

THE MEANING OF KNOWLEDGE AS A CRIMINAL FAULT ELEMENT: IS TO KNOW TO BELIEVE?

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A common mens rea state in New Zealand's statutory criminal law is that conduct occur with knowledge of a circumstance or as to an outcome. In the absence of any statutory definition of 'knowledge', the courts have suggested that a belief – identified as a lesser state of certainty of awareness – will suffice. This article suggests that the case law from New Zealand is in error because it fails to take a step back and review Parliament's use of knowledge and belief and other states of awareness. It is apparent that legislators are aware that there is a difference between knowledge and such lesser states of awareness as belief, recklessness, suspicion. By itself, and also supported by principles such as lenity and the need for plain meanings in the criminal law, this means that legislators should be taken to mean knowledge when that is the word used. It is also suggested that this strict reading of knowledge is not a charter for villainy because evidential rules, including through the approach of wilful blindness, allow an inference of knowledge when a defendant denies anything beyond a suspicion or belief.

I INTRODUCTION

There are frequent references to the fault element of knowledge in New Zealand criminal law. That law is entirely statute-based, and includes both omnibus statutes such as the *Crimes Act 1961* (NZ) and the *Summary Offences Act 1981* (NZ), and also more particular statutes such as the *Misuse of Drugs Act 1975* (NZ).¹ But what is meant when a legislature uses phrases such as 'knowingly'? Any perusal of a criminal statute reveals that a variety of states of awareness can be in play, from suspicion to belief to knowledge. Accordingly, in *R v Simpson*, the New Zealand Court of Appeal accepted that '[t]here are gradations of belief from being completely certain about a matter to thinking that an answer is

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¹ It can also be an implied *mens rea* as in *R v Simpson* [1978] 2 NZLR 221. The focus of the article is the approach to be adopted when it is an express *mens rea* term used by the legislature.

probable'.² Recklessness is one of the positions on the scale that has been subject to significant judicial definition. It is made out if two criteria are satisfied.³ First, the defendant recognised that there was a real possibility that his or her actions would bring about the proscribed result, and/or that the proscribed circumstances existed. And, secondly, having regard to that risk those actions were unreasonable.

As such, it requires knowledge of a risk as to a present fact or future outcome. There is much less clarity as to what is meant by 'knowledge' or 'belief'. Stephen Shute has sought to investigate the meanings of these words in the criminal context.⁴ As part of this, he explored the differences between them as psychological states, concluding that beliefs have several elements including that they are 'candidates for truth and falsity' and so 'necessitate a certain level of commitment', 'are ... open to revision and reassessment' and 'are fallible'.⁵ 'Knowledge', he suggested, was belief plus 'a degree of commitment to her belief over and above the commitment required for beliefs per se', plus the belief being true and the holding it being justified.⁶ As a result, he commented that a difference between the two states is the level of commitment to them.⁷ Shute also noted that it was possible to know the future, for example that there will be daylight tomorrow.

Shute provided a brief analysis of English and United States statutes that refer to knowledge or belief, and also its indirect usage through intention and recklessness.⁸ He then sought to explore the extent to which the conceptual

² *R v Simpson* [1978] 2 NZLR 221. The question in the case was whether assaulting a 'constable ... with intent to obstruct the person so assaulted in the execution of his duty', contrary to s 192 of the *Crimes Act 1961* (NZ), required some level of awareness that the person was a constable. Since the offence carries three years' imprisonment, as against the twelve months for an assault without that aggravating circumstance, it was clear that some level of awareness of the aggravating feature was needed. It was determined that the 'person charged must obviously reach a conclusion as to the status of the person assaulted' which was satisfied by 'a positive assumption as to the status of the person assaulted and the duty on which he is engaged' which was satisfied by the gradations from complete certainty to thinking it probable (see at 225).

³ *Cameron v R* [2017] NZSC 89 (9 June 2017) [73]. This is consistent with the UK House of Lords decision in *R v G* [2004] 1 AC 1034, which put an end to the determination in *Metropolitan Police Commissioner v Caldwell* [1982] AC 341 and *R v Lawrence* [1982] AC 510 that recklessness did not have a subjective element.

⁴ Stephen Shute, 'Knowledge and Belief in the Criminal Law' in Stephen Shute and Andrew Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press, 2002) 171.

⁵ *Ibid* 201. See also the longer discussion of these and the other elements at 182-5.

⁶ *Ibid* 185.

⁷ *Ibid* 185-6. On this scale, a state of mind of acceptance would involve a level of commitment lesser than that required for belief.

⁸ *Ibid* 172-82, 202-6.

account of knowledge and belief made sense in its statutory use. His conclusion was that, given the paucity of case law that discusses the meanings in any detail, more work was necessary;⁹ but that it could be suggested that judicial dicta had usually concluded that knowledge was merely a belief that was correct; and that belief was given an extended meaning to cover what was accepted even if it did not have the additional elements to count as a belief in the conceptual sense, though it did not extend to things that were possible or even highly likely.¹⁰

It is not the aim of this article to add to Shute's commendable account. However, there is a shared starting point, namely that cases such as *Simpson* and the account of Shute make clear that there is — at least as a starting point in terms of the meanings of words — a difference in the level of certainty or sureness that marks knowledge as opposed to a belief. This is consistent with a continuum of states of awareness: recklessness, for example, would be below that only involving a view that there is a risk.

The aim of the article is to consider the propriety of one of the few cases in New Zealand that has addressed the meaning of 'knowledge': *Kerr v R*.¹¹ That case involved the knowing supply of equipment to be used for drug cultivation. The Court of Appeal determined that 'the meaning of "knowing" ... was encapsulated by the use of the more precise word (in the context) of "believing"'.¹² In short, the legislature really meant to use a different word. The Court relied on cases from the areas of receiving stolen goods — that is, knowledge of a past fact — and supplying products to be used for an abortion — that is, knowledge of a future fact — in which there was case law to the effect that knowledge was made out by belief. Accordingly, the comment made may be applied more generally. Indeed, this possibility is apparent from the contrasting accounts of the leading textbook and the leading practitioner text. The authors of the former state that knowledge (at least of a present fact):

[R]equires a positive (and correct) belief ... that the relevant circumstance does indeed exist. ... Belief or knowledge that a circumstance *may* obtain ... is not knowledge that it does obtain. ... What is not necessary, however, is that the defendant should think that the relevant circumstance exists with provable certainty. In law, it is sufficient that the defendant accepts or 'assumes', and has no serious doubt, at the time he acts, that the circumstance is present. ... In sum,

⁹ Ibid 201.

¹⁰ Ibid 201. See also the lengthier discussion at 190–200.

¹¹ [2012] NZCA 121 (29 March 2012).

¹² Ibid [20].

‘knowing’ means ‘knowing, or correctly believing’. The qualification, that the belief be a correct one, is implicit in the meaning of knowledge.¹³

However, the authors of the leading loose-leaf text for practitioners say of this need for a correct belief:

Whatever its merits in terms of ordinary usage, this view has not found favour with the courts where ‘knowledge’ has consistently been interpreted in ‘the looser sense’ ... as including ‘belief’.¹⁴

In order to assess the propriety of this interpretation, this article involves a systematic review of the use in statute law of the main words denoting different levels of awareness (being knowledge, belief, recklessness). The purpose of this is to present a picture of the ability of legislators to determine different levels of awareness. This is then used in conjunction with the main rules of interpretation, which focus on both the text and purpose of legislative language, together with supplemental arguments, such as the principle of lenity, in order to determine whether respect should be given to the choice of language used. The specific statutory regime in *Kerr* is also examined in more detail, including its statutory history. The conclusion is that Parliament did and should generally be taken to mean knowledge when that is what it says.

II THE STATUTORY FRAMEWORK EXPLORED

A Codification Examples

It is possible for legislators to indicate what they mean by a *mens rea* word via a definitional section. For example, the *Criminal Code* (Cth) includes, in chapter 2, definitions of ‘intention’, ‘knowledge’, ‘recklessness’, and ‘negligence’. Section 5.3 provides that ‘[a] person has knowledge of a circumstance or a result if he or

¹³ A P Simester, W J Brookbanks and N Boister, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2012) (emphasis added). That text cites for these comments: *R v Crooks* [1981] 2 NZLR 53, *R v Hall* (1985) 8 Cr App R 260; [1985] Crim LR 377, and *R v Simpson* [1978] 2 NZLR 221. The text makes the further point that knowledge is the cousin of intention rather than of recklessness, and confirm their view that knowledge that a circumstance may obtain is not sufficient for the *mens rea* of knowledge, for which *United States v Dynar* (1997) 147 DLR (4th) 399, 115 CCC (3d) 481 (SCC) is cited. The authors do not discuss *Kerr v R* which had not been decided when this edition was written.

¹⁴ Simon France (ed), *Adams on Criminal Law* (Thomson Reuters, looseleaf service [CA20.20]). The ‘looser sense’ quotation is from *R v Irwin* (1967) 61 WWR 103 (ABSC) 106. *R v Kerr* and the authorities it relied upon is the authority for the statement

she is aware that it exists or will exist in the ordinary course of events', whereas 'recklessness' is awareness of a 'substantial risk' that the circumstance 'exists or will exist' or that the result 'will occur' and it being 'unjustifiable' to take that risk in 'the circumstances known to him or her'.¹⁵ In the Northern Territory's *Criminal Code*, s 43AJ indicates that '[a] person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events'. Section 43AK equates recklessness to awareness of a substantial risk in relation to the circumstance or consequence and the unjustifiable taking of the risk.

These instances accept the use of knowledge as to both the current and the predicted future. Similarly, in s 2.02 of the American Law Institute's Model Penal Code published in 1961, 'knowingly' is defined to involve awareness of the nature of conduct or of attendant circumstances, or awareness of the practical certainty of the result of conduct.¹⁶ It is also expressly noted that knowledge of a factual matter includes awareness of a 'high probability of its existence'.¹⁷ 'Recklessness' is made out by a conscious disregard of 'a substantial and unjustifiable risk that the material element exists or will result from his conduct'. It is further provided that the taking of this risk must involve a 'gross deviation from the standard of conduct' of 'a law-abiding person' assessed by reference to the 'nature and degree' of the risk and the 'nature and purpose of the actor's conduct and the circumstances known to him'.¹⁸ These definitions are all consistent with the meanings of the words and the context of a sliding scale of certainty as towards the fact or future occurrence.

B *New Zealand Statutes*

There was in the Crimes Bill 1989 a suggestion that there be statutory general principles for criminal law in New Zealand, including definitions of the major fault elements and also matters such as voluntariness and the effect of intoxication. It was suggested in cl 21 that it should be provided that:

¹⁵ *Criminal Code Act 1995* (Cth) s 5.4.

¹⁶ *Ibid* s 2.02(2)(b). Wilfulness equates to knowingly unless the circumstances of the offence indicate a higher standard: see s 2.02(8).

¹⁷ *Ibid* s 2.02(7).

¹⁸ *Ibid* s 2.02(2)(c).

[A] person ... knows any consequence of any act or omission where the person does or omits to do any act ... knowing or believing that the consequence is highly probable.

Similarly, it was provided that knowledge of a circumstance was made out by awareness or knowing or believing it to be highly probable.¹⁹ The Draft Bill was considered by a Crimes Consultative Committee, which was supportive on the whole but made some suggestions. In relation to 'knowledge', it proposed revised language, namely:

[A] person knows any circumstance of any act or omission when the person doing or omitting to do any act (a) Is aware that the circumstance exists or will exist; or (b) Believes that the circumstance exists or will exist.²⁰

The reason for this suggestion, which was replicated in relation to 'intention',²¹ was the importance of a proper differentiation from recklessness by replacing the reference to high probability with one to a high level of certainty. The Committee was in favour of retaining the reference to 'belief' within the concept of knowledge, stating that

While, philosophically, the concept of 'belief' is different from that of 'knowledge', the law has customarily run the two together. It is neither practicable nor desirable to disturb that situation.²²

No authority or rationale is offered for this statement and the indication that it should remain so.

This Bill was not enacted. What remains in place as the main statute is the *Crimes Act 1961* (NZ). Subject to limited exceptions, such as the definition of 'dishonestly' in s 217, it refers to — rather than defines — *mens rea* states. This gives the power of definition to the judiciary as a matter of statutory interpretation. The rules for that start, but do not finish, with the *Interpretation Act 1999* (NZ), s 5(1) of which requires that meaning 'be ascertained from its

¹⁹ Clause 21 also defined purposive and non-purposive intention; clauses 22 to 24 defined recklessness, heedlessness and negligence.

²⁰ Crimes Consultative Committee, Parliament of New Zealand, *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991) 92, considering the proposed cl 21A.

²¹ It suggested that intention being defined as '(a) Meaning to bring about that result or (b) Being aware or believing that that result will happen': see *ibid.*

²² *Ibid* 13–14.

text and in the light of its purpose'. Purposive interpretation is therefore valid, but not at the expense of ignoring the words of the text. Hence, an examination of the statutory text is important. This starts with the Act itself but also extends to selected other statutes.

1 *The Crimes Act 1961*

(a) *Overview*

The *Crimes Act 1961* (NZ) builds on the *Criminal Code Act 1893* (NZ) and the *Crimes Act 1908* (NZ). It covers the major offences identified by the late Victorian period. In some areas, new offences have been added to it. Additionally, other statutes cover other areas of criminality. Section 9 makes express that there are no common law offences. However, the Act preserves common law defences unless they conflict with a statutory codification of a defence.²³ In tabular form, the variety of express *mens rea* conditions involving states of awareness — together with defences or powers so as to exclude liability, clarifications that there is no defence, plus some indications that there is a mitigation or an *actus reus* element — involves the following:²⁴

Table 1

<i>Actus reus</i> element	Sections and offences
Knowledge	155 (duty to use reasonable knowledge re dangerous act)
Fact, opinion, belief or knowledge	108 (perjury – statement made)
Belief on reasonable grounds	2 (assault definition – state of mind of victim)

²³ See s 20.

²⁴ Not included, for the sake of space, are references to intention. It is nevertheless relevant, since it can be used to connote knowledge of circumstances: see, eg, the discussion in *DPP v Morgan* [1976] AC 182 to the effect that on the statutory language then in place in England and Wales, which criminalised but did not define rape, the offence involved non-consensual intercourse with a *mens rea* of intention. This meant that the prosecution had to show that there was knowledge of a lack of consent. Hence, intentionality as to circumstances can often be equated to knowledge of those circumstances.

<i>Mens rea</i> element	
Knowledge as to present matter	22 (doli incapax rule), 71 (accessory after fact), 78AA(1)(b) (copying classified information without authority), 78AA(1)(c) (not returning classified information – knowledge as intentional conduct), 78A(a) (communication of official information – lack of authority), 78A(b) (copy official information – lack of authority and relating to security/defence), 78A(c) (not returning official information – knowledge as intentional conduct; relating to security/defence), 98A(1) (participation in organised criminal group – objectives), 105B (using official information knowing obtained corruptly), 108 (perjury – falsity), 114 (use of purported affidavit – lack of authority or identity), 115 (conspiracy to falsely accuse of offence), 129A (sexual conduct with consent induced by certain threats), 130 (incest), 138 (sexual exploitation of person with significant impairment), 205 (bigamy – status of other), 207 (feigned marriage/civil union), 210(2) (receiving abducted young person under 16), 216C (disclosing wrongly intercepted private communication), 216I(2) (possessing intimate visual recording), 220 (theft in special relationship), 228(2) (dealings with dishonestly obtained document), 230 (taking trade secret), 240(1A) (dealing with thing or document obtained by deception), 256(2) (making false document), 256(5) (selling false document), 257 (using forged document), 258(3) (dealing with altered document), 259 (using altered document with intent), 261 (using counterfeit seal), 262 (using counterfeit corporate seal), 263 (possessing counterfeit banknote), 266(2) (possession in coinage)

	situation), 266(4) (importing counterfeit coin), 266(5) (passing counterfeit coin), 266(6) (possessing counterfeit coin), 272 (possessing/making explosive), 306(1)(b) (sending letter with threats to kill/do GBH), 307 (sending letter with threats to damage property)
Knowledge as to future	76 (party to treason), 98D (arranging people trafficking – knowing coercion or deception involved), 145 (criminal nuisance – endanger), 216D(1) (dealings with device for intercepting private communications), 251(1)(a) (software for committing crime)
Knowledge as to future likely	70(2) (incitement – offence other than intended), 78A(a) (communication of official information – prejudice), 167(d) (murder)
Knowledge as to future probable	66(2) (common purpose liability)
Knowledge as to risk	195A (failing protect child or vulnerable adult at risk of certain types of harm)
Knowledge or recklessness as to present	78AA(1)(a) (communication of classified information – knowledge as intentional conduct), 78A(a) (communication of official information – knowledge as intentional conduct), 98C(1) and (2) (smuggling migrants or arranging it – status), 198A (using firearm against police/prison officer), 216I(1) (possessing intimate visual recording for purpose), 216J (various dealings with intimate visual recording), 240(1) (obtaining by deception – falsity in deception), 246 (receiving), 250(2) (damaging computer system – lack of authority), 252 (unauthorised access to computer system)
Knowledge or recklessness as to future	98A(1) (participation in organised criminal group – contributing to criminal activity and

	to objectives), 98C(2) (arranging for smuggling of migrant – person intends to try enter), 251(1)(b) (promoting software for use in crime – knowledge as synonym for intention)
Knowledge as to future likely and recklessness	167(b) (murder)
Knowledge and wilfulness as to act	118 (assisting escape of prisoners of war – knowledge as intentional conduct), 202(2) (allowing trap to remain when likely injure)
Knowledge or constructive knowledge (know or ought to know) as to likelihood	250(1) (damage computer system causing danger to life), 267(1)(a) (arson causing danger to life), 269 (damage to property causing danger to life)
Belief as to current fact	124A (indecent communication with person under 16 – belief constable is person under 16); 131B (meeting person under 16 following sexual grooming – belief constable is person under 16), 307A (communicating false information likely to have various effects)
Belief as to future fact	186 (supplying means to procure abortion)
Lack of belief as to present fact	2 (without claim of right definition – used in various offence and defence sections – not listed separately), 217 (dishonesty definition – used in various offence sections – not listed separately)
Lack of belief as to present fact – plus reasonable grounds	128 (sexual violation – consent)
Recklessness as to conduct	216H (making intimate visual recording), 250(1) (damaging computer system and endangering life), 250(1) (unauthorised damage to computer system)
Recklessness as to consequence	188(2) (wounding), 189(2) (injuring), 198(2) (discharging firearm/doing dangerous act), 202(1) (setting trap), 267 (various arson offences), 269 (various property damage

	offences), 270 (endangering transport), 298A (causing disease or sickness in animals), 298B (contaminating products)
Knowledge or belief or recklessness as to current fact	243 (money laundering)
Defence/exception/power	
Incapable of understanding present fact	23 (insanity re nature/quality)
Incapable of knowing present fact	23 (insanity re wrongfulness)
Lack of knowledge as to present fact	205 (bigamy – defence if partner absent 7 years and not know alive)
Lack of knowledge as to present fact – plus no reasonable opportunity and excusable	124 (distributing or exhibiting indecent matter – re indecency), 124A (indecent communication to person under 16 – re indecency)
Lack of knowledge or suspicion as to present fact	216K (defences re delivering, storing etc intimate visual recording)
Belief as to present fact	48 (self-defence – threat level), 182A (miscarriage – exclusion as to viability), 216D(2) (supply of device to intercept communications to authorised person), 237 (blackmail – exception based on reasonable and proper means)
Belief as to future event	24 (compulsion – threats being carried out)
Belief as to present fact – plus good faith	28 (sentence/process without jurisdiction)
Belief as to present fact – plus good faith and absence of negligence	29 (irregular warrant/process)
Belief as to present fact – plus reasonable and proper grounds	32 (arrest by constable), 36 (arrest for offence at night), 37 (arrest for certain offences), 38 (arrest during flight), 42 (custody of person after breach of peace witnessed by another), 45 (force to carry out orders to suppress riot), 55

	(defence of dwellinghouse), 60 (discipline on ship or aircraft), 98AA (dealing in people under 18 – defence re age), 125 (indecent act in public – belief not observed)
Belief as to future fact	187A (actions re abortion not unlawful in light of belief as to certain consequences)
Belief as to future fact – plus reasonable and proper grounds	41 (prevention of suicide and certain offences), 44 (danger from ongoing riot), 46 (suppressing riot before police can arrive – danger from continuation)
Belief as to present fact – plus good faith and reasonable and proper grounds	30 (arresting wrong person), 44 (force to suppress riot)
Belief as to future fact - plus good faith and reasonable and proper grounds	46 (suppressing riot before police can arrive – level of mischief)
Belief as to present fact – plus reasonable grounds and reasonable steps taken	124A (indecent communication with person under 16 - age), 131B (meeting person under 16 following sexual grooming – age), 134/134A (sexual conduct with person under 16 – age)
Mitigation/lesser punishment	
Knowledge of present fact	206 (bigamy – lower maximum sentence if other person knew void), 207 (feigned marriage/civil union – lower maximum sentence if other person knew void)
No defence	
Ignorance no excuse	25 (ignorance of law)
Lack of knowledge of future likelihood not relevant	168 (murder in various situations involving harm not need foresight of death)
Lack of knowledge or belief	243 (money laundering – no defence re awareness of specific precursor offence)
Know no reasonable ground for belief or suspicion	34 (assisting constable – when no defence)

Belief as to current fact no defence	132 (sexual conduct with child under 12 – belief 12 or over), 202A (female genital mutilation – belief as to cultural validity or belief as to consent no defence), 202B (arranging female genital mutilation – belief in consent no defence), 210(3) (abduction of person under 16 – no defence of belief 16 or over), 243 (money laundering – no defence of belief different precursor offence)
Lack of belief prevents defence	187A (reliance on certificate re abortion not proper if not believe lawful)

(b) *Analysis*

The obvious point arising from standing back to review the range of options in legislation is that, in the context of an approach to statutory interpretation that credits legislators with deliberating about the use of words, Parliament is able to be precise in tailoring the level of awareness necessary for guilt or avoidance. This includes choosing between standards, adding requirements for good faith and objective support, or making use of constructive knowledge scenarios.

By itself, this surely precludes any simplistic assertion that the judiciary should assist Parliament's true intention by substituting a different level of awareness — or, belief — when knowledge has been used. Just as judges could not decline to avoid giving effect to indications that reasonable grounds are required or constructive knowledge is blameworthy, so they should not be able to substitute their own view as to the level of awareness required by using the word 'knowledge'.

This is reinforced by noting that various sections exemplify the sophistication of legislative choice and, importantly, point clearly to an understanding of the difference between 'knowledge' and 'belief' because of the way they are juxtaposed. First, it is apparent that 'knowingly' may be used as a synonym for 'intention', so revealing the need for a high level of awareness. For example, s 78AA contains various offences relating to classified information, including '(a) knowingly or recklessly, and with knowledge that he or she is acting without proper authority' communicating it, and '(c) knowingly fails to comply with any directions issued by a lawful authority for the return of any

classified information'. Section 78A has similar provisions relating to official documents relevant to defence or security.

Secondly, belief as opposed to knowledge may involve a deliberate use of a lesser standard because the belief is necessarily erroneous. Accordingly, ss 124A and 131B, which relate respectively to indecent communications with a person under 16 and meeting a person under 16 following grooming, can be committed when the person under 16 is a fiction because the other person is a police constable. In such situations, the erroneous belief has to be shown to be held. In addition, both sections have a positive defence of a belief that the other person is 16 or over, but the belief must be on reasonable grounds and must have involved reasonable steps to find out their age. Similarly, the definition of 'a claim of right', the absence of which is a feature in various property offences and which also features in relation to some powers that preclude liability, also involves an erroneous belief. That is, if the person had the legal right claimed there should be no prosecution to bring. In practice, permission to take something will prevent there being dishonesty. Nevertheless, the definition in s 217 in terms of the absence of a belief in consent or authority as opposed to knowledge appears to be deliberate.

These latter two examples may illustrate a third point, namely that a choice is made between belief and knowledge standards because the other would criminalise or exculpate too many people. In other words, clear choices are made about the ambit of the criminal law. The various defences provided in ss 28 to 60 illustrate this (as does the defence of compulsion in s 24). They are all based on belief rather than knowledge and so allow for error. At the same time, the fact that the belief may have to be supplemented in various ways, by good faith or reasonable grounds, indicates a level of sophistication in the legislature drawing the balance between non-criminalisation and the rights of the other person involved. This is also illustrated by choices between providing a justification and an excuse from criminal liability only.²⁵

A similar level of deliberation seems evident if one looks to the major sexual offences. Sexual violation under s 128 requires the prosecution to prove absence of a belief on reasonable grounds as to consent. In contrast, where the sexual connection is reluctantly consensual because of various threats not involving direct coercion, there must be knowledge that the consent has been

²⁵ If action is justified, it cannot be the subject of civil or criminal liability (that being the definition of justified in s 2). If the call comes from a private person to help in an arrest, s 34(2) provides a defence in criminal proceedings except if there is that knowledge.

obtained in this fashion: s 129A. The two sections being placed in such proximity strongly suggests that there was a conscious choice in relation to s 129A.²⁶ The choice to make these elements rather than defences is one which the judges must respect. The same should therefore apply in relation to the choice of the level of awareness. Accordingly, in the failure to protect offence under s 195A — which criminalises a failure by a person in a defined relationship to a vulnerable adult or child to take reasonable steps when there is knowledge of the risk of death, grievous bodily harm, or sexual assault — this could have been phrased in a way more protective of victims by requiring only recklessness as to the risk faced, or a belief as to its existence. However, the fault element is knowledge, which should be taken to be a deliberate choice. A contrary choice was made in relation to making threats of harm to people or property, contrary to s 307A, which can be carried out by communicating information ‘that he or she believes to be false’.

A fourth point is that the legislature is able to be express that either knowledge or belief or some other standard such as recklessness is sufficient, which thereby illustrates an understanding that they are different standards. Indeed, all three can be used. Hence, money laundering under s 243 turns on ‘knowing or believing that all or part of the property is the proceeds of an offence, or being reckless as to whether or not the property is the proceeds of an offence’. See also the creation of a defence and the exclusion of the defence in s 34(1): a person is justified in helping a constable to arrest someone when the officer has requested assistance ‘unless he or she knows that there is no reasonable ground for the belief or suspicion’.

This latter example involves the legislature drawing the clearest possible distinction between knowledge (on the part of the person asked to help) and belief or suspicion (on the part of the officer). Another exemplar of legislators having this clear understanding is the definition of perjury in s 109(1). It involves, as part of the *actus reus*, ‘an assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding’ and sets as the *mens rea* ‘that assertion being known to the witness to be false and being intended by him or her to mislead the tribunal holding the proceeding’. This language makes abundantly clear that the legislature is aware of the difference

²⁶ Knowledge of the impermissible degree of family connection is also required in relation to incest, contrary to s 130, or sexual exploitation of an impaired person, contrary to s 138. Bigamy also requires knowledge as to the previous marriage or civil union: s 205; and feigning a void marriage or civil union requires knowledge that it will be void: s 207.

between knowledge and belief given that it has both terms as part of the *actus reus* but limits the *mens rea* to knowledge. Similarly, membership of an illegal gang under s 98A requires knowledge or recklessness as to contribution to the criminal activity and ongoing objectives of the gang, but there must be knowledge as to the organisation being a gang. Equally, s 210(2) creates the offence of receiving a person under 16 'knowing that he or she has been unlawfully taken or enticed away or detained with intent to deprive a parent or guardian or other person having the lawful care or charge of him or her of the possession of him or her', and s 210(3) expresses that a belief the person is 16 or over is immaterial.

In sum, the legislature seems perfectly able to draw boundaries demonstrating its clear understanding of which level of awareness suffices as an element or exculpation in a particular offence. This can also be illustrated in relation to summary offences and drugs offending.

2 *The Summary Offences Act 1981*

Just as the *Crimes Act 1961* (NZ) sets out a range of offences, including the more serious ones that originate with the common law, the *Summary Offences Act 1981* (NZ) sets out a range of less serious offences. It is the successor to the *Police Offences Acts* of 1894, 1907 and 1927. Again, the Act includes various instances of the legislature making express choices that reveal an understanding of the difference between knowing something and a lesser state of mind involving belief or being aware of a risk of it being accurate. This is illustrated in Table 2, following which various examples are discussed.

Table 2

<i>Actus reus</i> element	Sections and offences
Belief plus reasonable grounds	2 (assault definition – state of mind of victim), 4(2) and (3) (indecent definition – state of mind of hearer)
Likely to cause belief	18 (imitating court documents), 19 (imitating official documents), 20 (false claim of qualification)

<i>Mens rea</i> element	
Knowledge of present fact	17 (false birth/death/marriage notice), 24(b) (false statement causing serious apprehension)
Knowledge of future fact	24(b) (false statement causing groundless apprehension)
Knowledge of future likelihood of reasonable reaction	21 (intimidation)
Recklessness as to future fact	4(1)(c)(i) (offensive language), 11 (damage to property), 13 (endangering safety), 24(b) (false statement causing serious apprehension)
Absence of belief in present fact	2/11 (without claim of right definition in wilful damage), 24(a) (false allegation to police)
<i>Defence</i> element	
Belief as to future event	27 (indecent exposure – non observed), 32 (excreting in public place – non observed)
Belief as to present fact – plus reasonable grounds	4(4) (defence as to indecent words), 14A (sale of spraycans to under 18), 39 (arrest for certain offences and false details)
Belief as to future fact – plus reasonable grounds	45 (seizure of alcohol to be used for unlawful drinking in public place)
Suspicion as to present fact – please reasonable grounds	39 (arrest for certain offences)

As with the definition of perjury in the *Crimes Act 1961* (NZ), there is a *Summary Offences Act 1981* (NZ) matter that involves the legislature revealing clearly its capability of understanding the differences. For example, s 24 is a kindred offence to perjury in court, being the making of a false allegation to the police. It can be committed in three ways. The elements of the first (s 24(a)) are:

- Actus reus elements: (i) making/causing to be made, (ii) to a police employee, (iii) a statement (written or verbal), (iv) alleging an offence, (v) that is ‘contrary to the fact’;
- Mens rea: ‘without a belief in the truth’.

The second sub-section, s 24(b), involves two alternatives which overlap only partially (in the form of a common *mens rea* element as to conduct and a common *actus reus* element) and can most easily be viewed as creating two separate offences:

- Actus reus elements of alternative one: (i) making a statement, (ii) that gives rise to, (iii) a serious apprehension, (iv) relating to the safety of, (v) the statement maker or any other person or property;
- Mens rea elements: (i) 'knowing that the statement is false' and (ii) intention or recklessness as to causing waste of police resources or diverting police resources;
- Actus reus elements of alternative two: (i) behaving in any manner, (ii) that is likely to give rise to (iii) a serious apprehension, (iv) relating to the safety of, (v) the statement maker or any other person or property;
- Mens rea elements: (i) 'knowing that such apprehension would be groundless' and (ii) intention or recklessness as to causing waste of police resources or diverting police resources.

The point arising here is that the offence contrary to s 24(a) could quite easily have involved a mens rea of knowledge that the statement was false, but the legislature chose to use the formulation of a lack of belief. Equally, in relation to either of the offences contrary to s 24(b), knowledge of the falsity of the statement or groundlessness of the apprehension could have been substituted by reference to a lack of belief in its truth or a belief in its falsity or groundlessness,²⁷ but the legislation is phrased as involving knowledge. The unavoidable consequence of this is that Parliament knew full well in this situation that there is a difference between 'knowledge' and 'belief' — and, for that matter, recklessness, which is also used as part of the *mens rea* — and determined what level of culpability as to awareness of circumstances was appropriate.

Other offences in the Act also indicate that there are deliberate choices to use knowledge or belief, and in particular there are a variety of qualifiers as to the belief that is necessary, sometimes as an exculpatory feature and sometimes as a positive *mens rea*. For example, knowledge is required in relation to the

²⁷ The difference is that there can be belief that something is false or groundless when it is in fact accurate, but that is virtually impossible if there is knowledge as to the groundlessness or falsity.

offence of printing or sending to a newspaper a false notice of a birth, death, marriage or civil union: s 17 requires a *mens rea* of ‘knowing it to be untrue’, which can be contrasted to a lesser state of mind such as ‘without a belief in its truth’ or ‘without a belief on reasonable grounds in its truth’, or involving recklessness. Given that these other *mens rea* states appear in the same statute, the clear implication is that the choice of knowledge is deliberate and suggests that the mischief of the offence is the intentionality of the falsity. The same can be said of the offence contrary to s 20A of disclosing official information that is not publicly available ‘knowingly’ in relation to the communication (which could have been replaced with ‘intentionally’) and ‘knowing’ that there was no authority for the action. An absence of belief *mens rea* could have been, but was not, used.²⁸

An example involving recklessness and belief is that recklessness as to whether anyone is alarmed is the *mens rea* of one way of committing the offence involving offensive words or behaviour, contrary to s 4:²⁹ but it comes with a defence of reasonable grounds for believing that the words used would not be overheard. Reasonable grounds to know that something would not be overheard would exclude recklessness — given that there would not be a risk — and so this suggests an awareness of the difference between knowledge and belief. The section also criminalises the use of obscene words, and provides that a relevant circumstance is whether the defendant had ‘reasonable grounds to believe’ that anyone hearing the words would not be offended.³⁰ Again, the legislature could have required knowledge as to this factor but clearly chose a lower standard of subjective belief together with objective support.

²⁸ See also s 21 which criminalises intimidatory conduct carried out with intent or ‘knowing’ of the likelihood of intimidation. This is a step down from oblique intention. Nevertheless, it still involves a choice that is higher than recklessness.

²⁹ Recklessness is also the *mens rea* for intentional damage, per s 11, and having a thing endangering safety in a public place, per s 13, reckless disregard for public safety).

³⁰ There is also a ‘reasonable grounds to believe’ defence in relation to the offence of selling spray cans to those under 18. The defence is open if a document produced by the purchaser provided reasonable grounds for believing the person was 18 or over, again reflecting the point that knowledge would be too high a standard. Similarly, indecent exposure has a defence of reasonable grounds for believing that one cannot be observed: see s 27; as does excreting in a public place: see s 28.

3 *Misuse of Drugs Act 1975*

A similar approach can be taken to the *Misuse of Drugs Act 1975* (NZ) and it reveals that in the sections setting out what amounts to a code relating to drugs offences — including, for instance, a distinct set of offences relating to the theft and handling of drugs — the legislature is perfectly able to use belief when that meets whatever aim it thinks is necessary. A caveat should be entered to this comment in that the legislature has left to the courts to work out what should be the mental state relating to the status of a substance as an illegal drug.³¹ Nevertheless, given that the point in issue is whether use by the legislature of the need for knowledge should be interpreted to mean belief as well the fact that there are implied *mens rea* states does not alter the point that the legislature should be taken to mean that belief is sufficient when it uses that word.

The table of results for the 1975 Act (and its accompanying *Misuse of Drugs Amendment Act 1978* (NZ)) ('MDAA') is as follows:

Table 3

<i>Mens rea</i> element	Sections and offences
Knowledge of present fact	15 (falsity), 25(2)(a) and (b) (restrictions on supply to persons subject to notice)
Knowledge or recklessness of present fact	11 (receiving stolen drugs)
Reason to believe present fact	24 (prescribe/administer controlled drug to dependent person except in authorised settings)
Defence/power element	
Knowing present fact	12 (permitting use of premises/vehicles)
Knowing future fact	12A (supplying items to be used), 12AB (import/export items to be used)
Knowing or suspecting present	7(3) (action to prevent ongoing offence)

³¹ In *Cameron v R* [2017] NZSC 89 (9 June 2017), the New Zealand Supreme Court determined that knowledge or belief that the substance was a controlled drug or recklessness as to its illicit nature was sufficient; knowledge or belief as to the identity of the drug would also be sufficient, since any view that it was not a controlled drug would be an error of law.

fact	
Belief of present fact plus reasonable grounds	12 MDAA (controlled delivery), 13A MDAA (secretion in body), 13E MDAA (application/grant warrant re secretion), 13EA MDAA (search re secretion), 13I MDAA (application/grant renewal of warrant re secretion)
Reason to believe present or future fact	20 (statements relating to drug-dependent people)
Reason to believe or suspect present fact	26 (power of arrest by customs)
Lack of belief of present fact plus reasonable grounds	13(1)(aa) (authorised supplier of needle or syringe)
<i>No defence/duty</i>	
Lack of knowledge of present fact	29 (no defence if not know particular controlled drug)
Lack of reasonable cause to believe present fact	13H MDAA (release from detention)

The full range of states of awareness — from suspicion to knowledge — is mentioned expressly in the statute, both in the context of being a *mens rea* state and also as part of a defence. The legislature has made choices to use knowledge alone, knowledge with an alternative, a belief, or another *mens rea* state involving awareness, all of which can be taken to be deliberate choices because other forms of awareness could have been specified. These are scattered throughout the Act, such that the choice of one can invariably be juxtaposed to the choice of another in a different section in the vicinity. In addition to ss 12A and 12AB, which are discussed in more detail below, knowledge alone is required in the following sections:

- Section 12 proscribes allowing premises or a vehicle to be used for the commission of any offence against the Act, and indicates that the *mens rea* is one of ‘knowingly’. This will clearly cover a future situation, and it would have made equal sense for ‘intentionally’ to have been used. The sense conveyed is ‘deliberately’, given that there is no use of recklessness (which is an express *mens rea* in s 11, the immediately

preceding section): as such, this most obviously conveys a 'knowing full well' scenario, which may be thought inconsistent with allowing 'believing' to be introduced, as that does not have the same level of certainty as is necessary for intentionality.

- Section 15 creates the offence of making false statements in relation to the obtaining or renewing of a licence, which can occur if the person '(a) makes any declaration or statement which to his knowledge is false in any particular; or (b) utters, produces, or makes use of any declaration or statement which to his knowledge is false in any particular; or (c) knowingly utters, produces, or makes use of any document that is not genuine'. It would have been open to the legislature to indicate that a lack of belief in the accuracy of the relevant document or statement was sufficient, but it has not done so.
- Section 25 contains a power for the Chief Medical Officer of Health to give a notice to doctors and dentists to prevent them providing controlled drugs to an identified person, and creates an offence of supplying drugs to the person 'knowing him to be a restricted person'; since the notice must have been served on the supplier or otherwise have come to their attention (those being elements of the offence), this is clearly a knowledge requirement that would not be satisfied by a belief. The restricted person also commits an offence if he or she attempts to breach the notice 'knowing himself to be a restricted person'.

Section 29 should be noted in this context. It is a provision that safeguards the prosecution from an argued lack of concurrence between *actus reus* and *mens rea* on the basis that the defendant thought it was a drug other than the one proved as part of the *actus reus*. This covers possession offences and various supplying offences. The language used is to be noted. There can be no acquittal 'by reason only of the fact that he did not know or may not have known that the substance, preparation, mixture, or article in question was the particular controlled drug or precursor substance alleged'.

There are then instances where knowledge is supplemented by an additional state, including suspicion and recklessness:

- There is a statutory defence to possession of a controlled drug that it has been taken into possession in order to destroy it or hand it to an

authorised person; the state of mind the person must have as to the illicit nature of the item is 'knowing or suspecting it to be a controlled drug' (s 7(3)). There is an understandable choice to include suspicion on the basis that requiring knowledge before having the defence would be too high a standard.³²

- There is an offence in s 11(1)(c) of receiving drugs that have been obtained via any other offence 'knowing that the controlled drug had been dishonestly obtained or being reckless as to whether or not the controlled drug had been stolen or so obtained' (which mirrors the mental state in s 246 of the Crimes Act).

The legislature has also made it clear that a belief will be sufficient in certain situations.

- Section 13 creates a variety of offences, including possessing a needle or syringe obtained from someone 'who he or she could not have reasonably believed at the time of the acquisition was' one of a list of persons who might lawfully supply them for legitimate reasons. This is a convoluted standard, but, since the legislature could have indicated that the offence required knowledge that the person was not suitably authorised, it must be taken as a deliberate choice to impose a lesser standard.
- Section 24 makes it an offence for medical practitioners to prescribe controlled drugs to a person they 'have reason to believe' is dependent on the drug except in certain circumstances; whilst it would have made sense to have knowledge as a *mens rea* here, the choice of a lower level of awareness must be deliberate.

There are various powers given to officials which should be noted. For example, s 20 allows a 'Medical Officer of Health' to publish material about a potentially drug-dependent person to relevant professional groups on the basis of a 'reason to believe' in the likelihood of dependency occurring unless action is taken to stop it. Similarly, customs officers have powers under s 26 to arrest

³² It would have been useful for the argument being developed if the legislature had referred to 'knowing, believing or suspecting' the item to be a controlled drug. However, that would also involve unnecessary verbiage.

based on ‘reasonable cause to believe or suspect’ that there has been involvement in importing or exporting a controlled drug.

Finally, other states of awareness are involved in the following situations:

- Section 9, which relates to the cultivation of prohibited plants, has a defence that papaver somniferum (opium poppy) is not intended to be used to produce anything illegal.
- Section 11(1)(b) creates the offence of obtaining controlled drugs by deception, and has a *mens rea* of ‘with intent to defraud’.

It is suggested that, as with the other statutes mentioned above, there is also a section which offers significant support for the contention being advanced in this article. However, it involves the very section — s 12A — that was construed in *Kerr* to the contrary. Accordingly, it is necessary to set out the details of that case and the statutory provisions.

Two offences are created in different subsections of s 12A. To put them in context, it should be noted that there are offences in s 6 relating to the manufacture of controlled drugs and of s 9 in relation to cultivating prohibited plants. The general principles of inchoate offending apply to these offences, but the statute also criminalises through ss 12A and 12AB the making and supplying of items that can be used in manufacture, including ‘precursor’ substances (which are listed in a schedule to the Act) and the importing or exporting of precursors. As was noted in *Kerr* in relation to s 12A, the introduction of this section:

...extended liability to preparatory events where an accused would not have otherwise been liable as a party, by making it a standalone offence to supply, produce or manufacture equipment or material before any offending took place.³³

Section 12A includes offences of supplying and having possession prior to supply. The former uses a *mens rea* of knowledge as to use whereas the latter intention as to use, from which the most obvious conclusion is that an equivalence is meant to be conveyed. Taking the elements of the two offences in turn:

³³ *Kerr v R* [2012] NZCA 121 (29 March 2012) [11].

- Section 12A(1) involves *actus reus* elements of: (i) supplying, producing or manufacturing (ii) either (a) equipment or material capable of being used for the manufacturing or cultivating offences in ss 6 of 9 or (b) precursor substances; the *mens rea* is ‘knowing that the equipment, material, or substance is to be used in, or for, the commission of an offence against those provisions’; and
- Section 12A(2) involves *actus reus* elements of: (i) possessing (ii) either (a) equipment or material capable of being used for the manufacturing or cultivating offences in ss 6 of 9 or (b) precursor substances; the *mens rea* is ‘with the intention that the equipment, material, or substance is to be used in, or for, the commission of an offence against that provision’.

The former carries seven years’ imprisonment, the latter five years. The essential difference between the two offences is that the second generally will be one step back from the first, namely possession in advance of supply or use rather than supplying or producing or manufacturing prior to use. Since the producing or manufacturing may lead to a possession before a supply or use, the same facts involving producing or manufacturing may produce either offence. However, it seems likely that this will involve a commissioned or designed production of the relevant material, whereas as shown by the facts in *Kerr*, many items may have a legitimate use but only become problematic if they are to be used in a certain way.

The factual background to the argument in *Kerr* was a sale of items, most obviously a 400 watt lamp and silver foil, that could be used for the cultivation of cannabis plants. The purchaser was an undercover police officer who made statements as to his intention and recorded the conversation on a concealed recorder. The trial judge directed the jury that suspicion or recklessness as to the future use would not be sufficient to conclude that there was a knowing supply, but that a belief would be.³⁴ The Court of Appeal approved this, summarising its view that ‘the meaning of “knowing” for the purposes of s 12A(1) was encapsulated by the use of the more precise word (in the context) of “believing”’.³⁵

This was in the context of a contention on appeal for Mr Kerr, who was the shop assistant at the Switched On Gardener who made the sale, that the offence

³⁴ Ibid [8]–[9].

³⁵ Ibid [20].

required both that it be shown to the satisfaction of the jury that the items ‘actually were to be used’ to commit the offence and ‘that they were so used’.³⁶ Naturally, since they were bought as part of a sting operation, these facts were not made out. Importantly, accepting the submission would involve the Court precluding the use of such police operations in relation to supplying things for illicit use via an interpretation of the *mens rea* of the offence (rather than the more normal route for controlling such conduct, namely the rules of evidence or procedure).

The need to avoid this outcome does not feature expressly in the reasoning of the Court in *Kerr*, though it was alert to what it saw as a practical problem that proof of a future use would require the prosecution to call purchasers to attest to their illegal plans.³⁷ This would be unrealistic in most situations and impossible in the case of a police undercover operation since the officer would not have such a plan. It was also suggested that directing the jury to consider whether the defendant had a belief was consistent with a dictionary definition of ‘knowing’ as ‘the state of being aware or informed of anything’.³⁸ However, the main rationale that led to the rule of law that knowing is made out by believing was that Parliament would be aware that English case law from Victorian times held that conviction for the knowing receipt of stolen goods required only proof of a belief that they were stolen³⁹ and that case law in England and Canada had determined that supplying something knowing that it was to be used to procure a miscarriage required only a belief as to the use to which it would be put.⁴⁰ The latter case law involves knowledge as to the future, whereas the receiving case law relates to knowledge of a past fact. Both lines of authority had been endorsed in New Zealand case law,⁴¹ allowing Asher J for the Court of Appeal to indicate that ‘[t]here is ... a significant body of authority that supports the proposition that “knowing” can mean “believing” in the context of a party being aware of a state of affairs’,⁴² and that the legislature which introduced the offence in question ‘can be taken to have been aware of a

³⁶ *Ibid* [10].

³⁷ *Ibid* [18].

³⁸ *Ibid* [17].

³⁹ *R v W White* (1859) 1 F&F 665, 175 ER 898.

⁴⁰ *R v Hillman* (1863) Le & Ca 343, 169 ER 1424; *R v Irwin* (1967) 61 WWR 103.

⁴¹ *R v Nosworthy* (1907) 26 NZLR 536 (CA), relating to the supply of items knowing their future use (a case involving a test purchase by an undercover police officer), and *R v Crooks* [1981] 2 NZLR 53 (CA), relating to receiving stolen goods (though the ratio of the case turns on matters of wilful blindness).

⁴² *Kerr v R* [2012] NZCA 121 (29 March 2012) [17].

line of authority relating to the meaning of “knowing” in the criminal context’.⁴³

The unrealistic submission made for Mr Kerr meant that the more nuanced argument based on the wider context of the use of words was not put. This is that, given that the two offences mirror each other in their elements, the choice of intention in relation to s 12A(2) is designed to support a level of commitment to the future that is equivalent to that conveyed by knowledge in s 12A(1). The Court noted that the use of ‘knowledge’ and ‘intention’ simply reflected the need to review the state of mind of the defendant at the time of the supply (or production or manufacture) for the one offence and at the time of possession for the other.⁴⁴ But just as it would be unthinkable for the Court to construe intention to mean a lesser level of certainty, the obvious conclusion from standing back to review the context is that ‘knowledge’ was deliberately chosen and so should be respected in relation to the more serious supplying offence.

It is suggested that this approach also conditions the understanding of the *mens rea* in s 12AB which makes it illegal to import or export a precursor ‘knowing that it will be used to commit an offence’ against s 6 in New Zealand or the equivalent abroad. This is because importing or exporting has an equivalent place as an inchoate offence, being a clear step towards the manufacture of a controlled drug. Accordingly, if the analysis of s 12A is correct, the same will apply to s 12AB.

4 *Conclusion as to the Statutory Setting*

The holding in *Kerr* is in the context of a statute where, once a review is taken of the statute as a whole, it is clear that the legislature is well aware that there are different connotations to knowledge and belief but has chosen in relation to s 12A(1) to use ‘knowledge’ when it could have followed what it did in other sections and express that a lesser form of awareness was sufficient. This reflects what happens in other statutes. Counteracting the indication by the Court in *Kerr* that judges will read knowledge as incorporating belief is this ability of Parliament to use knowledge alone. When placed in context, it is suggested that the legislature — far from relying on any judicial tendency to read knowledge as

⁴³ Ibid [14].

⁴⁴ Ibid [12].

being satisfied by belief — intends that the two words should be understood differently.

C *Lenity*

As was noted above, s 5 of the *Interpretation Act 1999* (NZ) requires consideration of the text used and the statutory purpose. The process of statutory interpretation also incorporates various other principles, including lenity — the concept of construing any ambiguity in favour of the defence.⁴⁵ Cooke J in *Police v Creedon*, in the context of conflicting precedents and policy considerations as to the correct interpretation of a statute, noted the need to ‘go back to first principles’.⁴⁶ One he immediately endorsed was that summarised by Lord Reid in *Sweet v Parsley*, namely that ‘... it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted’.⁴⁷ It is suggested that this supports the contention made here that knowledge should be taken to mean a correct belief. Indeed, if there is any ambiguity as to what is meant by using knowledge, it has arisen from the judicial view that the judiciary has informed the legislature of its tendency to give legislative language a different meaning.

D *The Enactment of the Statutory Language in Kerr*

A more narrow approach to statutory interpretation is to review material relevant to the parliamentary view of a particular section. Section 12A of the 1975 Act was added by s 5 of the *Misuse of Drugs Amendment Act 1998* (NZ). This latter Act started its journey through Parliament as part of the Statutes Amendment Bill (No 2) 1998 which covered some 44 different statutes. The report of the Government Administration Committee as to the Bill merely reports that there is a new offence (in what had been clause 189 of the Bill).⁴⁸ In the following parliamentary debate on 6 May 1998, at the end of which the

⁴⁵ See Jeremy Gans, ‘Legality and Lenity’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) ch 10.

⁴⁶ *Police v Creedon* [1976] 1 NZLR 571, 585. See also *R v Darwish* [2006] 1 NZLR 688, 695 [22] for an endorsement of using the principle.

⁴⁷ *Sweet v Parsley* [1970] AC 132, 149.

⁴⁸ See Statutes Amendment Bill 1998 (No 2) (45-3) as reported from the Government Administration Committee, p xiii.

relevant clauses became the 1998 Act,⁴⁹ there were comments to the effect that more time should be taken in relation to matters that had international treaty obligations behind them.⁵⁰ In relation to the specific offence, responding to concerns from one member as to the ambit of the two offences created, the Minister merely emphasises the need for intention in relation to the material being used for offending.⁵¹ He is clearly referring here to what became s 12A(2) (possession of the relevant material with intent) but the reassurance is in the context of concern raised also about s 12A(1). This again supports the view that the legislators thought that criminality was linked to a high level of awareness, albeit that the discussion is brief and occurs in the context of a lack of focus because of the nature of the process being followed involving a very large Bill covering various areas.

E Australian Comparators

The conclusion of Shute, whose chapter on knowledge and belief is referenced above, was that a great deal more research was to be done because of the comparative paucity of material. This article seeks to provide further material in relation to the laws of New Zealand, but it is worth pointing out in brief that the issue posed arises in other Australasian jurisdictions also. For example, in Victoria, the *Crimes Act 1958* (Vic) also has a range of offences where knowledge alone is the *mens rea* state. These include ss 9A(2) (treason by being an accessory after the fact or non-reporting it in advance), 49O (failing to protect a child from a sexual offence), 51G (possessing child abuse material), 70C (trading with pirates), and 83A(2) (using a false document). In various instances, the knowledge must be of a probability: for example, various of the other child abuse material offences. Knowledge and recklessness can be combined: as in ss 77 (aggravated burglary), 191 (fraudulently inducing persons to invest money, or 195C (match-fixing); or they can be distinct offences, as in s 194 (dealing with proceeds of crime), where differing levels of awareness produce different crimes. Similarly, knowledge and belief can be combined: as

⁴⁹ (6 May 1998) 567 NZPD 928–9.

⁵⁰ In introducing the debate, the Minister of Justice, Mr Doug Graham, noted that the amendments made were necessary to allow compliance with the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990): see (6 May 1998) 567 NZPD 918. Michael Cullen was one voice suggesting that a better process was required in light of the obligations in major international treaties: (6 May 1998) 567 NZPD 925.

⁵¹ (6 May 1998) 567 NZPD 927–8.

in ss 88 (handling stolen goods) or 197 (destroying property); and belief can be used on its own: as in ss 201 (the formulation of claim of right) or 322K (self-defence).

Similarly, there is apparent legislative choice in Western Australia: despite the general proposition for Griffith Code jurisdictions such as Western Australia that *mens rea* states are not relevant, there are instances where they are expressly mentioned, including knowledge or belief situations. For example, in the *Criminal Code* (WA), there are offences of knowingly giving a false answer to Parliament (s 57), continuing to riot (s 66(4)), voting when not entitled (s 102), and perjury (s 124); similarly, there are defences such as that of not knowing and having no reasonable means of knowing that election material was deceptive (s 99(3)). Knowledge and belief can be combined, as in conspiracy to commence a false prosecution (s 134); and belief can appear on its own, including in defences, such as s 186: this has an offence of knowingly permitting a person under 16 to be on premises for sexual conduct, but has a defence of reasonable belief that the person is 16 or over. The *Misuse of Drugs Act 1981* (WA) also has offences that involve knowledge: permitting premises to be used for drug manufacture or supply (s 5) or selling items for hydroponic cultivation of prohibited plants (s 7A).

This brief overview suggests that there is scope for a more detailed inquiry in relation to each Australian jurisdiction to consider whether the error made in *Kerr* has been repeated or avoided.

III CONTROLLING VILLAINY THROUGH EVIDENTIAL RULES: WILFUL BLINDNESS

Giving effect to a parliamentary choice to require knowledge when belief would provide a lower standard for conviction will not always assist the defendant, because evidential rules are also in play, and in particular the approach based on wilful blindness. In *R v Crooks*, whilst rejecting the view that a suspicion combined with a failure to enquire evidenced a belief because such a moral failing was not sufficient for criminal fault,⁵² the New Zealand Court of Appeal found that circumstances from which there could be an inference of awareness of the illicit origin of property could be added to a failure to investigate to

⁵² [1981] 2 NZLR 53, 57.

secure the relevant proof of subjective knowledge.⁵³ The Court differentiated between a suspicion as to the propriety of the origin of the property — namely the defendant ‘merely entertained a doubt’ — in relation to which a failure to inquire could not be used against him or her, because it might be explicable by gullibility, carelessness or a conclusion that the suspicion was not well-founded; and a contrasting situation in which the defendant ‘deliberately abstained from inquiry because he knew what the answer was going to be’. The latter might reveal that there was ‘an actual belief’ of the improper origin of the goods.⁵⁴ That failure would then be evidence because of its confirmatory value.

This has been subject to further elucidation. In *R v Martin*,⁵⁵ the Court of Appeal dealt with the question arising of whether knowledge that drugs were in her luggage on a drug importation charge required actual knowledge or could be made out by wilful blindness. Chambers J for the Court made clear that wilful blindness was sufficient, which he explained in the following terms:

... it will suffice if the Crown can prove beyond reasonable doubt that the accused (importer) had her suspicions aroused as to what she was carrying, but deliberately refrained from making further inquiries or confirming her suspicion because she wanted to remain in ignorance. If that is proved, the law presumes knowledge on the part of the accused. The fault lies in the deliberate failure to inquire when the accused knows there is reason for inquiry.⁵⁶

This goes beyond *Crooks* because it seems to require only suspicion. However, the Court added a comment to the effect that there was a distinction between this situation and recklessness — ‘actual knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur’ — which would not establish knowledge.⁵⁷ The distinction between a suspicion and knowledge of a risk is not immediately apparent. In a

⁵³ Ibid 58. This was an offence that at the time required knowledge and the courts suggested that belief would suffice.

⁵⁴ Ibid 59.

⁵⁵ [2007] NZCA 386 (31 August 2007).

⁵⁶ See at [10]. The Court applied the Canadian Supreme Court decision in *Sansregret v The Queen* [1985] 1 SCR 570 (see at 584–6). The Court noted that there might be an analytical distinction between failing to inquire because of knowledge of the answer and failing to confirm what was realised to be the likely truth because of a preference not to know, but suggested that this was a largely semantic distinction and that its suggested direction relating to a deliberate failure to inquire when there was known to be a reason for inquiry was sufficient. The approach to the moral fault arising from the deliberate failure to inquire was endorsed, though only in passing obiter dicta, in *Banks v R* [2014] NZCA 575 (28 November 2014) [19].

⁵⁷ [2007] NZCA 386 (31 August 2007) [12].

later case, *R v Soles*,⁵⁸ the Court of Appeal has indicated a need to revisit *R v Martin*. This was also an importation of drugs case in which the defendant admitted bringing into New Zealand a suitcase he had been asked to bring in and about which he admitted having suspicions. The trial judge directed the jury that suspicions that there might be drugs in the suitcase combined with refraining to make further enquiries in order to remain in ignorance was sufficient. This was held to amount to recklessness and so not sufficient for a conviction.⁵⁹ The Court then went on to discuss wilful blindness, emphasised that it was important to differentiate it from recklessness,⁶⁰ accepted that knowledge might include the idea of shutting one's eyes to an obvious means of knowledge,⁶¹ but also noted commentary as to the importance of limiting the concept to the situation of a person who refrained from obtaining confirmation in order to be able to say they did not have knowledge.⁶²

The Supreme Court in *Cameron v R*⁶³ has now held that recklessness is indeed a suitable *mens rea* relating to whether a substance is a controlled drug (and so *Martin* and *Soles* have to be viewed with that in mind). However, on the more general point of the role of wilful blindness, the Supreme Court confirmed that 'wilful blindness principles ... provide a method by which knowledge may be inferred', and had a role only when knowledge was the *mens rea*.⁶⁴

IV CONCLUDING SUMMARY

Criminal law designates when sanctions will be imposed by the coercive power of the state. Whilst it may be fanciful to suggest that many people will read criminal law statutes to know how far they may go in their conduct, there is a more general point that people should be able to read a criminal law statute and understand what it means. Anybody carrying out this task will notice that the legislature may designate knowledge alone, belief alone, belief with a variety of qualifications, knowledge or belief as alternatives, and may also introduce recklessness into the picture. That will no doubt found a natural reading of

⁵⁸ [2015] NZCA 32 (25 February 2015).

⁵⁹ *Ibid* [27].

⁶⁰ *Ibid* [33].

⁶¹ *Ibid* [34].

⁶² *Ibid* [37], the author ultimately cited being Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 159.

⁶³ *Cameron v R* [2017] NZSC 89 (9 June 2017).

⁶⁴ *Ibid* [77]. The outline in *Crooks* was endorsed.

knowledge as being a higher level of awareness than belief, and a conclusion that when knowledge alone is mentioned, that is what is required. If that person then turns to the relevant Interpretation Act, they will see the importance of the text in securing the meaning of words. That being so, the indication given in *Kerr v R* that judges have a standard approach of equating 'knowing' to 'believing' will raise the obvious question of why that should be when the legislature is able to mention both or either states of awareness when it so chooses and does so. It is suggested that a review of the two omnibus statutes in New Zealand criminal law together with the *Misuse of Drugs Act 1975* (NZ) supports the conclusion of the ordinary reader. Accordingly, in carrying out their role of statutory interpretation, the criminal courts should accept that knowledge means a higher level of awareness than belief and that Parliament's decision to have that as a sole mens rea, on the occasions it happens, should be respected. In this situation, the assistance given to the prosecution should arise from the established evidential rule of wilful blindness rather than ignoring the legislative choice to require knowledge.