is unlawfully killed in the course of a joint criminal venture, a participant in that venture will be guilty of murder if he foresaw that another participant might kill in the course of it. A participant who foresaw that another participant might cause physical harm but who did not foresee the possibility that death would result will be guilty of manslaughter.[247]

4.194 There does not seem to have been any further progress with this potential reform of the law in England and Wales, although in its more recent report, *Intoxication and Criminal Liability*, the Law Commission did deal with the impact of intoxication so far as that might also be relevant for the secondary participant in a case of extended joint criminal enterprise.

4.195 It observed, in this respect,[248] that it would be unacceptable to extend the doctrine of joint criminal enterprise by treating the *Chan Wing-Siu* state of mind as a species of recklessness, that would permit D to be liable for murder committed by P, on the basis that, although D did not actually foresee the possibility of the murder being committed (because he or she was voluntarily intoxicated), D would have done so had he or she been sober.

4.196 The Commission proposed two Recommendations in relation to intoxication and secondary liability as follows:

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243. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law. Summary of responses and Government position*, Response to Consultation CP(R) 19/08 (2009) [104].
244. United Kingdom, Ministry of Justice, Attorney General's Office, Home Office, *Murder, manslaughter and infanticide: proposals for reform of the law. Summary of responses and Government position*, Response to Consultation CP(R) 19/08 (2009) [105].
245. The Law Commission's proposals concerning the partial defences to murder of provocation and diminished responsibility were included, with some changes, in the *Coroners and Justice Act 2009* (Eng).
246. N Phillips, "Reforming the Law of Homicide" (Speech delivered at Clifford Chance, London, 6 November 2008) 17.
247. N Phillips, "Reforming the Law of Homicide" (Speech delivered at Clifford Chance, London, 6 November 2008) 17-18.
248. England and Wales, Law Commission, *Intoxication and Criminal Liability,* Report 314 (2009) [2.101].

Recommendation 7 (secondary liability generally)
For the doctrine of secondary liability generally (where no joint enterprise is alleged):

(1) if the offence is one which always requires proof of an integral fault element, then the state of mind required for D to be secondarily liable for that offence should equally be regarded as an integral fault element;

(2) if the offence does not always require proof of an integral fault element, then the (Majewski) rule on voluntary intoxication should apply in determining D's secondary liability for the offence.[249]

Recommendation 8 (secondary liability – joint enterprises)
Our proposed rule on the relevance of voluntary intoxication to secondary liability generally should apply equally to cases of alleged joint enterprise.[250]

4.197 The *Majewski* rule,[251] while accepting that self-induced intoxication is relevant in an offence of specific intent, provides, in effect, that, on the trial of a person charged for an offence of basic intent, evidence of self-induced intoxication is irrelevant and, as a consequence, inadmissible, if tendered for the purpose of raising a doubt as to the voluntariness of, or as to the presence of an intention to do, the physical act involved in the offence charged.

4.198 Part 11A of the *Crimes Act 1900* (NSW) substantially replicates the principles that were established in *Majewski,* in place of the common law principles which were approved by the High Court in *O'Connor v The Queen*.[252] In that case the High Court declined to follow *Majewski*.

4.199 It does not appear that the Recommendations in this further report of the Law Commission have been implemented.

Reform: Our approach

4.200 We consider that joint criminal enterprise should remain as a response to joint criminal activity that involves a more direct form of participation than that provided by an aider and abettor.

4.201 There is no apparent concern, or difficulty in principle, in aligning the criminal responsibility of those people who are party to a basic joint enterprise to commit an offence, or who are acting in concert in relation to the commission of that offence or who are otherwise liable as joint principal offenders. If an offence within the scope of a basic joint criminal enterprise, that is, in accordance with their agreement or understanding, is committed, then each party to the enterprise should clearly be responsible for its commission. Similar responsibility should arise where two or more people are responsible for carrying out the physical elements that together constitute the *actus reus* for an offence, and each share the intention or mental

249. England and Wales, Law Commission, *Intoxication and Criminal Liability,* Report 314 (2009) [3.92].

250. England and Wales, Law Commission, *Intoxication and Criminal Liability,* Report 314 (2009) [3.99].

251. *DPP v Majewski* [1977] AC 443.

252. *O'Connor v The Queen* (1980) 146 CLR 64.

element required for that offence, even though there was no preconcert between them.

4.202 We consider that it is appropriate to preserve the distinction, established by the common law, between the primary or direct liability of a party to a basic joint criminal enterprise and that of a joint principal offender on the one hand, and the secondary or derivative liability of an accessory before the fact and of a principal in the second degree on the other.[253] Although it is recognised that the significance of the distinction is reduced by the fact that accessories are liable to be tried and punished as principals, and by the further fact that, where the status of offenders is unclear on the facts, a case can be pursued on each basis, maintenance of the distinction will assist in the development of a harmonious model of complicity.

4.203 Of importance in this respect is recognition of the fact that assistance or encouragement given by D to P to commit an offence may not necessarily amount to an agreement between them to commit that offence, and there may well be a difference in the objective culpability of those who fall within these categories respectively.

4.204 We consider that this approach has the advantage of clarity, in that it requires the Court and a fact finder to focus on the mental elements that are necessary for each form of complicity in a system which treats concert and assistance as ways of establishing criminal responsibility for an offence in which two or more people have an involvement, rather than as giving rise to separate offences related to the nature and extent of their involvement. This approach leaves incitement, conspiracy and accessory after the fact to be dealt with as separate offences, in a manner consistent with the common law. The purpose is to reflect the different roles, which each has to play, in a scheme that is designed to criminalise conduct, commencing with encouraging the commission of an offence, extending to conduct that constitutes assisting its commission as well as carrying it into effect, and concluding with assistance to the perpetrator of the offence to escape justice.

4.205 The focus of the reform proposals considered below will accordingly be concerned: first, with establishing an appropriate boundary between the liability of joint principal offenders, of offenders acting in concert, and of the participants engaged in a joint criminal enterprise; and, secondly, with the principles applicable in relation to extended joint criminal enterprise. That there are discrete forms of liability arising in the three situations covered by the recommendations in this chapter has been recognised in the authorities.[254]

Reform: Basic joint criminal enterprise

4.206 Although the common law is settled in relation to the liability of those who act in concert in pursuit of a common criminal design, we consider it desirable for the relevant requirements to be stated in a statutory form. Amongst other things, this will provide a basis from which the principles applicable to extended joint criminal enterprise can be constructed. As was noted in the Explanatory Memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth), the existence of a provision of this kind enables the prosecution to aggregate the conduct of the parties to the agreement. This can be of particular value where it is

253. See para 3.72-3.73.

254. *Likiardopoulos v The Queen* [2010] VSCA 344 [50] and [62].

not possible to determine with any precision the role of each party.[255] Accordingly, what is proposed is contained in the following Recommendation.

Recommendation 4.1

The principles concerned with basic joint criminal enterprise should be the subject of a statutory provision which would render the participants liable for an offence which is committed, pursuant to its terms, as follows:

(1) Where at least two people enter into an agreement to commit an offence and that offence is committed, each is to be taken to have committed the offence and is punishable accordingly.

(2) The agreement may consist of an express agreement or a non-verbal understanding.

(3) The agreement may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the offence.

(4) The existence of the agreement and the nature of the offence which is the subject of the agreement may be inferred from the conduct of the parties to the agreement.

(5) The "offence" shall be taken to include the precise offence agreed to as well as any offence that is, having regard to the nature and scope of the agreement, necessarily incidental to its commission or that is of the same type as that agreed to.

(6) The parties must have intended that the offence would be committed pursuant to their agreement.

(7) A party to the agreement may be found guilty of the offence, even if:

  (a) another party to the agreement has not been prosecuted or has been found not guilty or has been convicted of a lesser offence by reason of a defence or qualified defence that is available to that party but that is not available to him or her (that is, the first-named party); or

  (b) he or she was not present when any of the conduct constituting the physical elements of the joint offence occurred.

(8) Any limitation provisions or defences that apply in relation to the offence apply in relation to each party respectively for the purpose of determining whether that party is guilty of that offence or of a lesser or other offence by reason of the operation of these provisions.

(9) A party to the agreement cannot be found guilty of an offence by reason of the operation of these provisions if, before the conduct constituting any of the physical elements of that offence was engaged in, he or she:

  (a) terminated his or her involvement; and

  (b) took all reasonable steps to prevent that conduct from being engaged in.

(10) A party to the agreement cannot be found guilty of an offence by reason of the operation of these provisions if he or she is a person

255. Explanatory Memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth) 135.

for whose benefit or protection the offence exists, and he or she is the person in respect of whom it is committed.

(11) Where the trier of fact is satisfied beyond reasonable doubt that a party to the joint agreement committed an offence because of the operation of these provisions or committed an offence otherwise than because of the operation of these provisions, but cannot determine which, the trier of fact may find that party guilty of the offence.

[**Note:** In relation to recommendation 4.1, a legislative note and the second reading speech should state that the question of whether an offence is capable of being "incidental to" the commission of an offence or is of the same type is an issue of law for the judge, and that otherwise any relevant question is one of fact for the jury.]

The agreement

4.207 The provisions in recommendation 4.1(1)-(4) are concerned with the formulation of the joint agreement and its proof. They are not controversial.

4.208 They reflect the common law, which does not require proof of the existence of an express or formal agreement for the joint enterprise. It may arise from a non verbal understanding, and it may be inferred from all of the circumstances of the case.[256] The rule in *Tripodi*[257] will continue to apply.[258] These provisions are also intended to take account of the fact that the common understanding or agreement between the parties may alter or broaden over time.[259]

The agreed offence

4.209 The concept of basic joint enterprise or criminal concert at common law extends to offences falling "within the scope" of the agreement or mutual understanding that constitutes the enterprise. The limits of that expression seem not to have been established with any degree of precision, although they are possibly best understood in the light of the earlier cases, in which the expression was used to refer to offences that were committed, as a probable consequence of the commission of the offence which was the primary object of the joint criminal enterprise, as determined objectively.[260] Subsequently, its use has tended to blur the boundary between this form of criminality, and that arising under extended joint enterprise principles. Further, it has acquired a significance in determining whether there was a fundamental departure from the agreed enterprise.

4.210 Rather than repeating the "scope" formula, we prefer an approach that would make it clear that the basic joint criminal enterprise doctrine will apply to the specific agreed offence as well as any offence that is necessarily incidental to its commission, or that is of the same type.

256. See *R v Tangye* (1997) 92 A Crim R 545, 556.

257. *Tripodi v The Queen* (1961) 104 CLR 1.

258. *Ahern v The Queen* (1988) 165 CLR 87, 99; *Re Pong Su (Ruling No 13); R v Lam* (2005) 191 FLR 272.

259. *Miller v The Queen* (1980) 55 ALJR 23, 25-26.

260. *McAuliffe v The Queen* (1995) 183 CLR 108, 114.

4.211 This would assist in clarifying the basis for joint enterprise liability.[261] It is acknowledged that there could potentially be an issue, in any given case, whether the offence in fact committed would qualify under recommendation 4.1(5). However, we consider that this formulation would more appropriately reflect the factual situation in which parties acting in concert behave. It moves away from the concepts of contract or agency, with their focus on express or implied authority or consent, which is dependent on planning and premeditation, and which is not well suited for a criminal context, particularly for crimes involving group violence.

4.212 In this formulation, the normal principles would apply so that it would be a question of law for the judge whether or not the offence committed is capable of qualifying as an agreed offence. The question for the jury to determine, as an issue of fact, would be whether the defendants agreed to commit that offence and, secondly, whether a party to the joint agreement committed that offence (with the necessary physical and mental elements).

4.213 Possible examples of "necessarily incidental" offences, or offences of the "same type", would include cases where a group of offenders entered into a joint agreement:

- to kill a person known to be resident in a dwelling, and committed an offence of breaking into the house with the intention of killing that resident, or of arming themselves with the implements and weapons needed to accomplish their objective;
- to assault V with the intent of causing grievous bodily harm,[262] yet the attack carried out amounts only to the infliction of actual bodily harm;[263]
- to steal a motor vehicle[264] yet what occurred was the taking and using of the vehicle without the consent of the owner;[265]
- to break and enter a dwelling house and rob V of cash believed to be in the premises, yet what was taken was jewellery;
- the various alternative forms of larceny, embezzlement and misappropriation which essentially involve the same concept of unlawfully depriving a victim of property, but which differ in relation to the means of achieving that objective.

4.214 In adopting the formulation "offence of the same type", we intend that there be consistency with the approach adopted in relation to accessorial liability dealt with in the preceding chapter.[266]

Differential verdicts

4.215 Under recommendation 4.1(7), the parties to the joint agreement would be liable as principals in relation to the offence committed, although the possibility of the return

261. *Criminal Code* (Cth) s 11.2A(1)(b)(i) and s 11.2A(2); and see *Criminal Code* (ACT) s 45A.
262. *Crimes Act 1900* (NSW) s 33.
263. *Crimes Act 1900* (NSW) s 59.
264. *Crimes Act 1900* (NSW) s 154F an offence punishable by imprisonment for 10 years.
265. *Crimes Act 1900* (NSW) s 115A and s 117 an offence punishable by imprisonment for 5 years.
266. See para 3.94-3.100.

of different verdicts would be preserved, in order to accommodate the availability, under recommendation 4.1(8), of a defence personal to one or the other of them.

Termination or withdrawal

4.216 Consistently with the Commonwealth, ACT, and Western Australian Codes we are of the view, in recommendation 4.1(9), that a "defence" of withdrawal or termination should be available. This recognises the requirement that the agreed offence be committed in accordance with, or in pursuance of, the joint agreement or understanding. Its purpose, however, is to clarify the circumstances in which an attempted withdrawal from a joint enterprise is effective. It will resolve any residual uncertainty concerning the requirements of the common law in this respect.[267]

4.217 It is not intended that the defence be one which places an onus on the accused. Once there is evidence that is capable of raising an issue as to whether a party withdrew from the enterprise before the commission of the offence, then it will be for the prosecution to satisfy the jury, beyond reasonable doubt, that the accused did not satisfy the relevant elements. As we have explained elsewhere, an effective withdrawal may not excuse a party to a joint enterprise from an inchoate offence of conspiracy. However, the explanation for preserving what may, on one view, be a Pyrrhic victory, is that the offence of conspiracy will normally attract a lesser penalty, even assuming the Director of Public Prosecutions elects to proceed with such a charge.

4.218 In relation to the conduct that will constitute a withdrawal, we have adopted the same provision as that adopted in relation to accessorial liability, that is "termination" by D (through communication) of his or her involvement, accompanied by the taking of all reasonable steps to prevent the commission of the relevant offence.[268] The same reasoning is applicable in this context.

Procedural aspects

4.219 Recommendation 4.1(10) is designed to accommodate the situation where the victim of the offence that is committed is himself or herself a party to the joint enterprise, and is a person for whose benefit the offence was created.

4.220 Recommendation 4.1(11) is directed at the situation where, on the evidence, it is clear that an accused was either party to a joint agreement to commit the relevant offence, or was a joint principal offender, or was an aider and abettor, but it is not possible to form a conclusion concerning the category into which he or she falls. The wording is derived from provisions in the Commonwealth and ACT Criminal Codes.[269]

267. As discussed in *White v Ridley* (1978) 140 CLR 342; *R v Menniti* [1985] 1 Qd R 520, 526-528; *R v Seiffert* (1999) 104 A Crim R 238, 255; *R v Tietie* (1988) 34 A Crim R 438, 446-447.

268. See para 3.108-3.118.

269. *Criminal Code* (Cth) s 11.2(7); *Criminal Code* (ACT) s 45(8).

Reform: Joint principal offenders

4.221 We consider it appropriate that the position of joint principal offenders should be equated with that of participants to a basic joint criminal enterprise; and, for the purpose of coherence, also reduced to a statutory formula, according to the following Recommendation.

Recommendation 4.2

(1) Where two or more people carry out the physical elements that, in combination, constitute an offence, then each person who had the mental elements required for that offence is taken to have committed the offence and is punishable accordingly as a principal offender, even though it may not be established otherwise that they were party to a joint criminal enterprise.

(2) A person may be found guilty of the offence even if another person alleged to have committed the offence has not been prosecuted or not found guilty or has been convicted of a lesser offence by reason of a defence or qualified defence available to that person.

(3) Any limitation provisions or defences that apply in relation to the offence apply in relation to each person for the purpose of determining whether he or she is guilty of that offence by reason of the operation of these provisions.

(4) Where the trier of fact is satisfied beyond reasonable doubt that a person committed an offence, because of the operation of these provisions or committed an offence otherwise than because of the operation of these provisions, but cannot determine which, the trier of fact may find such person guilty of the offence.

4.222 This approach would provide for the situation where the guilt of two or more participants acting in unison, without any preconcert, but with a common mental state, was dependant on the *actus reus* being established from the combined effects of their conduct. Classically, this is a case of concert of the kind considered in *R v Lowery (No 2).*[270]

4.223 This provision would accordingly apply to a case where two people individually engaged in an assault on V, each intending to inflict grievous bodily harm, although without any preconcert, as might be the case in a spontaneous gang fight or a riot. In that situation, if the combined effect of their acts was to bring about V's death, they would each be guilty of murder as principals, even though, individually, it might not be possible to attribute to either of them a specific act occasioning the death.

4.224 To include this category of case in the proposed statutory formulation would accord with the common law, which treats each person in this situation as a principal offender, responsible for the combined consequences of his or her actions. In some situations, the prosecution might be able to attribute a direct causative link to one offender, rendering that person a principal offender in his or her own right. In other cases, where that is not possible, there is no reason in principle why such a person should not be held jointly responsible, with the other offender, for the consequences of his or her actions. Pragmatically, in many, if not most, of the factual situations of

270. *R v Lowery* (No 2) [1972] VR 560; and see *Likiardopoulos v The Queen* [2010] VSCA 344 [52]-[53].

this kind which arise, the combined presence and conduct of the offenders, amounting to intentional assistance or encouragement, would constitute evidence from which one could infer an understanding, sufficient to constitute a joint criminal enterprise.[271] In such a case, it could be dealt with in accordance with the provisions proposed in recommendation 4.1. Otherwise recommendation 4.2 would apply.

4.225 A provision to the effect of recommendation 4.2(4) would again be necessary to deal with the situation where, on the evidence, it is clear that an accused was either party to a joint criminal enterprise to commit the relevant offence, or was a joint offender, or was an aider and abettor, or was the person who was liable as a principal offender irrespective of any contribution by any other person, but is it not possible to form a conclusion concerning the category into which that accused falls.

Reform: Extended joint criminal enterprise

4.226 The disarray which accompanies the doctrine of extended joint criminal enterprise has been noted earlier in this Report.[272] In part, this disarray is due to the difficulties which have been experienced in its application, and, in part, it is due to the difficulties which exist in identifying a clear and principled doctrinal basis for its existence. In particular, there is disagreement as to where it should take its place within the general framework of complicity law, that is, whether it is an aspect of secondary liability (aiding and abetting),[273] or whether it operates as an independent head of liability.[274]

4.227 More recently, it has been argued that it operates across the boundary line between primary and secondary liability, as a doctrine *sui generis*, the proper function of which is to police the limits of "associate liability", and, hence, to exculpate a party to a criminal enterprise (D) where the conduct of another participant to that enterprise (P) was excessive, rather than to inculpate those who may be party to a joint enterprise which goes further than was originally intended.[275]

4.228 In developing a proposal for reform in this respect it is recognised that legitimate questions can be asked concerning the merits of each of the justifications, which have been advanced, for attributing criminal responsibility to a secondary participant for an "additional offence" that another participant commits in pursuance of a joint criminal enterprise. Krebs has identified the following possible policy bases for extended joint criminal enterprise, which she criticizes for being too broad:

- D, by lending him or herself to the joint enterprise with foresight, provides assistance and encouragement to P to commit the additional offence and should accordingly be held responsible for it.

271. See *R v Tangye* (1997) 92 A Crim R 545, 557.

272. Para 4.5-4.152; and see A Ashworth, "General Principles of Criminal Law" in D Feldman (ed), *English Public Law* (OUP, 2004) (2004) [24.58]-[24.59].

273. As suggested by D Ormerod, *Smith and Hogan Criminal Law* (12th ed, Oxford UP, 2008) 207; J C Smith, "Criminal liability of accessories: law and law reform" (1997) 113 *Law Quarterly Review* 453; R Buxton, "Joint Enterprise" [2009] *Criminal Law Review* 233, 242-243; S Gray, "'I Didn't Know I Wasn't There': Common Purpose and the Liability of Accessories to Crime" (1998) 23 *Criminal Law Journal* 201.

274. As suggested by A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, 2007) 228-230.

275. B Krebs, "Joint Criminal Enterprise" (2010) 73 *Modern Law Review* 578, 579, 603-604.

- D, by signing up to the goals of the joint enterprise, assumes responsibility for all of the wrongs perpetrated by P in realising its goal.

- D, by participating with P in the joint enterprise, has enhanced the risk of an additional crime occurring and should, accordingly, be held responsible if it occurs.

- D, by participating with P in the joint enterprise, has allowed a situation to arise in which P might commit an additional offence and should, as a result, in failing to prevent its commission, be held responsible for it.

- D, by deliberately entering into a joint enterprise to commit a criminal offence, has changed his or her normative status in the eyes of the law, and consequently should be held responsible for all of the consequences that follow.

- For pragmatic reasons concerned with the hostility of the law to criminal groups, with their innate dangerousness and with the tendency for their activities to evolve into more serious crime, D should be held responsible for any offence that eventuates in connection with a joint enterprise to which D is a party.[276]

4.229 It is recognised that there have been practical difficulties in the application of the principles, not all of which can be resolved completely by any form of statutory restatement. In summary, those that arise under the common law relate to:

- The fact that D can be held liable for an offence on a lesser form of *mens rea* than that required of P, involving a departure, so far as D is concerned, from the basic requirement of criminal law that, for liability to attach, there should be a coincidence of *actus reus* and *mens rea*.

- The need to fix on a foundational offence, the identification of which may be illusory.

- The uncertainty in fixing the point at which D's foresight crystallises in the case of a joint enterprise that is evolving, as in the case of a gang fight.

- The difficulty faced by a jury in determining what D subjectively foresaw concerning P's possible conduct and state of mind.

- The problem in determining the point at which the offence committed by P ceases to be an "additional offence".

- The complexity occasioned where, in a murder trial, for example, a jury may need to consider the liability of D variously as an accessory, or as a principal offender in his or her own right, or as a party to a joint criminal enterprise, or by reference to the extended joint criminal enterprise principles, or additionally by reference to the constructive murder principle.

- The divergence between the subjective element required for accessorial liability (dependent on D's knowledge) and that required under the extended joint criminal enterprise principles (dependent on D's foresight of the possibility of P committing the additional offence), with a consequent need for additional directions in a case where D is charged alternatively as an accessory or as a party to a joint criminal enterprise.

276. For a detailed analysis of the problems associated with each of these justifications which are identified in a critical analysis of the role of the doctrine see B Krebs, "Joint Criminal Enterprise" (2010) 73 *Modern Law Review* 578, 579, 592-602.

4.230 Additionally it is a matter for concern that there is a glaring lack of harmony between the common law principles as applied in NSW, Victoria and South Australia, and the principles which are to be applied under the *Criminal Code* (Cth) and the codes of the other States and Territories.

4.231 As outlined above, there are clear difficulties in identifying a policy justification that, standing alone, would satisfactorily account for the emergence of extended joint criminal enterprise as a basis for culpability, either as it has developed at common law or as provision has been made in the criminal codes. There is also an inevitable degree of complexity in the application of the doctrine.

4.232 Nonetheless, we accept that extended joint criminal enterprise has a proper role to play as part of the law of complicity. In one form or another, it has become entrenched in the case law or statute law to the point where it is unrealistic to propose a wholesale retreat that would excuse D from any offence committed by P, other than that which was the specific object of their joint enterprise, or that was an offence that was necessarily incidental to its commission or of the same type as that agreed to.

4.233 Moreover, there is, in our view, a core policy justification for its retention that is based on the inevitable risks that are associated with entry into a joint criminal enterprise. For example, when embarking on an armed robbery there is a clear risk of someone being shot; when joining in a group attack there is a clear risk that it could get out of hand and result in a more serious injury than was planned; when joining a group to extort money by threats there is a clear risk that one participant may become violent and attack a victim. In these situations there is, in our view, a clear and established case for making a secondary participant liable for the actions of others, notwithstanding that the secondary participant did not intend or desire the additional offence. The challenge for law reform is to define the limits of that liability in a way that is clear and fair.

4.234 Our concern in this section of the Report, accordingly, is to formulate a fair, acceptable and workable statutory provision that will govern the situation where, in the course of the execution of a basic joint criminal enterprise, P commits an additional offence, that is, one that differs from the agreed offence and which, as a consequence, falls outside the provisions contained in recommendations 4.1 and 4.2.

4.235 The reform which we recommend is to the following effect:

Recommendation 4.3

The principles concerned with extended joint criminal enterprise should be the subject of a statutory provision which would render a secondary party to a joint criminal enterprise (D) liable for an additional offence committed by another party to the enterprise (P) in the circumstances, and subject to the provisions, which are set out as follows:

(1) D and at least one other person, P, enter into an agreement giving rise to a "joint criminal enterprise" to commit an offence (the "agreed offence").

(2) The agreement giving rise to the joint criminal enterprise may consist of an express agreement or a non-verbal understanding between D and P to commit the agreed offence.

(3) The existence of the joint criminal enterprise and the nature of the agreed offence may be inferred from the conduct of the parties.

(4) The agreed offence shall be taken to include the precise offence agreed to, as well as any offence that is, having regard to the nature and scope of the agreement, necessarily incidental to its commission or that is of the same type as that agreed to.

(5) D and P intend that the agreed offence be committed.

(6) In the course of carrying out the joint criminal enterprise or in attempting to do so, P does an act with the mental elements that would support a conviction of P for an offence ("the additional offence") that differs from the agreed offence.

(7) Save for a case of homicide (which is subject to recommendation 4.3(8), D foresaw that, in the course of carrying out the joint criminal enterprise, there was a substantial risk that P would commit the additional offence (such foresight being present at the time of, or immediately before, the commission of the additional offence).

(8) Where P causes a death in the course of carrying out a joint criminal enterprise (other than one in which there was a common intention to kill or cause grievous bodily harm, being a joint criminal enterprise within the meaning of and subject to the provisions contained in recommendation 4.1) then, D will be liable for:

(a) murder if D foresaw that it was probable (that is, likely) that a death would result from an act of P that was done with intent to kill or cause grievous bodily harm, in the course of carrying out the joint criminal enterprise in which D was participating; or

(b) if not satisfied of (8)(a), then manslaughter if D foresaw that there was a substantial risk that a death would result from an unlawful act that was done by P in the course of carrying out the joint criminal enterprise in which D was participating,

such foresight on the part of D being respectively present at the time of (or immediately before) the act causing the death.

(9) D will be guilty of the additional offence even if, at the time of its commission by P, he or she was absent from the place of its commission.

(10) D may be convicted of the additional offence, even if P has not been prosecuted or has been found not guilty of the additional offence, unless in a case where P has been acquitted of the additional offence, a conviction of D for that offence would involve the return of an inconsistent verdict or offend against the rule of incontrovertibility.

(11) D may be convicted of the additional offence even if P has been convicted of a lesser offence because of a defence or qualified defence available to P but not available to D.

(12) Otherwise any defences or qualifying provisions that would apply to the additional offence and be personal to D will apply for the purpose of determining D's guilt for the additional offence.

(13) D will not be guilty of the additional offence if, before the act of P constituting that offence, D:

(a) terminated his or her involvement as a party to the joint criminal enterprise; and

(b) took all reasonable steps to prevent the joint criminal enterprise being carried out.

(14) D will not be guilty of the additional offence if D is a person for whose benefit or protection that offence exists.

[**Note:** In relation to recommendation 4.3, a legislative note and the second reading speech should state that the question of whether an offence is capable of being "incidental to" the commission of an offence or is of the same type is an issue of law for the judge, and that otherwise any relevant question is one of fact for the jury.]

The existence of a joint criminal enterprise

Recommendations 4.3(1)-4.3(3) are non controversial in specifying what is required, by way of an agreement that will constitute (give rise to) a joint criminal enterprise, for the purpose of the provisions proposed, including the way in which it may come into being (recommendation 4.3(2)), as well as the way in which it may be proved (recommendation 4.3(3)). The provisions, in this respect, are generally consistent with the provisions contained in the Commonwealth and ACT criminal codes.[277]

The agreed offence

4.236 Recommendation 4.3(4) is intended to replicate the provisions proposed in relation to cases of basic joint criminal enterprise. Rather than defining the "agreed offence" as including any offence within the "scope" of the agreement constituting the joint criminal enterprise, we have followed the same course by defining the "agreed offence" as including any offence necessarily incidental to its commission, or being of the same type as the agreed offence. As explained earlier, whether an offence qualifies as such will be a question of law for the judge.

The additional offence

4.237 Recommendation 4.3(6) focuses on the additional offence committed by P, for which D will be liable if the remaining elements are satisfied. Necessarily it will be an offence that falls outside the scope of the joint criminal enterprise. However, the offence must be one that was committed by P in the course of carrying the joint criminal enterprise into effect, or in attempting to do so.

4.238 Considered in this way, the additional offence is limited to an offence that is committed by P in the general context of the performance, or attempted performance, of the joint criminal enterprise. For example, if while on the way to a bank with the other participants to a joint enterprise to commit an armed robbery, P sees someone across the street, with whom P has a long standing grudge, and walks away from the group and shoots that person, then it would not seem just for D to be potentially liable for the murder or manslaughter of that person.

4.239 What is required, in this context, is that P commit the *actus reus* for the additional offence with the state of mind that would support a conviction for that offence.

277. *Criminal Code* (Cth) s 11.2A(1), (4), (5); *Criminal Code* (ACT) s 45A(1), (4), (5).

4.240 What this recommendation is designed to achieve, therefore, is to avoid the situation, which currently exists at common law, in which D might be convicted of murder upon proof that he or she foresaw the possibility of P committing the additional offence, yet P is acquitted of murder because the prosecution could not prove that P possessed the necessary *mens rea* for that offence.

4.241 As recommendations 4.3(10) and 4.3(11) make clear, this provision would not affect D's liability for that additional offence (assuming the other requirements for D's liability under these principles are satisfied) if P has not been prosecuted for the additional offence, or has been found not guilty of it (except where P's acquittal and a conviction of D would give rise to an inconsistency of verdict or offend against the incontrovertibility rule), or has been convicted of a lesser offence by reason of some defence personal to himself or herself but not available to D.

The mental element required by D

4.242 Recommendation 4.3(5) provides that for D to be liable for any additional offence committed by P, in carrying out or attempting to carry out the joint criminal enterprise D must have intended to enter into the agreement giving rise to it, and to have intended that the "agreed offence" be committed. Neither of these requirements poses any difficulty, although each involves a question of fact dependent upon proof of a subjective intention on the part of D.

4.243 It is in relation to the additional mental element, that will extend D's liability beyond the "agreed offence" to the additional offence, that difficulties have arisen and in respect of which differences have emerged between the common law, the criminal codes and various proposals for statutory reform.

4.244 Critical for resolution of this issue is the determination whether the requirement for the link should depend on an objective test of the kind seen in the criminal codes of Queensland, Western Australia and Tasmania, or a test that includes recklessness as can be seen in the Commonwealth and ACT criminal codes, or a subjective test in accordance with the common law, or some other test.

4.245 The objective test focuses on the connection between the offence committed and the agreed unlawful purpose. It does not take account of what the participants foresaw or might have discussed when planning to commit the agreed offence.[278]

4.246 The objective test reflects the historical approach of the common law to fault.[279] It does not, however, sit well with the emphasis that the law now places upon the actual state of mind of a person who is charged with an offence.[280] It was not the

278. *R v Keenan* (2009) 236 CLR 397 [84] and [86] (Hayne J) [115] (Kieffel J); *Stuart v The Queen* (1974) 134 CLR 426, 442-443.

279. *R v Keenan* (2009) 236 CLR 397 [428] (Kieffel J).

280. *McAuliffe v The Queen* (1995) 183 CLR 108 [13].

approach favoured by the Gibbs Committee[281] or by the Criminal Law Officers Committee.[282]

4.247 We have given consideration to the several possible approaches that currently exist at common law or under the criminal codes, or that have been proposed, as outlined earlier in this chapter.[283]

Additional offence – other than homicide

4.248 Recommendation 4.3(7), which is intended to apply in those cases where the additional offence does not involve a homicide, maintains a subjective test of foresight, but elevates the common law test from one of foresight of a "possibility", to one of foresight of a "substantial risk" of P committing the additional offence. It is implicit in this recommendation, as follows from the availability of the possibility of D escaping liability where he or she had withdrawn from the joint criminal enterprise prior to P's act, that D have the necessary foresight, and continue to be a participant in that enterprise at the time when (or immediately before) P commits the additional offence.

4.249 It is recognised that the adoption of a test, dependent upon foresight of a "substantial risk" of P committing the additional offence, involves a retreat of some moment from the current common law test which merely requires foresight of the possibility of the commission of the additional offence. We have chosen this formula in order to alleviate the potentially harsh outcome of the common law. By the expression "substantial risk" we mean a risk of occurrence that is actual or real and not remote or fanciful or illusory, being a risk having more weight than a bare possibility. We have considered, but rejected, as an alternative, a test framed in terms of foresight of a "significant risk".

4.250 While each of the expressions "substantial" and "significant" has a range of meanings, there is some precedent for the use of the expression "substantial" in the *Crimes Act 1900* (NSW).[284] Its use was considered in *Darkan v The Queen*, where it was held that the expression "probable" means "more than a real or substantial possibility or chance",[285] the former being more correctly explained in the sense that the relevant consequence "could well happen".[286] It is an expression that is used in a quantitative or relative sense in a number of NSW and Commonwealth statutes.[287]

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281. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) 205-206.
282. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 25.
283. See para 4.153-4.190.
284. *Crimes Act 1900* (NSW) s 23A and s 93V.
285. *Darkan v The Queen* (2006) 227 CLR 373 [78].
286. *Darkan v The Queen* (2006) 227 CLR 373 [79] and [81].
287. See, eg, *Guardianship Act 1987* (NSW) s 45AA(2)(b); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 14(5); *Workers Compensation Act 1987* (NSW) s 47; *Service and Execution of Process Act 1992 (Cth) s 96(3); Therapeutic Goods Act 1989 (Cth) s 42T(1)(c); Commonwealth Radioactive Waste Management Act 2005 (Cth) s 3B(1)(e).*

4.251 The first meaning given to "substantial" in Butterworth's *Australian Legal Dictionary* is "real or of substance, as distinct from ephemeral or nominal".[288] In the context of the defence of diminished responsibility (substantial impairment) it has been held to mean "less than total, but more than trivial or minimal",[289] and, similarly, in the town planning context, the natural meaning of the word was said to denote something of a "real and not trivial or imaginary kind".[290]

4.252 It is recognised that the expression "significant risk" is also used in a number of NSW statutes,[291] although without definition, or much in the way of judicial interpretation.

4.253 However, on balance, we are of the view that the expression "substantial" more appropriately reflects the concept which we have in mind of involving a real and not a fanciful risk. The expression "significant", by contrast, appears to have more of a qualitative flavour, or, if used in a quantitative sense, to invite a difficult question of degree.

4.254 It is noted that the *Criminal Code* (Cth) defines recklessness with respect to circumstances by reference to whether a person is aware of "a substantial risk" that the circumstance exists or will exist.[292] We have not, however, considered it necessary to incorporate the remaining element of that definition concerning the unjustifiability of D taking that risk. In the present context, which assumes that D has entered into a joint criminal enterprise and has continued to be a participant with the foresight mentioned, such a provision would have no useful work to do and would risk being a distraction.

Additional offence - homicide

4.255 Homicide occurring in the course of a joint criminal enterprise, in which the killing of the victim was not the intended objective, can give rise to considerable complexity. This is due to the different mental elements required for murder and manslaughter, and to the availability of "defences" that can reduce what would otherwise be murder to manslaughter.

4.256 In summary, each of the mental elements for murder depend on the existence of a specific intention to kill or to cause grievous bodily harm; or, in the case of reckless indifference, a subjective awareness of the probability of death; or, in the case of constructive murder, whatever intention or mental element is required for the qualifying offence that is necessary to attract an application of that doctrine.

4.257 Conduct that would qualify as murder (by reason of the presence of the necessary *actus reus* and *mens rea*) can be punishable as ***voluntary*** manslaughter, by reason

288. Cited by Hidden J in *Losurdo v R* (1998) 101 A Crim R 162, 166.

289. *R v Lloyd* [1967] 1 QB 175.

290. *Attorney-General; Ex rel Whitten v Gisborne Shire Council* (1980) 45 LGRA 1, 9.

291. See, eg, *Civil Liability Act 2002* (NSW) s 5K; *Crimes (Administration of Sentences) Act 1999* (NSW) s 106Q(1)(a)(i)(C); *Liquor Act 2007* (NSW) s 136B(3)(a); *Mental Health Act 2007* (NSW) s 58(1)(b); *Public Health Act 2010* (NSW) s 57(1); *Swimming Pools Act 1992* (NSW) s 23A(1)(b).

292. *Criminal Code* (Cth) s 5.4.

of the presence of one or other of the "defences" of provocation, substantial impairment by abnormality of mind, or self defence.

4.258 Conduct that would not qualify as murder, because of the absence of one or other of the mental elements mentioned above, can be punishable as ***involuntary*** manslaughter, where it constitutes an unlawful and dangerous act (one that a reasonable person in the position of the accused would have realised exposed the victim to an appreciable risk of serious injury),[293] or where it amounts to gross negligence (that is negligence of such a high degree as to merit criminal punishment).[294]

4.259 Unlike murder, involuntary manslaughter at common law involves the application of a wholly objective test which is referrable, respectively, to the appreciation of a reasonable person concerning the risks of the relevant conduct (unlawful and dangerous act manslaughter), or to the extent to which the conduct charged falls short of the standard of care which a reasonable person would have exercised in the circumstances (manslaughter by gross negligence).

4.260 A further complicating factor is that, while voluntary manslaughter requires the presence of the *mens rea* required for murder, some of the circumstances, that operate to reduce murder to that form of manslaughter, depend on the application of an objective test. In the case of provocation, for example, it is necessary that the provocation be of such a nature and so serious that there is a reasonable possibility that it could have caused an ordinary person, in the position of the accused,[295] to have so far lost his or her self control as to have formed an intent to kill or inflict grievous bodily harm upon the deceased.[296]

4.261 Self defence operates as a general defence, assuming that the accused personally believed that it was necessary to commit the relevant act for one of the prescribed purposes,[297] but only if it was a reasonable response in the circumstances as he or she perceived them. The question whether the response was reasonable is determined objectively, by reference to the proportionality of the response to the circumstances as subjectively perceived by the accused.[298] In the case of a response that led to the death of a person, where the conduct of the accused is found not to have constituted a reasonable response, in accordance with this objective test, then this can reduce what would have been murder to manslaughter. That will arise where the accused subjectively believed that it had been necessary to defend himself or herself or another person, or to prevent or to terminate the unlawful deprivation of his or her liberty, or that of another person.

4.262 Further complications potentially arise where the accused was intoxicated at the time of the act causing a death, the consequences of which (for a potential acquittal,

293. *Wilson v The Queen* (1992) 174 CLR 313.

294. *R v Nydam* [1977] VR 430, 445 and *Lavender v The Queen* (2005) 222 CLR 67, 87-88.

295. As to which expression see *Green v The Queen* (1997) 191 CLR 334.

296. *Crimes Act 1900* (NSW) s 23(2)(b).

297. *Crimes Act 1900* (NSW) s 418(2).

298. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 69; *R v Katarzynski* [2002] NSWSC 613 [16].

or a conviction for manslaughter rather than murder) will depend on whether his or her state of intoxication was, or was not, self induced; and on whether the accused either resolved before becoming intoxicated to do the relevant act, or became intoxicated in order to strengthen his or her resolve to do that act.[299]

4.263 However, beyond noting that the relevant provisions of the *Crimes Act 1900* (NSW) concerning intoxication will have a specific application for any person who is party to a joint criminal enterprise (and therefore to be taken into account in relation to recommendations 4.3(10) to (12)), we do not consider that any additional provision is required in the present context.

4.264 By reason of these complexities, which are unique to the area of homicide, we have given consideration to whether there should be a separate set of provisions applicable in this context. In this respect it is noted that the United Kingdom Consultation Paper concerning Murder, Manslaughter and Infanticide[300] proposed separate provisions applicable to murder and manslaughter, respectively, in the context of a "joint criminal venture".

4.265 In recommendation 4.3(8) we have proposed a solution for the case where a death is caused in the course of a joint criminal enterprise (other than one which would be subject to recommendation 4.3(7), that is where there was a common intention on the part of D and P to kill or cause grievous bodily harm), that would result in:

- D being guilty of murder if he or she foresaw that it was ***probable*** (that is, likely) that a death would result from an act of P, that was done with intent to kill or cause grievous bodily harm, in the course of carrying out the joint criminal enterprise in which D was participating; or
- D being guilty of manslaughter if he or she only foresaw that there was a substantial risk that a death would result from an unlawful act of P that was done in the course of carrying out the joint criminal enterprise in which D was participating.

This would preserve a subjective test concerning D's foresight.

4.266 In relation to murder, the test is expressed in terms of D foreseeing that it was "probable" that a death would result from an act of P done with the relevant intent. In this sense, consistently with the decision in *Darkan*, the test is intended to require foresight of a greater risk of occurrence than that which is denoted by the expression "substantial risk". What is here envisaged is foresight that it was "likely" that a death would result, an expression which has been regarded as synonymous with "probable".[301]

4.267 This formulation would accordingly elevate the bar for murder in a way which would more closely align D's liability with his or her moral responsibility. It also expressly preserves the alternative of manslaughter at a lower level of culpability.

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299. *Crimes Act 1900* (NSW) s 428A-428I.
300. Noted earlier in this Report: para 4.184-4.187.
301. For example, *Boughey v The Queen* (1986) 161 CLR 10; and *Crabbe v The Queen* (1985) 156 CLR 464.

4.268 It would have a consistency with the law in relation to offences other than murder for which "recklessness" is a necessary or available element. Although the definition of that term provided by the *Crimes Act 1900* (NSW) is inclusive (by providing that it may be established by proof of intention or knowledge) rather than exclusive,[302] it would seemingly continue to embrace a realisation or foresight of the possibility that a particular kind or degree of harm would arise from a given course of conduct, and a willingness to proceed nevertheless.

4.269 So formulated this would also address the question that was left open in *R v Rees*[303] concerning the way in which the test in *Wilson v The Queen*[304] should be applied in the context of the extended joint criminal enterprise principles.

4.270 As we note in the following chapter, these recommendations would apply to D where the homicide occurred in circumstances giving rise to a case of constructive murder on the part of P. For the reasons outlined, we consider that the current law is unsatisfactory since it potentially exposes D as an accessory of P (in relation to the foundational offence) to be convicted of constructive murder, even though D played no part in the acts giving rise to homicide and did not foresee death even as a possibility.

Application of the additional offence provisions

4.271 Each formulation will allow the jury to take into account any evidence of knowledge on the part of D (or any lack thereof) of such matters as whether P is armed, and, if so, with what weapons, and of any propensity D knows P may have for violence, or for particular forms of criminal behaviour. For example, D may know, in the context of an agreement to commit an offence of break, enter and steal, that P has a practice, in connection with such offences, of unlawfully damaging property that is left behind, or of sexually or physically assaulting any person found on the premises. Similarly, D may know, in the context of an armed robbery, that P has a history of using a weapon if met with resistance, or otherwise has a history for violence, or, in the case of a drug "rip off", that P has a hatred of the victim arising from earlier confrontations.

4.272 The formulations would also allow the jury to take into account the precise circumstance as they have unfolded, and are observed by D, at the time of P's commission of the additional offence. They would also allow the jury to consider whether any expression of opposition by D to the use, for example, of violence, and P's reassurance that violence would not take place, meant that D lacked the foresight required under these principles. This could be important in a gang-related activity, where the circumstances in which an offence is committed may be quite different from those which were envisaged, when the joint criminal enterprise was first hatched. In such a case, the opportunity for D to terminate his or her involvement may also be important, lending force to the argument that continuing participation in a joint criminal enterprise, with the necessary foresight of the risks

302. *Crimes Act 1900* (NSW) s 4A.

303. *R v Rees* [2001] NSWCCA 23 [31]-[35].

304. *Wilson v The Queen* (1992) 174 CLR 313.

attached, can be seen as a justification for the doctrine of extended joint criminal enterprise.

4.273 A formula of this kind would also allow a jury to apply a common sense approach, of the kind that was suggested in *R v Uddin,*[305] to the case where the weapon used by P differed from that which D believed P to be carrying, but was equally dangerous, without any need for an application of the fundamental difference rule. On that basis we have not recommended the inclusion of an express provision that would exempt liability where the additional offence was, for example, "significantly different" from the agreed offence. The foresight test would seem to provide sufficiently for such a case.

4.274 As noted earlier, our recommendation deals with the potential problem of the common law that is associated with the possibility of D being convicted of an offence on the basis of a lesser *mens rea* than that attaching to P.

4.275 Recommendation 4.3(13) is designed to maintain the common law requirement that the joint criminal enterprise still be on foot, so far as D is concerned, when the additional offence is committed.

4.276 Recommendation 4.3(9) has the effect of ensuring that the actual presence of D is not required at the place where, or at the time when, the additional offence is committed. This is consistent with the Commonwealth and ACT criminal codes[306] and with the decision in *Johns v The Queen.*[307] It is also consistent with contemporary experience that many offences are committed in circumstances where those involved may not be physically present at the scene of its commission, but are nevertheless in contact with one or another by phone, or internet.

4.277 It would accommodate, for example, the case of a joint terrorist enterprise to detonate an explosive device for the purpose of destroying a building. Only some of the participants to that enterprise may be at the location where the device is detonated, but all could be expected to foresee the risk of a death or deaths ensuing. In that event, an application of the recommendation would potentially render them liable not only for the agreed offence of destroying or damaging property by explosives,[308] but also for the additional offence of murder or manslaughter.[309] Similarly, it could accommodate the situation which might arise where P finds it necessary to assault or shoot a security guard in order to place the explosives in the target premises.

Defences and differential verdicts

4.278 Recommendations 4.3(10) and 4.3(13) are generally consistent with the Commonwealth and ACT Codes, and recognise the availability of a defence of withdrawal, as well as the possibility of D being convicted of the additional offence,

305. *R v Uddin* [1999] QB 431.
306. *Criminal Code* (Cth) s 11.2A(7)(b); *Criminal Code* (ACT) s 45A(7)(b).
307. *Johns v The Queen* (1980) 143 CLR 108.
308. *Crimes Act 1900* (NSW) s 195(1)(b).
309. *Crimes Act 1900* (NSW) s 18.

even though P has not been prosecuted or convicted of it. Recommendations 4.3(11) and 4.3(12) go somewhat further in making it clear that differential verdicts may be returned in relation to D and P, where one or other has a defence personal to himself or herself.

4.279 Recommendation 4.3(14) repeats the defence that we consider should be available generally, in relation to the various forms of complicity, that is where the offence in question is one that was designed for D's protection.

5. Felony or constructive murder

5.1 The constructive murder rule renders a person, who causes the death of another in the course of committing another offence of a particular category (the "foundational offence"), liable to be convicted of murder, even though he or she lacks the mental element otherwise required for that offence. In its original formulation, the foundations for which have been seriously questioned,[1] any killing in the course of an unlawful act was murder.[2] The breadth of the rule has differed over time, and the various restatements of the rule have altered the requirements for the foundational offence. By the 19th century, it came to be accepted that an unintended killing, in

1. J F Stephen, *A History of the Criminal Law of England* (1883) vol 3, 57-58; D Lanham, "Felony Murder – Ancient and Modern" (1983) 7 *Criminal Law Journal* 90.
2. E Coke, *Institutes of the Laws of England concerning High Treason, and other pleas of the Crown and criminal causes* (E and R Brook, 1797) Part 3, cap 8, 56.

the course of executing another unlawful purpose, only constituted murder if the other purpose amounted to a felony[3] and, then, only if the felonious conduct involved violence or danger to some person.[4] This form of the offence of murder is more correctly termed "constructive murder" because the necessary mental element is "constructed" or imputed to the accused.[5] The essential feature is that a killing, which occurs in the context of the foundational offence, is treated as murder even though it is neither intentional nor reckless.[6]

5.2 Constructive murder is not a separate offence, but a way of establishing the offence of murder.[7]

5.3 Constructive murder, both at common law and as enacted by statute in various jurisdictions, can apply not just to the actual perpetrator (whose act causes death), but also to an accomplice to the foundational crime.[8] This means that the doctrine overlaps to some extent with joint criminal enterprise, in particular extended joint criminal enterprise. For that reason we consider the doctrine in this Report, and make recommendations to deal with this overlap.

The law in NSW

5.4 In NSW, the common law rule has been amended and restated under s 18 of the *Crimes Act 1900* (NSW). In accordance with that provision, an accused commits constructive murder where he or she does, or omits to do, a thing that causes death:

(1) in an attempt by the accused to commit a crime punishable by imprisonment for life or for 25 years; or

(2) during, or immediately after, the commission by the accused, or an accomplice of the accused, of a crime punishable by imprisonment for life or for 25 years.

5.5 It extends liability to a person who kills another in the above two circumstances without requiring any mental element except that the act or omission occasioning the death be willed or "voluntary".[9] So far as it concerns the person who caused the death, there is no need for any requirement of foreseeability or causal link between the foundational offence and the act or omission causing death.[10] As noted later, somewhat different requirements apply in the case of an accomplice to the

3. *R v Radalyski* (1899) 24 VLR 687, 691; *Ross v The King* (1922) 30 CLR 246, 253.
4. *Ryan v The Queen* (1967) 121 CLR 205, 241; *R v Van Beelen* (1973) 4 SASR 353, 400-403; *DPP v Beard* [1920] AC 479,493; *R v Jarmain* [1946] 1 KB 74.
5. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Law Book Co, 2010) [9.125].
6. D Lanham, "Felony Murder – Ancient and Modern" (1983) 7 *Criminal Law Journal* 90, 90.
7. P Bindon, "The Case for Felony Murder" (2006) 9 *Flinders Journal of Law Reform* 149, 151. *R v Hitchins* [1983] 3 NSWLR 318, 324; *R v Foster* (1995) 78 A Crim R 517, 519.
8. *R v Solomon* [1959] Qd R 123; *R v R* (1995) 63 SASR 417; *R v Sharah* (1992) 30 NSWLR 292.
9. See *Ryan v The Queen* (1967) 121 CLR 205, 213-214, 243-246.
10. See *R v Sharah* (1992) 30 NSWLR 292, 297-298; *R v Johns* [1978] 1 NSWLR 282, 294-295; *R v Munro* (1981) 4 A Crim R 67.

foundational offence, where it is the act of the other party which is the direct cause of the death.

Origins

5.6 The constructive murder provision in NSW can trace its origins back to the Criminal Law Consolidation and Amendment Bill 1873, which arose from recommendations of Sir Alfred Stephen's Law Reform Commission.[11] It sought to restate the common law, amongst other things, by imposing some limits or restrictions on the circumstances in which it would apply. Clause 8 of that Bill stated:

> Whoever shall be convicted of murder, shall be liable to suffer death. Provided that where the act shall not have been premeditated or committed with criminal indifference to life nor have been done with intent to kill or inflict grievous bodily harm upon any person, nor ***in any attempt by the accused to commit, or during, or immediately after the commission by him of a capital offence, or burglary, or robbery, or some offence obviously dangerous to life***, it shall be lawful for the jury to find the accused guilty of manslaughter only.

5.7 The Attorney General, in the second reading of the Bill, explained the operation of constructive murder at common law:

> There can be little doubt that whenever death is caused, even unintentionally, in the commission of a felony, the crime is murder; the law, so to say, translates the real intent from the felony contemplated by the perpetrator, to the death which accidentally happens in the perpetration of the felony, which alone he intended to commit, and makes of the criminal a murderer, when he only possibly intended to be a thief. By a fiction of law, his original unlawful intent (to steal perhaps) is transferred to the capital offence, which is accidental.[12]

5.8 He then quoted extensively from the evidence of Mr J Fitzjames Stephen before the Select Committee of the House of Commons, in 1874, in which Stephen cited from *Russell on Crimes*:

> The editor of Russell quotes Lord Coke's 3rd institute, 56. 'If the act be unlawful it is murder; as if A meaning to steal a deer in the park of B shoots at the deer, and by the glance of the arrow kills a boy that is hidden in a bush, this is murder.' ... Then he goes on: "in Rex v Plummer, Kel 117,[13] the question is discussed in the judgment of the Chief Justice, and Lord Coke's dictum is explained to mean (this is the more lenient form of the doctrine) 'that, if two men have a design to steal a hen, and one shoots at the hen for that purpose, and a man be killed, it is murder in both, because the design is felonious; and it is said that, with that explanation, the books cited do warrant that opinion,' ie, Coke's opinion, 'that if you shoot at a fowl with intent to steal it, and a man is killed, it is murder by reason of the felonious intent.'

5.9 Stephen's anecdotal account of a trial at Warwick was also supplied:

> Three boys were walking through the streets of Birmingham to pick pockets; an old gentleman, who was fat and weak, comes walking along with a gold watch in his pocket; one of the boys gives him a slap to make him bend forward, and the

11. See Criminal Law Consolidation and Amendment Bill 1873 (NSW) cl 5; A Stephen and A Oliver, *Criminal Law Manual* (Government Printer, 1883) 9-10.
12. *Sydney Morning Herald* (11 January 1877).
13. *R v Plummer* (1701) Kelyng J 109, 117; 84 ER 1103, 1107.

> poor old man did bend forward, and died by reason of that slap. I suppose some vessel was fractured. As he bent forward the boy pulls out the watch from his pocket and hands it to the second, and the second to the third. They were all tried and condemned to be hanged.

5.10 Criticisms of the operation of the rule at common law were noted, including that offered by Stephen:

> And I say that it seems to me that the dignity of justice is compromised, and that a great scandal takes place whenever so solemn a thing as the condemnation of a man to death occurs without a serious intention that it should be executed.

and that of Baron Bramwell:

> The state of the law, in the extreme case which I put, is preposterous, and ought to be set right.

as well as of Justice Shee:

> I think it most desirable that an effort should be made to distinguish between premeditated murder, the perpetrator of which is never an object of pity, and unpremeditated, and also constructive murder or homicide; of which the guilt is greater than that of manslaughter, but in the commission of which the 'malice aforethought' has only a momentary existence, or is rather a fiction of law than an operating motive of action.

5.11 Just over a week after this debate, Sir Alfred Stephen foreshadowed an amendment to the Bill[14] the terms of which were accepted in the committee stage in the Legislative Council, on 9 May 1877. This made it clear that accomplices (referred to as "confederates") were also to be included:

> Murder shall be taken to be the maliciously killing of a person, whether by act or omission, with intent to kill or to do grievous bodily harm, either to him, or to some other person, ***where (with or without any such intent) such killing was immediately before, or during, or immediately after the commission by the accused, or some confederate with him, of an offence obviously dangerous to life or punishable by death or penal servitude for life, or in an attempt or with intent to commit such an offence.*** Every other homicide being murder by law at the time of the passing of this Act shall be deemed manslaughter only.

5.12 The Bill did not pass that session. A similar provision was, however, eventually passed in s 9 of the *Criminal Law Amendment Act 1883* (NSW):

> Whosoever commits the crime of Murder shall be liable to suffer death – And Murder shall be taken to be where the act of the accused, or thing done by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life – or with intent to kill or inflict grievous bodily harm upon some person – ***or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or a crime punishable by death or penal servitude for life.*** – Every other punishable homicide shall be taken to be Manslaughter.

This provision became s 18(1) of the *Crimes Act 1900* (NSW).

14. *Sydney Morning Herald* (19 January 1877) 5.

5.13 The original statutory provision was, therefore, limited to crimes that were capital offences or that were punishable by penal servitude for life, or acts that were "obviously dangerous to life". This was seen as a departure from the common law rule which applied to a person "committing (or about to commit) a felony of any kind".[15]

Subsequent amendments

5.14 The words "***or of an act obviously dangerous to life***" were removed in 1974.[16] The second reading speech explained the reasons for this removal:

> The definition of murder in the Act includes, quite unnecessarily, the situation where the act or omission causing the death charged was done or omitted during the commission of an act obviously dangerous to life. Three different lines of interpretation have been applied by the courts to this concept, and the committee is unanimously of the opinion that, according to which of these lines is adopted, the concept either unnecessarily increases the Crown's difficulties of proof, or is mere surplusage, or operates with unreasonable harshness against the accused. The bill accordingly omits the concept.[17]

5.15 The "three different lines of interpretation" of the words "of an act obviously dangerous to life" had been identified by the NSW Criminal Law Committee in its 1973 report on amendments to the criminal law and procedure, namely that:

> (a) the words require the commission of (or an attempt to commit) an act obviously dangerous to life, and, during that commission or attempt, a separate act or omission causing the death charged – we thought this "two acts" situation most unlikely to occur without creating the elements of murder by some other concept in the definition, and we saw the Crown's difficulties of proof perhaps doubled if it elects to prove two acts;
>
> (b) the test of "obviously dangerous" is subjective – we thought that this approach renders the concept mere surplusage as an act obviously (to the accused) dangerous to life cannot be committed without intent to kill or reckless indifference to human life;
>
> (c) the test is objective – we felt that, in reasonable fairness to accused persons, anything approaching a "reasonable man" test, whatever might be its appropriateness to lesser crimes, ought not to be allowed to continue as one of the derogations from the proposition that murder should require the intent to kill. We concluded that the concept is, at best, without meaning, and at worst, a source of real injustice, and we recommend its removal.[18]

5.16 Legitimate questions can be asked in relation to the correctness of each of these interpretations; and also in relation to the 1989 amendment, which extended the

15. A Stephen and A Oliver, *Criminal Law Manual* (Government Printer, 1883) 201.
16. *Crimes and Other Acts (Amendment) Act 1974* (NSW) s 5(a).
17. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 13 March 1974, 1355-1356.
18. NSW, Criminal Law Committee, *Proposed Amendments to the Criminal Law and Procedure*, Report (1973) 6.

range of qualifying offences to those that attracted sentences of imprisonment for 25 years.[19]

5.17 There are currently a large number of State offences which attract such maximum penalties.[20] Most of these offences relate to crimes of serious violence, but there are some that do not necessarily involve acts of violence at all.[21] Some of these offences can, however, have very serious potential consequences, for example those concerned with the sabotage of public infrastructure, transport facilities or computer systems for the provision of banking services to the public,[22] or with the manufacture or sale of a commercial quantity of a controlled drug or the possession of such a substance with the intention of selling it.[23]

5.18 It is not entirely clear whether criminal offences at common law, for which the penalty is at large, for example, false imprisonment, conspiracy and escape lawful custody,[24] would qualify as foundational offences. There is, however, a viable argument[25] that, where the penalty for an offence is at large, this cannot be equated with a nominate penalty, no matter how high or low it might be. If so, they would not qualify for the purpose of the section.

Common law developments

5.19 The reach of the constructive murder rule at common law has been narrowed in those jurisdictions which have not replicated the NSW provision, in particular, with respect to the requirements for the foundational offence. For example, by 1949, in Victoria, it was observed:

> For fifty years past the view prevailing in England seems consistently to have been that death unintentionally brought about in the commission or furtherance of a felony is only murder in the actor, if the felony is one which is dangerous to life and likely in itself to cause death. The language used has varied with different judges, but has been substantially to the same effect as just set out.[26]

5.20 In 1967, Justice Windeyer considered that the "generally accepted rule of the common law", was "that an unintended killing in the course of or in connexion with a felony is murder if, but only if, the felonious conduct involved violence or danger to some person".[27]

19. *Crimes (Life Sentences) Amendment Act 1989* (NSW) s 3, sch 1(2).
20. See Appendix C for a complete list of these offences.
21. See, eg, *Drug Misuse and Trafficking Act 1985* (NSW) s 24(2A), s 25(2D), s 33AC.
22. *Crimes Act 1900* (NSW) s 203B.
23. *Criminal Code* (Cth) s 306.2, s 302.3, s 303.5, s 304.2, s 305.4.
24. Preserved by *Crimes Act 1900* (NSW) s 343.
25. *Clyne v DPP* (1984) 154 CLR 640.
26. *R v Brown* [1949] VLR 177, 181.
27. *Ryan v The Queen* (1967) 121 CLR 205, 241. Variations of the rule over time have included whether the felony must involve violence, and if so, which felonies are classified as involving violence: J Willis, "Felony murder at common law in Australia – the present and the future" (1977) 1 *Criminal Law Journal* 231, 232-233.

The law in other jurisdictions

5.21 Other jurisdictions have responded to the constructive murder rule in a variety of ways, ranging from abolition by statute or by judicial decision, to restatement or modification by statute.

Common law jurisdictions

5.22 Of the other common law States, Victoria and South Australia have abolished and restated the law in this area. The ACT, before the introduction of its code, abolished felony murder without restatement, in 1990.[28]

5.23 In Victoria, the common law was replaced in 1981.[29] The equivalent offence requires that the act causing death be an "act of violence". It also requires that the foundational offence be one "the necessary elements of which include violence".[30] The Victorian provision has been said to cover much the same range of killings "as would have been incriminated by the narrowest conception of felony murder at common law ... that is, a killing resulting from an act of violence done during a violent felony".[31] Excluded from this provision, however, are offences which "*might* be carried out without violence, whether or not carried out violently in fact".[32] It has been suggested that such offences could include rape, arson, kidnapping and burglary.[33]

5.24 In South Australia, the common law was replaced in 1984.[34] Under the equivalent provision, the act causing death must be "an intentional act of violence", and the foundational offence must be "a major indictable offence punishable by imprisonment for ten years or more (other than abortion)".[35]

5.25 In England and Wales, felony murder has been abolished without restatement. The relevant provision now simply states that a person who kills another in the course or furtherance of some other offence will not be guilty of murder, unless he or she acts with the same "malice aforethought (express or implied) as is required for a killing to amount to murder, when not done in the course or furtherance of another offence".[36]

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28. See *Crimes Act 1900* (ACT) s 12(1) inserted by *Crimes (Amendment) Ordinance (No 2) 1990* (ACT) s 5.
29. *Crimes (Classification of Offences) Act 1981* (Vic) s 3(1).
30. *Crimes Act 1958* (Vic) s 3A(1).
31. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 638.
32. Victoria, Law Reform Commissioner, *Murder: Mental Element and Punishment*, Working Paper 8 (1984) [15].
33. Victoria, Law Reform Commissioner, *Murder: Mental Element and Punishment*, Working Paper 8 (1984) [15].
34. *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA) s 5.
35. *Criminal Law Consolidation Act 1935* (SA) s 12A. The common law in SA had previously been that "it is murder to cause death in the commission of or in furtherance of the commission of a felony involving violence or danger": *R v Van Beelen* (1973) 4 SASR 353, 403.
36. *Homicide Act 1957* (Eng) s 1(1). The abolition was recommended by United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [121]. There was considerable debate as to whether this abolition had been rendered pointless by the House of

Code jurisdictions

5.26 The Western Australia and Queensland Code equivalents of constructive murder provide that a person who unlawfully kills another is guilty of murder if the "death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life".[37] It has been noted that the WA and Queensland provisions go beyond the common law in applying not only to felonies of violence but to all "unlawful purposes".[38]

5.27 In Tasmania, the killing of a person is murder, even if the offender "did not intend to cause death, and did not know that death was likely to ensue", if it is committed:

- with an intention to inflict grievous bodily harm; or
- by means of administering any stupefying thing; or
- by wilfully stopping the breath of any person,

for the purpose of facilitating:

- the commission of piracy, and offences deemed to be piracy, murder, escape or rescue from prison or lawful custody, resisting lawful apprehension, rape, forcible abduction, robbery with violence, robbery, burglary or arson; or
- the flight of the offender upon the commission, or attempted commission of the listed offences.[39]

5.28 The Tasmanian provision is based on the provision in the English Draft Criminal Code that was proposed by the Royal Commission of 1878-1879. It is probably the most limited of the formulations of constructive murder, in as much as the requirement of an intention to inflict grievous bodily harm is essentially the same as the requirement for intentional murder.[40] Notably, however, no intention (even to inflict grievous bodily harm) is required when the offender kills by "administering any stupefying thing" or by "wilfully stopping the breath" of the victim.[41] A version of this provision is also available in Queensland. It extends to a wide range of crimes for which an offender may be arrested "without warrant".[42]

5.29 Canada also adopted the constructive murder provisions of the English Draft Criminal Code in its Criminal Code of 1892. The provisions were, however, amended over the years, so that more recent formulations:

Lords' decision in *DPP v Smith* [1961] AC 290: see, eg, J L Travers, "Imputed intent in murder or Smith v Smyth" (1961) 35 *Australian Law Journal* 154, 164-165.

37. *Criminal Code* (Qld) s 302(1)(b); *Criminal Code* (WA) s 279(1)(c). This is the essential provision, other related provisions being too obscure, or unnecessary: C Howard, *Criminal Law* (4th ed, Law Book Company, 1982) 67.
38. C Howard, *Criminal Law* (4th ed, Law Book Company, 1982) 70.
39. *Criminal Code* (Tas) s 157(1)(d)-(f), (2).
40. J Edwards, "Constructive murder in Canadian and English Law" (1961) 3 *Criminal Law Quarterly* 481, 489-490; P Burns and R S Reid, "From felony murder to accomplice felony attempted murder: the Rake's progress compleat?" (1977) 55 *Canadian Bar Review* 75, 83.
41. J Edwards, "Constructive murder in Canadian and English Law" (1961) 3 *Criminal Law Quarterly* 481, 490-491.
42. *Criminal Code* (Qld) s 302(1)(c)-(e) and (4).

- required merely an intention to cause "bodily harm" rather than "grievous bodily injury"; and
- extended liability in situations where the offender used, or had upon his or her person, any weapon "during or at the time" he or she commits, or attempts to commit, one of the listed offences, or "during or at the time" of his or her flight after committing, or attempting to commit, one of the listed offences, and "death ensues as a consequence".[43]

5.30 The Canadian Supreme Court, however, subsequently struck down the constructive murder provisions under s 213 of the Criminal Code as infringing the *Canadian Charter of Rights and Freedoms*.[44] It was observed that there are "certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime", amounting at least to an objective foreseeability of the likelihood of death.[45]

Operation of the rule with respect to accomplices

5.31 A particular issue arises concerning the operation of the constructive murder rule in relation to accomplices to the foundational offence, who do not perform the act causing death.

5.32 It has been held that liability can be attributed to an accomplice to a foundational offence under the constructive murder provision,[46] even though the accomplice's act was not the cause of the death, and even though the accomplice did not counsel, assist or encourage the co-offender to commit the act occasioning the death. It has even been held that an accomplices' presence at the time of the fatal act is not necessary for that accomplice to be convicted by way of the constructive murder rule.[47]

5.33 In its traditional form, the rule has made accomplices liable for constructive murder on the basis of their complicity in the foundational offence, rather than in the act causing the death.[48] In NSW, Chief Justice Jordan accepted this to be so, in 1942, when noting that, if the agreement of the parties does not encompass the doing of something that amounts to murder, on a ground other than constructive murder:

> it is necessary, in order that the person who is an accomplice only may be guilty of murder, that it should have been within the common purpose of both that ... a crime punishable by death or penal servitude for life, should be committed, and

43. *Criminal Code*, RSC 1970, c C-34, s 213.
44. *Canadian Charter of Rights and Freedoms* s 7 (that a person is not to be deprived of life, liberty and security of the person "except in accordance with the principles of fundamental justice") and s 11(d) (any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal").
45. *Vaillancourt v The Queen* [1987] 2 SCR 636; 47 DLR (4th) 399 [100]-[103].
46. See *R v Jacobs* (2004) 151 A Crim R 452 [190]-[216].
47. *R v Lew* [2003] NSWSC 1073, a conclusion not questioned on appeal: *R v Lew* [2004] NSWCCA 320.
48. See *R v R* (1995) 63 SASR 417; *R v Solomon* [1959] Qd R 123, 126-127; D Lanham, "Accomplices and Constructive Liability" (1980) 4 *Criminal Law Journal* 78, 79-80.

> the cause of the death must have been something done by the other in an attempt to commit or during or immediately after the commission of that act or crime.[49]

5.34 Recent decisions of the NSW Court of Criminal Appeal appear to have imported a limited mental or fault element for constructive murder, in the case of an accomplice, namely, that the accomplice "had in mind" the "contingency" that the principal offender might carry out the act that caused the death.

5.35 This additional requirement for an accomplice first came to prominence in NSW in *R v Sharah*, where it was adapted from an earlier case, in which an appeal judge had approved the trial judge's summary of the prosecution's submissions.[50] *Sharah* was a case in which an offender (A) killed a victim (N), during the course of an armed robbery with wounding[51] in which another party (J) was wounded. S was charged as an accomplice to the armed robbery. He was also charged with murder. The Court of Criminal Appeal held that the prosecution had to prove, in relation to S's culpability for the foundational offence of armed robbery with wounding, that:

(i) there was a common purpose between S and A in company to rob J while A was, to S's knowledge, armed with an offensive weapon;

(ii) during the course of the armed robbery, A wounded J; and

(iii) S contemplated that, in carrying out the common unlawful purpose of armed robbery, such wounding might occur.

5.36 Then, in order to establish constructive murder in relation to S, the Court held that the prosecution had to prove that:

(i) there was a common purpose between S and A in company to rob J while A was, to S's knowledge, armed with an offensive weapon;

(ii) during the course of the armed robbery, A wounded J, and, during the course of such armed robbery with wounding or immediately thereafter, A discharged the weapon killing N; and

(iii) S had in mind the contingency that A would discharge the weapon during or immediately after the armed robbery with wounding of J, whether or not the weapon was fired intentionally and whether or not in furtherance of the common unlawful purpose.[52]

5.37 The third element in the constructive murder direction, which was approved in this case, appears to have imported an additional requirement for an application of the constructive murder rule to an accomplice. Previously the rule had, in relation to both the principal and accomplice, required only that the act or omission causing

49. *R v Surridge* (1942) 42 SR (NSW) 278, 283.
50. *R v Johns* [1978] 1 NSWLR 282, 294-295.
51. Under *Crimes Act 1900* (NSW) s 98.
52. *R v Sharah* (1992) 30 NSWLR 292, 297-298.

death be connected with the acts forming part of the foundational offence.[53] It had not required any foresight or contemplation, on the part of the accomplice, that the principal would use a weapon in the course of committing or attempting to commit the foundational offence.

5.38 Judges in the NSW Court of Criminal Appeal have subsequently applied the directions approved in *Sharah* without criticism,[54] and the *Criminal Trial Courts Bench Book* has also adopted them.[55] In *R v Spathis* Acting Justice Carruthers observed that "the critical question always must be whether the act causing death was within the contemplation of the accessory in his role as a principal in the original criminal enterprise".[56] The historical basis for this direction is unclear. It may be that it was thought appropriate to draw, by analogy, on the approach that had been developed, in relation to joint criminal enterprise liability; or perhaps, that the case was seen as one to which that form of liability applied.

5.39 We note however that the Supreme Court of South Australia rejected the submission of the appellant in *R v R*[57] that the criminal liability of a principal in the second degree, or of an accessory before the fact, to a felony, for a murder committed in the course of the felony, should be determined according to the common purpose rule laid down in *Johns*.[58] Chief Justice King with whom the other members of the Court agreed observed:

> As the Solicitor-General (Mr Doyle QC) observed, the argument on grounds of policy is really an attack on the felony murder rule itself. If the policy is accepted that the actual perpetrator should be liable for the unintended consequences of his actions in the course of the felony because in engaging in a violent or dangerous felony he must accept responsibility for what occurs in the course of that felony, even though unintended, there appears to be no reason of policy why other participants in the felony should not also have to accept the same responsibility.[59]

5.40 As enacted in s 12A of the *Criminal Law Consolidation Act* (SA) and, as interpreted by decisions in South Australia,[60] it does not seem to have been a requirement for the operation of the constructive murder rule, in that State, that the accomplice have the foresight required by *Sharah*.[61] The decision in *Sharah* preceded the decision of the High Court in *McAuliffe v The Queen*[62] that clarified the reach of the doctrine of extended joint criminal enterprise, although without directing attention to the manner

53. *Mraz v The Queen* (1955) 93 CLR 493, 505. The Criminal Law Officers Committee has characterised constructive murder as imputing "the fault element required for murder by reason of the coincidence of the death occurring in the context of other criminal conduct": Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 61.
54. *R v Spathis* [2001] NSWCCA 476 [233], [443] (Carruthers J, Heydon JA agreeing); *R v Jacobs* (2004) 151 A Crim R 452 [223].
55. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [2-900] and [2-910].
56. *R v Spathis* [2001] NSWCCA 476 [315] (Carruthers AJ, Heydon JA and Smart AJ agreeing).
57. *R v R* (1995) 63 SASR 417, 420-421.
58. *Johns v The Queen* (1980) 143 CLR 108.
59. *R v R* (1995) 63 SASR 417, 420-421; see also 424 (Matheson J), 424 (Millhouse J), 424 (Perry J), 425 (Duggan J).
60. *R v McBride* (1983) 34 SASR 433.
61. *R v Sharah* (1992) 30 NSWLR 292.
62. *McAuliffe v The Queen* (1995) 183 CLR 108.

in which that doctrine might, in a suitable case, overlap or interact with the constructive murder rule.

Justification of the rule

5.41 Generally, the rule has been seen as useful for the purposes of:

- **Deterrence** of the foundational offence.[63]
- **Retribution** against a person who must accept the consequences of engaging in a criminal enterprise.[64] In the most common scenario for constructive murder, the armed robbery gone wrong, it is said to be an insufficient response for an accused to claim that he or she did not intend to kill or to harm the victim; that the pistol carried was meant only to frighten the victim into submission; or that its discharge in the course of an unexpected scuffle was unforeseen. As the accused intended to participate in a serious criminal offence, he or she should be held accountable if things go awry and a person is killed in the course of committing that offence.
- **Facilitating prosecution** in cases where the mental element required for murder is difficult to prove. Constructive liability for the killing is in effect a legal device, grounded on considerations of policy and practicality, which enables the requisite intention for murder to be "constructed" from that attaching to the foundational offence. Its exceptional nature is attributable to the fact that a death is occasioned in the course of the commission or attempted commission of a particularly serious offence.

Criticisms

5.42 There are a number of criticisms of the constructive murder rule, both generally and in relation to its application to accomplices. It has been the subject of calls for its abolition,[65] and its jurisprudential origins have been questioned.[66]

Intention not required

5.43 Perhaps at the most basic level, the criticism focuses on the fact that the only mental element required, under the constructive murder rule, is that which is required in relation to the foundational offence, thereby departing from the principle

63. See Victoria, Law Reform Commissioner, *Law of Murder*, Report 1 (1974) [40]-[49]; Law Reform Commission of Canada, *Homicide,* Working Paper 33 (1984) 48; Law Reform Commission of Victoria, *Homicide*, Report 40 (1991) [148]; Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 63.
64. Law Reform Commission of Canada, *Homicide,* Working Paper 33 (1984) 48. See also P Burns and R S Reid, "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977) 55 *Canadian Bar Review* 75, 83.
65. For a consideration of the criticisms offered from many quarters see P Bindon, "The Case for Felony Murder" (2006) 9 *Flinders Journal of Law Reform* 149; B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 71, 76.
66. D Lanham, "Felony Murder – Ancient and Modern" (1983) 7 *Criminal Law Journal* 90.

of correspondence between the fault and physical elements required for the commission of an offence of murder.[67]

5.44 Put another way, it has been said to be contrary to established principles of criminal liability for someone to be held liable and punished for murder, when that person neither intended to cause death or grievous bodily harm, or foresaw that such an outcome was likely.[68] The Criminal Law Officers Committee, in stating that the rule was contrary to its "fault-based approach to determining culpability", suggested:

> Persons who kill while committing a felony or attempting to escape should be treated in the same way as any other person. If they intended to kill or are reckless as to death they will be convicted of murder pursuant to the existing rules regarding intentional and reckless killing. In the absence of these circumstances – where the death is truly accidental – murder should not be an issue. In these cases, manslaughter by gross negligence may be an appropriate charge but in any event the defendant can be prosecuted for the offence he or she intended to commit.[69]

Dubious deterrent effect

5.45 The deterrent effect of punishment consequent upon a conviction for constructive murder, at least with regards to the act causing death, has also been called into question.[70] It is unlikely that those who embark on a criminal venture, such as an armed robbery, are aware of the existence of an offence of constructive murder, or, even if they are aware of it, that this would deter them from proceeding with the intended foundational offence.

Unfairness

5.46 Unfairness has been suggested to arise from the fact that that the person convicted of constructive murder is subject to the same penalty as that for intentional murder. Although the availability, in NSW, of a sentence of less than life imprisonment for murder means that there is room for "sentencing justice to be done in those cases where there might otherwise be cause for concern",[71] it can also be argued, at least

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67. P Bindon, "The Case for Felony Murder" (2006) 9 *Flinders Journal of Law Reform* 153. In this respect the rule sits uncomfortably with the affirmation of the subjective intention approach to criminal law seen in *Parker v The Queen* (1963) 111 CLR 610.
68. United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [94]; Victoria, Law Reform Commissioner, *Law of Murder*, Report 1 (1974) [37]; Law Reform Commission of Canada, *Homicide,* Working Paper 33 (1984) 50-51; Law Reform Commission of Victoria, *Homicide*, Report 40 (1991) [149].
69. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 63.
70. United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [94]; Victoria, Law Reform Commissioner, *Law of Murder*, Report 1 (1974) [40]-[49]; Law Reform Commission of Canada, *Homicide,* Working Paper 33 (1984) 48; Law Reform Commission of Victoria, *Homicide*, Report 40 (1991) [148]; Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 63.
71. G D Woods, "The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales" (1983) 57 *Australian Law Journal* 161, 166. See also Victoria, Law Reform Commissioner, *Murder: Mental Element and Punishment*, Working Paper 8 (1984) [19].

in NSW, that the penalties required to establish a qualifying (foundational) offence – a minimum of 25 years imprisonment – allow ample scope for judges to satisfy any community demands for retribution for cases in which a victim is killed in the course of, or immediately after, the commission of a serious crime.[72]

5.47 Any criticism of the penalty available for constructive murder, in its application to the person who caused the death, would seem even more justified in the case of an accomplice who stood by while the principal committed that act, and who neither encouraged its commission or wished such an outcome. Canadian commentators have observed:

> We are at a loss to perceive why an accomplice should be guilty of murder in a situation where death ensued from the accidental use of a weapon by the actual perpetrator.[73]

5.48 This concern may be of less weight in NSW as a result of the decision in *Sharah,* which recognises that a mental element is required of the accomplice to the qualifying (foundational) offence, which is not required of the person who caused the death.

Double jeopardy

5.49 A conviction for constructive murder may give rise to an element of double jeopardy in circumstances where a sentence for the foundational offence may also be imposed in addition to a sentence for the murder.[74] However, it might normally be expected that any sentence imposed for the two offences would be at least partially, if not wholly concurrent.

Inconsistent and confusing

5.50 It can be argued that the operation of the constructive murder rule with respect to accomplices is complex and confusing for juries. This is especially the case in light of the *Sharah* direction, so that, in joint trials, there is an additional mental element required of an accomplice, which is not required of the offender who caused the death, but which needs to be explained to the jury. Additionally, the *Sharah* requirement differs from that required for extended joint criminal enterprise (that is, foresight of the possibility of the principal offender doing an act with one or other of the mental states required for murder on his or her part). As a consequence, there is a risk of jurors being confused if the prosecution seeks a conviction against the secondary participant (accomplice to the foundational offence) on the alternative bases of extended joint criminal enterprise and constructive murder.

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72. Victoria, Law Reform Commissioner, *Murder: Mental Element and Punishment*, Working Paper 8 (1984) [23].
73. P Burns and R S Reid, "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977) 55 *Canadian Bar Review* 75, 93.
74. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 63.

5.51 In relation to the principal participant, it will not be apparent from a guilty verdict whether it was returned by the jury on the basis of constructive murder, or of killing with specific intent, or reckless indifference.[75] In the case of the secondary participant, it will similarly not be apparent whether the verdict was returned on the basis that he or she was convicted as an accomplice in the second degree to the killing, or as a party to an extended joint criminal enterprise, or as an accomplice to the foundational offence who was liable by reason of the constructive murder rule.

Not limited to violent crimes

5.52 It has been suggested that the NSW formulation is even more capricious than the rule at common law, because the foundational offence need only be a crime punishable by imprisonment for life or for 25 years, "regardless of the degree of personal danger involved in the crime in question", and also because it extends to acts committed immediately after the foundational offence.[76]

Options for reform

5.53 A number of options present themselves.

Abolish the rule

5.54 There have been numerous calls, in various jurisdictions, for the abolition of the rule in its different forms,[77] for the reasons noted above.

5.55 Although Commonwealth law makes provision for offences of homicide in a limited range of circumstances (for example, in relation to the murder of United Nations personnel, and Australian residents overseas, as well as killings occurring in the course of genocide, war crimes or crimes against humanity);[78] it does not contain any provision that would permit the constructive murder rule, or any equivalent principle, to be employed as a means of establishing those offences. The *Criminal*

75. Victoria, Law Reform Commissioner, *Murder: Mental Element and Punishment*, Working Paper 8 (1984) [20]. See also *R v Spathis* [2001] NSWCCA 476 [224]-[237].

76. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 76.

77. For example, United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [107], [111]; Victoria, Law Reform Commissioner, *Law of Murder*, Report 1 (1974) [50]; Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977) 15-16; Law Reform Commission of Canada, *Homicide*, Working Paper 33 (1984) 51; Victoria, Law Reform Commissioner, *Murder: Mental Element and Punishment*, Working Paper 8 (1984) [27]; Law Reform Commission of Victoria *Homicide*, Report 40 (1991) Rec 19; Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 65; D Lanham, "Felony Murder – Ancient and Modern" (1983) 7 *Criminal Law Journal* 90, 101.

78. The *Criminal Code* (Cth) covers, for example, homicide where the victim is a representative of the United Nations or associated person (s 71.2 and 71.3); where the killing is of an Australian resident or citizen overseas (s 115.1 and 115.2), where the killing constitutes an act of genocide (s 268.3) or a crime against humanity (s 268.8 and 268.9) or a war (s 268.24, s 268.40, s 268.49, s 268.70 and s 268.90)

Code (ACT) similarly, no longer encompasses a form of murder dependent on the constructive murder rule.[79]

5.56 As noted earlier, the common law constructive murder rule was repealed in 1957 in the United Kingdom[80]; and the statutory form of the offence in the Canadian Criminal Code was held to be unconstitutional in 1987.[81]

5.57 However, numerous reviews, while acknowledging the reasons of principle justifying abolition of the rule, have noted that it has public support and have identified the arguments for retaining it on policy grounds.[82] The Criminal Law Officers Committee observed that it has survived, in one form or another, in most jurisdictions, and suggested that "society has little sympathy for persons who kill in the course of the commission of a serious crime".[83] Notwithstanding, it supported its abolition on the basis that equating accidental killings with murder was inconsistent with the fault-based approach to criminality that the Committee had adopted.[84]

5.58 The NSW Criminal Law Committee, in considering the provision in 1973, felt that it could not, "at least in the present climate, advocate any reduction in the scope of this concept, despite the argument that the gravest crime known to the law ought not to be capable of commission without the specific intent to commit it".[85] In 1983, one commentator observed:

> However it is a fact of life that the majority of New South Wales citizens generally take a hard view of the violent burglar or robber who kills in the course of his villainy, whether "accidentally" or otherwise. It would be an adventurous legislator who set out to amend the definition of "murder" to delete such behaviours from its ambit, however much he might privately agree in principle with [calls for its abolition].[86]

5.59 The South Australian legislature had contemplated abolishing felony murder, acknowledging the "unanimity of [legal] professional opinion" in favour of doing so,[87] but ultimately decided to retain it.[88] Chief Justice King, in 1995, observed:

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79. The *Crimes (Amendment) Ordinance (No 2) 1990* (ACT) s 5 having repealed the felony murder provisions in the ACT prior to enactment of the Code.
80. *Homicide Act 1957* (Eng) s 1(2).
81. *Vaillancourt v The Queen* (1987) 2 SCR 636.
82. For example, some members of the NZ Crimes Consultative Committee also considered the rule to be "an important policy statement about how the public views those responsible for a death occurring in the course of prosecuting some form of criminal activity": New Zealand, Crimes Consultative Committee, *Crimes Bill 1989* (1991) 52. See also M J Murray, *The Criminal Code: A General Review* (Report to the Attorney General of Western Australia, 1983) vol 1, 173-174.
83. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 63.
84. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998) 63.
85. NSW, Criminal Law Committee, *Proposed Amendments to the Criminal Law and Procedure*, Report (1973) 6.
86. G D Woods, "The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales" (1983) 57 *Australian Law Journal* 161, 165.
87. South Australia, *Parliamentary Debates*, Legislative Council, 5 May 1994, 767-768 (K T Griffin, Attorney-General).

> If the policy is accepted that the actual perpetrator should be liable for the unintended consequences of his actions in the course of the felony because in engaging in a violent or dangerous felony he must accept responsibility for what occurs in the course of that felony, even though unintended, there appears to be no reason of policy why other participants in the felony should not also have to accept the same responsibility.[89]

Limit the rule to offences or actions involving violence or inherent danger

5.60 Arguments in favour of retention of the rule, in a limited form, are more convincing.

5.61 The British Royal Commission on Capital Punishment, in 1953, observed that the argument, that the rule is necessary to protect human life, because experience shows that there are "so many cases of death caused by attempts to commit felonies", was more plausible if the rule was limited to "felonies of violence" or, yet more narrowly, to "acts of violence committed in the course of such felonies".[90] The Royal Commission, however, noted that such formulations involved a "difference of degree, not of principle".[91]

5.62 Most of the Code States and Territories, and the remaining common law States, have in fact adopted an approach that focuses on the presence of violence in relation to the foundational offence. In some formulations, there is a requirement that the foundational offence be one, the necessary *elements* of which include violence,[92] while other formulations require that the *act* causing death be an intentional act of violence,[93] or that it be of such a nature as to be likely to endanger human life.[94] A number of variations suggest themselves.

5.63 In Victoria, the requirement that the qualifying offence be one "the necessary elements of which include violence", was inserted as an amendment of the relevant section during the passage of the *Crimes (Classification of Offences) Bill 1981* (Vic), in place of the words "crime of violence".[95] This was seen as a deliberate departure from the common law use of the expression "felony involving violence".[96] The Full Court of the Victorian Supreme Court has considered that "violence", where used in the Victorian restatement of the rule:

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88. The doctrine was said to enjoy "a certain popular appeal" and, more obscurely, that it was felt "such a reform would be controversial, and that controversy would be destructive of the main aim of the Bill – which is to abolish the anachronistic distinction [between felonies and misdemeanours]": South Australia, *Parliamentary Debates*, Legislative Council, 5 May 1994, 767-768.
89. *R v R* (1995) 63 SASR 417, 421.
90. United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [95]-[96]. See also J Edwards, "Constructive murder in Canadian and English Law" (1961) 3 *Criminal Law Quarterly* 481, 506-507.
91. United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [97].
92. *Crimes Act 1958* (Vic) s 3A as explained in *R v Butcher* [1986] VR 43.
93. *Criminal Law Consolidation Act 1935* (SA) s 12A.
94. *Criminal Code* (WA) s 279(1)(c); *Criminal Code* (Qld) s 302(1)(b).
95. *R v Butcher* [1986] VR 43, 51; Victoria, *Parliamentary Debates*, 6 May 1981, 8688.
96. *R v Butcher* [1986] VR 43, 50.

> is not to be understood to refer only to physical force but rather to include those aspects of intimidation and seeking to intimidate by the exhibition of physical force or menaces as in the past have been considered to constitute violence.[97]

5.64 In Tasmania, the rule has been restricted to a number of specific offences,[98] in which the risk of violence or danger to others is inherent. It has, however, been suggested that relying on a list of specific offences and specified forms of violence, "would be clumsy and would inevitably give rise to anomalies".[99]

5.65 An alternative approach, which has been suggested, would be to "create a rebuttable presumption of recklessness as to death for those committing violent crimes".[100] This would follow the recommendation in the American Law Institute's Model Penal Code,[101] which provides that criminal homicide amounts to murder when:

> it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

5.66 The commentary to the Model Penal Code suggests that the effect of the model provision is "to abandon felony murder as a separate basis for establishing liability for homicide and to retain the presumption... as a concession to the facilitation of proof".[102] A criticism offered of such a provision is that "we should not be resorting to an artificial fiction in defining murder".[103] Problems have also been raised in relation to the use of the terms "recklessness" and "indifference" in this context.[104]

5.67 There is some support for requiring the act causing death to be itself one involving violence, or dangerousness. As one commentator has put it:

> What matters is not the abstract character of the felony itself but the manner in which it is carried out.[105]

5.68 It is at least arguable that the common law, in requiring that violence either be an inherent feature of the foundational offence, or a fact present in the commission of

97. *R v Butcher* [1986] VR 43, 51.
98. J Willis, "Felony murder at common law in Australia – the present and the future" (1977) 1 *Criminal Law Journal* 231, 234.
99. United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [111].
100. D Stuart, *Canadian Criminal Law: A Treatise* (Carswell, 1982) 224.
101. Model Penal Code s 210.2(1)(b).
102. American Law Institute, *Model Penal Code and Commentaries* (1980) Part 2 (Definition of specific crimes §210.0 to 213.6) 30.
103. D Stuart, *Canadian Criminal Law: A Treatise* (Carswell, 1982) 224.
104. G L Williams, *The Mental Element in Crime* (Hebrew University, 1965) 91-101.
105. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 69.

that offence, was heading in the direction which these various alternatives suggest.[106]

5.69 One commentator has suggested the use of the expression "dangerous act" is preferable to the term "act of violence" because "the act which causes death may not be violent in any helpful sense".[107] That commentator has also cautioned that defining the foundational offence as one that involves violence "necessitates the identification of a class of felonies violent in themselves":

> It would be difficult to identify such a class without putting a strained meaning on the word "violent", for it would have to include not only arson, gaolbreak, and possibly larceny in a dwelling-house, which in themselves are not violent at all, but also rape, which equally can be committed without any significant element of violence, and robbery, which requires no more than the threat of violence.[108]

Confine the operation of constructive murder to the perpetrator

5.70 Another option would be to confine the operation of constructive murder to the party whose act causes the death. One way to achieve this would be to remove the constructive murder provisions from s 18(1) of the *Crimes Act 1900* (NSW) and to enact a new provision which makes it clear that the constructive murder rule applies only to the accused whose act caused the death. This still would leave open the potential for the accomplice (secondary participant) to be convicted of murder, by reference to the principles applicable in extended joint criminal enterprise; or as an accessory, where he or she encouraged or assisted the principal offender to carry out the act causing death, with the mental element required of an accessory.

Require an additional mental element for accomplices

5.71 If constructive murder is to be preserved for accomplices, then consideration needs to be given to whether the additional requirement for accomplices, arising from the decision in *Sharah,* should be given statutory effect.

5.72 The Royal Commission on Capital Punishment, in 1953, in recommending the abolition of constructive murder, gave separate consideration to the question of accomplices. It concluded that:

> It is right that those who jointly embark on a felony intending that some violence shall be used should share the consequences if the violence actually used proves greater than was contemplated. In our view considerations both of equity and of public protection demand the maintenance of the principle of the existing law that when two or more persons are parties to a common design for the use of unlawful violence and the victim is killed, all the parties to the common design should be held responsible and all should be liable to the same punishment.[109]

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106. J Willis, "Felony murder at common law in Australia – the present and the future" (1977) 1 *Criminal Law Journal* 231, 234-236. See *Ryan v The Queen* (1967) 121 CLR 205, 241; *R v Van Beelen* (1973) 4 SASR 353, 403; *R v Jarmain* [1946] 1 KB 74, 75.
107. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 68.
108. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 69.
109. United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [120].

5.73 The Royal Commission, therefore, recommended that:

> Where murder is committed in the course or furtherance of another offence being a felony ... any person guilty of that other offence, either as a principal in the first or second degree or as an accessory, shall, if he was privy to the doing in connection therewith of anything which might reasonably have been expected to cause bodily injury to a human being, be guilty of murder.[110]

This comes close to the position under *Sharah*, although it appears to require an objective test in place of the subjective test favoured in *Sharah*.

Reduce the offence to manslaughter

5.74 Another option would be to leave cases of this kind to be dealt with as manslaughter, either for the perpetrator or for the accomplice. In the absence of one or other of the mental elements required for murder, the fatal act or omission bringing about death would normally constitute an unlawful and dangerous act. Any perceived potential for an imbalance in penalty could then be addressed, by adding to s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), an aggravating factor that the offence occurred during, or immediately after, the commission of a serious indictable offence, or during an attempt to commit such an offence.

Our view

5.75 Four matters are, accordingly, of concern, in relation to the application of the constructive murder provision contained within s 18(1) of the *Crimes Act 1900* (NSW):

- first, the range of foundational offences, to which the provision can attach, is extensive and includes a number of offences which, although serious and punishable by sentences of imprisonment for 25 years or life, are not of themselves dangerous offences or offences of violence;
- secondly, the reach of the provision in relation to accomplices, since they can be convicted of murder for an accidental killing, at the hand of someone else, that they neither intended or wanted;
- thirdly, the overlap of the provision with the extended joint criminal enterprise doctrine, and with murder by reckless indifference, with their potential for introducing undue complexity into the trial if relied upon by the prosecution as alternative case theories, either in relation to the principal offender or the accomplice; and
- fourthly, the fact that it applies to a killing occurring "immediately after" the commission of the foundational offence, raising a potential issue as to the time frame encompassed, as well as a potential for overlap with an offence of accessory after the fact.

110. United Kingdom, *Royal Commission on Capital Punishment 1949-1953*, Report (Cmd 8932, 1953) [123].

5.76 We are of the view that the present law in NSW risks over-criminalising those who are involved in a foundational offence that, inadvertently, escalates to a homicide, at least so far as accomplices to the foundational offence are concerned. Of importance is the fact that there is no requirement of a causal link between the foundational offence and the death of the victim, other than that the act causing death was done in an attempt to commit that offence, or during or immediately after its commission. Nor is there any requirement of foresight as to the consequences of the act causing a death, or any requirement of "malice" in relation to that act other than that required for the foundational offence.[111] In this respect, it may be noted that s 18(2)(a) of the *Crimes Act 1900* (NSW) provides that no act or omission, which was not "malicious", shall be within s 18,[112] and that s 18(2)(b) provides that "no punishment or forfeiture shall be incurred by any person who kills another by misfortune only". Each of these provisions has, however, been read down in a way that has not precluded the bringing of constructive murder charges.

Reform: Application in relation to principals

5.77 In some cases, the prosecution will be able to adduce evidence, against the party (P) whose act causes the death, of the presence of a specific intention on P's part to kill the victim (V) or to cause V grievous bodily harm. This might be inferred, for example, from words spoken by P at the scene, or from the very nature of the act or acts involved. In other cases, the manner in which a weapon is handled, or in which P behaved, may provide a basis for inferring that P acted with reckless indifference, that is, committed the fatal act with foresight of the probability that it would result in V's death.[113] In any such case, P can be convicted of murder in accordance with the ordinary principles applicable to that offence.[114]

5.78 Where murder could not be proved against P through one or other of these states of mind, then in many, if not the majority of cases, a conviction would be available for manslaughter by an unlawful and dangerous act, which does not require a subjective state of mind on the part of P beyond an intention to do the act that causes death.[115] A conviction for manslaughter, in such a case, would be appropriate by reference to the act or omission that led to the death, without any need to rely on the existence of a foundational offence.

5.79 The availability of these alternative ways of dealing with P's criminality could, in many cases, provide a suitable criminal justice response. Notwithstanding, we consider that there is still a proper role for a limited form of constructive murder in the case of P. We propose an approach that would make P liable for murder where,

111. *R v Munro* (1981) 4 A Crim R 67; *Mraz v The Queen* (1955) 93 CLR 493; and *Royall v The Queen* (1991) 172 CLR 378, 428.

112. L Babb and R Button, "Some Aspects of Constructive Murder in New South Wales" (2007) 31 *Criminal Law Journal* 234, 237-241. The application of s 18(2)(a) in relation to manslaughter was resolved in *R v Lavender* (2005) 222 CLR 67.

113. *Crabbe v The Queen* (1985) 156 CLR 464; and *Royall v The Queen* (1991) 172 CLR 378.

114. J Willis, "Felony Murder at Common Law in Australia – The Present and the Future" (1977) 1 *Criminal Law Journal* 231, 245-246, suggested that "recklessness murder" will cover most cases of felony murder and could provide a more humane and civilised successor to felony murder.

115. *Director of Public Prosecutions v Newbury* [1977] AC 500, 506-507; approved in *R v Coomer* (1989) 40 A Crim R 417, 423 and see *Wilson v The Queen* (1992) 174 CLR 313.

by reference to the whole of the circumstances, including the nature of the foundational offence and P's conduct during its commission or attempted commission, P can be seen to have created a situation of danger to the victim's life.

5.80 This would depart from the position currently in place in NSW, in which the threshold for constructive murder depends simply on P being engaged in a foundational offence that attracts imprisonment for 25 years or for life, whatever its nature, and whatever is the act of P that causes the death. The range of qualifying offences is now quite extensive and considerably wider than that which applied when the 25 year criterion was first introduced. Some of the offences that would qualify as foundational offences are offences of specific intent while others are not.[116] In the case of the latter, it is the basic intent involved in that offence that is effectively "imputed" to the offender, so as to make constructive murder available.

5.81 As s 18(1) currently applies, the provision can catch acts of a relatively non-dangerous kind. For example a relatively light punch directed to the victim of an armed robbery, which catches the victim off guard, causing him or her to fall back and strike his or her head resulting in a fatal brain injury; or words of threat spoken to a person suffering from a cardiac condition which brings about a fatal heart attack. It differs in this respect from the common law rule which requires violence or danger to be involved.[117]

5.82 The formulation which we propose would, in practice, have the effect of reintroducing the element of violence or dangerousness, which the courts came to regard as characterising the felony murder rule at common law.[118] It was not explicitly incorporated in the *Crimes Act 1900* (NSW) when the 25 year criterion (which narrowed the field of foundational offences to a fairly select group of serious offences) was first adopted.[119] It would align the offence so far as P is concerned more closely with the spirit of the formulations adopted in the legislation of most of the other Australian jurisdictions which retain constructive murder; and also with the considerations that have led to constructive murder being equated with the other forms of murder, for sentencing purposes.[120]

5.83 Accordingly we make the following recommendations.

Recommendation 5.1

So much of s 18(1) of the *Crimes Act 1900* (NSW) as relates to constructive murder should be repealed, and replaced by a statutory provision that provides as follows:

116. *R v Grant* (2002) 55 NSWLR 80, 94.
117. *R v Van Beelan* (1973) 4 SASR 353, 401; and see J Willis, "Felony Murder at Common Law in Australia – The Present and the Future" (1977) 1 *Criminal Law Journal* 231, 237.
118. *DPP v Beard* [1920] AC 479, 493; *R v Jarmain* [1946] 1 KB 74, 80; *Ryan v The Queen* (1967) 121 CLR 205, 241.
119. P Bindon, "The Case for Felony Murder" (2006) 9 *Flinders Journal of Law Reform* 173; and see *DPP v Beard* [1920] AC 479, 493 and *R v Van Beelan* (1973) 4 SASR 353, 400-403.
120. For example, see *R v Mills* (Unreported, NSWCCA, 3 April 1995); *R v Aslett* [2006] NSWCCA 360 [21].

(1) A person (P) shall be liable for murder and punishable accordingly, where:

  (a) P commits an act that causes the death of V;

  (b) P's act was done in an attempt to commit an offence or in the course of or during or immediately after the commission of an offence for which provision is made in the laws of NSW that is punishable by imprisonment for life or for a term of imprisonment of 25 years or more (the foundational offence);

  (c) P's act was one that, in all of the circumstances, including the nature of the foundational offence, [viewed objectively] was likely to endanger human life.

(2) The foundational offence shall not include common law offences where the penalty is at large, or manslaughter.

(3) The foundational offence shall include one in respect of which P was a principal offender, as well as one in which P was providing assistance in relation to its commission or attempted commission by another person.

(4) P shall be liable to be convicted of murder and sentenced accordingly in the circumstances outlined, whether or not:

  (a) P intended to kill V or to cause V bodily harm;

  (b) P knew or foresaw that by his or her act he or she was likely to do so; or

  (c) P knew or foresaw that his or her act was likely to endanger human life.

Recommendation 5.2

Section 18(2)(a) of the *Crimes Act 1900* (NSW) should be amended by deletion of the words "which was not malicious, or".

Repeal of part of s 18(1)

5.84 Recommendation 5.1 would require repeal of so much of section 18(1) of the Crimes Act, commencing with the words "or done in an attempt" to the end of that subsection, and its replacement by the recommended provision.

5.85 Section 18(2)(a) would then appear to have little, if any, work to do in relation to those forms of murder that would continue to be within s 18(1)[121], or in relation to manslaughter.[122] Amendment of the section to remove the words "which was not malicious" would be appropriate.

5.86 A question similarly arises concerning whether s 18(2)(b) has any useful role to play in relation either to murder or manslaughter. The expression "misfortune" is somewhat uncertain, although presumably it was initially intended to cater for cases of misadventure, in which there is an absence of any tangible fault or culpability on

121. *R v Coleman* (1990) 19 NSWLR 467, 474.

122. For the reasons noted in *R v Lavender* (2005) 222 CLR 67.

the part of the person, whose act brought about the death of another.[123] Clearly, it was not intended to exclude liability for consequences that were unintended, otherwise it would not have been possible to prosecute a case of murder dependant on reckless indifference or constructive murder. We make no recommendation in this respect as it could, at least, have a relevant presence in ensuring that more is required for murder or manslaughter than an act causing death; and it does not appear to have led to any difficulty in the application of s 18 or the common law of manslaughter.

Nature of the act

5.87 Recommendation 5.1 is intended to embrace an "omission" as well as an "act", in those circumstances where there was a legal duty in the offender,[124] although the circumstance in which a case of omission could be charged as murder would be rare.

5.88 Consistently with the common law, it is assumed that it will not matter if the act causing death was one that was necessarily part of the commission of the foundational offence, or was a separate act.[125]

Foundational offences

5.89 We have recommended clarification and amendment of the current law in relation to the foundational offences that should qualify for an application of the constructive murder rule.

5.90 A review of the current list of criminal offences included within the Judicial Commission database, arising under the statute law of NSW, reveals that there are 197 offences for which provision is made in the *Crimes Act 1900* (NSW), the *Drug Misuse and Trafficking Act 1985* (NSW) and the *Piracy Punishment Act 1902* (NSW), that attract maximum sentences of imprisonment for life or for a term of 25 years or more, although some of these are variations of an offence involving the same basic elements.[126] Subject to the same qualification, the number of potential foundational offences would increase to 349 if the criterion for constructive murder was amended to include offences punishable by imprisonment for a term of 20 years or more.[127]

123. A Stephen and A Oliver, *Criminal Law Manual* (Government Printer, 1883) 199-202.

124. *R v Taktac* (1988) 14 NSWLR 226; and *R v Taber* (2002) 56 NSWLR 443.

125. As was implicitly assumed in *Ryan v The Queen* (1967) 121 CLR 205; and *R v Foster* (1995) 78 A Crim R 517, 523. See also *R v Marshall* (1986) 43 SASR 448, 484-485.

126. For example, the series of sexual assault offences the subject of *Crimes Act 1900* (NSW) s 66A and the firearm offences the subject of *Crimes Act 1900* (NSW) s 33A.

127. In which even account would need to be taken of the offences for which provision is made in the *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW).

5.91 If the criterion was set to apply in respect of offences punishable by imprisonment for 15 years, or 10 years, again subject to the same qualification, the number of potential foundational offences would be increased respectively to 466 and 1028.[128]

5.92 It is clear from a review of the offences for which sentences of imprisonment for terms of less than 25 years are available, that there are several offences included which will commonly be associated with acts that are likely to endanger human life, and which may well lead to death.[129]

5.93 It is also clear that there are offences that attract sentences of imprisonment for life or for terms of 25 years, that will not necessarily involve conduct that is likely to endanger human life, or that is likely to escalate to a killing of any person.[130]

5.94 A review of the offences attracting maximum sentences of 20-24 years suggests that these offences would, generally, not qualify as being objectively dangerous, save perhaps for the offences of taking control of an aircraft with a person on board by force or violence,[131] and robbery while armed with an offensive weapon.[132] It would remain open to the government to review the maximum penalties for any such offences in the *Crimes Act 1900* (NSW) that qualify as being objectively dangerous but do not currently attract a maximum penalty of 25 years.

5.95 It is noted that offences, for which there is a maximum penalty of 10 years imprisonment, would qualify under the equivalent laws in force in Victoria and South Australia; and that, in other jurisdictions, there is no qualifying requirement beyond the fact that the offence is one of violence. However to lower the threshold offences beyond those carrying 20 years imprisonment would not seem to achieve much in practical terms. Most of the offences attracting lower sentences will not be accompanied by any act that is likely to endanger human life. In many instances, they involve basic forms of offences which, by reason of other statutory provisions, will carry a longer sentence where aggravating circumstances or elements of intent to cause harm are present, thereby taking the relevant conduct into one of the higher bands of criminality.

5.96 The alternative approach, which was that taken in Tasmania, is to select from the entire range of offences that attract a sentence of imprisonment for life, or for terms of 10 years or more, those that are both inherently serious and likely to be

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128. To allow for those cases where the maximum penalty is increased for a second offence and also to take into account those that are created additionally under the *Fisheries Management Act 1994* (NSW); *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW); *Inscribed Stock (Issue and Renewals) Act 1912* (NSW); *Law Enforcement (Controlled Operations) Act 1997* (NSW); *New South Wales—Queensland Border Rivers Act 1947* (NSW); *Oaths Act 1900* (NSW); *Petroleum (Offshore) Act 1982* (NSW); *Property, Stock and Business Agents Act 2002* (NSW); *Casino Control Act 1992* (NSW); *Crimes (Appeal and Review) Act 2001* (NSW); *Conveyancers Licensing Act 2003* (NSW) and *Witness Protection Act 1995* (NSW).

129. For example, cases of robbery while armed with an offensive weapon: *Crimes Act 1900* (NSW) s 97; taking control of an aircraft with a person on board: *Crimes Act 1900* (NSW) s 154B; and offences involving the setting of fires or the use of explosives: *Crimes Act 1900* (NSW) s 48, s 195, s 196 and s 197.

130. For example, various of the sexual intercourse offences in *Crimes Act 1900* (NSW) pt 3 div 10; as well as those concerned with the manufacture or supply of prohibited drugs.

131. *Crimes Act 1900* (NSW) s 154B(4).

132. *Crimes Act 1900* (NSW) s 97.

accompanied by acts which would endanger human life, in their commission, or attempted commission. This, however, we consider to be inappropriate. It would involve a somewhat arbitrary selection of offences that would not always be accompanied by a danger to human life, and could, as a consequence, result in unjustified over-criminalisation.

Excluded foundational offences

5.97 We have not found any instance where the foundational offence for a charge of constructive murder was one arising under a law of the Commonwealth, although, read literally, the provision would extend to those Commonwealth offences that carry a penalty of imprisonment for 25 years or life (a list of which is also included in the appendix to this chapter). It is likely that any attempt, in such a situation, to apply a constructive murder provision would attract a challenge on constitutional grounds, particularly as the Commonwealth chose not to enact a felony murder rule. We consider that the reach of the recommended provision should be confined to acts occurring in the course of the commission of offences arising under NSW State laws, or in the course of attempts to commit those offences. The recommendation is framed accordingly so as to exclude any argument to the contrary.

5.98 We also consider that it would be appropriate to exclude common law offences in which the penalty is at large, for two reasons. The first relates to the origins of the constructive murder rule in that it applied only to felonies, and not to common law offences that were misdemeanours. Secondly, it is suggested that the reasoning of the High Court in *Clyne v DPP*[133] would exclude equating a penalty that is at large with a nominate penalty.

5.99 It is necessary to exclude manslaughter (even though it is an offence carrying a 25 year maximum term of imprisonment), having regard to its role in allowing for the finding of a lesser form of homicide. Otherwise conduct constituting an unlawful and dangerous act, which occurs in the course of offending could be escalated to constructive murder.

An act likely to endanger human life

5.100 The requirement, in recommendation 5.1(1)(c), that the act causing death be one that, in all the circumstances (viewed objectively), was likely to endanger human life, will contain constructive murder within appropriate limits. It will overcome the concern that arises, in relation to the current provision, which can potentially be used in the case of a foundational offence that is unlikely to involve danger to human life. Framing the element in terms of an "act likely to endanger human life" is important in that it places the focus not simply on the foundational offence, but on the manner in which it is carried out, or attempted, including, in particular, the nature of the act that causes the death. It involves a question for the jury to be determined

133. *Clyne v DPP* (1984) 154 CLR 640.

objectively on the facts, irrespective of any belief or foresight of P as to the consequences of that act.[134]

5.101 Furthermore, we consider an element, which would require the act causing death to be one that was likely to endanger human life, to be preferable to one expressed in terms of requiring the act to be "one of violence", having regard to the potential width of such an expression, and to the fact that not all acts of violence endanger human life. Whether the act was the cause of death will still require attention to the principles concerned with causation, considered in *Ryan v The Queen,*[135] and in *Royall v The Queen*.[136] This, however, is essentially a jury question and it does not require any statutory direction.

Who is liable

5.102 The recommendation would make liable the person (P) who did the act, or who is liable for the omission, causing the death. The liability of accomplices for foundational offences, where they have not done the act causing death is considered below.

5.103 P may be a principal in relation to the foundational offence, or he or she may be an accomplice who is providing assistance in relation to the foundational offence. What is relevant in this respect is that it was P's act or omission that caused the death.

Relationship to other forms of murder

5.104 The approach suggested would, accordingly, occupy the ground between those forms of murder that depend upon specific intent to kill or to cause grievous bodily harm, and those that depend on reckless indifference. Both constructive murder and murder by reckless indifference would continue to require proof of an act occasioning the death. However there would be a difference between them, in that reckless indifference would require proof of an *awareness,* in the accused, that the *probable consequences* of the act was death; while this version of constructive murder would be made out by a lesser and purely objective requirement that the act was one that, in all of the circumstances, was *likely to endanger* human life (being additionally, an act that occurred in an attempt to commit a foundational offence, or during or immediately after its commission). It will ensure the availability of a sentence that would adequately reflect the total criminality of the person who engaged in or attempted to commit a particularly serious offence, and whose act brought about the death of another.

134. Compare *Arultilakan v The Queen* (2003) ALR 259 [23]; *Stuart v The Queen* (1974) 134 CLR 426, 438.

135. *Ryan v The Queen* (1967) 121 CLR 205.

136. *Royall v The Queen* (1991) 172 CLR 378.

Reform: Application in relation to accomplices

5.105 We are of the view that the constructive murder principle should not apply to a defendant (D) who is an accomplice to the foundational offence, but who does not perform the act causing death (or who does not assist or encourage P to kill the victim).

5.106 This is to be distinguished from cases where D, in the course of the commission of the foundational offence, has actually joined with P in an attack on V, and where it is the combination of their acts that results in V's death. It would be appropriate for the constructive murder principle, as proposed above, to apply to both P and D in such a case, as each would be a principal offender in relation to the fatal act.

5.107 Where D has not physically engaged in any attack directed to V, but has encouraged or assisted P to commit the fatal act or omission, for example by words of support or by handing P the weapon that is used to kill V, then D's culpability should be left to be determined according to the principles applicable to accessories, as considered in chapter 3. This would open the way for a conviction for murder or manslaughter, depending on D's state of mind.

5.108 Otherwise, where the act of P causing the death was accidental, was unforeseen by D, and did not involve any direct act or omission on the part of D, then, in our view, to hold D guilty of murder, through an application of s 18(1) *Crimes Act 1900* (NSW), risks an over-criminalisation on D's part.

5.109 The criticisms, which have been directed to the application of the constructive murder rule at common law, have added force in relation to an offender in this category.[137] In particular, there is a lack of concurrence between D's mental state and P's act with its consequences, even allowing for the element of foresight required by the decision in *Sharah.*[138] Moreover, an application of s 18(1) *Crimes Act 1900* (NSW) in relation to an accomplice, in this situation, leaves room only for a murder conviction,[139] whereas a conviction for manslaughter might more appropriately reflect the *Sharah* element of foresight.

5.110 We consider it preferable for the culpability of an accomplice, who is a party to a joint criminal enterprise in relation to the commission of the foundational offence, but who is not personally involved in P's killing of V, and who does not provide actual encouragement or assistance to P in relation to that killing, to be determined by reference to the extended joint criminal enterprise principles outlined in chapter 4. This would allow the killing to be treated as an "*additional offence*" for which D could be held liable, if he or she satisfied the elements required for extended joint criminal enterprise. This was the basis on which the conviction of the secondary participant was upheld, for example, in *R v Foster*,[140] it being held, on the facts, that a conviction based on constructive murder was not available.

137. A different view was taken by the Supreme Court of South Australia in *R v R* (1995) 63 SASR 417, 421.

138. *R v Sharah* (1992) 30 NSWLR 292.

139. *R v Hitchins* [1983] 3 NSWLR 318, 324; and *R v Foster* (1995) 78 A Crim R 517, 529.

140. *R v Foster* (1995) 78 A Crim R 517.

5.111 It would also satisfy the elements for manslaughter, in the case of an offender D who lacked the foresight required for murder under the extended joint criminal enterprise principles, but who had, or ought to have had, the foresight concerning the lesser offence required under those principles. The foresight thus required for a conviction, concerning what P might do in the course of carrying out the joint criminal enterprise, would seem to involve a more appropriate approach than that required by *Sharah*.

5.112 Moreover, this approach should simplify the case against D, by eliminating the opportunity for the prosecution to present alternative cases against D based on constructive murder and extended joint criminal enterprise, with the consequent risk of jury confusion from the multiple directions that would be required.

Constructive murder and intoxication

5.113 The common law relating to the effects for criminal liability of intoxication (due to alcohol or drugs)[141] has been overturned by legislation in NSW.[142]

5.114 The statutory regime that replaced the common law is contained in Part 11A of the *Crimes Act 1900* (NSW). It draws a distinction between the consequences of intoxication in relation to offences of specific intent and offences of basic intent. In summary, for cases of both specific and basic intent, self-induced intoxication cannot be taken into account in determining whether the conduct constituting the offence alleged was voluntary.[143]

5.115 Evidence of intoxication, however caused, can be taken into account, in relation to offences of specific intent, in determining whether the accused had the intention to cause the specific result that is necessary for such an offence. There is an exception where the accused had resolved before becoming intoxicated to engage in the relevant conduct, or where the accused became intoxicated in order to strengthen his or her resolve for that purpose.[144]

5.116 In the case of an offence of basic intent, self-induced intoxication cannot be taken into account in determining whether the accused had the necessary *mens rea* for the offence charged. However, it can be taken into account if it is not self-induced.[145]

5.117 The Act specifically nominates murder as an example of a case of specific intent for the purpose of these provisions along with a number of other offences included in a Table.[146] It goes on, however, to provide that, where a person is acquitted of murder by reason of self-induced intoxication, evidence of that intoxication cannot be taken

141. Concerning which conflicting views had been expressed by the House of Lords in *R v Majewski* [1977] AC 443, and by the High Court in *R v O'Connor* (1981) 146 CLR 64.
142. *Crimes Act 1900* (NSW) s 428H.
143. *Crimes Act 1900* (NSW) s 428G(1).
144. *Crimes Act 1900* (NSW) s 428C.
145. *Crimes Act 1900* (NSW) s 428D.
146. *Crimes Act 1900* (NSW) s 428B.

into account in determining whether he or she had the requisite *mens rea* for manslaughter.[147] The position is otherwise if the intoxication was not self-induced.[148]

5.118 In *R v* Grant,[149] the Court of Criminal Appeal, when dealing with the issue whether murder by reckless indifference should be taken to be a crime of specific intent for the purpose of this Part, held that this was the case, and observed, obiter, that the same should be the case for constructive murder.[150]

5.119 The consequences of this decision in relation to P's potential responsibility for constructive murder require mention. It is a form of murder for which the relevant *mens rea* is imputed from that required for the foundational offence, which may be an offence of basic or specific intent, in combination with the fact that the act causing death occurs during the commission of the foundational offence, or during its attempted commission, or immediately after its commission. There is no degree of foresight, or of any other mental element, attaching to the act that causes the death, other than the requirement that it be a voluntary act. Accordingly, the intoxication provision need to apply to the mental element required for the foundational offence.

5.120 In a case where, an accused's actions in committing or attempting to commit the foundational offence, or in performing the act that caused death, were involuntary because of the effects of non self-induced intoxication, for example, where an accused has unwittingly or involuntarily been given drugs or spiked drinks, no difficulty arises in the conclusion that he or she should not be found guilty of the foundational offence or, as a consequence, of constructive murder.

5.121 Although perhaps uncommon, it is not impossible that a person will commit a foundational offence in circumstances of self-induced intoxication, or in circumstances for which an exception is made in relation to offences of specific intent,[151] that is, where he or she had resolved before becoming intoxicated to commit the relevant offence, or had become intoxicated in order to strengthen his or her resolve to commit that offence.

5.122 We do not consider that any special provision is required for such a case. If, despite the fact of intoxication, P is criminally responsible for the foundational offence, then the constructive murder rule should apply. If the foundational offence is not made out because of P's intoxication, then the constructive murder provision will not be engaged. While the outcome may vary according to whether the foundational offence is one of basic or specific intent, we do not see this as an impediment.

147. *Crimes Act 1900* (NSW) s 428E(a).
148. *Crimes Act 1900* (NSW) s 428E(b).
149. *R v Grant* (2002) 55 NSWLR 80.
150. *R v Grant* (2002) 55 NSWLR 80, 97.
151. *Crimes Act 1900* (NSW) s 428C(2).

6. Conspiracy

6.1 In this chapter we refer, in some detail, to the elements of the offence of conspiracy, and note the issues that arise in its application, as a means of responding to group criminal activity. We also make reference to reform initiatives proposed or adopted in jurisdictions other than NSW.

Introduction

The common law

6.2 Conspiracy is an indictable offence at common law, applicable to situations where one person agrees (conspires) with at least one other person to do an unlawful act, or to do a lawful act by unlawful means.[1]

6.3 It is a crime of duration extending over the period of the agreement, so that a person may join a conspiracy after it has started, and leave it while it is still in operation, and still be a party to the same conspiracy, so long as there are at least two people at any one time acting in combination to achieve the same unlawful objective.[2] It is complete, in relation to a party, as soon as he or she joins the agreement, regardless of whether any further steps are taken by that party, or by any other party, towards its execution.[3]

6.4 The requirement, that there be an actual agreement between at least two people to commit an unlawful act, is important. If, in a case involving only two people, one of them merely pretends to make an agreement with no intention of carrying it out, as may be the case in an undercover police operation, there will be no offence.[4]

6.5 The mental element required for the offence is often said to be an intention to do the unlawful act which is the subject of the agreement.[5] A more precise statement would appear to be that the mental element required is an intention to be party to an agreement to do an unlawful act, and also an intention to carry out the unlawful purpose.[6]

1. *Mulcahy v The Queen* (1868) LR 3 HL 306, 317; *R v Kempley* (1944) 44 SR (NSW) 416, 432; B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 356; D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 2008) 1092; D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 461.
2. *R v Masters* (1992) 26 NSWLR 450, 458.
3. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [1.13].
4. *R v Ansari* (2007) 70 NSWLR 89 [60] (Howie J) citing *R v Kotish* (1948) 3 CCC 138; and *Peters v The Queen* (1998) 192 CLR 493 [62] (McHugh J).
5. *DPP v Nock* [1978] AC 979.
6. *Churchill v Walton* [1967] 2 AC 224; PJ Richardson, *Archbold: Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2010) [33.15]; Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [40.1].

6.6 As a common law offence, the penalty that courts may impose for conspiracy is "at large" although, absent exceptional circumstances, it would not normally be correct to impose a higher sentence than that available for the substantive offence.[7]

The law in NSW

6.7 Unlike the other Australian jurisdictions, the general offence of conspiracy in NSW continues to be a common law offence. However, there are some statutory provisions in force in NSW that make it an offence to conspire to commit a specified prohibited act. They also specify the applicable penalty, rather than leaving it at large.

6.8 So, for example, s 26 of the *Drug Misuse and Trafficking Act 1985* (NSW) makes a person, who conspires with another person or other persons to commit an indictable offence under the Act, "guilty of an offence and liable to the same punishment, pecuniary penalties and forfeiture", as would be the case if the person had committed the indictable offence. Likewise, s 51C of the *Firearms Act 1996* (NSW) makes it an offence for a person to conspire, in NSW, to commit an offence outside NSW that corresponds with an offence under the *Firearms Act 1996* (NSW), and renders such a person liable to the "same punishment, pecuniary penalty and forfeiture that the person would be subject to if the offence concerned had been committed in New South Wales".

6.9 Additionally, there are a number of statutory or regulatory offences that include conspiracy to commit a prohibited act, in combination with other forms of conduct such as aiding and abetting, counselling or inciting, or being party to the commission of the prohibited act,[8] as an available element of the offence.

6.10 None of these statutory provisions supplies any further content as to what constitutes an act of conspiracy, impliedly leaving that to be determined by reference to the common law.[9]

The law in other jurisdictions

6.11 Apart from South Australia, which retains the common law offence of conspiracy,[10] all other Australian jurisdictions have adopted a statutory provision, by way of restatement or code, that sets out at least some of the requirements for the offence. Victoria has replaced the common law with a statutory offence,[11] as is the case in England and Wales.[12] The most recent Australian codifications are those of the

7. *Verrier v Director of Public Prosecutions* [1967] 2 AC 195, 220, 223; *Brown v R* [2010] NSWCCA 73; *R v Hoar* (1981) 148 CLR 32.
8. See para 8.15-8.18.
9. See *R v El Azzi* (2001) 125 A Crim R 113 [18].
10. *Lipohar v The Queen* (1999) 200 CLR 485 [42].
11. *Crimes Act 1958* (Vic) s 321-321F.
12. *Criminal Law Act 1977* (Eng) s 1-5.

Commonwealth, ACT and NT,[13] which differ, in a number of respects, from the code provisions in Queensland, Tasmania and WA,[14] as noted later in this chapter.

6.12 The differences between the conspiracy provisions contained in the *Criminal Code* (Cth) and in the laws of the other Australian States, may give rise to a problem when they have a concurrent field of operation. This arises by reason of the recent decision of the High Court in *Dickson v The Queen*,[15] a case concerning a conspiracy to steal a quantity of cigarettes that were held in a Victorian warehouse, after being seized by the Australian Customs Service. As a consequence of that seizure, and the possession of the goods under Customs control, they constituted Commonwealth property.

6.13 The appellant, in that case, was charged with a conspiracy to steal the goods under the *Crimes Act 1958* (Vic).[16] As the goods were Commonwealth property, the offence could have been charged as a conspiracy to steal Commonwealth property under the *Criminal Code* (Cth).[17] It was held that, by reason of the direct inconsistency between the Victorian and Commonwealth conspiracy provisions, s 109 of the *Constitution* (Cth) was engaged. As a result, the relevant provisions of the Victorian Act were held to be invalid, in the sense of being suspended, inoperative and ineffective in the context of the prosecution.

6.14 The inconsistencies that were seen to exist concerned the fact that:

- under the *Criminal Code* (Cth), it is necessary, for a conspiracy, that there be an overt act committed by a party to the conspiracy, whereas under Victorian law the offence of conspiracy is complete on the making of the agreement;
- under the *Criminal Code* (Cth), but not under Victorian law, a defence of withdrawal is available;
- the Commonwealth offence of conspiracy only applies where the primary (substantive) offence is one that is punishable by imprisonment for more than 12 months or by a fine of at least 200 penalty units, whereas the Victorian offence is available in relation to any offence.

6.15 We draw attention to the decision as it may have an impact, particularly in the context of various aspects of the drug trade, where Commonwealth and State legislation have a potential concurrent field of operation.

Reasons for the offence

6.16 The 1990 Gibbs review of the Commonwealth criminal law considered the most compelling justification for making conspiracy a crime was that it is preventative. "It enables law enforcement bodies to take early action to prevent the commission of a serious substantive crime"; it being desirable for the law to have a mechanism that

13. *Criminal Code* (Cth) s 11.5; *Criminal Code* (ACT) s 48; *Criminal Code* (NT) s 43BJ.
14. *Criminal Code* (Qld) s 541-543; *Criminal Code* (Tas) s 297; *Criminal Code* (WA) s 558 and s 560. See also *Criminal Code* (NT) s 282-293.
15. *Dickson v The Queen* [2010] HCA 30.
16. *Crimes Act 1958* (Vic) s 72 and s 321.
17. *Criminal Code* (Cth) s 11.5 and s 131.1.

would allow the police, for example, "to intervene and charge persons who have planned to import... heroin before the actual importation takes place".[18] However, it has been observed that often agreements are finalised in secret and, therefore, sufficient evidence to satisfy a prosecution will not usually be available when the agreement is made, but will need to be inferred from acts done in furtherance of the conspiracy.[19]

6.17 It has been suggested, as a further justification for the offence, that those who go so far as to agree to commit a crime "may not be significantly less blameworthy or less dangerous" than those who in fact commit it,[20] and that it may be easier to bring those parties to justice through a charge of conspiracy, than by charging them as accessories.[21]

6.18 An additional justification, which has been offered for pursuing a charge of conspiracy, rather than a charge for a substantive offence, is that the seriousness of the criminality involved can be seen to increase where the offence was plotted and carried out by several parties, who may answer the description of "gangsters" or "racketeers", acting in concert.[22]

6.19 The persistence of conspiracy charges, in modern times, most probably derives from the procedural benefits that are available when conspiracy is charged. An evidentiary rule in relation to the evidence of alleged co-offenders applies so that, if there is reasonable evidence that the accused participated in the conspiracy, the actions or statements of the alleged co-conspirators are admissible against the accused, in order to prove the nature and extent of his or her participation in the conspiracy.[23] This allows evidence to be tendered to prove the offence of conspiracy, that would not be admissible, in a joint trial, to prove the substantive offence that was the subject of the agreement constituting the conspiracy. The operation of this rule can, however, be criticised on a number of grounds including that:

- the accused's conviction for conspiracy may depend on evidence that is hearsay; and
- such evidence, admitted for the purpose of showing the nature and extent of the accused's participation in the conspiracy, may bias the jury against the accused.[24]

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18. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [34.12]. See also A Ashworth, *Principles of Criminal Law* (5th ed, Oxford UP, 2006) 455; Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977) 310-311.
19. A Ashworth, *Principles of Criminal Law* (5th ed, Oxford UP, 2006) 457. See also B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 367; and P Gillies, *The Law of Criminal Conspiracy* (2nd ed, Federation Press, 1990) 9.
20. A Ashworth, *Principles of Criminal Law* (5th ed, Oxford UP, 2006) 455.
21. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [7].
22. *R v Kempley* (1944) 44 SR (NSW) 416, 425.
23. *Ahern v The Queen* (1988) 165 CLR 87; *Tripodi v The Queen* (1961) 104 CLR 1; *R v Masters* (1992) 26 NSWLR 450; *R v Chai* (1992) 27 NSWLR 153. See also *Evidence Act 1995* (NSW) s 57(2).
24. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 376.

6.20 The fact that the prosecution can include conspiracy counts in the indictment, in addition to a count for the substantive offence, can require complex jury directions in relation to the use to which individual bodies of evidence can be put, thereby complicating the trial and increasing the risks of appellable error.[25]

6.21 In particular, complications can arise in distinguishing the liability of an accused who is charged as an accessory, and that of an accused who is charged as a conspirator, by reason of the different mental states which each offence entails.[26] They can also arise in those cases, where it is asserted by the defence that the conspiracy was impossible or incapable of performance, which has led to a need to define the nature and scope of the conspiracy with precision — for example, to determine whether it involves an agreement generally to manufacture a prohibited drug, or to manufacture it from specific ingredients or by specific means.[27]

6.22 Additionally, as noted below, there are some areas of uncertainty in the law which persist which, in other jurisdictions, have been resolved by a codification or by legislative provision.

6.23 One commentator, in discussing the possibility of abolishing the offence of conspiracy altogether, observed:

> it is difficult to see that conspiracy serves any legitimate purpose which cannot be achieved by relying on the offences of attempt and incitement, complemented if necessary by a general statutory offence of criminal facilitation.[28]

6.24 The Criminal Law Officers Committee, however, concluded that "there are some cases where only a conspiracy charge adequately reflects the criminality of the conduct" although, in light of the criticisms of the offence, it also thought it appropriate to impose some limitations in the Model Criminal Code.[29]

6.25 The existence of the issues that are examined in more detail in the following sections of this chapter, and the legislative experience elsewhere raise the question whether the offence of conspiracy should be restated in statutory form, in NSW, in a way that would limit its reach, for example, by confining its application to agreements to commit a criminal offence; or that would otherwise bring it into harmony with the Model Criminal Code; or that would see it abolished and replaced with an offence of facilitating the commission of a crime.[30] A further issue arises of whether the offence should continue to be available or subsumed into the substantive offence which is its object, if the agreement is carried into effect.

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25. *R v Dawson* [1960] 1 WLR 163, 170, 172; *R v Griffiths* [1966] 1 QB 589. See also B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 376.
26. *R v Trudgeon* (1998) 39 A Crim R 252, 255-256.
27. *R v Barbouttis* (1995) 37 NSWLR 256; *R v El Azzi* (2001) 125 A Crim R 113; *R v El-Azzi* [2004] NSWCCA 455.
28. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 381.
29. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 97.
30. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 365, 381.

Elements of the conspiracy

Agreement and intention

6.26 What is required, by way of agreement at common law, has been said to be "a conscious understanding of a common design" on the part of the conspirators to achieve an unlawful object,[31] that is an agreement to commit an unlawful act or to do a lawful act by unlawful means. The agreement may be tacit, although a shared intention to commit the unlawful object is required.[32]

6.27 It is not necessary that each party be shown to have been in direct communication with each other,[33] it being accepted that the offence can take the form of a "wheel", in which there is a central party around whom the others revolve; or a "chain", in which A communicates with B who communicates with C and so on.[34]

6.28 It is necessary that there be a common intention to carry the unlawful purpose into effect,[35] although it will not matter if one party who, as an informer or undercover operative, does not intend it to be completed,[36] so long as there are at least two other parties sharing the necessary intention.

6.29 Careful attention to these requirements is needed for those cases where multiple parties are charged, and an issue arises as to whether there was one overall conspiracy with the same common object, or separate conspiracies with distinct, albeit similar, objects.[37]

Recklessness

6.30 Questions of whether recklessness can constitute a sufficient mental element for the purposes of a charge of conspiracy occur at two distinct points. First, intention as to the agreement itself, and, secondly, intention as to the substantive offence the subject of the conspiracy.

6.31 At common law, the accused must intend to enter into the conspiracy and recklessness as to the making of an agreement will not suffice.[38] The Criminal Law Officers Committee considered that the "concept of recklessness is foreign to an

31. *R v Orton* [1922] VLR 469, 473.
32. *Gerakiteys v The Queen* (1983) 153 CLR 317, 320, 323, 327 and 334; *Giorgianni v The Queen* (1985) 156 CLR 473, 506.
33. *R v Ribuffi* (1929) 21 Cr App R 94.
34. The use of the terminology of "wheel" and "chain" has been criticised as diverting attention from the need to concentrate on the existence of a common intention or purpose: B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 369.
35. *R v Trudgeon* (1998) 39 A Crim R 252, 256, 263; *R v Wilson* (Unreported, NSWCCA, 12 August 1994).
36. *R v Kapeliotis* (1995) 82 A Crim R 300; *R v Yip Chieu-Cheng* [1995] 1 AC 111.
37. *Gerakiteys v The Queen* (1983) 153 CLR 317 provides an illustration of such a case.
38. *R v LK* [2010] HCA 17 [54], [77] (French J), [117], [141] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Ansari v R* (2007) 70 NSWLR 89 [61]-[63], [68]. See also *Ansari v The Queen* [2010] HCA 18 [17].

offence based wholly on agreement".[39] As one commentator has put it, "reckless assistance or encouragement does not amount to a conspiratorial agreement".[40]

6.32 It is possible, however, for the parties to a conspiracy to reach an agreement for the commission of a substantive offence, for which the *mens rea* is one of recklessness. To make out such an offence, the prosecution must show that the accused had the intention or knowledge of the facts required for that offence; or that the offence was to be carried out by a third party, the reckless state of mind being that of the person committing the substantive offence.[41] The circumstances in which this is likely to arise are rare.[42]

6.33 However, parties cannot conspire to commit an offence by entering into an agreement, being reckless whether or not the substantive offence would be committed.[43] Rather, as the High Court has recently confirmed, the parties must be shown to "know the facts that make the proposed act or acts unlawful".[44] Commentators have also supported this position so that, even though recklessness may be a sufficient mental element for a person committing the substantive offence, it cannot constitute sufficient intent for the acts agreed on by the parties to the conspiracy.[45]

6.34 The requirement of intention that a substantive offence be committed is said to flow from the concept of agreement, so that recklessness as to the commission of that offence is insufficient to establish liability for conspiracy.[46]

6.35 It has also been suggested that the "prime justification" for excluding recklessness in conspiracy is "the need to avoid the injustice associated with sprawling conglomerated charges of conspiracy":

> If the scope of conspiracy extends to persons who have recklessly participated in the pursuit of a criminal venture, peripheral as well as central participants are caught within the same conspiratorial grouping, with the result that a conspiracy charge can easily spread beyond fair or manageable limits. By contrast, if the scope of conspiracy extends only to persons who intend mutually to achieve the same unlawful object, the parties to a conspiracy charge cannot multiply to anywhere near the same extent and the potential for abuse is accordingly much less.[47]

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39. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 99.
40. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 370-371.
41. *R v LK* [2010] HCA 17 [54], [69] (French J), Gummow, Hayne, Crennan, Kiefel and Bell JJ agreed with the conclusion of the CCA in *R v RK* (2008) 73 NSWLR 80; *Ansari v R* (2007) 70 NSWLR 89 [76], [87]; *R v RK* (2008) 73 NSWLR 80 [32], [53]. See also *Ansari v The Queen* [2010] HCA 18 [18].
42. *R v RK* (2008) 73 NSWLR 80 [53]-[54].
43. *R v LK* [2010] HCA 17 [67] (French CJ), [93]-[94], [110], [114] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *R v RK* (2008) 73 NSWLR 80 [55]-[60]; *Ansari v R* (2007) 70 NSWLR 89 [67]-[68].
44. *R v LK* [2010] HCA 17 [114] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
45. D Ormerod, *Smith and Hogan Criminal Law* (12th ed, OUP, 2008) 417-418.
46. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 372.
47. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 373.

6.36 The Gibbs review committee considered that there was no adequate reason to depart from the intention requirement and concluded that "recklessness without intention should not suffice".[48] The Criminal Law Officers Committee supported this conclusion.[49]

6.37 The Victorian provision appears to take this position, by requiring that the accused must "intend that the offence the subject of the agreement be committed", and also by specifying that the accused must "intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time when the conduct constituting the offence is to take place".[50] The second reading speech included an example of two people agreeing to injure another person (C) seriously:

> They may be liable to be charged with conspiracy to inflict grievous bodily harm, even though they could be charged with murder if the plan were carried out and C died. They could not however be guilty of conspiracy to murder if they intended an injury short of death and did not intend that C should die. The person must also intend or believe that any fact or circumstance, the existence of which is an element of the offence, will exist at the time when the conduct constituting the offence is to take place.[51]

6.38 Others have argued that there is no reason why the concept of recklessness cannot be imported into the intention required for the substantive offence. They question why two people "cannot agree (that is, intend the commission of) conduct which is reckless", suggesting that such a conspiracy "would be an agreement to commit a crime of recklessness, such as reckless murder":

> what happens in these situations is that D deliberately agrees upon conduct which is itself of a risk-producing nature, which nature is known (or anticipated) by D. In this limited sense, D can be incriminated in conspiracy by reference to recklessness – but it would go too far to say that D may conspire recklessly, for the purposes of criminal liability.[52]

6.39 The Law Commission of England and Wales, in its proposals for a criminal code that were published in 1989, recommended a qualification to the requirement of intention so that:

> an intention that an offence shall be committed is an intention with respect to all the elements of the offence (other than fault elements), except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.[53]

6.40 The Law Commission provided the following example:

> Thus if A and B agree to have sexual intercourse with C being aware that she may not consent they are guilty of conspiracy to rape. Because their awareness

48. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [40.6].
49. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 99.
50. *Crimes Act 1958* (Vic) s 321(2)(b).
51. Victoria, *Parliamentary Debates (Hansard),* 21 March 1984, 1932.
52. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 712.
53. Criminal Code (Eng) cl 48(2) in England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Report 177 (1989) vol 1, 63.

> of the risk of her non-consent is sufficient fault in respect of that element of rape it is also sufficient for conspiracy to rape. The rule qualifies the general principle that intention is the characteristic fault requirement of the preliminary offences.[54]

6.41 In its most recent report on conspiracy, the Law Commission has recommended that there should be a "minimum fault requirement of recklessness as to the circumstance elements (if any) of the offence"[55], so that where the substantive offence requires no proof of fault in relation to a circumstance event, or proof only of negligence, the prosecution should only be required to show that an alleged conspirator was *reckless* concerning the possible presence or absence of the circumstance element at the relevant time.[56]

6.42 In practice, cases where recklessness is the required mental element for the substantive offence are likely to be rare. It has been noted that the courts have seldom found it necessary to consider an offence of conspiring to commit an offence of recklessness:

> For one thing, there are relatively few offences of recklessness (including offences of intention which can in the alternative be committed recklessly, such as murder and rape). Secondly, given its nature – a premeditated agreement to commit a crime – it is unlikely in practice that two persons would conspire to commit an offence of recklessness, let alone a series of them. However, the distant possibility should not be precluded, or at least the possibility of incriminating in conspiracy persons who agree to commit an act which is criminal and is of a risk-producing character should not be precluded.[57]

Overt act requirement

6.43 At common law, the offence of conspiracy is established by proof of the agreement without the need for proof of any overt act having been committed, pursuant to the agreement.[58]

6.44 For conspiracy to be established under the Commonwealth, NT and ACT codes, however, a person must have:

- entered into an agreement;
- intended (with at least one other party to the agreement) that an offence would be committed pursuant to the agreement; and,
- additionally, unlike the common law, at least one party to the agreement must have committed an "overt act" pursuant to the agreement.[59]

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54. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Report 177 (1989) vol 2 [13.26].
55. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [2.5].
56. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [1.48].
57. P Gillies, *The Law of Criminal Conspiracy* (2nd ed, Federation Press, 1990) 101.
58. *R v LK* [2010] HCA 17 [57] (French CJ).
59. *Criminal Code* (Cth) s 11.5(2)(c), s 135.4(9); *Criminal Code* (ACT) s 48(2)(c), s 334(5); *Criminal Code* (NT) s 43BJ(2)(c). The same requirement is contained in the public justice conspiracy offences contained in the *Crimes Act 1914* (Cth) s 41(2) and (3).

6.45 The Criminal Law Officers Committee recommended the inclusion of this provision on the grounds that, a "simple agreement to commit a criminal offence without any further action by any of those party to the agreement, was insufficient to warrant the attention of the criminal law". The Committee noted a similar requirement in the American Law Institute's Model Penal Code,[60] and reported its understanding that the requirement "works well in the American jurisdictions which have it".[61]

6.46 No such requirement exists in the other Australian jurisdictions, or in England and Wales. Where present, it opens the way for a party to a conspiracy to withdraw from the conspiracy and escape liability, so long as that occurs before the commission of the overt act. In the ACT, NT and Commonwealth criminal codes, what is required, therefore, is that the party withdraw before the commission (by any party to the conspiracy) of an overt act, and that he or she take all reasonable steps to prevent the commission of the offence (or the thing) that is the object of the conspiracy.[62]

6.47 The Criminal Law Officers Committee identified the policy behind allowing a "defence" of withdrawal, as that of "encouraging people to desist from criminal activity". It was recognised that what would constitute "taking all reasonable steps" would vary from case to case. It suggested examples of what would be required: including informing the other parties of the withdrawal, advising the intended victims and giving a timely warning to the appropriate law enforcement agency.[63]

6.48 No such "defence" is currently available at common law, with the consequence that the law in NSW differs, in this respect, from that of the ACT, NT and Commonwealth which all allow the "defence" of withdrawal to a charge of conspiracy.

Parties to the conspiracy

6.49 It is necessary that there be at least two parties to a conspiracy, including the defendant, although that does not require that the other party or parties be identified, since it is possible for an accused to be charged as having conspired with a person or persons unknown.[64]

6.50 As conspiracy is a crime of duration (that is, a continuing crime), the parties to it may change over time so long as there are, at any given time, at least two parties agreeing in combination to achieve the same criminal objective.[65] In such a case, however, questions can arise of some complexity as to whether the prosecution should charge one or several separate conspiracies.

60. US Model Penal Code s 5.03(5).
61. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 101.
62. *Criminal Code* (Cth) s 11.5(5), s 135.4(12); *Crimes Act 1914* (Cth) s 41(5) and s 42(6); *Criminal Code* (ACT) s 48(6) and s 334(7); and *Criminal Code* (NT) s 43BJ(6).
63. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 101.
64. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 363.
65. *R-v Masters* (1992) 26 NSWLR 450, 458; *Savvas v The Queen* (1995) 183 CLR 1.

6.51 Several issues arise in relation to the identity of those who can be regarded as a party to a conspiracy, which require brief mention.

Corporations

6.52 At common law, a corporation can be guilty of conspiracy.[66] However, this bare statement does not address the situation that was considered by the Victorian working group, in which the only other party to the alleged conspiracy is a person who is the effective owner and controller of the Corporation. Since each is a distinct legal entity, it might be thought that, in such a situation, a prosecution might lie. However, in *R v McDonnell* the contrary was held to be the case, since, it was observed, two separate minds must have been involved in making the agreement.[67] The Law Commission for England and Wales, in 1976, considered that the decision in *R v McDonnell* was correct:

> In order to convict a corporation of an offence requiring a mental element it is necessary to identify someone whose guilty mind and activities are, for these purposes, to be treated as those of the company itself; if all that has happened is that the individual has made a decision on his own, he cannot be taken to have agreed with another.[68]

6.53 The Victorian working group, accordingly, recommended that this rule should continue to apply, noting however that any gaps in the law that might result would be covered by other aspects of company law.[69]

6.54 One commentator has observed that, where an individual uses a company as a means of committing an offence, the company "serves as a tool, not as a participant in group decision making".[70] However, it has also been suggested that:

> The situation could arise where it is the policy of a company to nurture the pursuit of an unlawful object. In such a situation, there would be some conceivable justification for treating the company as a party to the conspiracy. A corporate policy represents an exercise in decision-making and a corporate policy to conspire might even be regarded as the quintessential forum of participation in conspiracy.[71]

6.55 The Gibbs review committee recommended that the law should make it clear "that there can be conspiracy between a company and the directors or other persons having the responsibility for its management and control or between a company and a subsidiary of that company which it wholly owns and controls". The committee,

66. *R v ICR Haulage Ltd* [1944] KB 551.
67. *R v McDonnell* [1966] 1 QB 233.
68. England and Wales, Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform*, Report 76 (1976) [1.24]. The Law Commission appears not to have considered the issue again in its later report: England and Wales, Law Commission, *Conspiracy and Attempts,* Report 318 (2009).
69. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [20].
70. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 613, citing *R v McDonnell* [1966] 1 QB 233, 245.
71. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 613.

also noted that "there may be a conspiracy between two companies whose directors are the same if in fact neither controls the other so that each is a separate entity".[72]

6.56 The Commonwealth, NT and ACT criminal codes provide that a person may be found guilty of conspiracy even if the only other party to the agreement is a corporation.[73] The codes do not, however, specifically deal with the issue concerning conspiracies between an individual defendant and a corporation, of which the defendant is the effective owner or controller, or between corporations with interlocking shareholders and directors.[74]

Spouses

6.57 The position, at common law, is that a husband and wife cannot be guilty of conspiring with each other. The common law immunity has been abolished in a number of jurisdictions, including NSW[75] and the Northern Territory,[76] and by the Commonwealth and ACT codes by implication.[77]

6.58 Some jurisdictions, for example, Tasmania,[78] and England and Wales,[79] have retained the immunity, which has been criticised as "outdated".[80] The Law Commission has recommended the repeal of the provision in England and Wales on a number of occasions.[81]

6.59 The Victorian Working Group recommended retention of the common law rule, which had previously been partially repealed,[82] in relation to conspiracies between spouses to commit treason or murder, an outcome now preserved in the *Crimes Act 1958* (Vic).[83]

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72. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [39.23].
73. *Criminal Code* (Cth) s 11.5(3)(b); *Criminal Code* (NT) s 43BJ(4)(b); *Criminal Code* (ACT) s 48(5)(b).
74. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 103; and see M R Goode, *Criminal Conspiracy in Canada* (1975) 109-134.
75. *Crimes Act 1900* (NSW) s 580D.
76. *Criminal Code* (NT) s 291.
77. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 101-103.
78. *Criminal Code* (Tas) s 297(2).
79. *Criminal Law Act 1977* (Eng) s 2(2)(a), which also extends the immunity to a "civil partner".
80. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 101; See also England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [5.10]-[5.12]; B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 366.
81. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Report 177 (1989) vol 2 [13.29-13.32]; England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [5.16].
82. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [26]-[27].
83. *Crimes Act 1958* (Vic) s 339.

6.60 The immunity has been described as an "outdated relic" which depended on the notion that the confidentiality of marital ties should not be broken.[84]

Other parties not criminally responsible

6.61 At common law, if one of the two parties to a conspiracy is excluded from criminal liability generally, for example, because he or she is a diplomat or a child under the age for criminal responsibility, that party will not be liable to be convicted of conspiracy.[85] The rationale for such qualification is that an agreement cannot be made with someone who is incapable of forming a criminal intent.[86]

6.62 It would seem, however, that the other party to the agreement will be liable at common law so long as the party who is personally exempt from criminal liability is capable of forming the *mens rea* for conspiracy.[87]

6.63 Under the Commonwealth and ACT criminal codes, a party to a conspiracy may be found guilty of that offence even if each other party to the agreement is a person who is not criminally responsible.[88] In the Northern Territory, a party may be found guilty of conspiracy even if the other party "lacked the capacity to commit an offence", or is not amenable to justice.[89]

6.64 In England and Wales, however, a person is not guilty of conspiracy if the only other person with whom he or she agreed is, a "person under the age of criminal responsibility".[90] The Law Commission of England and Wales, in its 1989 report, did not support this provision on the grounds that it was unjustified, preferring to leave such cases to be dealt with according to general principles of conspiracy, in much the same way as the law applies to cases in England involving agreements with those who are mentally disordered. The Commission noted in particular the justification for conspiracy as allowing for early intervention to prevent crime:

> If the child understands the nature of the agreement and intends that the offence be committed, his own immunity from prosecution should not affect the liability for conspiracy of the person who is over the age of criminal responsibility.[91]

6.65 Notwithstanding this reservation, the Law Commission recommended, in its 2009 report, the retention of the provision "despite the fact that it may appear unsatisfactory that the adult's criminal responsibility rests in part on the age of his or her co-conspirator". It recommended that, when all but one of the conspirators is

84. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [26].
85. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 733.
86. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [5.38].
87. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 733; D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 473.
88. *Criminal Code* (Cth) s 11.5(3)(c) and (4)(b); *Criminal Code* (ACT) s 48(5)(c) and (7).
89. *Criminal Code* (NT) s 292.
90. *Criminal Law Act 1977* (Eng) s 2(2)(b).
91. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Report 177 (1989) vol 2 [13.31].

under the age of criminal responsibility, "there is not the requisite meeting of guilty minds that is of the essence in conspiracy cases".[92]

6.66 The Gibbs review committee suggested that the question of whether there can be a conspiracy with a child should be left to general principles, so that, "if the child had capacity to make, and did make, the agreement, the other party to the agreement will be liable for conspiracy, even if the child, by virtue of his or her age, is exempt from criminal liability".[93]

6.67 The Victorian Working Group recommended that the general rules concerning the criminal liability of children, and those with mental illness, should continue to apply in relation to their potential liability for becoming a party to a conspiracy.[94] It also recommended that the fact of such exemption should not apply to a party of full age, who did not have a mental illness but who entered into a conspiracy with someone who was not criminally responsible because of their age or mental state.[95] This recommendation does not appear to have been implemented in the *Crimes Act 1958* (Vic).

Intended victims (parties protected by the substantive offence)

6.68 The question of a conspiracy with an intended victim raises two issues – whether the intended victim can be guilty of conspiracy; and whether an individual can be guilty of conspiracy if the only other person with whom he or she conspires is an intended victim. A typical example of a conspiracy with an intended victim is where a person agrees with a child under the age of consent to have sexual intercourse.[96]

6.69 At common law, an individual, who falls within the class of people which a particular criminal law intends to protect (the "protected person"), cannot be found liable for conspiring to commit an offence against that law.[97] The rationale for exempting a protected person from being liable for conspiracy to commit that offence is that it is contrary to the policy underlying the substantive offence to convict someone who the act was intended to protect.[98]

6.70 Under the Commonwealth, ACT and NT criminal codes, "a person for whose benefit or protection the offence exists" cannot be found guilty of conspiracy to commit the

92. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [5.39].
93. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [39.10].
94. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [28].
95. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [29].
96. See Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [39.11].
97. *R v Tyrrell* [1894] 1 QB 710.
98. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [5.20].

offence.[99] In England and Wales, an "intended victim" also cannot be guilty of conspiring to commit the offence of which he or she is the intended victim.[100]

6.71 Under the Commonwealth and ACT criminal codes, an individual may be found guilty of conspiracy even if each other party to the agreement is a person for whose benefit or protection the offence exists.[101] This is consistent with the recommendation of the Criminal Law Officers Committee.[102]

6.72 In England and Wales, however, an individual is not guilty of conspiracy if the only other person with whom he or she agreed is, amongst other things, "an intended victim of that offence or of each of those offences".[103] The Law Commission of England and Wales has recommended against this provision on a number of occasions,[104] preferring to allow the general principles of conspiracy to apply to such cases so that where, for example, a child over 10 years of age (who is deemed capable for forming a criminal intent) conspires with another, "there can be a meeting of two minds capable of forming a criminal intent, even when the crime they agree to commit is one meant to protect young people".[105]

6.73 The Victorian Working Group recommended that there be no exemption for victims or people who conspire with them, pointing out that the main difficulty with a victim exemption was defining such a person, particularly in the context of those crimes which do not have a victim in the ordinary sense of someone against whom the criminal activity is directed.[106]

Other parties acquitted

6.74 The High Court has overturned the traditional common law rule that an accused cannot be found guilty of conspiracy if all the other alleged co-conspirators are acquitted. Now, "the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person".[107]

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99. *Criminal Code* (Cth) s 11.5(4)(b); *Criminal Code* (ACT) s 48(7); *Criminal Code* (NT) s 43BJ(4)(c)(ii). See Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 103.
100. *Criminal Law Act 1977* (Eng) s 2(1).
101. *Criminal Code* (Cth) s 11.5(3)(c); *Criminal Code* (ACT) s 48(5)(c).
102. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 103.
103. *Criminal Law Act 1977* (Eng) s 2(2)(c).
104. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Report 177 (1989) vol 2 [13.32]; England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [5.35]. But see England and Wales, Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform*, Report 76 (1976) [1.55] and [1.58].
105. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [5.28].
106. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [30].
107. *R v Darby* (1981) 148 CLR 668, 678, not following *Dharmasena v The King* [1951] AC 1. See also *R v Rogerson* (1992) 65 A Crim R 530; *DPP v Shannan* [1975] AC 717.

6.75 The Commonwealth, NT, and ACT criminal codes[108] accord with the High Court's decision. Victoria, and England and Wales have similar provisions.[109]

6.76 The Criminal Law Officers Committee considered that "the courts must not be hindered from examining the merits of what may be a quite complex situation by rules about formal inconsistencies on the face of the record".[110] It has been particularly noted that the fact that a jury was not satisfied of the guilt of an accused does not necessarily amount to a finding of actual innocence.[111]

6.77 Other reviews have, however, come to a different conclusion. A review in South Australia considered that, if an accused's co-conspirators are acquitted because the jury is not satisfied of their guilt, his or her conviction for conspiracy "cannot stand for the simple reason that no conspiratorial agreement has been proved between him [or her] and anyone else".[112] This view would not seem to reflect the reality of the application of the rules of evidence, which may preclude the admission of some critical body of evidence in the trial of one party, but not in the trial of the other party to the conspiracy.

The acts contemplated by the conspiracy

Unlawful act or unlawful means

6.78 An issue potentially arises in relation to the common law offence concerning an agreement to do *an unlawful act*. It has been suggested, in this respect, that "unlawful" has a very wide meaning and historically:

> included agreements to perform not only any crime triable in England, even a crime triable only summarily, but also at least (i) fraud, (ii) the corruption of public morals, (iii) the outraging of public decency, and (iv) some torts.[113]

6.79 It has been observed that this gave the criminal law a "long reach", for example, in the 19th century, when the offence was used to curtail the activities of the early trade unions by encompassing agreements to strike.[114] It has been held that a conspiracy to commit a tort is an offence at common law, although the House of Lords placed some limitations on this, in confining its application to combinations

108. *Criminal Code* (Cth) s 11.5(3)(d) and (4)(a); *Criminal Code* (ACT) s 48(5)(d); *Criminal Code* (NT) s 292 which is to be read in conjunction with s 43BJ(5).

109. *Crimes Act 1958* (Vic) s 321B; *Criminal Law Act 1977* (Eng) s 5(8).

110. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 103. See also Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [47.5].

111. *R v Darby* (1981) 148 CLR 668, 692.

112. Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977) 315.

113. D Ormerod, *Smith and Hogan Criminal Law* (12th ed. OUP, 2008) 399. See also *Shaw v Director of Public Prosecutions* [1962] AC 220.

114. A Ashworth, *Principles of Criminal Law* (5th ed, Oxford UP, 2006) 455. See also D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, Federation Press, 2006) 1110-1111.

that involved an invasion of the public domain, for example trespass in relation to a publicly owned building or an intended infliction of more than a purely nominal injury or damage to a plaintiff.[115] The Law Commission and the Victorian working group recommended the abolition of the common law offence of conspiracy to commit a tort.[116]

6.80 Examples of the long reach of the offence can be seen in the prosecution, in England in the 1960s and 1970s, of conspiracies to corrupt public morals, or to outrage public decency.[117] These were criticised in Australia as illustrating the broad and ill-defined scope of the power asserted for the courts as custodians of public morals.[118] It has been suggested that "there is no warrant in the Australian law for the extension of conspiracy to acts which are generally conceded to be immoral but are not otherwise unlawful".[119]

6.81 While the authorities have consistently stated that the common law offence of conspiracy embraces an agreement to do a *lawful act by unlawful means*, as well as an agreement to do an unlawful act, it has been suggested that, as a matter of logic, the latter includes the former, and that it is immaterial whether the act in question is the ultimate object of the agreement or one of the steps along the way to that object.[120] It has also been said that the absence of a precise definition of the word "unlawful" in the context means that the offence has an uncertain scope, that will allow the prosecution of parties to an agreement to do an act which, if committed by one party alone, would not be a crime.[121]

6.82 While it may be that this formulation is a relic of the procedural requirements for the particularisation of the charge,[122] it is arguable that it still has work to do in the case of deceptive conduct or misrepresentations that are designed to achieve a lawful object, at least in the absence of a comprehensive set of provisions criminalising such conduct.[123]

6.83 The *Criminal Code* (Qld) expressly preserves the common law formulation of conspiring to "effect any lawful purpose by any unlawful means",[124] but it appears to

115. *Kamara v DPP* [1974] AC 104, 129-130 (Lord Hailsham, Lords Morris and Simon agreeing).
116. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [66]; England and Wales, Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform*, Report 76 (1976) [5.17].
117. *Shaw v Director of Public Prosecutions* [1962] AC 220. See also *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435.
118. Law Council of Australia, *Draft Criminal Code for the Australian Territories*, Australia, Parliamentary Paper No 44 (1969) 40; Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [57].
119. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 359. See also *R v Cahill* [1978] 2 NSWLR 453, 457-458.
120. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 356, 357; Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [10]. See also *R v Ryan* (1984) 14 A Crim R 97, 103 (Roden J).
121. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [11], [13].
122. *R v Peck* (1839) 9 Ad & E 686; 112 ER 1372. Compare *Criminal Procedure Act 1986* (NSW) sch 3 cl 21 which omits the need for the indictment to state any overt act of conspiracy.
123. See, eg, *Board of Trade v Owen* [1957] AC 602, 622; *R v Ryan* (1984) 14 A Crim R 97.
124. *Criminal Code* (Qld) s 543(1)(g).

be alone in this respect, at least in maintaining an offence in such general and potentially uncertain terms.[125]

6.84 It has been observed that the question of what is meant by "unlawful" is "one of the most difficult, and unnecessarily difficult, questions in the law of conspiracy". Accordingly, it has been suggested that "every legitimate purpose of a law of criminal conspiracy would be served by a rule that an agreement is not a conspiracy unless it contemplates the commission of some other criminal offence".[126]

6.85 This issue has been addressed in several reviews, and in those jurisdictions that have codified conspiracy or introduced a statutory offence. For example, the Gibbs review committee concluded that, as a matter of policy, "conspiracy should be confined to an agreement to commit what would be a substantive offence against the law of the Commonwealth if done by an individual alone", adding:

> In principle, speaking generally, it is impossible to justify the invocation of the criminal law to punish an agreement to do something which if done alone would be perfectly lawful. A provision of that kind would normally have the effect of introducing both uncertainty and an element of oppression into the criminal law.[127]

6.86 The Criminal Law Officers Committee similarly concluded that the offence of conspiracy should be limited to agreements to commit other criminal offences.[128] The *Criminal Code* (Cth) has adopted that formula in enacting a general offence of conspiring to commit an offence against a law of the Commonwealth,[129] as has the *Criminal Code* (ACT).[130]

6.87 In Victoria, Western Australia and England and Wales, the relevant statutes have similarly limited the general offence of conspiracy to agreements that contemplate the commission of a criminal offence.[131] The English provisions[132] followed recommendations by the Law Commission for England and Wales that conspiracy should be limited to agreements to commit criminal offences:

> an agreement should not be criminal where that which it was agreed to be done would not amount to a criminal offence if committed by one person.[133]

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125. But see *Crimes Act 1914* (Cth) s 86(1)(a), (c) and (d) (now repealed); *Criminal Code* (WA) s 543(6) and (7) (now amended). Howie J has noted that under the *Criminal Code* (Cth) it is not an offence to commit a lawful act by unlawful means: *R v Ansari* (2007) 70 NSWLR 89 [66].
126. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 357.
127. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [35.11].
128. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 97.
129. *Criminal Code* (Cth) s 11.5.
130. *Criminal Code* (ACT) s 48(1).
131. *Crimes Act 1958* (Vic) s 321(1); *Criminal Code* (WA) s 558, s 560; *Criminal Law Act 1977* (Eng) s 1.
132. *Criminal Law Act 1977* (Eng) s 1 and s 5(3).
133. England and Wales, Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform*, Report 76 (1976) [1.8]-[1.9], [1.113].

6.88 In Ireland, a provisional recommendation has also been made for conspiracy to be restricted to agreements to commit criminal offences.[134]

Substantive offences

6.89 In some jurisdictions, the reach of the offence of conspiracy has been narrowed by limiting the offences that can be the subject of the conspiratorial agreement.

6.90 Under the ACT, NT and Commonwealth codes the substantive offence must be a serious one, that is, one which is defined as punishable by imprisonment for more than 12 months or by a fine of at least 200 penalty units.[135] In each instance proceedings for the conspiracy offence must not be commenced without the consent of the Director of Public Prosecutions.[136]

6.91 The limitation to "more serious offences" was the subject of some debate within the Criminal Law Officers Committee. The Committee's original proposal would require the offence to be one that carried a penalty of at least 2 years' imprisonment or a fine of $100,000.[137] This can be compared with the *Crimes Act 1958* (Vic) which extends conspiracy to summary offences.[138] The extension to summary offences was considered necessary, in Victoria, to encompass offences relating to the provision and issuing of licences by various authorities. It was considered that a conspiracy may consist of "a large-scale agreement" to procure breaches of the relevant statutes and that such conspiracies were deserving of punishment.[139]

6.92 In England and Wales, conspiracy, as set out in *Criminal Law Act 1977* (Eng), extends to summary offences.

6.93 It would appear that the common law offence would encompass agreements to commit summary offences in NSW that are not caught by the statutes concerned with regulatory offences.[140] An issue arises as to whether any statutory offence, that is introduced in NSW, should extend this far, or be subject to some limitations that would, for example, confine its application to multi-party conspiracies that involve the widespread commission of minor offences.

134. Ireland, Law Reform Commission, *Inchoate Offences*, Consultation Paper 48 (2008) [3.70]-[3.76].
135. *Criminal Code* (Cth) s 11.5(1); *Criminal Code* (ACT) s 48(1); *Criminal Code* (NT) s 43BJ(1). See also Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977) 311.
136. *Criminal Code* (Cth) s 11.5(8); *Criminal Code* (ACT) s 48(10); and *Criminal Code* (NT) s 43BJ(10).
137. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 97.
138. *Crimes Act 1958* (Vic) s 321 and s 321C.
139. Victoria, *Parliamentary Debates (Hansard),* 21 March 1984, 1932.
140. *R v Skewes* (1981) 7 A Crim R 276.

Conspiracy to cheat and defraud

6.94 While it has been said that there is no general offence of "fraud" at common law,[141] there is an offence of conspiracy to cheat and defraud[142] (hereafter referred to as "conspiracy to defraud"), the essence of which is the intentional use by the defendant of *dishonest means* to prejudice another person's rights or interests or performance of public duty,[143] with the knowledge that the defendant possesses no such right to do so.[144]

6.95 At common law, it is possible for two people to be criminally responsible if they enter into a conspiracy to defraud, even when they would not have committed any crime had they acted separately.[145]

6.96 Contrary to earlier authority[146] it is now settled that at common law there may be a conspiracy to defraud without deceit.[147]

6.97 Justice McHugh held in *Peters v The Queen* that while it must be proved, for the common law offence, that the conspirators were consciously using dishonest means, they need not *know* that their behaviour was dishonest.[148]

6.98 Recently, in NSW a statutory definition of "dishonesty" was enacted in s 4B of the *Crimes Act 1900* (NSW). It differs from the common law test established in *Peters,* in that it defines "dishonest" to mean dishonest:

> according to the standards of ordinary people and *known* by the defendant to be dishonest according to the standards of ordinary people.[149]

6.99 The definition of dishonesty, which has now been adopted in NSW conforms with that of the *Criminal Code* (Cth)[150] which, in turn, was based on the decision in *R v Ghosh*.[151]

6.100 This definition was introduced in 2010, contemporaneously with the enactment of Part 4AA of the *Crimes Act 1900* (NSW), which modernised and simplified the

141. England and Wales, Law Commission, *Fraud*, Report 276 (2002) [2.4], although in some contexts a common law misdemeanour of cheating has been recognised, eg, in relation to conduct designed to pervert the course of justice: *R v Vrones* [1891] 1 QB 360; and *R v Selvage* [1982] QB 372; or in relation to a fraud on the Crown or public: *R v Hudson* [1956] 2 QB 252; and *R v Bradbury* [1956] 2 QB 262, 263.
142. *R v Weaver* (1931) 45 CLR 321; *R v Brailsford* (1905) 2 KB 730; *R v Fountain* [1965] 2 All ER 671.
143. *Peters v The Queen* (1998) 192 CLR 493, 529 (McHugh J).
144. *Peters v The Queen* (1998) 192 CLR 493, 508 (Toohey and Gaudron JJ); *Spies v The Queen* (2000) 201 CLR 603.
145. England and Wales, Law Commission, *Fraud*, Report 276 (2002) [2.4].
146. In *Re London and Globe Finance Corp Ltd* [1903] 1 Ch 728 cited in *Balcombe v De Simoni* (1972) 126 CLR 576, 593.
147. *Scott v Metropolitan Police Commissioner* [1975] AC 819; *R v Horsington* [1983] 2 NSWLR 72, 75; *Peters v The Queen* (1998) 192 CLR 493.
148. *Peters v The Queen* (1998) 192 CLR 493 [79].
149. *Crimes Act 1900* (NSW) s 4B(1).
150. *Criminal Code* (Cth) s 480.2.
151. *R v Ghosh* [1982] QB 1053, 1064. See A Steel, "New fraud and identity-related crimes in New South Wales" (2010) 22 *Judicial Officers Bulletin* 17.

existing law in NSW in relation to fraudulent conduct and related offences that were previously contained in the *Crimes Act*.[152]

6.101 It provides for a general offence of *fraud*, which applies where a person, by any deception, dishonestly obtains property belonging to another, or obtains any financial advantage or causes any financial disadvantage.[153]

6.102 "Deception" is defined, for the purpose of this Part, to mean any deception, by words or other conduct, as to fact or as to a law, including:

- deception as to the intentions of the person using the deception or any other person;
- conduct by a person that causes a computer, machine or any electronic device to make a response that the person is not authorised to cause it to make.[154]

6.103 So far as an offence under this Part requires a deception as an element, the Act provides that the deception may be intentional or reckless.[155]

6.104 Recklessness is not defined in the *Crimes Act 1900* (NSW), save in so far as s 4A provides that, if an element of an offence is "recklessness", that element may also be established by proof of intention or knowledge. Otherwise, it would seem that "recklessness" will continue to involve a realisation, on the part of the defendant, that the kind of harm charged might (possibly) be done, accompanied by a preparedness on the part of the defendant to proceed nevertheless.[156] By way of comparison, the *Criminal Code* (Cth) defines "recklessness" for the purposes of the Code, both in relation to a circumstance and a result, as involving an awareness by the defendant of a substantial risk in relation to the circumstance or result, and the unjustifiable taking of the risk having regard to the circumstances known to that party.[157]

6.105 In addition to the offence of fraud, the *Crimes Act 1900* (NSW) provides for a series of specific additional offences as follows:

- dishonestly destroying or concealing any accounting record, with the intention of obtaining property belonging to another or obtaining a financial advantage or causing a financial disadvantage;[158]
- dishonestly making or publishing or concurring in making or publishing any statement (whether in writing or not) that is false in a material particular, with the

152. *Crimes Act 1900* (NSW) s 158, s 164-186, s 527-527B, s 528, s 545A, s 547A; *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW) sch 2. See NSW, *Parliamentary Debates (Hansard)* Legislative Council, 12 November 2009, 19507.
153. *Crimes Act 1900* (NSW) s 192E(1).
154. *Crimes Act 1900* (NSW) s 192B(1).
155. *Crimes Act 1900* (NSW) s 192B(2).
156. See *R v Coleman* (1990) 19 NSWLR 467, 475-476; *R v Cryer* [2010] NSWCCA 18.
157. *Criminal Code* (Cth) s 5.4.
158. *Crimes Act 1900* (NSW) s 192F(1).

intention of obtaining property belonging to another, or obtaining a financial advantage or causing a financial disadvantage;[159]

- conduct of an officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly makes or publishes, or concurs in making or publishing a statement (whether in writing or not) that, to his or her knowledge, is or may be false and misleading in a material particular.[160]

6.106 The amending legislation in NSW did not deal with the common law offence of conspiracy to defraud, with the consequence that, like South Australia,[161] this form of criminality continues to be the subject of the common law. One consequence of the fact that such an offence was not dealt with in the "codification" of the fraud offences in NSW, is that arguably there is a disjunction between the common law offence and the new fraud offence in relation to the mental element required.[162]

6.107 The common law offence of conspiracy to defraud has been the subject of considerable review,[163] and of legislative action, in jurisdictions other than NSW.

6.108 The Law Commission of England and Wales, in its most recent report on fraud offences, recommended that the common law offence be abolished in favour of reliance on the general conspiracy provisions, combined with a statutory offence of fraud.[164] Previously, it had argued for the retention of the common law offence on the basis that its abolition would have left "unacceptable lacunae" in the law.[165]

6.109 The Government of the United Kingdom, in choosing not to abolish the common law offence of conspiracy to defraud, when enacting the *Fraud Act 2006* (Eng),[166] contended that the Commission's previous recommendation was still valid. It argued that the common law offence could be called upon to fill any limitations in the statutory offence of conspiracy, which is embodied in the *Criminal Law Act 1977* (Eng).[167] That Act, accordingly, abolished the common law offence of conspiracy, save so far as it relates to conspiracy to defraud and also so far as it relates to agreements to engage in conduct that tends to corrupt public morals or outrage public decency.[168]

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159. *Crimes Act 1900* (NSW) s 192G.
160. *Crimes Act 1900* (NSW) s 192H.
161. *Criminal Law Consolidation Act 1935* (SA) s 133(2).
162. A Steel, "New fraud and identity-related crimes in New South Wales" (2010) 22 *Judicial Officers Bulletin* 17.
163. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [36.1]-[36.4]; Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 3: Conspiracy to Defraud*, Report (1997); England and Wales, Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform*, Report 76 (1976) [1.14]-[1.16]; England and Wales, Law Commission, *Fraud*, Report 276 (2002) pt 2-4; Ireland, Law Reform Commission, *Inchoate Offences*, Consultation Paper 48 (2008) [3.55]-[3.56], [3.68]-[3.69], [3.74]-[3.76]; Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) pt 5.
164. England and Wales, Law Commission, *Fraud*, Report 276 (2002) [9.4].
165. England and Wales, Law Commission, *Fraud*, Report 276 (2002) [B.1].
166. Thus continuing the offence under *Criminal Law Act 1977* (Eng) s 5(2).
167. Explanatory notes, Fraud Act 2006 (Eng).
168. *Criminal Law Act 1977* (Eng) s 5(2) and (3).

6.110 Similarly, in its report, *Conspiracy to Defraud,* the Criminal Law Officers Committee acknowledged that gaps in the law may result from any attempt to abolish the offence of conspiracy to defraud.[169]

6.111 The Criminal Law Officers Committee adopted the principle that conspiracy should only apply to conduct which would constitute an offence, if committed by an individual. The Committee recognised that the common law offence of conspiracy to defraud does not accord with this general principle.[170] Upon review of the potential gaps identified by the Law Commission, the Criminal Law Officers Committee concluded that these existing gaps had already been closed by the Model Criminal Code, were subject to other specific legislation, or did not justify the intervention of criminal law.[171] Despite this, the Committee concluded that conspiracy to defraud should be retained as an offence, and included in the Model Criminal Code, on the basis that the ingenuity of fraudsters would lead to truly criminal behaviour falling between gaps, or establishing new gaps, in the general law of fraud.[172]

6.112 Subsequently, the *Criminal Code* (Cth) replaced the offence of conspiracy to defraud the Commonwealth, for which provision had formerly been made by the *Crimes Act 1914* (Cth),[173] with offences, among others, of conspiracy with the intention of dishonestly obtaining a gain from a Commonwealth entity, or of dishonestly causing a loss to a Commonwealth entity, or of dishonestly influencing a Commonwealth public official in that person's duties as a Commonwealth public official.[174]

6.113 As is the case for the general offence of conspiracy under the *Criminal Code* (Cth),[175] it is necessary for the prosecution to prove, in accordance with these provisions, that the defendant entered into an agreement with one or more other parties, that the defendant and at least one other party to the agreement intended to do the relevant "thing" pursuant to the agreement, and that the defendant, or at least one other party to the agreement, committed an overt act pursuant to the agreement.[176]

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169. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 3: Conspiracy to Defraud,* Report (1997) 14-23.
170. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 3: Conspiracy to Defraud,* Report (1997) 24.
171. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 3: Conspiracy to Defraud,* Report (1997) 23.
172. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 3: Conspiracy to Defraud,* Report (1997) 26-27.
173. *Crimes Act 1914* (Cth) s 86A, replaced as a result of the commencement of the *Criminal Code Act 1995* (Cth). The pre-existing statutory offences of conspiracy to bring a false accusation and conspiracy to defeat justice contained in *Crimes Act 1914* (Cth) s 41 and s 42 remain in force.
174. *Criminal Code* (Cth) s 135.4(1)-(8). See also comparable provisions in *Criminal Code* (ACT) s 334.
175. *Criminal Code* (Cth) s 11.5, which replaced the general conspiracy offence for which provision was made is *Crimes Act 1914* (Cth) s 86.
176. *Criminal Code* (Cth) s 135.4(9).

6.114 The criminal codes of Queensland, Tasmania and the NT, each of which provide for a general offence of conspiracy to commit a crime,[177] also variously make provision (although with some differences) for specific forms of conspiratorial conduct comprising dishonest or deceitful conduct, including offences of:

- conspiracy to deceive or defraud;[178]
- conspiracy to prevent or defeat the execution of any statute law;[179]
- conspiracy to prevent or obstruct the free and lawful disposition of any property by its owner for a fair value;[180]
- conspiracy to prevent or obstruct the free and lawful exercise of the trade, profession or occupation of any person;[181] and
- conspiracy to extort, by any means, property from another, or otherwise to inflict injury or harm by unlawful means, or to do an act with intent to injure another without lawful justification.[182]

6.115 Victoria has replaced the general offence of conspiracy at common law,[183] with a statutory offence of conspiracy and has abolished the offences of inciting or attempting an offence of conspiracy.[184] However, the abolition of the general common law offence does not apply so far as it relates to a conspiracy to cheat and defraud, or to defraud.[185] This solution allows the general statutory offence of conspiracy to overlap with the preserved common law offence, in order to accommodate the manifold ways in which one human being is able to cheat another, to which reference was made in the report of the working group.[186]

6.116 In Western Australia, a charge of conspiracy may only be brought in relation to substantive offences.[187] In a review of the *Criminal Code* (WA), it was recommended that the specific provision in the Code, relating to the offence of conspiracy to defraud, be repealed due to its "superfluous" and uncertain nature.[188] Instead, a broad substantive offence of fraud was introduced which required an "intent to defraud, by deceit or any fraudulent means".[189] Thus, it was envisaged that the prosecution of conduct, of the kind that was caught by the previous

177. *Criminal Code* (Qld) s 541 and s 542; *Criminal Code* (Tas) s 297(1)(c); *Criminal Code* (NT) s 43BJ, s 282, s 283.
178. *Criminal Code* (NT) s 284; *Criminal Code* (Tas) s 297(1)(d).
179. *Criminal Code* (NT) s 289(a); *Criminal Code* (Qld) s 543(1)(a).
180. *Criminal Code* (NT) s 289(b); *Criminal Code* (Qld) s 543(1)(c).
181. *Criminal Code* (NT) s 289(c); *Criminal Code* (Qld) s 543(1)(d) and (e).
182. *Criminal Code* (Tas) s 297(1)(e), (f) and (i); *Criminal Code* (Qld) s 543(1)(b).
183. *Crimes Act 1958* (Vic) s 321F(1), replacing it with a statutory crime applicable where a person agrees with any other person or persons that a course of conduct shall be pursued which will involve the commission of an offence by a party to the agreement.
184. *Crimes Act 1958* (Vic) s 321F(3).
185. *Crimes Act 1958* (Vic) s 321F(2).
186. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [53]-[54].
187. *Criminal Code* (WA) s 558.
188. M J Murray, *The Criminal Code: A General Review* (Report to the Attorney General of Western Australia, 1983) 271, 349.
189. A Steel, "General Fraud Offences in Australia" [2007] *University of New South Wales Legal Research Series* 55; *Criminal Code* (WA) s 409.

provision, would be achieved by combining the new statutory provisions relating to fraud and conspiracy under the Code.

6.117 It can be seen that there is now a considerable legislative inconsistency in the manner in which conspiracies to defraud are captured across the Australian jurisdictions.

6.118 Now that there is a comprehensive statutory framework for fraud-related offences in NSW,[190] an issue arises whether there is any need to retain the common law offence of conspiracy to cheat and defraud; or whether a specific offence concerned with conspiracies to commit any offence included in Part 4AA of the *Crimes Act 1900* (NSW) should be added to that Part; or whether it would be sufficient to deal with this form of criminality by way of a general statutory offence of conspiracy that would extend to agreements to commit a Part 4AA offence, as well as any of the remaining offences for which provision is made under the *Crimes Act 1900* (NSW) or any other NSW Act.

Acts in furtherance of an industrial dispute

6.119 The NT and Queensland exclude from the reach of the code offence of conspiracy, agreements or combinations to do any act, or to make any omission or to cause any event, or to procure the same, in contemplation of, or in furtherance of, an industrial dispute unless the act, omission or event when done, made or caused, by an individual would have rendered such a person guilty of an offence.[191]

6.120 In NSW, the *Industrial Relations Act 1996* (NSW) provides:

> The purposes of a trade union are not, by reason only that they are in restraint of trade, unlawful, so as:
>
> (a) to make any member of the trade union liable to criminal proceedings for conspiracy or otherwise...[192]

6.121 A similar provision is made in s 3 of the *Trades Unions Act 1889* (Tas). The *Criminal Code* (Tas) provision relating to conspiracy[193] specifically states that it does not affect the provisions of the *Trade Unions Act 1889* (Tas).

Conspiracy to commit public justice offences

6.122 In NSW, the common law offence of conspiring to pervert the course of justice has been abolished.[194] However, a prosecution can still be brought for an offence of conspiring to commit a public justice offence under Part 7 of the *Crimes Act 1900* (NSW),[195] which Part makes express provision for most, if not all, of the forms of

190. As contained in *Crimes Act 1900* (NSW) pt 4AA; see also the identity offences contained in *Crimes Act 1900* (NSW) pt 4AB.

191. *Criminal Code* (NT) s 290; *Criminal Code* (Qld) s 543A.

192. *Industrial Relations Act 1996* (NSW) s 304. See also *Trade Union Act 1871* (UK) s 2; *Industrial Relations Act 1971* (UK) s 135(a).

193. *Criminal Code* (Tas) s 297.

194. *Crimes Act 1900* (NSW) s 341.

195. *Crimes Act 1900* (NSW) s 342.

conduct, that would constitute common law offences concerned with obstructing, preventing, perverting or defeating the course of justice, including the making of false allegations.

6.123 Provision continues to be made, in the *Crimes Act 1914* (Cth), for the offences of conspiracy to bring a false accusation (to charge or cause a person to be charged falsely with an offence against the law of the Commonwealth), or to obstruct, prevent or defeat the course of justice in relation to the judicial power of the Commonwealth.[196] The Gibbs review committee recommended the retention of these provisions.[197]

6.124 The NT, Tasmanian, WA and Queensland criminal codes contain express provisions for an offence of conspiracy to obstruct, prevent, pervert or defeat the course of justice (or some variation thereof).[198] These jurisdictions have also retained conspiracy to lay a false charge or to bring a false accusation.[199]

6.125 The position in Victoria is somewhat unclear in that the "public justice offences" continue to be common law offences.[200] The Victorian working group appears to have assumed that the statutory conspiracy offence would extend to conspiracies to pervert the course of justice.[201]

6.126 In any statutory reform of the law in relation to conspiracy in NSW it would be appropriate to ensure that this form of conspiracy was maintained.

Impossibility

6.127 The Gibbs committee considered that it was "doubtful" whether, at common law, two people could agree to commit an offence which, factually, it was not possible to commit.[202] However, recent authority, dependent on the common law, has confirmed that an accused may be liable for a conspiracy to do the factually impossible.[203]

6.128 The Gibbs review committee considered that it would be correct to consider impossibility of performance of an agreement as irrelevant to culpability, if the rationale for the offence of conspiracy was that conspiratorial agreements are

196. *Crimes Act 1914* (Cth) s 41 and s 42.

197. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [38.7] and [38.8]. The provisions in the *Criminal Code* (ACT) concerning perverting the course of justice and related offences (s 713-716) would appear to rely on the general conspiracy provisions in s 48.

198. *Criminal Code* (NT) s 286; *Criminal Code* (Tas) s 297(1)(b); *Criminal Code* (Qld) s 132; *Criminal Code* (WA) s 135.

199. *Criminal Code* (NT) s 285; *Criminal Code* (Qld) s 131; *Criminal Code* (WA) s 134.

200. As is recognised by *Crimes Act 1958* (Vic) s 320 and the attached table which specifies the maximum terms of imprisonment for the common law offences of perverting the course of justice or attempting to do so.

201. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [56].

202. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [41.1].

203. *R v El Azzi* (2001) 125 A Crim R 113 [22]-[29], [32]-[34]; *R v Barbouttis* (1995) 37 NSWLR 256, differing in this respect from the earlier decision of the House of Lords in *DPP v Nock* [1978] AC 979. See also *Onuorah v R* (2009) 260 ALR 126.

inherently culpable; but thought that the position might be otherwise if the rationale was to allow the law to intervene before the agreed crime was committed. However, the committee concluded that, "for practical reasons", impossibility of performance should be irrelevant.[204]

6.129 Under the Commonwealth, ACT and NT criminal codes, a person may accordingly be found guilty of conspiracy to commit an offence even if its performance would be impossible.[205] In England and Wales, a person may be guilty of conspiracy, notwithstanding "the existence of facts which render the commission of the offence ... impossible".[206] Similarly, in Victoria, a person may be guilty of conspiracy "notwithstanding the existence of facts of which he is unaware which make commission of the offence by the agreed course of conduct impossible".[207]

6.130 The Victorian provisions arose from the Victorian working group's report on conspiracy. This report noted the distinction between factual and legal impossibility, and adopted the reasoning of the Law Commission, in its recommendations relating impossibility in the context of attempt.[208] The Law Commission considered that factual impossibility should not preclude a conviction for attempt and that, on the other hand, legal impossibility should preclude a conviction for attempt:

> pursuing a course of action which does not constitute an offence should not become an attempt to commit an offence because, by reason only of an error as [to] the general law, the defendant believes that that course of action does constitute an offence.[209]

Cross border conspiracies

6.131 Two possible situations arise for consideration: agreements made in NSW to commit a criminal offence in another jurisdiction; and agreements made in another jurisdiction to commit an offence in NSW.

6.132 There are conceptual difficulties involved in treating conspiracy as a subject which can be given a fixed territorial jurisdiction. It is an offence that can originate in one place, in so far as the making of the agreement (which is at its heart) is concerned, yet it can contemplate implementation and consequences in another jurisdiction or jurisdictions.[210] Moreover, a conspiracy can be joined by parties resident in a different jurisdiction from that in which it was originally established.

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204. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [41.6].
205. *Criminal Code* (Cth) s 11.5(3)(a); *Criminal Code* (ACT) s 48(5)(a); *Criminal Code* (NT) s 43BJ(4)(a).
206. *Criminal Law Act 1977* (Eng) s 1(1)(b).
207. *Crimes Act 1958* (Vic) s 321(3); and see Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [74].
208. England and Wales, Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, Report 102 (1980) [2.99], [2.100], [3.8].
209. England and Wales, Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, Report 102 (1980) [2.100].
210. See *DPP v Doot* [1973] AC 807, 817-818 cited in *R v Fan* (1991) 24 NSWLR 60, 64.

6.133 The practical realities of transnational and international crime, particularly internet crime, which pays no heed to territorial borders, do require specific attention, in relation both to conspiracies formed in NSW to engage in criminality outside the State, and to conspiracies formed outside NSW to engage in criminality within NSW.

Conspiracies made in NSW

6.134 At common law, a conspiracy entered into in England to commit a substantive offence, in another jurisdiction, was not indictable in England unless the substantive offence itself was also indictable in England.[211] This common law position is recognised by s 1(4) of the *Criminal Law Act 1977* (Eng), which requires the substantive offence to be one that is "triable in England and Wales".

6.135 The *Criminal Law Act 1977* (Eng) extends the offence of conspiracy to situations where the parties to a conspiracy intend an act or event, within an agreed course of conduct, that takes place in a jurisdiction outside England and Wales, and creates an offence under the law in force in that jurisdiction, if, but only if:

(a) a party to the agreement, or a party's agent, did anything in England and Wales in relation to the agreement before its formation, or

(b) a party to the agreement became a party in England and Wales (by joining it either in person or through an agent), or

(c) a party to the agreement, or a party's agent, did or omitted anything in England and Wales in pursuance of the agreement.[212]

6.136 The Law Commission of England and Wales has observed, in its report on conspiracy and attempts, that "it should be possible to convict D under this heading, if D's relevant conduct in England or Wales was simply part of the process leading up to the final conspiracy (for example, the sending of e-mails preceding the parties' eventual agreement)".[213] The Commission[214] also drew support from judicial comments that "it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy", and that the law must "face this new reality" that "crime is now established on an international scale".[215] The Commission recommended:

> it should be possible to convict D of conspiracy to commit a substantive offence, regardless of where any other party's conduct occurred, if: D's relevant conduct occurred in England or Wales; D knew or believed that the conduct or consequence element of the intended substantive offence might be committed wholly or partly in a place outside England and Wales; and the substantive

211. *Board of Trade v Owen* [1957] AC 602, although this is a case of a conspiracy to commit a lawful act by unlawful means, it was accepted that a similar principle applied.
212. *Criminal Law Act 1977* (Eng) s 1A(5). See also *Drug Misuse and Trafficking Act 1985* (NSW) s 28.
213. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [7.52].
214. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [7.53].
215. *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, 251.

> offence, if committed in that place, would also be an offence under the law in force in that place (however described in that law).[216]

6.137 Such provisions are arguably very broad. For this reason, the Law Commission recommended the retention of the requirement for the Attorney General to consent to proceedings, in cases where it could not be proved that the accused knew or believed that the substantive offence might be committed wholly or partly in England or Wales, on the grounds that there should be "a safeguard to prevent the provisions being applied too readily".[217]

6.138 The Law Council of Australia, in 1969, proposed a variation of the above provisions, for application within Australia, so as to include a conspiracy to commit an act which would constitute an offence in another Australian jurisdiction, even though the relevant act may not be an offence in the State or Territory where the conspiracy takes place. The Law Council was of the view that "in a federation it should not be possible for one Territory (or State) to harbour conspirators against the laws of another".[218]

6.139 The Gibbs review committee also recommended that Commonwealth law should apply to "conspiracies made within Australia to commit offences outside Australia".[219]

6.140 In *R v Catanzariti,* it was held that a conspiracy in South Australia to cultivate cannabis in the Northern Territory could not be prosecuted in South Australia.[220] So, too, it had been held, in NSW, that a conspiracy to commit a crime in another jurisdiction did not amount to an offence against the law of NSW, and therefore could not be taken up by the then existing geographical nexus provisions of the *Crimes Act 1900* (NSW).[221]

6.141 Part 1A of the *Crimes Act 1900* (NSW) is a provision of general application, that was enacted in 2000, partly to overcome the problems caused by the South Australian decision in *R v Catanzariti.* It is understood to be in line with recommendations of the Criminal Law Officers Committee.[222] It now provides that a person commits an offence against the law of NSW if all the elements necessary to constitute that offence exist (disregarding geographical considerations), and the offence is committed wholly or partly in NSW (whether or not the offence has any effect in NSW).[223] This would cover a conspiracy to commit a crime in another jurisdiction. Similar provision is made in the *Criminal Code* (ACT).[224]

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216. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [7.56].
217. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [7.70].
218. Law Council of Australia, *Draft Criminal Code for the Australian Territories*, Australia, Parliamentary Paper No 44 (1969) 40.
219. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [43.5].
220. *R v Catanzariti* (1995) 65 SASR 201, 215.
221. *R v Isaac* (1996) 87 A Crim R 513, 525; *R v Lowe* (2003) 57 NSWLR 102 [27]-[28].
222. NSW, Parliamentary Debates (Hansard) Legislative Assembly, 1 June 2000, 6455.
223. *Crimes Act 1900* (NSW) s 10C.
224. *Criminal Code* (ACT) s 64.

6.142 In Victoria, the conspiracy provisions extend to conspiracy with respect to an offence outside Victoria but only if:

> (a) the necessary elements of the offence include elements which, if present or occurring in Victoria, would constitute an offence against a law in Victoria; and
>
> (b) one or more of the persons [involved] is or are in Victoria when the agreement referred to ... is made.[225]

6.143 In Queensland and Western Australia, the conspiracy provisions extend to a conspiracy that is made in the "home" jurisdiction to do any act in "any part of the world" which, if done in the home jurisdiction, would be variously a crime, or an offence of a particular category (for example, "simple offence" or "indictable offence"), and which is an offence "under the laws in force in the place where it is proposed to be done".[226]

6.144 This approach appears to have been adopted in some individual NSW statutes. For example, the *Firearms Act 1996* (NSW) makes it an offence to conspire in NSW to commit an offence outside of NSW, that corresponds with an offence under the *Firearms Act 1996* (NSW). It makes a party to such a conspiracy liable to the "same punishment, pecuniary penalty and forfeiture that he or she would be subject to, if the offence concerned had been committed in New South Wales".[227]

Conspiracies made outside NSW

6.145 At common law, a conspiracy entered into, in another jurisdiction, to commit a crime in England, was indictable in England, provided the accused committed acts in England in furtherance of the agreement,[228] or, possibly, was simply within the jurisdiction during the continuance of the conspiracy.[229] The requirement of acts done in the forum jurisdiction, in furtherance of a conspiracy agreed in another jurisdiction, appears to have been adopted in some Australian decisions.[230] However, it has been held, in South Australia, that a conspiracy formed in another jurisdiction to commit an offence in South Australia can be charged in South Australia, "whether or not an act in furtherance of the conspiracy is performed in South Australia".[231]

6.146 Similarly, the Privy Council has held that a conspiracy entered into abroad, which was intended to result in the commission of a criminal offence in England, is justiciable in England, whether or not an overt act occurred in England.[232]

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225. *Crimes Act 1958* (Vic) s 321A(1).
226. *Criminal Code* (Qld) s 541(1), s 542(1); *Criminal Code* (WA) s 558(1)(b), s 560(1)(b). See also *Criminal Code* (NT) s 282, s 283.
227. *Firearms Act 1996* (NSW) s 51C.
228. *DPP v Doot* [1973] AC 807; *Woss v Jacobsen* (1985) 60 ALR 313, 319-320.
229. J Smith, *Smith and Hogan Criminal Law* (9th ed, Butterworths, 1999) 286-287.
230. See, eg, *R v Skewes* (1981) 7 A Crim R 276, 288-289.
231. *R v Winfield* (1997) 70 SASR 300, 336-337.
232. *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, 251.

6.147 In NSW, a case of this kind would currently fall to be considered according to Part 1A of the *Crimes Act 1900* (NSW), so that geographical jurisdiction can be extended to an offence, that is committed wholly outside NSW, if it is also an offence in that place; or, if it is not also an offence in that place, the court is "satisfied that the offence constitutes such a threat to the peace, order or good government of the State that the offence warrants criminal punishment in the State".[233] The *Criminal Code* (ACT) makes similar provision.[234]

6.148 The *Criminal Code* (Cth) extends geographical jurisdiction to conspiracies (and other ancillary offences) so that a conspiracy that takes place wholly outside of Australia, will be covered so long as conduct constituting the object of the conspiracy occurs or, is intended to occur wholly or partly in Australia.[235] This accords with the Gibbs review committee's recommendation that Commonwealth law should "apply ... to conspiracies made outside Australia to commit offences within Australia".[236]

6.149 The Law Commission of England and Wales has recently recommended that:

> it should be possible to convict D of conspiracy to commit a substantive offence regardless of where any of D's relevant conduct (or any other party's relevant conduct) occurred so long as D knew of believed that the conduct or consequence element of the intended substantive offence might occur, whether wholly or in part, in England or Wales.[237]

A proposed s 1B of the *Criminal Law Act 1977* (Eng), that gives effect to this recommendation, has not yet been enacted.

6.150 The Victorian working group recommended that the Victorian legislation should allow a conspiracy made outside Victoria, to pursue a criminal course of conduct in that State, to be prosecuted in Victoria.[238] The Victorian provisions reflect this recommendation in allowing parties to a conspiracy, which is made outside the State, to be prosecuted if the agreement was to pursue a course of conduct which, if carried out in accordance with their intentions, would amount to, or involve, the commission of an offence against a law in force in Victoria.[239]

6.151 Issues arise as to the approach that should be taken in introducing a statutory offence in NSW that might best achieve a practical harmony with the laws in force in the other States and Territories, and that would minimise the possibility of criminals using NSW as a haven for conspiracies to commit crimes elsewhere, and *vice versa*.

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233. *Crimes Act 1900* (NSW) s 10C and s 10D; *Weston v Commissioner of Police* [2003] QSC 174.
234. *Criminal Code* (ACT) s 64 and s 65.
235. *Criminal Code* (Cth) s 14.1(2)(c).
236. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [43.5]. See also *R v Winfield* (1997) 70 SASR 300, 319.
237. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [7.49].
238. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [44].
239. *Crimes Act 1958* (Vic) s 321A(2).

Reasonableness defence

6.152 The Law Commission of England and Wales has proposed a defence of reasonableness, in relation to conspiracy, that would be dependent on proof that the defendant knew, or reasonably believed, that certain circumstances existed, and that in those circumstances (known or believed to exist) it was reasonable for the defendant to enter into the agreement. The proposed provision identifies, as factors to be considered in determining whether it was reasonable for the defendant to enter into the agreement:

- the seriousness of the proposed offence(s);
- any claimed purpose for which the defendant entered into the agreement; and
- any claimed authority to do so.[240]

6.153 The suggested rationale for the defence was the public interest that, within reasonable bounds, it should be possible to undertake some action to prevent crime or to prevent or limit the occurrence of harm.[241] Anecdotal reasons concerned the need to ensure that the offence of conspiracy was treated consistently with offences involving assisting or encouraging others to commit a crime, for which a reasonableness defence was introduced by the *Serious Crime Act 2007* (Eng);[242] and the need to facilitate the work of undercover agents, informants and law enforcement officials.[243]

6.154 No Australian jurisdiction provides expressly for this defence, although in circumstances where the defendant enters into a conspiracy in response to "circumstances of sudden or extraordinary emergency", a defence may be available under the *Criminal Code* (Cth), provided it is shown that such circumstances exist, that committing the offence is the only reasonable way to deal with the emergency, and the conduct is a reasonable response.[244] Some other Australian jurisdictions make similar provision.[245]

6.155 In NSW, the conduct of law enforcement officials and civilian participants who enter into a conspiracy, while engaged in a controlled operation, would be protected so long as the operation is authorised and the agreement is made in accordance with the authority approved for the operation.[246] If it were the case that the law enforcement official or civilian participant did not intend that the offence which was the object of the conspiracy should occur, then he or she would not be guilty of conspiracy by reason of the lack of the mental element required for the offence.[247]

240. Proposed s 2A.
241. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [6.4], [6.18].
242. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [6.26].
243. England and Wales, Law Commission, *Conspiracy and Attempts*, Report 318 (2009) [6.18]-[6.20], [6.28].
244. *Criminal Code* (Cth) s 10.3.
245. See also *Criminal Code* (ACT) s 43; *Criminal Code* (NT) s 43BC; *Criminal Code* (Qld) s 25; *Criminal Code* (WA) s 25; *Crimes Act 1958* (Vic) s 9AI (as an exception to homicide).
246. *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 16.
247. *R v Kapeliotis* (1995) 82 A Crim R 300; and *R v Anderson* [1986] AC 27, 39.

Otherwise his or her position would depend upon the residual exercise of the prosecutorial discretion which would, no doubt, take into account the reasonableness of his or her conduct.

Preventing/curbing inappropriate use

6.156 A conspiracy occurs at common law once the agreement has been made. It is irrelevant that the accused has later withdrawn from the conspiracy. Whether or not the substantive offence is carried out is also irrelevant. However, concerns have been expressed in relation to the situation where the substantive offence has been carried out, and the conspiracy is charged in addition to the substantive offence, or instead of it. These concerns arise by reason of the potential prejudice associated with the co-conspirator's evidence rule, and by reason of the complexity in the directions to a jury that are required in a conspiracy case.[248] The traditional position has been that it lies within the discretion of the prosecutor to decide what charge should be laid.[249]

6.157 The courts have attempted to overcome the prejudice caused by joining conspiracy counts to substantive charges, by instructing the jury as to the different purposes for which evidence may be taken into account. However, such attempts have been subject of criticism over a long period. The English Court of Appeal, in 1960, declared conspiracy charges undesirable since, where substantive charges are also available, they may complicate and lengthen matters, and work unfairness to some defendants because of the admission of otherwise inadmissible evidence. As a consequence, it was noted they can make trials "wellnigh unworkable, and impose a quite intolerable strain both on the court and on the jury".[250]

6.158 The Gibbs review committee noted that conspiracy was "regarded by many criminal lawyers with suspicion and distaste", because the application of the evidentiary rule could cause unfairness.[251] Another commentator has observed that "all too often... the prosecution surmounts difficulties of proof of substantive offences by introducing evidence on a conspiracy count which may not prove a conspiracy but which is certainly apt to create a tendentious impression on the jury in relation to the other counts".[252]

6.159 The courts have also questioned the use of conspiracy charges where a substantive offence could have been charged. For example, it has been observed in the High Court that:

> generally speaking it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed. ... There is even less justification for charging conspiracy and the substantive offence separately and for

248. *R v Griffiths* [1966] 1 QB 589; *R v Hoar* (1981) 148 CLR 32; *R v Kalazjik* (1989) 39 A Crim R 45.

249. *R v Weaver* (1931) 45 CLR 321, 334; *R v McCready* (1985) 20 A Crim R 32.

250. *R v Dawson* [1960] 1 WLR 163, 170.

251. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [34.12].

252. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 378.

> maintaining the prosecution in respect of the substantive offence after securing a conviction for conspiracy.[253]

Court's power to intervene in the interests of justice

6.160 A court has no power to stay a prosecution merely because the prosecutor has proceeded with a charge of conspiracy, where a charge for the substantive offence is available, unless there is an ulterior motive behind the choice.[254]

6.161 However, the courts, arguably, have the power to ensure that a conspiracy charge is tried separately from the substantive charge, where that is appropriate. One commentator, for example, has suggested that:

> The courts should use their ample powers over the presentation of indictments and the control of trials to insist that conspiracy be charged and proved in separate proceedings from other offences, or that the charge of conspiracy be struck out.[255]

6.162 In England, a practice direction was adopted to deal with situations where an indictment contained substantive counts and related conspiracy counts, so that a judge could require the prosecution to justify their joinder, or to elect to proceed with one or the other. The joinder would be justified if the interests of justice demanded.[256]

6.163 Archbold has suggested that an additional charge of conspiracy could be justified in the interests of justice, for example, in:

- "cases of complexity in which the interests of justice can be served by presenting to a jury an overall picture which cannot be achieved by charging a relatively small series of substantive offences";
- cases in which the jury is likely to infer, from the evidence, a general conspiracy, but one in which "the particular acts constituting the [substantive offences] may only be supported by rather nebulous evidence"; and
- cases where "the agreement to commit the offence is itself more wicked than the act".[257]

6.164 The Gibbs review committee considered that "it would be undesirable to put the law in a procedural straightjacket which would not permit the recognition of genuine exceptions to the general rule". It concluded that the enforcement of the principles

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253. *R v Hoar* (1981) 148 CLR 32, 38. See also Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 97; *Mok v R* (1987) 27 A Crim R 438, 443; *Checconi v R* (1988) 34 A Crim R 160, 163; *R v Partridge* (1930) 30 SR (NSW) 410, 413-414.
254. *McCready v R* (1985) 20 A Crim R 32.
255. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 379. See *R v Moore* (1987) 25 A Crim R 302, 314; *R v Hurrey* (1987) 28 A Crim R 42, 45-46; *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1980) 32 ALR 570, 579.
256. P J Richardson, *Archbold: Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2010) [33.58]; *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 WLR 2870.
257. P J Richardson, *Archbold: Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2010) [33.61].

regarding charges of conspiracy is "more appropriately left to the courts rather than made the subject of rigid statutory control".[258] However, it did recommend that "express power be given to any court to discharge the jury (in the case of indictable offences), or the court itself (in the case of summary offences), when a charge of conspiracy is brought, to enable the presentment of an indictment, or the laying of an information, for the completed substantive offence, where the court is of the opinion that the interests of justice require that course".[259] This was based, in part, on proposals by the Law Commission for England and Wales which allowed an accused to be found guilty of conspiracy (among other potential offences), even though he or she is "shown to be guilty of the completed offence". However, the proposed provision also expressly stated that it "does not limit any discretion of the court to discharge the jury or itself with a view to the preferment of an indictment or the laying of an information for the completed offence".[260]

6.165 Under the ACT, NT and Commonwealth criminal codes, a court may now dismiss a charge of conspiracy if it thinks "the interests of justice require it to do so".[261] The Criminal Law Officers Committee envisaged that such a provision would most likely be used when the substantive offence could have been charged.[262]

Same limitations as ultimate offence

6.166 It appears to be the case that the restrictions on the bringing of charges in relation to a substantive offence (for example, time limits, or prior consent of a prosecution authority) do not apply to the bringing of charges in relation to a conspiracy to commit that substantive offence.[263] In some jurisdictions there are either general or specific provisions to deal with this. For example, in Victoria, any prosecutorial consent requirements that apply to proceedings for a substantive offence apply equally to the institution, or continuance, of proceedings for conspiracy in relation to that offence.[264] The time limits that apply to proceedings for a substantive offence apply also to proceedings for conspiracy to commit that offence.[265] In England and Wales, proceedings for conspiracy cannot be instituted if proceedings could not be instituted for the substantive offence because of an applicable time limit.[266]

6.167 The Gibbs review committee considered that the application of time limits, or other restrictions that apply to the substantive offence, should also apply to a charge of

258. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [44.5], [44.7].

259. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [44.7].

260. Criminal Code (Eng) cl 9(2) in England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Report 177 (1989) vol 1, 48.

261. *Criminal Code* (Cth) s 11.5(6); *Criminal Code* (ACT) s 48(9); *Criminal Code* (NT) s 43BJ(7).

262. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 97.

263. England and Wales, Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform*, Report 76 (1976) [1.72]; *R v Simmonds* [1969] 1 QB 685, 695.

264. *Crimes Act 1958* (Vic) s 321E(1).

265. *Crimes Act 1958* (Vic) s 321E(2).

266. *Criminal Law Act 1977* (Eng) s 4(4).

conspiracy to commit that offence.[267] It also considered that a charge of conspiracy to commit a summary offence should be tried summarily.[268]

6.168 In the ACT and Commonwealth criminal codes, any special liability provisions, defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.[269]

Consent of a prosecuting authority

6.169 Under the *Criminal Code* (Cth), proceedings for an offence of conspiracy (beyond arrest, charge and remand) must not be commenced without the consent of the Director of Public Prosecutions.[270] In the ACT, in addition to the Director of Public Prosecutions, the Attorney General may also give consent for proceedings for conspiracy.[271] In Queensland, prosecutions for conspiracy cannot be commenced without the consent of the Attorney-General.[272] There is no such general requirement in NSW. However, under the savings and transitional provisions of the *Crimes Act 1900* (NSW) no prosecution for conspiracy to commit an offence under the now repealed s 78H, s 78I, s 78K, s 78L, s 78M, s 78N, s 78O, s 78Q (relating to sex with males under the age of 18 years) shall, if the accused was at the time of the alleged offence under the age of 18 years, be commenced without the sanction of the Attorney General.[273]

6.170 In England and Wales, proceedings cannot be instituted in relation to a conspiracy to commit a summary offence without the consent of the Director of Public Prosecutions.[274] The consent of the Attorney General is required for the institution of proceedings for conspiracy, where the substantive offence can only proceed on behalf of, or with the consent of, the Attorney General. Likewise, the consent of the Director of Public Prosecutions is required for the institution of proceedings for conspiracy where the substantive offence can only proceed on behalf of, or with the consent of, the Director of Public Prosecutions.[275] Finally, proceedings for conspiracy to commit an offence in another jurisdiction, that is an offence in that jurisdiction, cannot be instituted without the consent of the Attorney General, subject to the Secretary of State ordering, by statutory instrument approved by both houses of parliament, the removal of the consent requirement in relation any case of a specified description.[276]

6.171 The requirement for consent has been questioned on the basis that, leaving such a matter to the discretion of the prosecutor, "however conscientiously exercised", is

267. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [42.6].
268. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [42.4].
269. *Criminal Code* (Cth) s 11.5(7) and (7A); *Criminal Code* (ACT) s 48(3) and (8).
270. *Criminal Code* (Cth) s 11.5(8). See *B v R* [2008] NSWCCA 85 [87].
271. *Criminal Code* (ACT) s 48(10) and (11).
272. *Criminal Code* (Qld) s 541(2), s 542(2), s 543(2).
273. *Crimes Act 1900* (NSW) sch 11 cl 55, formerly s 78T.
274. *Criminal Law Act 1977* (Eng) s 4(1).
275. *Criminal Law Act 1977* (Eng) s 4(1)-(3).
276. *Criminal Law Act 1977* (Eng) s 4(5)-(7).

"most unsatisfactory", since he or she is "the very person who has the most to gain from joinder".[277]

6.172 The need for an express provision may, in any event be an unnecessary step in the prosecution process, in the light of modern prosecution practices.[278] In NSW they presuppose the approval of the Director or the authorised delegate of the Director to the signing and presentation of any indictment presented in the District Court or Supreme Court.[279]

Merger

6.173 One suggestion, that has been made to deal with the problem of inappropriate use of the offence of conspiracy, is that of providing for a merger of the conspiracy into the substantive offence, once it is committed, or otherwise forbidding the presentation of an indictment charging the conspiracy and the substantive offence together.

6.174 One commentator has observed, in relation to the merger option, that it is arguable that "no special characteristic of group criminality would be lost, because there remains the doctrine of complicity", and the courts would have the same discretion, at the point of sentencing, to "reflect the element of aggravation in planned group offending". While the prosecution may not get the same evidential advantage arising from a charge of conspiracy, a charge of complicity will still give the prosecution a procedural advantage by not requiring it to charge defendants as accomplices or as principals.[280]

6.175 The South Australian Criminal Law and Penal Methods Reform Committee, noting the undesirability of combining a conspiracy count with a count in relation to the substantive counts to which the conspiracy relates, but also noting the difficulty of obtaining convictions for conspiracy if amendments were made to the current rules of evidence, recommended that it should become a rule of law that a trial for the substantive offence should not be combined with a trial for conspiracy to commit that offence.[281]

Penalty

6.176 At common law, the penalty for conspiracy is at large. However, it is generally not considered appropriate for the court to pass a greater sentence for conspiracy than for the substantive offence, unless there are exceptional circumstances.[282] The "long established" rule has also been noted that "prosecutions for conspiracy and

277. B Fisse, *Howard's Criminal Law* (5th ed, Law Book Company, 1990) 379.

278. See Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [42.5].

279. See *Criminal Procedure Act 1986* (NSW) s 126.

280. A Ashworth, *Principles of Criminal Law* (5th ed, Oxford UP, 2006) 459.

281. Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977) 313.

282. *Verrier v Director of Public Prosecutions* [1967] 2 AC 195.

for a substantive offence ought not to result in a duplication of penalty".[283] A review of the penalty provisions in force in the several Australian jurisdictions, and in England and Wales, reveals a marked difference in approach.

6.177 The penalty for conspiracy, under the Commonwealth and ACT criminal codes, is limited to the penalty that would have been available for the completed offence.[284] This is consistent with the recommendation of the Gibbs review committee.[285]

6.178 For the statutory conspiracy offences in NSW, including the regulatory offences, a maximum available penalty is specified. For example, conspiracy to commit murder attracts a maximum penalty of imprisonment for 25 years,[286] rather than the life imprisonment that may be imposed for the substantive offence.[287] Conspiracy to commit an indictable offence under the *Drug Misuse and Trafficking Act 1985* (NSW) attracts the "same punishment, pecuniary penalties and forfeiture" as would apply to the substantive offence.[288] Otherwise the sentence continues to be at large.

6.179 In Victoria, the general rule is that the penalty for conspiracy is limited to the maximum penalty available for the substantive offence. However, special provision is made for conspiracies to commit substantive offences (except for murder and treason) where the penalty is at large, in which case the maximum penalty for the conspiracy is imprisonment for 15 years. Special provision is also made in relation to conspiracies to commit an offence that can be determined only in the Magistrates' Court, in that the maximum sentence available for the conspiracy will be one of imprisonment for a maximum of five years or the maximum penalty for the substantive offence, whichever is greater. Special provision is also made where the substantive offence is against the law in a jurisdiction other than Victoria, in which case, if the substantive offence is punishable by a term of imprisonment, that term is the maximum penalty for the conspiracy. In any other case the penalty for the conspiracy is a maximum of 600 penalty units.[289]

6.180 The *Criminal Code* (Qld) provides that the maximum penalty for conspiracy to commit a "crime" is imprisonment for seven years, or the maximum penalty for the substantive offence if it is less than seven years.[290] The maximum penalty for conspiracy to commit an "offence" (which is not a crime) is imprisonment for three years.[291] An unusual situation results in that a conspiracy to commit an offence,

283. *R v Hoar* (1981) 148 CLR 32, 38. See also *R v Button* (1848) 11 QB 929, 947-948; 116 ER 720, 727.
284. *Criminal Code* (Cth) s 11.5(1); *Criminal Code* (ACT) s 48(4).
285. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [46.11].
286. *Crimes Act 1900* (NSW) s 26.
287. *Crimes Act 1900* (NSW) s 19A(1).
288. *Drug Misuse and Trafficking Act 1985* (NSW) s 26.
289. *Crimes Act 1958* (Vic) s 321C.
290. *Criminal Code* (Qld) s 541(1). See also *Criminal Code* (NT) s 282.
291. *Criminal Code* (Qld) s 542(1); separate penalty provisions apply in relation to conspiracies to bring false accusations (s 131) and conspiracies to defeat justice (s 132).

where the maximum penalty for that offence is a fine, may become punished by a sentence of imprisonment.[292]

6.181 Western Australia takes a slightly different approach, so that where the substantive offence is punishable on indictment with imprisonment for life, the maximum penalty for the conspiracy is one of imprisonment for 14 years. For any other offence, the maximum penalty for conspiracy is half of the maximum penalty "with which the principal offence is punishable on indictment". However, when a substantive offence may be dealt with summarily, the maximum penalty for conspiracy is the maximum penalty for the substantive offence upon summary conviction.[293] Finally, a conspiracy to commit a "simple offence" is subject to the same maximum penalty as the simple offence.[294]

6.182 In England and Wales, where the substantive offence is murder, or an offence attracting a maximum penalty of life imprisonment, or an indictable offence punishable by imprisonment for which no maximum term has been provided, the maximum penalty for conspiracy is life imprisonment. In all other cases, the maximum term is that specified for the substantive offence.[295]

Reform

6.183 We accept that there are a number of reasons for the existence of an offence of conspiracy. It aids in the prevention of crime by allowing law enforcement bodies to take action before a planned substantive offence is committed. It ensures that those who conspire to commit an offence are appropriately punished where that offence has been frustrated. Those who agree to commit an offence are often as blameworthy, and occasionally more blameworthy, than those who actually commit the offence. It will often be easier to charge the principals or masterminds behind organised crime with conspiracy, than as accessories or principals to the offence that is actually committed. A charge of conspiracy in such a case may allow a more appropriate assessment to be made of the objective criminality involved.

6.184 A charge of conspiracy is also useful where there are multiple substantive offences some of which may, by themselves, be of a minor nature, for example, offences involving pretending to be a charity collector, or multiple instances of credit card fraud, particularly where what is involved is an organised criminal operation involving several participants. In such situations a charge of conspiracy can avoid unwieldy indictments.

6.185 For these reasons we consider that, despite the criticisms that have been made from time to time concerning the offence, there is no occasion for its abolition. On the contrary, we propose the adoption of a statutory offence in accordance with the following recommendation.

292. See M J Murray, *The Criminal Code: A General Review* (Report to the Attorney General of Western Australia, 1983) vol 2, 351.
293. *Criminal Code* (WA) s 558(2).
294. *Criminal Code* (WA) s 560(1).
295. *Criminal Law Act 1977* (Eng) s 3.

Recommendation 6.1

The offence of conspiring to commit an offence should be the subject of a statutory provision to the following effect:

(1) A person (D) who agrees with one or more other parties (P) to commit an offence (the substantive offence) is guilty of conspiracy to commit the substantive offence, and is punishable accordingly.

(2) For D to be guilty, he or she and at least one other party to the agreement must have intended that the substantive offence would be committed.

(3) To the extent that the commission of the substantive offence would depend on the existence of certain facts or circumstances, it is sufficient to establish in D a belief in, or expectation of, the existence of those facts or circumstances.

(4) D may be found guilty of conspiracy whether or not the substantive offence is committed.

(5) D may be found guilty of conspiracy to commit a substantive offence even if:

  (a) facts or circumstances exist which make commission of the offence by the agreed course of conduct impossible; or

  (b) the only other party to the agreement is a body corporate, unless D is the sole director or controller of that body corporate; or

  (c) each other party to the agreement is one of the following:

    (i) a person who is not criminally responsible or otherwise amenable to justice;

    (ii) a person for whose benefit or protection the substantive offence exists, or

  (d) no other party to the agreement has been prosecuted or has been found guilty.

(6) Any defences, limitations as to time, or qualifying provisions that apply to the substantive offence apply also for the purposes of determining whether a party to the agreement is guilty of conspiring to commit that offence.

(7) D cannot be found guilty of conspiracy to commit an offence if:

  (a) he or she is a person for whose benefit or protection the substantive offence exists; or

  (b) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal.

(8) If the substantive offence is to be carried out in another jurisdiction (that is, entirely outside NSW) it must be:

  (a) an offence under the laws of NSW if it were committed in NSW; and

  (b) an offence under the laws of the other jurisdiction.

(9) If, at the time when the agreement is made, the parties to it are all in a jurisdiction other than NSW, then the substantive offence to which it relates must be one that is to take place in NSW and at least one

party to the agreement must commit at least one act in pursuance of the agreement in NSW.

(10) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a party to a conspiracy may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence of conspiracy before the necessary consent has been given.

(11) The court may dismiss a charge of conspiracy if it thinks that it is in the interests of justice to do so.

(12) A person who is found to be guilty of conspiracy to commit an offence or offences is liable to the same penalty as that which is applicable for the substantive offence or offences (if the conspiracy is to commit more than one offence).

The act of agreement

6.186 Recommendation 6.1(1), in requiring that D agree with one or more other parties, conforms to the common law position and draws on s 11.5(2)(a) of the *Criminal Code* (Cth).[296]

The offence the subject of the agreement

6.187 In limiting the activity that can be the subject of the conspiratorial agreement to criminal "offences", we are departing from the common law, which embraces within the offence of conspiracy the doing of an "unlawful act" as well as the doing of a "lawful act by unlawful means" (including torts and conduct tending to corrupt public morals). We do not think it necessary to extend the reach of the provision to agreements to "do a lawful act by unlawful means". The reach of that formulation is uncertain and dated. Having regard to the extensive list of offences that now exist, we consider it sufficient, as is the case with the provisions in the other Australian jurisdictions, to define the offence in terms of an agreement to commit an "offence".

6.188 We are not recommending any limit on the offences that may be the subject of a conspiracy. We have adopted the common law position in NSW in this respect,[297] rather than that of the Commonwealth, ACT and NT, which limits the types of offence that may be the subject of a conspiracy, by reference to matters such as the maximum penalty which attaches to those offences.[298]

6.189 Conspiracies to commit "trivial" offences are unlikely to be charged under our proposed model. The prosecution of individual offences, if committed, would normally be a sufficient response of the justice system in relation to such forms of criminality. However, it is important to preserve the capacity to pursue a conspiracy charge in relation to such offences, in order to cater for the case of multi-party agreements aimed at the commission of minor offences that, collectively, could cause considerable harm, or give rise to civil disobedience or significant disruption of the public convenience. The need for the DPP's consent would prevent any abuse in this regard.

296. See also *Criminal Code* (ACT) s 48(2)(a); *Criminal Code* (NT) s 43BJ(2)(a).

297. *R v Skewes* (1981) 7 A Crim R 276.

298. *Criminal Code* (Cth) s 11.5(1); *Criminal Code* (ACT) s 48(1); *Criminal Code* (NT) s 43BJ(1).

Intention of the participants in the agreement

Intention about the agreement

6.190 It is implicit that, for conspiracy to be found, at least two people must intend to enter into the agreement that constitutes the conspiracy.

Intention about the substantive offence

6.191 Recommendation 6.1(2) follows the common law in requiring that at least two parties must share a common intention to commit the substantive offence. It is consistent with s 11.5(2)(b) of the *Criminal Code* (Cth).[299]

6.192 We do not consider it necessary to include an express requirement that the parties to the agreement must "know the facts that make the proposed act or acts unlawful".[300]

6.193 Recommendation 6.1(3) is intended to apply to the case where the agreement to commit the offence is contingent on the occurrence or existence of some other facts or circumstances. It obviates the need to rely on recklessness as an element. For example, in a case like *R v LK*,[301] it would be sufficient to prove that the parties to the conspiracy had an expectation of the existence, or occurrence, of the relevant facts or circumstances that would amount to the substantive offence. This might have a particular relevance in the case of economic crimes. An alternative formulation, to recommendations 6.1(2) and (3), which we would consider acceptable, would take the following form:

> For the person to be guilty, he or she and at least one other party to the agreement must have intended that the substantive offence would be committed, that is:
>
> (a) know the facts that make the proposed act or acts unlawful; or
>
> (b) have a belief in, or expectation of, the present or future existence of the facts or circumstances that make the proposed act or acts unlawful.

Substantive offence need not be committed

6.194 In accordance with the position at common law, neither D nor P need to commit the substantive offence, or to do any act in furtherance of the agreement. In proposing recommendation 6.1(3), we are rejecting the overt act requirement contained in the criminal codes of some Australian jurisdictions.[302] The requirement of an overt act in pursuance of the agreement has been adopted in these and other jurisdictions because of concerns about the potential misuse of conspiracy provisions.[303]

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299. See also *Criminal Code* (ACT) s 48(2)(b); *Criminal Code* (NT) s 43BJ(2)(b).
300. *R v LK* [2010] HCA 17 [114]; *Giorgianni v The Queen* (1985) 156 CLR 473, 505-507.
301. *R v LK* [2010] HCA 17.
302. *Criminal Code* (Cth) s 11.5(2)(c); *Criminal Code* (ACT) s 48(2)(c); *Criminal Code* (NT) s 43BJ(2)(c).
303. D Ormerod, "Making Sense of Mens Rea in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185, 188.

6.195 Advances in technology (especially in surveillance technology) mean that conspiracies can be identified at an earlier stage.[304] So, for example, a law enforcement agency may pick up, through a telephone intercept, or a listening device, an agreement to commit a serious crime with potential for loss of life, but may find it difficult to detect an act done in pursuance of the agreement before it is carried into effect. We consider it desirable that the law enforcement authorities should be able to act as soon as there is sufficient evidence of the conspiracy rather than having to wait for an overt act in pursuance of the agreement.

6.196 In any event, having to identify an "overt act" involves a degree of artificiality, since almost anything said or done once the agreement is made, will qualify as such. The presence of such a requirement is only likely to generate an unnecessary issue of fact whether something, which a party did, was or was not done pursuant to the conspiracy.

6.197 Withdrawal or termination, which is not available at common law, but is available as a defence in those codes which require an overt act,[305] will accordingly not be available under our recommendations.

6.198 It has been suggested that the traditional position may work unfairly, for example, in situations where the agreement to commit an offence was not seriously intended or where one of the parties seeks to withdraw at an early stage, before any acts have been undertaken in pursuance of the agreement. However, in cases where an agreement was not seriously intended, the prosecution would have difficulty establishing the necessary meeting of minds for the conspiracy to be established. Cases where a person seeks to withdraw from a conspiracy at an early stage can be addressed under recommendation 6.1(10) which requires the consent of the Director of Public Prosecutions before proceedings can be commenced. Early withdrawal by a participant is also a matter that can be taken into account in sentencing for the conspiracy.

Factors which do not affect D's liability

6.199 Recommendation 6.1(5) identifies a number of factors that would not affect D's guilt. They are derived from s 11.5(3) of the *Criminal Code* (Cth),[306] and we accept that the approach taken by the *Criminal Code* (Cth), in this respect, is sound.

Impossibility

6.200 Recommendation 6.1(5)(a) reflects the common law that an accused may be liable for a conspiracy to do the factually impossible.[307] It is based on s 321(3) of the *Crimes Act 1958* (Vic) and is consistent with s 11.5(3)(a) of the *Criminal Code* (Cth)[308] and with the approach that we are also recommending in relation to incitement.

304. On this point, see the observations in *Liangsiripraset v Government of the United State of America* [1991] 1 AC 225, 251.

305. *Criminal Code* (Cth) s 11.5(5); *Criminal Code* (ACT) s 48(6); *Criminal Code* (NT) s 43BJ(6).

306. See also *Criminal Code* (ACT) s 48(5); *Criminal Code* (NT) s 43BJ(4).

307. *R v El Azzi* (2001) 125 A Crim R 113 [22]-[29], [32]-[34]; *R v Barbouttis* (1995) 37 NSWLR 256, differing in this respect from the earlier decision of the House of Lords in *DPP v Nock* [1978] AC 979. See also *Onuorah v R* (2009) 260 ALR 126.

308. See also *Criminal Code* (ACT) s 48(5)(a); *Criminal Code* (NT) s 43BJ(4)(a).

6.201 The provision, consistently with the approach in the Commonwealth, NT and ACT criminal codes, does not specifically refer to "factual" impossibility as distinct from "legal" impossibility. It has been suggested that the Commonwealth, NT and ACT provisions include both legal and factual impossibility.[309] The distinction between legal and factual impossibility is as follows:

- **Legal impossibility**: agreement to commit an act believed to be a crime, such as agreeing to import something which is believed to be a prohibited object, when in fact it is not prohibited.
- **Factual impossibility**: agreement to commit something which is an offence, but, because of certain circumstances, it is not possible to carry the agreement into effect.

6.202 It may be accepted that a charge of conspiracy should not lie where there is an agreement to do something which, under no circumstances, could constitute a crime, that is, an imagined offence.[310]

6.203 The position at common law has been somewhat clouded by the decisions in *R v Barbouttis*[311] and *R v El-Azzi*[312] and the outcome may depend principally on how the charge is formulated. The outcome could be important for undercover operations or "stings",[313] or for grooming type cases where the offender is dealing with a police officer rather than someone he believes to be a child.

6.204 We have omitted from our formulation the phrase from the Victorian provision "of which [D] is unaware" as potentially requiring an unnecessary additional element for the offence. The phrase has its origins in the report of the Victorian Working Party which recommended that a person could be found guilty of an offence "notwithstanding the existence of facts of which he is unaware which make the commission of the offence by the agreed course of conduct impossible".[314] In making its recommendation, the working party drew on the work of the Law Commission for England and Wales in its Report 102 which considered the question whether an offence of conspiracy could be committed where "unknown" to the participants it was not possible to achieve their object by the course of conduct agreed upon.[315] The Law Commission's recommendation, and the resulting provisions in the *Criminal Law Act 1977* (Eng), referred only to facts (or circumstances) which render the commission of the agreed offence impossible.[316] There does not appear to be any compelling reason for including a requirement that D be "unaware" of the existence of the facts or circumstances.

309. See a similar point made with respect to attempt: *Guillot v Hender* (1998) 157 ALR 233, 244.
310. See a similar point made with respect to attempt: *Guillot v Hender* (1998) 157 ALR 233, 243-246.
311. *R v Barbouttis* (1995) 37 NSWLR 256.
312. *R v El-Azzi* [2004] NSWCCA 455.
313. For example, *R v Barbouttis* (1995) 37 NSWLR 256.
314. Victoria, Criminal Law Working Group, *Report on Conspiracy* (1982) [74].
315. England and Wales, Law Commission, *Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement,* Report 102 (1980) [3.1].
316. England and Wales, Law Commission, *Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement,* Report 102 (1980) [3.8]; *Criminal Law Act 1977* (Eng) s 1(1)(b).

Bodies corporate as co-conspirators

6.205 The first half of recommendation 6.1(5)(b) adopts the common law position and is consistent with provisions in the Commonwealth, ACT and NT criminal codes.[317] We do not, however, intend to criminalise conduct where the nominal parties to an agreement are a single member company and that company's director or shareholder, who is the company's effective controller and beneficial owner. Although strictly unnecessary, it may be desirable to state explicitly that a sole director or controller cannot be liable for a conspiracy with the body corporate of which he or she is the sole director or controller. It would be expected that, in such a case, the prosecutor would pursue a substantive offence rather than a charge of conspiracy.

Co-conspirators not criminally responsible or otherwise amenable to justice

6.206 Recommendation 6.1(5)(c)(i) adopts the common law position, in providing that D's guilt can be established even if he or she conspires with a party who is not criminally responsible, or otherwise amenable to justice, for example, a person who is not responsible by reason of mental illness, a child under the age of criminal responsibility (*doli incapax*) or a person entitled to diplomatic immunity. The other party must, however, be capable of entering into the agreement which is the basis for the conspiracy.

6.207 This recommendation is consistent with provisions in the Commonwealth, ACT and NT criminal codes.[318]

Co-conspirator is a protected person

6.208 Recommendation 6.1(5)(c)(ii) is intended to ensure that a person may be convicted of conspiracy to commit an offence, notwithstanding that the only other party to the agreement is the intended victim, being a person for whose protection the offence was enacted. It is consistent with provisions in the Commonwealth, ACT and NT criminal codes.[319]

No other person has been prosecuted or been found guilty

6.209 Recommendation 6.1(5)(d) is consistent with s 11.5(3)(d) of the *Criminal Code* (Cth)[320] and reflects the common law, established by the High Court in *R v Darby.*[321] It operates in conjunction with recommendation 6.1(7)(b).[322] The Criminal Law Officers Committee considered that the:

317. *Criminal Code* (Cth) s 11.5(3)(b); *Criminal Code* (ACT) s 48(5)(b); *Criminal Code* (NT) s 43BJ(4)(b).

318. *Criminal Code* (Cth) s 11.5(3)(c)(i); *Criminal Code* (ACT) s 48(5)(c)(i); *Criminal Code* (NT) s 43BJ(4)(c)(i).

319. *Criminal Code* (Cth) s 11.5(3)(c)(ii); *Criminal Code* (ACT) s 48(5)(c)(ii); *Criminal Code* (NT) s 43BJ(4)(c)(ii).

320. See also *Criminal Code* (ACT) s 48(5)(d); *Criminal Code* (NT) s 43BJ(4)(d).

321. *R v Darby* (1981) 148 CLR 668, 678.

322. See para 6.213.

> courts must not be hindered from examining the merits of what may be a quite complex situation by rules about formal inconsistencies on the face of the record.[323]

Defences

Defences, limitations or qualifying provisions applicable to the substantive offence

6.210 Recommendation 6.1(6) departs from the existing law in NSW,[324] pursuant to which restrictions on the bringing of charges in relation to a substantive offence (such as time limits or a requirement of consent by the prosecuting authority to the institution of proceedings) do not apply in relation to a charge of conspiracy to commit that offence. We are of the view that a charge of conspiracy should not be used where the practical consequence is to revive a charge in relation to a substantive offence that is no longer available.

6.211 This is generally consistent with the *Criminal Code* (Cth).[325] The expression "procedure" used in the Code has not been replicated, as it is not seen to add anything of moment in the present context. As with the case of the substantive offence, proceedings in a conspiracy trial will be subject to the *Criminal Procedure Act 1986* (NSW). We have also not replicated the reference to the "special liability provisions" contained in s 11.5(7A) of the *Criminal Code* (Cth),[326] as these are not currently relevant to NSW.

Defence for protected people

6.212 Recommendation 6.1(7)(a) is consistent with s 11.5(4)(b) of the *Criminal Code* (Cth).[327] It adopts the position at common law that a person who falls within the class of people, which a particular criminal offence is intended to protect, cannot be found liable for conspiring to commit that offence.[328]

Acquittal of all other parties to the agreement

6.213 Recommendation 6.1(7)(b) is consistent with s 11.4(4)(a) of the *Criminal Code* (Cth).[329] It reflects the common law, established by the High Court in *R v Darby,* which allows the conviction of a conspirator to stand notwithstanding that his or her alleged co-conspirator is acquitted, unless the conviction is, in all the circumstances of the case, inconsistent with the other person's acquittal.[330]

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323. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 103.
324. England and Wales, Law Commission, *Criminal Law: Report on Conspiracy and Criminal Law Reform*, Report 76 (1976) [1.72]; *R v Simmonds* [1969] 1 QB 685, 695.
325. *Criminal Code* (Cth) s 11.5(7). See also *Criminal Code* (ACT) s 48(8); *Criminal Code* (NT) s 43BJ(8).
326. See also *Criminal Code* (ACT) s 48(3); *Criminal Code* (NT) s 43BJ(9).
327. See also *Criminal Code* (ACT) s 48(7); *Criminal Code* (NT) s 43BJ(5)(b).
328. *R v Tyrrell* [1894] 1 QB 710.
329. See also *Criminal Code* (ACT) s 48(5)(d); *Criminal Code* (NT) s 43BJ(5)(a).
330. *R v Darby* (1981) 148 CLR 668, 678.

Jurisdiction in respect of cross-border conspiracies

6.214 Recommendations 6.2 (8) and (9) deal with two possible situations: agreements made in NSW to commit a criminal offence in another jurisdiction; and agreements made in another jurisdiction to commit an offence in NSW.

6.215 Currently, in NSW, the question of jurisdiction for cross-border crime is dealt with by Part 1A of the *Crimes Act 1900* (NSW). The precise effect of these provisions is unclear, and it is possible that, in the context of conspiracy, they may result in over-criminalisation where the substantive offence is not an offence in NSW. We are, therefore, recommending a set of provisions which will operate specifically in relation to the inchoate offence of conspiracy, as we have similarly recommended in relation to the offence of incitement.

6.216 The purpose of the recommendations is to minimise the possibility of criminals using NSW as a haven for establishing conspiracies to commit crimes elsewhere; and to ensure that conspiratorial agreements that are made outside NSW to commit crimes that would occasion loss or harm within NSW, are amenable to justice in NSW.

Conspiracies made in NSW

6.217 It is clearly appropriate that NSW should not be used to harbour conspirators, whose object is to commit offences against the laws of other jurisdictions. However, in order to ensure that this provision is kept within proper bounds, we have included, in recommendation 6.1(7), a requirement that the substantive offence be an offence against the laws of NSW if committed in NSW.

6.218 This provision departs from the position at common law, which was that a conspiracy entered into in England to commit a substantive offence in another jurisdiction was not indictable in England, unless the substantive offence itself (that is when committed in the other jurisdiction) was also indictable in England.[331] The position in NSW is affected by Part 1A of the *Crimes Act 1900* (NSW), which provides that a person commits an offence against the law of NSW if all the elements necessary to constitute that offence exist (disregarding geographical considerations), and the offence is committed wholly or partly in NSW (whether or not the offence has any effect in NSW).[332] This would conceivably cover a conspiracy to commit a crime in another jurisdiction.

6.219 A particular provision to deal with conspiracies within NSW to commit an offence outside NSW, so long as it would also be an offence if committed within NSW, would be consistent with the approach adopted in Victoria,[333] and in the code jurisdictions of Queensland and WA.[334] Similar specific provision has been made in NSW under the *Firearms Act 1996* (NSW) which makes a person, who conspires in NSW to commit an offence outside of NSW that corresponds with an offence under the *Firearms Act 1996* (NSW), liable to the "same punishment, pecuniary penalty

331. *Board of Trade v Owen* [1957] AC 602, although this is a case of a conspiracy to commit a lawful act by unlawful means, it was accepted that a similar principle applied.

332. *Crimes Act 1900* (NSW) s 10C. Similar provision is made in *Criminal Code* (ACT) s 64.

333. *Crimes Act 1958* (Vic) s 321A(1).

334. *Criminal Code* (Qld) s 541(1), s 542(1); *Criminal Code* (WA) s 558(1)(b), s 560(1)(b). See also *Criminal Code* (NT) s 282, s 283.

and forfeiture that the person would be subject to if the offence concerned had been committed in New South Wales".[335]

Conspiracies made outside NSW

6.220 Currently, NSW has jurisdiction to try a conspiracy made outside NSW to commit an offence in NSW where it is also an offence in that other jurisdiction. If it is not an offence in that place, then NSW only has jurisdiction if the court is "satisfied that the offence constitutes such a threat to the peace, order or good government of the State that the offence warrants criminal punishment in the State".[336] Recommendation 6.1(9) adopts a different approach in requiring that the substantive offence be an offence in NSW, and that there be at least one act in pursuance of the agreement in NSW. This is consistent with the common law rule that, in order to be liable, a party to a conspiracy formed outside of England must commit an act in England in furtherance of the agreement.[337]

Procedural protections

6.221 It is recognised that concerns have been consistently expressed in relation to the use of conspiracy charges in situations where the substantive offence has been carried out, and a conspiracy count has been preferred, either in addition to, or in lieu of a count based, on the substantive offence.[338] Recommendations 6.1(10) and (11) provide options for dealing with such concerns.

DPP consent

6.222 Recommendation 6.1(10) envisages a similar provision to that which appears in the Commonwealth and NT criminal codes.[339]

6.223 This provision is seen to offer a useful brake on the inappropriate use of charges of conspiracy, and to be preferable to the Victorian provision which allows a "person authorized" by the DPP to give the necessary approval.[340]

Interests of justice

6.224 Recommendation 6.1(11) is intended to deal with those cases where the substantive offence has been committed and where charging conspiracy would either be oppressive, or likely to occasion unnecessary complexity.

6.225 It is broader than the current law in NSW relating to abuse of process and is similar to provisions in some Australian jurisdictions.[341]

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335. *Firearms Act 1996* (NSW) s 51C.
336. *Crimes Act 1900* (NSW) s 10C and s 10D; *Weston v Commissioner of Police* [2003] QSC 174.
337. *DPP v Doot* [1973] AC 807; *Woss v Jacobsen* (1985) 60 ALR 313, 319-320.
338. See para 6.156-6.159.
339. *Criminal Code* (NT) s 43BJ(10), (11); *Criminal Code* (Cth) s 11.5(8). See also *Criminal Law Act 1977* (Eng) s 4(1).
340. *Crimes Act 1958* (Vic) s 321(4).
341. *Criminal Code* (Cth) s 11.5(6); *Criminal Code* (ACT) s 48(9); *Criminal Code* (NT) s 43BJ(7).

Penalty

6.226 Recommendation 6.1(11) links the maximum penalty for conspiracy to that which is available for the substantive offence or offences (if the conspiracy is to commit more than one offence). This is consistent with the similar provision that is made in some other Australian jurisdictions.[342]

6.227 Limiting the penalty to that available for the substantive offence or offences preserves, for the court, the full sentencing discretion that would be available when dealing with a substantive offence. Amongst other things, that will allow consideration to be given to the number of offences that are the subject of the conspiracy, when determining the objective seriousness of the conspiracy.

6.228 Under this proposal, where the penalty for the substantive offence is at large (as in the case of common law offences), the penalty for a conspiracy to commit that offence would also be at large. We do not consider that this needs to be the subject of an express provision of the kind employed in Victoria,[343] having regard to the conventional approach that the penalty, in such a case, should not exceed that for the substantive offence, save in special circumstances. We remain, however, of the view that the residual common law offences should be abolished or, as necessary, replaced by comparable statutory offences which provide for a maximum penalty appropriate for that offence.

6.229 The alternative approach to linking the penalty for conspiracy to that applicable for the relevant substantive offence (or offences), is to nominate maximum sentences for specific forms of conspiracy. Examples can be seen of this in relation to offences of conspiracy to defraud.[344] Other examples can be seen in those State and Territory provisions that have created specific offences of conspiracy rather than, or in addition to, a general conspiracy offence.[345]

6.230 We are, however, of the view that it is preferable to introduce a single offence of conspiracy that will attract a penalty that is related to the offence or offences the subject of the conspiratorial agreement. This has the benefit of simplicity. It avoids the need to undertake what can be an arbitrary exercise in specifying separate maximum penalties for discrete forms of conspiracy. Moreover it overcomes the practical difficulty which might arise when a conspiratorial agreement encompasses conduct that might qualify for more than one form of statutory conspiracy.

6.231 The implications of this approach for conspiracy to defraud are discussed later in this chapter.

The common law of conspiracy

Recommendation 6.2

The general common law offence of conspiracy should be abolished.

342. *Criminal Code* (ACT) s 48(4); *Criminal Code* (Cth) s 11.5(1); *Criminal Code* (NT) s 43BJ(1). But see *Crimes Act 1958* (Vic) s 321C; and *Criminal Code* (WA) s 558(2).
343. *Crimes Act 1958* (Vic) s 321C.
344. *Criminal Code* (Cth) s 135.4; *Criminal Code* (ACT) s 334 and *Criminal Code* (NT) s 284.
345. *Criminal Code* (NT) s 282, 283, 285, 286, 288; *Criminal Code* (Qld) s 131, 132, 543; *Criminal Code* (WA) s 134, 135.

6.232 We consider, although with some reservations, that the general common law as it relates to conspiracy should be abolished and replaced by the recommended provisions. Those reservations relate to that form of dishonesty that has been charged under the specific common law offence next mentioned, namely that of conspiracy to cheat and defraud.

Conspiracy to cheat and defraud

Recommendation 6.3

The common law offence of conspiracy to cheat and defraud should be abolished.

6.233 Earlier in this chapter we identified, as an issue, whether it would be advisable to retain a common law offence of conspiracy to cheat and defraud, particularly in light of the reluctance of some past reviews to abolish it.[346] The concern was whether this was necessary to cater for any new forms of dishonesty and deception that might be the subject of a conspiratorial agreement but that would fall outside a statutory offence of conspiracy attaching to an agreement to commit any one of the fraud offences which are now the subject of Part 4AA of the *Crimes Act 1900* (NSW). Additionally, the availability of the common law offence might be of value where the conspiracy extends to the commission of multiple offences of the same kind.

6.234 We recognise that history has revealed considerable ingenuity on the part of fraudsters in developing new schemes for cheating others out of their property or rights, or of causing them financial disadvantage. Ponzi schemes, phishing (with its variations of vishing and smishing), Nigerian letters, early release of superannuation funds, false lotteries, fake debt invoices, bottom of the harbour schemes, identity theft, and pump and dump share scams are but a few of the examples of the ways in which fraud has been practiced, and which are the subject of warnings provided on a regular basis by the Australian Investments and Securities Commission.[347]

6.235 It is impossible to divine in advance what new schemes might emerge, or to be entirely certain that the conduct which they involve would fall within the new statutory offence of fraud. As an example which is of contemporary interest, attention is drawn to the possibility that an agreement between a gambler, or a bookmaker, and a participant in a sporting contest, to manipulate an outcome, or to ensure a particular occurrence in the course of the contest, might not qualify as a conspiracy to commit a statutory offence of fraud, or an offence in relation to the *Unlawful Gambling Act 1998* (NSW). This draws attention again to the lawful act conundrum, since to drop a catch or to miss a goal is not unlawful, and the player responsible would not commit any offence by that act alone.

6.236 Notwithstanding this concern, we consider that a general statutory offence of conspiracy to commit any one of the offences now included in Part 4AA and Part 4AB of the *Crimes Act 1900* (NSW) would suffice, without the need for the retention of a back-up common law offence. Those provisions have been framed in a broad and comprehensive way and would seem to deal with most cases of fraudulent conduct, affecting private citizens, the revenue and government institutions, including those that might formerly have fallen into the unlawful means

346. See para 6.94-6.118.

347. Australian Securities and Investments Commission, "Typical scams and our warnings" (2010) Fido <http://www.fido.gov.au/fido/fido.nsf/byHeadline/Scams - types of scams>.

category of cases. This can be demonstrated by a review of recent relevant case law.[348] Each of these cases would be adequately covered by a general conspiracy count that would include agreements to commit an offence that would fall within Part 4AA.

6.237 In many instances it would not be necessary or even desirable to rely on a conspiracy offence since, depending on how far the venture had proceeded, the participants could be charged with the substantive offence or offences the subject of the agreement, either under State or Commonwealth law, or with attempt.[349]

6.238 On balance, we consider it preferable for Part 4AA fraud and Part 4AB identity offences to be treated in a like manner to other substantive offences, so that a conspiracy to commit one or other of them would be considered by reference to the general conspiracy provision proposed in this chapter.

6.239 In the event of some new form of dishonest or deceptive conduct emerging that cannot be accommodated within a Part 4AA or Part 4AB offence, the preferred solution in our view, is to amend those provisions, or alternatively the specific Act that is concerned with the relevant area of conduct,[350] to make it an offence to which the general conspiracy offence would thereafter attach in like cases. The advantage of this course is to ensure a consistency in approach to the offence of conspiracy. Otherwise it might be thought to be an anomaly that a residual common law offence to cheat and defraud exists, the elements of which differ from the statutory offence.

6.240 We have given consideration to the kind of case where there is a conspiracy to commit multiple "fraud" offences, an example of which can be seen in *Brown v R*[351] In that case, Brown was party to a conspiracy to secure fraudulently a payment of money by company A, that would allow the refinancing of an invoice discounting facility that had been provided by company B to his employer.

6.241 The fraudulent conduct involved the preparation of a false debtor's list that was supplied to company A, followed by the provision of a number of faxes, e-mails and correspondence that purported, falsely, to provide verification or substantiation of the outstanding debts that were shown in the debtor's list. This conduct gave rise to the commission of multiple offences, each of which could have been charged as offences under the then existing provisions contained in s 178BA of the *Crimes Act 1900* (NSW) (obtaining financial advantage by deception), and in s 300 of the *Crimes Act 1900* (NSW) (using a false instrument to another's prejudice). In the context of the conspiracy charged, they amounted to overt acts.

6.242 Error was found in the sentencing of Brown, in that, although the conspiracy had involved the commission of numerous offences, the sentencing judge had inappropriately fettered the sentencing discretion, by accepting that the maximum penalty available was that for a single offence committed in the course of the

348. *Brown v R* [2010] NSWCCA 73; *R v Huang* [2010] NSWCCA 68; *Chung v The Queen* [2007] NSWCCA 231; *Marinellis v The Queen* [2006] NSWCCA 307; *Page v The Queen* [2006] NSWCCA 123; *R v Lewis* [2003] NSWCCA 375; *R v Koh* [2001] NSWCCA 324; *R v Kheng* [2001] NSWCCA 85; *R v Dammous* [2004] VSCA 62; *R v Walsh* (2002) 131 A Crim R 299 (Vic CA).

349. Compare the conspiracy to defraud provisions in *Criminal Code* (Cth) s 135.4 which deal with the obtaining of a gain from, or causing a loss to, a Commonwealth entity. *Criminal Code* (ACT) s 334 makes similar, but more general, provision, not being limited to government entities.

350. For example, the *Unlawful Gambling Act 1998* (NSW) to deal with the manipulation of sporting or other contests, at the behest of gamblers and bookmakers.

351. *Brown v R* [2010] NSWCCA 73.

conspiracy. The Court noted that the relevant sentencing principle was that contained in the majority judgment in *R v Hoar*:[352]

> Although the principle is that the penalty for conspiracy to commit an offence should not as a rule exceed the penalty fixed for that offence – see *Verrier*[353] – the court must take into account the number of offences which are the subject of the conspiracy. If the conspiracy is to commit but one offence, and *Verrier* was such a case, then the penalty to be imposed for conspiracy should not in general exceed the maximum penalty for the commission of the substantive offence. If, however, the conspiracy is to commit a number of offences then the court for the purpose of the principle will have regard to the maximum penalty that can be imposed in respect of those offences.[354]

6.243 These decisions acknowledge that it is permissible to present an overarching conspiracy to defraud count, that will accommodate the entirety of the several offences which are the subject of the conspiratorial agreement, and to impose a sentence that will reflect the maximum penalty that could be imposed in relation to those offences.

6.244 In our view, a statutory offence of conspiracy, that would embrace more than one of the Part 4AA offences, should be similarly available, and should attract similar consequences in terms of sentencing. This does, however, reinforce the need for sufficient particulars to be given of the several offences which are said to be the subject of the conspiratorial agreement, and which will be relied on as overt acts. Recommendation 6.1(12) is intended to reflect this position.

6.245 Accordingly, we have not followed the model which has been adopted by the Commonwealth, ACT and NT criminal codes in specifically legislating for an offence of conspiracy to defraud, which attracts a nominated penalty.

Consequential amendments and repeals

Recommendation 6.4

Existing statutory provisions in NSW relating to complicity should be amended so that the recommended conspiracy provisions apply consistently to all of the offences arising under NSW law that are intended to be amenable to a prosecution for conspiracy.

6.246 There are a number of consequential amendments and repeals that will need to be considered, if the above recommendations are implemented, that arise from the fact that, amongst others, the *Crimes Act 1900* (NSW), the *Drug Misuse and Trafficking Act 1985* (NSW),[355] and the *Firearms Act 1996* (NSW),[356] make express provision for particular offences of conspiracy, which would be better catered for by a general statutory conspiracy offence.

6.247 Similarly, as we note elsewhere in this Report, there are very many statutory or regulatory offences which prohibit conspiratorial conduct along with the other forms

352. *R v Hoar* (1981) 148 CLR 32, 39.
353. *Verrier v Director of Public Prosecutions* [1967] 2 AC 195, a decision that concerned an offence of conspiracy to defraud by false pretences.
354. *Brown v R* [2010] NSWCCA 73 [58].
355. *Drug Misuse and Trafficking Act 1985* (NSW) pt 2 div 2.
356. *Firearms Act 1996* (NSW) s 51C.

of conduct that give rise to primary or derivative liability, on the part either of a sole offender or on the part of offenders acting in concert.

6.248 We consider it desirable for there to be a legislative scheme that would apply consistently to all of the offences arising under NSW law, that are intended to be amenable to a prosecution for conspiracy, including a conspiracy to commit any of the public justice offences, the availability of which was expressly preserved by s 342 of the *Crimes Act 1900* (NSW). However, we recognise that this will involve a long-term process that should commence with the core criminal statutes.

Spousal immunity

6.249 We do not consider that there should be any change in relation to the abolition of the common law immunity under which a husband and wife could not be convicted for conspiring together. In our view, s 580D of the *Crimes Act 1900* (NSW) should continue to be the law.

7. Incitement

7.1 This chapter deals with liability for the inchoate offence of inciting, assisting or encouraging the commission of an offence. This provides a means for the justice system to respond to the activities of those who incite or encourage or persuade another to commit an offence, before it actually takes place.[1] This offence gives rise

1. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 661.

to a primary liability that differs from the derivative accessorial liability discussed in chapter 3.

7.2 As one text writer has put it, "the criminality of incitement consists simply in its potential to cause or encourage another to commit a crime."[2] For example, it has been noted that:

> The problem with people who incite others to commit crimes is that on occasions they succeed and crimes are committed which would not otherwise have occurred. To make the inciting an offence may prevent the commission of those crimes.[3]

7.3 If the offence incited is committed, the inciter will generally become an accomplice and can be charged as such. Whether a person can be convicted of incitement in such a case seems not to have been considered in the reported cases,[4] although it appears to be accepted that there would be no impediment to the bringing of such a charge.[5] The Criminal Law and Penal Methods Reform Committee of SA considered that there is "room for an offence of incitement where the offence incited is not actually committed" but that "if it is committed, the normal law of complicity should cover the situation adequately".[6]

Current law in NSW

7.4 An offence of incitement at common law remains available in NSW, even though it is also dealt with by statute.

7.5 For example, the *Crimes Prevention Act 1916* (NSW) makes it an offence to incite, urge, aid or encourage the commission of crimes, or to incite the carrying on of any operations for or by the commission of crimes. It also makes it an offence if a person "prints or publishes any writing which incites to, urges, aids or encourages ... the commission of crimes".[7] Originally enacted to deal with civil and industrial disruption during World War I (in particular, in an attempt to curtail the activities of members of the Industrial Workers of the World), its primary purpose was to allow incitements to be tried summarily without the need to undertake serious criminal trials.[8] Its provisions were subsequently adopted by now repealed general

2. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 662.
3. M J Murray, *The Criminal Code: A General Review* (Report to the WA Attorney General, 1983) vol 2, 344.
4. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 666.
5. Australia, Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 271.
6. Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977) 316.
7. *Crimes Prevention Act 1916* (NSW) s 2 and s 3. See Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) 232.
8. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 13 December 1916, 3652-3677, the prescribed penalty being imprisonment for a term not exceeding 6 months, unless a penalty is otherwise provided: *Crimes Prevention Act 1916* (NSW) s 4.

enactments in the ACT and the *Crimes Act 1914* (Cth).[9] In NSW, it has been seldom used in modern times.[10]

7.6 There are also several statutory offences, some of a regulatory nature,[11] that include, as an element of the offence, "inciting", "soliciting" or similar expressions embracing the same concept.

7.7 For example, the *Crimes Act 1900* (NSW) makes it an offence for a person to solicit, encourage, persuade, or endeavour to persuade, or propose to a person to murder "any person, whether a subject of Her Majesty or not, and whether within the Queen's dominions or not".[12] The *Crimes Act 1900* (NSW) also makes it an offence for a person to incite or counsel another person to commit suicide, although, in this case, the offence is not complete unless the other person commits or attempts to commit suicide, as a consequence of the incitement or counsel.[13]

7.8 Section 80G of the *Crimes Act 1900* (NSW), which establishes the offence of incitement in relation to certain sexual offences, requires that the inciter must intend that the incited offence be committed, allows for the inciter to be guilty even though committing the substantive offence is impossible, and applies to the offence of incitement any defences, procedures, limitations or qualifications that apply to the substantive offence.

Law in other jurisdictions

Australia

7.9 Incitement continues to be a common law offence in South Australia.[14] All other jurisdictions within Australia make statutory provision for the offence of incitement or for an analogous offence.[15] Queensland and Western Australia have offences of "*attempted procuring*", which appear to cover similar ground.[16] In recent years, Western Australia and the Northern Territory have also introduced some specific offences of incitement.[17]

9. *Crimes Act 1900* (ACT) s 348; *Crimes Act 1914* (Cth) s 7A.
10. It is, however, still referred to in other legislative schemes: see, eg, *Police Service Act 1990* (NSW) s 207A which exempts integrity testing of police officers from the operation of the Act.
11. See para 8.16.
12. *Crimes Act 1900* (NSW) s 26.
13. *Crimes Act 1900* (NSW) s 31C(2).
14. *R v Haines* (2001) 80 SASR 363 [32].
15. *Criminal Code* (WA) s 553, 555A; *Criminal Code* (Cth) s 11.4; *Criminal Code* (ACT) s 47; *Crimes Act 1958* (Vic) s 321G; *Criminal Code* (Tas) s 298; and *Criminal Code* (NT) s 43BI.
16. *Criminal Code* (Qld) s 539; *Criminal Code* (WA) s 556. See also *Criminal Code* (NT) s 280.
17. *Criminal Code* (WA) s 553; *Criminal Code* (NT) s 43BI. The WA provision followed recommendations in M J Murray, *The Criminal Code: A General Review* (Report to the WA Attorney General, 1983) vol 2, 584.

England and Wales

7.10 In 2006, the Law Commission for England and Wales recommended, in its Report on Inchoate Liability for Assisting and Encouraging Crime, the introduction of two new inchoate offences, namely those of:

- encouraging or assisting the commission of an offence (the principal offence) *intending* to encourage or assist its commission; and
- encouraging or assisting the commission of an offence *believing* that it will be committed.[18]

7.11 These offences were to replace the existing common law offence of incitement, and to fill a perceived anomalous gap in the common law which meant that no criminal liability attaches for assisting the commission of an offence, unless and until it is committed or attempted.[19]

7.12 The Law Commission also recommended that a person should be liable for assisting or encouraging the commission of an offence that he or she believed might be committed, if the act were capable of encouraging or assisting the commission of one or more of a number of different offences, and he or she:

- believed that at least one will be committed;
- had no belief as to which particular one will be committed; and
- believed that his or her act will encourage or assist the commission of at least one of those offences.[20]

The *Serious Crime Act 2007* (Eng) effectively implemented these recommendations.[21]

The act of incitement

Terminology

7.13 There is no common definition of what constitutes an act of incitement. The Commonwealth, the Australian Capital Territory and Northern Territory codes use the term "urges".[22] In Western Australia, the term "incites", used in the statutory offence, is defined to include soliciting and endeavouring to persuade.[23]

18. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006).
19. See also S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) 483.
20. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [1.28].
21. *Serious Crime Act 2007* (Eng) s 44-47.
22. *Criminal Code* (Cth) s 11.4(1), s 80.2; *Criminal Code* (ACT) s 47(1); *Criminal Code* (NT) s 43BI(1).
23. *Criminal Code* (WA) s 1(1) (definition of "incites").

7.14 In Victoria, the term "incite" is defined to include command, request, propose, advise, encourage and authorize.[24] It has been suggested that this terminology is "representative of the common law rather than an expansion of it".[25] The working group, which recommended the Victorian provisions, noted that these words were those most commonly used in the cases and in text books to describe the conduct covered by incitement, omitting the old fashioned expressions "solicit" and "counsel" which are adequately covered by "request" and "advise".[26]

7.15 The use of "authorise" in Victoria is, however, unusual and was included in order to "cover the case of a person who authorises some illegal activity while advising against it". The working group considered that a person who "authorises" must be in a "position of authority" and, as such, should be:

> under a duty to refrain from authorising the conduct if it is illegal. If the person does authorise it, then he ought to be within the scope of the offence of incitement.[27]

7.16 Tasmania's statutory formulation is simple: "Any person who incites another to commit a crime is guilty of a crime."[28]

7.17 The Gibbs Review Committee noted that "urge" and "encourage" were synonyms and suggested defining "incite" to include "urge and encourage".[29] The Criminal Law Officers Committee observed that there are "differing verbs employed in this area with little consideration of what the differences, if any, may be".[30] It was concerned that some courts had interpreted "incite" to mean "cause" rather than "advocate" an offence.[31] It concluded that "urge" would "avoid this ambiguity while capturing the essence of the offence".[32]

7.18 The Law Commission for England and Wales, in 1989, considered that "incite" was preferable to "encourage", since "a person may be liable for incitement even though the person incited is not in fact encouraged".[33] However, in 2006, the Commission concluded that "encourage" was to be preferred, since the proposal that the proscribed act could be one "capable of encouraging" would "preclude an argument

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24. *Crimes Act 1958* (Vic) s 2A(1) (definition of "incite").
25. D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 456.
26. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [5].
27. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [4].
28. *Criminal Code* (Tas) s 298.
29. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.23].
30. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 93.
31. But see *R v Crichton* [1915] SALR 1, 3 where Way CJ states that "incite" does not necessarily mean to "originate or initiate".
32. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 93.
33. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.6].

that there has to be actual encouragement".[34] The Commission preferred "encourage" to "incite", because incite "has somewhat instigatory connotations".[35] The expression "capable of encouraging" was taken up in the statutory offences embodied in the *Serious Crime Act 2007* (Eng).[36]

7.19 Threats or other forms of pressure may count as incitement under the common law.[37] The English Court of Appeal did not consider "incite" to be limited to urging or spurring on by advice, encouragement or persuasion, but considered that it also encompassed threatening or the use of pressure.[38]

7.20 The Law Commission recommended that threatening or pressurising another person to commit a crime should be included within the meaning of "encouraging or assisting", observing that "there is no reason why an employer who persuades an employee to commit an offence by threatening redundancy should be in a better position than an employer whose persuasive technique is to offer a pay rise".[39]

Communication

7.21 The common law would appear to require that the incitement be communicated to its intended audience, although it need not be aimed at a specific individual.[40]

7.22 The Law Commission of England and Wales, in 1989, recommended a provision to make it clear that the identity of the person incited is immaterial, so as to "further the successful prosecution of those who insert incitements into newspapers, periodicals etc addressed to the public or a section of the public at large".[41] In 2006, the Law Commission reiterated this position, updating the example to refer to those who post incitements on web-sites.[42]

7.23 Where the incitement is by means of publication through, for example, a newspaper or website addressed to the world at large, it is sufficient to attract a conviction for incitement, at common law, if it is distributed in such a way as to be likely to come into the hands of those capable of committing the incited offence (although not addressed to anyone in particular).[43]

7.24 The Law Commission, in considering the requirements for its proposed inchoate offence of encouraging and assisting, observed that the encouraging or assisting

34. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.33].
35. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.34].
36. *Serious Crime Act 2007* (Eng) s 44-46.
37. A Ashworth, *Principles of Criminal Law* (5th ed, Oxford University Press, 2006) 465.
38. *Race Relations Board v Applin* [1973] QB 815, 825 (Lord Denning MR).
39. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.42].
40. *R v Ransford* (1874) 13 Cox CC 9, 16.
41. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.18].
42. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.52].
43. *R v Most* (1881) 7 QBD 244.

conduct need not in fact encourage or assist the substantive offence and recommended that the new provision merely require the doing of "an act 'capable of' encouraging the doing of a criminal act".[44] It suggested that the scenario of a letter encouraging the commission of an offence, which is destroyed before it reaches its intended recipient, presented a "question of fact for the jury whether D had done an act capable of encouraging or assisting the commission of murder or, instead, had merely attempted to do an act capable of encouraging or assisting P to commit the offence".[45]

7.25 By contrast, the US Model Penal Code simply provides that it is "immaterial ... that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication".[46]

7.26 As noted earlier, the *Crimes Prevention Act 1916* (NSW) and the former s 7A of the *Crimes Act 1914* (Cth) introduced the additional offence of printing or publishing any writing which "incites to, urges, aids or encourages ... the commission of offences". However, it would appear that, in a case brought in reliance on these provisions, it would not be necessary to prove an intention to incite on the part of the printer or publisher, so that an offence would be available even if the intention of such party was "only to derive profit".[47]

Attempt to incite

7.27 At common law, the offence is complete upon the incitement coming to the attention of the person incited.[48] It does not require agreement between the inciter and the person to whom the incitement is directed; nor does it require the person incited to perform an act towards commission of the substantive offence.[49] The Criminal Law Officers Committee, when considering this offence, decided not to depart from the common law by recommending a provision requiring that the incitement be acted upon.[50] None of the statutory offences in Australia, or embraced in the *Serious Crime Act 2007* (Eng), require that the incitement be acted upon. A failed attempt at communicating an incitement, for example, where the communication is intercepted before it reaches its intended recipient or recipients, can be tried at common law as an attempt to incite.[51]

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44. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.27].
45. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.30].
46. US Model Penal Code s 5.02(2).
47. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.28].
48. *R v Ransford* (1874) 13 Cox CC 9; *R v Krause* (1902) 18 TLR 238.
49. *R v Assistant Recorder of Kingston-upon-Hull; Ex Parte Morgan* [1969] 2 QB 58, 62.
50. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95.
51. *R v Banks* (1873) 12 Cox CC 393, 399; England and Wales, Law Commission, *Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement,* Report 102 (1980) [2.121]; and see R v *Crichton* [1915] SALR 1; *R v Ransford* (1874) 13 Cox CC 9.

7.28 The Law Commission of England and Wales, in 1980, decided to retain the possibility of a charge of attempt to commit the common law offence of incitement, chiefly on the ground that it is "both appropriate and necessary where a communication amounting to an incitement is intercepted before it reaches the person to whom it is sent".[52]

7.29 The Criminal Law Officers Committee also decided that there should be no bar to a charge of attempting to incite.[53] This position is consistent with the relevant provision in the US Model Penal Code.[54]

Mens rea for incitement

Intention

7.30 To be guilty of incitement at common law, an inciter must intend the incited person to carry out the physical element of the offence incited with the required *mens rea*.[55] One commentator has suggested that "these propositions hardly need authority for they are implicit in the notion of incitement".[56] Therefore, "if D intends no more than that the other person will commit an *actus reus*, but without any mental state required by the corresponding crime, D does not incite the commission of this crime".[57] It is "unnecessary that the person incited form the *mens rea* for the crime incited to be committed".[58]

7.31 Consistently with the common law, the *Criminal Code* (Cth) requires that the inciter "must intend that the offence incited be committed".[59] The Codes in the Northern Territory, Western Australia, and the Australian Capital Territory contain similar provisions.[60]

7.32 In Victoria, the inciter must both intend that the substantive offence be committed, and "intend or believe that any fact or circumstance the existence of which is an

52. England and Wales, Law Commission, *Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement,* Report 102 (1980) [2.121]. See also England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.7].
53. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95.
54. US Model Penal Code s 5.01(3).
55. See A Ashworth, *Principles of Criminal Law* (5th ed, Oxford University Press, 2006) 465-466.
56. J Smith, "Incitement" [1994] *Criminal Law Review* 365, 366.
57. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 663.
58. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 663. But see *R v Curr* [1968] 2 QB 944 which is considered wrongly decided because it required the prosecution to prove that the person incited knew that the substantive offence amounted to an offence: *R v C* [2006] 1 Cr App R 20 [28]-[31]; England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.11], England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.48]; "What is the mens rea of incitement?" *Archbold News* (25 February 1994) 5.
59. *Criminal Code* (Cth) s 11.4(2).
60. *Criminal Code* (ACT) s 47(2); *Criminal Code* (WA) s 553(1); *Criminal Code* (NT) s 43BI(2).

element of the offence in question will exist at the time when the conduct constituting the offence is to take place".[61]

7.33 The Law Commission of England and Wales, in 1989, gave support to extending the fault element to situations where the inciter "believes" that the offence incited will be committed.[62] This, it said, reflected the common law.[63] It observed:

> Whenever the fault required for a substantive offence includes knowledge of or recklessness as to circumstances (such as the absence of consent), it is likely to be more appropriate for the purposes of incitement to refer to the incitor's belief that such knowledge or recklessness exists rather than to his intention that it should.[64]

7.34 The Law Commission pointed out that if a person intends the *actus reus* of the substantive offence, but does not believe that the person incited will act with the fault required, that person may be guilty of an attempt to commit the substantive offence by means of an innocent agent.[65]

7.35 In Victoria, inciting an innocent agent to commit an offence is covered by the incitement provisions in the *Crimes Act 1958* (Vic), which provide that a person is guilty of incitement if he or she "incites any other person to pursue a course of conduct which will involve the commission of an offence by ... the inciter".[66]

Recklessness

7.36 The role, if any, of recklessness in relation to incitement, is somewhat contested.

7.37 The Criminal Law Officers Committee initially proposed including recklessness as an alternative, or additional, fault element for incitement. However, it accepted the arguments, which were advanced in submissions, that "to extend the extensions of criminal responsibility even further by allowing recklessness ... was going too far".[67]

7.38 The Committee noted, additionally, that including recklessness in incitement was "too great a threat to free speech".[68]

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61. *Crimes Act 1958* (Vic) s 321G(2).
62. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.9], and cl 47 of the draft Criminal Code.
63. *R v Goldman* [2001] Crim LR 822; *DPP v Armstrong* [2000] Crim LR 379; *R (O) v Coventry Magistrates' Court* [2004] Crim LR 948.
64. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.9].
65. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.10]; Ireland, Law Reform Commission, *Inchoate Offences*, Consultation Paper 48 (2008) [4.33].
66. *Crimes Act 1958* (Vic) s 321G(1)(b). See Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [18].
67. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 77.
68. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95. See also Australia, Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 271.

7.39 Some commentators have suggested that any concern as to extending the reach of the offence too far, by allowing for reckless incitement, could be met by adopting a narrow version of recklessness involving foresight of a substantial rather than remote possibility of the commission of the substantive offence.[69]

The offence incited

Filter based on seriousness of the offence incited

7.40 At common law, the offence of incitement extends to both summary and indictable offences.[70]

7.41 The Law Commission of England and Wales, in 1989, considered that its proposed statutory statement of incitement should continue to extend to substantive offences that are summary offences because such offences:

> which *ex hypothesi* concern more than one person, enable the promoters and organisers of large-scale minor offences to be brought within the reach of the law. Admittedly prosecutions may be appropriate in practice only on rare occasions.[71]

7.42 It recommended, however, that a prosecution for an incitement to commit a summary offence should be brought only with the consent of the Director of Public Prosecutions.[72] No such recommendation was made in its 2006 Report on *Inchoate Liability for Assisting and Encouraging Crime*, where it observed that:

> a distinction between indictable and summary offences pays insufficient attention to the fact that some summary offences involve wrongdoing that can lead to very serious consequences and are punishable with imprisonment.[73]

7.43 In Western Australia, the general offence of incitement is limited to the incitement of indictable offences,[74] although there is also a separate offence of incitement to commit a "simple offence".[75] In Victoria, the offence is available whether the offence incited is indictable or summary. This represents a rejection of the Victorian working group's proposal to place a "filter" on charges of incitement, by requiring consent for their prosecution from the DPP. This was intended as a mechanism to differentiate between "trivial" and "serious" summary offences.[76]

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69. D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 458-459.
70. D Ormerod, *Smith and Hogan Criminal Law* (12th ed, Oxford UP, 2008) 446. See *R v Curr* [1968] 2 QB 944.
71. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.12].
72. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.12].
73. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.49].
74. *Criminal Code* (WA) s 553(1).
75. *Criminal Code* (WA) s 555A(2).
76. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [23].

Offence must be one that the other party can commit

7.44 At common law the offence incited must be an offence that the person incited is capable in law of committing. So, it has been held that a father cannot incite his 15 year old daughter to commit incest if, under the relevant legislation, a girl under 16 years of age cannot be guilty of incest.[77] Arguably, in such a case, a charge of attempt to incite would be available.[78]

7.45 If the person incited commits the offence incited, but is, for example, under the age of criminal responsibility, the inciter may be guilty of committing the offence by way of the doctrine of innocent agency. However, as the Law Commission for England and Wales has observed, it is uncertain whether an inciter can be found guilty in such circumstances where the child, for whatever reason, does not commit or attempt to commit the offence incited.[79]

Offence intended to protect the person incited

7.46 Two situations arise for consideration where the offence incited is one, which was enacted to protect a person who is a member of a particular class or category of people (the "protected person"): first, where the protected person incites another to commit the offence with him or her; secondly, where a person incites the protected person to commit the offence with him or her.

7.47 With regards to the first scenario, at common law, a protected person cannot incite another to commit an offence against him or herself where the offence was enacted to protect that person from harm.[80]

7.48 In 1989, the Law Commission for England and Wales proposed the enactment of a specific provision stating that an intended victim of an offence, who is a member of the class of people that the offence is intended to protect, cannot be convicted of inciting that offence.[81] The Law Commission, in its 2006 report on inchoate liability for encouraging or assisting crime, repeated the recommendation.[82] It has now been implemented in s 51 of the *Serious Crime Act 2007* (Eng).

7.49 With regards to the second scenario, the English Court of Appeal has held that a person cannot be guilty of inciting the protected person to commit the offence, because to do so would "impose criminal liability upon persons who the parliament

77. *R v Whitehouse* [1977] QB 868. See also *R v Richard* (1986) 30 CCC (3d) 127 where a person could not incite an 11 year old to touch his penis because the age of responsibility in that jurisdiction was 12 years.
78. D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 458. See England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.7]; Ireland, Law Reform Commission, *Inchoate Offences*, Consultation Paper 48 (2008) [4.33].
79. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.27].
80. *R v Tyrrell* [1894] 1 QB 710, 712.
81. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.17].
82. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.44].

has intended should be protected, not punished".[83] The Law Commission has noted, however, that this decision "enables D to take advantage of a principle designed for the protection of P".[84]

Incitement to commit inchoate offences

7.50 The question of whether it is possible to incite the commission of any of the inchoate offences involves varying views and some nice distinctions.

Incitement

7.51 It appears that, at common law, inciting a person to incite another to commit an offence will constitute an offence of incitement.[85] However, there is sometimes a fine line between this, and incitement to agree with another to commit a crime.

7.52 The Gibbs Committee doubted the need for such an offence and did not recommend its inclusion in Commonwealth law.[86] The Criminal Law Officers Committee similarly concluded that there should not be an offence of inciting to incite.[87]

7.53 The Law Commission of England and Wales, in 1989, however, considered that there should be an offence of inciting to incite.[88] In its, 2006 report, the Law Commission continued to support this position, and recommended its extension to the new inchoate offence, so that one person could be guilty of encouraging or assisting a second person to encourage or assist a third person to commit murder, so long as the first person intended that the second person would encourage or assist the third person. The Law Commission, however, considered that it would be an over-extension of criminal liability if the first person's guilt depended only upon him or her believing that the second person would encourage or assist the third person.[89] The *Serious Crime Act 2007* (Eng) implements this recommendation.[90]

Conspiracy

7.54 The Gibbs Review Committee did not see a need to provide for an offence of inciting to conspire.[91] The Criminal Law Officers Committee similarly decided that

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83. *R v Whitehouse* [1977] QB 868, 875. See also *R v Pickford* [1995] QB 203, 207-208; *R v C* [2006] 1 Cr App R 20.
84. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.29].
85. *R v Sirat* (1985) 83 Cr App R 41, 44-45.
86. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.42].
87. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95.
88. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.13]-[13.15].
89. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [7.11]-[7.13].
90. *Serious Crime Act 2007* (Eng) s 49(4).
91. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.44].

there should not be an offence of inciting to conspire, on the grounds that "there has to be some limit on preliminary offences".[92]

7.55 In England, the offence of inciting to conspire was abolished by s 5(7) of the *Criminal Law Act 1967* (Eng). The Law Commission of England and Wales recommended the re-enactment of the offence of inciting to conspire for consistency with the offence of inciting to incite,[93] noting the absurdity of it being an offence for D to incite E to incite F to wound G, but not being an offence for D to incite E to agree with F to wound G.[94] The Law Commission, in its 2006 report, limited this recommendation to circumstances where the person who encouraged or assisted the conspirators intended that they should form the conspiracy.[95] The *Serious Crime Act 2007* (Eng) implements this recommendation.[96]

Attempt

7.56 Opinion is divided as to whether at common law it is possible to incite an attempt. Some commentators have suggested that inciting an attempt is impossible.[97] The Law Commission of England and Wales doubted that it was an offence known to law.[98] However, it noted a possible scenario where, "in the circumstances known to the incitor, but not to the person incited, the completed act will amount only to any attempt".[99] It recommended an extension of the offence to cater for such a case, in order to achieve consistency with its recommendations concerning the offences of incitement to incite and incitement to conspire.[100]

7.57 In its 2006 Report the Law Commission recommended that this form of the offence should be limited to the case where the person, who encouraged or assisted another to attempt a crime, intended that he or she should do so.[101] The *Serious Crime Act 2007* (Eng) implements this recommendation.[102]

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92. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95.
93. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.15].
94. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.13].
95. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [7.21].
96. *Serious Crime Act 2007* (Eng) s 49(4).
97. See P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 661.
98. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.16].
99. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.16]. See also England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.38].
100. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.16].
101. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [7.24].
102. *Serious Crime Act 2007* (Eng) s 49(4).

7.58 The Gibbs Review Committee agreed with the Law Commission that it was "difficult to conceive of a case where a charge of inciting an attempt would not be inept"[103], and considered the scenario envisaged by the Law Commission to be a "somewhat unlikely possibility and insufficient reason ... to provide for such an offence".[104] The Criminal Law Officers Committee agreed with the Gibbs Review Committee in not recommending that there be an offence of inciting to attempt an offence.[105]

7.59 As a consequence, the criminal codes for the NT, ACT and Commonwealth each provide that it is not an offence to incite the commission of an incitement, an attempt, or a conspiracy.[106]

Incitement to commit accessorial offences

7.60 It would appear that incitement of another to become an accessory to a crime is not an offence known to the law.[107] This is because accessorial liability only attaches once an offence is complete.[108]

7.61 However, the Gibbs Review Committee considered that it was "possible to conceive of circumstances where a person is incited to take steps of an active or positive nature to assist or facilitate the commission by another of an offence". It considered that the technical grounds for denying such an offence do "not seem sufficient reason to refrain from making such incitement subject to criminal sanction".[109]

7.62 The Review Committee, in recommending that it "should be made clear that it is an offence to incite a person to assist, encourage or procure another person to commit an offence", acknowledged that "prosecutorial discretion would need to be carefully exercised".[110] In this regard, the Review Committee suggested that:

> it would probably be rarely appropriate to charge A with inciting B to be knowingly involved in [the] commission of an offence by C when B's role could only be described as encouraging C. However, if B's role was to assist C actively, a charge could be appropriate.[111]

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103. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.45].
104. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.46].
105. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95.
106. *Criminal Code* (Cth) s 11.4(5); *Criminal Code* (NT) s 43BI(7); *Criminal Code* (ACT) s 47(6).
107. *R v Bodin* [1979] Crim LR 176, 176 (Crown Court); England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.19]; England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.39]-[3.43]; D Ormerod, *Smith and Hogan Criminal Law* (12th ed, Oxford UP, 2008) 444.
108. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.19].
109. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.38].
110. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.39]-[18.40].
111. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.39].

7.63 The Criminal Law Officers Committee does not appear to have dealt with the question.

Incitement to commit a factually impossible offence

7.64 At common law, the rule in relation to impossibility that applies to conspiracy applies equally to incitement,[112] so that it is possible for a person to be guilty of inciting another to commit an offence that is factually impossible.

7.65 The *Criminal Code* (Cth) replicates the common law in providing that a person "may be found guilty, even if committing the offence incited is impossible".[113] The Northern Territory and ACT codes contain similar provisions.[114] Victoria also recognises that a person can be guilty of inciting the physically impossible.[115]

7.66 The Law Commission of England and Wales, whose recommendations led to the enactment of the *Serious Crime Act 2007* (Eng), considered that impossibility should not be a defence for its proposed inchoate offence of assisting and encouraging crime, observing that:

> D's state of mind and, therefore his or her culpability, is unaffected by the unknown impossibility of the principal offence being committed. Further, if D can be liable notwithstanding that, contrary to D's belief, P never intends to commit the principal offence, it would be illogical if D was able to plead that it would have been impossible to commit the principal offence.[116]

7.67 The Law Commission recommended that incitement be brought into line with conspiracy and attempt, neither of which allowed impossibility as a defence.[117] Consistently with this recommendation, the new inchoate offence of assisting and encouraging crime in the *Serious Crime Act 2007* (Eng) does not allow for a defence of impossibility.

Territorial nexus

7.68 Two scenarios arise for consideration. First, the situation where the act of incitement occurs outside of the jurisdiction, but relates to an offence to be committed within the jurisdiction. Secondly, where the act of incitement occurs within the jurisdiction, but relates to an offence to be committed outside the jurisdiction.

112. *R v Fitzmaurice* [1983] QB 1083.
113. *Criminal Code* (Cth) s 11.4(3).
114. *Criminal Code* (NT) s 43BI(4); *Criminal Code* (ACT) s 47(4).
115. *Crimes Act 1958* (Vic) s 321G(3).
116. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.61].
117. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales* Report 177 (1989) vol 2 [13.50]-[13.51].

Incitement outside jurisdiction of offence within jurisdiction

7.69 There is some support in Australia for making a person liable for incitement when that person, while outside the jurisdiction, incites an offence within the jurisdiction. The *Criminal Code* (Qld) provides for an offence in such a situation.[118] The Victorian working group considered "the danger of incitement in such a case is obvious", and that allowing an inciter to escape liability in such circumstances would be "unjustifiable".[119] This position is reflected in the *Crimes Act 1958* (Vic).[120]

7.70 The Law Commission of England and Wales, considered there was no reason why the principles applicable should be different to those in relation to conspiracy.[121] It recommended that a person should be guilty of the new inchoate offence of assisting or encouraging crime, if he or she "knew or believed that the principal offence might be committed wholly or partly in England and Wales, irrespective of where [he or she] did the act capable of encouraging or assisting the commission of the principal offence".[122] The *Serious Crime Act 2007* (Eng) accordingly provides that a person may be guilty of encouraging or assisting crime, if he or she "knows or believes that what he [or she] anticipates might take place wholly or partly in England or Wales ... no matter where he [or she] was at any relevant time".[123]

Incitement within jurisdiction of offence outside jurisdiction

7.71 The *Crimes Act 1958* (Vic) provides that a person may be convicted of an incitement, in relation to an offence against the law of another jurisdiction, if "the necessary elements of the offence consist of or include elements which, if present or occurring in Victoria, would constitute an offence against a law in force in Victoria", and the person inciting is in Victoria at the time of the incitement.[124] This extension was justified on the ground that "Victoria ought not to be available for use as a haven for criminals who incite others to commit crimes elsewhere".[125] The requirement, that the offence be one that would also be an offence in Victoria, was introduced because "it is obviously undesirable that a person should be exposed to punishment in Victoria for inciting a person to do something which, if done in Victoria, would be lawful".[126]

7.72 In the Northern Territory, it was the case that a charge for incitement, in such circumstances, could only be brought upon the request of the government in the other jurisdiction.[127]

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118. *Criminal Code* (Qld) s 539.
119. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [25].
120. *Crimes Act 1958* (Vic) s 321G(1).
121. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [8.13].
122. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [8.18].
123. *Serious Crime Act 2007* (Eng) s 52(1).
124. *Crimes Act 1958* (Vic) s 321H.
125. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [26].
126. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [27].
127. *Criminal Code* (NT) s 280(3).

7.73 In England and Wales, there was no general provision enabling incitements to commit offences out of the jurisdiction, to be tried within the jurisdiction.[128] The Law Commission of England and Wales recommended provisions similar to those in relation to conspiracy, so that a person can be guilty of assisting or encouraging an offence, if the substantive offence is an offence under the law of England and Wales, if he or she knows that the substantive offence might be committed wholly or partly outside the jurisdiction, and if the substantive offence is also an offence in that other jurisdiction, subject to a requirement that any prosecution can only be instituted with the consent of the Attorney General.[129] The *Serious Crime Act 2007* (Eng) contains provisions giving effect to this recommendation.[130]

Reasonableness defence

7.74 The *Serious Crime Act 2007* (Eng) provides for a defence of acting reasonably in relation to the inchoate offence of encouraging or assisting crime, so that a person is not guilty of such an offence if he (or she) proves:

(a) that he believed certain circumstances to exist;

(b) that his belief was reasonable; and

(c) that it was reasonable for him to act as he did in the circumstances as he believed them to be.[131]

7.75 The Act also provides that, in determining the reasonableness of the person's action, the court should consider:

(a) the seriousness of the anticipated offence (or, in the case of an offence under section 46, the offences specified in the indictment);

(b) any purpose for which he claims to have been acting;

(c) any authority by which he claims to have been acting.[132]

7.76 The Law Commission of England and Wales, recommended such provisions in the belief that there "should be a defence which will prevent D being held liable for acts which, in the circumstances, D could reasonably have expected to be able to engage in free from the taint of criminality", providing as an example the case of a driver on an expressway pulling over to allow a speeding driver to continue speeding.[133] The Commission acknowledged that the defence had the potential to operate in an unfettered way and, therefore, recommended the requirement that "D

128. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [8.15].
129. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [8.22], [8.28].
130. *Serious Crime Act 2007* (Eng) s 52(2), s 53, sch 4 cl 2.
131. *Serious Crime Act 2007* (Eng) s 50(2).
132. *Serious Crime Act 2007* (Eng) s 50(3).
133. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.18]-[6.19].

acted reasonably in the circumstances that he or she knew or reasonably believed existed".[134]

Procedure

Same limitations as for the incited offence

7.77 The Gibbs Review Committee observed that the common law offence of incitement, because it is a distinct offence, is not subject to the procedural requirements that are applicable to the offence incited.[135] However, it could see "no reason why the procedural requirements of the (incited) offence, such as time limits and consents to prosecution, should not apply to the offence of incitement".[136]

7.78 Consistently with this view, the *Criminal Code* (Cth) now makes "any defences, procedures, limitations or qualifying provisions", that apply to a substantive offence, "apply also to the offence of incitement in respect of that offence".[137] Similarly, it provides that any "special liability provisions" that apply to the offence incited, apply also to an offence of inciting its commission.[138] The ACT and NT make similar provisions.[139]

7.79 Likewise, the Law Commission of England and Wales, in 1989, concluded that it would not be right to convict a person for inciting an offence in circumstances where he or she could take advantage of a statutory defence to that offence, even though he or she was unaware of the circumstances of justification or excuse.[140]

Summary/indictable procedure

7.80 In NSW, the *Crimes Prevention Act 1916* (NSW) allows for summary trial in cases of incitement and other matters falling within its provisions.

7.81 In England and Wales, incitement to commit a summary offence may be tried summarily.[141]

7.82 The 1983 review of the WA Code suggested that incitement to commit a summary offence should be tried summarily.[142] It also suggested that where a substantive

134. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.23].
135. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.14].
136. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.49].
137. *Criminal Code* (Cth) s 11.4(4).
138. *Criminal Code* (Cth) s 11.4(4A).
139. *Criminal Code* (ACT) s 47(3), (5); *Criminal Code* (NT) s 43BI(5), (6).
140. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.53].
141. *Magistrates' Court Act 1980* (Eng) s 45.
142. M J Murray, *The Criminal Code: A General Review* (Report to the WA Attorney General, 1983) vol 2, 346.

offence may be tried summarily, the incitement to that offence should also be capable of being tried summarily.[143]

7.83 The Law Commission of England and Wales, recommended that the mode of trial for its proposed inchoate offence of assisting or encouraging crime, should be the same as if the defendant had been charged with the offence incited.[144]

Penalty

7.84 At common law, the penalty for incitement is at large.

7.85 Generally, when provided for by legislation, the penalties for incitement are not as severe as the penalties for the offence incited.[145]

7.86 Victoria, however, makes the penalty for incitement the same as that for the offence incited,[146] although there are some exceptions for murder, treason, offences where the penalty is at large and for offences that may only be determined in the Magistrates' Court. The working group, that recommended this approach, considered that incitement should be punished in the same way as that proposed for conspiracy, on the grounds that the "incitement may be directed to large numbers of people just as conspiracy may involve a large number of people". It also observed that the recommended penalties were "maximum penalties, and it may be expected that the maximum penalty will only very rarely be imposed".[147]

7.87 The Law Commission of England and Wales similarly recommended that, for the proposed inchoate offence of encouraging or assisting crime, the penalty should be the same as that which is available for the offence incited.[148] The *Serious Crime Act 2007* (Eng) accordingly provides that a person convicted of encouraging or assisting crime, is liable to imprisonment for life if the anticipated offence is murder, and is liable to any penalty for which he or she would be liable if he or she had been convicted of the anticipated offence.[149]

7.88 The Gibbs Review Committee proposed a "range of penalties related to the penalties for the offence incited".[150] The proposal was implemented in the Commonwealth and ACT Criminal Codes.[151]

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143. M J Murray, *The Criminal Code: A General Review* (Report to the WA Attorney General, 1983) vol 2, 346.
144. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.128].
145. For example, *Criminal Code* (Cth) s 11.4(5); *Criminal Code* (ACT) s 47(1); *Criminal Code* (NT) s 43BI(7); *Criminal Code* (WA) s 553(2).
146. *Crimes Act 1958* (Vic) s 321I(1); and see *Criminal Code* (Qld) s 539(1).
147. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [29].
148. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.127].
149. *Serious Crime Act 2007* (Eng) s 58.
150. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.52].
151. *Criminal Code* (Cth) s 11.4; *Criminal Code* (ACT) s 47(1).

Reform: Incitement

7.89 As noted earlier, the traditional justification for the offence of incitement is that it allows the State to intervene to prevent the commission of an offence by P, that might not have been within P's contemplation, had D not incited or encouraged its commission.[152] We consider that this justification should also apply to a person's acts that are directed towards assisting (or facilitating) the commission of an offence, pending its commission, even though it may not eventuate. It can be argued that the moral culpability for providing assistance in these circumstances should not be affected by the question of whether the offence is committed or not.[153]

7.90 It has been suggested that the absence of an inchoate facilitation (or assistance) offence at common law has caused distortion in the existing inchoate offences of incitement and conspiracy, as well as in relation to accessorial liability.[154] This arises from the fact that D will be liable for conspiracy with P to commit a crime, or for inciting P to commit a crime, which does not occur, but will not be liable, for providing assistance to P to commit a crime which P fails to commit.

7.91 In some cases, the acts constituting assistance may be such that an inference can be drawn that D in fact incited P to commit the offence. However this may not always be possible.

7.92 We consider it desirable that the existing offence of incitement be enlarged to cover acts of assistance or facilitation by D, where they are directed at encouraging P to commit an offence, as well as those acts that are encompassed within the notion of inciting or soliciting its commission. This approach has received some support,[155] including that of the Law Commission of England and Wales, which recommended a range of new offences that criminalise assisting the commission of an offence, in order to fill the perceived gap left by the inability of incitement adequately to deal with all forms of assistance or facilitation.[156] In making such recommendations, the Law Commission was of the view that "the rendering of assistance, no less than the rendering of encouragement, increases the likelihood of harm occurring".[157] The Commission also considered that "criminalising conduct that assists others to commit offences, irrespective of whether or not those offences are subsequently committed or attempted, will enhance and reinforce the ability of law enforcement agencies to tackle serious organised crime.[158]

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152. P Gillies, *Criminal Law* (4th ed, LBC Information Services, 1997) 661-662; M J Murray, *The Criminal Code: A General Review* (Report to the WA Attorney General, 1983) vol 2, 344.
153. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [4.7]; S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Law Book Company, 2010) 420.
154. J Spencer, "Trying to Help another Person Commit a Crime" in P Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (Butterworths, 1987) 148-158. See also England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.9]-[3.17]; S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Law Book Company, 2010) 483.
155. J Spencer, "Trying to Help another Person Commit a Crime" in P Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (Butterworths, 1987) 148-151.
156. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006).
157. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.6].
158. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [4.29].

7.93 The inchoate offence which we propose draws on the Law Commission's recommendations that have been partially implemented in the *Serious Crime Act 2007* (Eng),[159] and on the model provided by s 11.4 of the *Criminal Code* (Cth). For convenience we will refer to the proposed offence as "an offence of incitement" although its reach will be greater than the current common law offence.

Recommendation 7.1

Statutory provision should be made for an offence of incitement that would include provisions to the following effect:

(1) A person (D) who assists or encourages another person (P) to commit an offence (the "incited offence") may be convicted of the offence of incitement.

Encourage includes command, request, propose, advise, incite, induce, persuade, authorise, urge and threaten or pressure another to commit an offence.

(2) D may be found guilty of an offence of incitement whether or not the incited offence is committed.

(3) For D to be found guilty of an offence of incitement:

(a) D must intend that P commit the incited offence; and

(b) D must communicate the encouragement to P or provide the assistance to P.

(4) D may be found guilty of an offence of incitement even if:

(a) facts or circumstances exist which make commission of the incited offence by the course of conduct incited impossible, or

(b) P is a person for whose benefit or protection the incited offence exists.

(5) D cannot be found guilty of an offence of incitement if he or she is a person for whose benefit or protection the incited offence exists.

(6) Any defences, limitations as to time, or qualifying provisions that apply to the incited offence apply also for the purposes of determining whether D is guilty of the offence of incitement.

(7) The mode of trial for the offence of incitement should be the same as if D had been charged with the incited offence.

(8) If the incited offence is to be carried out in another jurisdiction (that is entirely outside NSW) it must be:

(a) an offence under the laws of NSW if it were committed in NSW; and

(b) an offence under the laws of the other jurisdiction.

(9) If D is in another jurisdiction at the time of the incitement, the incited offence must be one that he or she intends to take place in NSW.

(10) It is not an offence to incite a person to:

(a) conspire with another to commit an offence;

159. *Serious Crime Act 2007* (Eng) s 44-46.

(b) incite another to commit an offence; or

(c) attempt to commit an offence.

(11) D, if found guilty of incitement to commit an offence, is liable to the same penalty as that which is available for the incited offence.

(12) Withdrawal or countermand of the incitement shall not constitute a defence to an offence of incitement.

(13) The law of attempt is not affected by this recommendation so that, if the encouragement or assistance is not communicated to P, then D may be convicted of an attempt to incite P to commit the relevant offence.

7.94 An extension of the existing inchoate offence, in this way, would enhance law enforcement by allowing police to proceed without the need to wait for P to commit the offence.[160] It might also serve to "deter some individuals from assisting prospective perpetrators of offences if they were aware that there was an immediate risk of liability, regardless of whether the offence they were assisting was committed or attempted".[161] We have chosen not to follow the Victorian provision that requires that the inciting is acted on by the person incited, in accordance with the intention of the inciter.[162] This approach has not been adopted in the other Australian States and Territories and, in our view, it would unduly limit the scope of the offence.

7.95 This recommendation ties in with our recommendations concerning accessorial liability. Under those recommendations, a person who assists or encourages another to commit a crime will become an accomplice and will be liable to be tried and convicted as such, if the substantive offence is completed. Theoretically in such a case, however, they could be tried for, and convicted of, an offence of incitement, although that possibility would be expected to be reserved for the rare case, where there might be difficulties in proving a case based on accessorial liability. That could arise, for example, where there is a difference between the offence incited, or in respect of the contemplated commission of which the assistance was provided, and the actual offence that was committed by the principal offender.[163]

The act of incitement

Terminology

7.96 In Recommendation 7.1(1) we have adopted the phrase "assists or encourages", in place of the expression "incites", as descriptive of the offence. This accords with the approach taken in the *Serious Crime Act 2007* (Eng).[164] The addition of "assisting" will cover situations where the conduct of the offender would not qualify as incitement under the common law.

160. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [4.4].

161. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [4.8].

162. *Crimes Act 1958* (Vic) s 321G(1).

163. J Spencer, "Trying to Help another Person Commit a Crime" in P Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (Butterworths, 1987) 151.

164. *Serious Crime Act 2007* (Eng) s 44-46.

7.97 We have chosen not to define the offence by reference simply to the term "urge", even though that is the term which is employed by the criminal codes of the Commonwealth, ACT and NT.[165] This is for the sake of consistency with the provisions relating to accessorial liability, but also because the offence proposed would embrace acts of assistance, which are designed to aid P in the commission of an offence, but which might fall short of urging its commission.

7.98 While the term "encourage" has been defined by the courts from time to time,[166] we have decided that the code should include a non-exhaustive list of synonyms based on the definition of "incite" in s 2A of the *Crimes Act 1958* (Vic). The terms used are said to reflect those most commonly used by the courts and commentators, while avoiding the archaic terms "solicit" and "counsel".[167] The term "authorise" was added in order to "cover the case of a person who authorises some illegal activity while advising against it".[168] We consider it appropriate to include words to the effect of "threatening or otherwise putting pressure on" a person. Negative threats of pressure can be effective forms of incitement.[169] This was recommended by the Law Commission[170] but not adopted by the *Serious Crime Act 2007* (Eng).

Communication of encouragement and provision of assistance

7.99 Recommendation 7.1(3)(b), in requiring that the encouragement or assistance must be respectively communicated or provided to P, is derived from the position at common law which provides that the incitement be communicated to its intended audience.[171] In accordance with the common law, P need not be a specific individual to whom the encouragement or assistance is directed or provided, but may be a member of a class of people to whom the communication or the act of assistance is directed. D's failure to communicate the encouragement or direct the assistance to P can be dealt with by the preservation of attempt in relation to incitement in recommendation 7.1(13).[172]

The offence the subject of the incitement

7.100 We have decided not to place a limit on the types of offences that can be the subject of an offence of incitement. This approach accords with the existing law in NSW,[173] and with the approach taken in most other Australian jurisdictions.

7.101 This will make the offence applicable in the case of those who organise the large-scale commission of minor offences.[174] Any attempt to differentiate minor from

165. *Criminal Code* (Cth) s 11.4(1); *Criminal Code* (ACT) s 47(1); *Criminal Code* (NT) s 43BI(1). On "urging" see Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report 104 (2006) [8.59]-[8.64].
166. See, eg, *R v Most* (1881) 7 QBD 244, 258: "Encourage, which is to intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident".
167. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [5].
168. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [4].
169. *Race Relations Board v Applin* [1973] QB 815.
170. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [5.42].
171. *R v Ransford* (1874) 13 Cox CC 9, 16.
172. See para 7.123.
173. See para 7.40.
174. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.12].

more serious offences will run into difficulty, especially since, as the Law Commission for England and Wales has observed, some summary offences "involve wrongdoing that can lead to very serious consequences and are punishable with imprisonment".[175]

Substantive offence need not be committed

7.102 At common law, the offence is complete upon the incitement coming to the attention of the person incited.[176] It does not require P to perform any act towards the commission of the offence incited by D.[177] In this regard, recommendation 7.1(2) is consistent with the common law. [178]

7.103 The Recommendation is also intended to eliminate any concern that P has to be encouraged, in fact, by D's acts, or any concern that the section might be read as requiring a causal connection between D's acts and the commission of an offence by P.[179]

7.104 The fact that the offence is complete once D provides the necessary encouragement or assistance means that there is no occasion for a defence of withdrawal or termination. However, we consider it desirable that this be the subject of an express provision in recommendation 7.1(12).

The inciter's intention

7.105 It is necessary for the proposed offence, that D intend by his or her assistance or encouragement to incite the commission of the offence by P, and that D's conduct, in providing such assistance or encouragement, involved a conscious and deliberate act.

7.106 Recommendation 7.1(3)(a) has its origins in s 11.4(2) of the *Criminal Code* (Cth).[180] An equivalent provision may also be found in the NSW offence of incitement to commit a sexual offence.[181]

7.107 The case of a person who intends that an offence be committed by a person, who does not have the necessary mental element, presents some problems. In some instances, for example, involving the incitement of children under the age of criminal responsibility, liability would seem to depend on whether the relevant acts are, in

175. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.49].

176. *R v Ransford* (1874) 13 Cox CC 9; *R v Krause* (1902) 18 TLR 238.

177. *R v Assistant Recorder of Kingston-upon-Hull; Ex Parte Morgan* [1969] 2 QB 58, 62.

178. See also Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95.

179. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 93.

180. See also *Criminal Code* (ACT) s 47(2); *Criminal Code* (NT) s 43BI(2).

181. *Crimes Act 1900* (NSW) s 80G(2).

fact, carried out.[182] However, an inciter in these circumstances may be guilty of attempting to commit the substantive offence by means of an innocent agent.[183]

Factors that do not affect the liability of the inciter

Impossibility

7.108 The provision in recommendation 7.1(4)(a), relating to the impossibility of the incited offence, is based on s 321G(3) of the *Crimes Act 1958* (Vic). It mirrors a similar provision with respect to conspiracy in recommendation 6.1(5)(a) and is consistent with s 11.4(3) of the *Criminal Code* (Cth).[184] Such provisions restate the common law that a person can be found guilty of inciting another to commit an offence that is factually impossible,[185] although there is some conflicting authority in this respect.[186]

Where P is the person protected

7.109 The provision in recommendation 7.1(4)(b) is necessary to negate a decision of the English Court of Appeal that a person cannot be guilty of inciting a person to commit an offence that was intended to protect that person.[187] We agree with the Law Commission for England and Wales that an inciter should not be able to take advantage of a principle designed to protect the person incited.[188] This would also ensure harmony with the common law, and with our recommendations concerning the offences of conspiracy.

7.110 While a provision to this effect exists in relation to the offence of conspiracy under the Commonwealth, ACT and NT Criminal Codes,[189] no such provision exists with respect to the offence of incitement under any of these Codes.

Defences

Where D is the person protected

7.111 Recommendation 7.1(5) restates the common law that a protected person cannot incite another to commit an offence against him or herself, where the offence was enacted to protect that person from harm.[190] This draws on s 51 of the *Serious*

182. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.27].

183. England and Wales, Law Commission, *Criminal Law: A Criminal Code for England and Wales,* Report 177 (1989) vol 2 [13.10]; Ireland, Law Reform Commission, *Inchoate Offences*, Consultation Paper 48 (2008) [4.33].

184. See also *Criminal Code* (ACT) s 47(4); *Criminal Code* (NT) s 43BI(4). An equivalent provision may be found in the NSW offence of incitement to commit certain sexual offences: *Crimes Act 1900* (NSW) s 80G(3).

185. *R v Fitzmaurice* [1983] QB 1083.

186. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Law Book Company, 2010) 498-499.

187. *R v Whitehouse* [1977] QB 868, 875.

188. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [3.29].

189. *Criminal Code* (Cth) s 11.5(3)(c)(ii); *Criminal Code* (ACT) s 48(5)(c)(ii); *Criminal Code* (NT) s 43BJ(4)(c)(ii).

190. *R v Tyrrell* [1894] 1 QB 710, 712.

Crimes Act 2007 (Eng), which was introduced following recommendations of the Law Commission for England and Wales.[191]

7.112 While a provision to this effect exists in relation to the offence of conspiracy under the Commonwealth, ACT and NT Criminal Codes,[192] no such provision exists with respect to the offence of incitement under any of these Codes.

Defences, etc applicable to the substantive offence

7.113 Recommendation 7.1(6) has its origins in s 11.4(4) of the *Criminal Code* (Cth),[193] which provides that "any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence". The NSW provisions, relating to incitement to commit a sexual offence, also provide that "any defences, procedures, limitations or qualifying provisions that apply to the offence incited also apply to an offence under this section".[194]

7.114 This changes the position at common law that incitement, as a distinct offence, was not subject to the procedural requirements that apply to the offence incited.[195] We are of the view that it should not be possible to proceed against a person for inciting an offence when the offence incited is barred by a limitation, or is subject to a defence or qualifying provision. This is also consistent with the approach we have taken with respect to conspiracy, accessorial liability for assisting and encouraging crime and joint criminal enterprise.

7.115 We have omitted the provision contained in the *Criminal Code* (Cth) which achieves a similar outcome with respect to "special liability provisions",[196] as such provisions are only relevant to the Commonwealth's general scheme of codification in relation to the required mental elements for an offence.

Mode of trial

7.116 Recommendation 7.1(7) is procedural and designed to clarify the manner in which an offence of incitement may be tried, that is, by applying a similar regime to the offence of incitement as that applying to the offence incited. In NSW, the *Crimes Prevention Act 1916* (NSW) allows for the summary trial of incitement offences and of other matters falling within its provisions. As noted later, we are of the view that this Act should be repealed.

Jurisdiction

7.117 Currently, in NSW, the question of jurisdiction for cross-border crime is dealt with by Part 1A of the *Crimes Act 1900* (NSW). The precise effect of these provisions is unclear, especially in relation to the inchoate offences of conspiracy and incitement. Some commentators have suggested that the provisions may go no further than the

191. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report 300 (2006) [6.44].

192. *Criminal Code* (Cth) s 11.5(4)(b); *Criminal Code* (ACT) s 48(7); *Criminal Code* (NT) s 43BJ(5)(b).

193. See also *Criminal Code* (ACT) s 47(5); *Criminal Code* (NT) s 43BI(5).

194. *Crimes Act 1900* (NSW) s 80G(4).

195. Australia, Attorney-General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters*, Interim Report (1990) [18.14].

196. *Criminal Code* (Cth) s 11.4(4A). See also *Criminal Code* (ACT) s 47(3); *Criminal Code* (NT) s 43BI(6).

common law.[197] It is also possible that, in the context of conspiracy and incitement, they may give rise to over-criminalisation where the substantive offence is not an offence in NSW. The purpose of recommendations 7.1(8) and (9) is to provide a specific response, in this respect, for the proposed offence of incitement, leaving to another day a more general review of this Part of the *Crimes Act 1900* (NSW).

Incitement within NSW of an offence outside NSW

7.118 Recommendation 7.1(8) deals with the situation where D incites (within NSW) the commission by P of an offence in another jurisdiction. It follows the provisions in force in Victoria.[198] We agree with the reason offered by the Victorian working group that the home State ought not to be a haven for people who incite others to commit crimes elsewhere.[199]

7.119 We do not see the need for provisions such as those which require that a request be made to the government of the other jurisdiction prior to prosecution;[200] or which require the Attorney General's consent for a prosecution.[201]

Incitement outside NSW of an offence within NSW

7.120 Recommendation 7.1(9) follows the approach taken in Victoria and Queensland.[202] We consider that the harm intended to be occasioned in NSW is a sufficient basis for attributing liability to a person who, while outside NSW, incites the commission of an offence within NSW.

Incitement of inchoate offences

7.121 Recommendation 7.1(10) follows s 11.4(5) of the *Criminal Code* (Cth)[203] in providing that it is not an offence to incite someone to conspire, incite, or attempt, to commit an offence. We consider it generally desirable to avoid the complexity of double inchoate offences and agree with the Criminal Code Officers' Committee that there has to be some limit on the reach of inchoate liability.[204]

7.122 Recommendation 7.1(10)(b) differs from the common law position which recognises that inciting a person to incite another to commit an offence will constitute an offence of incitement.[205]

7.123 Recommendation 7.1(13) is intended to make it clear that an offence of attempting to incite the commission of an offence remains available in NSW.[206] This would

197. S Bronitt and B McSherry, *Principles of Criminal Law* (3rd ed, Law Book Company, 2010) 100; M Goode, "Two New Decisions on Criminal 'Jurisdiction': The Appalling Durability of Common Law" (1996) 20 *Criminal Law Journal* 267, 282.

198. *Crimes Act 1958* (Vic) s 321H.

199. Victoria, Criminal Law Working Group, *Report on Incitement* (1983) [26].

200. *Criminal Code* (NT) s 280(3).

201. *Serious Crime Act 2007* (Eng) s 52(2), s 53, sch 4 cl 2.

202. *Crimes Act 1958* (Vic) s 321G(1); and *Criminal Code* (Qld) s 539.

203. See also *Criminal Code* (ACT) s 47(6).

204. Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility*, Final Report (1992) 95.

205. *R v Sirat* (1985) 83 Cr App R 41, 44-45.

206. Its retention was supported by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal*

cater for the situation in which for some reason the communication constituting D's encouragement or assistance fails to reach P, as is required by recommendation 7.1(3)(b).[207]

Penalty

7.124 In making an offence of incitement subject to the same maximum penalty as that available for the incited offence, recommendation 7.1(11) differs from the common law position under which the penalty for incitement is at large.

7.125 This also differs from the penalty provisions in the criminal codes of the Commonwealth, ACT and NT which set out a scale of maximum penalties for incitement, which vary depending on the maximum penalties for the substantive offence.[208]

7.126 It would, however, correspond with the provisions of the *Crimes Act 1900* (NSW) concerned with the offence of attempt. The penalty in respect of the common law offence of attempt to commit any offence, for which a penalty is provided under the *Crimes Act 1900* (NSW), is the penalty so provided.[209]

7.127 This does not affect the discretion of the sentencing court to impose a sentence that is commensurate with the objective and subjective circumstances of the case. In most instances, the sentence for an offence of incitement will be well below that which would be applicable if D were an accessory before the fact or a principal in the second degree. However, in the case of a person who directs the activities of criminal organisations, and who "encourages" or "assists" the commission of an offence by a member of the organisation, or of a person who encourages or assists another to commit a murder, it is appropriate that there be a capacity to impose a significant sentence.

Consequential abolitions and repeals

The common law of incitement

7.128 The common law as it relates to incitement will need to be abolished in order for the proposed provisions to take effect.

Recommendation 7.2

The common law offence of incitement should be abolished.

Responsibility, Final Report (1992) 95; and England and Wales, Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, Report 102 (1980) [2.121]. Again this is consistent with the common law: *R v Ransford* (1874) 13 Cox CC 9.

207. This requirement is consistent with the common law: *R v Krause* (1902) 18 TLR 238 (in relation to the offence of solicitation to murder); *Horton v Mead* [1913] 1 KB 154 (in relation to the offence of soliciting for immoral purposes).

208. *Criminal Code* (Cth) s 11.4; *Criminal Code* (ACT) s 47(1); *Criminal Code* (NT) s 43BI.

209. *Crimes Act 1900* (NSW) s 344A.

Crimes Prevention Act 1916 (NSW)

7.129 The *Crimes Prevention Act 1916* (NSW) should also be repealed, since the offence of incitement proposed will adequately cover the ground occupied by its proscription (in s 2) of any person who "incites to, urges, aids, or encourages the commission of crimes or the carrying on of any operations for or by the commission of crimes", including the printing or publishing activities covered by s 3 of the Act.

7.130 The need to make provision for summary trial, one of the original reasons for the introduction of this Act,[210] has also been dealt with by provisions allowing the courts to deal with offences, either on indictment or summarily, according to the provisions of the *Criminal Procedure Act 1986* (NSW).

Recommendation 7.3

The *Crimes Prevention Act 1916* (NSW) should be repealed.

Other provisions

7.131 There are a number of provisions in the *Crimes Act 1900* (NSW) and in other Acts that include within their reach conduct amounting to an incitement, variously described as "inciting", "inducing", "soliciting", "procuring", "encouraging", "provoking", "proposing" and so on.[211] Our long-term recommendation is that the provisions relating to the proposed statutory offence of incitement, and similarly those relating to the proposed statutory offence of conspiracy should have a general operation. As a consequence, it would be appropriate in due course to amend those statutory provisions that currently include conduct amounting to inciting, or conspiring, as an element, preserving, however, the option of maintaining an exception for specific inchoate offences where that continues to be appropriate. As we note in Chapter 8 of this Report, this will involve an extensive review of the relevant regulatory or other statutes, in order to achieve a uniform approach under the laws of NSW in relation to the principles concerned with complicity, and in particular, in relation to their impact on the existing inchoate offences. In the short term, it is intended that the core criminal statutes be amended to give effect to the recommendations in this and the preceding Chapter.

Recruitment for criminal activity

7.132 Earlier,[212] we drew attention to the specific offence of recruiting people to carry out or assist in carrying out a criminal activity that constitutes a serious indictable offence.[213] Recruit is defined for the purposes of the offence as meaning "counsel, procure, solicit, incite or induce". It is unclear whether the legislature intended that the recruitment offence be inchoate or that it should apply only if the "criminal activity" is carried into effect.

7.133 Having regard to the reach of the recommendations of this report in relation to accessorial liability and incitement, we question whether this offence has any work to do beyond increasing the maximum penalty where the person who is recruited to

210. See para 7.5.

211. See para 8.16.

212. See para 2.70.

213. *Crimes Act 1900* (NSW) s 351A.

carry out or assist in the criminal activity is a child. If it was the legislature's intention to increase the maximum penalty where the person recruited is a child, then it is our view that the offence should be repealed and the offender left to be dealt with under the recommended provisions relating to incitement or accessorial liability, as the case may be. A provision could then be introduced that would increase the maximum penalty if the person "recruited" is a child.

7.134 Otherwise, if it was the legislature's intention that the offence should be an inchoate offence directed to gang-related recruitment, whether or not the relevant criminal activity is committed, then it is our view that this section should be amended to make that clear, or, alternatively, that it be repealed and a specific provision dealing with this form of offence be added to the recommended provision concerning incitement.

Recommendation 7.4

The offence contained in *Crimes Act 1900* (NSW) s 351A be reviewed and amended or replaced so as to give effect to its intended objectives.

8. Implementation

8.1 In this chapter, we deal with a number of matters which have relevance for complicity, but which either do not call for any reform, or which would merit progressive reform, in order to ensure a consistency, and coherence, in the application of this area of the criminal law.

Application of the recommended provisions

8.2 The current position in NSW is that the common law doctrines relating to the various forms of accessorial liability, joint criminal enterprise, incitement and conspiracy operate (unless specific provision is otherwise made) with respect to all offences. This includes offences:

- arising at common law;[1]
- established under the *Crimes Act 1900* (NSW);
- established under other predominately criminal statutes such as the:
  - *Drug Misuse and Trafficking Act 1985* (NSW);
  - *Firearms Act 1996* (NSW); and
  - *Weapons Prohibition Act 1998* (NSW); and
- established under the other NSW statutes that create offences as an incident to their primary purpose.

8.3 The Commonwealth has responded to this situation by making it clear, in the *Criminal Code* (Cth), that the provisions relating to criminal liability, including those dealing with complicity, joint commission, incitement and conspiracy, apply with

1. *See Crimes Act 1900* (NSW) s 340-343.

respect to all offences, and not just to those established under the *Criminal Code* (Cth).[2]

8.4 In this part of the chapter we consider whether the provisions recommended in this Report should ultimately apply to all offences under the laws of NSW, and whether there should be a staged implementation of any amending legislation.

8.5 It is recognised that implementation would be simplified if, in the longer term, codification of the criminal law could be achieved for NSW, in which event the precedent of the *Criminal Code* (Cth)[3] could be followed in the extension of its reach, concerning the principles of criminal responsibility, to all offences arising under the laws of the State.

Offences arising under the Crimes Act 1900 (NSW)

8.6 The *Crimes Act 1900* (NSW), for the most part, defines offences in terms applicable to the principal offender, on the understanding that secondary parties, and those who incite, or conspire with, principal offenders to commit an offence, can be held liable according to the relevant common law principles. For this reason, the offences created by the *Crimes Act 1900* (NSW) should be the first offences to which our recommended provisions apply.

8.7 There are some provisions, however, that may need to be considered with a view to determining their compatibility with our recommended provisions, where the provision includes, as an element of the offence, an act of aiding or abetting, counselling or procuring, or inciting, soliciting, encouraging or persuading another to commit a forbidden act. For example:

- aiding or abetting suicide or attempted suicide; or inciting or counselling another to commit suicide;[4]
- aiding, abetting, counselling or procuring another to commit an act of female genital mutilation;[5]
- conspiring with, soliciting, encouraging, persuading, endeavouring to persuade, or proposing to another to commit murder;[6]
- aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence under Part 4A of the *Crimes Act 1900* (NSW) (corruptly receiving commissions or engaging in other corrupt practices);[7] and
- assisting another to do or omit to do an act which causes the passage or operation of a locomotive or rolling stock to be obstructed.[8]

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2. *Criminal Code* (Cth) s 2.2.
3. *Criminal Code* (Cth) s 2.1 and s 2.2.
4. *Crimes Act 1900* (NSW) s 31C(1) and (2).
5. *Crimes Act 1900* (NSW) s 45.
6. *Crimes Act 1900* (NSW) s 26.
7. *Crimes Act 1900* (NSW) s 249F.
8. *Crimes Act 1900* (NSW) s 213.

8.8 There is a noticeable inconsistency in the ways in which these provisions are framed, and a question arises as to why it was ever appropriate for acts of complicity to be addressed, expressly, for some offences but not for others. These will need to be reviewed before our recommendations can be applied generally to offences arising under the *Crimes Act 1900* (NSW) although the preferable course would be to amend the relevant provisions and to render them subject to the general provisions for complicity recommended in this Report.

Offences arising at common law

8.9 The offences which subsist at common law[9] cover a wide range of unlawful conduct, and include some regularly resorted to offences such as false imprisonment, escape lawful custody and attempt. In our view it would be highly desirable, in due course, to replace the remaining common law offences with statutory offences, and to do this in the course of a codification project. Pending such a development, the common law principles outlined in this Report would continue to apply to such offences, raising the unsatisfactory spectre of there being a duality of principles applicable respectively to the statutory and common law offences. For this reason, we consider it is desirable that this inconsistency be addressed contemporaneously with the adoption of the recommendations in relation to the *Crimes Act 1900* (NSW) so that the recommendations would also apply to offences arising at common law.

Offences arising under predominately criminal statutes

8.10 There are a number of statutes, other than the *Crimes Act 1900* (NSW) whose purpose is predominately to establish criminal offences. These include the *Drug Misuse and Trafficking Act 1985* (NSW), the *Firearms Act 1996* (NSW), the *Weapons Prohibition Act 1998* (NSW) and the *Summary Offences Act 1989* (NSW). These provisions will require separate consideration where, in their terms, they extend liability to conduct involving one or other of the forms of complicity considered in this Report. Depending on the context, this may require an addition of a non-exclusive definition, for example, of what is included within accessorial conduct for the purpose of the relevant statute.

8.11 An example of this can be seen in the *Drug Misuse and Trafficking Act 1985* (NSW) which contains provision for several serious offences, that embrace the specific act of a principal offender in committing the proscribed act, as well as the acts of those who "knowingly take part" in the offence[10] or who "conspire with another for its commission".[11] The expression "knowingly take part in" an offence is potentially problematic as it is capable of capturing several forms of complicity, and it is not an expression that we favour, or that has been adopted in any of our recommendations. Specific provision is also made in this Act for "aiding and abetting" the commission of relevant offences in NSW,[12] or outside NSW,[13] although

9. *See Crimes Act 1900* (NSW) s 340-343.
10. *Drug Misuse and Trafficking Act 1985* (NSW) s 23-24, s 25.
11. *Drug Misuse and Trafficking Act 1985* (NSW) s 26, s 28.
12. *Drug Misuse and Trafficking Act 1985* (NSW) s 27.
13. *Drug Misuse and Trafficking Act 1985* (NSW) s 20.

without defining those terms or distinguishing that form of conduct from knowingly taking part in an offence.

8.12 Under the *Firearms Act 1996* (NSW), the statutory offence is cast in terms of "*taking part* in" a prohibited act, for which a definition is provided:

> **51 Restrictions on sale of firearms**
> (3) For the purposes of this section, a person *takes part* in the sale of a firearm if:
>
> (a) the person takes, or participates in, any step, or causes any step to be taken, in the process of that sale, or
>
> (b) the person provides or arranges finance for any step in that process, or
>
> (c) the person provides the premises in which any step in that process is taken, or suffers or permits any step in that process to be taken in premises of which the person is the owner, lessee or occupier or of which the person has the care, control or management. [14]

8.13 Consideration will need to be given to the potential replacement of this provision with those provisions that are recommended in this Report, in relation to the various forms in which complicity can arise. If that occurs, then the several forms of conduct specifically mentioned in this section could be defined (if that was thought desirable), for the purpose of the Act, as constituting accessorial conduct, or as included in it.

Offences arising under other statutes

8.14 There are also a significant number of NSW Acts and Regulations that are concerned with specific areas of activity of a public or commercial kind, and which create offences in relation to certain forms of proscribed conduct, or in relation to breaches of their provisions. Such offences (referred to as statutory or regulatory offences) are punishable, variously by court-imposed fines or imprisonment, or by penalties imposed pursuant to penalty notices.

8.15 Almost invariably, they are framed in terms that will expressly extend their reach to the principal participant and to those who, at common law, would be criminally responsible as accessories, or as conspirators, or as people who had incited another person to commit the relevant offence. However there is an even more obvious lack of consistency in the terms in which they have been drafted than is the case with the *Crimes Act 1900* (NSW), the *Drug Misuse and Trafficking Act 1985* (NSW) or the *Firearms Act 1996* (NSW). These will require extensive review.

8.16 In some instances, the relevant Act contains a general provision extending its reach to the principal participant and to others who might potentially fall within each of the areas of complicity considered in this Report, as illustrated by the following example in the *Fair Trading Act 1987* (NSW):

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14. *Firearms Act 1996* (NSW) s 51(3); see also the *Drug Misuse and Trafficking Act 1985* (NSW) s 6 in relation to the series of offences concerned with the cultivation or supply of a prohibited plant, and the manufacture, production or supply of a prohibited drug.

> **62 Offences against this Act**
> (1) A person who:
>
> (a) contravenes,
>
> (b) aids, abets, counsels or procures a person to contravene,
>
> (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene,
>
> (d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of, or
>
> (e) conspires with others to contravene,
>
> a provision of this Act other than section 42, 43 or 60Y is guilty of an offence against this Act.[15]

8.17 Sometimes, the provision adopts the classic accessorial formula so that, on its face, it will apply to the principal participant and to those who "*aid, abet, counsel or procure*" that offender to commit the relevant offence.[16] In some, but not all, instances, the Act extends liability, additionally, to those who "*attempt to commit*" or "*conspire to commit*" an offence.[17]

8.18 In other cases, the provision adds to the classic formula phrases such as "*knowingly concerned in*", or "*knowingly party to*", or "*knowingly involved in*" a contravention or breach.[18] An offence charged in these terms would arguably give rise to a primary rather than a derivative liability.[19] A somewhat different approach can be seen in the *Commons Management Act 1989* (NSW) which effectively defines a "person in default", who by reason of the Act will be guilty of an offence, as one who "is in any way, by act or omission, directly or indirectly, *knowingly concerned in or party to*" the relevant contravention.[20]

8.19 In yet another group of statutory offences, a person who "*causes (or permits)*" the commission of the offence, or "*by whose order or direction*" it is committed is added

15. *Fair Trading Act 1987* (NSW) s 62(1). For other examples employing this formula see: *Property, Stock and Business Agents Act 2002* (NSW) s 213; *Home Building Act 1989* (NSW) s 134; *Conveyancers Licensing Act 2003* (NSW) s 155; *Residential Tenancies Act 1987* (NSW) s 128; *Retirement Villages Act 1999* (NSW) s 187; *Residential Parks Act 1998* (NSW) s 151; *Apiaries Act 1985* (NSW) s 42(2); *Protection of the Environment Operations Act 1997* (NSW) s 168 and *Water Management Act 2000* (NSW) s 347; and for the purpose of a civil claim for damages see the *Superannuation Administration Act 1996* (NSW) s 121 which contains a similar provision in its definition of a "person knowingly involved in a contravention" of the duties owed by trustees.
16. For example, *Prevention of Cruelty to Animals Act 1979* (NSW) s 33C; *Road Transport (General) Act 2005* (NSW) s 81 and *Western Lands Act 1901* (NSW) s 49(3).
17. For example, *Protection of the Environment Operations Act 1997* (NSW) s 168; *Apiaries Act 1985* (NSW) s 42(2).
18. For example, *Coal Mine Health and Safety Act 2002* (NSW) s 204(1); *Occupational Health and Safety Act 2000* (NSW) s 27(1); *Mine Health and Safety Act 2004* (NSW) s 175(1); *Farm Debt Mediation Act 1994* (NSW) s 27; *Home Building Act 1989* (NSW) s 52, 134 and *Associations Incorporation Act 1984* (NSW) s 70(2).
19. *R v Shin Nan Yong* (1975) 7 ALR 271, 273.
20. *Commons Management Act 1989* (NSW) s 59; for another Act in which a similar approach is taken, extending criminal liability to those who were "knowingly concerned" in another's act, see also *Associations Incorporation Act 2009* (NSW) s 69, s 91(1) (Act not yet commenced).

to the classic formulation.[21] Even within this group the provisions differ, since in some cases the offence expressly extends to those who are "*directly or indirectly concerned in*" the commission of the offence,[22] while, in one case, the offence extends, additionally, to those who "*attempt or conspire*" to commit an offence.[23]

8.20 There are also some Acts which provide variously for liability on the part of a director of a corporation, or of a person concerned in its management or an officer of the corporation, or the public officer or member of a committee of an association, where the corporation or association has been guilty of a contravention of any of their provisions.[24] These provisions are otherwise, perhaps surprisingly, silent in relation to others who may be regarded as falling within one or other of the complicity groupings.

8.21 Yet again, there is no consistency in the way that liability is extended under these provisions. Variously in the case of offences by corporations, liability is expressed to extend to: a director; an officer; a director and officer; a director and anyone concerned in the management (of the corporation); a person concerned in the management (of the corporation); a director or officer concerned in the management (of the corporation); and, in one case, to each person who is a director or employee of a corporation which commits an offence.[25]

8.22 The status of these several Acts accordingly stands in stark contrast with the position that now applies in relation to offences arising under Commonwealth legislation.[26]

8.23 There is precedent elsewhere for the inclusion of an express provision in a primary statute, in order to ensure a consistency, in the application of complicity principles, across a range of enactments. In Victoria, this problem has been approached by providing, for example, in relation to the general provisions in the *Crimes Act 1958* (Vic) concerning incitement and conspiracy, that the provisions "shall apply, so far as they are capable of doing so and with such changes as are necessary", for the purpose of determining whether a person is guilty of incitement or conspiracy under any other enactment".[27] However, this appears to be less desirable than a general provision that will ensure a uniform application of complicity principles.

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21. *Housing Act 2001* (NSW) s 69(3); *Hunter Water Act 1991* (NSW) s 33; *Local Government Act 1993* (NSW) s 669; *Sydney Catchment Management Act 1998* (NSW) s 67(1); *Sydney Water Act 1994* (NSW) s 52(1) and *Water Management Act 2000* (NSW) s 347.
22. *Housing Act 2001* (NSW) s 69(3); *Local Government Act 1993* (NSW) s 669.
23. *Water Management Act 2000* (NSW) s 347.
24. For example, *Animal Research Act 1985* (NSW) s 58(1); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) s 62(1); *Unlawful Gambling Act 1998* (NSW) s 53(1); *Environmentally Hazardous Chemicals Act 1985* (NSW) s 53(1); *Apiaries Act 1985* (NSW) s 43(1); *Associations Incorporation Act 1984* (NSW) s 70(1); *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) s 12(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 258(1); *Coal Mine Health and Safety Act 2002* (NSW) s 203(1); *Explosives Act 2003* (NSW) s 33(1); *Forestry Act 1916* (NSW) s 29(3). See also *Drug Misuse and Trafficking Act 1985* (NSW) s 36(1).
25. *Heritage Act 1977* (NSW) s 159.
26. *Criminal Code* (Cth) s 1.1, s 2.1, s 2.2, and s 11.6.
27. *Crimes Act 1958* (Vic) s 321D and s 321J.

The Commission's recommendation

8.24 In summary, the current position in NSW reflects a remarkable inconsistency in, and a potentially uneven application of, the policies which underpin complicity, which needs to be addressed.

8.25 We consider it important for there to be a uniform approach to complicity, which would apply equally to the "mainstream" offences for which provision is made in the core criminal statutes, to any residual common law offences, and to the regulatory offences.

8.26 This has a particular relevance for those offences in respect of which the relevant Act or Regulation specifies, as alternatives, the several forms of conduct which encompass not only acts giving rise to a primary liability, but also those that, in addition, have historically given rise to derivative, secondary, or inchoate liability.

8.27 It is recognised that, to bring this degree of uniformity and order to a set of laws, which currently provide for a very significant body of offences extending across a wide panorama of activities, involves a potentially complex and time consuming project.

8.28 We, therefore, recommend that our provisions be implemented in a series of stages so that they can be applied:

- first, in relation to offences arising at common law and under the *Crimes Act 1900* (NSW);
- secondly, in relation to offences established by the other predominately criminal statutes, including the *Drug Misuse and Trafficking Act 1985* (NSW), the *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW); and
- thirdly, in relation to offences established under all other NSW statutes.

8.29 In applying the provisions to offences in the third category, we are of the view that consideration should be given to amending the remaining Acts either by:

- the enactment of an overarching provision, which would specify the principles governing primary and secondary criminal liability that are to be applied in relation to the offences established by the relevant statutes; or
- the amendment of each Act so as to include a common set of principles concerned with complicity, so as to ensure that the elements are expressed in a uniform way, accompanied by the inclusion of any extended definition, for example, of what constitutes accessorial liability, where that is necessary for the proper implementation of the relevant Act.

8.30 In any such long-term exercise concerning the third category of offences, it would be highly desirable, in each case, to make it clear whether:

- the relevant offence is one of specific or basic intention, or is an offence of absolute or strict liability;
- the secondary participant's liability is primary or derivative; and whether

- the offence is intended to have an inchoate application.

8.31 It is also our view that, once the provisions recommended in this Report are introduced into the *Crimes Act 1900* (NSW), there should be a consequent repeal of such of Part 9 of the *Crimes Act 1900* (NSW) as would then become redundant, although preserving s 347A in relation to the abolition of a wife's common law immunity from being an accessory after the fact to a felony committed by her husband. It is noted in this respect that the common law does not provide for spousal immunity in the case of an accessory before the fact or a principal in the second degree or a party to a joint criminal enterprise. As a result of s 580D of the *Crimes Act 1900* (NSW), the common law rule that prevented a husband and wife being guilty of conspiring together, has been repealed. Accordingly, no recommendation is made to amend the *Crimes Act 1900* (NSW) in relation to these forms of complicity.

Recommendation 8.1

Legislative action should be taken in a series of stages:

(1) to ensure that the recommendations in this Report, concerning complicity, are ultimately made applicable to all offences in NSW, by applying the recommendations:

  (a) initially to offences arising at common law, and under the *Crimes Act 1900* (NSW);

  (b) then to offences arising under predominately criminal statutes such as the *Drug Misuse and Trafficking Act 1985* (NSW), the *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW);

  (c) finally, to offences arising under the remaining NSW statutes, with suitable amendment in each case, in relation to the inclusion of any extended definition required for the effective implementation of the statute in question; and

(2) consequently to repeal so much of Part 9 of the *Crimes Act 1900* (NSW) as will then become redundant (save for s 347A).

Assisting or inciting suicide

8.32 Although attempting or committing suicide is no longer an offence in NSW, it continues to be an offence for one person to assist another to commit or to attempt to commit suicide, or to incite or counsel another to commit suicide.[28] Consideration of the controversial issues concerned with euthanasia, and its promotion, fall outside our terms of reference. However, we have thought it necessary to deal with the topic briefly to ensure that any recommendations concerning amendment, or codification, of the laws of complicity do not indirectly or inadvertently interfere with the offences of aiding or inciting suicide.

28. See para 2.40-2.41; and *Crimes Act 1900* (NSW) s 31C.

Law in NSW

8.33 The offences created in s 31C of the *Crimes Act 1900* (NSW) encompass two forms of conduct which attract different maximum penalties. The offence of "aiding and abetting" the suicide or attempted suicide of another person attracts a maximum sentence of imprisonment of ten years.[29] The offence of "inciting or counselling" another person to commit suicide, which is only complete where the other person commits or attempts suicide as a consequence of that incitement or counsel, attracts a lesser maximum sentence of imprisonment for five years.[30]

8.34 The "aiding and abetting" offence possesses the unusual feature of being a primary criminal offence, since the act of suicide or attempted suicide which is aided or abetted is not itself a crime. Proof of the commission of such an offence does, however, depend on the person who is aided and abetted actually committing or attempting to commit suicide. While the inciting or counselling offence has the appearance of being an inchoate offence, it differs from such an offence since it will not be complete unless and until the person incited or counselled proceeds to commit or attempt to commit suicide as a consequence of the incitement or counsel.

Law in other jurisdictions

8.35 The position in NSW differs from that in England and Wales in two respects. First, the *Suicide Act 1961* (Eng) creates a single offence applicable to any person who "aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide". For each form of conduct the same maximum sentence of imprisonment for 14 years applies.[31] Secondly, a survivor of a suicide pact under English law can be convicted of manslaughter (but not murder);[32] whereas in NSW such a person cannot be convicted of either murder or manslaughter but can be convicted of an offence under s 31C of the *Crimes Act 1900* (NSW).[33]

8.36 Suicide or attempted suicide is no longer an offence in any Australian jurisdiction. While assisting or encouraging another person to commit suicide is an offence in all Australian jurisdictions, there are still differences among jurisdictions in relation to:

- the existence of an offence applicable to those who aid, abet, counsel or incite another to attempt to commit suicide; and
- the offence of which a survivor of a suicide pact can be convicted, and the maximum sentence available in such a case.

8.37 Like NSW, assisting or encouraging (also aiding, abetting, counselling, or inciting) another person to commit or attempt suicide is an offence in South Australia,

29. *Crimes Act 1900* (NSW) s 31C(1).
30. *Crimes Act 1900* (NSW) s 31C(2).
31. *Suicide Act 1961* (Eng) s 2(1).
32. *Homicide Act 1957* (Eng) s 4(1).
33. *Crimes Act 1900* (NSW) s 31B(1).

Victoria, the ACT, and the NT.[34] In Western Australia, Queensland, and Tasmania, aiding, procuring, or counselling another person to commit suicide is an offence.[35]

8.38 Suicides pacts are only mentioned in NSW, Victoria, and South Australia.[36] Manslaughter is available for wilfully causing death according to a suicide pact in Victoria;[37] in similar circumstances, murder, attempted murder or manslaughter are available in South Australia.[38]

Interaction with complicity principles

8.39 In circumstances where two or more people assist or encourage another to commit suicide, a question of complicity, in its more traditional sense, can arise, for example, where the deceased did not voluntarily participate in the termination of his or her life. In this respect, the existence of a statement of the wishes of a terminally ill person may have considerable practical importance for family members, or medical staff, faced with a decision whether or not to prolong the life of that person.[39]

8.40 A relevant recent case is that of *R v Justins*[40] in which W, a 72 year old male suffering from Alzheimer's disease, died as the result of ingesting Nembutal, a toxic drug which was obtained in Mexico by Caren Jenning, a long term friend of the deceased and given to the deceased by Shirley Justins, his long term de facto partner.

8.41 Prior to his death, he had made two attempts at suicide and had expressed an interest in travelling to Dignitas in Switzerland for the purpose of obtaining its assistance in ending his life. Dignitas had refused his application by reason of concerns as to whether, in the light of his severe cognitive impairment, he had the capacity to make the necessary decision. Both Ms Justins and Ms Jenning gathered material to support the application to Dignitas and Ms Justins paid that organisation 1000 Swiss Francs.

8.42 Within a few days before the death of the deceased, but after the Nembutal had been acquired in Mexico, Ms Justins arranged for the deceased to sign a new will which significantly increased the benefits that she would receive. The solicitor who prepared the will was unaware of the deceased's cognitive disabilities or inability to read the will, or of any plan for him to take his life. The general practitioner who gave a certificate as to his testamentary capacity was similarly unaware of the purpose for which it was required.

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34. *Criminal Law Consolidation Act 1935* (SA) s 13A(5); *Crimes Act 1958* (Vic) s 6B(2); *Crimes Act 1900* (ACT) s 17; *Criminal Code* (NT) s 162.
35. *Criminal Code* (WA) s 288; *Criminal Code* (Qld) s 311; *Criminal Code* (Tas) s 163.
36. *Crimes Act 1900* (NSW) s 31B; *Crimes Act 1958* (Vic) s 6B; *Criminal Law Consolidation Act 1935* (SA) s 13A.
37. *Crimes Act 1958* (Vic) s 6B(1).
38. *Criminal Law Consolidation Act 1935* (SA) s 13A(3), (4), (7).
39. *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45; *Brightwater Care Group v Rossiter* [2009] WASC 229.
40. *R v Justins* [2008] NSWSC 1194.

8.43 The two women arranged for Ms Justins to give the deceased the Nembutal, and for the bottle and glass to be collected and disposed of by Ms Jenning after the event. The matter went according to plan, however an autopsy discovered the presence of a lethal does of Nembutal in the deceased. As a consequence of the police investigations, and contested proceedings for administration of the deceased's will, Ms Justins was charged with murder and with an alternative count of aiding and abetting the suicide of the deceased. Ms Jenning was charged with a drug importation offence as well as being an accessory before the fact to murder with an alternative count of aiding and abetting the suicide. After a trial, Ms Justins was convicted of manslaughter by gross criminal negligence and Ms Jenning was convicted as an accessory before the fact to that manslaughter.[41]

8.44 As Justice Howie noted the critical issue in the trial concerned the right of the deceased to make the decision about taking his own life, and not to have it made by someone else on his behalf. His Honour noted:

> If the deceased had the capacity to make an informed decision to take his own life, then it was his act and the offender was guilty only of assisting him, (and hence guilty of the statutory offence of aiding and abetting the deceased to commit suicide). But if he did not have that capacity, then it was the act of the offender that intentionally took his life regardless of whether he would himself have made the same decision. The law holds human life so sacred that a person cannot give some other person permission to take his or her life.[42]

8.45 On appeal, the conviction of Ms Justins was set aside and a new trial was directed. In the course of the reasons given by the NSW Court of Criminal Appeal, Justice Simpson held that the case was not one in which manslaughter by criminal negligence was available as an alternative verdict, on the basis that the appellant's act of providing the deceased with the Nembutal must necessarily have been accompanied by an intention on her part that it would result in his death.[43]

8.46 Chief Justice Spigelman dissented in this respect,[44] Justice Johnson observed that it was difficult to see a proper conceptual basis upon which manslaughter could arise on the facts of the case but found it unnecessary to decide the question.[45]

8.47 A consequence of this decision is that there is now likely to be a distinction, in NSW, between the consequences for a survivor of a suicide pact who can be convicted of manslaughter but ***not*** murder; and for an accused who provides another person without capacity, with the means of taking his or her life, who can be convicted of murder, but not of manslaughter.

8.48 Some attention was given in *Justins v R* to what is required in relation to the mental capacity of a person to participate in the decision or events leading to his or her death. Justice Howie expressed the test in terms of the deceased having the

41. *R v Justins* [2008] NSWSC 1194 [4].
42. *R v Justins* [2008] NSWSC 1194 [30].
43. *Justins v R* [2010] NSWCCA 242 [247]-[248].
44. *Justins v R* [2010] NSWCCA 242 [128]-[130].
45. *Justins v R* [2010] NSWCCA 242 [339]-[340].

capacity to make an "informed and independent decision" to take his own life.[46] Error was however found in relation to the written directions, which went on to list (as matters of law) a number of factors that needed to be present in order for such capacity to exist.[47]

8.49 Justice Johnson[48] observed that the concept of an "informed decision" was not "especially apt" to an assessment of the capacity of a person to decide to commit suicide, and indicated that the capacity involved in this context differed from testamentary capacity.[49] His Honour concluded:

> A person possessing capacity may decide to commit suicide on a basis which is ill-informed or not supported by a reason, but it may be the reasoned choice of the person, which the law accepts will render the act of suicide the act of the person and not another person who provides the means of death. In my view, the last proposition reflects the appropriate test to be applied in a case such as this.[50]

8.50 The question of capacity which was the essential issue in this case is of significant importance in relation to the potential criminal liability of a person who assists another to commit suicide since, depending on its presence or absence, such a person may be guilty of murder (but arguably not manslaughter), or otherwise of the statutory offence of assisting suicide. This will continue to be a practical issue of some difficulty, since factual arguments are likely to arise as to whether a deceased made a reasoned decision or choice, to accept the assistance of another person in the events resulting in the termination of his or her life.

8.51 In sentencing Ms Justins[51] Justice Howie observed:

> As Coldrey J of the Victorian Supreme Court pointed out, the offence of aiding and abetting suicide exists not only in recognition of the community's regard for human life but also for the protection of persons who are vulnerable because of advanced age, pain or emotional distress. [52]

and additionally:

> Of course it is one thing to assist a person to travel to a country where his death can be brought about legally but it is quite another to illegally bring into this country the means of unlawfully aiding his death. The offender and Ms Jenning must have understood this fact, if not the seriousness of what they were doing. The gravity of the offender's negligence was high because, as a result of what she did, death was inevitable. [53]

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46. Spigelman CJ accepted as appropriate s non-legal test expressed in these terms: *Justins v R* [2010] NSWCCA 242 [91]-[92].
47. *Justins v R* [2010] NSWCCA 242, Spigelman CJ [94]-[100], Simpson J [268] and Johnson J [349] each agreed that there was error in relation to this aspect of the directions.
48. With whom Simpson J agreed [269].
49. *Justins v R* [2010] NSWCCA 242 [352].
50. *Justins v R* [2010] NSWCCA 242 [365].
51. Ms Jenning had herself committed suicide between the date of the verdict of the jury and the commencement of the sentencing proceedings: *R v Justins* [2008] NSWSC 1194 [1].
52. *R v Justins* [2008] NSWSC 1194 [44]. Citing *R v Hood* (2002) 130 A Crim R 473 [32].
53. *R v Justins* [2008] NSWSC 1194 [56].

8.52 An additional practical issue arises in relation to the potential liability of a person who provides assistance or encouragement to a person who commits or attempts suicide outside NSW (for example, by assisting or encouraging their travel to Switzerland where suicide is lawful), having regard to the general rule that the criminal law does not extend to acts or omissions occurring outside the jurisdiction. This is an issue that recently arose for consideration by the House of Lords, with the added complication that consideration also needed to be given in that case to the possible engagement of article 8 of the European Convention on Human Rights.[54]

8.53 The House of Lords did not finally determine this issue. However, on the assumption that such conduct might well constitute an offence under s 2(1) of the *Suicide Act 1961* (Eng), the House of Lords required the Director of Public Prosecutions to promulgate an offence-specific policy, identifying the facts and circumstances to be taken into account in deciding whether to give the consent which is required under the Act for a prosecution in such a case. A policy supplementing the general Code for Crown Prosecutors has now been released, in compliance with the directions given.[55]

8.54 The suggested justification for such a policy relates to the conundrum faced by a terminally ill person who wishes to have his or her life terminated lawfully before that illness makes life intolerable. If there is a risk of a close friend or relative being charged under s 31C of the *Crimes Act 1900* (NSW) if that person pays for their trip to Switzerland or accompanies them or otherwise provides information or assistance, then the person with the illness may have to make the arrangements alone and do so while they are well enough to make those arrangements and travel without assistance. Otherwise they will need to wait until such time as they qualify for a lawful termination of their life overseas, in which event they will almost certainly need assistance, but with the knowledge that their close friend or relative risks being charged with an offence under s 31C if he or she provides that assistance.

8.55 So far as it may be relevant to assistance or encouragement provided by a person within NSW to another person who commits suicide outside the State, we draw to attention the female genital mutilation provisions of the *Crimes Act 1900* (NSW). These provisions establish an offence on the part of anyone who performs an act involving the mutilation of female genitals, as well as an express offence of aiding, abetting, counselling or procuring. The section applies where the acts constituting the offence occur outside NSW, so long as the victim is ordinarily resident in NSW.[56] The application of the geographical nexus provisions contained in s 10B-s 10D arise for potential consideration in a case of assisting or encouraging a suicide or attempted suicide where that act occurs outside the State.

8.56 We also draw to attention the fact that the *Criminal Code* (Cth) creates a series of offences in relation to using a carriage service to access or, in various ways, to

54. *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

55. Director of Public Prosecutions (England and Wales), *Policy for Prosecutors in respect of Cases of Encouraging or Assisting suicide* (2010) Crown Prosecution Service <*http://www.cps.gov.uk/consultations/as_policy.html*> at 12 May 2010.

56. *Crimes Act 1900* (NSW) s 45(2).

make suicide related material available;[57] or to possess or supply or obtain such material for use through a carriage service,[58] any one of which could catch any friend or relative of a person wishing to commit suicide either in Australia or lawfully overseas, who accesses or uses a carriage service, in a prohibited way, while endeavouring to provide assistance to that person.

8.57 Any detailed examination of the offence of assisting or encouraging a person to commit, or to attempt to commit, suicide falls outside our terms of reference, and gives rise to significant issues of public policy, having a local and federal connotation, on which we have not received any submissions. As a result we do not intend to deal with it in this Report, save to draw attention to three matters:

- First, that there are significant differences in the criminal justice response, including the maximum available penalties, across the jurisdictions noted. For example, in Victoria inciting, aiding or abetting a suicide or attempted suicide attracts a maximum 5 years imprisonment.[59] However, in NSW aiding or abetting a suicide or attempted suicide attracts a maximum 10 years penalty, while inciting or counselling a suicide or attempted suicide attracts a maximum five years penalty.[60] In contrast, in the Australian Capital Territory, either aiding, abetting, or inciting or counselling, a suicide or attempted suicide attracts a maximum penalty of 10 years in both cases.[61] In the Code States of Western Australia, Queensland and Northern Territory various acts including assisting, encouraging, procuring, counselling or aiding suicide (depending on the jurisdiction), all attract life imprisonment.[62] In Tasmania, instigating (counselling, procuring or commanding) or aiding suicide is a crime generally punishable by imprisonment for 21 years.[63] South Australia distinguishes between aiding, abetting or counselling a successful suicide (14 years imprisonment) and an attempted suicide (8 years imprisonment).[64]

- Secondly, that there is an issue relating to the consequences of providing any form of assistance to those who desire to have their life terminated lawfully overseas.

- Thirdly, that there is an issue as to whether the capacity test should be formulated in terms of the deceased making a reasoned decision or choice, or in terms of having a sound mind and not being under any form of duress, inducement or undue influence.

8.58 In light of these comments, although without making any specific recommendation, we raise for consideration:

(a) the possible development by the Office of the Director of Public Prosecutions of a guideline for prosecution decisions in this context;

57. *Criminal Code* (Cth) s 474.29A.
58. *Criminal Code* (Cth) s 474.29B.
59. *Crimes Act 1958* (Vic) s 6B(2).
60. *Crimes Act 1900* (NSW) s 31C(1), (2).
61. *Crimes Act 1900* (ACT) s 17.
62. *Criminal Code* (Qld) s 311; *Criminal Code* (WA) s 288, *Criminal Code* (NT) s 162.
63. *Criminal Code* (Tas) s 163, s 1 (Interpretation of "instigate") and s 389(3) (Sentences).
64. *Criminal Law Consolidation Act 1935* (SA) s 13A(5), (6)(a).

(b) the introduction of a possible requirement for consent by the Attorney General to any prosecution, and

(c) the desirability of there being a national review, in order to achieve a greater degree of uniformity of State and Territory laws in relation to assisting or inciting suicide.

8.59 We recognise, additionally, that each of these matters will have some relevance for any debate that may eventuate in response to any proposal for the introduction of euthanasia laws.[65]

65. It is noted that the Consent to Medical Treatment and Palliative Care (End of Life Arrangements) Amendment Bill 2010 (SA) and the Voluntary Euthanasia Bill 2010 (WA) have each failed to pass into legislation. The Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010 (Cth) is currently before the Australian Parliament.

Appendix A. Submissions

Mr Richard Button SC, 30 March 2008

Mr Peter Breen, 1 April 2008, 14 April 2008

Criminal Law Review Division, NSW Attorney General's Department, 7 April 2008

Commonwealth Director of Public Prosecutions, 7 April 2008; amendment, 7 July 2008

Office of the Director of Public Prosecutions (NSW), 8 April 2008

New South Wales Bar Association, 15 April 2008

Confidential submission, 14 July 2010

Mr Mark Ierace SC, 9 November 2010

New South Wales Bar Association, 9 November 2010

Law Society of New South Wales, 18 November 2010

Appendix B. Consultation

Consultation, 6 December 2010

Mr Don Colagiuri
NSW Parliamentary Counsel

Mr Nicholas Cowdery QC
Director of Public Prosecutions (NSW)

Mr Mark Ierace
Public Defender (NSW)

Ms Penny Musgrave
Director, Criminal Law Review Division, NSW Department of Justice and Attorney General

Mr Stephen Odgers SC
Barrister (representing the NSW Bar Association)

Mr Jeremy Styles
Solicitor, Aboriginal Legal Service (NSW/ACT) Limited (representing the Law Society of NSW's Criminal Law Committee)

Appendix C.
Offences that come within the constructive murder provisions

NSW offences carrying a sentence of imprisonment for 25 years

Offences against the Sovereign	*Crimes Act 1900* (NSW) s 12
Murder and manslaughter defined life or 25 years	*Crimes Act 1900* (NSW) s 18
Infanticide	*Crimes Act 1900* (NSW) s 22A
Manslaughter by provocation	*Crimes Act 1900* (NSW) s 23
Manslaughter by diminished responsibility	*Crimes Act 1900* (NSW) s 23A
Manslaughter	*Crimes Act 1900* (NSW) s 24
Conspiracy to murder	*Crimes Act 1900* (NSW) s 26
Acts done to person or property with intent to murder	*Crimes Act 1900* (NSW) s 27 and s 28
Attempts to murder	*Crimes Act 1900* (NSW) s 29 and s 30
Impeding endeavours to escape shipwreck	*Crimes Act 1900* (NSW) s 32
Wounding or grievous bodily harm with intent	*Crimes Act 1900* (NSW) s 33(1)
Wounding with intent to resist arrest	*Crimes Act 1900* (NSW) s 33(2)
Discharging firearm with intent to cause grievous bodily harm or with intent to resist arrest	*Crimes Act 1900* (NSW) s 33A(1) and s 33A(2)
Attempts to choke etc or garrotting	*Crimes Act 1900* (NSW) s 37
Using intoxicating substance to commit an indictable offence	*Crimes Act 1900* (NSW) s 38
Causing bodily injury by gunpowder or other corrosive substance etc	*Crimes Act 1900* (NSW) s 46
Using etc an explosive substance or corrosive fluid	*Crimes Act 1900* (NSW) s 47
Sexual Intercourse with a child under 10 (not aggravated)	*Crimes Act 1900* (NSW) s 66A
Attempting or assaulting with intent, to have sexual intercourse with a child under 10	*Crimes Act 1900* (NSW) s 66B
Persistent sexual abuse of a child	*Crimes Act 1900* (NSW) s 66EA
Kidnapping (specially aggravated offence)	*Crimes Act 1900* (NSW) s 86(3)
Contamination of goods (aggravated circumstances)	*Crimes Act 1900* (NSW) s 93O
Robbery with wounding	*Crimes Act 1900* (NSW) s 96

Armed robbery (dangerous weapon) (aggravated)	*Crimes Act 1900* (NSW) s 97(2)
Armed robbery with wounding	*Crimes Act 1900* (NSW) s 98
Breaking out of dwelling after committing, or entering to commit, indictable offence (specially aggravated offence)	*Crimes Act 1900* (NSW) s 109(3)
Breaking, entering and assaulting with intent to murder	*Crimes Act 1900* (NSW) s 110
Breaking etc. into any house and committing serious indictable offence (specially aggravated form)	*Crimes Act 1900* (NSW) s 112(3)
Destroying or damaging property with intention of endangering life	*Crimes Act 1900* (NSW) s 198
Sabotage	*Crimes Act 1900* (NSW) s 203B
Destruction or damage to aircraft or vessel with intent or reckless indifference	*Crimes Act 1900* (NSW) s 204
Threatening to destroy aircraft, vessel or vehicle (Demand and action)	*Crimes Act 1900* (NSW) s 208(3)
Criminal Acts relating to railways with intent	*Crimes Act 1900* (NSW) s 211(1)
Punishment of accessories after the fact to murder etc	*Crimes Act 1900* (NSW) s 349(1)
Supply of drugs to persons under 16	*Drug Misuse and Trafficking Act 1985* (NSW) s 33AA(2)(b), s 25(2A)
Manufacture or production of drugs in the presence of children or procuring children for their supply – not less than large commercial quantities	*Drug Misuse and Trafficking Act 1985* (NSW) s 33AC(3), s 24(1A), s 25(2D)

NSW offences for which life imprisonment is available

Murder	*Crimes Act 1900* (NSW) s 18 and s 19A
Aggravated sexual assault in company	*Crimes Act 1900* (NSW) s 61JA
Sexual intercourse with a child under 10 years in circumstances of aggravation	*Crimes Act 1900* (NSW) s 66A(2)
Drug offences involving commercial quantities or for a commercial purpose	*Drug Misuse and Trafficking Act 1985* (NSW) s 33(3), s 25(2D)
Manufacture or production of drugs in the presence of children involving not less than large commercial quantities	*Drug Misuse and Trafficking Act 1985* (NSW) s 33AC(4), s 24(2A)
Piracy accompanied by assaults with intent to murder etc.	*Piracy Punishment Act 1902* (NSW) s 4
Punishment in other cases	*Piracy Punishment Act 1902* (NSW) s 5
Punishment of accessories before the fact	*Piracy Punishment Act 1902* (NSW) s 6

Table of cases

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