Parties, conspiracies and attempts

K E Dawkins*

I INTRODUCTION

Most criminal prohibitions are directed at the commission of a substantive offence by a person acting alone. Such a person may assault another, steal or damage property or deal in a controlled drug. In each case the criminal conduct results in a completed offence that is committed without assistance from any other person. But the criminal law has also developed auxiliary doctrines that extend liability in two general directions. First, the doctrine of complicity implicates those who help or encourage others in the commission of offences. Under this doctrine helpers and encouragers are ranked alongside the actual perpetrator as "parties" to the offence. To differentiate their participation, they are often described as "secondary offenders" while the actual perpetrator is called the "principal offender". Secondly, the criminal law prohibits the doing of certain acts for the purpose of effecting some ulterior offence. This is the domain of inchoate offending. Three main forms of inchoate liability are found in New Zealand law - agreeing with someone else to commit an offence (conspiracy), trying to commit an offence (attempt), and encouraging an offence that is not committed (incitement).

The current statutory rules on complicity and inchoate offending are scattered throughout the Crimes Act 1961 (the present Act). Despite the processes of consolidation and amendment over the years, many have remained in statutory aspic since their initial enactment by the Criminal Code Act 1893. Part IV of the Crimes Bill 1989 (the Bill) is intended to replace these rules. Its purpose is to restate the rules in an improved form that is appropriate to a contemporary statutory codification of general principles of criminal liability. That would seem to be indicated by the Bill's long title which states that it will "revise" the law. Of course part of the revision includes new provisions and some changes. But, unlike other parts of the Bill, Part IV is characteristically evolutionary rather than revolutionary. If I may stray beyond the four corners of the Bill for a moment and refer to an earlier departmental draft, the new rules on parties, conspiracy and attempt were apparently intended to continue the process begun last century by those "who have identified and increasingly distilled the substantive criminal law into general propositions of liability".[1] According to the same source, the proposed legislation would not disturb the basic principles of liability for parties; some modification of the rules on attempt was required to deal with the problem of impossibility; and the elements and scope of conspiracy were to be defined for the first time.[2]

---

* Senior Lecturer, Faculty of Law, University of Otago.

1 Explanatory commentary accompanying a 1986 departmental draft of the Bill.

2 Above n 1.

In this paper I propose to examine the draft rules as they now stand in Part IV. For this purpose I shall adopt the following evaluative standards.[3] First, the new rules should be both comprehensive and well arranged. Secondly, they should not depart from established principle or criminalise conduct that is not properly the law's business. The rules should also be consistent and certain. And all these things should be achieved in clear, straightforward provisions. But at the same time certain limitations must be accepted. No revision of this kind will even be perfect and complete. Occasionally the rules will also have what has been described as an "irreducible minimum of uncertainty".[4] And complicated drafting and technical jargon will not always be avoidable. Nonetheless, the point remains that if it is to be counted a success such a project must result in an overall improvement upon the existing rules.

II PARTIES

A *Arrangement*

With the notable exception of the excision of objective liability for parties by the Crimes Act 1961,[5] most of the current statutory rules on complicity have remained undisturbed since the enactment of the Criminal Code Act in 1893. They are now to be found in the general provision of section 66 of the present Act. As for subsection (1) of section 66, Adams has rather kindly described it as a "remarkable instance of far-reaching and far-sighted legal reform effected by a simple and succinct enactment ... intended as a substitute for the whole of the old [common] law".[6] Whatever its merits when first formulated, the provision now appears distinctly imperfect. As well as using antiquated language, it is both elliptical and inconsistent in parts.

Apart from recasting the substance of section 66(1) in more familiar language, the Bill fills in some gaps and makes specific provision for particular kinds of complicity. Clause 54 is the predicate and expands on what is now the opening part of section 66(1). As described in the explanatory note to the Bill, it is a "drafting device" designed to make it clear that all parties to an offence are guilty of and equally liable to the penalties prescribed for that offence. Clauses 56 to 58 then specify the various ways in which a person can be a party to an offence:

- by personally committing the offence (clause 55)
- by committing the offence through an innocent agent (clause 56)
- by helping or bringing about the commission of an offence, including participation by presence at the scene of an offence or by failing to exercise any authority to prevent the commission of an offence (clause 57)

---

3 See Law Reform Commission of Canada, *Secondary Liability : Participation in Crime and Inchoate Offences* (Working Paper 45, 1985) 25.

4 Law Commission, *Criminal Law : Codification of the Criminal Law* (Law Com No 143, 1985) 88, para 10.14 (iii) (*Codification*).

5 Crimes Act 1961, ss66(2) and 70(2) which removed the words "or ought to have known" that had previously appeared before "known".

6 Adams, *Criminal Law and Practice in New Zealand* (2 ed 1971) 180, para 625.

- by carrying out a common intention (clause 58).

B Personal Commission

Where A helps, encourages or procures B to commit an offence, B will normally be the principal offender and A a secondary offender. In terms of section 66(1)(a) of the present Act, B "Actually commits the offence". Clause 55 re-enacts section 66(1)(a), the only amendment being the substitution of "personally" for "actually". Evidently the change reflects a preference for "personally" as a term that more aptly describes a person who commits an offence by his or her own hand alone. It also clearly differentiates this mode of offending from the use of an innocent agent which is the subject of separate provision in clause 56. However clauses 55 and 56 need not be mutually exclusive. Where an offence is a composite of one person's acts of personal commission and the innocent acts of another caused by that person, both provisions may apply.

C Innocent Agency

Suppose that A intentionally causes B, an innocent actor, to perform all the acts that constitute the offence. A cannot be regarded as a secondary offender because secondary liability presupposes the commission of an offence by someone else who is directly and originally liable. And since B is innocent he cannot be the principal offender. In such a case the orthodox solution is reached by applying the doctrine of innocent agency. B's innocent physical acts are imputed to A and conjoined with A's culpable intent to commit an offence.

The present Act contains no express reference to the doctrine of innocent agency. Nonetheless, the concept of commission by such an agent was rather problematically imported into the Act by the Court of Appeal's decision in *R* v *Paterson*.[7] There the Court held that the language of section 66(1)(a) is "perfectly appropriate ... to describe a person who, with the necessary criminal intent, uses another but innocent person to perform the physical act necessary to commit the particular crime".[8] Although that conclusion can be defended on the ground that the concept of innocent agency is implicit in the notion of commission or perpetration itself, it clearly put some strain on the language of section 66(1)(a). Despite the explicit requirement that the offence "actually" be committed, the Paterson interpretation treats the person who uses an innocent agent as a constructive committer.

Clause 56 of the Bill corrects the ellipsis in the present Act by codifying the doctrine of innocent agency. As the provision now stands, "Every person is a party to an offence who intentionally causes an innocent agent to commit the act that constitutes the offence". While the Bill retains the customary expression "innocent agent" to

---

7 [1976] 2 NZLR 394. For commentary on the decision see Orchard, "Criminal Responsibility for the Acts of Innocent Agents" [1977] NZLJ 4.

8 Above n 7, 396.

express perpetration-by-means-of,[9] the definition of such an actor is significantly different from earlier departmental drafts which appeared to favour the approach taken in the 1985 English Draft Code.[10] Thus an innocent agent was initially defined as one who (a) was under twelve years old; (b) was or would not be found guilty of the offence because of insanity; or (c) did the act without the necessary mental element to constitute the offence. However, the original formulation departed from the English draft in that it did not recognise the general category of persons who are innocent because they have some other "defence".[11]

The new definition in clause 56 is much crisper and more comprehensive. To begin with, clause 56(1) properly reflects existing limitations on the doctrine by confining it to cases where one person "intentionally" causes another to act as the cat's paw.[12] In turn, clause 56(2) defines an innocent agent to mean "a person who at law cannot be held criminally responsible for the offence". Running the definition of "criminally responsible" under clause 2(1) into clause 56(2), such a person then becomes one who is not "liable to punishment for an offence", whether because of age, insanity, lack of mens rea or some other reason comprehended by the general principles of criminal responsibility set out in Part II of the Bill.[13]

The formulation of innocent agency in clause 56(1) should also overcome a limitation on the operation of the doctrine acknowledged in *Paterson*.[14] The manoeuvre of treating the person who uses a non-culpable actor as the constructive principal offender works adequately for most offences which can be committed through the agency or instrumentality of another. This would include offences that prohibit "causing" a particular consequence or doing something "directly or indirectly", as well as offences that are not so defined as to require personal conduct or some special qualification or status.[15] But, as the Court of Appeal cautiously observed in *Paterson*, "It may be that there are some crimes which by virtue of their statutory definition cannot be committed by the use of an innocent agent".[16] While the court did not elaborate, presumably it had in mind offences that can be committed only by persons of a statutorily defined class or description such as licensees or office-holders. Here it would seem incongruous to treat

---

9 There is no true relationship of agency between the parties. In fact the concept of agency is used in the reverse sense to that applied in civil law. In this context an agent includes an inanimate instrumentality as well as a human actor: see *White* v *Ridley* (1978) 21 ALR 661 (HC Aus), especially at 671 per Stephen J.

10 Draft Criminal Code Act (UK), cl 30(2)(b) in *Codification*, above n4. See also 187 and 84, para 10.7 of the report.

11 Above n 10, cl 30(2)(b)(iv).

12 See Law Commission, *Parties, Complicity and Liability for the Acts of Another* (Law Com Working Paper No 43, 1972) 13, proposition 3(1) and illustration (c); Glanville Williams, *Textbook of Criminal Law* (2 ed, 1983) 369.

13 The definition of innocent agency will also extend to persons who can avail themselves of a Common Law justification or excuse under cl 53. See also the definitions of "justified" and "protected from criminal responsibility" in cl 2.

14 Above n 7.

15 See Orchard, above n 7, 5.

16 Above n 7, 396-397.

the person who uses an innocent agent as the principal offender when that person does not fit the particular statutory description.[17] Furthermore, some other "non-proxyable"[18] offences like rape are not readily amenable to the application of the doctrine because the nature of the prohibited conduct necessarily requires personal bodily action.[19] Unless one is prepared to accept, for example, the notion of constructive rape through the innocent genitalia of another,[20] these offences would also appear to preclude a coherent application of innocent agency.

In face of these difficulties, the courts have twisted and turned to affirm the liability of persons who have used innocent agents. Notwithstanding the fact that there has been no culpable principal they have been convicted as secondary offenders,[21] or held to account as constructive principals[22] - often with no regard to the relevant statutory definition or the essentially non-proxyable nature of the prohibited conduct. To accommodate these cases the 1985 English Draft Code includes a special rule that a person, who would be guilty as a principal offender acting by an innocent agent but for the fact that the offence falls within one or other of the problematic categories identified above, is nonetheless guilty as a secondary offender. However this exception has been forced on the authors of the Draft Code because they have chosen to classify persons who use innocent agents as principal offenders.[23] Having preserved the fiction of the constructive principal, they have then been drawn to frame a special rule for troublesome cases where even the fiction runs out.

Clause 56(1) of the Bill should avoid this problem. By separating personal commission from the use of an innocent agent and placing the person who uses such an agent within the genus of "parties", it reduces the significance of classification. Further, the basis of liability under clause 56(1) is "causing" an innocent actor to commit the proscribed acts. This formulation, which seems to owe a good deal to the

---

17 See Glanville Williams, above n 12, 369-370; Smith and Hogan, *Criminal Law* (5th ed 1983) 120; Orchard, above n 7, 5-6. Other examples might be perjury and bigamy (subject to marriage by proxy under s 34 of the Marriage Act 1955).

18 The term is borrowed from Kadish, "Complicity, Cause and Blame : A Study in the Interpretation of Doctrine" (1985) 73 Cal L Rev 324, 373.

19 Above n 18, 373-385; Glanville Williams, above n 12, 370-372; Smith and Hogan, above n 17, 120; Orchard, above n 7, 5-6.

20 See Glanville Williams, above n 12, 371.

21 *R* v *Bourne* (1952) 36 Cr App R 125.

22 *R* v *Cogan and Leak* [1976] QB 217. American cases on the application of innocent agency to sexual offences are discussed by Kadish, above n 18, 374-376. *Cogan and Leak* has recently been considered by Williamson J in *R*v *Cooper* Unreported, 29 June 1988, High Court, Christchurch, Registry, T 16/88. In answer to a preliminary objection that it was inappropriate for the prosecution to rely on the doctrine of innocent agency on charges of unlawful sexual connection, Williamson J ruled that "a person may actually commit an offence by using the bodies of others, who could not be convicted of that offence, in order to perform the necessary physical acts involved in that particular crime".

23 Draft Criminal Code Act (UK), cl 30(1), (2)(b), and (3), *Codification*, above n 4, 187 and 85, para 10.9.

American Law Institute's Model Penal Code,[24] has two important advantages.[25] First, it accurately describes what the person who uses an innocent agent does in fact. And no less importantly, it out-flanks the doctrinal limitations referred to above because liability no longer depends on the imputation of one person's acts to another and the legal construction that the person using an innocent agent committed the offence.

D Helping or Bringing About the Commission of an Offence

Clause 57(1) replaces the existing categories of aiding, abetting, and inciting, counselling or procuring under section 66(1)(b)-(d) of the present Act with two new modes of participation. The proposed provision runs as follows:

> Every person is a party to an offence who, knowing the circumstances constituting the offence or intending the consequences of the offence, -
>
> (a) Helps any person to commit the offence; or
> (b) Does or says anything to bring about the commission or continuance of the offence.

At the risk of assuming too much, I take it that clause 57(1) is designed to effect two general improvements. One is to restate the rules in more familiar language while the other is to specify the mental requirements for the newly-described modes of participation. However, if my assumption of purpose is correct, clause 57(1) does not satisfactorily achieve either goal.

So far as language is concerned, the substitution of "helps" for the present term "aids" is to be welcomed. But, as even a cursory examination of the Bill reveals, the new term is not used consistently.[26] Furthermore, the new descriptions may create fresh interpretative difficulties in place of those associated with the existing categories.[27] Thus the express reference to "purpose" in the aiding provision of section 66(1)(b) is not reproduced in clause 57(1)(a), although its companion provision carries a purposive implication in the words "to bring about".[28] Clause 57(1)(b) then makes it an offence where a person "does or says anything" to bring about the commission or continuance of an offence. The quoted language is irredeemably vague. Presumably it is intended to catch all forms of participation, other than helping, that are presently within the catchment of paragraphs (c) and (d) of section 66(1). If so, "encourage" and "procure"

---

24 Section 2.06(2)(a) provides that a person is legally accountable for the conduct of another person when "acting with the kind of culpability that is sufficient for the commission of the offence, he causes an innocent or irresponsible person o engage in such conduct".

25 See Kadish, above n 18, 382-384.

26 While "helps" appears in kindred provisions such as cls 58 and 133(b), as well as cl 68(c) and (d), "assists" is used elsewhere eg cls 101(1), 102, 105(1)(b) and 107(1)(a).

27 See J C Smith, "Aid, Abet, Counsel or Procure" in Glazebrook (ed), *Reshaping the Criminal Law : Essays in Honour of Glanville Williams* (1978) 120; *Larkins* v *Police* [1987] 2 NZLR 282 and my comment on that decision in "The Unknown Lookout and Liability for 'Aiding' an Offence" [1989] NZLJ 30.

28 See below nn36-38.

would seem to cover the ground.[29] Economy of language would still be served by the excision of the overlapping terms "abet", "counsel" and "incite" now found in paragraphs (c) and (d) of section 66(1).

The prescription of mens rea set out in clause 57(1) may also require reconsideration. Although the present Act contains no equivalent provision, the mens rea of complicity is usually described as an intention to help or encourage the principal offence.[30] More specifically, this general requirement comprises several distinct mental elements that go to the very heart of the doctrine of complicity. In normative terms, they function as a crucial safeguard by ensuring the equivalence of blameworthiness that justifies treating a helper or encourager as the principal offender's shadow.[31] To establish this culpability the following matters must be established.[32]

1 A helper or encourager must know[33] that the principal offender intends or is likely to do the acts that constitute the offence in fact committed.[34]

2 Such a person must also know of the circumstances specified by the definition of the relevant offence, including any required intent.[35]

3 A helper or encourager must know that his or her acts will help or encourage the commission of the offence.

4 A helper or encourager must act with the purpose of helping or encouraging the commission of the offence.[36] Purpose is not the same as motive or desire. It

---

29 These are the terms used with "assists" in the Draft Criminal Code Act (UK), cl 31(1)(a), *Codification*, above n 4, 187 and 86, para 10.11. Within a few lines of "does or says anything" in cl 57(1)(b) of the New Zealand Bill, "encourage" is used in cl 57(2)(a). "Says anything" recurs in provisions associated with cl 57(1)(b) eg cls 57(4), 126 and 133(a). But less conspicuous provisions adopt various terms to express encouragement. The litany includes "encourage", "encourage or persuade", "persuade" and "incite": see eg cls 68(d), 71 and 82(c)(iii).

30 *R* v *Lewis* [1975] 1 NZLR 222 (CA); *R* v *Pene* Unreported, 1 July 1980, Court of Appeal, CA 63/80; *R*v *Genet, Rewi and Jackson* Unreported, 10 April 1984, Court of Appeal, CA 146/83; *R*v *Curtis* [1988] 1 NZLR 734 (CA).

31 See Dennis, "The Mental Element for Accessories" in P Smith (ed), *Criminal Law : Essays in Honour of J C Smith* (1987) 40 at 41-42.

32 Above n 31, 44-58. See also Gillies, *The Law of Criminal Complicity* (1980) 56-71; Orchard, "Parties to an Offence : The Function of Section 66(2) of the Crimes Act" [1988] NZLJ 151, 153-154.

33 As applied to propositions 1-3, knowledge includes not only actual or direct knowledge but also the states of mind described as "wilful blindness" and "connivance": see Dennis, above n 31, 49-50.

34 *Johnson* v *Youden* [1950] 1 KB 544; *Maxwell* v *DPP for Northern Ireland* (1978) 68 Cr App R 128 (HL(NI)).

35 *R* v *Samuels* [1985] 1 NZLR 350 (CA); *R* v *Hamilton* [1985] 2 NZLR 245 (CA).

36 For the English position see Dennis, above n 31, 51-55 and the recent exchange between Sullivan, "Intent, Purpose and Complicity" and Dennis, "Intention and Complicity : A Reply" in [1988] Crim LR 641 and 649.

conveys the sense of acting "in order to bring about" an offence. This element is an express requirement of aiding under section 66(1)(b) of the present Act[37] and has been inferentially imported into the abetting provision of section 66(1)(c).[38]

Whether or not clause 57(1) carries all these requirements into the Bill is debateable. Under the proposed provision, liability is predicated on "knowing the circumstances constituting the offence or intending the consequences of the offence". Applying the definitions of knowledge and intention in clause 21, knowledge means being aware of the circumstances or knowing or believing that their existence is highly probable while intention is either meaning to bring about a consequence or knowing or believing that it is highly probable. However, leaving to one side the propriety of these definitions,[39] I see difficulties with the formulation in clause 57(1). First, the distinction between knowledge of circumstances and intention as to consequences is expressed disjunctively. That form may be intended to reflect the difference between conduct- and result-offences. Whatever the explanation, the provision may not make it clear that, in the case of a result-offence, a helper or encourager must know of the circumstances constituting the offence *and* have the same mens rea in relation to the prohibited result that is required for the principal offender. If I am correct, the solution might be either the deletion of "or" and the substitution of the phrase "and where a consequence is an element of the offence", or the adoption of the model in the English Draft Code with all the consequential amendments that would be entailed.[40] Secondly, paragraphs (a) and (b) could more accurately reflect the present law by a prefatory reference to "intentionally" or "knowingly". However, since that would double up the earlier references to "knowing" and "intending", the best solution may be to begin afresh either by reducing the bulk of clause 57(1) to a more succinct statement of secondary participation[41] or by specifying seriatim the various mental elements referred to above.

E Presence at the Scene of an Offence and Failing to Exercise Authority

Clause 57(2) is new and remains essentially unchanged from earlier departmental drafts of the Bill. According to the explanatory note, the provision is designed to deal

---

37 In *Larkins* v *Police* above n 27, 288, Eichelbaum J concluded that the expression "for the purpose of aiding" in s66(1)(b) of the present Act is descriptive of the state of mind of an aider "*superimposing* a requirement in that respect upon the need for proof that the accused intentionally did an act which had the effect of aiding" (my emphasis).

38 *R* v *Pene*, above n 30.

39 By way of a rather extraordinary parenthetical aside, the author of the explanatory note to the Bill dismissively states that there is "nothing magic" about the words "highly probable": "The drafters of the Criminal Code (UK) preferred 'almost certain', and section 2.02(2)(b)(iii) of the Model Penal Code (US) plumps for 'practically certain'".

40 Draft Criminal Code Act (UK), cl 31(4), *Codification*, above n 4, 188 and 87-88, para 10.14(iv).

41 One proposal to this effect recommends the following provision: "Every one is a party to an offence who knowingly or intentionally assists [or encourages] the commission of [an] offence": Submissions on the Crimes Bill 1989 by Neil Cameron, Simon France and Warren Young, Victoria University of Wellington.

with the so-called "mere presence" defence: "I was there but I didn't do anything to encourage the other fellow". The full text of clause 57(2) is as follows:

> A person may be a party to an offence by virtue of subsection (1) of this section merely by being present at the scene of the offence if -
>
> (a) That person knows that his or her presence will encourage any other person to commit or to continue the offence; or
> (b) That person fails to exercise any authority that he or she has in the circumstances to prevent the commission or continuance of the offence.

Paragraph (a), which deals with passive encouragement, is intended "to make ... clear ... the extent of the exception to the 'mere presence' rule at issue in *Coney* (1882) 8 QBD 534".[42] Some may question the need to make specific provision for this particular form of participation when the requirements of liability appear clearly established.[43] In view of this, it may be asked whether sensible juries properly instructed have much trouble with the so-called "mere presence" defence. On the other hand, if paragraph (a) represents an attempt to make the statutory rules more comprehensive and the law more accessible, then it may require redrafting. At first blush, liability appears to attach to bare presence accompanied by knowledge that it will encourage another person to commit an offence. This conclusion is invited, perhaps, by the phrase "merely by being present". But since the provision imposes liability as a party "by virtue of subsection (1)", presumably such presence must in fact encourage the other person. Relatedly, paragraph (a) requires only that a person "knows" his or her presence "will encourage" the commission of an offence. Does that exhaust the prescription of mens rea for this form of encouraging or must it also be read subject to the elements of knowledge and intention in subclause 1?

In its present form, clause 57(2) with its cross-reference to sub-clause (1) simply adds to the mass of an already complex statement. If it is to be retained, clarity might be advanced by separating it from subclause (1). On that basis paragraph (a) could remain in tandem with paragraph (b), with each provision containing a fuller specification of the elements of liability. So far as the mere presence rule is concerned, that would require express reference to the twin elements of an intention to encourage and encouragement in fact.

Paragraph (b) of clause 57(2) appears to be loosely based on a similar provision in the 1985 English Draft Code.[44] Both are directed at situations where A may incur secondary liability by failing to exercise authority over B, the principal offender. Typical cases occur where a parent or other person having charge or custody of a child fails to intervene to prevent the commission of an offence against that child, or where

---

42 Explanatory commentary accompanying a 1986 departmental draft of the Bill.

43 See the cases cited in n30. For English authority see *R* v *Allan* [1965] 1 QB 130; *R* v *Clarkson* [1971] 1 WLR 1402; *R* v *Jones and Mirrless* (1977) 65 Cr App R 250; *Parrish* v *Garfitt* (Note) [1984] 1 WLR 911; *Allen* v *Ireland* [1984] 1 WLR 903; *R* v *Bland* [1988] Crim LR 41.

44 Draft Criminal Code Act (UK), cl 31(3), *Codification*, above n 4, 188 and 87, para 10.13.

the owner of a motor vehicle remains passive while the driver of the vehicle commits an offence.[45] However the New Zealand provision differs from its English counterpart in two important ways. In the first place, paragraph (b) does not premise liability on failing "to take reasonable steps"[46] to exercise any authority. Secondly, the Draft Code incorporates a significant qualification on liability by linking A's "authority" to "control" over B's acts.[47] To illustrate the application of the provision, the authors of the Draft Code give the case of a licensee who fails to take steps to collect the drinks of patrons who are consuming alcohol on licensed premises outside permitted hours, thereby attracting possible secondary liability as a party to the offences committed by the patrons.[48] Elsewhere it is also made clear that liability under the Draft Code arises from failure to exercise a "special authority".[49]

If paragraph (b) of clause 57(2) is to be declaratory of existing law, both the limitations found in the English Draft Code should be adopted. Indeed, to remove any doubt about the nature of the relevant "authority" under paragraph (b), it would be better to base liability on the failure "to take reasonable steps" to exercise any "legal authority" or "legal duty".[50]

F Carrying Out a Common Intention

Clause 58 re-enacts section 66(2) of the present Act without major amendment. The main change is the substitution of the term "offence" for the present expression "unlawful purpose". Together with some other minor textual alterations the common intention rule now reads:

> Where 2 or more persons form a common intention to help each other to commit an offence, each of them is a party to every offence committed by any of them in carrying out that common intention if he or she knows that the commission of that offence is a probable consequence of the carrying out of that common intention.

---

45 *R* v *Russell* [1933] VLR 59; *R* v *Clarke and Wilton* [1959] VR 546; *R* v *Drury* (1974) 60 Cr App R 195; *R* v *Gibson* (1984) 80 Cr App R 24; *R* v *Forman* [1988] Crim LR 677; *Ashton* v *Police* [1964] NZLR 429; *Theeman* v *Police* [1966] NZLR 605; *Du Cros* v *Lambourne* [1907] 1 KB 40; *Rubie* v *Faulkner* [1940] 1 KB 571; *R* v *Harris* [1964] Crim LR 54.

46 Draft Criminal Code Act (UK), clause 31(3), *Codification*, above n 4, 188. See also s2.06(3)(a)(iii) of the Model Penal Code (US): "fails to make proper effort".

47 Draft Criminal Code Act (UK), cl 31(3), above n 4.

48 Draft Criminal Code Act (UK), sch 1, illustration 31(iv), above n 4, 219. See *Tuck* v *Robson* [1970] 1 WLR 741.

49 *Codification*, above n 4, 87, para 10.13.

50 For references to "duty", "duty imposed by law" and "legal duty" in the Bill see cls 20(3)-(5), 112(a), 118-121, 122(1)(b), 130 and 132. Section 2.06(3)(a)(iii) of the Model Penal Code (US) bases liability on failure "to make proper effort" to discharge a "legal duty".

In recent years quite a thicket of case law has grown around section 66(2). We now know that "probable" is descriptive of a "real risk"[51] or an event that "could well happen",[52] that a party under section 66(2) may be convicted of a lesser form of culpable homicide than the principal offender,[53] and that the common intention rule should not be used as a "makeweight or fall back position"[54] in cases which really fall only within section 66(1). But uncertainty still persists as to the precise nature of liability under section 66(2). Adams concludes that the two subsections of section 66 are best regarded as "separate and independent enactments".[55] Thus subsection (1) deals with the offence that was actually intended whereas subsection (2), though capable of being applied to such an offence, is primarily directed at "collateral" offences that were not actually intended.[56] Much the same view has recently been expressed by the Court of Appeal in *R* v *Curtis* where McMullin J explained that subsection (1) is concerned with "intentional acts of aiding or abetting or encouraging given by one party to another in the commission of the very crime which the principal offender commits".[57] On the other hand, subsection (2) contemplates a "different situation" where the principal offender does an act which "while not the result aimed at, was a probable consequence of the prosecution of the unlawful common purpose".[58]

However, against that interpretation it has been claimed that the common intention rule in section 66(2) is no more than a "particular instance" or "partial definition" of section 66(1) and does not describe a form of liability distinct from aiding, abetting and the other modes of participation specified in paragraphs (b) to (d).[59] On this view, section 66(1) is the primary provision because it alone states that the persons described as parties are "guilty" of the offence committed, section 66(2) simply declaring that every one caught by it is a "party".[60] As section 66(2) now stands, there is certainly room for this interpretation. But it is less convincing under the new arrangement in the Bill. Clause 54 states that every person who is a party to an offence "in accordance with any of the succeeding provisions of this Part [is] guilty of that offence and liable to the penalty prescribed by law for that offence". In the light of clause 54 and the promotion of the common intention rule to the status of an independent provision in clause 58, both clauses 57 and 58 must now be regarded as "separate and independent enactments".[61]

---

51 *R* v *Tomkins* [1985] 2 NZLR 253 (CA); *R* v *O'Dell* Unreported, 28 October 1986, Court of Appeal, CA 46/86.

52 *R* v *Gush* [1980] 2 NZLR 92 (CA); *R* v *Hamilton* [1985] 2 NZLR 245 (CA); *R* v *Tompkins* above n 51. See also *R* v *Piri* [1987] 1 NZLR 66 (CA).

53 *R* v *Hartley* [1978] 2 NZLR 199 (CA); *R* v *Hamilton*, above n 52; *R* v *Tompkins*, above n 51.

54 *R* v *O'Dell*, above n 51.

55 Above n 6, 180-181, para 624.

56 Above n 55, 180, para 624.

57 Above n 30.

58 Above n 30. See also *R* v *Hamilton*, above n 52.

59 Orchard, above n 32.

60 Above n 59, 153.

61 Adams, above n 6, 180-181, para 624.

Even so, there is good reason for thinking that clause 58 entrenches an historical accident.[62] When the common intention rule first appeared in section 73(2) of the Criminal Code Act 1893 it cast a wider net of liability for every offence known "or ought to have been known" to be a probable consequence of the transaction of the unlawful common purpose. This objective element was retained in section 90(2) of the Crimes Act 1908, finally being deleted by section 66(2) of the present Act.[63] However, once the unpalatable objective clause was removed, the rule expressed in section 66(2) arguably became otiose with its orbit of liability contracting to the outer limits of secondary responsibility under section 66(1).[64]

That is not to say that the rule preserved in clause 58 serves no useful purpose. In particular, it may provide a "convenient single test"[65] for determining liability where several offences are committed by parties to a general common intention, although the particular contribution of each of the participants is not clear. In such cases the rule may apply notwithstanding the fact that the consequential offences were the very same as those contemplated by the common purpose.[66] But the common intention provision ought not to be invoked where its effect is to complicate the issues in straightforward cases of helping or encouraging under clause 57(1).[67]

G *Unexpected Mode of Commission and Liability for Encouraging Consequential Offences*

Subsections (1) and (2) of section 70 of the present Act provide for two special rules under the shoulder heading "Offence committed other than offence intended". Subsection (1) deals with liability for an offence committed "in a way different from that which was incited, counselled or suggested". Although the rule is limited to the forms of participation now found in section 66(1)(d), in principle there is no reason why it should not apply to aiding and abetting.[68] Subclause 3 of clause 57 of the Bill should remove any doubt in this respect. By providing that "A person may be a party to an offence by virtue of subsection (1) of this section even though the offence is committed in a way that person does not expect", the new rule will apply to helpers as well as encouragers under clause 57(1)(a) and (b).

Like section 70(1) of the present Act, clause 57(3) confines the rule to a variation in the mode of commission of the relevant offence. Such an unexpected change in the way the offence is executed may occur by accident or mistake and is probably confined to

---

62 See Gillies, above n 31, 124-125.

63 It still survives in s21(2) of the Canadian Criminal Code. See Rose, *Parties to an Offence* (1982) 73-78; Stuart, *Canadian Criminal Law* (1982) 500-505. Recent proposals for a new criminal code include a provision restricting liability to offences "known" to be probable consequences: cl 4(6)(c), Draft Criminal Code, Law Reform Commission of Canada, *Recodifying Criminal Law* (Report 30, 1986) 44-45.

64 See Gillies, above n 32, 122-123, 134-125; Orchard, above n 59, 155.

65 Orchard, above n 32, 155.

66 *R* v *Currie* [1969] NZLR 193 (CA); *R* v *Nathan* [1981] 2 NZLR 473.

67 *R* v *Curtis*, above n 30.

68 Adams, above n 6, 636.

cases of relatively immaterial divergence from the contemplated mode of commission.[69] But where a different offence is committed (and perhaps where there is a deliberate and material variation in the commission of the contemplated offence[70]), liability will normally arise, if at all, under either clause 58 or 57(4). The latter provision is intended to replace section 70(2) of the present Act and imposes liability for consequential offences "known by [a person who does or says anything to bring about the commission by another person of an offence] to be a likely consequence of what is said or done".

Two points should be mentioned about the drafting of clause 57(4). First, the provision is limited by its terms to persons who do or say anything to bring about the commission of an offence. It would therefore appear to have the same scope as the present rule which is confined to inciting, counselling or procuring. Yet its companion provision in subclause (3) reaches helpers as well as persons who do or say anything to bring about an offence. Again the solution may be to remove the cross-references to subclause (1), making both provisions expressly applicable to both forms of participation. Secondly, clause 57(4) refers to "likely" consequences whereas the related rule in clause 58 uses the term "probable". Under the present Act the difference is less obvious because the corresponding provisions stand some distance apart. Now that they are immediate neighbours they should share one common term.

H Procedural Provisions

Clause 60 introduces a new provision directed at certain procedural matters that have practical implications for the substantive rules on parties. Under paragraph (a) a person may be convicted as a party to an offence even though no other person has been charged with or convicted of the offence. This is merely declaratory of existing law, although a fuller statement would extend the rule to cases where the identity of any other party is unknown.[71] Paragraph (b) re-enacts the substance of sections 21(2) and 23 (4) of the present Act by providing that a conviction as a party may be entered despite the fact that some other person is not liable to be convicted of the offence because of age or insanity. Finally, paragraph (c) allows for conviction where the evidence shows that the act or omission which made a person a party to an offence differs from the act or omission alleged in the information or indictment.

Whereas paragraphs (a) and (c) of clause 60 apply to "offences" and therefore operate on summary conviction as well as conviction on indictment, clause 273 retains a related

---

69 See Gillies, above n 32, 155.

70 Glanville Williams, above n 12, 356. See further *R* v *Leahy* [1985] Crim LR 99 and the proposed rules in the Draft Criminal Code Act (UK), cl 31(6), *Codification*, above n 4, 188 and 88-89, para 10.16, and in the Canadian Draft Code, cl 4(6)(b), Law Reform Commission of Canada, above n 63, 44.

71 Draft Criminal Code Act (UK), cl 32(3)(b), *Codification*, above n 4, 189 and 91, para 10.24. Clause 62(1)(b) of the Bill provides such a rule for conspiracy.

procedural rule on the indictment of parties to "crimes".[72] In addition, though there is no equivalent provision to clause 273 in the Summary Proceedings Act 1957, section 76 of that enactment provides yet another procedural rule applicable only to secondary parties to "offences".[73] Even allowing for some differences between these rules, the virtues of comprehensiveness and good organization might be better promoted by one general procedural provision applicable to all parties to all offences.

III CONSPIRACY

A Arrangement

Although successive New Zealand criminal codes have established general liability for conspiracy, neither the elements nor scope of the offence have been defined by statute. At present the general penalty provision appears in section 310 - well adrift of the rules on parties and attempt - while special punishments for particular conspiracies are spread throughout the Act.[74]

Clauses 61 to 65 of the Bill introduce two main changes. Most importantly, the elements, scope and duration of conspiracy are defined for the first time. And secondly, the rules have been relocated alongside the kindred inchoate offences of attempt and incitement.

B Definition

Clause 61(1) proposes a definition of conspiracy that is modelled closely on the United Kingdom Draft Code provision[75] - itself a modification of the definition in the Criminal Law Act 1977 (UK). The New Zealand version is stated in the following terms:

> A person conspires to commit an offence where -
>
> (a) That person agrees with any other person that an act will be done or omitted to be done, and that act or omission, if it occurs, will constitute that offence; and
> (b) That person and at least one other party to the agreement intend that the act will be done or omitted to be done.

---

72 Clause 273, which re-enacts s343 of the present Act, provides that "Every person who is a party to any crime may be convicted either upon a count charging him or her with having committed that crime, where the nature of the crime charged will admit of such course, or upon a count alleging how that person became a party to it".

73 Section 76 provides: "Every party to an offence (not being the person who actually committed it) may be proceeded against and convicted for that offence, either together with the person who actually committed or before or after the conviction of that person".

74 See ss73(f), 74(2), 82, 96, 115, 116, 136, 175, 257 and 309. Most are retained in the Bill.

75 Draft Criminal Code Act (UK), cl 52(1), *Codification*, above n 4, 199 and 136-137, para 14.18.

The new provision thus preserves the commission of an "offence" as the exclusive object of conspiracy.[76] Beyond that, the central elements of the definition are agreement and intention. As for the first element, "agrees" and "agreement" are used in their ordinary sense[77] and require the formation of a consensus between at least two minds. Since the agreement may have as its object that something will be "omitted to be done", it will be possible to conspire to commit an offence by omission - for example, where A and B agree not to feed their young child, or not to provide it with medical attention when ill, thereby intending to cause the child's death.[78]

In addition, for a person to be liable as a conspirator he or she "and at least one other party to the agreement" must intend that the relevant act will be done or omitted to be done. One effect of this requirement will be to exclude the liability of a "pretence" conspirator, such as a police agent, who joins an agreement in order to frustrate its criminal objective.[79] Moreover, the "plus one" rule in clause 61(1)(b) will mean that where such an agent feigns adherence to an agreement with only one other person, who does intend to carry out the agreement, there will be no conspiracy.[80]

However the Bill does not reproduce the provision in the English Draft Code that, for the purposes of the definition of conspiracy, "an intention that an offence shall be committed is an intention in respect of all the elements of the offence".[81] That provision was specifically included in the Draft Code to settle any doubt about whether the Criminal Law Act (UK) required intention as to the consequences as well as any circumstances specified in the definitions of substantive offences.[82] One explanation for its omission from the Bill is that such a clause might be seen as inconsistent with clause 65(5) which provides that on a charge of attempt recklessness as to the circumstances of an act or omission will be sufficient where it is also sufficient to constitute an element of the completed offence.[83] In fact, the authors of the English

---

76 Under the Criminal Code Act 1893 and the Crimes Act 1908 the object of conspiracy was limited to "crimes". Section 310 of the present Act substituted "offence". However under some specific conspiracy provisions eg s257 (conspiracy to defraud) and s116 (conspiring to defeat justice), the agreement need not be aimed at the commission of any offence: see Adams, above n 6, 541, para 2084 and 247, para 880: *R*v *Barker* [1986] 1 NZLR 252 (CA).

77 See *Codification*, above n 6, 137, para 14.18.

78 Draft Criminal Code Act (UK), sch 1, illustration 53(iii), *Codification*, above n 4, 231 and 137, para 14.18.

79 *R* v *Thomson* (1965) 50 Cr App R 1; *R* v *Anderson* [1986] AC 27 (HL); Gillies, *The Law of Criminal Conspiracy* (1981) 17; Smith and Hogan, above n 17, 252.

80 See Gillies, above n 79, 17.

81 Draft Criminal Code Act (UK), cl 52(2), *Codification*, above n 4, 199 and 137, para 14.19.

82 *Codification*, above n 4, 137, para 14.19. See further on the interpretative difficulties under the Criminal Law Act (UK): Glanville Williams, above n 12, 429-432; Smith and Hogan, above n 17, 230-234.

83 See Law Commission, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980), 21-23, (Law Commission, *Attempt and Impossibility*).

Draft Code decided not to include an equivalent recklessness provision for attempt largely because it would be inconsistent with the mens rea required for the related preliminary offence of conspiracy.[84]

Under the Bill the result is that the scope of intention in conspiracy is ambiguous. On the one side, the requirement that conspirators must intend to do acts that, if done, will constitute an offence should settle any argument about intention in relation to consequences, especially when read alongside existing law. But on the other side, it is arguably inconsistent to provide that recklessness as to circumstances is sufficient for attempt if nothing less than intention as to circumstances is required for conspiracy.

C Scope

Earlier departmental drafts of the Bill contained a curious proposal that a person would be liable for conspiring to commit any offence "which he knows to be a probable consequence of the agreement to commit any other offence unless he has abandoned the intention that all offences to which the conspiracy relates should be committed". As cryptically explained in the accompanying commentary, the proposed provision was "a possible narrowing of the common law which has in some formulations imposed strict liability as to other offences committed unless there has been a clear withdrawal from the conspiracy".[85]

Judged simply as an exercise in drafting, this provision was convoluted in the extreme. It began by supposing an agreement to commit an offence, then fixed conspiratorial liability for consequential offences that a conspirator knew could probably happen (as if such knowledge amounted to agreement), and concluded with a proviso that implied that all the "offences" had been intended after all. Clause 62(2) of the Bill reproduces this proposal in revised form, buried in the middle of a provision that deals with essentially procedural matters. It is designed, according to the explanatory note, "to place conspirators on the same footing as parties". This is achieved by engrafting the consequential offence provision of the common intention rule in clause 58 to conspiracy while deleting the original withdrawal proviso:

> A person who conspires to commit an offence may be convicted of conspiring to commit any other offence that is committed in carrying out the agreement if he or she knows that the commission of that other offence is a probable consequence of the carrying out of the agreement.

---

84 In so doing they followed the proposal of the Law Commission which had rejected its Working Party formulation that recklessness as to circumstances should be sufficient on attempt: *Codification*, above n 4, 140, para 14.30; Law Commission, *Attempt and Impossibility* above n 83, 8-10, paras 2.11-2.13.

85 Explanatory commentary accompanying a 1986 departmental draft of the Bill.

I imagine that the intended purpose of this rule is as follows.[86] Suppose A and B agree to commit offence X. In the course of carrying out that agreement B commits offence Y. A is liable for conspiring to commit Y if he knew that the commission of Y could well happen as a consequence of carrying out the agreement to commit X. But the terms of clause 62(2) do not confine the rule to this type of case. Unlike clause 58 and the related rule for encouragers in clause 57(4), there is no express requirement that the "other offence" (Y) must be committed by a party to the agreement to commit X. Yet if, as is proclaimed, clause 62(2) has been framed "to place conspirators on the same footing as parties", then it should also incorporate the equivalent limitation under the common intention rule. Were it otherwise, the rule in clause 62(2) could extend conspiratorial liability well beyond even the penumbra of the presently defined limits of criminal responsibility for this species of preliminary offending.

But there is another more fundamental objection to clause 62(2). As it now stands, the provision holds that A has conspired to commit Y so long as he knew Y could well be committed in carrying out the agreement with B to commit X. However we know that to conspire is to agree and intend that something specific will be done. Therefore the effect of clause 62(2) is to convert knowledge of probability into agreement and intention. That, you might say, is just the drafting scrivener's way of doing things. Be that as it may, it still amounts to an alarming extension of conspiracy by legislative fiat. Indeed, in a passage worth quoting in full, the Court of Appeal has recently rejected the idea that the common intention rule presently expressed in section 66(2) can be coupled to conspiracy:[87]

> Viewed simply in conceptual terms we incline to the view that s66(2) has no application to a conspiracy charge for the reason that the concept of probable consequence of a common purpose used in that provision is inconsistent with the concept of conspiracy. It is of the essence of a conspiracy that there must be a common design, a meeting of the minds directed to the crime which is to be committed. That points to a state of knowledge on the part of the accused at the time the agreement is made between the conspirators. Reference to an offence which is a probable consequence of the crime which the conspirators have actually agreed to commit is at odds with an agreed common design to commit an agreed particular crime. In the end, and whatever academic arguments may be advanced to the contrary, we think that in the interests of certainty and as a matter of policy, the Court ought to reject the application of s66(2) to a charge of conspiracy under s310. To accept its application would run counter to the *whole settled principle* that the minds of the conspirators must go to the single conspiracy charged. (My emphasis)

---

86 Clause 62(2) is closely related to cl 4(6)(c) of the Canadian Draft Criminal Code which also incorporates the consequential offence element of the common intention rule in s21(2) of the Canadian Criminal Code. The Canadian draft provides that "A person who agrees with another person to commit a crime and who also otherwise furthers it, is liable not only for the crime he agrees to commit and intends to further, but also for any crime which he knows is a probable consequence of such agreement or furthering". "Furthering" includes helping, encouraging and allied forms of participation. Clause 4(6)(c) is expressed as a "qualification" to the "general rule" in cl 4(6)(a) that "no one is liable for furthering ... any crime which is different from the crime he meant to further": Law Reform Commission of Canada, above n 63, 44-45.

87 *R* v *Gemmell* [1985] 2 NZLR 740, 748.

Of course clause 62(2) could be rendered less objectionable by deleting the words "of conspiring to commit" that now follow "may be convicted". However it might then be asked whether there remains any compelling justification for imposing liability on this basis. If A and B agree to commit offence X and B commits offence Y in carrying out the agreement, A is liable for conspiring to commit X. If the agreement is in fact a plural or multiple object conspiracy[88] that includes the commission of Y, A will also be implicated in a conspiracy to commit Y. Even if the conspiracy is confined to X, A will be liable under clause 57(1)(a) and/or (b) if he helps or encourages B to commit Y. So also, where A either encourages B or forms a common intention to help B commit Y, the consequential offence rules in clauses 57(4) and 58 may be engaged. Finally, if Y is not in fact committed by B, A may fall within the attempt or incitement provisions of clauses 65 and 67 of the Bill.

D Duration

Under clause 62(5) a conspiracy continues "until the agreement is carried out, or until all of the parties, or all of the parties except one, have abandoned the intention that it be carried out". This provision simply expresses the continuing offence rule,[89] although the Bill does not take the further step by codifying the corollary that a person may become a party to a subsisting offence of conspiracy by joining the agreement constituting the offence.[90]

E Impossibility

The relevance of impossibility to conspiracy is unclear under the present Act. Since the elements of conspiracy are not statutorily defined, it is scarcely surprising that section 310 does not include an impossibility clause equivalent to that found in section 72(1) in the definition of attempt. However, because section 310 requires the object of a conspiracy to be an "offence", there is no liability where - contrary to the belief or understanding of the parties to the agreement - what they agree to do is not in fact an offence. In that limited sense, section 310 excludes perhaps the most obvious kind of so-called "legal" impossibility.

That case aside, the question remains whether liability for impossible conspiracies can be excluded on a wider basis. Following the decision of the House of Lords in *DPP* v *Nock*[91] that the principle in *Haughton* v *Smith*[92] should apply beyond attempt to the

---

88 See Gillies, above n 79, 8-11, 20-38.

89 *DPP* v *Doot* [1973] AC 807 (HL); *R* v *Sanders* [1984] 1 NZLR 636 (CA); *R* v *Johnston* (1986) 2 CRNZ 289 (CA).

90 See Draft Criminal Code Act (UK), cl 52(6)(b), *Codification*, above n 4, 199 and 138, para 14.23. Such a rule is useful to cover "chain" conspiracies where A agrees with B, B enrols C and so on down the chain, as well as "wheel" or "umbrella" arrangements where B and C etc on the rim or at the end of a spoke enter into agreement with A at the centre: see Glanville Williams, above n 12, 423-424; *R* v *Humphries* [1982] 1 NZLR 353 (CA).

91 [1978] AC 979.

92 [1975] AC 476 (HL).

related inchoate offence of conspiracy, it was claimed that a wider "defence" of impossibility did apply to conspiracy under New Zealand law.[93] Such a defence would arise where two or more people agree on a course of conduct with the object of committing an offence but, unknown to them, that offence could not under any circumstances result from the conduct agreed on. Two central propositions were advanced to support the claim that this exculpatory principle applied in New Zealand: (1) that the *Nock* principle amounted to a matter of common law justification or excuse preserved by section 20(1) of the present Act; and (2) that an impossibility defence in this sense was not, in terms of section 20(1), "altered by or ... inconsistent with" any provision of the present Act or any other enactment. In respect of the second proposition, it was argued that the statutory restriction on the defence of impossibility to attempt under section 72(1) could not be read up to limit a broader exculpatory principle for conspiracy.[94]

Since that argument was advanced, however, the decision in *Nock* has been reversed by amendment to the Criminal Law Act 1977.[95] Although limited to statutory conspiracies, the result is that impossibility is now "not an issue".[96] If it can be accepted that this is a change for the better, initial departmental proposals to adopt the *Nock* impossibility principle in the Bill were rather surprising.[97] However, the current proposals in subclauses (2) and (3) of clause 61 represent a significant change of position evidently influenced by the 1985 English draft which codifies a general rule on impossibility for all the preliminary offences of incitement, conspiracy and attempt.[98] Since the Bill's impossibility rule for conspiracy parallels that for attempt, I propose to consider it more fully in the section on attempt below.

F Procedural and Other Provisions

Clause 62 makes provision for several procedural matters. Subclause (1) is based on clause 52(8) of the English Draft Code. Both paragraphs (a) and (b) restate existing law in providing that a person may be convicted of conspiring to commit an offence even though no other person has been charged with or convicted of conspiracy with him or her, or the identity of any other party to the agreement is unknown. The same rule applies under paragraph (c) where any other person alleged to have been a party to the agreement has been or is acquitted, unless a conviction would be inconsistent with that acquittal.[99]

---

93 Orchard, "Impossibility and the Inchoate Offences" [1978] NZLJ 403, 410-412.

94 Above n 93, 411.

95 Criminal Attempts Act 1981 (UK), s5.

96 Smith and Hogan, above n 17, 237.

97 Explanatory commentary accompanying a 1986 departmental draft of the Bill.

98 Draft Criminal Code Act (UK), cl 54(1), *Codification*, above n 4, 201 and 142-143, para 14.40.

99 See eg *DPP* v *Shannon* [1975] AC 717 (HL); *R* v *Longman* (1980) 72 Cr App R121; *R* v *Holmes* [1980] 1 WLR 1055; *R* v *Roberts* (1983) 78 Cr App R 41; *R* v *Harrington* [1976] 2 NZLR 763.

Subclause (3) of clause 62 states that a person may not be convicted of conspiring to commit an offence "if, as a matter of law, that person is not capable of being a party to the offence". Accordingly, no conspiratorial liability will attach to persons who have statutory exemption from prosecution for substantive offences - for example, under the several "victim" clauses in both the present Act and the Bill.[100] However the liability of any non-exempt party joined in agreement with such a person will presumably survive.[101] In this type of case the elements of conspiracy could still be established against the non-exempt party, with clause 62(1)(a) seemingly overcoming any procedural impediment to that party's conviction.

Essentially the same penalty provision now found in section 310 is retained by clause 64, while clause 61(4) re-enacts in simpler form the rule that spouses may conspire with each other. Clause 63 deals with conspiracies to commit offences outside New Zealand. The proposed provision will change the current position under section 310(3) whereby it is a defence to "prove" that the act to which the conspiracy relates was not an offence under the law of the place where it was to be carried out. Clause 63(2) states that the general rule as to a conspiracy with an extra-territorial object "does not apply in respect of an act or omission that is not an offence in the place where it occurs".

IV ATTEMPT

Three problems straddle the law of attempt. First, beyond the settled requirement that an attempter must actually intend to bring about the attempted result, there is disagreement about whether recklessness as to a relevant circumstance is a sufficient form of mens rea. The Bill provides that recklessness will suffice. Secondly, there remains the intractable difficulty of marking the point where non-criminal preparation ends and criminal attempt begins. Here the Bill cannot improve on the present abstracted and general distinction between, on the one hand, conduct that is "so remote as to be mere preparation", and on the other, acts that are "immediately or proximity connected with the [completed] offence". Nonetheless, the Bill does remove an unnecessary complication under the present Act by declaring that the question whether conduct amounts to an attempt or no more than mere preparation in any particular case is a matter of fact and not one of law. And not least of all, there is the problem of dealing with would-be committers whose best efforts to bring about complete offences are frustrated by impossibility. The Bill proposes to resolve this question by pruning from the law the entirely arbitrary distinction between legal and factual impossibility.

---

100 See eg ss132(4), 133(3), 134(6), 139(2), 140(2), 141(2), 142(3) and 183(2) of the Act; cls 145(3), 146(5) and 166(2) of the Bill.

101 See Garrow and Caldwell, *Criminal Law in New Zealand* (6th ed 1981) 267. For the position at Common Law where the liability of the non-exempt party has been unnecessarily complicated by statutory intervention see Glanville Williams, above n 12, 435-437.

A *Intention and Recklessness*

Attempt is a purposive notion. In common understanding it means trying or striving to bring about a particular result.[102] If for no other reason, this ordinary meaning justifies the criminal law in requiring nothing less than an actual intention to achieve the completed offence.[103] This remains so even though the completed offence may itself be committed recklessly, negligently or even without fault at all.

Clause 65(1) carries the requirements of "intent" and "purpose" into the Bill, though perhaps with less emphasis than section 72 of the present Act.[104] However clause 65(5) introduces an important change. Whereas clause 65(1) makes it clear that intention is required as to consequences, clause 65(5) provides, in the following terms, that recklessness will be sufficient as to a material circumstance:

> Notwithstanding anything in subsection (1) of this section, where recklessness as to the circumstances of an act or omission would be sufficient to constitute an element of the offence, it is also sufficient to constitute an element of an attempt to commit the offence.

When it comes to this provision, the note accompanying the Bill offers no explanation at all. However its pedigree can be traced to a tortuous formulation in an earlier departmental draft where it was stated that its purpose was "to counter any argument that subclause (1) refers only to 'intent' and that intention must be proved in respect of the total situation necessary to constitute the offence", and further, "to clarify that recklessness as to circumstances will suffice for attempt if that would suffice for the completed crime".[105]

The inclusion of clause 65(5) can be supported on two main grounds. First of all, if recklessness is a sufficient state of advertence to a circumstance of the actus reus of the complete offence, then it is right in principle that it should also be sufficient for the attempt to commit that offence.[106] Moreover, this conclusion must also be right as a matter of policy. On the view that the law reflects the common understanding of the notion of attempt, an attempter who intends to bring about a result, being reckless as to a material circumstance, can be said to attempt without working any violence to the ordinary meaning of the concept.[107] To take the case of attempted rape again, a strong argument on policy can be made for holding a would-be rapist to account where he

---

102 Smith and Hogan, above n 17, 156.

103 *R* v *Murphy* [1969] NZLR 959 (CA); *R* v *Wilcox* [1982] 1 NZLR 191 (CA); *R* v *Mohan* [1976] QB 1; *R* v *Pearman* (1985) 80 Cr App R 259; *R* v *Millard* [1987] Crim LR 393; *R* v *O'Toole* [1987] Crim LR 759.

104 Section 72(1) of the present Act refers to "intent" and "intended" as well as "purpose" and "object". Both subss (2) and (3) include the phrase "with intent to commit an offence". The new formulation in the Bill confines reference to "intent" and "purpose" to subclause (1).

105 Explanatory commentary accompanying a 1986 departmental draft of the Bill.

106 Glanville Williams, "The Problem of Reckless Attempts" [1983] Crim LR 365, 372; Smith and Hogan, above n 17, 257.

107 Glanville Williams, above n 106, 374-375.

intends to have sexual intercourse with a woman and is "indifferent" or "couldn't care less"[108] whether she consents or not.

But there are some arguments the other way. While the separation of the elements of the actus reus of an offence into circumstances and consequences can sometimes be analytically useful, it is both artificial and difficult to require the distinction to be made for all offences.[109] This is the more so because the distinction itself largely turns on whether an offence is categorized as a conduct- or a result-offence. It is also instructive to trace the recent history of the distinction as it relates to the law of attempt in the United Kingdom. In 1973 the Working Party on Inchoate Offences recommended that the mens rea of attempt should be divided into intention as to consequences and recklessness as to circumstances.[110] However the Law Commission later rejected that proposal as "unduly complex".[111] But when the Criminal Attempts Bill was introduced the distinction resurfaced, only to disappear from the resulting enactment.[112] In the most recent report on the question, the distinction has again been rejected on the ground that to accept recklessness as to circumstances for attempt would be inconsistent with the general requirement of intention for both conspiracy and incitement.[113]

---

108 In *R* v *Pigg* (1982) 74 Cr App R 352 the English Court of Appeal assumed that recklessness in the sense of being indifferent and not considering an obvious risk that the woman was not consenting was sufficient mens rea for attempted rape. Although the case arose at Common Law before the Criminal Attempts Act 1981 (UK) came into force, it has been claimed that *Pigg* is authority for the same proposition under the Act: see Glanville Williams, above n 106, 373. For cases applying the "couldn't care less" sense of recklessness to the completed offence of rape see *R* v *Satnam* (1983) 78 Cr App R 149; *R* v *Breckenridge* (1983) 79 Cr App R 244; *R* v *Taylor* (1984) 80 Cr App R 327; *R* v *Haughian* (1985) 80 Cr App R 334. Alternatively, "not caring" in attempt might be treated as a case of conditional intent as to a circumstance: see Colvin, *Principles of Criminal Law* (1986) 287; Smith and Hogan, above n 17, 158-159.

109 Law Commission, *Attempt and Impossibility*, above n 83, 8, para 2.12. See also Buxton, "Circumstances, Consequences and Attempted Rape" [1984] Crim LR 25, 26 ff. Clause 3 of the Bill distinguishes "results" from "circumstances" in setting out the meaning of "act" and "omission". But this provision, based on cl 19 of the Draft Code Act (UK), simply states that, wherever the statutory context permits, an "act" as an element of an offence includes any result of the act or the circumstance in which it occurs *if* the result or circumstance is an element of the offence.

110 Law Commission, *Inchoate Offences : Conspiracy, Attempt and Incitement* (Working Paper No 50, 1973) 60-61, para 89.

111 Law Commission, *Attempt and Impossibility*, above n 83, 8, para 2.12.

112 Glanville Williams, above n 12, 409 and above n 106, 371, explains that the authors of the 1981 Act, which punished impossible attempts for the first time, thought that it would be going too far to punish attempts that were both impossible and reckless.

113 Thus cl 53(2) of the Draft Criminal Code Act (UK) follows cl 52(2) on conspiracy by providing that an "intention of committing an offence" for the purpose of attempt means "an intention in respect of all the elements of the offence": *Codification*, above n 4, 200 and 140, para 14.30.

B *Conduct Amounting to an Attempt*

The abiding difficulty in determining the external component or actus reus of attempt is that we know a line must be drawn between "mere preparation" and "attempt" without knowing precisely where to draw it. We begin by assuming that all criminal conduct can be reduced to a number of discrete observable acts beginning with the formation of criminal intent and ending in the commission of a completed offence.[114] Having accepted this stage-by-stage approach, we then apply a general test of circumstantial nearness in order to decide whether particular conduct falls on one or other side of the threshold of attempt. But while this general test works well enough in most cases, around the borderline "good sense would seem to be the only available guide".[115]

It is, of course, the borderline that is critical because by moving it we can expand or contract the scope of liability. However the authors of the Bill have been unable to define this line with any greater precision than others before them. In clause 65(1) they have reproduced the so-called "proximity" rule now found in section 72 of the present Act whereby the test of an attempt is whether conduct is "immediately or proximately connected with the [completed] offence, and not so remote as to be mere preparation".[116]

Expressed in these terms, the proximity test has a certain "elucidatory circularity".[117] Short of spelling out illustrative cases by statute,[118] it probably represents the least inexact way of marking the threshold of attempt.[119] The test also has several other advantages over other formulations.[120] Because it is still the predominant measure of attempt, more cases have been decided under it than any other, and they provide a useful source of reference and guidance. At the same time, the test remains fairly flexible. For example, more emphasis can be placed on what has already been done rather than on what remains to be done by resorting to the pliable requirement of a "real and practical step"[121] towards the completion of the full offence; or the threshold can be set by

---

114 See Fletcher, *Rethinking Criminal Law* (1978) 140.

115 Adams, above n 6, 200, para 700.

116 Clause 65 does not re-enact the provision of s72(3) of the present Act which abrogates the discredited equivocality test.

117 Meehan, *The Law of Criminal Attempt* (1984) 79.

118 Section 5.01(2) of the Model Penal Code (US) sets out several illustrative situations for the purpose of applying the "substantial step" test adopted in the Code. In its 1973 Working Paper the Law Commission reached the provisional conclusion that a list of non-exhaustive examples of "substantial steps" would be useful in a future code: Law Commission, *Inchoate Offences*, above n 110, 55-59, paras 78-87. Subsequently the Commission rejected the "substantial step" test as too vague and the illustrations as too wide: Law Commission, *Attempt and Impossibility*, above n 83, 19-22, paras 2.32-2.37.

119 For the other tests see Meehan, above n 117, 97-146; Law Commission, *Attempt and Impossibility*, above n 83, 14-22, paras 2.22-2.26, 2.30-2.37; Law Reform Commission of Canada, *Secondary Liability*, above n 3, 51-53 (appendix).

120 See Meehan, above n 117, 145.

121 *Police* v *Wylie* [1976] 2 NZLR 167 (CA).

applying the rather question-begging notion that there must be a "commencement of execution" or "step in the commission of the actual crime".[122]

C *Fact and Law*

Clause 65(2) alters the respective functions of judge and jury as presently defined in section 72(2) of the Act. The new provision provides that "The question whether an act or omission constitutes an attempt or mere preparation is a question of fact". Under section 72(2) this question is now treated as one of law, although as Adams rightly observes it is really one of fact and degree.[123]

The difference between the two formulations cannot be dismissed as merely semantic.[124] If clause 65(2) is enacted the jury will decide both (1) whether the alleged facts have been proved beyond reasonable doubt and (2) whether the proved facts amount to an attempt. But at present (1) alone lies with the jury while (2) is reserved to the judge. Of course the new provision will not disturb the fundamental division of function between judge and jury. To use the words of the equivalent provision in the English Draft Code, the question is to be left to the jury as one of fact "where there is evidence to support a finding that an act was more than merely preparatory to the commission of the offence intended".[125] What has changed is that the judge will not then decide whether what was done, if found by the jury, was an attempt.

D *Impossibility*

The note accompanying the Bill explains that subclauses (3) and (4) of clause 65 deal with a "more philosophical" question: should a person be liable for attempting to commit an offence that is in fact impossible to commit? Were it not for an important judicial gloss on its terms, section 72(1) of the present Act would seem clearly to answer the question in the affirmative. The provision concludes with the words "whether in the circumstances it was possible to commit the offence or not".

However in *R* v *Donnelly*[126] the Court of Appeal drew a distinction between factual impossibility and legal impossibility. In that case a would-be receiver tried to receive goods he believed to be stolen, though unknown to him the goods had been restored to the owner. Consequently, because of the operation of section 261 of the Act, it would have been impossible in law for him to have committed the full offence of receiving. All the members of the Court were at one in concluding that the fact that the goods had been physically removed from the place where the appellant believed them to be did not

---

122 *R* v *Wilcox* above n 103. Williamson J has recently expressed the view that the decision reached in *Wilcox* is difficult to reconcile with other cases: *Drewery* v *Police* (1988) 3 CRNZ 499.

123 Above n 6, 200-201, paras 700, 703. See also *Police* v *Wylie*, above n 121.

124 See Meehan, above n 117, 86.

125 Draft Criminal Code Act (UK), cl 53(4), *Codification*, above n 4, 200 and 141, para 14.32.

126 [1970] NZLR 980.

affect his liability for attempt. That was a case of factual impossibility plainly covered by the concluding words of section 72(1). But North P and Turner J in the majority held that the facts of the case disclosed a legal impossibility that precluded the would-be receiver's liability for attempt. Since by law he could not have committed the completed offence of receiving, the majority reasoned that he could not be convicted of attempt. As Turner J put it, "to say that he should be convicted because 'he meant to do it' seems to me to involve some confusion between the ideas of sin and crime".[127] However Haslam J dissented, taking the view that the concluding clause of section 72(1) treats as irrelevant any "objective" impossibility, whether or not it is attended or followed by legal consequences.

The majority decision assumes that the reasons for impossibility can be neatly segregated into separate compartments. Factual impossibility will include frustration resulting from ineptitude, insufficiency of means, the intervention of another agent, the occurrence of some supervening circumstance, or the non-existence of some supposed fact.[128] But the distinction between these cases and the category of legal impossibility is often as illusory as it is analytically suspect.[129] Beyond the obvious cases of the would-be receiver saved by section 261 and others who try to commit "offences" unknown to the law, many attempts routinely held to disclose only factual impossibility can just as easily be recast to involve an issue of legal impossibility.[130]

The approach taken by the majority in *Donnelly* is also open to the objection that it admits a technical and unmeritorious defence based on fortuitous circumstances unrelated to an alleged attempter's social dangerousness and moral blameworthiness. This and other arguments against the majority approach were considered by the New Zealand Criminal Law Reform Committee in its 1973 report on attempt and impossibility.[131] In the result, however, the Committee declined to recommend any change in the general law of attempt, suggesting only an amendment to the receiving provisions of sections 258 to 261 of the present Act.

Against this background the authors of earlier departmental drafts of the Bill developed two proposals. According to the first, a person could be guilty of an attempt to commit an offence "irrespective of whether it was possible in the circumstances, either in fact or in law, to commit that offence". However that formulation may have been over-inclusive to the extent that it could have snared the person who, by reason of a mistaken view of the law, tried to commit a non-existent offence. Yet, by inevitable deduction from the principle of legality, no question of a criminal attempt can arise in

---

127 Above n 126, 992.

128 For post-*Donnelly* decisions on factual impossibility see eg *R* v *Hansard* Unreported, 17 February 1978, Court of Appeal, CA 172/77; *Police* v *Jay* [1974] 2 NZLR 204; *R* v *Grant* [1975] 2 NZLR 165; *R* v *Willoughby* [1980] 1 NZLR 66; *Higgins* v *Police* (1984) 1 CRNZ 187; *Collector of Customs* v *Kozanic* (1982) 2 DCR 3.

129 See Meehan, above n 117, 151-153.

130 See Orchard, above n 93, 409-410.

131 Criminal Law Reform Committee, *The Law Relating to the Frustration of Attempts by Impossibility* (1973).

such a case.[132] That proposal was in turn modified by adding a proviso that "the fact that it was not possible in those circumstances to commit the offence may be taken into account in determining whether an act or omission was remotely rather than immediately or proximately connected with the offence". Evidently the proviso was inspired by the idea that impossibility could become part of proximity rather than being a "confusing doctrine in its own right":[133]

> In other words proximity is to a degree dependent on the question of the likelihood of success and, where this involves impossibility, the issue of whether the offence *could* have been committed is given circumstantial boundaries by proximity.

Fortunately this arcane notion has not survived. Instead the Bill adopts an impossibility rule for attempt and conspiracy that is derived in part from the English Draft Code.[134] As it applies to attempt, the rule consists of two propositions set out in subclauses (3) and (4) of clause 65 (the almost identical formulation for conspiracy appears in clause 61(2) and (3)):

> (3) Subject to subsection (4) of this section, a person may be convicted of an attempt to commit an offence, even though the commission of the offence was impossible.
> (4) A person may not be convicted of an attempt to commit an offence in respect of any act or omission that, through a mistake of law, he or she wrongly believed to constitute an offence.

The general rule that impossibility does not affect liability for attempt is therefore subject only to a "mistake of law" qualification. On this basis the would-be receiver in *Donnelly* would now be liable for attempt because although he wrongly believed that his acts, if completed, would constitute an offence, he made no "mistake of law". His mistake or ignorance related to material facts from which certain legal consequences flowed.

Although the terms of this new rule differ from the formulation in the English Draft Code, it seems intended to have the same effect. Under both the Draft Code and the current Criminal Attempts Act 1981 (UK), a subjective approach is adopted. For the purpose of determining liability for attempt the circumstances are taken as the attempter believed or hoped them to be. If on those supposed facts such a person would be guilty of an attempt, the impossibility of achieving the full offence is immaterial.[135] But there can be no liability for attempting an imaginary as opposed to an impossible offence. So if somebody believes, because of a mistake of law rather than fact, that certain conduct constitutes an offence when it does not, he or she cannot be convicted of attempt for acting in accordance with that belief.

---

132 See Law Commission, *Attempt and Impossibility*, above n 83, 47, para 2.88.

133 Explanatory commentary accompanying a 1986 departmental draft of the Bill.

134 Draft Criminal Code Act (UK), cl 54(1), *Codification*, above n 4, 201 and 142-143, para 14.40.

135 See *R* v *Shivpuri* [1987] AC 1.

Had the Bill adopted the Draft Code formulation, it would have reached this position by adding to the end of clause 65(3) the words "if it would have been possible in the circumstances which he or she believed or hoped existed or would exist at the relevant time". But as it stands, the mistake of law qualification in clause 65(4) will probably produce the same results. Suppose, for instance, A intends to have sexual intercourse with a female under the age of sixteen and believes that B is fifteen. In fact B is seventeen. A can be convicted of attempting to have sexual intercourse with a female under sixteen because his mistake was exclusively one of fact. But equally clearly, A would not be liable for attempt where he knows that B is seventeen years old but mistakenly believes that it is an offence to have sexual intercourse with a female over sixteen but under eighteen. Here, in terms of clause 65(4), A has done something that "through a mistake of law, he ... wrongly believed to constitute an offence".

Problems may still arise in distinguishing mistakes of law from mistakes of fact. There is also an element of fortuity in qualifying liability for impossible attempts by reference to a particular attempter's view or understanding of the law. However it ought to be remembered that in the area of impossible attempts the problems are as often metaphysical as real.[136] In many of the cases where liability for attempt *could* arise, the completed act was not criminal and the question will not come to light unless the doer acknowledges his or her mistake.[137] Even if the issue surfaces, sensible prosecutorial discretion may stop it rising further.

V INCITEMENT AND FACILITATION

At present the offence described as incitement or solicitation appears in subsection (2) of section 311, harnessed to the technically unrelated general penalty provision for attempt in subsection (1).[138] Clauses 66 and 67 of the Bill deal with these matters separately. Under the new arrangement the penalty provision for attempt in clause 66 sensibly follows the definition of the offence in clause 65, while what is now incitement is included within Part IV alongside the related rules on parties and attempts.

Section 311(2) creates a form of inchoate liability by making it an offence to incite, counsel or attempt to procure another person to commit an offence that is not in fact committed.[139] It was included in the 1961 Act to fill the gap exposed in *R* v *Bowern*[140] where the Court of Appeal held that it was not an offence under the Crimes Act 1908 to counsel the commission of an offence that was not actually committed. The provision thus supplements the statutory rules on complicity since, if the offence incited or

---

136 Meehan, above n 117, 213.

137 See Smith and Hogan, above n 17, 264.

138 See Adams, above n 6, 607, paras 2365, 2369.

139 In a sense, s311(3) incorporates an element of doubly inchoate/relational liability. As the words "attempts to procure" reveal, the provision essentially punishes attempting to be a secondary offender. See generally Robbins, "Double Inchoate Crimes" (1989) 26 Harv J Legis 1, especially 29-34, 113-115.

140 (1915) 34 NZLR 696. See Adams, above n 6, 607-608, para 2369.

counselled is in fact committed, liability will arise under the parties provision of section 66.

However in its present form the offence does not cover aiding as such. By its terms section 311(2) is directed at a form of attempted persuasion rather than attempted facilitation.[141] This may mean that if A helps rather than encourages B to commit an offence that B does not in fact commit, A falls outside section 311(2). Admittedly, A's provision of help might amount to an "attempt to procure" under section 311(2) if it could be said that A had tried to bring about the commission of the offence "by endeavour".[142]

However the reformulation of the offence in clause 67(1) plainly expands the scope of liability. As the shoulder heading to clause 67 indicates, the new offence covers any "attempt to *help* or bring about" the commission of offences (my emphasis). Accordingly, clause 67(1) then provides that any person "who would have been a party to an offence by virtue of section 57(1) of this Act had the offence been committed" is liable to the same penalty as would apply if he or she were guilty of an attempt to commit the offence. Since clause 57(1)(a) and (b) comprehends helping as well as bringing about the commission of an offence, clause 67(1) now clearly catches attempted facilitation.

VI CONCLUSION

At the beginning of this paper I suggested that the new rules in Part IV of the Bill should be judged by the standards of good arrangement, comprehensiveness and certainty, coherence, and clarity. So far as arrangement is concerned, Part IV is certainly an improvement on the disordered tangle of the present scheme. By drawing all the general rules on complicity and inchoate offending into one part, the Bill makes the rules more accessible and comprehensible. The new rules are also more comprehensive. Some gaps that until now have been left to the interstitial interpretation of the courts have been filled while fresh provision has been made for particular problems. To that extent the law is the more certain.

But in some areas the Bill goes too far. I have identified the consequential offence provision for conspiracy in clause 62(2) as objectionable on this count. There is also inconsistency between that provision and the related rules expressed in clauses 57(4) and 58. An element of ambiguity may also linger over the mens rea of conspiracy when measured against the express specification of recklessness as to circumstances for attempt. Furthermore, I remain unconvinced that the prescription of mentes reae for parties in clause 57 carries all the requirements of existing law into the Bill. Now and again I have also pointed to what I consider infelicitous drafting.

---

141 See Spencer, "Trying to Help Another Person Commit a Crime" in P Smith (ed), above n 31, 148, 152-154, 164-166.

142 *Attorney-General's Reference (No 1 of 1975)* [1975] 1 QB 773.

Having said that, however, I must add that in both form and substance Part IV of the Bill is a considerable advance on earlier departmental drafts. That in itself reflects the benefits that accrue from wider consultation and participation in a project of this kind. Now that the proposals to rewrite the law have finally seen the light of day, it is hoped that the sponsors of the Bill will pause to take stock of criticisms and suggested changes, unshackled by commitment to an early enactment date.

VII AUTHOR'S POSTSCRIPT

Since this paper was written, the English Law Commission's report recommending the adoption of a Criminal Code has become available (*Criminal Law : A Criminal Code for England and Wales* (Law Com No 177, 1989)). Volume 1 of the Report contains the Commission's recommendations, together with its draft of a Criminal Code Bill, while Volume 2 provides a commentary on the draft provisions.

The Commission's Bill revises and expands the 1985 draft Code referred to throughout this paper. Several changes have been recommended in the new draft provisions which correspond with Part IV of the Crimes Bill on parties, conspiracy and attempt. Two bear directly on matters discussed in this paper. First, the specification of accessorial mens rea has been revised to require proof of three separate mental elements for assisting, encouraging or procuring the commission of an offence. As set out in clause 27(1) of the 1989 Draft Code, they are (1) an intention to assist, encourage or procure the offence in the sense of acting in order to help the principal offender or knowing that the effect of the relevant act will be, in the ordinary course of events, to help the principal offender; and (2) knowledge of or, where recklessness suffices in the case of the principal offender, recklessness with respect to any circumstance that is an element of the offence; and (3) an intention that the principal offender shall act, or awareness that he or she may be acting or may act, with any fault required for the offence.

The commentary to clause 27(1) points out that this comprehensive formulation reflects the complexity of the common law. By contrast, we saw earlier that the equivalent prescription of mens rea in clause 57(1) of the Crimes Bill is shortly expressed by the words "knowing the circumstances constituting the offence or intending the consequences of the offence". As I mentioned in the paper, it is by no means clear that this ungainly form of words will carry into the Bill the various discrete elements of knowledge and purpose required to establish liability for helping or encouraging (see above pages 7-9). Both schematically and definitionally, the new provision in clause 27(1) of the 1989 English draft is a much more satisfactory proposal. At the very least, it should be carefully considered in redrafting clause 57(1) of the New Zealand Bill.

The 1989 English draft also departs from the Code team's 1985 version, as well as the Law Commission's earlier recommendations (see above notes 111 and 113), by providing in clause 49(2) that recklessness with respect to a circumstance will suffice for attempt where it is sufficient for the complete offence. This change in policy reflects widespread criticism of the provision in the 1985 draft that expressly required intention as to all the elements of the offence attempted (see above note 113). While

recognising that the distinction between circumstances and other elements of the substantive offences attempted may occasionally cause difficulty, the Commission considered that this was not the case with rape and obtaining property by deception, the two offences where the new rule in clause 49(2) of the 1989 draft is most likely to apply.

The Law Commission further concluded that it would be inconsistent to accept recklessness as to circumstances for attempt but not for the related preliminary offence of conspiracy. Accordingly, clause 48(2) of the English draft codifies the same rule for conspiracy as for attempt. However, whereas clause 65(5) of the New Zealand Bill stipulates a recklessness-as-to-circumstances provision for attempt, clause 61 on conspiracy draws no distinction between circumstances and other elements of the object offence (see above page 16). If one accepts the Law Commission's view of the relationship between attempt and conspiracy, clause 61 should be amended by including a recklessness-as-to-circumstances provision qualifying the general rule that intention is the characteristic mental requirement of conspiracy. But that step should not be taken without correcting another inconsistency in the Bill. Although the offence of conspiracy is directed at conduct further removed from the offence-in-chief than attempt, the punishment provisions of clauses 64 and 66 produce the rather anomalous result that some conspiracies attract higher penalties than attempts to commit the same object offences.