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Consultation Paper 2

Complicity

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Complicity

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Terms of reference

In a letter to the Commission received on 3 July 2007, the Acting Attorney General, the Hon John Watkins MP issued the following terms of reference:

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

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

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Submissions

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues and questions raised in this Consultation Paper.

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The closing date for submissions is 31 March 2008.

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Consultation Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked "confidential" will be determined in accordance with *the Freedom of Information Act 1989* (NSW).

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1. INTRODUCTION

1.1 In July 2007 the Attorney General asked the New South Wales Law Reform Commission to undertake a review of the common law of complicity. The terms of reference for this review are set out at page iv.

2. PRESENT LAW

2.1 The law of complicity has been succinctly (and counter-intuitively) described as follows: "From its earliest days our criminal law has recognised that a person may be convicted of committing a crime that was in fact committed by someone else."[1]

2.2 Complicity is a term encompassing the rules that widen criminal liability beyond the main perpetrator[2] of a criminal act[3] to another person (or persons)[4] when that secondary participant assists the primary participant to commit (or attempt to commit) the offence. In such a case[5] the secondary participant is held equally guilty of the crime committed by the primary participant.[6]

2.3 Complicity is, generally speaking,[7] a derivative or secondary liability:

> The area of the criminal law that governs whether or not a person is guilty of an offence as an accessory is often described as the law of complicity and the liability of an accessory is often referred to as secondary liability. Secondary liability is a derivative form of liability in that D's liability derives from and is

1. John Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 *Law Quarterly Review* 453.
2. Also known as the 'primary participant' or 'principal offender'.
3. Also known as the 'foundational crime', 'principal offence' or 'actus reus' – being the physical element to the crime.
4. Being the 'secondary participant(s)'.
5. There are exceptions such as the doctrine of 'innocent agency' where the primary participant avoids criminal liability because, for example, he or she lacked the requisite 'mens rea' due to extreme youth or mental impairment; but the secondary participant who intentionally aided and abetted the commission of the crime does not correspondingly avoid criminal liability.
6. *Gillard v The Queen* (2003) 219 CLR 1, [46] Kirby J said 'Where criminal liability is imposed on the basis of a common unlawful purpose, one person (the secondary offender) is rendered liable for the acts of another person (the principal offender) although the secondary offender has not actually performed the acts in question and may not have agreed to, or specifically intended, that such acts take place.' See also *Crimes Act 1900* (NSW) s 345.
7. An exception is for 'joint criminal enterprise' where the criminal liability of the secondary participant is primary, not derivative.

> dependent on an offence committed by P. Although there are exceptions, the general principle is that if P does not commit (or attempt to commit) the offence, D is not secondarily liable.[8]

2.4 The basis of secondary liability lies in the "requirement" of a "tenacious, fundamental" link to the "commission of the principal offence."[9] To attract the secondary liability of complicity, actual harm must have been done or attempted to be done to another person. This "actual harm" link distinguishes the common law doctrine of complicity from the other common law inchoate offences of incitement, attempt and conspiracy.[10]

2.5 In New South Wales, complicity is based on the common law.[11] Unlike Queensland,[12] Western Australia,[13] Northern Territory,[14] Tasmania,[15] the Australian Capital Territory,[16] and the Commonwealth,[17] the elements of the offence of complicity are not codified under the law of New South Wales, although some statutory provisions govern aspects of complicity liability, such as in the *Crimes Act 1900* (NSW).[18]

3. CLASSIFICATION OF COMPLICITY

3.1 The extension of the criminal liability of the primary participant to a secondary participant under the legal rules or doctrine of complicity can occur in three situations:[19]

- Joint criminal enterprise;[20]
- Extended common purpose;[21] and

8. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.8].
9. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [2.19] citing K M J Smith.
10. See further in paras 4.1-4.5.
11. See *McAuliffe v The Queen* (1995) 183 CLR 108 as applied in *Gillard v The Queen* (2003) 219 CLR 1.
12. *Criminal Code* (Qld) ss 7, 8, 9.
13. *Criminal Code* (WA) ss 7, 8, 9.
14. *Criminal Code* (NT) ss 8, 9, 10, 12, 43AK, 43BG.
15. *Criminal Code* (Tas) ss 3, 4, 5.
16. *Criminal Code* (ACT) ss 20, 45.
17. *Criminal Code* (Cth) ss 5.4, 11.2.
18. Statutory provisions that deal with accessorial liability include the *Crimes Act 1900* (NSW) pt 9 (ss 345-351B).
19. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].
20. Also known as 'acting in concert'.

- Accessorial liability.[22]

3.2 Although these three categories are expressed as separate branches of the doctrine of complicity, in practice there is considerable overlap between them.[23] The facts of the High Court case of *Clayton v The Queen*[24] illustrate this point. Three friends in collective outrage at the behaviour of a neighbour, armed themselves with household weapons, including poles and a large carving knife, and invaded the neighbour's home. The neighbour was detained, beaten and stabbed, one of the wounds causing death. The prosecution argued that although it could not identify which of the three applicants inflicted the fatal stab wound, each applicant was guilty of murder on the basis of one or other of the three categories of complicity set out above.[25] First, on the basis of participation in a "joint criminal enterprise", the prosecution argued the killing occurred in the course of the three applicants' implementation of an agreed plan to cause very serious injury to the deceased. Alternatively, on the basis of "extended common purpose", each applicant was guilty of murder because each had agreed to assault the deceased using weapons, and reasonably foresaw the possibility that death or very serious injury might be intentionally inflicted on the victim by one of them in the course of their carrying out the agreed assault. Finally, on the basis of "accessorial liability", the prosecution argued that the two applicants who did not inflict the fatal stab wound had aided and abetted the person who did (whoever that was), by intentionally helping, encouraging or conveying their assent to that person in his or her commission of the murder.[26]

3.3 In addition to the overlapping nature of its three constituent parts, the law of complicity suffers from "fundamental doctrinal obscurity."[27] Being substantially governed by the common law, rather than statute, the law of complicity "contains a fairly high proportion of opportunistic judicial decisions that lend no coherence to the rules."[28] For example, complicity has sometimes been limited to the rules

21. Also known as 'extended joint criminal enterprise'.
22. When a secondary participant either assists or encourages the primary participant either before the crime or at the crime scene.
23. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].
24. *Clayton v The Queen* (2006) 231 ALR 500.
25. *Clayton v The Queen* (2006) 231 ALR 500, [11].
26. *Clayton v The Queen* (2006) 231 ALR 500, [11].
27. Andrew Ashworth, 'General Principles of Criminal Law' in David Feldman (ed), *English Public Law* (Oxford University Press, 2004) ch 24, [24.58].
28. Ashworth, above n 27, [24.58].

relating to "accessorial liability".[29] At other times it has been used to cover the liability of principals and accomplices, thereby excluding "joint criminal enterprise" where all participants are considered principals.[30]

3.4 To facilitate discussion of this area of the law, the Commission considers the law of complicity under the three categories mentioned above. In each of these three categories a different set of rules applies to extend liability to people other than the principal offender.[31] However, to amount to complicity with the primary participant, two issues must be established in respect of each category:

- the state of mind (*mens rea*) of the secondary participant; and
- the conduct (*actus reus*) of the secondary participant.[32]

Joint criminal enterprise

3.5 A concise statement on the common law of joint criminal enterprise is found in *R v Lowery and King [No 2]* by Justice Smith:

29. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].
30. The latter version is found in the text of Simester and Sullivan which divides secondary participation into either: assistance and encouragement (aiding, abetting, counselling or procuring; that is, accessorial liability) or membership of a joint enterprise which led to the offence (that is, extended common purpose). However, Simester and Sullivan acknowledged that the distinction between principal and secondary participant is now of little practical significance in criminal law since each is deemed guilty of the full offence: Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 195-196. See also Ashworth, above n 27, [24.58]; David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1]: 'In the second and third categories, the liability of the secondary participants is derivative of the liability of the principal whereas, in the first category, the liability of all parties to the joint criminal enterprise is primary.'
31. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].
32. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].

> The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime. [33]

Elements of joint criminal enterprise

3.6 A joint criminal enterprise or "traditional common purpose"[34] exists when:

- Two or more people *agree* to commit a crime,[35] and
- The secondary participant[36] is *physically present* at the scene of the crime; and
- The secondary participant possesses the *necessary mental element* for the crime.

3.7 In this situation all of the participants in the joint criminal enterprise are *equally guilty* of the crime regardless of the part played by each in its commission.[37]

Agreement

3.8 The "agreement" is a reciprocal understanding or mutual arrangement between two or more participants to commit the crime. The mutually agreed participation in a criminal activity, or "acting in concert", is key to a joint criminal enterprise.[38]

3.9 The understanding or arrangement to assist as a member of a joint enterprise to commit a crime need not be express and may be

33. [1972] VR 560, 560.
34. Also known as 'common design or concert'.
35. *McAuliffe v The Queen* (1995) 183 CLR 108, 113 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ): '[t]he doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design.'
36. Or 'secondary participants' as the case may be.
37. *R v Tangye* (1997) 92 A Crim R 545, 557.
38. Peter Zahra and Jennifer Wheeler, *Principles of Complicity* (Conference Paper presented at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales 1 <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008.

inferred from all the circumstances.[39] For example, the mere presence of the secondary participant at the time when the crime is committed and his or her readiness to give aid to the primary participant if required, is sufficient to amount to encouragement in the joint criminal enterprise to commit that crime.[40] It may even be an unspoken agreement.[41]

> For people to be acting in concert in the commission of a crime their assent to the understanding or arrangement between them need not be expressed by them in words their actions may be sufficient to convey the message between them that their minds are at one as to what they shall do.[42]

3.10 The understanding or arrangement need not be reached at any time before the crime is committed.[43] It can be established "then and there to commit that crime"[44] or emerge while carrying out the crime.[45]

> The understanding or arrangement need not be of long standing; it may be reached only just before the doing of the act or acts constituting the crime.[46]

3.11 The agreement must not be called off before the crime is committed. However, a secondary participant will only be regarded as having withdrawn from the agreement if he or she makes a timely and unequivocal countermand and takes all reasonable steps to prevent the commission of the offence.[47] It is not sufficient if the secondary participant "feels qualms or wishes he had not got himself involved or wishes that it were possible to stop the proceedings…".[48]

3.12 In summary, a person can participate in a joint criminal enterprise in one of two ways, once the necessary reciprocal agreement has been established, by:

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39. *McAuliffe v The Queen* (1995) 183 CLR 108; 114, *R v Tangye* (1997) 92 A Crim R 545, 556.
40. *R v Tangye* (1997) 92 A Crim R 545, 557.
41. *R v Tangye* (1997) 92 A Crim R 545, 556, 557. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 220-221.
42. *R v Lowery and King [No 2]* [1972] VR 560, 561 (Smith J).
43. *R v Tangye* (1997) 92 A Crim R 545, 556.
44. *R v Tangye* (1997) 92 A Crim R 545, 557.
45. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 220-221.
46. *R v Lowery and King [No 2]* [1972] VR 560, 561 (Smith J).
47. *White v Ridely* (1978) 140 CLR 342, 350-351 (Gibbs J), *Criminal Code* (Cth) s 11.2(4). See generally, David Lanham, Bronwyn Bartal, Robert Evans and David Wood, *Criminal Laws in Australia* (The Federation Press, 2006) 514-516.
48. *R v Lowery and King [No 2]* [1972] VR 560, 561 (Smith J).

- Committing the agreed crime itself; or
- Simply being physically present at the time when the crime is committed and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging the primary participant in the joint criminal enterprise to commit that crime.[49]

Physically present

3.13 Before a secondary participant can be found guilty of a crime under joint criminal enterprise, he or she must be physically present when the crime is committed.[50]

Mental element

3.14 The "necessary mental element" is present when the secondary participant intentionally participates in the criminal act in some way, either by committing the agreed crime itself or by intentionally assisting or encouraging the other participant(s) to commit the crime.[51] To achieve this, the secondary participant must have knowledge of the essential facts and circumstances of the principal offence, including the primary participant's state of mind, and with this knowledge provide intentional assistance or encouragement.[52] Any "wilful blindness" of the secondary participant is treated as equivalent to knowledge of the offence, but neither "negligence" nor "recklessness" is sufficient to constitute the requisite knowledge.[53]

All equally guilty

3.15 In a joint criminal enterprise, the secondary participant is liable for the crime itself as a "principal in the first degree".[54] The criminal liability of the secondary participant is therefore primary, not derivative. That is, the offence does not have to be proved against the primary participant first, before the secondary participant is also liable for the same offence. For example, the primary participant may

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49. *R v Tangye* (1997) 92 A Crim R 545, 557 (Hunt CJ at CL) regarding encouragement '[t]he presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime.'
50. *R v Lowery and King [No 2]* [1972] VR 560, 561 (Smith J).
51. *R v Tangye* (1997) 92 A Crim R 545, 557.
52. *Giorgianni v The Queen* (1985) 156 CLR 473, 482, 487-488, 494, 500, 505.
53. *Giorgianni v The Queen* (1985) 156 CLR 473, 488 (Gibbs CJ).
54. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].

be acquitted completely, perhaps by reason of insanity, yet the secondary participant is still held guilty of the principal crime.[55]

> If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.[56]

Extended common purpose

3.16 In *R v Tangye* Justice Hunt commented on the distinction between "joint criminal enterprise" and "extended common purpose":

> The Crown needs to rely upon a straightforward joint criminal enterprise only where…it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making that point for years, and it is a pity that in many trials no heed is taken of what has been said.[57]

Elements of extended common purpose

3.17 Each of the participants to the arrangement or understanding forming the joint criminal enterprise as explained above, is liable for any other crime which both:

- falls within the *scope of the common purpose*; and
- is committed while carrying out that primary criminal venture.[58]

3.18 These are sometimes called "collateral offences".[59]

3.19 Simester and Sullivan describe the elements of extended common purpose as follows:

1. Secondary participant (S) and primary participant (P) jointly embark on the commission of crime A ("joint criminal enterprise");
2. S foresees that, in the course of the joint criminal enterprise to commit crime A, P might commit crime B (with P having the requisite *mens rea* for that crime);

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55. *Matusevich v The Queen* (1977) 137 CLR 633.
56. *R v Tangye* (1997) 92 A Crim R 545, 557.
57. *R v Tangye* (1997) 92 A Crim R 545, 556.
58. *McAuliffe v The Queen* (1995) 183 CLR 108, 114, 115. The primary criminal venture is also sometimes called the 'foundational crime'.
59. For example, England and Wales, Law Commission, *Participating in Crime,* Law Com No 305 (2007) [3.8], [3.134].

3. P commits crime B; and

4. The commission of crime B must occur as an incident of the joint criminal enterprise agreed upon, and not in a manner that is fundamentally different from the possibility foreseen by S.[60]

Scope of the common purpose

3.20 The second element mentioned above, "scope of the common purpose," covers the required level of mental intention by the secondary participant. This is the most controversial element of extended common purpose (and within the law of complicity) because a secondary participant can still be held liable for a criminal offence without *mens rea* and without committing the *actus reus*. This would appear initially at odds with the two basic elements required for criminal culpability. As such, extended common purpose has been described as a "legal fiction",[61] because a fundamental principle of criminal liability is that a criminal action *(actus reus)* and a criminal intention *(mens rea)* must normally coincide.[62]

3.21 The mental test for determining what comes within the "scope of the common purpose" is both individual and subjective.[63] This was not always so.

> Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.[64]

3.22 The scope is determined by what was contemplated by the secondary participant as a *possible* incident in the commission of the original joint criminal enterprise to which he or she had agreed.[65]

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60. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 220.
61. *Gillard v The Queen* (2003) 219 CLR 1, [47] (Kirby J).
62. *Gillard v The Queen* (2003) 219 CLR 1, [47] (Kirby J).
63. *McAuliffe v The Queen* (1995) 183 CLR 108.
64. *McAuliffe v The Queen* (1995) 183 CLR 108, 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).
65. *McAuliffe v The Queen* (1995) 183 CLR 108, 115 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ): 'the possible consequences which could be taken into account were those which were within the contemplation of the parties to the understanding or arrangement.' See also *Gillard v The Queen* (2003) 219 CLR 1, [112].

Accordingly, the secondary participant to the original (or "foundational") crime may also be liable for this extra crime[66] not because he or she assisted, agreed to it, intended it, or encouraged it; but simply because as one of the parties to the original crime he or she could (subjectively) foresee the additional crime occurring.[67] This "foresight of possibility" test is described as follows:

> the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties.[68]

3.23 The secondary participant does not have to *agree* to the extra crime to be liable under extended common purpose, unlike for joint criminal enterprise. Foresight of the primary participant's additional crime as a possible incident of the original collaborative crime is sufficient to render a secondary participant liable.[69] As such, an additional crime fundamentally different from those potential crimes recognised by the secondary participant as possible incidents of the original mutually agreed crime does not attract criminal liability on the part of the secondary participant under "extended common purpose".[70]

3.24 As noted in a leading text,[71] this mental element required for the criminal liability of the secondary participant is at odds with the notion of commonality:

> Given that liability now clearly turns on the individual foresight of the secondary participant(s), the term *common* purpose is itself something of a misnomer as a descriptor of this special set of rules. The term "common purpose" connotes express or implicit agreement between the secondary participant(s) and the principal. However, following *McAuliffe*, there is no longer any need for the prosecution to prove that the additional crime was,

66. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].
67. *Chan Wing-Sui v The Queen* [1985] AC 168, 175.
68. *McAuliffe v The Queen* (1995) 183 CLR 108, 118 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).
69. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 221-222.
70. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 222-223; *R v Powell* [1999] 1 AC 1.
71. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.3.1] (emphasis in original).

> in any respect "commonly" foreseen, let alone implicitly agreed to or authorised. Nonetheless, the term common purpose is still used by Australian courts, although there is a growing tendency to use the terms "joint criminal enterprise" and "common purpose" as synonymous, and to refer to "*extended* joint criminal enterprise" or "*extended* common purpose" to refer to the special rules with respect to liability for additional or incidental crimes.

3.25 Does the necessary (individual and subjective) foresight by the secondary participant extend beyond contemplating the possibility of the performance of the additional criminal *act* by the primary participant, to contemplating the possibility of the *consequences* of the additional criminal act as well? This is an issue especially when the primary participant uses a weapon in a mutually agreed original crime. For example, a secondary participant contemplated the primary participant would bring a gun to a robbery, but did not contemplate that a gun would be used by the primary participant to shoot someone during the robbery (which is what in fact happened). The position would appear to be that the secondary participant is liable if he or she foresees the possibility of the additional *act* and the possibility of the requisite *mental intention* of the primary participant in carrying out that additional act; notwithstanding he or she did *not* foresee the possibility of the *consequences* of the act.[72] This position is supported by the English Court of Appeal in *R v Bentley*[73] in the following propositions:

> (i) Where two parties embark on a joint enterprise to commit a crime and one party foresees that in the course of the enterprise the other party may carry out, with the requisite *mens rea*, an act constituting another crime, the former is liable for that crime if committed by the latter in the course of the enterprise…
>
> (ii) Where the principal kills with a deadly weapon, which the secondary party did not know that he had and of which he therefore did not foresee use by the principal, the secondary party is not guilty of murder.
>
> (iii) If the weapon used by the primary party is different to but as dangerous as the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the

72. Colin Scouler and Richard Button, *Guide to Accessorial Liability in New South Wales* (Paper included at the end of Zahra and Wheeler paper at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales [36], [37] <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008.
73. [2001] 1 Cr App R 21, [75] (emphasis in original).

> weapon, for example if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill or vice versa…
>
> (iv) The secondary party is subject to criminal liability if he contemplated the act causing the death as a possible incident of the joint venture unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible…

3.26 Extended common purpose can extend to an "accessory before the fact"; that is, the secondary participant need not be present at the original crime scene to be liable for the additional crime.[74] For example in one case, an accomplice agreed to drive an associate to a location, from where the latter would change cars and proceed, in the company of a third man, to rob the victim. The victim was shot dead in the heat of the struggle. The driver of the first car was held guilty of murder even though he was not present at the crime scene; had agreed to a robbery only (although he expected that his associate, who was quick-tempered would carry a loaded gun); and had only found out about the murder in the newspaper the next morning.[75]

3.27 The liability of the secondary participant in extended common purpose cases *derives* from the liability of the primary participant.[76] This is in contrast to joint criminal enterprise cases where the liability of the secondary participant *is* that of a primary participant.

Accessorial liability

3.28 Accessorial liability arises where there is *no* agreement or understanding, as there is in a joint criminal enterprise, to commit a crime among participants.[77]

3.29 However, the secondary participant (or "accessory") is still liable for a crime along with the primary participant, if the secondary participant[78] nevertheless intentionally "aids, abets, counsels or procures"[79] the commission of a crime.

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74. *Johns (TS) v The Queen* (1980) 143 CLR 108.
75. *Johns (TS) v The Queen* (1980) 143 CLR 108, 111.
76. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].
77. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 221.
78. Or 'secondary participants' as the case may be.
79. 'Aid, abet, counsel, or procure' from *Accessories and Abettors Act 1861,* 24 & 25 Vict, c 94, s 8 as amended by the *Criminal Law Act 1977* (UK) c 45,

Elements of accessorial liability

3.30 Accessorial liability exists when:

- A crime is committed;
- The accessory knew all the essential facts and circumstances linking the principal participant with the crime, including the principal participant's criminal intention (this is the accessory's *mens rea*); and
- The accessory intentionally assisted or encouraged the principal participant to commit the crime (this is the accessory's *actus reus*).

Crime is committed

3.31 It is not necessary that anyone be convicted as the principal offender to establish accessorial liability against the secondary participant.[80] Where the person charged as the principal offender is acquitted because of insufficient evidence, an accessory may still be convicted if it is shown that the principal offence was committed, and there is no evidentiary inconsistency in the different results.[81]

> The conviction of a person charged as accessory is not necessarily inconsistent with the acquittal or failure to convict the person charged as the principal offender. That is because the evidence admissible against them concerning the commission of the offence may be different. Even so, an accessory cannot be convicted unless the jury is satisfied that the principal offence was committed.[82]

3.32 However, if the evidence against a principal offender and accessory is exactly the same, the acquittal of one will be inconsistent with the conviction of the other.[83]

Accessory's mens rea

3.33 An accessory must have knowledge of the essential facts and circumstances of the principal offence, and with this knowledge provide intentional assistance or encouragement. The essential facts and circumstances of the principal crime include the accessory's

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s 65(7), Sch 12. Language also found in *Crimes Act 1900* (NSW) ss 249F, 351, 351B and 546.

80. *Crimes Act 1900* (NSW) s 346; *Criminal Procedure Act 1986* (NSW) s 24; *Giorgianni v The Queen* (1985) 156 CLR 473, 491.
81. Peter Zahra and Jennifer Wheeler, *Principles of Complicity* (Conference Paper presented at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales 2 <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008.
82. *Osland v The Queen* (1998) 197 CLR 316, [14].
83. *Osland v The Queen* (1998) 197 CLR 316, [14].

knowledge of the type of offence committed by the principal offender and the relevant intention of the principal offender.[84]

3.34 The classic statement of intention in this area is that of Lord Chief Justice Goddard in *Johnson v Youden*:[85]

> Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed…If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, "I knew of all those facts but I did not know that an offence was committed," would be allowing him to set up ignorance of the law as a defence.

3.35 However, the accessory need not have actual knowledge of all the essential facts constituting the offence in order to establish secondary participation. It is enough if the accessory has deliberately shut his or her eyes to a relevant fact, or has deliberately abstained from making an inquiry for fear that he or she may learn the truth.[86]

Accessory's actus reus

3.36 Reference is often made in statute and case law to the term "aids, abets, counsels, or procures" as explaining what a secondary participant must do (the accessory's *actus reus*) to be liable as an accessory to a crime. This term encapsulates four varieties of secondary participation which are recognised at common law,[87] and are often collectively referred to as "assisting and encouraging" a crime. The common law term "aids, abets, counsels, or procures" has found expression in the *Crimes Act 1900* (NSW) sections 45, 249F, 351, 351B and 546. In England, this common law expression is found in section 8 of the *Accessories and Abettors Act 1861* (U.K.).

3.37 In England, the term "aids, abets, counsels, or procures" has been given its ordinary meaning and has been treated as four separate words, although cases and texts acknowledge that the words overlap

84. Peter Zahra and Jennifer Wheeler, *Principles of Complicity* (Conference Paper presented at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales 3 <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008.
85. *Johnson v Youden* [1950] 1 K.B. 544, 546-547 approved in *Giorgianni v The Queen* (1985) 156 CLR 472, 481 (Gibbs CJ), 494 (Mason J), 500 (Wilson, Deane, Dawon JJ).
86. *Giorgianni v The Queen* (1985) 156 CLR 472, 495.
87. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 199.

and a charge of secondary participation need not specify which type of conduct is relied upon.[88] In Australia, however, the High Court has examined the common law concept of accessorial liability rather than the ordinary, separate meaning of the four words themselves. As Justice Mason explains:[89]

> Once it is acknowledged that those terms [aid, abet, counsel, or procure] are merely declaratory of the common law, it is to the common law concept of secondary participation, and not to the ordinary meaning of the words themselves, that regard must be had.

3.38 Instead, in Australia, the terms "aids, abets, counsels or procures" are descriptive of a single concept expressed as follows:

> All the words…are…instances of one general idea, that the person charged as [accessory] is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission.[90]

3.39 The four words overlap and collectively cover the *actus reus* of any form of effective assistance, encouragement or contribution by the secondary participant to a crime by the principal.[91] This does not necessarily mean that the secondary participant "causes" the crime, even in a broad sense of the word.[92] No agreement or consensus between the principal participant and the secondary participant needs to be established.[93] This assistance or encouragement can occur either *before* the crime or *at* the scene of the crime.[94]

88. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 199-203. Ashworth, above n 27, [24.60].
89. *Giorgianni v The Queen* (1985) 156 CLR 472, 492.
90. *R v Russell* [1933] VLR 59, 67 (Cussen ACJ) as quoted with approval in *Giorgianni v The Queen* (1985) 156 CLR 472, 493 (Mason J).
91. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 199.
92. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 239.
93. *Giorgianni v The Queen* (1985) 156 CLR 472, 493.
94. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].

3.40 The liability of the secondary participant in accessorial liability cases, as in extended common purpose cases, is derivative of the liability of the primary participant.[95]

3.41 In common law, a secondary participant *at* the crime scene who provides assistance and encouragement to the person who commits the crime is known as a "principal in the second degree."[96] If the secondary participant is not present at the crime, but intentionally assists or encourages the person who commits the crime *before* it occurs, then such a secondary participant is called an "accessory before the fact".[97] There is no difference in the liability between a "principal in the second degree" and an "accessory before the fact"; the mental elements are the same.[98] The only difference is that the former accessory is at the crime scene, whereas the latter is not.[99]

3.42 Under either of these types of "accessorial liability" the secondary participant has a derivative liability,[100] which is dependent upon establishing the commission of the principal offence and its link to the secondary participant's act of assisting or encouraging that

95. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].
96. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1]. See also *Giorgianni v The Queen* (1985) 156 CLR 473, 493 (Mason J).
97. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1]. See also *Giorgianni v The Queen* (1985) 156 CLR 473, 493 (Mason J).
98. Colin Scouler and Richard Button, *Guide to Accessorial Liability in New South Wales* (Paper included at the end of Zahra and Wheeler paper at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales [56] <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008. See also *Crimes Act 1900* (NSW) ss 345, 346.
99. Colin Scouler and Richard Button, *Guide to Accessorial Liability in New South Wales* (Paper included at the end of Zahra and Wheeler paper at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales [57] <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008.
100. David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, The Federation Press, 2006) [11.4.1].

offence.[101] Once the link is established, the secondary participant is liable for the principal offence, even if the person charged as the principal participant is acquitted for insufficient evidence.[102]

3.43 The *actus reus* of assistance or encouragement by the secondary participant can happen by omission.[103] This occurs where it is established that the secondary participant owes a legal duty to the victim and fails to take reasonable steps to intervene in the commission of the crime.[104]

3.44 Part 9 of the *Crimes Act 1900* (NSW) makes accessories to serious indictable offences, liable to the same punishment at the principal offender.[105]

Participation in criminal group activity

3.45 An additional potential area in which criminal responsibility can attach to a person who is not the actual perpetrator of a criminal act exists in the case of a person who participates in a criminal group, knowing that it is a criminal group, and knowing or being reckless as to whether, his or her participation in that group contributes to the occurence of any criminal activity.[106]

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101. Peter Zahra and Jennifer Wheeler, *Principles of Complicity* (Conference Paper presented at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales 2, 6 <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008. Colin Scouler and Richard Button, *Guide to Accessorial Liability in New South Wales* (Paper included at the end of Zahra and Wheeler paper at Public Defenders Annual Criminal Law Conference, 3rd and 4th March 2007) Lawlink New South Wales [14]: 'That does not mean…that the principal in the first degree must be convicted for the principal in the second degree to be proven guilty. It means that the prosecution must prove, in the proceedings against the principal in the second degree, the commission of the crime by the principal in the first degree.' <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_principlescomplicity> at 8 January 2008. See also, Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 203.
102. *Osland v The Queen* (1998) 197 CLR 316, [14] (Gaurdron and Gummow JJ), [64] (McHugh J); *Giorgianni v The Queen* (1985) 156 CLR 473, 491 (Mason J).
103. Ashworth, above n 27, [24.61].
104. Ashworth, above n 27, [24.61]. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 204-207.
105. See *Crimes Act 1900* (NSW) ss 345, 346.
106. *Crimes Act 1900* (NSW) s 93T(1) originally inserted as s 93IK by *Crimes Legislation Amendment (Gangs) Act 2006* (NSW).

4. DISTINGUISHING COMPLICITY FROM INCITEMENT, ATTEMPT, AND CONSPIRACY

4.1 There are three common law inchoate offences: attempt, conspiracy and incitement. Inchoate offences are offences that punish conduct by the secondary participant, not because they involve actual harm, but because they enhance the prospect of actual harm occurring.[107] The three inchoate offences therefore punish conduct which is one step removed from the commission of the principal offence.[108] In each case, the secondary participant incurs criminal liability even if the principal offence is not committed.[109] As such, they differ from complicity, which is not an "inchoate offence" since it requires the commission of a principal offence.

Incitement

4.2 "Incitement" differs from complicity (under all three categories) in the following way. Where a secondary participant ("S") *encourages* rather than *assists*[110] the primary participant ("P") to commit an offence, then even if P does *not* commit or attempt to commit the offence, S is still liable for the criminal offence of "incitement".[111] This is because the act of encouragement by S, if undertaken with a guilty intention (*mens rea*) by S, is a criminal offence in itself as soon as the encouragement by S comes to P's attention.[112]

Attempt

4.3 "Attempt" involves a primary participant ("P") trying to commit an offence but failing to do so. If P commits the attempt with

107. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.11].
108. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.14].
109. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.14].
110. 'Assisting' is a form of complicity. 'By contrast [to 'encouragement'], if D *assists* P to commit an offence, D incurs no criminal liability at common law if subsequently P, for whatever reason, does not commit or attempt to commit the offence:' (emphasis in original): England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.3].
111. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.3].
112. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.13(2)].

assistance or encouragement from a secondary participant ("S"), then S is criminally liable as an accessory to P's attempt.[113]

Conspiracy

4.4 "Conspiracy" is an agreement between a secondary participant ("S") and a primary participant ("P") to commit an offence; for example, to commit murder. Both S and P commit the offence of conspiracy as soon as the agreement (for example, to commit murder) is concluded, regardless of whether any further steps are taken towards executing the agreement (that is, whether someone is actually murdered).[114]

4.5 As they do not fall within the doctrine of complicity, the Commission will not be considering the common law inchoate offences of incitement, attempt and conspiracy under the terms of this reference.

5. CRITICISMS OF PRESENT LAW

5.1 The focus of the Commission's review is on two types of complicity described above:

- Extended common purpose, and
- Accessorial liability.

5.2 The Commission focuses on these because both categories are concerned with derivative criminal liability; whereas the other type, joint criminal enterprise, is founded on a mutual embarkation in a criminal enterprise and is therefore a primary and not derivative criminal liability. Because it carries primary criminal liability, some legal commentators do not consider joint criminal enterprise a form of complicity anyway.[115] It is the *derivative* nature of criminal liability under extended common purpose and accessorial liability cases that causes controversy in the common law doctrine of complicity.

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113. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.12].
114. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.13(1)].
115. Ashworth, above n 27, [24.58]: 'There is…a fundamental doctrinal obscurity: are there simply two forms of liability, that of principals and of accomplices, or is there a third and separate doctrine of 'joint enterprise'? Judicial and academic opinions are divided, but this branch of criminal law is so malleable that it is unlikely that the outcome of any case would be held to depend on whether or not 'joint enterprise' exists as a separate set of rules.'

5.3 This Consultation Paper concentrates on the doctrine of extended common purpose, rather than accessorial liability. This is because current controversy, as our terms of reference show, centres on appeals concerning the alleged misdirection of juries by trial judges in extended common purpose cases. Moreover, these appeals invariably involve the application of the law of complicity in a particular context, namely homicide cases.[116]

5.4 Notwithstanding the focus of this Consultation Paper on extended common purpose in homicide cases, the Commission is interested in identifying other areas of the law of complicity that should be considered in the course of this inquiry. Accordingly, we invite submissions on this topic.

Present test for extended common purpose

5.5 In the common law jurisdictions of Australia, including New South Wales, the test for imposing extended common purpose liability in homicide cases is a subjective one of "possible foreseeability."[117] Extended common purpose in New South Wales covers any additional crime foreseen as a *possible* consequence of the joint criminal enterprise, rather than any foreseen on the narrower test of a *probable* consequence.

5.6 The test for extended common purpose liability in New South Wales is expressed in the High Court case of *Gillard v The Queen* as follows:

> According to the principles stated in *McAuliffe*, the culpability of the [secondary participant] in the event that [the primary participant] shot and killed [the victim] would depend upon the scope of their common design [joint criminal venture], and what [the secondary participant] foresaw as a *possible* incident of the design. If [the secondary participant] foresaw, as a *possible* incident of carrying out the common design, that [the primary participant] might shoot [the victim] with intent to kill or cause grievous bodily harm, then [the secondary participant] would be guilty of murder.[118]

116. For example, all the major cases in the area of complicity: *Johns (TS) v The Queen* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1; *R v Powell* [1999] 1 AC 1; *Chan Wing-Sui v The Queen* [1985] AC 168; *Clayton v The Queen* (2006) 231 ALR 500 were appeal cases involving extended common purpose liability for homicide. *R v Taufahema* (2007) 228 CLR 232 is a recent example.
117. *McAuliffe v The Queen* (1995) 183 CLR 108 and *Gillard v The Queen* (2003) 219 CLR 1.
118. *Gillard v The Queen* (2003) 219 CLR 1, [19] (emphasis added).

5.7 The possible consequences which can be taken into account are those within the subjective contemplation of the participants to the original understanding or arrangement.[119] This is so even if the secondary participant did not agree to the incidental crime being committed.[120]

> To hold the individual liable for the commission of the incidental crime, when its commission is foreseen but not agreed, accords with the general principle that "a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it." The criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight.[121]

5.8 This test is the focal point of criticism in the law of complicity.

Criticisms of present test

Present test is too wide

5.9 The main criticism of the present "possible foreseeability" test for extended common purpose liability in New South Wales is that it is too wide. It has been referred to as the "overreach of criminal liability".[122] The test, it is argued, needs to be simpler, narrower, and more comprehensible.

5.10 Justice Kirby is a prominent critic of the current test and has outlined his objections to it in several High Court cases involving extended common purpose liability in homicide cases.[123] These objections are as follows:

- Present test for the legal responsibility of secondary participants in extended common purpose liability cases needs to align better with notions of moral culpability;[124]
- Present test in effect holds a secondary participant liable for the same murder on a "lesser form of mens rea"[125] than required for the primary participant who actually commits the murder (actus reus). This is unjust;[126]

119. *McAuliffe v The Queen* (1995) 183 CLR 108, 115.
120. *Gillard v The Queen* (2003) 219 CLR 1, [112] (Hayne J).
121. *Gillard v The Queen* (2003) 219 CLR 1, [112] (Hayne J).
122. *Clayton v The Queen* (2006) 231 ALR 500, [119] (Kirby J).
123. For example, *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 231 ALR 500; *R v Taufahema* (2007) 228 CLR 232.
124. *Clayton v The Queen* (2006) 231 ALR 500, [90] (Kirby J).
125. *Clayton v The Queen* (2006) 231 ALR 500, [108] (Kirby J).
126. *Clayton v The Queen* (2006) 231 ALR 500, [108], [109], [110] (Kirby J).

- Present test creates a "serious disparity"[127] between the subjective element required of a secondary participant in the case of "aiding, abetting, counselling or procuring" a murder and the subjective element required of a secondary participant in the case of "extended common purpose" liability in a murder;
- Present test in effect expands the potential for a secondary participant to be found guilty of murder and lessens the ability of a jury, acting rationally and honestly on this present test, of finding the alternative verdict of guilty of manslaughter;[128]
- Undue complexity in the conduct of trials associated with failing to correctly identify the "foundational crime" in extended common purpose trials; and
- Present test of extended common purpose for secondary liability in murder cases places trial judges in difficulty explaining the law to juries, and results in a great number of appeals.

Present test needs to align better with notions of moral culpability[129]

5.11 The subjective approach that one is only responsible for one's own moral wrongdoings and shortcomings, and not those of others, is reflected in the fundamental principle of criminal liability: that criminal actions (*actus reus*) and intentions (*mens rea*) must normally co-incide.[130] Therefore, the criticism has been made that joint liability for extended common purpose is cast too widely, and catches co-participants who did not perform the critical *acts* and shared no *intention* concerning the consequences caused by those acts.[131]

> [T]he doctrine of common purpose imposes criminal liability upon secondary offenders in a way that sometimes appears to offend fundamental principles of our criminal law. By those principles (limited exceptions apart) criminal liability ordinarily attaches only to the doing of criminal *acts* with a requisite criminal *intention*.[132]
>
> [I]t countenances what is "undoubtedly a lesser form of mens rea."[133]

5.12 This, it could be argued, requires a subjective test more refined and narrow than the present subjective test of *foreseeing* the

127. *Clayton v The Queen* (2006) 231 ALR 500, [104] (Kirby J).
128. *Clayton v The Queen* (2006) 231 ALR 500, [109] (Kirby J); *Gillard v The Queen* (2003) 219 CLR 1, [92] (Kirby J).
129. *Clayton v The Queen* (2006) 231 ALR 500, [90] (Kirby J).
130. *Gillard v The Queen* (2003) 219 CLR 1, [47] (Kirby J).
131. *Gillard v The Queen* (2003) 219 CLR 1, [62] (Kirby J).
132. *Gillard v The Queen* (2003) 219 CLR 1, [46] (Kirby J) (emphasis in original).
133. *Clayton v The Queen* (2006) 231 ALR 500, [108] (Kirby J).

possibility of murder in extended common purpose cases. As Justice Kirby in *Clayton v The Queen* reasoned:

> Foresight of what might possibly happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite *intention*. Its adoption as a test for the presence of the mental element necessary [for a secondary participant] to be guilty of murder amounts to a seriously unprincipled departure from the basic rule that is now generally reflected in Australian criminal law that liability does not attach to criminal conduct of itself, unless that conduct is accompanied by a relevant criminal intention.[134]

5.13 However the majority in *Clayton v The Queen* did not find the criticism of the discrepancy between legal and moral responsibility of a secondary participant persuasive, arguing:

> A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder.[135]

5.14 Extended common purpose, as previously noted, does not confine the liability of the participants in a joint criminal enterprise only to those offences that the participants have *agreed* will be committed.[136] If this were so, it would be the ultimate (both theoretical and practical) binding of a secondary participant's moral culpability and legal responsibility. However, extended common purpose principles cover what the secondary participant *foresaw* (under the relevant test applied in that jurisdiction), not just what he or she agreed with the primary participant would be done. Justice Hayne in *Gillard v The Queen* explains why:

> If liability is confined to offences for the commission of which the accused has previously agreed, an accused person will not be guilty of any form of homicide in a case where, despite foresight of the possibility of violence by a co-offender, the accused has not

134. *Clayton v The Queen* (2006) 231 ALR 500, [97] (Kirby J) (emphasis in original).
135. *Clayton v The Queen* (2006) 231 ALR 500, [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) (emphasis in original).
136. *Gillard v The Queen* (2003) 219 CLR 1, [115] (Hayne J).

> agreed to its use. That result is unacceptable. That is why the common law principles have developed as they have.[137]

Status quo

5.15 An argument in favour of the status quo on the liability of a secondary participant is also found in the social policy argument of "deterrence". This argument is well-expressed by Justice Kirby in *Gillard v The Queen*:[138]

> Those who participate in activities highly dangerous to life and limb share equal responsibility for the consequences of the acts that ensue. This is because, as the law's experience shows, particularly when dangerous weapons are involved in a crime scene, whatever the actual and earlier intentions of the secondary offender, the possibility exists that the primary offender will use the weapons, occasioning death or grievous bodily harm to others. The law then tells the secondary offender not to participate because doing so risks equal inculpation in such serious crimes as ensue.

Other options

5.16 One alternative approach to this test was canvassed by Justice Kirby in *Clayton v The Queen*.[139] It would replace the test of "possible foreseeability" with one of "probable foreseeability". This is closer to the Queensland, Tasmanian and Western Australian approach in their respective criminal codes.[140] However, Justice Kirby felt that such a "modest"[141] change would not solve the tension between legal responsibility and moral culpability of the secondary participant.[142] Justice Kirby had similar concerns with the use of the "recklessness" test under section 11.2 of *The Criminal Code* (Cth);[143] in particular that, like the tests of "possibility" or "probability," it did not strongly bind the legal responsibility and moral culpability of the secondary participant.

5.17 An alternative test which attempts to bind legal responsibility and moral culpability of the secondary participant more closely, was

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137. *Gillard v The Queen* (2003) 219 CLR 1, [119] (Hayne J). Common purpose principles require consideration of what the secondary participant foresaw, not just what he or she agreed would be done. This is the common law position in Australia, and the common law position arrived at in the Privy Council case of *Chan Wing-Sui v The Queen* [1985] AC 168 and in the English Court of Appeal case of *R v Hyde* [1991] 1 QB 134.
138. *Gillard v The Queen* (2003) 219 CLR 1, [62].
139. *Clayton v The Queen* (2006) 231 ALR 500, [121].
140. *Clayton v The Queen* (2006) 231 ALR 500, [123].
141. *Clayton v The Queen* (2006) 231 ALR 500, [121].
142. *Clayton v The Queen* (2006) 231 ALR 500, [124].
143. *Clayton v The Queen* (2006) 231 ALR 500, [123], [124].

cited by Justice Kirby in *Clayton v The Queen* as a test discerning an intention by the secondary participant of either *wanting* the primary participant to so act, or knowing that it was a *virtual certainty* that the primary participant would so act.[144] This test would be based on "a precise and sensible solution, namely that a killing should be classified as murder if there is an intention to kill or an intention to cause really serious bodily harm coupled with awareness of the risk of death."[145]

Present test unjustly holds a secondary participant liable for the same murder on a "lesser form of mens rea" than the primary participant who commits the murder.[146]

5.18 Justice Kirby in *Gillard v The Queen* explained why he considers the test is an exception to the normal requirements of criminal liability:

> If a *principal* offender were to kill the victim, foreseeing only the possibility (rather than the probability) that his or her actions would cause death or grievous bodily harm, that person would not be guilty of murder. Yet a *secondary* offender with a common purpose could, on the current law, be found guilty of murder of the same victim on the basis of extended common purpose liability if the jury were convinced that he or she had foreseen the possibility that one of the group of offenders might, with intent, cause grievous bodily harm and if, in the result, one of the group does indeed kill the victim with the intention to cause such grievous bodily harm.[147]

5.19 In the House of Lords case of *R v Powell*[148] counsel for the appellants argued this criticism of the common law test in extended common purpose cases involving homicide as follows:

> If foreseeability of risk is insufficient to found the mens reas of murder for a principal then the same test of liability should apply in the case of a secondary party to the joint enterprise…it is wrong for the present distinction in mental culpability to operate to the disadvantage of a party who does not commit the actus reus and that there is a manifest anomaly where there is one test for a principal and a lesser test for a secondary party.

5.20 However the public policy argument of deterring criminals from engaging in joint criminal activities holds dominance in the common law. Lord Hutton expressed this public policy argument of

144. *Clayton v The Queen* (2006) 231 ALR 500, [122], [125], [126].
145. *R v Powell* [1999] 1 A.C. 1, 15 (Lord Steyn).
146. *Clayton v The Queen* (2006) 231 ALR 500, [108] (Kirby J).
147. *Clayton v The Queen* (2006) 231 ALR 500, [100] (Kirby J) (emphasis in original).
148. [1999] 1 AC 1, 23.

"deterrence" succinctly in response to the above argument in *R v Powell* (which upheld the present test) as follows:

> I recognise that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs…In my opinion there are practical considerations of weight and importance related to considerations of public policy which justify the principle…and which prevail over considerations of strict logic.[149]

Present test creates a "serious disparity" between the subjective element required in "aiding, abetting, counselling or procuring" a murder and that required for "extended common purpose" liability in murder[150]

5.21 Under the common law, guilty intention on the part of the secondary participant to cause (at least) very serious injury has to be proved by the prosecution in two types of complicity cases: joint enterprise liability ("acting in concert") or aiding and abetting ("accessorial liability"). However, in the case of the third type of complicity, extended common purpose, proof of guilty intention by the secondary participant to cause at least really serious injury as such is unnecessary.[151] All that the prosecution has to prove in extended common purpose cases, is that the secondary participant thought that the criminal offence (which did occur) was "possible", rather than any guilty intention on the part of the secondary participant to cause the criminal offence to occur.

5.22 As stated above, the facts of *Clayton v The Queen* show the crime which did occur can be categorised by the prosecution under any of the three categories of complicity, yet there are differences in the way the elements of each are established and proved. For example in the case of extended common purpose liability there is no need to refer to specific intention on the part of the secondary participant.[152]

5.23 As Justice Kirby in *Clayton v The Queen* in a minority judgment explained:

149. *R v Powell* [1999] 1 AC 1, 25 (Lord Hutton).
150. *Clayton v The Queen* (2006) 231 ALR 500, [104] (Kirby J).
151. *Clayton v The Queen* (2006) 231 ALR 500, [113] (Kirby J).
152. *Clayton v The Queen* (2006) 231 ALR 500, [114] (Kirby J).

> Why, in point of legal principle, should murder in consequence of acting in concert require proof by the prosecution of a specific intention on the part of the secondary offender when no specific intention at all was required for proof of murder [in case of extended common purpose] in the course of carrying out a purpose held in common that did not include murder [that is, as part of a joint criminal venture]?[153]

5.24 Justice Kirby thought these discrepancies in proving the liability of a secondary participant under the three categories of complicity leave too much discretion with the prosecution as to which type of complicity to choose to prosecute under.

> It is…unjust…Effectively at the option of prosecutors, it fixes people with very serious criminal liability because they were in the wrong place at the wrong time in the wrong company. It is prone to misuse by public authorities. It deflects prosecutors and juries from the difficult but ordinarily necessary task of assigning criminal liability appropriately by reference to proved moral culpability, particularly in circumstances of homicide which attract the serious punishments properly imposed in respect of conviction for such offences.[154]

5.25 The majority judgment in *Clayton v The Queen*, however, considered there was a valid reason for the differing liabilities of secondary participants in aiding and abetting as compared with extended common purpose:

> liability as an aider and abettor is grounded in the secondary party's contribution to another's crime. By contrast, in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture.[155]

5.26 Simester and Sullivan also support the public policy argument in favour of the present test of liability for secondary participants in extended common purpose cases even though it differs from the test of liability for secondary participants in "aiding, abetting, counselling and procuring" (accessorial liability) cases:

> Aiding/abetting and joint enterprise are structurally unalike. In cases of aiding and abetting only one crime is at issue…In joint enterprise cases, the wrong is the agreement or confederacy.[156]

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153. *Clayton v The Queen* (2006) 231 ALR 500, [105] (Kirby J).
154. *Clayton v The Queen* (2006) 231 ALR 500, [119] (Kirby J).
155. *Clayton v The Queen* (2006) 231 ALR 500, [20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
156. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 225.

> The law has a particular hostility to criminal groups…the rationale is partly one of dangerousness: "experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences."[157] Criminal associations are dangerous. They present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address…A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has set itself against the law and order of society at large…Thus concerted wrongdoing imports additional and special reasons why the law must intervene.[158]

5.27 Another reason given in support of the present test for extended common purpose is the practical forensic advantage it gives to prosecutors of homicide cases in being able to hold all those involved in a joint criminal activity liable for the same crime (murder) even if it is unclear which of them committed the actual fatal act.[159]

Present test expands the potential for a secondary participant to be found guilty of murder and lessens the ability of a jury finding the alternative verdict of guilty of manslaughter[160]

5.28 The extended common purpose test is now so broad (being proof of foresight of the possibility that the victim will suffer very serious harm as a result of the joint criminal enterprise), it expands the potential liability for murder. This may leave little room for an intermediate culpability of a secondary participant for unlawful

157. *R v Powell* [1999] 1 AC 1, 14.
158. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 226.
159. This was the factual situation in *Clayton v The Queen* (2006) 231 ALR 500 and one of the prosecution arguments was based on extended common purpose [11]: 'each applicant was guilty of murder because each had agreed to assault the deceased using weapons, and reasonably foresaw the possibility that death or really serious injury might be intentionally inflicted on the victim by one of them in the course of their carrying out the agreed assault.'
160. *Clayton v The Queen* (2006) 231 ALR 500, [109] (Kirby J): 'By providing a legal footing upon which a jury might find a secondary offender guilty upon proof of mere foresight of the possibility that the victim will suffer really serious harm as a result of the common purpose of the accused, the present doctrine expands the liability of secondary offenders, in the case where a murder is charged, so far that, realistically, there will ordinarily be very little, if any, room left for manslaughter.' *Gillard v The Queen* (2003) 219 CLR 1, [92] (Kirby J) 'To the extent that an accused is liable for mere possibilities that were (or were to be taken as) contemplated, the scope of accessorial responsibility for murder is extended. The scope of manslaughter is arguably diminished.'

homicide such as manslaughter (rather than murder).[161] This is not the fault of trial judges in misdirecting juries.

> If a person [the secondary participant], who did not perform the acts causing the homicide [no actus reus] and did not actually intend the death of, or grievous bodily harm to the victim [no mens rea], can still be liable for the murder on the basis of the "traditional" or "extended" common purpose doctrine, it is difficult to identify the case that will somehow fall outside such joint liability, authorising the jury to return a verdict of manslaughter. If, within current doctrine, such a difficulty appears for this Court, it will also present itself to legal advisers, counsel at trial and trial judges in explaining the point of differentiation to the jury which has the responsibility of deciding the issue.[162]

5.29 Alternatively, because the test is so broad, Justice Kirby argued that a jury might be tempted to return a "compromise" verdict of manslaughter and not a verdict according to the law.[163] However, Justice Kirby conceded that the risk of a jury compromise verdict (for manslaughter) may be avoided or diminished by appropriate judicial instructions.[164]

5.30 The availability of manslaughter as an alternative to murder or acquittal ameliorates the potential overreach of extended common purpose liability as it is presently expressed.[165]

Undue complexity in the conduct of trials associated with failing to correctly identify the "foundational crime" in extended common purpose trials

5.31 It is of great importance to the success or otherwise of establishing liability under "extended common purpose" for the prosecution to clearly specify the "foundational crime" or the "joint criminal enterprise".[166]

5.32 This was evident in *R v Taufahema*.[167] The facts were that four men on parole met as arranged and went for a ride together in a stolen car, each armed with a loaded stolen revolver. As the car was speeding excessively a highway patrol car followed in pursuit. The speeding car fled but collided with an obstacle on the road and stopped. All four

161. *Gillard v The Queen* (2003) 219 CLR 1, [65], [66], [67] (Kirby J).
162. *Gillard v The Queen* (2003) 219 CLR 1 [67] (Kirby J).
163. *Gillard v The Queen* (2003) 219 CLR 1, [70].
164. *Gillard v The Queen* (2003) 219 CLR 1, [70].
165. *Gillard v The Queen* (2003) 219 CLR 1, [83] (Kirby J); *R v Barlow* (1997) 188 CLR 1, 43-35 (Kirby J): 'In the non-code States of Australia the right of a jury to convict a common purpose co-offender of a lesser offence than that of the principal has long been recognised.'
166. *R v Taufahema* (2007) 228 CLR 232, [120] (Kirby J).
167. *R v Taufahema* (2007) 228 CLR 232.

passengers leapt from the car. One of the passengers (not Taufahema) shot several bullets into the windscreen of the patrol car, hitting a policeman sitting inside who later died of his injuries. Two pairs of gloves and a hockey mask were found in or near the car. Taufahema, the driver of the stolen car, was soon apprehended on the run with his revolver. He was charged with the policeman's murder.

5.33 The prosecution originally suggested that Taufahema's liability for murder would rest on a joint criminal enterprise; that is, a jointly agreed plan by the four men to avoid arrest by using a revolver to shoot a police officer, if necessary. However, there was no evidence of such a jointly agreed plan and as the trial progressed the prosecution case altered to secondary liability for murder under "extended common purpose".[168] The issue then became what was the "foundational crime" or "joint criminal enterprise" on which the extended common purpose liability rested.

5.34 Three different grounds were proffered during the course of the trial in the Supreme Court of New South Wales before Justice Sully and a jury, and subsequent appeals[169] by the prosecution for asserting the existence of the original foundational crime on which the extended common purpose crime of murder could be attached. These alleged primary or foundational offences were an (original) agreement among the four men to:

- evade lawful arrest;[170]
- hinder a police officer in the execution of his duty;[171] and
- participate in an armed robbery.[172]

5.35 The High Court on appeal held[173] that a new trial for extended common purpose liability could be ordered on the basis of a new interpretation of the foundational crime as "setting out to commit armed robbery" rather than the earlier argued "avoiding apprehension by the police" because:

> what the prosecution proposes to do is rely on the same evidence [at the proposed new trial] as was called at the first trial, but to

168. *R v Taufahema* (2007) 228 CLR 232, [3], [4], [6] (Gleeson CJ and Callinan J).
169. *Taufahema v The Queen* (2006) 162 A Crim R 152; *R v Taufahema* (2007) 228 CLR 232.
170. *Taufahema v The Queen* (2006) 162 A Crim R 152, [20].
171. *Taufahema v The Queen* (2006) 162 A Crim R 152, [24].
172. *R v Taufahema* (2007) 228 CLR 232, [54].
173. *R v Taufahema* (2007) 228 CLR 232 Gummow, Hayne, Heydon and Crennan JJ (Gleeson CJ, Kirby and Callinan JJ dissenting), granting special leave to appeal.

> seek to characterise the facts which that evidence may establish in a different way, but not in radically different way. At the first trial the criminal enterprise revealed by the evidence was not called "armed robbery", but the evidence was capable of supporting the inference that it was.[174]

5.36 The *Taufahema* trial highlights the difficulties surrounding the interpretation of facts in a crime and the consequential complexity of administering a criminal trial and explaining the present law on complicity, especially in extended common purpose cases.

Present test places trial judges in difficulty explaining the law to juries and results in a great number of appeals

5.37 Facts in criminal trials differ. Trial judges have to explain the complex web of responsibilities in, and exceptions to, the law of complicity to juries in comprehensible terms. These "jury directions" are a frequent source of grounds for appeal.

5.38 There is arguably a need to derive principles which can be clearly and simply explained to juries by trial judges in the place of the present "potentially confusing" state of secondary liability under the common law.[175]

5.39 In a recent article, Justice Eames, supported[176] the view of Justice Kirby in *Clayton v The Queen* that the law of complicity is complicated and difficult for trial judges to explain to juries.[177] Justice Eames argued that trial judges giving directions to juries on complicity should have a readily sourced database of written precedents to assist them. [178]

5.40 The Commission notes the difficulties presented to trial judges in giving jury directions in the area of complicity and the desirability of the jury receiving written instructions, rather than having directions delivered to them orally. Any reform of the law must make it easier for the judge to direct the jury. The issue of directions by a judge to a jury in criminal trials generally, is being presently

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174. *R v Taufahema* (2007) 228 CLR 232, [68] (Gummow, Hayne, Heydon and Crennan JJ).
175. *Gillard v The Queen* (2003) 219 CLR 1, [50] (Kirby J). See also, Stephen Gray, "I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime' (1999) 23 *Criminal Law Journal* 201, 210 and Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29 *Australian Bar Review* 161.
176. Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29 *Australian Bar Review* 161.
177. *Clayton v The Queen* (2006) 231 ALR 500, [114].
178. Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29 *Australian Bar Review* 161, 173.

examined under another recent Commission reference "Jury directions in criminal trials".[179] The Commission will consider general issues on jury directions in this other reference.

6. SOLUTIONS TO PROBLEMS WITH SECONDARY LIABILITY

Law in the code jurisdictions

6.1 There are nine criminal jurisdictions in Australia. Some of these jurisdictions have codified the substantive principles of their criminal law,[180] including the law of complicity. Other jurisdictions, among them New South Wales, have left some of their criminal law, including the law of complicity, to the common law.[181] Even so, legislation has superseded much of the common law in these jurisdictions. This legislation can vary markedly among the various common law jurisdictions.[182]

6.2 In the codified criminal jurisdictions of Australia the test of extended common purpose liability is set out in their respective codes; while in the common law criminal jurisdictions of Australia the test derives from case law, especially the more recent High Court cases of *McAuliffe v The Queen* and *Gillard v The Queen.*[183]

6.3 Two different tests for extended common purpose liability operate in the codified criminal jurisdictions of Australia.[184] In Queensland,[185] Tasmania,[186] and Western Australia,[187] the test is one

179. <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref116> at 10 January 2008.
180. Being: the Commonwealth, Queensland, Western Australia, Tasmania, Northern Territory and Australian Capital Territory.
181. Being: New South Wales, Victoria and South Australia. David Lanham, Bronwyn Bartal, Robert Evans and David Wood, *Criminal Laws in Australia* (The Federation Press, 2006) 1.
182. David Lanham, Bronwyn Bartal, Robert Evans and David Wood, *Criminal Laws in Australia* (The Federation Press, 2006) 1: 'In effect the non-Code jurisdictions are increasingly putting their law in legislative form. Hence the large amount of legislation in this area of law. In some cases these statutory developments have brought some Code jurisdictions closer to some of their common law cousins than to their Code siblings and vice versa.'
183. *McAuliffe v The Queen* (1995) 183 CLR 108 and *Gillard v The Queen* (2003) 219 CLR 1.
184. The Northern Territory has a test closer to the common law test of 'foresight of possibility': *Criminal Code* (NT) s 8. It also incorporates the 'reckless' test for complicity and common purpose: *Criminal Code* (NT) ss 43AK, 43BG.
185. *Criminal Code* (Qld) s 8: 'When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its

of "probable consequence."[188] This is an objective standard to assess liability. The secondary participant is liable for an offence committed by the primary participant if that offence is an objectively probable consequence of the common unlawful purpose.[189] "Probability" is determined by examining the circumstances in which the offence is committed.[190] For example, the primary participant is guilty of murder; while the secondary participant is guilty of manslaughter, where manslaughter and not murder was the probable result of the implementation of the common purpose.[191]

6.4 The meaning of "a probable consequence" under section 8 of the Criminal Code of Queensland was recently examined in *Darkan v The Queen*[192] where the High Court concluded:

> The difficulty in defining "a probable consequence" is that once it is accepted that "probable" does not mean "on the balance of probabilities" and that it means more than a real or substantial possibility or chance, it is difficult to arrive at a verbal formula for what it does mean and for what the jury may be told.
>
> The expression "a probable consequence" means that the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible. It must be probable in the sense that it could well happen.

6.5 In the more recently codified jurisdictions of the Commonwealth[193] and Australian Capital Territory[194] the test for extended common purpose is a more subjective test of "recklessness."[195] The secondary participant is liable for an offence committed by the primary participant if the secondary participant is reckless about the offence that the primary participant actually

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commission was a *probable consequence* of the prosecution of such purpose, each of them is deemed to have committed the offence.' (emphasis added)

186. *Criminal Code* (Tas) s 4
187. *Criminal Code* (WA) s 8.
188. The test 'probable consequence' is also used in New Zealand and Canada: *Crimes Act 1961* (NZ) s 66(2) and *Criminal Code* s 21(2) (Canada).
189. David Lanham, Bronwyn Bartal, Robert Evans and David Wood, *Criminal Laws in Australia* (The Federation Press, 2006) 502-503.
190. David Lanham, Bronwyn Bartal, Robert Evans and David Wood, *Criminal Laws in Australia* (The Federation Press, 2006) 503.
191. David Lanham, Bronwyn Bartal, Robert Evans and David Wood, *Criminal Laws in Australia* (The Federation Press, 2006) 503 citing *R v Barlow* (1997) 188 CLR 1.
192. (2006) 227 CLR 373, [78], [79].
193. *Criminal Code* (Cth) s 11.2(3)(b).
194. *Criminal Code* (ACT) s 45(2)(b)(ii).
195. Also see the 'reckless' test for complicity and common purpose: *Criminal Code* (NT) ss 43AK, 43BG.

commits. This test has been adopted by these jurisdictions from the Model Criminal Code.[196] Recklessness is defined in the Code as involving an awareness of a substantial risk and a lack of justification in taking the risk.[197]

English law reform proposals

6.6 The English law of complicity, like that of New South Wales, is based in the common law, as set out in the Privy Council case of *Chan Wing-Sui v The Queen*.[198] This case held that a secondary participant is liable for an offence committed as part of a joint criminal venture if he or she foresaw the possibility that some serious bodily harm *might* result incidentally during the joint venture, arising from both the act (actus reus) and the intention (mens rea) of the primary participant.[199] This is a subjective test based on what the secondary participant contemplated, inferred from his or her conduct, and any other evidence of what he or she foresaw at the material time.[200]

6.7 The Law Commission of England and Wales recently undertook a thorough and wide-ranging enquiry into the law relating to secondary participation in crime. In this process, it recently produced three reports.[201] Initially, the Law Commission in its 1993 consultation paper, *Assisting and Encouraging Crime,*[202] proposed (with the possible exception of the common law doctrine of accessorial liability for collateral offences committed in the course of a joint venture) abolishing secondary liability for aiding, abetting, counselling or procuring altogether, and replacing it with two new inchoate statutory offences of "assisting" and "encouraging" crime.[203] In part

196. See further in paras 6.14-6.16.
197. Model Criminal Code s 5.4, *Criminal Code* (ACT) s 20, *Criminal Code* (Cth) s 5.4, *Criminal Code* (NT) s 43AK.
198. [1985] AC 168.
199. The Chan Wing-Sui principle as explained in England and Wales, Law Commission, *Participating in Crime,* Law Com No 305 (2007) [3.133].
200. *Chan Wing-Sui v The Queen* 1985] AC 168, 177.
201. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006); England and Wales, Law Commission, *Murder, Manslaughter and Infanticide,* Law Com No 304 (2006); and England and Wales, Law Commission, *Participating in Crime,* Law Com No 305 (2007).
202. England and Wales, Law Commission, *Assisting and Encouraging Crime*, Consultation Paper No 131 (1993).
203. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [1.16], [2.4], [2.5], 2.6]. See also, Spencer, 'Trying to Help Another Person Commit A Crime' in P Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (1987) 148. See Spencer argument explained in Andrew P Simester and Robert G Sullivan, *Criminal*

this proposal was inspired by leading commentators such as Simester and Sullivan who canvassed, among other ideas, the argument based on the proposition that an essential component of any crime is the harm done to another. Consequently, they argued, if the primary participant does no harm (regardless of circumstances leading to non-commission of the criminal act), then the secondary participant should not be held liable for a criminal offence (either inchoate or secondary liability) regardless of his or her intent.[204]

6.8 Following criticism of the 1993 Consultation Paper,[205] the proposal to abolish secondary liability altogether and replace it with the two new inchoate statutory offences of "assisting" and "encouraging" crime was rejected in the Commission's 2006 report, *Inchoate Liability for Assisting and Encouraging Crime*.[206] The

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Law: Theory and Doctrine (2nd ed, Hart Publishing, 2003) 237-239. The rationale behind this argument was to dispense with the need to describe participants in a crime by their relationship to each other; that is, as principals and accessories. In this way, the person assisting or encouraging the crime ('S') is still liable under either of the two new inchoate offence of 'assisting' or 'encouraging' whether or not the crime is actually committed by the other person ('P'). It was argued that S should not escape criminal liability under complicity rules for encouraging a crime, just because P changes his or her mind and does not commit the criminal act. S's 'moral culpability' remains the same regardless.

204. Andrew P Simester and Robert G Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, 2003) 238-9.

205. The Law Commission of England and Wales received much criticism for this proposal in their *Assisting and Encouraging Crime*, Consultation Paper No 131 (1993). The criticism centred on the advantages of keeping secondary liability, being: forensic advantages, public acceptability, condemnation and labelling, and the connection between the accessory's conduct and the offence committed by principal offender. Critics argued that practical advantages exist of ascribing liability for an offence to the all those present at a crime when it is unclear who actually committed the offence. Also, public policy needs to attribute and equally condemn the accessory where there is a direct culpable link between an accessory's actions and the actual harm done by the principal offender: see further, England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006) [2.1-2.26].

    The Law Commission acknowledged that under its consultation paper proposal for a scheme consisting solely of inchoate offences would simply replace the anomalies and unexpected consequences of secondary liability with new ones. See an example of the unexpected consequences of a scheme consisting solely of inchoate offences in England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300, (2006) [2.21], [2.23].

206. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300, (2006) [2.26]. However, although the Commission believed that the common law doctrine of secondary liability

Commission believed instead that the common doctrine of secondary liability be retained, although acknowledging it is unsatisfactory and in need of reform.[207]

> We acknowledge that the retention of secondary liability may sometimes result in D [secondary participant] being liable for unexpected consequences. However, this will usually be the result of anomalies in the substantive law that the doctrine of secondary liability must accommodate. The doctrine of secondary liability is of general application, applying to many different offences whether or not those offences are well structured, well defined or even consistent with one another. Removing D's but not P's [primary participant] liability for unseen consequences, would simply create a new anomaly.[208]

6.9 The Commission concluded:

> One aim of the proposals in the CP [1993 Consultation Paper] was to simplify the law by creating a clear distinction between the liability of the principal offender and the liability of the accessory. We now believe that this simplicity comes at too high a price.[209]

6.10 The Law Commission in its later 2007 report, *Participating in Crime*, supported retaining the doctrine of extended common purpose under the "Chan Wing-Sui principle" referred to above.[210] It believed that while it would be possible to dispense with a general doctrine of secondary liability, this would only be achievable if each criminal offence had its own rules for determining not only the primary participant's liability, but also the secondary participant's liability. The Commission considered that such an approach would be

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should be retained [1.19], it recommended that the common law offence of incitement be abolished and replaced with two new inchoate statutory offences of 'intentionally encouraging or assisting a criminal act' and 'encouraging or assisting [a criminal act] believing that [it] will be done': England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300, (2006) [9.1] and Appendix A, [A.2-A.4].

207. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300, (2006) [1.18], [1.19].
208. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300, (2006) [2.25].
209. England and Wales, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300, (2006) [2.26].
210. England and Wales, Law Commission, *Participating in Crime*, Law Com No 305, (2007) [3.8] and recommendation [3.151].

impracticable and result in the law of secondary liability being out of line with related areas of the criminal law.[211]

6.11 Reasons given by the Commission for retaining the "Chan Wing-Sui principle," being the secondary participant's liability for a collateral offence committed as an incident of a joint criminal venture, include the following:

- A collateral offence will frequently be logically referable to the success of the joint criminal venture and, therefore, is of benefit to all the parties involved.
- The secondary participant has agreed to participate with the primary participant in a joint criminal venture, that has the potential to escalate and involve the commission of more serious offences.
- The secondary participant, if anticipating the possible commission of a range of different offences, should not be able to pick and choose which of those offences to be liable for, simply on the basis of his or her attitude towards their occurrence.
- The above is tempered by the "subjective" requirement that the secondary participant must foresee that the principal participant may commit the offence. Also, the secondary participant has the opportunity to claim that the collateral offence committed by the primary participant was too remote from the agreed offence to fall within the scope of the joint criminal venture. Finally, the secondary participant always can withdraw from the criminal venture by negating the effect of the original agreement before the principal participant commits the principal offence.
- No logical incongruity exists in stipulating different fault elements for principal participant(s) and secondary participant(s). The conduct of each is different and, accordingly, there is no logical reason why the fault element must be the same for each.[212]

6.12 While retaining secondary liability, the Commission nevertheless recommended that the elements of extended common purpose should be set out in a statute.[213] It recommended that:

211. England and Wales, Law Commission, *Participating in Crime*, Law Com No 305 (2007) Appendix B, [B.5].
212. England and Wales, Law Commission, *Participating in Crime*, Law Com No 305 (2007) [3.140], [3.141], [3.142], [3.146], [3.147].
213. See draft Participating in Crime Bill in England and Wales, Law Commission, *Participating in Crime*, Law Com No 305 (2007) 155.

> if P [primary participant] and D [secondary participant] are parties to a joint criminal venture, D satisfies the fault required in relation to the conduct element of the principal offence committed by P if:
>
> D intended that P (or another party to the venture) *should* commit the conduct element;
>
> D believed that P (or another party to the venture) *would* commit the conduct element; or
>
> D believed that P (or another party to the venture) *might* commit the conduct element.[214]

Reform options

6.13 The various tests canvassed below (drawn from case law, academic commentary, and legislation) set out the present and possible tests of liability for secondary participants in extended common purpose cases in Australia. They are set out arguably in order of the degree of difficulty for a prosecution to establish secondary liability in extended common purpose crimes:

- Intention to commit homicide *(This test cited by Justice Kirby in Clayton v The Queen as binding moral culpability and legal responsibility arguably goes too far in allowing a secondary participant in a joint criminal enterprise to escape from liability for an additional crime. It would also allow both primary and secondary participants to escape liability for an additional crime if it was unclear who actually committed the additional crime. It relies on the subjective state of mind of the secondary participant.)*
- Intention to cause really serious bodily harm coupled with an awareness of the risk of homicide *(This test cited by Justice Kirby in Clayton v The Queen as binding moral culpability and legal responsibility, although not as difficult for a prosecution to establish as the test above, still arguably goes too far in allowing a secondary participant in a joint criminal enterprise to escape liability for an additional crime and makes it easy for both participants to escape liability for an additional crime if it was unclear who actually committed that crime. It relies on the subjective state of mind of the secondary participant.)*
- Virtual certainty to commit homicide *(This test cited by Justice Kirby in Clayton v The Queen as binding moral culpability and legal responsibility arguably suffers from the same difficulties as*

214. England and Wales, Law Commission, *Participating in Crime*, Law Com No 305 (2007) [3.151] (emphasis added).

the above two tests, although a shade less challenging for a prosecution to establish.)

- Probability of homicide *(This test is used in Queensland, Tasmania, and Western Australia under their respective criminal codes. It is arguably harder to establish by a prosecution than the "possibility" test because it makes the secondary participant liable for the offence committed by the primary participant if that offence is an objectively probable consequence of the common unlawful purpose.*[215]*)*
- Recklessness as to homicide *(This test is used in the more recently codified jurisdictions of the Commonwealth and the Australian Capital Territory.*[216] *This test arguably sits between "probability" and "possibility" since the test combines elements both of the subjective intent of the secondary participant and the objective situation. "Recklessness" involves an awareness of a substantial risk by the second participant and a lack of justification in taking that risk.*[217]*)*
- Possibility of homicide *(This test is used in common law jurisdictions such as New South Wales.*[218] *It relies on the subjective state of mind of the secondary participant and whether he or she thought that the additional crime was "possible" in the circumstances as he or she knew them.)*

Desirability of uniformity

6.14 A desire for legislative uniformity among the many criminal law jurisdictions in Australia is expressed both in the existence of a Model Criminal Code as well as in the terms of this reference as a value in law reform. In this context the Commission notes its recommendation for the adoption of the relevant Model Criminal Code provisions in New South Wales in its earlier report on the sentencing of corporate offenders.[219]

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215. David Lanham, Bronwyn Bartal, Robert Evans and David Wood, *Criminal Laws in Australia* (The Federation Press, 2006) 502-503.
216. Also see the 'reckless' test for complicity and common purpose: *Criminal Code* (NT) ss 43AK, 43BG.
217. Model Criminal Code s 5.4.
218. Also see 'possible consequence' for offences committed in the pursuit of a common purpose: *Criminal Code* (NT) s 8.
219. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report No 102 (2003) 30.

6.15 Over more than a decade a joint committee has progressively compiled a Model Criminal Code.[220] The Model Criminal Code represents an inspiration and template for uniformity among the nine differing criminal jurisdictions of Australia.[221] Its beginnings lie in a 1990 decision of the Standing Committee of Attorneys-Generals ("SCAG") to formally raise the issue of the development of a national model criminal code for all Australian jurisdictions.[222] In a December 1992 Report, the Criminal Law Officers Committee (since renamed the Model Criminal Law Officers Committee or "MCLOC") released Chapters 1 and 2 of the Model Criminal Code (including provisions on liability for complicity and extended common purpose).

6.16 The relevant subject matter on the law of complicity is found in Chapter 2 "General Principles of Criminal Responsibility" of the Model Criminal Code. Chapter 2 outlines the basic principles applying to every criminal offence. So far the Commonwealth,[223] the Australian Capital Territory,[224] and more recently, the Northern Territory[225] have substantially adopted the provisions of Chapter 2 of the Model Criminal Code.

6.17 The Chief Minister and Attorney-General of the Australian Capital Territory, Mr Stanhope, eloquently expressed the aspiration for a uniform criminal system in the Second Reading Speech of the *Criminal Code 2002* (ACT), as well as the advantages of having a codified system:

> The template of basic principles that it [the code] applies to every offence is simply a distillation of the law as it currently exists, but located in a convenient place, comparatively brief and in terms that most of us can understand…the code is about accessibility. It is fashioned for a modern age that puts a premium on access to information that is clear, precise and to the

220. There are now nine chapters to the Model Criminal Code based on over nine reports released by the Criminal Law Officers Committee (since renamed the Model Criminal Law Officers Committee or 'MCLOC') over more than a decade. Each report includes detailed model legislation designed to operate within the basic framework established by the Model Code's Chapter 2 dealing with the general principles of criminal responsibility. MCLOC was established by the Standing Committee of Attorneys-General or 'SOCOG'.
221. In 1994, both the Commonwealth Government and the State and Territory Premiers' Leaders Forum endorsed the Model Criminal Code project as one of national significance. See further: <http://www.ag.gov.au/www/agd/agd.nsf/Page/Model_criminal_code> at 10 January 2008.
222. On 28 June 1990.
223. *Criminal Code* (Cth) ch 2, pt 2.4, Extensions of criminal responsibility.
224. *Criminal Code* (ACT) ch 2, pt 2.4, Extensions of criminal responsibility.
225. *Criminal Code* (NT) pt IIAA, div 4, Extensions of criminal responsibility.

> point and can be relied upon for effective action. If we demand that in all other fields of human endeavour, we should demand it of the law and certainly the criminal law.
>
> The code has yet another important advantage. The object of those who first sat down to frame it was to achieve uniformity in the criminal law across the nation. Our lives are no longer confined to the sometimes arbitrary boundaries fixed in the 18th and 19th centuries…In common with the rest of the globalising world, we are a nation of travellers…This is a feature of modern Australian life that the criminal law can no longer choose to ignore. The hodgepodge of laws, rules and procedures with which we contend are an unnecessary complexity no longer suited to the way we live.[226]

6.18 The Model Criminal Code is the template for unified criminal law throughout Australia. The Model Criminal Code provisions are thus worthy of consideration in any reform of criminal law in New South Wales.

6.19 Section 11.2(3) of the Model Criminal Code provides that a person is taken to have committed an offence committed by another if he or she aids, abets, counsels or procures the commission of that offence and intended either that his or her conduct would aid, abet, counsel or procure that commission of that offence, or that his or her conduct would aid, abet, counsel or procure the commission on an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed. Recklessness is defined in the Code as involving an awareness of a substantial risk and a lack of justification in taking the risk.[227]

6.20 The majority in the recent High Court case of *Clayton v The Queen*[228] considered that if any change in this area was made by legislatures and law reform commissions:

> there could be no change undertaken to the law of extended common purpose without examining whether what was being either sought or achieved was in truth some alteration to the law of homicide depending upon distinguishing between cases in which the accused acts with an intention to kill and cases in which the accused intends to do really serious injury or is reckless as to the possibility of death or really serious injury.

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226. Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2002, 3278-3279 (Mr Stanhope, Chief Minister, Attorney-General, Minister for Health, Minister for Community Affairs and Minister for Women) <http://www.hansard.act.gov.au/hansard/2002/week11/3278.htm> at 10 January 2008.
227. Model Criminal Code s 5.4.
228. *Clayton v The Queen* (2006) 231 ALR 500, [19].

6.21 However, it is noted that the language in any legislation (whether codified or not) setting out the test for extended common purpose must be very precise as to what intention (*mens rea*) of the secondary participant(s) is culpable. Difficulties can arise with interpretation of the precise language of a code, as occurred in *R v Barlow*[229] over the exact meaning of section 8 of the Criminal Code of Queensland.[230]

6.22 However, as indicated by Justice Kirby in *R v Barlow*[231] although the language of a code must be construed according to its provisions by a court, regard may also be had to the pre-existing common law and to parallel developments in non-code jurisdictions. This interpretation is undertaken by courts with the aspiration of achieving uniformity in the basic principles of criminal law in Australia:

> Thus the first loyalty is to the code…At least in matters of basic principle, where there is ambiguity and where alternative constructions of a code appear arguable, this Court has said it will ordinarily favour the meaning which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions. It will also tend to favour the interpretation which achieves consistency as between such jurisdiction and the expression of general principle in the common law obtaining elsewhere.[232]

6.23 If the law of complicity were codified in New South Wales it could plausibly be done as part of the wider codification of criminal law in this State, such as potentially adopting the Model Criminal Code in its entirely, and not just as an ad hoc piece of legislation.

6.24 One exception to this more general uniform approach would be if some parts of the law of complicity were considered so notorious as to warrant an immediate and specific reform. For example, a change to the controversial common law test for extended common purpose, a test much criticised by Justice Kirby of the High Court of Australia.[233] However, any specific reform would presumably be accomplished by a statutory amendment to the *Crimes Act 1900* (NSW) rather than "codification" as such.

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229. *R v Barlow* (1997) 188 CLR 1.
230. Under the *Criminal Code* (Qld) s 8 could a secondary offended in an extended common purpose offence be convicted of a different offence (that is, manslaughter) to the offence of the principal offender (that is, murder)?
231. *R v Barlow* (1997) 188 CLR 1, 31-32.
232. *R v Barlow* (1997) 188 CLR 1, 32 (Kirby J).
233. See Kirby J criticisms in *Gillard v The Queen* (2003) 219 CLR 1 and *Clayton v The Queen* (2006) 231 ALR 500 as discussed above.

Issues

- Apart from extended common purpose, are there other aspects of the law of complicity that the Commission needs to address in the course of this reference?

- In particular: (a) What (if any) aspects of the law relating to accessorial liability ought the Commission to review in the course of this reference? (b) Is the law relating to the withdrawal or alleged withdrawal of a secondary participant in a criminal offence in a satisfactory state?

- Is the present "possibility" test for extended common purpose liability satisfactory? If so, why? If not, why not?

- If not, are the tests adopted in other Australian jurisdictions preferable?

- If these other tests are themselves unsatisfactory, what ought the test for extended common purpose liability be?

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