

## Attempts

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## Policy statement and principles

### What

Section [72](#) of the Crimes Act 1961 sets out what constitutes an 'attempt'. Any one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing their object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

The section, does not, of itself, create an offence of attempt, but does provide that it applies to all offences.

### Why

Key functions of the Police are law enforcement, crime prevention and the maintenance of public safety. With 'attempts' applying to all offences Police can be focused on:

- preventing crime
- targeting and catching offenders before the principal offence is committed
- delivering a more responsive Police service.

### How

- To meet law enforcement and crime prevention objectives, Police will investigate, intervene before the principal offences have been committed and apply case management resolution to those people believed to be attempting to commit an offence.

## Overview

### Introduction

As a general rule, an attempt to commit an offence is itself an offence. The definition of attempt is found in section [72](#) of the Crimes Act 1961. Section [72](#) does not create attempt offences. Attempt offences are found in specific statutory provisions that proscribe offences, including attempting to commit those offences. For example, section [173](#) of the Crimes Act 1961 proscribes attempted murder and provides a penalty for the offence of attempted murder. The table of offences (below) gives examples of the more common attempt offences proscribed by legislation.

Section [311](#)(1) of the Crimes Act 1961 establishes a penalty regime for attempt offences not dealt with specifically by statute. Section [311](#)(2) makes it an offence to attempt to arrange for someone else to commit an offence. Making arrangements for someone else to commit an offence is an attempt to commit the principal offence and is punishable accordingly.

### Purpose

This chapter considers a body of case law that explains the law of attempt, what constitutes attempt and the nature of proximity. The chapter also considers the offence of being found in a public place preparing to commit an imprisonable offence (section [28](#) of the Summary Offences Act 1981) and procedures for investigating attempt offences.

## Health and safety duties

### Maximising safety and minimising risk

Maximising safety and eliminating or minimising risk at work is the responsibility of all Police employees and persons engaged by Police to provide a service including contractors and their employees, trainees, interns and volunteers. It is delivered through meeting the obligations under the [Health and Safety at Work Act 2015](#) and Police safety policies.

A key enabler is the application of the [TENR-Operational threat assessment](#) in the workplace.

The expectation of the Commissioner and the Act is that persons in the workplace will take reasonable care to ensure that their acts or omissions do not adversely affect the health and safety of other persons, comply as far as they are reasonably able to with any reasonable instruction that is given in order to comply with the [Health and Safety at Work Act 2015](#) or regulations under that Act. They will co-operate with any reasonable policy or procedure relating to health or safety at the workplace that has been notified to them and take immediate action to stop any perceived or potential breach of the act or if impractical, immediately report the matter to a supervisor.

### Health and safety should be an everyday conversation

Relevant Police instructions include:

- [Hazard management](#)
- [Health and safety](#)
- this chapter in relation to the safe procedures for investigating attempt offences.

## Table of 'attempt' related offences

This table lists offences under the Crimes Act 1961 (or as stated below) relevant to this chapter.

| Offence   | Jurisdiction   |
|---|--|
| Attempting to procure murder outside New Zealand when murder is not in fact committed<br>Section <a href="#">68(2)</a>                | Category 4 offence   |
| Attempted treason<br>Section <a href="#">74(3)</a>  | Category 4 offence   |
| Attempted piracy<br>Section <a href="#">95</a>  | Category 4 offence   |
| Attempting to pervert the course of justice<br>Section <a href="#">117</a>  | Category 3 offence   |
| Attempted sexual violation<br>Section <a href="#">129</a>   | Category 3 offence   |
| Attempted sexual intercourse with child or young person<br>Sections <a href="#">131</a> , <a href="#">132</a> and <a href="#">134</a> | Category 3 offence   |
| Attempted murder<br>Section <a href="#">173</a>   | Category 4 offence   |
| Attempting to procure murder in New Zealand when murder is not in fact committed<br>Section <a href="#">174</a>                       | Category 4 offence   |
| Attempted dishonest taking or conversion<br>Section <a href="#">226(2)</a>  | Category 3 offence   |
| Attempted arson<br>Section <a href="#">268</a>  | Category 3 offence   |
| Attempting to commit an offence other than those specified<br>Section <a href="#">311(1)</a>  | Category - as for actual offence   |
| Attempting to procure a person to commit an offence not committed<br>Section <a href="#">311(2)</a>                                   | Category - as for actual offence   |
| Being found in a public place preparing to commit a crime<br>Section <a href="#">28</a> - Summary Offences Act 1981                   | Category 1 offence for first offence or when offence committed later than 12 months since the previous offence<br><br>Category 2 offence for a second or subsequent offence within 12 months |

**Note:** Less common offences, set out in sections [102](#), [103](#), [104](#) and [105](#) of the Crimes Act 1961, are also defined in law as specific attempts; for example, attempted corruption and bribery.

## Definition of attempt

Section [72](#) of the Crimes Act 1961 defines ‘attempt’ but does not, of itself, create an offence of attempt. Section [72](#) provides that attempt applies to all offences and [72\(2\)](#) draws a distinction between attempting to commit an offence, and merely preparing to commit an (imprisonable) offence (discussed below under the heading of ‘[Proximity](#)’).

**Note:** Preparing to commit an imprisonable offence may, in itself, be an offence; see the discussion of section [28](#) of the Summary Offences Act 1981, below.

## Ingredients of attempt

These three elements of an attempt offence must be proven by the prosecution:

- Intent (mens rea)
- Act (actus reus)
- Proximity.

In addition, it must be legally possible, in the circumstances, for the offence to be committed (see discussion of physical or factual impossibility and legal impossibility below).

### Intent (mens rea)

The law distinguishes between an intention to commit an offence and an attempt to commit an offence. Mere dishonest intention does not amount to an attempt. (*R v Eagleton* (1855) Dears CC 515; 169 ER 826 at p 538, p 835, *Haughton v Smith* [1075] AC 476; [1973] 3 All ER 1109)

In order for an attempt offence to be proven, it must be shown that the defendant intended to commit the completed offence. There must be an attempt to commit an actual offence, not just an attempt to do something mistakenly believed to be an offence. For example, if a person seeks to supply a (harmless) substance for use as a recreational drug wrongly believing that supply of that substance is illegal no offence has been committed.

Whether or not intent exists is a question of fact for the jury. Intent may be proven by admissions or confession, or inferred from the act itself. For example, if someone gets into a motor vehicle and turns the key in the ignition then an intention to drive away in the vehicle may be inferred.

### Act (actus reus)

There must be an overt act of such a kind that it forms part of a series of acts that would constitute commission of an offence if it were not interrupted (*Haughton v Smith* [1075] AC 476; [1973] 3 All ER 1109). Effectively, the defendant must have put in train a series of events that would lead to the completion of the offence.

An act may have both an innocent and a guilty explanation; but if admission of other evidence supports the guilty explanation, a conviction may be entered.

### Omission

Section 72 of the Crimes Act 1961 provides that an omission may amount to an attempt to commit an offence. For example, withholding food and drink to an infant with the intention of starving the child to death may well be attempted murder.

### Proximity

The test in New Zealand of whether an act is sufficiently proximate to the offence so as to amount to an attempt to commit that offence is:

- Does the act or omission in question constitute a real or substantial step towards the commission of the offence?

(Per *Police v Wylie* [1976] 2 NZLR 167 (CA) at p 170)

The Court must apply common sense in determining whether an accused has gone beyond mere preparation, and has attempted to commit the offence.

So the answer to the question of whether an act is merely preparatory, or whether it amounts to an attempt, depends on whether real and practical step(s) or real and substantial step(s) toward the commission of the offence have been taken.

Put another way, in order for a crime to be attempted, an act must be done that goes beyond preparation of the crime, and is the commencement of execution of that crime (per *R v Henderson* (1948) 91 CCC 97 at p 105).

The test of proximity as outlined above, "enables more emphasis to be placed on what has already been done than on what remains to

be done".

(Per [R v B \(No 5\)](#) 7/9/01, William Young J, HC Christchurch T19/01)

This does not necessarily mean that the suspect has carried out most of the series of acts necessary to commit and complete the intended offence. The first step may, or may not, be enough to constitute an attempt. For example, if a person administers a small dose of poison, intending to give further doses until death occurs, the act of giving the first dose may constitute attempted murder, even in the absence of an intention that the first dose cause death.

The test of proximity requires the exercise of fine judgement on the part of Police.

## Scenario table

These scenarios may assist Police in determining the distinction between preparatory acts and real or substantial steps toward the commission of an offence:

| Scenario   | Offence?                    |
|--|-----------------------------|
| <b>Intention</b><br>- thinks about burglary and gathers equipment.                   | No offence                  |
| <b>Preparation</b><br>- decides on dairy to be burgled, borrows car.                 | No offence                  |
| <b>Action</b><br>- drives to dairy and parks in vicinity.                            | No offence                  |
| <b>Further action</b><br>- gets out of car, examines front door of dairy.            | Possible attempted burglary |
| <b>Still further action</b><br>- places jemmy in doorway, tries to spring door open. | Attempted burglary          |
| <b>Final action</b><br>- door gives way, offender enters and steals items.           | Burglary                    |

## Examples of proximate actions

A man approached two girls and offered one of them money to show him to a place with which, it was later proved, he was familiar and, on the way, he made indecent observations to her. He took the other girl's arm and offered her money to go with him to his place without her companion. It was held that these acts justified a finding of attempted sexual intercourse with both girls - [R v Yelds](#) [1928] NZLR 18.

A man got into a car driven by his ex-lover's new lover, and pointed a loaded sawn-off shotgun at the driver, who wrested the gun from him and escaped. It was held that:

- the actions of:
  - obtaining the shotgun,
  - shortening it, and
  - going to the victim's car

were merely preparatory

- the actions of:
  - getting into the car,
  - taking out the loaded gun, and
  - pointing it at the victim with the intention of killing him



were sufficiently proximate to convict the man of attempted murder.

(Per *R v Jones* [1990] 1 WLR 1097)

If in doubt, your colleagues and / or Legal Services will be able to assist you to decide whether an act or omission amounts to an attempt.

## Impossibility

Section 72(1) of the Crimes Act provides a person may be guilty of attempting to commit an offence even in circumstances where it would not have been possible to commit the actual offence.

It is not necessarily a defence to a charge of attempting to commit an offence that the actual offence could not have been carried out; i.e. it would have been impossible to carry out the offence. There are two types of impossibility; legal impossibility and factual impossibility.

### Physical or factual impossibility

An act is physically or factually impossible if the act in question amounts to an offence, but the accused is unable to commit it due to interruption, ineptitude, or any other circumstances beyond their control. For example:

- The accused was seen to hustle some women on a railway platform, and he put his hand in the pocket of one of them. The woman could not be located to give evidence, and accordingly there was no evidence that there was anything in her pocket (*R v Ring* (1892) 17 COXCC 491).
- A man bought hedge clippings believing they were cannabis (*Police v Jay* [1974] 2 NZLR 204).

The defendants in each case acted with criminal intent, and were found guilty of attempted theft and attempted drug offending respectively.

### Legal impossibility

By contrast with factual impossibility, where completion of an act is legally impossible, the person attempting that act cannot be convicted of attempt, even if they had criminal intentions. For example:

- In some cases, the law states that a particular act is not an offence. See, for example, section 246(4) of the Crimes Act 1961. The subsection allows dealings in goods which had once been the subject of a crime of dishonesty but which had been recovered. Thus if A steals goods from B, and B later recovers them, any disposition to C does not amount to receiving even though C was aware of A's theft. **Note:** An attempt to receive such stolen goods is therefore possible in fact, but impossible in law.
- The suspect may be mistaken in their belief that the completed act is illegal. That is, there must be an attempt to commit an actual offence, not an attempt to do something that, contrary to the person's belief at the time, does not amount in law to an offence. For example, it is not an offence to attempt to sell the hallucinatory plant, *Datura*, in the mistaken belief that possession of it is illegal.

### Police powers and attempt

In cases of suspected attempted offending, Police employees have the same powers as if the principal offences had been committed. Accordingly, suspects may be arrested without a warrant under section 315(2)(a) and (b) of the Crimes Act 1961 if the principal offence is punishable by imprisonment. If the offence is not punishable by imprisonment, check your powers in respect of that offence.

## Section 28 of the Summary Offences Act 1981; being found in a public place preparing to commit an imprisonable offence

Section [28](#) of the Summary Offences Act 1981 for the offences and penalties.

'Being found in a place' means to be found on, or discovered at the place, or seen entering or leaving that place, by some person, at the time of the incident. In *Braxton v Sugrue* (1929) GLR 31, the suspect admitted to being on the property, but as he had not been found or seen on the property, the judge ruled that the admission was not sufficient evidence.

### Ingredients of the section 28 offence

Under section [28](#)(1) of the Summary Offences Act 1981, you must prove the identity of the suspect and that they:

- were found in a public place, and
- were behaving in a manner from which it could be reasonably inferred that they were preparing to commit an imprisonable offence.

In determining the defendant's guilt the court may have regard to any previous convictions of a similar nature (section [28](#)(3) refers).

You do not have to specify the imprisonable offence. It is sufficient to show that the suspect was preparing to commit a particular class of crime ([Mellon v Police](#) (unreported), High Court Dunedin, 19 July 1994, AP8/94, AP9/94).

**Note:** Section [28](#) of the Summary Offences Act applies to offences punishable by imprisonment, reference to 'crime' being replaced as a result of the Criminal Procedure Act 2011.

### Powers

You can arrest a person suspected of 'preparing to commit an imprisonable offence' pursuant to section [28](#)(1) of the Summary Offences Act 1981 without warrant under section [39](#)(1) of the Summary Offences Act 1981.

### Possession of instruments for burglary

Section [233](#) of the Crimes Act 1961 and section [14](#) of the Summary Offences Act 1981 contain provisions similar to those of section [28](#) of the Summary Offences Act 1981 (above). They relate to disguises and possession of instruments for burglary. See the '[Burglary and allied offences](#)' chapter of the Police Manual.

## Examples of attempts to commit offences

### Attempted theft

A person enters a parked car intending to steal items in the car; later, it cannot be proven that anything is missing from the car (factual impossibility, but attempted offence committed).

### Attempted sexual contact with young person under 16

Man invites boys aged less than 16 to enter vehicle for express purpose of committing an indecent act.

### Attempted murder

A woman tries to shoot another person with a firearm she mistakenly thinks is loaded (factual impossibility, but attempted offence committed).

### Attempting to obtain money by deception

A person writes letter seeking money by false pretences although recipient not deceived; *Light* (1915) 84 LJ KB 865.

### Attempted dishonest taking of motor vehicle

Person unlawfully gets into driver's seat of vehicle with intention of driving it away.

### Attempted deception

A man arranges his own disappearance so his partner may collect his life insurance (*DPP v Stonehouse* [1977] 2 All ER 909).

### Attempting to procure a controlled drug

A person contacts dealer, negotiates to purchase controlled drug, attends dealer's premises with money and asks to see a sample (*Police v Wylie and Anor* [1976] 2 NZLR 167).

## Offences that cannot be attempted

In some cases a principal offence cannot be attempted. Such cases include:

- the offence is one of recklessness or negligence. For example a charge of manslaughter arising from reckless driving is based on an unintended consequence, i.e. the death. It is not possible to attempt to bring about something that is unintended;
- an element of attempt is part of the definition of the principal offence. For example, attempting to apply force is an element of the offence of assault, so attempting to assault a person is in itself an assault;
- the offence is such that the act has to be completed in order for it to exist at all. For example, a person cannot attempt to demand money with menaces because as soon as the demand is made the principal offence is committed.

## Attempts at attempt

A person cannot attempt to attempt to commit an offence.

## Acts to further an offence

In some cases, an act that is done to further the commission of an offence is punishable without needing to address the issue of whether the act actually amounts to an attempt at that offence. For example, a person who has committed an assault with intent to commit rape can be prosecuted for the assault, whether or not there is sufficient evidence to proceed with the charge of attempted rape.

## Jurisdiction

Attempts to commit offences covered by section [311](#) of the Crimes Act 1961 will be proceeded in the same category that would apply if the complete offence was alleged, (refer section [6\(2\)](#) of the Criminal Procedure Act 2011).

## Part and alternative convictions

If a person is found not guilty of the principal offence but the evidence establishes an attempt, they can be convicted of the attempt

even though an attempt charge was not filed (section [149](#) of the Criminal Procedure Act 2011 refers).

If a person is charged with the attempt but the evidence establishes that the principal offence was committed, they can be convicted of the attempt, or, if in the court's opinion the person will not be or has not been misled or prejudiced in his or her defence by an amendment, the court may amend the charge. After a conviction for an attempt however, the person cannot later be charged with the principal offence (section [150](#) of the Criminal Procedure Act 2011 refers).

If a person is charged with the attempt to commit an offence that includes in its commission any other offence, they may be convicted of an attempt to commit any of the offences included, even if the attempt to commit the whole offence is not proven (section [143](#) of the Criminal Procedure Act 2011 refers; (attempts to commit offences are themselves offences)).

## Parties

If a person intends to be a party to an offence and carries out the physical act that is his or her part in the offence, the ingredients in section [72\(1\)](#) are met. It is immaterial (on the question of the party's guilt) that it was impossible for the offence to be completed because the principal offender did not carry out the physical act that was their part of the offence ([R v Peneha](#) (unreported), High Court Invercargill, 22 November 1993, T 7/93).

## Penalties

Some provisions include express penalties for attempts to commit specific offences; see for example section [268](#) of the Crimes Act that provides for a penalty of imprisonment not exceeding 10 years for attempted arson.

If no express punishment is provided, section [311\(1\)](#) of the Crimes Act 1961 applies. Section [311\(1\)](#) provides that:

- where the maximum penalty for the principal offence is life imprisonment, an offender convicted of an attempt is liable to a term of imprisonment not exceeding 10 years, and
- in all other cases, the maximum punishment for an attempt is one half of the penalty for the principal offence.

## Procedures

### Action when suspect is attempting to commit an offence

Investigations into attempts should follow the procedure for the principal offence, with any necessary modifications. Follow these steps.

| Step | Action  |
|------|---|
| 1    | <p>Establish intent. This can often be inferred from:</p> <ul style="list-style-type: none"> <li>- the act referred to in the complaint; for example, when a shopkeeper reports an attempted burglary after finding jemmy marks on the door to the premises</li> <li>- suspicious behaviour</li> <li>- interview with the suspect.</li> </ul>   |
| 2    | <p>In the case of suspicious behaviour:</p> <ul style="list-style-type: none"> <li>- watch the suspect until they do something that shows intent and is proximate to the offence, unless early intervention is necessary to prevent the commission of a serious offence</li> <li>- obtain the suspect's explanation</li> <li>- complete enquiries</li> <li>- consult your supervisor about prosecution.</li> </ul> <p><b>Note:</b> Where the suspect's actions are insufficient to constitute an attempt, consider whether there is evidence of preparing to commit an offence, or of conspiracy.</p> |

### Action when suspect may be preparing to commit an imprisonable offence

If a person is acting suspiciously, follow these steps.

| Step | Action   |
|------|--|
| 1    | In a public place, watch until the suspect's actions amount to preparing to commit an imprisonable offence. Elsewhere, watch until the suspect's actions amount to an attempt to commit an imprisonable offence. |
| 2    | <p>Call for assistance and contain the scene.</p> <p><b>Remember:</b> The suspect may have company.</p>  |
| 3    | Obtain the suspect's explanation.  |
| 4    | Complete enquiries.  |
| 5    | Consider obtaining a warrant to search the premises and any vehicle.   |
| 6    | Securely label and store any instruments or tools found. They may be used in court or examined alongside evidence from premises to which entry has been forced.  |

### Framing charges

When framing the charge, add the words "attempted to" before the main text. After the reference to the Act and section that creates the full offence, add the Act and section that creates the offence of attempt (where applicable).

#### Example

"Attempted to enter a building, namely ( ), without authority and with intent to commit an imprisonable offence in that building.

Crimes Act 1961 s231(1)

Crimes Act 1961 s72"

