

Broader Liability for Gang Accomplices: Participating in a Criminal Gang

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I. INTRODUCTION

Mounting public concern over the “gang problem”¹ in New Zealand was addressed on 1 December 1997 when the Harassment and Criminal Associations Bill 1996 (“HCA Bill”) became law. The HCA Bill, passed as a series of Acts,² aimed to “provide better protection from harassment generally and to place restrictions on the activities of criminal associations or gangs”.³ This article concerns the most significant⁴ new offence created to fulfil those aims. Enacted as s 98A of the Crimes Act 1961 (“Crimes Act”), it is labelled “Participation in criminal gang”.

This label is perhaps misleading, as the requirements for liability extend beyond bare membership of a gang. Otherwise, the provision would offend gravely against freedom of association and the criminal law principle that conduct, rather than mere status, is required for criminalisation.⁵ A person is liable under s 98A if he or she knowingly “participates” in a “criminal gang” and “intentionally promotes” or “furthers” conduct by a gang member amounting to an offence punishable by imprisonment.⁶

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1. “Mike Moore’s Gang Crusade”, *The Evening Post*, 21 January 1997, 5; “Offensive Gangs” *The Press*, 30 November 1996, 23; Moore, M “Hit Gangs Before they Hit Us”, *The Dominion*; 27 June 1996, 8; “Busting the gangs” *The Press*, 22 September 1997, 9.
2. The original Bill’s provisions are described in Dawkins, “Criminal Law” [1997] NZ Law Review 20. The provisions of two parts of the Bill passed: the Crimes Amendment Act (No 2) 1997 and Summary Offences Amendment Act 1997 are described in Cull, “Criminal Practice: Recent Legislation” [1998] NZLJ 66.
3. Harassment and Criminal Associations Bill 1996 (No. 215—1), Explanatory Note, ii.
4. As stated by the Minister of Justice, the Hon Doug Graham, 565 NZPD 5532 (20 November 1997).
5. To create offences arising from a person’s status is usually to punish general propensity to cause harm, rather than behaviour that is truly socially dangerous. However, some status offences exist despite this. See Packer, *The Limits of the Criminal Sanction* (1969), ch 5.
6. Crimes Act 1961, s 98A(2).

Section 98A is an unprecedented development in the criminal law of New Zealand. It creates an entirely new head of liability as yet not considered by the courts. Part II of this article details the legislative background to s 98A. Part III explores the forms of conduct and accompanying mental elements which could be covered by the offence, drawing upon parallel Californian law. The section is compared to established doctrines of derivative liability in s 66 of the Crimes Act, and it is contended that s 98A shares a doctrinal basis with s 66. This basis and its form in New Zealand is examined in Part IV. The utility of this overlapping liability is questioned. In Part V the problematic scope of s 98A is examined, and the extension of boundaries of liability beyond established accessory liability is challenged.

II: LEGISLATIVE BACKGROUND

Section 98A was passed with the support of nearly all political parties,⁷ reflecting wide ranging concern over the extent of the “gang problem” in New Zealand. However, in the explanatory note to the first reading of the HCA Bill, it was conceded that no independent empirical evidence existed to attest to endemic gang activity in New Zealand.⁸ The section is modelled on § 186.22(a)⁹ of the Californian Street Terrorism Enforcement and Prevention (“STEP”) Act,¹⁰ but there was neither empirical, nor anecdotal evidence, to show that the Californian provision would be effective in New Zealand. The Minister of Justice adverted vaguely to the Californian government experiencing “some success in curbing gang activity”.¹¹ There was no explanation of how New Zealand gangs are similar to the “street” gangs in the United States. Overall, Parliamentary debates were short on close analysis of the HCA Bill, and long on the rhetoric of crime control — “cracking down” on gangs.

The extent to which the STEP provision infringes civil rights, specifically due process and freedom of association, has been a cause for concern; yet it has been consistently upheld by the courts. The supporters of the HCA Bill stressed that the proposed legislation would not interfere with civil rights. The Hon. Phil Goff stated:¹²

7 With the exception of the Alliance party.

8 Harassment and Criminal Associations Bill 1996 (No. 215—1), Explanatory Note, ii.

9 See *infra* at Part III for full statement of § 186.22(a).

10. The STEP Act (Ca, US) is one of many statutes that deal with the gang problem in Californian cities. It comprises § 186.20 et seq of the Californian State Penal Code, and was passed under urgency in 1988. In addition to creating a substantive offence of gang participation, it also provides for enhanced sentences for gang-related crimes, the forfeiture of weapons, and the designation of gang premises as nuisances. The statute was modelled on the Federal Racketeer Influenced and Corrupt Organisations (“RICO”) Act (18 USC 1961 et seq) which has also been used against street gangs.

11. *Supra* at note 4.

12. 565 NZPD 5536 (20 November 1997).

[The HCA Bill] complies with the New Zealand Bill of Rights Act [1990]. Nothing in this legislation contradicts that Act. I think it has found the balance between civil liberties and the need of society to protect itself against these gangs.

The prerequisite of conduct by another amounting to an offence, makes the new head of liability similar to the established doctrine of accessory, or derivative, liability. However, the Minister of Justice seemed to suggest that s 98A will be broader than the existing class of accessory liability. He contended that it would allow for the prosecution of gang “bosses”, and deter young people from joining gangs when they realized that they would be liable for crimes committed by other members.¹³ There appears to be confusion concerning the breadth of liability created.¹⁴

III: ESTABLISHING THE ELEMENTS OF THE NEW OFFENCE

1. The Statutory Provision

Section 98A was inserted into the Crimes Act 1961 by s 2 of the Crimes Amendment Act (No 2) 1997.¹⁵ Effective from 1 January 1998, it reads:

Participation in Criminal Gang

98A. Participation in criminal gang— (1) In this section,—
‘Criminal gang’ means any organisation, association, or group (whether formal or informal) of 3 or more persons where—

(a) At least 3 of the members have each been convicted of the commission or attempted commission of at least 1 serious offence (together) referred to in paragraphs (b) and (c) as the 3 qualifying offences; and

(b) The 3 qualifying offences were committed on separate occasions; and
(c) At least 1 of the qualifying offences was committed within the 3 years immediately preceding the alleged commission of the offence under this section:

‘Member’ includes any person—

(a) Who is a prospective or associate member of a gang; or

(b) Who acts at the direction of, or in association with, any member of a gang:

‘Serious offence’ means—

(a) An offence punishable by a period of imprisonment for a term of 10 years or more; or

(b) An offence against any of the following provisions of this Act:

13. As reported in: *The Timaru Herald*, 17 August 1996, 2; and *The Press*, 29 June 1996, 1.

14. See *infra* at Part V.

15. The Act was passed as part of the HCA Bill.

- (i) Section 116 (conspiring to defeat justice):
 - (ii) Section 117 (corrupting juries and witnesses):
 - (iii) Section 188(2) (wounding with intent):
 - (iv) Section 189(2) (injuring with intent):
 - (v) Section 191(2) (aggravated injury):
 - (vi) Section 227(ba) (theft):
 - (vii) Section 257A (money laundering):
 - (viii) Section 116 (receiving property dishonestly obtained); or
 - (c) An offence against section 6 of the Misuse of Drugs Act 1975; or
 - (d) An offence against section 54 or section 55 of the Arms Act 1983:
- (2) Every one is liable to imprisonment for a term not exceeding 3 years who—
- (a) Participates in any criminal gang knowing that it is a criminal gang; and
 - (b) Intentionally promotes or furthers any conduct by any member of that gang that amounts to an offence or offences punishable by imprisonment.
- (3) In any prosecution for an offence against subsection (2), it is not necessary for the prosecution to prove for the purposes of either paragraph (a) or paragraph (b) of that subsection that the accused has committed any other offence, or that the accused was a party within the meaning of section 66 to any particular offence committed by any other person.
- (4) In any prosecution for any offence against subsection (2), it is not necessary for the prosecution to prove for the purposes of paragraph (b) of that subsection that—
- (a) The accused knew or intended that any particular offence would be committed by any member of the criminal gang:
 - (b) The accused promoted or furthered the commission of any particular offence:
 - (c) Any member has been convicted of any offence in respect of particular conduct.
- (5) Without limiting the manner in which the prosecution can prove that the accused knew that the gang was a criminal gang, it is sufficient if the prosecution proves that a member of the Police had warned the accused on at least 2 separate occasions that the gang was a criminal gang.

The offence is stipulated by s 98A(2), and the remainder consists of definitions¹⁶ and qualifications as to how a charge under subsection (2) may be proven. The first limb, s 98A(2)(a), is considered with a discussion of the key terms “participates”, “criminal gang” and “knowledge”. The term “intentionally promotes or furthers” of the second limb, s 98A(2)(b), is then analysed. This leads to a discussion of existing accessory liability. The scope of this limb is then examined separately in Part V, having established a basis for comparison. The offence is compared to the STEP provision, § 186.22(a) of the Californian State Penal Code, of which the current form is:

16. Some of which are used in other new provisions in the Crimes Act 1961.

(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

Some key terms are absent from s 98A, such as “criminal street gang”, “pattern of criminal gang activity”, and “felonious criminal conduct. “Felonious criminal conduct” means “conduct that amounts to the commission of an offense punishable by imprisonment in state prison”,¹⁷ which is equivalent to “offence or offences punishable by imprisonment” in s 98A(2)(b). The STEP provision also has slightly different wording in that an offender “promotes, furthers or assists”, as opposed to “promotes or furthers” in s 98A(2)(b).

(a) “Participating” in a “Criminal Gang” — Section 98A(2)(a)

(i) “Criminal Gang”

The first part of the offence, s 98A(2)(a), is a threshold for liability directed to status. This means that the offence is directed at a class of persons, namely, those who participate in a criminal gang. Establishing what a “criminal gang” is under the statute is straightforward. The provision provides a formula based on the association of three persons who have been convicted for offences of a specified nature within specified time frames. It is always debatable whether such a “threshold” casts too broad or too narrow a net. A subjective reading suggests that this provision is broad in defining a gang. In contrast, the STEP provision has a more flexible definition, encompassing a group of three or more people in formal or informal association, who take part in a pattern of serious offending with a principal goal of undertaking criminal enterprise. This more complex definition of “criminal gang” has required clarification from the courts.¹⁸

Accepting that the definition “criminal gang” must be an exercise in selecting an arbitrary threshold, it is contended that the s 98A definition can be criticised only for omitting to provide that the association have crime as a purpose. However, should such an element be necessary, the precision of the definition would be lost. Determining the “purpose” of an association would involve a variety of factual considerations that are less clear cut than the simple “true or false” requirements in the current definition of “criminal gang”.

17. *People v Green* 227 Cal App 3d 692 (1991).

18. *Ibid.*

(ii) “Participates”

“Participates” is a key word in the offence that is left undefined. This is a grave flaw, as it is less clear to whom s 98A(2)(a) applies. It seems unnecessary that a person charged be a “member” of a gang. This is a defined term, and it is submitted that if Parliament intended the section to apply only to gang members, the term would have been inserted. If a person need not be a member to be liable, then the group of possible offenders is broader than that of gang members alone.

Californian law may be of assistance on this issue. The STEP provision uses the phrase “actively participates”, and the courts have given this branch of the offence a firm conduct element. The Californian Appeals Court in *People v Green*¹⁹ held that part of the *actus reus* for conviction under § 186.22(a) consists of a person devoting substantial effort to the activities of the gang. Mere association or passive membership was held to be insufficient for a criminal offence.²⁰ This interpretation conforms with the principle that culpable participation is to be construed as conduct rather than mere association, which is in the nature of status. The United States Supreme Court has consistently held criminal liability deriving from status alone to be unconstitutional.²¹

Given the core similarities between the actual offence in s 98A(2) and the Californian provision it is likely, and desirable, that New Zealand courts adopt a similar approach to the interpretation of “participates”. However, the word “actively” is omitted from s 98A(2)(a). Although this omission appears to be a conscious effort by Parliament to extend liability to participants who are not active in a gang, the statutory words are probably too ambiguous to overcome the principle that criminal statutes are to be construed strictly, and in favour of the accused.²² Moreover, this interpretation upholds the principle that offences should be directed to harmful conduct, rather than to status.²³

(iii) Knowledge of “Criminal Gang”

The prosecution must prove that a person participating in a criminal gang knew it was indeed a criminal gang. This should not be difficult if the police take up the statutory encouragement in subsection (5); two warnings that a person is associating with a group of people within the definition of “criminal gang” satisfies the prosecution’s burden. Ordinarily, this “knowledge” would require awareness of the material facts that lead the group to be a “criminal gang”,

19. Ibid.

20. Ibid, citing *Scales v United States* 367 US 203 (1961), 223.

21. *Robinson v California* 370 US 660 (1962) held that punishment for crimes not based on conduct linked to harm, of which there is social interest in prevention, violate the Eighth and Fourteenth Amendments which protect against cruel and unusual punishment. The judgment in *People v Gardeley* 927 P 2d 713 (1996) emphasizes that the STEP Act does not punish association itself.

22. See *Hutt Valley Properties v Gamages (NZ) Ltd* [1952] NZLR 296, at 300.

23. See supra at note 5.

for example, knowledge of the convictions of the group, and the relevant time frames. An accused's knowledge of past convictions is likely to be difficult to establish given the specificity of the "criminal gang" definition. Subsection (5) alleviates this problem considerably, but is a disquieting prospect.

Reading between the lines, it seems that people could be targeted by police as likely to be charged under s 98A, and have warnings issued to them. The warning itself might constitute an informal sanction or stigmatisation to prevent people from associating with gangs. It is easy to conceive of a person fearing prosecution under s 98A after receiving such a warning, regardless of whether his or her association amounts to criminal culpability under the provision. This sort of police activity arguably has a chilling effect on freedom of association. Even more alarming is the prospect that people who deal with criminal gangs, such as shopkeepers, suppliers of services, or even legal advisors, might also receive such warnings. Thus, the warning procedure could be used to prevent people from dealing with gang members on an innocent basis.

Regardless of the definition given to "participation", the ability of the police to give warnings is unaffected. Seemingly, there is no penalty for issuing false warnings, aside from the obvious consequence that an erroneous warning will not "manufacture" knowledge of facts that do not exist for the purposes of a prosecution under s 98A.

It is difficult to discern how the courts will deal with these initial definitional problems. A relatively purposive interpretation for the subsection could be argued, given the strong Parliamentary intention to suppress gang activities evinced when the HCA Bill was debated in the House. This is not to say that an implicit purpose could be read into a criminal statute. The courts would be reluctant to interpret the section in a way that seriously impinges upon freedom of association. As noted, the character of the "warning" procedure is dubious and may be susceptible to abuse by the police.

(b) Intentionally Promotes or Furthers — Section 98A(2)(b)

The most important part of this new head of liability rests on the interpretation of s 98A(2)(b). This subsection provides a direct link between the prohibition and the harm, which is the core of any meaningful criminal sanction. The key theoretical basis for criminal liability is conduct, committed with a culpable state of mind, which is linked to some social evil sufficiently dire to justify criminalisation.²⁴ The harm in this provision is found in the words: "any conduct by any member of that gang that amounts to an offence or offences punishable by imprisonment." It is therefore offending by gang members that leads to the social harm to be prevented. The conduct proscribed in relation to this harm is where a person "[i]ntentionally promotes or furthers" the harm.

²⁴ See for example, Gillies, *The Law of Criminal Complicity* (Law Book Co: Sydney, 1980), Ch 1. and *supra* at note 5.

Such liability is known as “derivative” or “secondary” liability. Essentially, it is conduct that amounts to help or encouragement for the person who perpetrates the offence.²⁵ People convicted in this way are accessories, and are liable for the same offence as the perpetrator. The justification for derivative liability, and the existing accessory liability in New Zealand is examined in Part IV. This existing law of criminal complicity is an important comparative foundation for assessing the scope of s 98A, which is undertaken fully in Part V.

IV: DERIVATIVE LIABILITY

A person whose physical conduct, or the results of whose conduct, constitutes a crime with the appropriate *mens rea* is axiomatically criminally liable in the absence of some positive defence.²⁶ Such persons are labelled “principals” at common law. A person who has encouraged or helped a principal to perform a crime can be criminally liable for the same offence as a secondary offender.²⁷ The terminology of derivative liability is complex through historical accretion. The terms used in this article are “perpetrator”, for a person who commits the *actus reus* of a crime, and “accessory” for a party inculpated through derivative liability.²⁸

In simple terms, the elements of accessory liability are the commission of an offence by the perpetrator, help or encouragement for that offence by the accessory, and the accessory’s knowledge of the material facts. The precise limits of the sort of intention necessary, and how much an accessory must do to actually help or encourage a perpetrator is contentious. There is dispute as to whether someone who assists in the commission of an offence must actually intend that the offence be committed, or merely know the material facts and be indifferent to the criminal outcome.²⁹ There is a broad range of conduct that can constitute participation. Depending on the circumstances, there may be different elements of intention, knowledge and causation necessary to establish accessory liability.³⁰

25. Derivative liability should not be confused with vicarious liability, which arises in civil law where one person’s act or omission attributes liability to another, usually between an employer and an employee. Vicarious liability has very limited application in criminal law, usually to regulatory or summary offences, and has no proper *mens rea* requirement. Gillies provides a discussion of the distinctions between derivative liability and other cognate criminal law doctrines: *ibid*, 6.

26. Crimes Act 1961, s 66(1)(a).

27. Crimes Act 1961, ss 66(1)(b) — (d), and 66(2).

28. Glanville Williams laments the confusing terminology of complicity and condones the use of these terms in Williams, “Complicity Purpose and the Draft Code—1” [1990] *Crim L R* 4, 5.

29. See Sullivan, “Intent, Purpose and Complicity” [1988] *Crim LR* 641, and Dennis, “Intention and Complicity: A Reply” [1988] *Crim LR* 649.

30. See Smith, J C, “Aid, Abet, Counsel, or Procure” in Glazebrook (ed), *Reshaping the Criminal Law* (1978) 120.

Significantly, it is the actual offending of the perpetrator that justifies criminal sanction, and the accessory is punished for his or her part in that offence. There is no derivative liability where the perpetrator does not commit an offence. The requirement that the perpetrator be liable for the offence is not absolute, but the presence of the *actus reus* is essential. There may be cases where a perpetrator has some defence associated with capacity or *mens rea*, and an accessory will remain liable.

The basis of accessorial liability should be distinguished from inchoate offences such as conspiracy and incitement which are offences in themselves. These offences are complete once an agreement to undertake a concerted criminal purpose is formed, or a person has incited another to commit a prohibited act. It is irrelevant to such inchoate offences that the conspirators' plan was not carried out, or the person incited was indifferent to the urgings of the inciter. Another important distinction is in the law of attempts. Although a person may be an accessory to an attempt to commit an offence,³¹ just as it is theoretically possible to be an accessory to conspiracy or incitement, it is not possible to attempt to be an accessory. In other words, there is no basis for derivative liability where a person fails to satisfy the elements of participation in an offence, even if he or she attempts to do so.

The United Kingdom Law Commission has suggested that complicity be reformed to move towards an inchoate basis of liability.³² This would allow for distinct liabilities for facilitation and encouragement of crime where there is no actual perpetrator or no offence ultimately committed. The scope and conceptual basis of liability would change drastically if this occurred. Inchoate offences prohibit conduct that has a risk of social harm, such as the risk that a crime will occur if a conspiracy is made to commit it. This is inconsistent with the current basis of derivative liability, founded upon a person's part in an actual offence, as distinct from the creation of a risk of offending.

The causation element of accessory liability is also problematic. Where the assistance or encouragement contributes only minimally to the commission of an offence, an objection to liability can be raised on the basis of remoteness of social danger. On the other hand, it has been argued that in some cases, the causation of the offence can be so strongly linked to the acts of an accessory that the accessory should be treated as a direct perpetrator.³³ Arguably, it is critical to derivative liability that the accessory's conduct causally contribute to the offence,³⁴ otherwise the concept of an "accessory" is undermined.

A further feature of accessory liability is the doctrine of withdrawal. A defence can be raised by a secondary party where they have negated their

31. *R v Baker* (1909) 28 NZLR 536 (CA).

32. Consultation Paper No 131, *Assisting and Encouraging Crime* (1993) as discussed in Smith, "The Law Commission Consultation Paper on Complicity: (1) A Blueprint for Rationalism" [1994] Crim LR 239.

33. Lanham, "Accomplices, Principals and Causation" (1980) 12 Melb UL Rev 490.

34. Smith, "Complicity and Causation" [1986] Crim LR 663.

participation, whether by encouragement or assistance, in the offence. It is a logical consequence of the derivative nature of the liability that where the link to the offence is severed, no liability can exist.

1. Accessory Liability Under s 66 of the Crimes Act 1961

Section 66 of the Crimes Act 1961 sets out the New Zealand formulation of derivative liability:

66. Parties to offences— (1) Every one is a party to and guilty of an offence who—

- (a) Actually commits the offence; or
- (b) Does or omits an act for the purpose of aiding any person to commit the offence; or
- (c) Abets any person in the commission of the offence; or
- (d) Incites, counsels, or procures any person to commit the offence.

(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

Under s 66(1), a person who actually commits an offence, or who aids, abets, incites, counsels or procures the commission of an offence is a party to, and guilty of, that offence. Section 66(2) states that any person involved in a common unlawful purpose is a party to offences committed by others involved in that purpose, where it was known that the offences were probable consequences of prosecuting that purpose.³⁵

The various terms in the provision, in addition to their individual meanings, import a considerable body of common law that defines the scope of conduct and mental elements that lead to culpability.³⁶ The general proposition is that conduct can be divided into assistance and encouragement. These two branches of conduct are examined below.

(a) Assistance

Although the statutory terms require that conduct be “for the purpose of aiding”, the conduct must also be of actual assistance.³⁷ “Purpose” refers to the

35. Robertson (ed), *Adams on Criminal Law* (Brooker’s: Wellington, 1997), para CA66.01 et seq.

36. *Ibid*, at para CA66.18.

37. There is no requirement that the assistance cause the offence.

state of mind of the accused.³⁸ The extent of what will constitute “actual assistance” is uncertain. In *Larkins v Police*,³⁹ L kept watch whilst the perpetrators burgled a bottle store. The perpetrators were unaware of his assistance. It was accepted that had the police arrived, L would have alerted the perpetrators, but the police never came. The element of aid provided by L to the perpetrators appeared on the facts to be conditional rather than actual, yet Eichelbaum J found that this constituted the requisite actual aid. Dawkins has criticized this decision as effectively inculcating an unsuccessful attempt to aid.⁴⁰ This case highlights the difficulty of defining to what extent an accessory must be involved in the perpetrator’s offence to be culpable.

Mere presence at the scene may give rise to accessory liability. For example, where a person has a duty or right of control over another person which is not exercised at an appropriate point to prevent the commission of a crime, he or she may be liable as an accessory for aiding by omission.⁴¹ This sort of case overlaps with encouragement. In *R v Witika*⁴² for instance, the Court of Appeal held that an accused could intend to encourage the commission of an offence through their inaction.⁴³

The common unlawful purpose referred to in s 66(2) is also in the nature of assistance. Liability arises if the offence committed was known to be a probable consequence of that common purpose. However, an offence arising through an independent initiative of one of the parties will not be imputed to accessories under this section.⁴⁴ There are some cases where, after the completion of the purpose, an accessory will be liable for subsequent acts.⁴⁵

(b) Encouragement

Encouragement is encompassed by abetting, inciting, counselling and to some extent, procuring. It may be in the form of words or conduct, and includes presence at the scene. Omitting to act, as described above, may also amount to encouragement. In *R v Schreik*,⁴⁶ the Court of Appeal considered what was necessary for culpability arising from presence at the scene of an offence. It was confirmed that there was no requirement of a causal connection between the offending and the encouragement, but some connection between the perpetrator

38. *Larkins v Police* [1987] 2 NZLR 282 (HC).

39. *Ibid.*

40. Dawkins, “The unknown look-out and liability for “aiding” an offence” [1989] NZLJ 30.

41. McGechan J suggests in *Cooper v MOT* [1991] 2 NZLR 693 (HC) that knowingly not exercising an existing power to prevent the commission of an offence could be “help”.

42. (1991) 7 CRNZ 621 (CA).

43. The recent case of *R v Bough* (CA 507/96, 27 February 1997, Thomas, Tompkins and Heron JJ), has cast doubt on this requirement of a legal duty to act. See *supra* at note 35, at para CA66.17.

44. *R v Hubbard* (1990) 6 CRNZ 80 (HC).

45. *Supra* at note 35, at para CA66.24, citing *R v Tompkins* [1985] 2 NZLR 253 (CA).

46. [1997] 2 NZLR 139 (CA).

and the accessory was regarded as necessary.⁴⁷ In other words, the perpetrator must be aware that he or she is being encouraged. Communication of the encouragement to the perpetrator supports the existence of actual encouragement. However, the Court did not hold this to be an essential requirement.

Procuring is a form of encouragement. Similar to liability arising from actual causation of an offence, there must be a causal link so that the offence was “in consequence” of the procurement. Arguably, this could effectively render the accessory the perpetrator.⁴⁸ An offence may be procured even if the perpetrator would have committed the offence in the absence of the procuring conduct.⁴⁹ The facilitation of an offence by procuring overlaps with concepts of assistance.⁵⁰ A final point in relation to these modes of conduct is that conduct amounting to culpable assistance or encouragement must occur *before* or *during* the commission of the offence.⁵¹

(c) *Mental Elements*

The *mens rea* for accessory liability can be described as an intention to encourage or assist the perpetrator to commit the offence.⁵² Knowledge of the material facts of the perpetrator’s offence is a necessary element. A particular knowledge of the specifics of the offence to be committed is not required, but more than mere knowledge of “something illegal” is necessary. The Court of Appeal in *R v Kimura*⁵³ adopted the English precedents of *R v Bainbridge*⁵⁴ and *DPP for Northern Ireland v Maxwell*,⁵⁵ stating that an accessory must know either the type of offence intended and committed or know of a variety of possible offences to be committed, one of which is actually carried out. The element of material knowledge extends to the accessory’s knowledge of the *mens rea* required of the perpetrator.⁵⁶

It is not necessary that an accessory desire the outcome that constitutes the offence. “Purpose” in s 66(1)(b) is satisfied by oblique intention, that is, any consequences that are foreseen with sufficient certainty. In *R v Richards*,⁵⁷ a pharmacist who sold codeine used for the manufacture of heroin was held to be guilty as an accessory, regardless of whether or not he wanted heroin to be

47 Ibid, 146-147 per Eichelbaum CJ.

48 Supra at note 33.

49 Supra at note 35, at para CA66.18(3).

50 This type of procuring would not require the knowledge of the perpetrator, whereas procuring more properly classed as “encouragement by persuasion” must be communicated to the perpetrator.

51 *R v Bleuth* [1937] NZLR 282 (CA).

52 Supra at note 35, at para CA66.20.

53 (1992) 9 CRNZ 115, at 117.

54 [1960] 1 QB 129 (CA).

55 [1978] 1 WLR 1350 (HL).

56 *R v Hamilton* [1985] 2 NZLR 245 (CA).

57 (1992) 9 CRNZ 355 (HC).

manufactured. The material knowledge of the purpose for which the codeine was bought gave rise to sufficient certainty that the accused's conduct would aid the offence. This position is consistent with the earlier authorities of *National Coal Board v Gamble*⁵⁸ and *Lynch v DPP for Northern Ireland*,⁵⁹ holding that encouragement or assistance need only be directed towards the conduct giving rise to the offence, independently of whether the results are actually desired.

Difficult cases arise where there is an absence of purpose. Debate exists regarding the extent to which an accessory must intend the outcome constituting the offence.⁶⁰ There are authorities to the effect that where a person believes he or she is legally obliged to commit an act, usually aiding, a defence is available.⁶¹

Orchard has argued that liability under s 66(2) could be mostly subsumed by the general formulation of secondary liability in s 66(1).⁶² This must be contrasted with the Court's view in *R v Curtis*⁶³ that the liability is complementary and concerns a different situation to s 66(1). The distinction appears to be that s 66(2) does not require any actual help or encouragement, or intention to do so, provided there is a common intention to carry out some other illegal purpose to which the offence is a known probable consequence. Knowledge is a subjective requirement. It is arguable that knowledge of probable consequences could be sufficient in some cases to constitute *mens rea* for accessory liability under s 66(1). A probable consequence of an illegal purpose is also likely to be sufficiently linked to an accessory's participation in the main purpose. In New Zealand, the offence charged can be the actual common purpose.⁶⁴ Probable consequences include any that are known by the parties as "substantial or real" risks. Risks dismissed or regarded as possible but remote by the accused will not give rise to liability. This test appears equivalent to the common law position on cases of "joint enterprise", where it is unclear whether the basis of liability is that a risk is simply foreseen; or that the range of risks foreseen is implicitly agreed upon or authorised.⁶⁵ The authorisation conception is closer to the traditional formulation of accessory liability, as authorisation may constitute encouragement. However, the implicit authorisation formulation has been abandoned, and a foreseeable substantial risk will now give rise to

58. [1959] 1 QB 11 (CA).

59. [1975] AC 653 (HL).

60. *Supra* at note 29.

61. *R v Lomas* (1913) 9 Cr App R 220 cited *supra* at note 35, at para CA66.19; *NCB v Gamble* *supra* at note 58. Further issues arise where a person acts in the ordinary course of business.

62. Orchard, "Parties to an offence: The function of s 66(2) of the Crimes Act" [1988] NZLJ 151.

63. [1988] 1 NZLR 734 (CA).

64. *R v Currie* [1969] NZLR 193 (CA).

65. *Chan Wing-Siu v R* [1985] AC 168 (PC).

liability.⁶⁶

For s 66(2) to operate, a common intention must also be established. This need not be by explicit prior agreement, and may be inferred from concerted conduct. The common intention must be directed to assisting the prosecution of the purpose, but need not provide actual assistance.⁶⁷

(d) *The Doctrine of Withdrawal*

A person can avoid derivative liability by withdrawing his or her participation before the commission of the offence.⁶⁸ The exculpatory effect of establishing withdrawal is well recognised, but its basis and rationale are uncertain. Lanham discusses how the elements necessary to the participation will affect which basis withdrawal ought to take. A negation of the *actus reus* by an accessory is an effective withdrawal, but other lesser acts could also constitute a withdrawal of encouragement or assistance.⁶⁹

Where a joint criminal enterprise is involved, where possible, there must be communication of the intention to withdraw and abandon the common purpose.⁷⁰ A mere alteration of intention is insufficient. Notifying the police or the victim has been held to be sufficient to constitute withdrawal.⁷¹ In cases of assistance or encouragement it appears that “timely and effective withdrawal”⁷² has an exculpatory effect. Withdrawal is also effective when the accused takes all reasonable steps to undo the effect of their participation before the commission of the offence. The sufficiency of such conduct depends on the acts of participation that have occurred. Procuring seems to be the most difficult conduct to reverse as it is causally connected to the offence.

(e) *Summary of the Elements of Derivative Liability*

In summary, existing derivative liability provisions have sufficient scope to cover a huge range of participants in crime. The frontiers of derivative liability, however, are uncertain and subject to various qualifications. The case law can be criticised for often casting the net of liability too broadly, and stretching the

66. *Hui Chi-ming v R* [1992] AC 34 (PC); *R v Powell* [1996] 1 Cr App R 14; supra at note 35, at para CA66.25. The foreseen consequences basis is supported in the context of placing derivative liability on a more inchoate basis. See Sullivan, “The Law Commission Consultation Paper on Complicity: (2) Fault Elements and Joint Enterprise” [1994] Crim L R 252, 260-263.

67. Supra at note 35, at para CA66.23.

68. Supra at note 35, at para CA66.15.

69. Lanham, “Accomplices and Withdrawal” (1981) 97 LQR 575.

70. *R v Whitehouse* [1941] 1 DLR 683.

71. *R v Becerra* (1976) 62 Cr App R 212 (CA); *R v Jensen* [1980] VR 194 (SC).

72. *R v Becerra*, *ibid.*

underlying doctrine of derivative liability in order to secure convictions.⁷³ Nevertheless, the principles underpinning derivative liability should be adhered to strictly, as this area of criminal law imposes liability for harms that are alienated and remote from the accused's conduct. The common law and statutory provisions have developed through reasoning based on the derivation of harm through the link between a culpable accessory and a substantive offence causing social harm. The strength of this link is a crucial part of determining the bounds of liability. Section 98A uses a similar link to connect an accessory's conduct with social harm, but creates a substantive offence, as opposed to a derivative offence. The scope of liability under s 98A is examined below and compared with the established doctrine of derivative liability.

V: SCOPE OF LIABILITY UNDER s 98A

Interpreting the scope of liability under s 98A poses an unenviable task for the courts. The first limb of the offence, s 98A(2)(a), requires the development of a consistent definition for participation, although the remaining elements are clear from the statutory language. The second limb, s 98A(2)(b), however, involves an important interpretative dilemma in respect of the words "promotes or furthers". The meaning given to this phrase will determine whether liability for gang participation extends beyond the existing limits of accessory liability. The simple answer from the California Appeals Court in interpreting the STEP provision is that a person who participates in a criminal gang must also be an accessory, as discussed below.⁷⁴ This interpretative dilemma is further analysed in light of the additional provisions in s 98A. It is argued that it is unclear whether these will generate a broader class of participant liability, although this may have been the intention of Parliament.

1. The STEP Treatment of "furthers or promotes"

The Californian State Penal Code § 186.22(a) penalises any person who "promotes, furthers, or assists" the commission of crime by members of a gang. The provision was constitutionally challenged in *People v Green*.⁷⁵ Delivering the opinion of the Court, Stein J clarified the phrase "promotes, furthers, or

73. *Supra* at note 40.

74. The commentary on the Bill itself from the Justice and Law Reform Committee states: "The aim of the provision is to criminalise gang association, where the gang is involved in serious criminal offending and where the defendant is aware of that offending and intends to further the criminal conduct of the gang", Harassment and Criminal Associations Bill 1996 (215—2), Commentary, vii. This statement appears to omit any *actus reus* requirement beyond mere association.

75. *Supra* at note 17.

assists”:⁷⁶

Penal Code section 186.22 imposes no criminal liability unless a defendant “willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” Similar phrases are not uncommon in the criminal law. CALJIC No. 3.01, restating common law principles, defines an aider and abettor of a crime as a person who “with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.” The similarity of the relevant phrase in Penal Code section 186.22 with that employed in determining if a person is an aider and abettor means, we think, that the phrases should be viewed as synonymous.

The decision renders the phrase identical to the Californian formulation of accessory liability.⁷⁷ A person is liable where he or she knows the perpetrator’s criminal purpose and gives aid or encouragement intending to facilitate the commission of that purpose.⁷⁸ The core elements of accessory liability described in the previous section are equivalent to this formulation.

The court went on to clarify that the conduct promoted, furthered, or assisted must be conduct amounting to a felony punishable by imprisonment in a state prison. The Court concluded:⁷⁹

While by our construction the statute in essence imposes liability for aiding and abetting the commission of a felony, and thus Penal Code section 186.22 becomes somewhat superfluous, it does not lack certainty.

Thus, Californian courts have explicitly stated that the “furthering, promoting or assisting” element of § 186.22 is satisfied by the same requirements as those for accessory liability for a felony.

2. Section 98A(2)(b) Revisited

Using the Californian case law as a starting point, the substance of s 98A(2)(b) appears to be the same as the corresponding part of the STEP provision, save for the omission of the word “assists”. One would expect that from this omission the scope of liability would shrink. Referring to *People v Green*⁸⁰ and applying the ordinary meanings of “further” and “promote”, a person

76 Supra at note 17, at 22.

77. It is apparent that “aider and abettor” must be read as encompassing accessory liability generally rather than in the strict meaning of “abettor” in the common law that requires the accessory be present and encouraging the perpetrator during the commission of the offence.

78. *People v Beeman* 35 Cal 3d 547 (1984) provides the judicial development of the Californian accessory provision.

79. Supra at note 17, at 24-25.

80. Supra at note 17.

who intentionally promotes or furthers conduct by a gang member amounting to an offence would seem necessarily also to be a party to that offence under s 66.

3. Qualifications to s 98A(2); ss 98A(3) and 98A(4)

Subsections 98A(3) and 98A(4) of s 98A qualify the elements to be proven in a charge under s 98A(2). They provide that certain things need not be proven for a prosecution under s 98A(2), thus removing boundaries to liability. However, as no broader limits to liability are defined in place of the boundaries removed, these provisions have no certain effect in extending the scope of s 98A(2) liability beyond that in s 66.

(a) Subsection 98A(3)

Subsection 98A(3) states:

(3) In any prosecution for an offence against subsection (2), it is not necessary for the prosecution to prove for the purposes of either paragraph (a) or paragraph (b) of that subsection that the accused has committed any other offence, or that the accused was a party within the meaning of section 66 to any particular offence committed by any other person.

This provision echoes the comments of the Minister of Justice⁸¹ that gang participants could be for crimes committed by other gang members, regardless of whether they are actually parties to the offences under established accessory law. The confusion begins here: how can s 98A(3) deny that liability under s 66 is necessary, when a construction of s 98A(2)(b), using the relevant law determines that accessory liability is effectively the requirement? Subsection 98A(3) suggests that the liability encompassed by “promotes or furthers” should be wider than existing accessory liability. Yet it does not do so unequivocally. Instead, it provides that the set of limits to s 66 liability need not apply, without defining broader limits to replace them. To effectively create more extensive liability, Parliament would need to explicitly and positively identify how far the boundaries of liability for s 98A(2) should be shifted from those of s 66. Subsection 98A(3) alone is not a sufficient statutory basis upon which to construct a clearly delimited interpretation of the conduct prohibited in s 98A(2)(b).

Subsection 98A(3) also applies to the proof of s 98A(2)(a), where the relevant term is “participation”. The difficulty with this term is discussed above. The judicial construction of the equivalent STEP Act provision does not require that accessory liability must exist for “active participation” to be satisfied.⁸² The

81. *Supra* at note 13.

82. *People v Green*, *supra* at note 17.

inclusion of s 98A(2)(a) is presumably a measure to prevent argument that “participation” means that the accused must be a criminally liable participant in crime, that is, an accessory. Given the direction taken in California, s 98A(3) probably adds no further meaning into s 98A(2)(a).

(b) Subsection 98A(4)

Subsection 98A(4) states:

(4) In any prosecution for any offence against subsection (2), it is not necessary for the prosecution to prove for the purposes of paragraph (b) of that subsection that—

(a) The accused knew or intended that any particular offence would be committed by any member of the criminal gang:

(b) The accused promoted or furthered the commission of any particular offence:

(c) Any member has been convicted of any offence in respect of particular conduct.

This subsection has the potential to generalise the scope of culpability under s 98A(2) by removing several prosecution burdens. It is probable that it was enacted to manufacture the extended area of liability beyond that of accessories implicit in s 98A(3).

(i) Subsection 98A(4)(c)

Section 98A(4)(c) makes no departure from the existing law of derivative liability, as it is unnecessary for a perpetrator be successfully prosecuted for the actual commission of an offence for liability under s 66.⁸³

(ii) Subsection 98A (4)(a)

Interpreting s 98A(4)(a) is a difficult exercise. While the accused must intentionally promote or further conduct amounting to an offence under s 98A(2)(b), s 98A(4)(a) purports to adjust this intention so that it need not be specific to any particular offence. These statements are difficult to reconcile. Clearly there must be at least one offence committed by a gang member. The promotion or furtherance of this offence by the accessory must be intentional. The doctrine of strict construction of criminal statutes suggests that to be liable under s 98A, a person must intend to promote, at a minimum, criminal conduct generally. This interpretation does not make *mens rea* reliant on any particular offence, but preserves the general element of intention to further or promote

83. See discussion *supra* at Part IV.

crime. This is a very weak *mens rea* element for an indictable offence, especially given the lack of a positive definition in the statute of the necessary state of mind. The existing accessory liability under s 66 is not made out where there is merely knowledge of “something illegal”.⁸⁴

An illustration of this point is a gang associate providing transport for a gang member to a locale where that gang member later commits a robbery.⁸⁵ Culpability deriving from the robbery should require at the least some criminal intention or knowledge on the part of the associate. If a completely unwitting associate were liable in such a situation, then the offence would be one of mere association. The conduct alone would not, of itself, cause harm, and the risk of harm flowing from the facilitation would not even be apparent to the actor. This violates the principle that only the most socially dangerous conduct ought to be criminalised.

Under this construction the offence becomes analogous to strict or absolute liability for the acts of another. This is a species of liability similar to vicarious liability. The statements of the Minister of Justice to the effect that gang associates would be made liable for the crimes of the gang⁸⁶ could be construed as references to vicarious liability for gang associates. It is contended that courts would not be receptive to interpreting the provision in a way that offends so broadly against underlying rationales of criminal culpability.

Contrasted with the established scope of accessory liability, s 98A(4)(a) has the potential to broaden the scope of liability. Section 66(2) makes specific provision for offences committed in the course of carrying out a joint criminal enterprise within contemplation of accomplices. This type of liability has a weaker *mens rea* that does not require intention or knowledge for a particular offence, and is most probably covered by the general formulation of derivative liability in s 66(1).⁸⁷

In the case of a joint gang criminal enterprise, liability under the existing accessory provisions covers all offences that are known probable consequences of that enterprise. Conduct outside these probable, or contemplated, consequences might be sufficient under s 98A. In *DPP for Northern Ireland v Maxwell*,⁸⁸ a driver was convicted for a bombing perpetrated by someone to whom M had provided transport. M’s knowledge of the type of criminal conduct to be engaged in was deemed to be sufficient for derivative liability under the equivalent of s 66(1). It is possible that s 98A(2)(b) requires the same *mens rea*, as it accords with the provision in s 98A(4)(b) that intention to further or promote a particular offence need not be proven. This interpretation would place the boundary case for *mens rea* in s 98A(2)(b) alongside that of accessory culpability.

In addition, the general intention and knowledge levels that exist for

84. See *supra* at Part IV.

85. Assuming the sole issue is whether s 98A(2)(b) is satisfied.

86. *Supra* at note 13.

87. *Supra* at note 62.

88. *Supra* at note 55.

accessory liability under the common law could fit within the statutory terms of s 98A. Knowledge of the type of offence or range of offences intended by a perpetrator will be sufficient for accessory liability. These mental requirements do not extend to the knowledge or intention that a *particular* offence be committed. Thus, s 98A(4)(a) is open to construction, such that the scope of s 98A(2) is not extended beyond the existing *mens rea* requirements for accessory liability.

The precise nature of the *mens rea* resulting from a less strict interpretation is too vaguely defined by the statute. There is no positive direction as to what elements are necessary. The bare provision that a “particular” offence need not be intentionally promoted can be more easily interpreted as imputing no real modification to the established *mens rea* involved in accessory liability.

(iii) *Subsection 98A(4)(b)*

Section 98A(4)(b) provides that the prosecution need not prove that the accused promoted or furthered the commission of any particular offence. However, s 98A(2)(b) states that the accused must promote or further conduct amounting to an offence. In determining how s 98A(4)(b) modifies the scope of s 98A(2)(b), the inquiry is: what will be promotion or furtherance of conduct amounting to an offence that is not also promotion or furtherance of any *particular* offence? On its face, s 98A(2)(b) seems directed to conduct or *actus reus*, whereas s 98A(4)(a) is directed to *mens rea*.

A distinction might be made between the words “particular offence” and “conduct amounting to an offence”. It could be argued that the promotion and furtherance need not be so proximate to the actual offence as to be furthering that particular offence. This may mean that a very weak *actus reus* element, one that simply created some link between the gang participant and the perpetrator of an offence, might support a conviction under s 98A(2). The potential liability in this case seems unacceptably broad. Any assistance or encouragement from a gang participant to a gang member, even perhaps innocently directed, could lead to criminal liability when that gang member at some later point commits an offence.

It may be that these provisions cannot be sensibly reconciled to coherently define a class of conduct. This could mean that s 98A(4)(b) simply removes the prosecution’s onus to prove any conduct in particular by the accused to satisfy s 98A(2)(b). If this active conduct element of the new offence is rendered nugatory, the offence could effectively become vicarious liability for gang participants for any imprisonable crimes of gang members. The only thing to be proven under s 98A(2)(b) becomes the commission of an imprisonable offence by a gang member.

Subsection 98A(4)(b) is likely to create substantial difficulty in its practical application. The criminal conduct that must be proven to satisfy s 98A(2)(b) is

rendered unclear by s 98A(4)(b). Interpretations that spread a very wide scope for the crime do not co-exist well with established conceptions of derivative liability. Looser requirements would essentially criminalise the membership element in s 98A(2)(a), which contradicts the principle that conduct rather than status be subject to punishment.⁸⁹

4. A New Substantive Liability

Three issues arise from the fact that s 98A(2) contains a substantive offence. The first relates to penalties. In cases of derivative liability, the accessory is made liable for the same offence as the perpetrator. It follows that an accessory is exposed to the same sanctions as the perpetrator, in contrast to s 98A where the same penalty⁹⁰ will apply independently of the actual offence that the accused promotes or furthers. Thus, different sentencing possibilities exist under s 66 and s 98A. A lesser crime by a gang member could lead to greater jeopardy for a person convicted as a participant. By contrast, the doctrine of derivative liability has the advantage of permitting penalties commensurate with the offending involving a secondary party. This flexibility of application is lost in the substantive head of liability created in s 98A.

The second issue is the status of s 98A with respect to the law of criminal attempts. It is theoretically possible that a charge could be brought for *attempted* gang participation under the new provision. Under established accessory law, there can be no criminal attempt to participate in crime, as s 66 merely imposes derivative liability by describing those persons who can be party to offences. Section 98A(2), by contrast, is a substantive offence and may fit within the ambit of s 72,⁹¹ which defines attempts to “commit an offence”. As previously noted, attempted participation is tenuously linked to the associated social danger. This “remoteness of social danger” can undermine the justification for criminal liability to apply. Dawkins specifically regards attempts to aid as too remote to warrant a criminal sanction.⁹²

Thirdly, the existence of the withdrawal defence to a charge under s 98A is questionable. The s 66 formulation is complemented by the common law, and thus the existing exculpatory factors can be easily incorporated. As discussed above, there are various forms that the defence may take. On the words of s 98A it appears that an offence will be complete on participation in a criminal gang, coupled with at least one instance of promotion or furtherance of an offence by a gang member. It is therefore probable that a defence is available where there is withdrawal by complete negation of the conduct promoting or furthering an offence. Section 20 of the Crimes Act 1961 preserves common law defences of

89 See *supra* at note 5.

90. Crimes Act 1961, s 98A(2): imprisonment for a term not exceeding three years.

91 Crimes Act 1961.

92. *Supra* at note 40.

justification and excuse, except where they are inconsistent with the Act or another enactment. There is scope for the preservation of withdrawal as an excuse in this section given the similar bases for liability. However, the existence of participation as an offence alone may be an impediment. Under s 66, the modes of participation create derivative liability for the offence perpetrated, participation is negated by a legally recognised withdrawal, and thus the accused is not liable. As the offence in s 98A may be complete upon the act of furtherance or promotion (and the onus of proof of this element may be nugatory), withdrawal may only exculpate the accused for liability under s 66, leaving the substantive s 98A liability to rest on the completed “furtherance” or “promotion”.

5. Broader Participant Liability?

The limits and boundaries of liability are recurrent issues in the rationale of derivative liability. This is due to the general policy in liberal democracies that the criminal law must be of minimal content, reserved only for the sanction of conduct of extreme social danger. These existing boundaries are not free from uncertainty, but have been subject to extensive development in the common law.

The courts have created constraints by requiring an *actus reus* that contributes to the commission of an offence and a *mens rea* that is more than a general knowledge of some criminal design. The existing liability for participation in the crimes of others is already extensive: there is no strict necessity for “but for” causation or a specific knowledge of the precise crime to be committed.

As drafted, the new substantive offence of participation in a criminal gang suffers from severe contradictions in interpretation. The statute from which it is adopted has been held to be subject to the same limits as accessory liability.⁹³ The additional provisions in ss 98A(3) and 98A(4) do not precisely state new, broader boundaries for liability that go beyond those of accessory liability. They simply make statements regarding the onus of the prosecution to prove the elements of the offence. As discussed above, it is doubtful whether this has any effect in establishing the broader bounds for liability claimed to exist by the Minister of Justice.⁹⁴

The broader criminal scope spoken of is analogous to vicarious liability for gang participants. This is certainly not clear from the provision enacted. If such a substantive crime existed, it would create a grave sanction on conduct not properly the subject of criminal law. To criminalise conduct by gang participants not already within the scope of derivative liability is to make crimes of conduct that the courts have, so far, not regarded as sufficiently connected to substantive offences to justify penalty. In a properly minimalist system of criminal law, conduct that is too remote from social harm should not be

93. *People v Green*, supra at note 17 and see accompanying text.

94. Supra at note 13.

criminalised.

The desired effects of the new offence are vague: to “crack down” on gangs, to make “bosses” subject to prosecution, and to prevent recruiting through deterrence. No explanation has been offered as to why a broader basis for participant liability was necessary. If the success of the Californian statute is relied on, then why was a broader liability than that in the STEP Act sought? A lack of enforcement of existing law seems a more sensible explanation of any gang crime problem in New Zealand. If someone is truly a “boss” then derivative liability is ideally suited to attach liability to such a person for the actual offence that was commanded. It is submitted that s 98A(2), as a substantive offence limited by its own penalty provision, is not suitable for punishing a “boss” for ordering a murder.

The deterrent effect of a specific offence for gang members could have some success in specifically stigmatising gang membership. However, it is a strange suggestion that participating in criminal activity should require any further stigmatisation than that already given to criminal conduct in general. Thus, s 98A(2) is potentially superfluous.

VI: CONCLUSION

A careful and minimalist approach should be employed in creating new offences. This article has challenged the utility of s 98A principally on the grounds that the criminal law already encompasses adequate sanctions for the harm to which the section is directed. Persons who participate in the offending of others, as gang members undoubtedly do, have long been subject to prosecution under the rubric of accessory liability, expressed in New Zealand in s 66 of the Crimes Act 1961. The possible extension to existing liability in s 98A is not a justifiable employment of the criminal law. It is far from clear in the provision that the net of liability is extended beyond the bounds of accessory liability for participation in a criminal gang. There has been vague rhetoric to the effect that the offence will create what appears to be a vicarious liability for gang participants, but this is not clearly supported by the law enacted. The matter of construction is uncertain as the section is fraught with almost irreconcilable statements. It is therefore likely that any litigation of the section will result in confusion. The examination undertaken in this article suggests that the principles of interpretation and general criminal law direct an approach to s 98A that constrains liability closely to the existing boundaries of derivative liability. In addition, there is potential for abuse of the warning procedure, in the absence of bringing charges, which may have the undesirable effect of condoning police intimidation of people who deal innocently with gangs.

Most of the difficulties with s 98A arise from the fact that the basis of the offence in the Californian STEP Act, upon which s 98A(2) was modelled, is

confined to a subset of established accessory liability. The provisions that appear to attempt to extend liability create confusion. Given that there was a desire to create a broader liability, it is illogical that an offence of narrower liability should be used as a model.

The commentary to the HCA Bill itself admits that there is no empirical evidence to support the contention that New Zealand needs a gang targeted criminal statute. Moreover, there is no discussion of the specifics of *actus reus* and *mens rea* to be applied with regard to "participation". The problem of scope in relation to the existing accessory liability was not addressed in the commentary or Parliamentary debates. This exacerbates interpretation difficulties.

The idea of substantive liability for those who help or encourage others' offending in place of the traditional derivative liability has some support,⁹⁵ but s 98A does not constitute an enactment addressing this more general matter. The HCA Bill did not in any way purport to reform accessory liability as a whole in a systematic way, and has not done so. The provision concerns a highly specific group of people, and concerns only imprisonable offences.

As a measure against gangs, it remains to be seen whether the offence will be put to any effective use. It is argued that the provision is probably superfluous, as it covers conduct already within the ambit of accessory liability, which is a fully developed and important part of the criminal law. The boundaries of accessory liability in its established form represent sufficiently broad scope for criminalising conduct. Any extension of the law arising from interpreting s 98A is likely to go too far towards arbitrary imputation of liability for the socially dangerous conduct of others.

95. See Wells, "Rethinking liability for aiding and abetting" [1990] New LJ 265; and *supra* at note 32.

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