

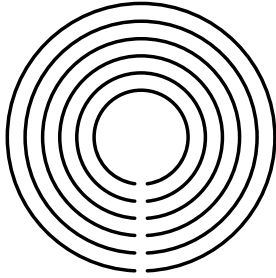


LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

INCHOATE OFFENCES

[LRC CP 48 – 2008]



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FIRST PUBLISHED
February 2008

ISSN 1393-3140

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Part-time Commissioner:

Marian Shanley, Solicitor

Part-time Commissioner:

Donal O'Donnell, Senior Counsel

LAW REFORM RESEARCH STAFF

Director of Research:

Raymond Byrne BCL, LLM (NUI),
Barrister-at-Law

Legal Researchers:

Áine Clancy BCL, LLM (NUI)
Kate Dineen LLB, LLM (Cantab)
Philip Flaherty BCL, LLM (NUI), Diop sa Gh (NUI)
Eleanor Leane LLB, LLM (NUI)
Richard McNamara BCL, LLM (NUI)
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Jane O’Grady BCL, LLB (NUI), LPC (College of Law)
Charles O’ Mahony BA, LLB (NUI), LLM (Lond), LLM (NUI)
Nicola White LLB, LLM (Dub) Attorney-at-Law (NY)
Joanne Williams LLB, LLM (NUI), Barrister-at-Law

STATUTE LAW RESTATEMENT

Project Manager for Restatement:

Alma Clissmann, BA (Mod), LLB, Dip Eur Law (Bruges), Solicitor

Legal Researchers:

John P. Byrne BCL, LLM (NUI), Barrister-at-Law
John Kenny LLB, LLM (Cape Town), Barrister-at-Law

LEGISLATION DIRECTORY

Project Manager for Legislation Directory:

Deirdre Ahern LLB, LLM (Cantab), Dip E-Commerce
(Law Society), Solicitor

Legal Researchers:

Eóin McManus BA, LLB (NUI), LLM (Lond)
Tina O’ Reilly BCL (Law and German), LLM (NUI)

ADMINISTRATION STAFF

Secretary/Head of Administration:

John Quirke

Head of Administration and Development:

John Glennon

Higher Executive Officer:

Alan Heade

Executive Officers:

Emma Kenny

Darina Moran

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Legal Information Manager:

Conor Kennedy BA, H Dip LIS

Cataloguer:

Eithne Boland BA (Hons), HDip Ed, HDip LIS

Clerical Officers:

Ann Browne

Ann Byrne

Liam Dargan

Sabrina Kelly

PRINCIPAL LEGAL RESEARCHER FOR THIS CONSULTATION PAPER

David Prendergast LLB, LLM (Lond), Barrister-at-Law

CONTACT DETAILS

Further information can be obtained from:

Head of Administration and Development
Law Reform Commission
35-39 Shelbourne Road
Ballsbridge
Dublin 4

TELEPHONE:

+353 1 637 7600

FAX:

+353 1 637 7601

EMAIL:

info@lawreform.ie

WEBSITE:

www.lawreform.ie

ACKNOWLEDGEMENTS

The Commission would like to thank the following people for their assistance in the preparation of this Consultation Paper:

Dr Bebhinn Donnelly, Lecturer, School of Law, Swansea University
Ms Elizabeth Howlin, Office of the Director of Public Prosecutions

Full responsibility for the content of this publication lies with the Commission.

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INTRODUCTION

A Background to the project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ under which the Commission is committed to examining, and exploring reform options for, the inchoate criminal offences of attempt, conspiracy and incitement. This project complements other work by the Commission in criminal law, including its examination of homicide² and defences in criminal law.³

2. The Commission's work on criminal law should also be seen against the wider background of the codification of Ireland's criminal law. The Criminal Law Codification Advisory Committee⁴ has been established by the Oireachtas to oversee the development of a process of codification in Ireland. The Committee's *First Programme of Work 2008-2009*⁵ states that the Advisory Committee intends to publish an inaugural *Draft Criminal Code Bill* consisting of a General Part and a Special Part.⁶ The General Part comprises the principles and rules of criminal liability that apply generally to criminal offences (such as the physical and fault elements and general defences), while the Special Part contains the details for specific offences,

¹ See *Report on the Third Programme of Law Reform 2008-2014* (LRC 86 – 2007). Project 19 in the Third Programme commits the Commission to examine inchoate offences, on which the Commission began work under its *Second Programme of Law Reform 2000-2007*.

² See *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87 – 2008), which completed the Commission's work under Project 17 in the Third Programme of Law Reform (on which the Commission had published two Consultation Papers under its Second Programme).

³ Project 18 in the Third Programme commits the Commission to examine the defences of provocation, legitimate defence (including self-defence) and duress and necessity. Under its *Second Programme of Law Reform 2000-2007*, the Commission published three Consultation Papers on these defences and is currently preparing a Report on them.

⁴ Established under Part 14 of the *Criminal Justice Act 2006*.

⁵ Available at www.criminalcode.ie

⁶ As recommended in the Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 2004), available at www.justice.ie

such as offences against the person, and theft and fraud offences. The inchoate offences of attempt, conspiracy and incitement belong to the General Part because they relate to, and can attach to, all the specific offences in the Special Part of the criminal law.⁷ The Advisory Committee has included these inchoate offences in the General Part of the inaugural *Draft Criminal Code Bill* which it intends to publish under its *First Programme of Work 2008-2009*.⁸ The Commission is very pleased to be working closely with the Advisory Committee and, in this way, contributing to the development of the inaugural code instrument.⁹

B Introduction to inchoate offences

3. The inchoate offences addressed in this Consultation Paper are the common law offences of attempt, conspiracy, and incitement that attach to specific special part offences. “Inchoate” comes from the Latin word “inchoare,” which means “to start work on.” Inchoate offences criminalise behaviour that is working towards, or leading up to, the completion of a crime. If you request another to murder someone you may be committing incitement to murder. This inchoate offence is committed regardless of whether the murder is actually carried out. Likewise, if two or more people agree to murder someone they may be committing conspiracy to murder, and for this no actual murder is required to take place. Finally, if someone tries to cause death by their own means, but the intended victim does not die, they may be guilty of attempted murder.

4. Murder is the special part offence here. Each of the three inchoate offences may attach to this special part offence depending on the facts. Inchoate offences are parasitic on special part offences. There is no such thing as an offence of simply “attempt”; criminal attempt is always attempt to do something criminal. Lawyers and academics may talk about attempt and criminal attempts without mentioning what is being attempted; this Paper does so. What is being discussed here are the contours of attempt liability, that is, the common features of attempted murder, attempted theft, attempted burglary, attempted rape, and all the other conceivable attempt offences.

⁷ See *Codifying the Criminal Law* at paragraphs 2.89 and 2.99.

⁸ Criminal Law Codification Advisory Committee *First Programme of Work 2008-2009* at paragraph 1.04, available at www.criminalcode.ie

⁹ This Commission’s previous work on specific areas of criminal law, such as non-fatal offences against the person, formed the basis for some of the mini-codes already enacted which will be incorporated into the inaugural *Draft Criminal Code Bill*: see *Codifying the Criminal Law* at paragraph 1.69.

5. Inchoate offences do not exist in isolation. An inchoate offence comes into existence only when it combines with one or more of the special part offences. Attempt and incitement always attach to a crime. Conspiracy always attaches to either a crime or an unlawful activity. Unlawful activity for the purpose of conspiracy has a particular meaning and is wider than “criminal”. It should be also noted that there are a number of conspiracy offences that are really special part offences. Conspiracy to defraud and conspiracy to corrupt public morals are examples.

6. Generally, if a new special part offence comes into existence, then inchoate offences relating to that substantive offence also come into existence. Suppose, for example, a new statutory offence of adultery is enacted. This would have the effect of creating inchoate offences of attempting, inciting, and conspiring to commit adultery. It is noted that Article 15.2.1° of the Constitution of Ireland vests exclusive law-making power in the Oireachtas. The process described in the adultery example here does not conflict with Article 15 since it would be the Oireachtas, not judges causing attempt, conspiracy, and incitement to commit adultery to come into existence. Just as self-defence would be a defence to any new offence enacted in the absence of the enacting statute providing otherwise, so too would attempt, conspiracy, and incitement relate to any new offence enacted.

C Scope of the project

7. The label “inchoate offences” can be used to describe not just attempt, conspiracy and incitement when they attach or relate to special part offences, but also many special part offences that have the character of criminalising conduct that leads to prohibited harm. Central examples of special part offences that can reasonably be called inchoate offences are possession offences.¹⁰ Possession of a knife in public¹¹ is a special part offence on the statute book. Yet mere possession causes no actual prohibited harm such as injury or the fear of attack. Carrying a knife may increase the likelihood of criminal harm, or it may be thought that carrying a knife in public is a prelude to offences such as assault and robbery. By prohibiting mere possession in public, the law aims to stamp out conduct leading to substantive criminal harm. Thus it has a similar function to attempt, conspiracy, and incitement, though in this particular instance the special part inchoate offence (possession of a knife) catches conduct further removed from the completion of substantive criminal harm than criminal attempt liability would. Accordingly, this special part inchoate offence can be thought of as supplementing the general part inchoate offences.

¹⁰ Another example is endangerment in section 13 of the *Non-Fatal Offences Against the Person Act 1997*.

¹¹ Section 9 of the *Firearms and Offensive Weapons Act 1990*.

8. Inchoate liability in the wide sense means the attribution of criminal liability for conduct leading to, but not occasioning, the resulting harm that the criminal law prohibits. This includes special part inchoate offences as well as the general part principles allowing for attempt, conspiracy, and incitement to attach to special part offences. The narrower meaning of inchoate liability includes only the latter – that is, attributing liability for attempting, inciting, or conspiring to commit particular offences. This can be called relational liability. Relational liability is a subset of inchoate liability. Relational liability is the focus of this Consultation Paper; it is concerned with attempt, incitement and conspiracy as relational offences that attach to – and are entirely parasitic on – substantive special part offences.

9. Another note about the scope of this Consultation Paper is that it focuses on the substantive law of general part inchoate offences. That is, the descriptions of the constituent parts of attempt, conspiracy, and incitement. Significant procedural issues arise regarding these offences. There are rules of evidence unique to conspiracy, for example. These procedural issues are not, however, within the scope of this Paper. Neither are questions of punishment for these offences. It is envisaged that by initially focusing exclusively on the substantive law of inchoate offences, the Commission can best serve Ireland's process of codification. This takes account of the recommendation of The Expert Group on Codification of the Criminal Law that the first phase of codification should include a comprehensive statement of general part principles¹² and this statement should not be cluttered with procedural rules.¹³

D Outline of this Consultation Paper

10. This Consultation Paper begins with discussion of the relational inchoate offences and their place in the criminal law. It then proceeds to address attempt, conspiracy and incitement. This particular sequence reflects a movement outwards from the occurrence of substantive criminal harm, attempt being closest to the completion of a substantive special part offence, incitement typically furthest away.¹⁴

¹² Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 2004) at paragraph 2.86.

¹³ *Codifying the Criminal Law* at paragraph 2.89.

¹⁴ This sequence is used in a number of textbooks including Charleton, McDermott, and Bolger *Criminal Law* (Butterworths 1999), McAuley and McCutcheon, *Criminal Liability* (Round Hall Press 2000) and Hanly *An Introduction to Irish Criminal Law* (2nd ed Gill & Macmillan 2006).

11. Chapter 1 explores the nature of inchoate offences. It gives a brief account of the history of inchoate offences and their rationale. It then discusses criminal law theory engaged by inchoate offences, namely principles of legality, objectivist and subjectivist perspectives, and principles of *mens rea*. Then follows a discussion of how inchoate liability relates to, and differs from, secondary liability. Next, the operation of inchoate offences in practice in Ireland is surveyed. The Chapter concludes with discussion of considerations relevant to the task of codifying inchoate offences.

12. Chapter 2 focuses on criminal attempts, describing current Irish law on attempt by separating attempt into three components: *actus reus*, *mens rea*, and the target or goal of an attempt. The target of an attempt refers to the special part offence that the attempt relates to. For each section, reform options are evaluated and provisional recommendations are set out. Chapter 2 also discusses, in the context of criminal attempts, issues that apply to all three inchoate offences. These issues include the scope for inchoate offences to attach to other inchoate offences (double inchoate liability). Also discussed is the relevance of impossibility and abandonment to inchoate liability. The Commission makes a number of provisional recommendations for the law of criminal attempt. These provisional recommendations amount to a codification of attempt law as it is. Though it is acknowledged there is substantial uncertainty as to precisely what the existing law in Ireland is. To sum up the Commission's provisional recommendations for attempt: the *actus reus* of attempt is an act proximate to the completion of the target special part offence, the *mens rea* of attempt is intention, and neither impossibility nor abandonment are a defence to a charge of attempt.

13. Chapter 3 is on criminal conspiracy. Following the structure of the previous Chapter it sets out Irish law on conspiracy, highlights problematic aspects, and then evaluates other jurisdictions' approaches as well as arguments for reform. Chapter 3 deals with what might be called substantive or special part conspiracy offences such as conspiracy to defraud. These conspiracy offences differ from conspiracy as an inchoate offence that attaches to special part crimes in that they are free-standing full special part offences in themselves. Case law on these offences does, however, employ and indeed develop the law on conspiracy generally since the same concept of agreement is used. For the most part the Commission provisionally recommends a codification of existing conspiracy law. To sum up, the Commission provisionally recommends conspiracy is an agreement to commit a crime whether or not the crime is the primary purpose of the agreement or a side effect of pursuing the agreement; that so-called impossible conspiracies are still conspiracies; and that withdrawal from a conspiracy is not a defence. The significant provisional recommendation for

law reform in relation to conspiracy is that conspiracy be limited to agreements to commit crime. The Commission provisionally recommends, therefore, that it no longer be the case that agreements to pursue unlawful, though non-criminal, activity constitute criminal conspiracy.

14. Chapter 4 is on incitement. Again, it follows the structure of the previous Chapters in that it aims to set out the existing law and then survey and evaluate options for reform. Some issues that arise only with incitement are discussed. These include a perceived gap in incitement liability and the relationship of incitement to free speech principles. The Commission's provisional recommendations for incitement are to codify the existing common law position. The Commission, therefore, provisionally recommends that the *actus reus* of incitement be defined as "commands, encourages, or requests"; that the *mens rea* of incitement be intention; that only crimes can be incited; and that neither impossibility nor withdrawal is a defence to incitement.

15. Chapter 5 lists the Commission's provisional recommendations.

16. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations made are provisional in nature. The Commission will make its final recommendations on the subject of inchoate offences following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its Final Report, those who wish to do so are requested to make their submissions in writing by post to the Commission or by email to info@lawreform.ie by **30 May 2008**.

CHAPTER 1 INCHOATE LIABILITY

A Introduction

1.01 This Chapter explores the nature of inchoate offences. It gives a brief account of their history and rationale. The Chapter explains the relevance of some aspects of criminal law theory to inchoate offences. In particular those aspects are legality, objectivist and subjectivist perspectives, and *mens rea*. The similarity and the difference between inchoate liability and secondary liability are outlined. Also, a picture of the operation of inchoate offences in practice in Ireland is provided. Finally, the Chapter considers the tension between achieving certainty and allowing flexibility in the codification of inchoate offences.

B Historical development

1.02 Inchoate liability in the wide sense means the attribution of criminal liability for conduct leading to, but not occasioning, prohibited consequences. The criminal law imposes this inchoate liability by having specific offences such as possession of firearms in what is known as the special part of the criminal law. The criminal law also has general part principles allowing for attempt, conspiracy, and incitement to attach to special part offences and thereby expanding their scope. The narrower meaning of inchoate liability includes only the attribution of liability for attempting, inciting, or conspiring to commit particular offences. This is called relational inchoate liability or simply relational liability;¹ it is a subset of inchoate liability in the wide sense. Relational liability is the focus of this Paper; it is concerned with attempt, incitement and conspiracy as relational offences that attach to special part offences.

1.03 Relational liability as understood today – that is, attempt, incitement, and conspiracy available to attach to special part offences – is a relatively recent development in the story of inchoate liability in the wide sense.² In the late 18th Century there was judicial recognition that every

¹ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at Chapter 9.

² For an account of the evolution of inchoate liability in the wide sense see McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at Chapter 9, especially at 401-412. See also Law Reform Commission of Canada *Secondary Liability: Participation in Crime and Inchoate Offences* (Working Paper 45 1985) at 9-14.

crime necessarily entails criminal liability for attempting it.³ *R v Higgins*,⁴ at the beginning of the 19th Century, was handled by the judges as a case of criminal attempt. It was, however, a classic case of incitement – the defendant solicited a servant to steal his master’s goods. It can be seen, therefore, as establishing incitement as a distinct inchoate offence that will attach to special part crimes.

1.04 Specific conspiracy offences go back many centuries. An example of a specific conspiracy from the 14th Century is conspiracy to maintain false pleas or cause children to maintain false pleas.⁵ A modern day specific conspiracy is conspiracy to defraud.⁶ Sayre reports an interesting case from as far back as 1351 where it seems a general conspiracy charge that would relate to a substantive wrong was charged but refused recognition by Shardlowe J.⁷ McAuley and McCutcheon interpret the failure of the charge as revealing the specific nature of conspiracy at the time and indeed for the centuries that followed.⁸

1.05 The first identification of conspiracy as a relational offence that would attach to all other specific crimes and indeed non-criminal wrongs may have been in the 18th Century in the writings of Hawkins and Blackstone.⁹ Sayre doubts Hawkins was accurately describing the existing law,¹⁰ McAuley and McCutcheon doubt Blackstone was.¹¹ *R v Journeymen Tailors*¹² employed conspiracy as Hawkins and Blackstone described, that is, as something that could attach to a yet to be specified wrong, though this case subsequently became an authority for a specific offence amounting to conspiracy to strike. The seminal 19th Century authority for conspiracy cited in modern courts and textbooks is *R v Jones*,¹³ which identifies conspiracy in

³ *R v Schofield* (1784) Cald 397. See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 409-410.

⁴ (1801) 2 East 5.

⁵ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 422-423.

⁶ See Chapter 3 below at paragraphs 3.55 and 3.68. See also McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 422-430.

⁷ Sayre “Criminal Conspiracy” (1922) 35 HLR 393, at 397.

⁸ See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 423.

⁹ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 424, citing 1 Hawk PC c72 paragraph 1 and 4 Bl. Com. 136.

¹⁰ Sayre “Criminal Conspiracy” (1922) 35 HLR 393, at 402.

¹¹ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 424.

¹² (1721) 8 Mod 10.

¹³ (1832) 110 ER 485, 487, per Denman CJ.

its pure relational form as an agreement to do an unlawful act or a lawful act by unlawful means.

C The rationale of inchoate offences

(1) *Retributivism and harm prevention*

1.06 Inchoate offences have two main rationales. One rationale points out how the person who attempted, incited, or conspired to murder is just as morally culpable as the person who committed murder. The fortuitous event of the victim not dying can be thought to cause no reduction in the blameworthiness of those who intended him dead by their own hands or by the hands of another. One judge in 2007 when sentencing for an attempted murder is reported as saying that he failed to see why the defendant should “avoid a life sentence merely because [he] is a bad shot”.¹⁴

1.07 Another rationale of inchoate offences maintains that law enforcement agents should be able to step in before crimes are completed and still be able to process the would-be perpetrators through the criminal justice system. It is thought that the goal of harm prevention is better pursued if this is so, rather than if law-enforcement agents have to wait until the crime is completed before intervening if they want prosecution to be possible. Putting it another way, one writer asserts, “society should not be required to choose between prevention of the crime and prosecution of the offender.”¹⁵

1.08 Neither of these rationales is adequate on its own. If the moral culpability rationale was the sole rationale, why is it that intending harm or hoping for it or other wicked thoughts are not punishable? It is not just evidential difficulties that stand against such a possibility; our criminal law does not aim to criminalise all bad people but rather, for the most part, bad people who cause harm.

1.09 Consistent pursuit of the harm prevention goal alone would require serious thought be given to criminalising such behaviour as leaving one’s own bicycle unlocked in the street, displaying valuable items in public and so on. Though there are many examples in criminal law of extending liability out from the already wide range of relational inchoate liability, the mere tendency to lead to criminal harm does not of itself make conduct appropriate for criminalisation.

¹⁴ “Man Gets Life Sentence for Attempted Murder” *The Irish Times* 5 May 2007.

¹⁵ Enker “*Mens Rea* and Criminal Attempt” (1977) Am B Found Res J 845, at 850.

(2) *Rationale of conspiracy*

1.10 It has been argued that conspiracy has a unique rationale among the inchoate offences.¹⁶ It is said that the rationalisation of conspiracy is not to be found in an account of criminalising conduct that leads to crime. If criminalising conduct leading to crime is the only rationale in play, then it would suggest preparatory acts of a single actor should be criminal also.¹⁷ Rather, the rationalisation of conspiracy is based on the seriousness of the choice the conspirator makes when he or she exchanges one obligation (to obey the law) for another (the criminal enterprise that he or she agrees to).¹⁸ It is one thing for a lone actor to discontinue on a criminal path, it's quite another matter where an actor is part of a criminal group. Add to this the observations about how criminal gangs, as opposed to individuals, can achieve economies of scale in criminal enterprise and there emerges a picture of a conspiracy as a particularly dangerous threat of criminal harm of significant magnitude.¹⁹

1.11 Undoubtedly conspiracy is the odd one among the three inchoate offences; that it can relate to non-criminal wrongs as well as crimes makes it unique as a general part entity. Conspiracy can transform clearly non-criminal conduct into something criminal. Of course, principles of secondary liability render seemingly innocuous behaviour, such as giving somebody a lift, into a crime if such behaviour was done knowing a crime was being assisted (driving the person to a shop that they will rob). But this behaviour is clearly connected to a crime (in this case, robbery). With conspiracy there may be no crime. The peculiarity of conspiracy warrants questioning of the justification of conspiracy. The arguments for restricting conspiracy to agreements to commit crime are examined in Chapter 3. Restricting conspiracy in this way would bring its rationale more in line with that of attempt and incitement.

¹⁶ Dennis "The Rationale of Criminal Conspiracy" (1977) 93 LQR 39. See also Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at 25-35.

¹⁷ The Law Commission for England and Wales notes that this observation does not have as much force today as it formerly did in light of the many preparatory offences since enacted in England and Wales. *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraph 2.11, footnote 9.

¹⁸ Dennis "The Rationale of Criminal Conspiracy" (1977) 93 LQR 39, at 41.

¹⁹ See Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraphs 2.11-2.19.

D Criminal law theory engaged by inchoate offences

(1) Legality

1.12 The legality principle is a foundational principle of modern criminal law. It can be stated in various ways.²⁰ One formulation says that persons should be convicted and punished for doing X only if they in fact did X and X was clearly and accessibly marked out in advance as something that is prohibited and that can result in punishment. This legality principle forms the core of “the rule of law” which applies to all law – not just criminal law – and is fleshed out with principles including: law should not be retroactive, it should be accessible, capable of being obeyed, stable, and certain, applied in practice consistent with how it is promulgated and so on.²¹ The rule of law is concerned with respecting citizens’ autonomy and freedom. When the law is certain and applied as it says it will be applied, citizens can lead self-shaping lives enjoying maximum freedom. Certainty in law provides security for citizens to rely on the law to be enforced for their protection and not to their detriment provided they keep within its boundaries.²²

1.13 The legality principle has played a crucial role in informing the Commission’s recent recommendations for criminal law.²³ It is also a driving force presupposed in current processes to codify the criminal law.²⁴ This Paper will pay much attention to the legality principle, especially when considering reform of conspiracy.²⁵

²⁰ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 42, Ashworth *Principles of Criminal Law* (5th ed Oxford University Press 2006) at 68, Dripps “The Constitutional Status of the Reasonable Doubt Rule” (1987) 75 Calif L Rev 1665.

²¹ This draws on Lon Fuller’s account of the rule of law and its value in Fuller *The Morality of Law* (Yale University Press 1965). The Constitution of Ireland expressly enshrines a number of these principles, for example, the prohibition of retroactive criminalisation in Article 15.5.1^o.

²² See Simmonds *Central Issues in Jurisprudence* (2nd ed Sweet & Maxwell 2002) at chapter 7.

²³ Law Reform Commission *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

²⁴ Legality is invoked 12 times in the Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 2004).

²⁵ See Chapter 3 below at paragraphs 3.64-3.76.

(2) *Subjectivism and objectivism*

1.14 Tension between subjectivism and objectivism is engaged by inchoate offences. Broadly speaking, subjectivists²⁶ recommend that criminal defendants be punished on the basis of their responsibility and culpability for criminal harm. Objectivists²⁷ say this concern should be tempered with recognition of the actual harm people have caused. Inchoate offences uniquely do not, or need not, occasion actual criminal harm. Thus objectivists argue for narrow inchoate offences while subjectivists argue for wider. While subjectivism tends to work as an exculpatory doctrine – and objectivism inculpatory – when applied to defences such as duress and self-defence, for inchoate offences the roles are reversed. Thus an objectivist like Antony Duff proposes a quite narrow definition for criminal attempt while Glanville Williams’ subjectivist approach recommends a wider criminal attempt.²⁸

(3) *The significance of mens rea for inchoate offences*

1.15 Generally, criminal law operates so that specified acts (or omissions) are prohibited. If these acts are done with a culpable or guilty mind liability, specified punishment may result. Punishment is imposed because a (criminal) harm was caused by an actor with a guilty mind. In contrast, inchoate offences serve to punish on the basis of, at most, risked or threatened criminal harm posed by an actor with a guilty mind. With inchoate offences the emphasis on the aspects on the offence is the reverse of what is typical in criminal law. That is, the guilty mind of the accused, rather than his or her physical actions, is the most important part of an inchoate offence. Indeed, his or her actions by definition will not satisfy the *actus reus* of the substantive offence to which the inchoate offence charged relates, for otherwise the substantive offence is the appropriate charge. Of course, the evidence in a case of attempted murder, for example, will often also tend to suggest the commission of lesser offences such as assault. But this is not necessarily the case. People who plan shoplifting most likely do not commit any substantive special part offence, though they commit the inchoate offence of conspiracy to commit theft.²⁹ The actions that constitute a criminal attempt may be innocuous if viewed without reference to the guilty mind. For incitement and conspiracy the actions are typically mere communications.

²⁶ Leading writers include HLA Hart, Glanville Williams, and Andrew Ashworth.

²⁷ Proponents include Oliver W Holmes, Antony Duff.

²⁸ See below at paragraph 2.34.

²⁹ See Enker “*Mens Rea and Criminal Attempt*” (1977) Am B Found Res J 845, at 847.

1.16 Some textbook writers reverse their usual order of approach when writing about inchoate offences and thus discuss *mens rea* before *actus reus*.³⁰ As Duff states, “[i]t is commonplace that the analysis of criminal attempts must begin with the *mens rea* or fault element. In an attempt, ‘the intent becomes the principal ingredient of the crime’.”³¹

E Inchoate liability and secondary liability

1.17 There are two ways in which a person can be held criminally liable where he or she did not *in fact* completely perform a special part offence.³² One way is by relational inchoate liability – a person can be convicted of attempt, conspiracy, or incitement where the target special part offence is not completed by them or indeed by anyone. The other way is by secondary liability. Where a person aids, abets, counsels or procures the commission of an indictable offence they can be tried and convicted as if they themselves committed that offence.³³ This means that a person can be found guilty of a special part offence even though what they did does not satisfy the definition of offence. An illustrative example is the getaway driver for a bank heist. The driver does not in fact perform the acts that constitute robbery (appropriating another’s property by force); the driver just helps those who do. Yet the driver may be convicted of robbery. In this case secondary liability serves to widen out or amplify the reach of special part offences. This is also what relational inchoate offences do. Relational inchoate liability and secondary liability are how the general part expands liability for special part offences. In this respect, secondary and inchoate liability have the opposite function to the general defences such as self-defence and duress because these defences serve to restrict or negate liability for special part offences.

1.18 The crucial difference between inchoate liability and secondary liability is that for the secondary liability a special part offence is necessarily completed, while for inchoate liability it is not necessary that any special part offence is completed. Textbooks and other academic writing thus treat inchoate liability and secondary liability separately. But in practice the two areas overlap, particularly with incitement and conspiracy. If one person incites another they will be inchoately liable, but this will transform to

³⁰ Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 400.

³¹ Duff *Criminal Attempts* (Oxford University Press 1996) at 5 citing *R v Whybrow* [1951] 35 Cr App R 141, 147.

³² This draws on Law Reform Commission of Canada *Secondary Liability: Participation in Crime and Inchoate Offences* (Working Paper 45 1985) at 1-3.

³³ Section 7(1) of the *Criminal Law Act 1997*.

secondary liability if the other person goes on to commit the incited crime. In Chapter 4 on incitement there is discussion of the appropriate way for the criminal law to address those who encourage, assist, or direct crimes that they do not themselves perform.

1.19 It can be noted that just as new special part offences in statutes have served to widen out the range of inchoate liability, so too they have widened out secondary liability. Statutory derivative liability does this. An example is section 58 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, which grounds derivative liability where a corporate offence “is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of” an officer.³⁴ There is a range of conduct that might not have satisfied the secondary liability requirements of “aid, abet, procure, or counsel” but would satisfy this “consent, connivance, or neglect” requirement.

F Inchoate offences in practice

(I) Attempts

1.20 The Annual Reports of the Director of Public Prosecutions (DPP) provide records of offences directed for prosecution in the Central Criminal Court and the outcome of these prosecutions. Combining the data in the 2004, 2005, and 2006 Annual Reports, there were four prosecutions for attempted murder in the five year period, 2001-2005. A number of recent attempted murder cases will increase this number in future reports.³⁵ In the same period there were 195 prosecutions for murder. Of the four attempted murder prosecutions, two resulted in convictions on a guilty plea, one in conviction for a lesser offence, and for one there is no data.

1.21 On no occasion in the four year period, 2002-2005, did a prosecution for murder result in a conviction for attempted murder, though 41 of the 159 murder prosecutions in that same period resulted in convictions for lesser charges, other than attempted murder, such as manslaughter and assault causing harm. This confirms what might have been supposed: that attempted murder does not function as a “fall-back” charge for foundering murder prosecutions.

1.22 For the five year period, 2001-2005, there were seven directions for prosecution for attempted rape. In the same period the number of prosecutions for rape was 298. Of the seven attempted rape prosecutions,

³⁴ See Law Reform Commission *Report on Corporate Killing* (LRC 77-2005) at 67-69.

³⁵ See, for example, “Man gets life sentence for attempted murder” *The Irish Times* 5 May 2007; “Suspended term for wife who tried to kill family” *The Irish Times* 24 July 2007.

one resulted in conviction by the jury, two resulted in convictions on guilty pleas, one in conviction for a lesser offence, and for three there is no data.

1.23 On two occasions in the four year period, 2002-2005, what started as a rape prosecution resulted in conviction for attempted rape. In the same period there were eight convictions for a lesser offence, other than attempted rape, resulting from 164 rape prosecutions. Here, attempted rape differs from attempted murder in that it does seem to serve a limited “fall-back” function for rape prosecutions that do not succeed. One might venture to explain this by reference to the difference between murder and attempted murder being the death of the victim, and whether a victim has died or not can be proved with certainty. In contrast, it is not so easy to prove the fact distinguishing rape from attempted rape, that fact being sexual penetration.

1.24 Attempted burglary and attempted robbery are subsumed under burglary and robbery respectively, and are therefore not distinguished in the DPP’s statistics. The Commission, nevertheless, understands that outside of the Central Criminal Court, prosecutions for attempted burglary and attempted robbery commonly feature in the Circuit Criminal Court.

(2) *Inchoate offences in the wide sense*

1.25 Inchoate offences in the wide sense means all those offences that criminalize conduct leading to, but not occasioning, the harm that society seeks to prevent through the use of criminal law. Inchoate offences in the wide sense, therefore, includes attempting, inciting or conspiring to commit crimes. It also includes many stand alone special part offences in statutes, such as possession offences and endangerment offences. These may be called statutory inchoate offences.

1.26 Statutory inchoate offences feature more frequently than the common law inchoate offences of attempt, conspiracy, and incitement attaching to substantive crimes. Examples include:

- Possession of a firearm without a firearm certificate.³⁶
- Possession of a knife in public.³⁷
- Dangerous driving.³⁸

1.27 The 2006 Annual Report of the Courts Service details the offences disposed of in the Special Criminal Court. The offences are:

- Membership of an unlawful organisation.³⁹

³⁶ Section 2 of the *Firearms Act 1925* as amended.

³⁷ Section 9 of the *Firearms and Offensive Weapons Act 1990*.

³⁸ Section 53 of the *Road Traffic Act 1961* as amended.

- Possession of an explosive substance.⁴⁰
- Possession of an explosive device.⁴¹
- Possession of ammunition.⁴²

1.28 Each of these four offences is an example of an inchoate offence in the wide sense. The occurrence of any substantive harm is not necessary for conviction for any of these offences. Rather, the conduct criminalised by these offences is conduct that is perceived as tending to lead to substantive harm or the threat of substantive harm.

(3) *Conspiracy*

1.29 On many occasions academic writers have criticised the overuse of conspiracy.⁴³ Perhaps this is a reaction to the criticism that conspiracy is the prosecutor’s “darling”⁴⁴ since, among others things, it triggers a relaxation of evidential rules such as hearsay. This criticism does not, however, seem to apply to Ireland at the moment. Among guidelines for prosecutors set out by the DPP are specific considerations when charging conspiracy. Under section titled “Choice of Charge” the DPP states:

“Conspiracy charges are generally not appropriate where the conduct in question amounts to a substantive offence and there is sufficient reliable evidence to support a charge for that offence. But there are occasions when to bring a conspiracy charge is the only adequate and appropriate response on the available evidence. Where it is proposed to lay or proceed with conspiracy charges jointly against a number of accused, the prosecutor should be aware of the risk of the trial becoming unduly complex or lengthy.”⁴⁵

³⁹ Section 21 of the *Offences Against the State Act 1939* as amended.

⁴⁰ Section 3 of the *Explosive Substances Act 1883*, substituted by section 4 of the *Criminal Law (Jurisdiction) Act 1976* and amended.

⁴¹ Section 4 of the *Explosive Substances Act 1883* as amended by section 15 of the *Offences Against the State (Amendment) Act 1998*.

⁴² Section 21 of the *Firearms Act 1925* as amended.

⁴³ See, for example, Hocking “Conspiracy as a very enduring practice: Part I” [1998] 8 ICLJ 1 and “Conspiracy as a very enduring practice: Part II” [1998] 8 ICLJ 121, Sayre “Criminal Conspiracy” (1922) 35 Harv L Rev 393, Hadden “Conspiracy to Defraud” (1966) Camb LJ 248.

⁴⁴ *Harrison v United States* 7 F.2d 259, 263 (2d Cir. 1925).

⁴⁵ Director of Public Prosecutions “Statement of General Guidelines for Prosecutors” at 18, available at http://www.dpp.ie/filestore/documents/E_Guidelines.pdf

1.30 Evident here is a principled reluctance to charge conspiracy – it is only to be charged out of necessity; it is bad practice to charge conspiracy where substantive charges could be laid. Nevertheless, conspiracy has historically been charged where a substantive offence has indeed been completed. Conspiracy is committed by a mere agreement, and it is not the kind of agreement that will be recorded. A conspiracy because of its nature may be unlikely to come to the attention of state officials and there is often insufficient evidence without acts on foot of the conspiracy to reveal its existence.

G Codification of inchoate offences

1.31 Codification of inchoate offences engages a tension between certainty and flexibility. In aiming for certainty and precision when defining inchoate offences, particularly attempt, a price is paid in that the law becomes rigid.⁴⁶ A rigid law tends to bind the court to reaching unwanted decisions, either because it criminalises behaviour that should not be criminal or fails to criminalise behaviour that should be criminal. The code-drafter seems to be left in a difficult position: to opt for certainty at the cost of flexibility, or to allow flexibility at the cost of certainty. It can be argued, however, that the position is not so difficult because the second option, flexibility at the cost of certainty, does not involve the destruction of the benefits associated with certainty that might be thought.

1.32 It is accepted that certainty in the criminal law is a good thing. It is a key part of the legality principle set out above.⁴⁷ Often certainty is seen as a good in itself, and this may be so. But the principal value of certainty in law lies in its instrumental value. One account of the good of certainty in law points out that it makes for more efficient handling of cases in court thus making justice less costly to the State and to litigants. This explanation continues, explaining why it is a good thing to keep the cost of justice down – it might ultimately boil down to the good of equality or liberty – this does not matter for present purposes. The point is that certainty in law is not the point at which the explanation ends. Another account of the good of certainty in law claims that it allows people to rely on the law. If citizens can be reasonably confident about how the law will be applied then they have greater scope to plan their lives, pursue their goals with coherent plans; the more certain law is, the more confidently it can be relied on and thus the greater liberty people have to pursue self-shaping lives. Certainty is an instrumental good, not an end in itself.

⁴⁶ A problem referred to as “ossification of the criminal law”. See Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 2004) at paragraph 1.108.

⁴⁷ At paragraph 1.12.

1.33 If the substantive criminal law indicates with certainty what conduct is liable for criminal sanction, then citizens enjoy greater freedom than they would enjoy were substantive criminal law to be vague and uncertain. Of course, there are more aspects than just certainty that need to be present if this goal of substantive criminal law is to be achieved. The substantive criminal law needs to be relatively stable, it needs to be promulgated and accessible, and must not be so onerous as to be incapable of being complied with, and so on.⁴⁸ The drafter of a particular provision of the criminal code chiefly contributes to this overall effort through precision of drafting. For example, special part offences such as theft and fraud offences need to be known by someone conducting business – such a person needs to know what they must not do in order to avoid incurring a criminal penalty. The more precise these offences are drafted in a Code, the better.

1.34 Now, turning from substantive special part offences to inchoate offences, it is suggested that the drive for certainty is different in an important way. As has been remarked on in detail above,⁴⁹ inchoate offences attach to substantive offences. Their existence is essentially relational or parasitic. It is the substantive special part offences that people need to know (or at least are able to find out quickly and inexpensively) so that they can avoid committing them. When citizens know they cannot do these offences then they know there is no gain, but only danger, in attempting, conspiring, or inciting these things. There is no additional benefit to be gained regards shaping your life from being able to know precisely at what point you become criminally liable when you plan and prepare and then execute a bank heist.⁵⁰ By definition there is no money to be made in an attempted bank robbery.

1.35 The value of certainty in defining inchoate offences is more limited than the value of certainty in defining substantive offences. This should be borne in mind when striving to make inchoate offences certain. Similarly, the legality principle is not so constraining regarding defining the

⁴⁸ Fuller *The Morality of Law* (Yale University Press 1965), Raz “The Rule of Law and its Virtue” in Raz *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979), Finnis *Natural Law and Natural Rights* (Clarendon Press 1980).

⁴⁹ At paragraphs 4-6 of the Introduction above.

⁵⁰ See Duff *Criminal Attempts* (Oxford University Press 1996) at 394 discussing *DPP v Kneller* [1973] AC 435.

excusatory defences⁵¹ as it is regarding justificatory defences such as legitimate defence.⁵²

⁵¹ Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 2004) at paragraph 2.95.

⁵² Law Reform Commission *Consultation Paper on Legitimate Defence* (LRC CP 41-2006).

CHAPTER 2 ATTEMPT

A Introduction

2.01 It is criminal to attempt to commit a crime. Haugh J in *The People (Attorney General) v Thornton* described a criminal attempt as “an act done by the accused with specific intent to commit a particular crime.”¹ This definition has three components:

- i) “an act” (the *actus reus*)
- ii) “intent” (the *mens rea*)
- iii) “a particular crime” (the target of the attempt).

2.02 This Chapter describes these three components in detail and evaluates different approaches to defining criminal attempt. It also addresses the issues:

- i) whether a criminal attempt is committed where it is not possible to complete the target substantive offence (impossibility)
- ii) whether a person who ceases in their attempt at crime thereby becomes not liable for attempt (abandonment).

2.03 The law on attempt liability in Ireland is found in case law. An attempt to commit a statutory offence is still a common law offence.² Describing the law involves setting out the Irish courts’ interpretation of the common law. For some aspects, however, there is no Irish judicial comment and therefore non-Irish courts’ interpretation of the common law is of particular relevance.

2.04 A number of substantive offences have their related attempt offence provided for in statute. Attempted murder is provided for in section 11 of the *Offences Against the Person Act 1861*. Strictly speaking, this provision is unnecessary because once murder is an offence known to the law, the offence of attempted murder automatically exists. An advantage of

¹ [1952] IR 91, 93.

² See comments of Walsh J in *People (Attorney General) v Sullivan* [1964] IR 169, 200.

codifying inchoate offences will be to remove whatever doubts about their existence that motivate the enactment of specific inchoate offences.

B The components of attempt

(1) The actus reus of attempt

2.05 At common law it is settled that an act is necessary for criminal attempt; mere intention to commit a crime is not criminal.³ Also settled at common law is that merely preparatory acts cannot constitute the act necessary for an attempt.⁴ Beyond this there are differing and much debated approaches to defining the *actus reus*. It has been noted many times how difficult it is to provide a formula or definition that will distinguish attempt from mere preparation.⁵ As the Law Commission for England and Wales recognised, “there is no magic formula which can [] be produced to define precisely what constitutes an attempt.”⁶

2.06 This section endeavours to identify the *actus reus* of attempt in Irish law. It also evaluates different approaches to defining the *actus reus* before setting out the Commission’s provisional recommendations.

(a) Four approaches

2.07 Four basic approaches to defining the *actus reus* of attempt have been developed. Each approach proposes a test for identifying the act of a criminal attempt.

- i) Proximity theory requires an act close to completing the target substantive offence.
- ii) The “first act” approach is satisfied with any act towards the completion of the target offence.
- iii) The “last act” approach requires the defendant to have done every act necessary on his part to bring about the completion of the target offence.

³ *Attorney General v Richmond* (1935) 1 Frewen 28, *R v Eagleton* [1845-60] All ER 363; 169 ER 766; 6 Cox CC 559.

⁴ *R v Eagleton* [1845-60] All ER 363, *The People (Attorney General) v Thornton* [1952] IR 91, 93, *The People (Attorney General) v Sullivan* [1964] IR 169, 195.

⁵ Gavan Duffy P in *The People (Attorney General) v England* (1947) 1 Frewen 81, 83, *Haughton v Smith* [1975] AC 476, 499, Law Commission for England and Wales *Consultation Paper Conspiracy and Attempts* (CP No 183 2007) at paragraph 16.1.

⁶ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.45.

- iv) An unequivocal act approach requires the act to unambiguously bear its criminal intent on its face.

2.08 The first three approaches impose liability at different points along the range between beginning to act on an intention to commit a crime and completing that crime; the proximate act lying somewhere in between the first and last acts. The unequivocal act approach differs in that it is not range-based. Rather, it expects the act to have an intrinsic quality. The unequivocal act approach is perhaps best understood as motivated by a concern to have an *actus reus* of attempt that confirms the *mens rea*. Thus, it is said that under the unequivocal act approach the primary purpose of having an “act” requirement is evidential. The act confirms that the mind is indeed a guilty one. The first three approaches are mutually exclusive in that it would be incoherent to combine the first and last act approaches with each other. Nor would it make sense to combine either the first or last act approaches with the proximate act approach. But the unequivocal act approach can coherently be combined with any one of the others.

(b) *Actus reus of attempt in Ireland*

(i) *Proximity theory in Ireland*

2.09 In *The People (Attorney General) v Sullivan*⁷ the Supreme Court held that the defendant could rightly be tried for attempting to obtain money by false pretences. The defendant was a midwife who was contracted to be paid a basic salary for attending 25 births in a year. For additional births beyond 25 she would get additional pay. She had submitted some reports of fictitious births. There was no evidence whether she had reached or exceeded the 25 mark. Accordingly, the Court assumed, in her favour, she had not. The question was whether she had done enough at this point (having submitted just three false reports) to be guilty of an attempt given that she would in the end receive the extra pay only if her reported cases within the contract year exceeded 25? Were her actions attempt rather than mere preparation? In answering yes, the Court held that each and every false claim submitted was “sufficiently proximate” to committing the substantive offence in order to constitute the physical element of attempt.⁸

2.10 This decision is seen as a straightforward application of proximity theory,⁹ which holds that the act done towards the target offence must be close to completion of the target offence in order to be a criminal attempt. Indeed, Walsh J, speaking for the Supreme Court in *Sullivan*, stated what he

⁷ [1964] IR 169.

⁸ Thus, the Supreme Court affirmed the conclusion of Teevan J in the High Court.

⁹ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 274.

called “the proximity rule” to decide the case, quoting Parke B in *R v Eagleton* as expressing this rule in the negative form:

“acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are”¹⁰

2.11 An act “immediately connected with” the commission of an offence could reasonably be considered not just a proximate act, but actually a last act. Of course, the passage quoted above does not say that *only* acts immediately with commission are attempts; it can be read as illustrating the proximity rule by stating how last acts most certainly qualify as attempts under the proximity rule. This is Walsh J’s reading of *Eagleton*. However, *Eagleton* has been read by other courts, and by commentators, as setting out a last act test.¹¹ The last act reading has much plausibility when Parke B’s judgment is quoted more expansively than the Supreme Court in *Sullivan* did. The passage above continues:

“if, in this case, ... any further step on the part of the defendant had been necessary to obtain payment ... we should have thought that the obtaining credit would not have been sufficiently proximate to the obtaining the money. But ... no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt.”¹²

2.12 The Law Commission for England and Wales suggest this passage was “probably not intended to be a statement of law to be applied in all cases.”¹³ Whatever the exact intention behind it, this passage reveals the *ratio* of *Eagleton*: an attempt is committed when the defendant has performed the last act needed on his part to bring about the substantive offence. The word “proximate” is used, but it is used in a quite restrictive sense.¹⁴ *Sullivan*, strictly speaking, did not apply *Eagleton*, for in *Sullivan*

¹⁰ *R v Eagleton* [1855] 6 Cox CC 559, 571; 169 ER 826, 835, quoted by Walsh J at [1964] IR 169, 195-196.

¹¹ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 415. See Lord Diplock in *Stonehouse* [1978] AC 55, 68. Note the suggestion of the Law Commission for England and Wales that Lord Diplock should not be read as applying a last act test – Law Commission for England and Wales *Consultation Paper Conspiracy and Attempts* (CP No 183 2007) at paragraph 13.7.

¹² [1855] 6 Cox CC 559, 571; 169 ER 826, 835-836.

¹³ Law Commission for England and Wales *Consultation Paper Conspiracy and Attempts* (CP No 183 2007) at paragraph 13.3.

¹⁴ See discussion of meaning of “proximate” in Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.48.

the Court held that there could be a criminal attempt notwithstanding there being more acts on the part of the accused needed to complete the substantive offence. The additional acts needed in *Sullivan* were the submission of further birth reports, whether real or fictitious, so as to exceed 25 births for the contract year.

2.13 The case of *The People (Attorney General) v England*,¹⁵ like *Sullivan*, applies a proximity test. The defendant had talked about an unspecified house in Dublin where “pornographic practices” took place and, so the witness claimed, invited the witness to attend this house. Gavan Duffy P, speaking for the Court of Criminal Appeal, held that the defendant’s conviction for attempting to procure an act of gross indecency could not stand because the action of the accused “was not, in fact, near enough to the actual criminal procurement of [the witness] to constitute in law the attempt to procure charged in the indictment.”¹⁶

2.14 The *England* is not an authority for the proposition that mere words cannot constitute an attempt.¹⁷ There are numerous scenarios where mere words would satisfy even the stringent last act test for attempt. For example, an adult instructs a child do a criminal act. The child is incapable of the crime; hence, an incitement charge is not appropriate. But there may be a criminal attempt here since the adult has tried to commit a substantive offence through the agency of the innocent child.

(ii) Unequivocal act in Ireland

2.15 In *The People (Attorney General) v Thornton*¹⁸ the accused had been convicted of attempting to procure a poison to bring about a miscarriage. The accused had made a girl pregnant. While a doctor was examining this girl the accused asked “wasn’t there something called ergot?” In the opinion of the Court of Criminal Appeal though this could, as a matter of probability, be construed as an attempt to get an abortion, the communication was ambiguous and thus could not be considered an attempt.¹⁹ The conviction was quashed. A version of the unequivocal act requirement forms the *ratio* of *Thornton* since the reason why a prosecution for attempt could not lie in *Thornton*, according to the Court of Criminal

¹⁵ (1947) 1 Frewen 81.

¹⁶ (1947) 1 Frewen 81, 84.

¹⁷ The *England* judgment cited *R v Higgins* (1801) 2 East 5, where words alone constituted an attempt. In *The People (Attorney General) v Thornton* [1952] IR 91 an alleged attempt committed by words alone was held not to constitute an attempt, but not for the reason that evidence disclosed mere words.

¹⁸ [1952] IR 91.

¹⁹ [1952] IR 91, 96-97.

Appeal, was because more than one inference could be drawn on viewing the act of the accused

(iii) Proximity theory's primary position in Ireland

2.16 *The People (Attorney General) v Thornton*²⁰ could be described as applying an unequivocal requirement. Yet no express endorsement of unequivocal act approaches was made in *Thornton*. Furthermore, Haugh J endorses proximity theory:

“[the act] must go beyond the mere preparation, and must be a direct movement towards the commission after the preparations have been made ... and if it only remotely leads to the commission of the offence and is not immediately connected therewith, it cannot be considered as an attempt to commit an offence.”²¹

2.17 This is the *Eagleton* formula, interpreted by the Supreme Court in *Sullivan* as suggesting simply a proximity test. But the *Eagleton* formula can be, and has been, read as suggesting a last act test. Requiring the act to be “immediately connected” with the commission of the offence can plausibly be another way of saying that a last act is required. It is true that “the Irish law on criminal attempts embraces the proximity theory.”²² But proximity theory is not the only approach discernible in Irish cases.

(c) Evaluation of the four approaches

(i) Evaluation of the proximate act approach

2.18 Proximity theory requires a proximate act for criminal attempt. A proximate act is one that is close to the commission of the full target offence. A proximate act stands in contrast to a remote act; the latter will not suffice for attempt liability. In *R v Button*²³ the defendant lied in order to get a favourable handicap for some running races, which he went on to win. The defendant's deceit was discovered prior to the stage of his claiming the prize money. It was held that his acts were close enough to obtaining money by false pretences and thus he could be convicted of attempting that offence.

2.19 The *Eagleton* formula has been read as applying a proximate act test and also as applying a last act test. Perhaps this reveals that these two tests are really the same thing. The Law Commission for England and Wales pointed out that the literal meaning of proximate is “nearest, next

²⁰ [1952] IR 91.

²¹ [1952] IR 91, 93.

²² Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 274.

²³ [1900] 2 QB 597.

before or after (in place, order, time, connection of thought, causation etc”.²⁴ Adopting this meaning for “proximate” and the result is that “proximate act” is just another way of saying “last act”.²⁵ However, it is apparent that for the most part in recent times, when judges and commentators use “proximate act” they do not mean to restrict their subject matter to last acts.²⁶ Furthermore, “proximity” is much used in tort cases, and it is clear that in tort proximity is not restricted to meaning right beside, or immediately beside something.

(I) *Arguments for proximate act approach*

2.20 The main advantage of the proximate act approach over other tests is also, strangely, its chief disadvantage. That is, its vagueness and indeterminacy allows a court flexibility to avoid reaching unacceptable results in individual cases. First and last act tests tend to criminalise, respectively, too much and too little. The proximate act test allows a court to steer clear of these extremes. It enables the court to provide a legally justified decision that will accord with the court’s sense of a just result.

(II) *Arguments against proximate act approach*

2.21 The indeterminacy of the proximate act test is demonstrated by asking of any case applying the test whether it could have been used to reach the opposite conclusion.²⁷ Consider the leading Irish case, *The People (Attorney General) v Sullivan*.²⁸ The Supreme Court said each submission of a fictitious birth report by the defendant midwife was sufficiently proximate to the substantive offence of obtaining money by false pretences. But the Court could easily and plausibly have said that each fictitious birth report was not sufficiently proximate given that the midwife still had much work to do – submit more than 25 reports within a year²⁹ – before she was in a position to claim and receive pay for work she did not do. There is substantial distance, both in terms of quantity of work (more reports, whether real or false) and time (up to a whole year), between the acts of the

²⁴ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.48, citing Concise Oxford Dictionary (6th ed 1976).

²⁵ Parke B’s judgment in *Eagleton* [1855] 6 Cox CC 559, 571; 169 ER 826, 835-836 attains its greatest level of coherence when his use of “proximate” is understood as this literal traditional dictionary meaning.

²⁶ *The People (Attorney General) v Sullivan* [1964] IR 169.

²⁷ As done by Duff *Criminal Attempts* (Oxford University Press 1996) at 42, 44 and 48.

²⁸ [1964] IR 169.

²⁹ In the absence of evidence on point the Court assumed, in the defendant’s favour, that she was below the 25 report mark when she made the false reports detailed in evidence.

accused for which she stood trial and the completion of the substantive offence. The point is that the *Sullivan* decision could have gone the other way and still be an entirely reasonable application of the proximate act approach.

2.22 With some confidence it can be said that the first and last act approaches, if applied to *Sullivan*, would result, respectively, in conviction and acquittal. But predicting which way a *Sullivan* type case would go on the proximate act approach cannot be done with any confidence because the proximate act approach does not constrain judicial decisions. Rather, it provides a way for judges to make their decision sound constrained in law. McAuley and McCutcheon say it “looks more like a guide than a true test”.³⁰ Guides do not bind their users as to where to go.

(ii) ***The last act approach***

2.23 The last act is the final thing the defendant needs to do in order for the full offence to happen. In *DPP v Stonehouse*³¹ the defendant faked his death so that his wife, who was unaware of her husband’s plan, could collect insurance money. Citing the *Eagleton* requirement for an act “immediately connected” with the full offence Lord Diplock said that the “offender must have crossed the Rubicon and burnt his boats.” The defendant was guilty of attempt, according to the House of Lords, because he had done all the physical acts necessary on his part to result in his wife getting the insurance money.

(I) ***Evaluation of last act test***

2.24 The last act test promises certainty. The problem is that the more the last act approach is geared towards pursuing the goal of certainty the less it serves the purpose of having inchoate offences in the first place. This is because the last act test needs to be applied strictly in order to give certainty. But when it is applied strictly it results in an extremely restricted law of criminal attempts.

2.25 Duff claims *Stonehouse* is not really a literal application of the last act test.³² To ensure his wife would get and keep the insurance money Stonehouse himself had to evade detection, something he in fact failed to do. The same point can be made about other supposed last act cases. This literal application is needed if the last act approach is to have the certainty it promises. For otherwise it will collapse to something like the proximate act approach, which does not give the formula to pick out precisely what is and what is not the *actus reus* of an attempt in any given set of facts.

³⁰ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 417.

³¹ [1978] AC 55.

³² Duff *Criminal Attempts* (Oxford University Press 1996) at 41.

2.26 Yet with the literal application of the last act approach we see just how restrictive it is. Does it even catch the classic case of the shooter who misses her intended victim? The last act required is that the would-be murderer shoots her victim, but, in contrast to where the intended victim is wearing a bullet proof vest or otherwise survives despite the bullet hitting him, where the shot is simply off target the last act – send a bullet *at* the intended victim – has not been done. When sentencing for an attempted murder in 2007, de Valera J said he failed to see why the defendant should “avoid a life sentence merely because [he] is a bad shot”.³³ This sentiment applies, with even stronger reason, to the issue of whether it is attempted murder where the shooter misses having intended to kill his target. This is precisely the scenario where attempt liability should attach and yet a strict last act test would suggest otherwise. Duff cites attempted theft and attempted rape as attempt crimes that will no longer exist if a strict last act test is applied since the very act needed to make out the attempt – the last act – is precisely the same act that makes the substantive crime complete.³⁴ Criminal attempt is made redundant.³⁵

2.27 It could be said that these statements about how last act theory applies in practice are incorrect, that you can convict for attempted murder the shooter who misses his victim under the last act test, as well as the would-be rapist who fails to complete rape solely because of impotence. But insofar as this is the case, then the last act approach has lost its chief attribute, namely, the promise of certainty and consistency in picking out criminal attempts.

2.28 The supposed benefit of certainty gained by a last act test over a proximate act test comes at the cost of not pursuing the aim of having inchoate offences in the first place. This aim being consistent moral punishment (why should the person who tried and failed to commit rape get an aggravated sexual assault conviction rather than an attempted rape conviction?) and the prevention of criminal harm (we want the police when possible to stop would-be car thieves before they make off in the car).

(iii) *The first act approach*

2.29 The “first act” is any act towards the commission of the target offence. In *R v Schofield*³⁶ the defendant, intending to burn down a house, had placed materials and a lighted candle under the stairs. Although the

³³ “Man Gets Life Sentence for Attempted Murder” *The Irish Times* 5 May 2007.

³⁴ Duff *Criminal Attempts* (Oxford University Press 1996) at 41.

³⁵ See Gordon *Criminal Law* (3rd ed Green & Sons 2000) at 209.

³⁶ [1784] Cald 397.

defendant had progressed well beyond the “first act,” the following *dictum* of Lord Mansfield can be read as endorsing a first act test:

“...if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.”³⁷

2.30 A number of code provisions from around the world embody versions of first act tests for attempts. Queensland’s Criminal Code of 1899 is an example. Section 4(1) provides:

“When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.”³⁸

2.31 The use of “begins” in this provision indicates the first act suffices. However, the act still has to be “overt” and must manifest the person’s intention. So not all conceivable first acts will suffice. A more pure form of a first act test is section 22 of the German Penal Code, which defines attempt:

“An attempt to commit a crime occurs when a person, in accordance with his conception of the crime, moves directly toward its accomplishment.”³⁹

2.32 James Fitzjames Stephen wrote,

“[A]n act done with intent to commit a crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted.”⁴⁰

This can be read as a first act test; the act can be at any stage (including, therefore, the first) in the series of acts. The Law Commission for England and Wales read Stephen’s test this way.⁴¹ Yet Duff argues that Stephen’s test endorses proximity theory rather than first act theory.⁴² In any event,

³⁷ [1784] Cald 397, 403.

³⁸ Section 4(1) of the *Criminal Code Act 1899*.

³⁹ Buffalo Criminal Law Centre’s translation. Available at <http://wings.buffalo.edu/law/bclc/StGBframe.htm>

⁴⁰ *Sturge Stephen: A Digest of the Criminal Law* (9th ed Sweet & Maxwell 1950).

⁴¹ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.22.

⁴² Duff *Criminal Attempts* (Oxford University Press 1996) at 43.

this approach did not find much favour with the courts; it is inconsistent with the requirement that the conduct element of an attempt be more than mere preparation.

(I) *Evaluation of first act test*

2.33 The first act approach vigorously pursues the rationale of inchoate offences, whether that rationale be located chiefly in the crime prevention or moral punishment goal, because it enables police to step in at any stage after the first act towards the substantive crime is committed and prosecute the would-be perpetrator. This approach to inchoate liability does not logically lead on to requiring criminal intent alone to be an inchoate crime. The physical element (the first act) is still required as a matter of evidence – the act is insisted on as a reassurance that the intention is real, that is, doing the act corroborates the existence of the criminal intent.⁴³ At trial there must be evidence suggesting the requisite intent and also that an act was done in furtherance of that intent.

2.34 Glanville Williams commended the logic of the first act approach:

“Any act done with the fixed intention of committing a crime, and by way of preparation for it, however remote it may be from the crime, might well be treated as criminal. The rational course would be to catch intending offenders as soon as possible, and set about curing them of their evil tendencies: not leave them alone on the ground that their acts are mere preparation.”⁴⁴

2.35 With a first act test the range of attempt liability would be very large. Many people harbour criminal intentions which they never pursue and thus they cause no criminal harm. Yet the first act test stands ready to criminalise people the very minute they take one act towards committing a crime no matter how much additional work would be needed. The man who looks up strangulation methods on the internet intending to strangle his wife commits attempted murder. There are problems with this. It criminalises conduct very far away from substantive criminal harm. Perhaps the encroachment on liberty is too much a price to pay for the marginal gains in harm prevention.⁴⁵

2.36 There is an additional rule of law objection. A legal system cannot possibly detect and enforce criminal law that prohibits such a wide range of behaviour as that rendered criminal under the first act approach.

⁴³ Duff *Criminal Attempts* (Oxford University Press 1996) at 36.

⁴⁴ Williams *Criminal Law: The General Part* (Stevens & Sons 1953) at 632.

⁴⁵ See Duff *Criminal Attempts* (Oxford University Press 1996) at 37 on the good of allowing *locus poenitentiae* (a place for repentance), and thereby treating citizens as autonomous agents.

And it is costly to try – police and court time is used up on trivial crimes. Left with un-enforced criminal law there results disparity between application of law in practice and the law as promulgated. Selective police enforcement results, which has a corrupting effect.⁴⁶ It becomes incumbent on police to turn a blind eye to things. The more they have to do this, the more scope for corruption. It is not that these undesirable circumstances do not happen as things are, or do not happen so long as a first act test for attempts is declined; the point is that the tendency for these bad things increases with letting the criminal law net become more and more all-catching.

(iv) ***The unequivocal act approach***

2.37 The act needed to satisfy the physical element of attempt according to the “unequivocality” theory is one that cannot be regarded as having a purpose other than the commission of the target offence. This theory was proposed by Sir John Salmond; in his words the physical act of the attempt must be “unequivocally referable” to the intention to commit the target offence.⁴⁷ Salmond said a criminal attempt should bear “criminal intent upon its face. *Res ipsa loquitur*.” Thus, it can be seen that Salmond’s test is motivated by seeking to have an evidential confirmation of the criminal intention to commit substantive crime.

2.38 The New Zealand Appeal Court, of which Salmond was a member, put this theory into practice in *R v Barker*.⁴⁸ The defendant was caught leading away a young boy to whom he had promised “good fun.” The defendant later admitted he intended to commit buggery. Salmond J said the physical act of a criminal attempt must be such that on its own it is evidence of the particular criminal intent. The act must bear its criminal intent on its face. The act in *Barker*, according to Salmond J, did indeed manifest the admitted intention; an objective observer of the defendant’s actions would see no explanation for the conduct other than pursuing the relevant sexual assault. This approach was applied subsequently with some modification in New Zealand in a number of cases,⁴⁹ but was expressly abolished by statute in 1961, which states “[a]n act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or

⁴⁶ Ashworth “Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law” (1988) 19 Rutgers LJ 725, at 750.

⁴⁷ Salmond *Jurisprudence, or the Theory of the Law* (3d ed Stevens & Haynes 1910). The section on attempts was deleted from later editions of this work.

⁴⁸ [1924] NZLR 865.

⁴⁹ Duff *Criminal Attempts* (Oxford University Press 1996) at 50.

proximately connected with the intended offence, *whether or not there was any act unequivocally showing the intent to commit that offence*".⁵⁰

2.39 The English Court of Appeal's judgment in *Davey v Lee*⁵¹ has been seen as endorsing the unequivocal act approach.⁵² A translation of the Italian Penal Code provision on attempt reads "Anyone who does acts aptly directed in an unequivocal manner towards commission of a crime shall be liable for an attempted crime..."⁵³ In *United States v Oviedo*⁵⁴ it was said that the act must corroborate the *mens rea*:

"[W]e demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law."

The reason for this was evidential, that is, to prevent conviction of the innocent on the basis of inferences from possibly unreliable testimony and the history of the defendant.

(I) *Evaluation of the unequivocal act approach*

2.40 McAuley and McCutcheon identify the chief weakness of the unequivocal approach as its likelihood of leading to unmeritorious acquittals.⁵⁵ The concern is that on a charge of attempting a specific offence the defendant will escape liability if it can be demonstrated that his actions were capable of being viewed as trying to achieve something other than the target offence specified in the indictment. Glanville Williams illustrated this point with the example of the man found kneeling beside a corn stack with pipe in mouth and matches in hand.⁵⁶ Even with independent evidence of intent to burn the corn this man evades attempt liability since his act is equivocal: it is ambiguous between trying to set fire to the corn and trying to light his pipe. This is how the pure unequivocal approach as developed

⁵⁰ Section 72(3) of the *Crimes Act 1961* (NZ). Emphasis added.

⁵¹ [1967] 2 All ER 423.

⁵² McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 418-419, Gordon *Criminal Law* (3rd ed Green & Sons 2000) at 195.

⁵³ Translation of Article 56 of Italian Penal Code from Rocco, Maitlin and Wise, *The Italian Penal Code* (Sweet and Maxwell 1978) at 18.

⁵⁴ 525 F.2d 881 (5th Cir.1976).

⁵⁵ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 421.

⁵⁶ Duff discusses this example: Duff *Criminal Attempts* (Oxford University Press 1996) at 51. See also Dressler *Cases and Materials on Criminal Law* (3rd Ed Thomson West 2003) at 762.

and subsequently abolished in New Zealand applies. Evidence of *mens rea* in the form of a confession goes to establish *mens rea* only and is not to be used to help establish the *actus reus*.

2.41 The test can be watered down, and thereby not allow so much unmeritorious evasion of liability, by allowing independent evidence of *mens rea* to resolve equivocality about the defendant's act. Thus, in light of the man beside the corn stack later admitting an intention to set fire to the corn, his act is no longer equivocal. Rather, it can now be seen as an unequivocal act towards the target offence. Italian courts have taken this approach.⁵⁷ This approach has also been discerned in the English Court of Appeal's decision in *Jones v Brooks*.⁵⁸ The defendant brothers had been acquitted at trial of attempting to take and drive away a car without the owner's consent. They were not charged with attempted theft of a car; their "confession" disclosed only an intention to "borrow" a car in order to get home. A police constable had observed one of them try without success to open a locked Ford Anglia with unsuitable keys and then duck down when his brother keeping watch called out a warning. Later, one of the defendants admitted to police that they were seeking to borrow a car in order to drive themselves home. The Court of Appeal accepted that if the expressed intention to borrow a car was ignored then the act of trying to enter the car was equivocal between a number of possible aims including theft or sleeping in the car.⁵⁹ But, according to the Court, the expressed intention should be considered as a relevant circumstance which can help reveal what aim the otherwise equivocal act was directed towards.⁶⁰

2.42 As McAuley and McCutcheon recognise, the Court in *Jones* did not really apply the unequivocality test, or at least what the Court applied is not the distinctive unequivocality test developed in Salmond's writings. Rather, the *Jones* Court's watered down version of unequivocality is really a proximity test. The very fact that that the Court had to use the defendant's *mens rea* to render his attempt-act unequivocally directed towards achieving the target offence reveals that the Court considered the attempt-act equivocal when viewed on its own.⁶¹ The Court of Appeal in *Jones* do indeed say the *actus reus* must be "sufficiently proximate" to the target offence and thus lead one to wonder what is remarkable about claiming that *Jones* applied a proximity test rather than an unequivocality test? The answer is that there are two reasons why *Jones* could or would be seen as taking the

⁵⁷ See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 420.

⁵⁸ (1968) 52 Cr App R 614.

⁵⁹ (1968) 52 Cr App R 614, 616, per Parker LCJ.

⁶⁰ (1968) 52 Cr App R 614, 617.

⁶¹ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 420.

unequivocality approach. First, the unequivocality test can be applied in addition to a proximity test.⁶² Second, *Jones* was decided under the authority of the then one-year-old case of *Davey v Lee*,⁶³ which is indeed an example of the unequivocality approach.

(d) The approach in England and Wales

2.43 Section 1(1) of the *Criminal Attempts Act 1981* states:

“If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.”

2.44 This provision is identical in substance to the recommendation of the Law Commission for England and Wales. The Law Commission’s Draft Bill provision⁶⁴ on the *actus reus* of attempt read “If, with intent to commit a relevant offence, a person does an act which goes so far towards the commission of that offence as to be more than a merely preparatory act...” The *actus reus* of a criminal attempt is a “more than merely preparatory” act. Thus the 1981 Act put the common law rule that mere preparation for crime by a single actor is not criminal on a statutory basis. It also based the definition of attempt on this rule.

2.45 Glanville Williams suggested that a “proximate act” and a “more than merely preparatory” act are much the same thing; the latter phrase just being more cumbersome.⁶⁵ Though the Law Commission aimed to recommend a formula that would express the existing common law⁶⁶ – which relied on the notion of proximity – it eschewed the use of the word “proximate” because the literal meaning of that word would make the test for attempt too demanding.⁶⁷ In other words, if a “proximate act” is understood as its literal dictionary meaning then it will be understood as a last act. Williams suggested that the dominant modern English usage of

⁶² *Davey v Lee* [1967] 2 All ER 423, 427, adopting a formulation from Archbold *Pleading, Evidence and Practice* (36th ed).

⁶³ [1967] 2 All ER 423.

⁶⁴ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at 86.

⁶⁵ Williams “Wrong Turnings in the Law of Attempt” [1991] Crim LR 416 at 417-418.

⁶⁶ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.47: “We have reached the conclusion that, in regard to these cases, it is undesirable to recommend anything more complex than a rationalisation of the present law.”

⁶⁷ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.48.

“proximate” was more like “near” than the original Latin *proximus* meaning “nearest”.⁶⁸ He could have added that, at least in recent times, when judges used “proximate act” they mean any act near the completion of the crime, not just acts right next to, or just before, the completion of the crime.

2.46 An advantage of the “more than merely preparatory” formula over the proximity formula is coherence with criminalizing impossible attempts. This is not to pre-judge the issue of whether impossible attempts should be criminalised. The point here is that one formula more comfortably allows for that option than does the other. It is also noted that the impossible attempts question might refer back to the *actus reus* question in the sense that it might be argued that impossible attempts should not be criminalised because doing so goes against proximity theory.⁶⁹ For the person attempting the impossible cannot ever be said to be near completion of what they were trying to do. But the acts of such a person can be described as having the quality of being “more than merely preparatory”. Consider the example of someone shooting a dummy believing it to be the person they wish to kill. They have not come close to killing, but they have done an act that can be categorised as more than merely preparatory.⁷⁰

2.47 “Merely” in the “more than merely preparatory” formula is an important word. It is noteworthy that leading Irish judgments on attempt include “mere” when stating the rule that mere preparation is not a criminal attempt.⁷¹ Ormerod suggests that all but the very last step towards the commission of a crime may properly be described as preparatory, an example being the would-be assassin readying his finger on the trigger “preparing” to pull it.⁷² The 1981 Act certainly was not intended to collapse to a last act test for attempt.⁷³ Yet a number of times it has been applied as if it was a last act test.⁷⁴ Not all preparatory acts towards crime are merely

⁶⁸ Williams “Wrong Turnings in the Law of Attempt” [1991] Crim LR 416 at 417.

⁶⁹ See Duff *Criminal Attempts* (Oxford University Press 1996) at 379 for example.

⁷⁰ Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 409.

⁷¹ Walsh J in *The People (Attorney General) v Sullivan* [1964] IR 169, 195; Kennedy CJ in *Attorney General v Richmond* (1935) 1 Frewen 28, 31; Haugh J in *The People (Attorney General) v Thornton* [1952] IR 91, 93.

⁷² Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 410. *State v Otto* 102 Idaho 250, 629 P.2d 646 (1981).

⁷³ Especially in light of Law Commission for England and Wales’s express efforts to formulate a law that would not result in last act framework – the very reason why the language of proximity was rejected. Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.48.

preparatory. Ormerod quotes Rowlatt J saying an actor is attempting crime when he is “on the job”.⁷⁵ When you’re on the job your acts may have the characteristic of being preparatory, but they are not “only” or “just” or “merely” preparatory. Ormerod cites *R v Tosti*⁷⁶ as illustrating the significance of “merely” in section 1 of the 1981 Act. And indeed the Court in *Tosti* described acts as “preparatory, but not merely so”.⁷⁷

2.48 But what does “on the job” mean? For Ormerod it means “attempt”.⁷⁸ Thus, the process of applying the codified *actus reus* of attempt in England appears to be circular. The 1981 Act aims to tell what a criminal attempt is. It says it is more than merely preparatory acts towards crime. How do the jury decide which acts are more than merely preparatory? The answer: if they constitute attempt.

2.49 Here lies the basis of a critique of the 1981 Act articulated by Ian Dennis in the early 1980s. Dennis criticised the 1981 Act for not giving guidance as to what constitutes attempt, that the “more than merely preparatory” test is even more open-textured than the common law tests and that the 1981 Act presents as a rule what is really a principle that merely preparatory acts should not be criminalised as attempts.⁷⁹ The Act does not tell the tribunal of fact how to distinguish between merely preparatory acts and something more.

2.50 Perhaps, though, what Dennis laments as imprecise – and Ormerod refrains from criticising – is a good thing, for it bases the law of attempts on the ordinary meaning of attempt. Yet if basing attempt law on the ordinary meaning of attempt is what is desired why did the Law Commission for England and Wales not just propose a statutory provision

⁷⁴ The 1981 Act was read as stating a last act test in *Widdowson* (1985) 82 Cr App R 314, 318-319. *R v Geddes* [1996] Crim LR 894 is seen by the Law Commission for England and Wales as applying a test for attempt that is too restricted. See Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at 14.15-14.16.

⁷⁵ *Osborn* (1919) 84 JP 63.

⁷⁶ [1997] Crim LR 746.

⁷⁷ Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 410 (footnote 370).

⁷⁸ Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 411.

⁷⁹ Dennis “The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement: (1) The Elements of Attempt” [1980] Crim LR 758, 768 commenting on Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980). Dennis re-affirms the critique in “The Criminal Attempts Act 1981” [1982] Crim LR 5 at 8.

providing, bluntly, that attempting to commit crimes is criminal, and that this it is for the jury to decide? Dennis canvassed this possibility as “[o]ne radical answer” but, we may add, an answer nonetheless. That so many courts and experts proclaim the intractable elusiveness of a precise formula for identifying criminal attempts may be because such a formula does not exist. If it does not exist then settling for the simple ordinary language description of attempt is a sensible option.⁸⁰

2.51 The “more than merely preparatory” test suffers a similar weakness to that of the proximity test. That is, many acts could be described as merely preparatory, but they could also be described as *more than* merely preparatory. The problem is apparent in *R v Campbell*.⁸¹ The defendant was apprehended as he was about to enter a Post Office with an imitation gun, sunglasses, and a threatening note. The Court of Appeal held that because he had yet to enter the place of the intended robbery, the defendant’s acts had not progressed beyond mere preparation and thus could not be considered a criminal attempt to commit robbery. This decision has been criticised for undermining police efforts to prevent crime since it means they must – if a prosecution for attempt is to be achieved – hold off intervening.⁸² The decision also illustrates the malleability of the “more than merely preparatory” formula because the judges’ choosing of the perimeter of the Post Office building as the dividing line between mere preparation and attempt was not something mandated by the text of the 1981 Act. Again, the Court’s decision could be otherwise and yet claim with at least equal plausibility to be consistent with the 1981 Act. That is, in walking purposely towards the Post Office door the defendant could be said to have advanced beyond the merely preparatory acts of equipping himself with a fake gun and robbery note.

2.52 Further illustration of this indeterminacy criticism is provided by contrasting *R v Geddes*⁸³ with *R v Tosti*.⁸⁴ In *Geddes* the defendant had been in a boys’ school toilet in possession of, among other things, a knife and rope. The Court of Appeal⁸⁵ held what the defendant had done was not beyond mere preparation and accordingly quashed his conviction for attempted false imprisonment. In *Tosti* the defendants had run off when seen

⁸⁰ See Dennis “The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement: (1) The Elements of Attempt” [1980] Crim LR 758 at 768.

⁸¹ [1991] Crim LR 268.

⁸² JC Smith’s commentary [1991] Crim LR 268 at 269.

⁸³ [1996] Crim LR 894.

⁸⁴ [1997] Crim LR 746.

⁸⁵ Bingham CJ, Ognall and Astill JJ.

examining a barn door padlock. They had metal cutting equipment hidden in a nearby hedge and their cars close by. The Court of Appeal⁸⁶ held that the acts of the defendants were more than merely preparatory and their conviction for attempted burglary could stand.

2.53 It is difficult to say that any of *Campbell*, *Geddes*, or *Tosti* are incorrect interpretations of the 1981 Act, though strong criticisms of *Campbell* and *Geddes* could be made by reference to the practicalities of crime prevention (that is, catching and being able to prosecute would-be offenders before citizens become endangered). Worth noting is that the *Tosti* Court emphasised the word “merely” in the “more than merely preparatory” formula. As recognised in various editions of Smith and Hogan⁸⁷ placing importance on the inclusion of “merely” can help alleviate indeterminacy somewhat, for it brings realisation that all acts right up to commission of crime can, from some light, be viewed as *preparatory*, but not quite as many acts can be viewed as *merely preparatory*.

(e) ***The Model Penal Code***

2.54 The American Law Institute’s Model Penal Code (“MPC”) section 5.01, in much truncated form, reads:

“A person is guilty of an attempt to commit a crime if ... he ... purposely does or omits to do anything which ... is an act or omission constituting a substantial step in the course of conduct planned to culminate in his commission of the crime.”

Guidance is given on what is a “substantial step”:

“Conduct shall not be held to constitute a substantial step ... unless it is strongly corroborative of the actor’s criminal purpose.”

2.55 Yet further guidance on what is to be considered a substantial step that is strongly corroborative of the actor’s criminal purpose is provided by illustrative examples:

“lying in wait for, searching out or following the contemplated victim of the intended offence;

enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission;

reconnoitering the place contemplated for the commission of the intended offence;

⁸⁶ Beldam LJ, Bracewell and Mance JJ.

⁸⁷ Most recently in Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 410.

unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the offence will be committed;

possession of materials to be employed in the commission of the offence which are specifically designed for such unlawful use, or which can serve no lawful purpose in the circumstances;

possession, collection or fabrication of materials to be employed in the commission of the offence, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose in the circumstances;

soliciting an innocent agent to engage in conduct constituting an element of the offence.”

2.56 The MPC provision is notable for the wideness of the range of conduct it can be used to identify as attempt. The “substantial step” is not far removed from the “first act”. Furthermore, the illustrative examples set out include acts that would not have been considered an attempt at common law because they are merely preparatory. Consider *R v Campbell*⁸⁸ (defendant caught about to enter Post Office with imitation gun, sunglasses and threatening note), for example, in light of the MPC’s “possession of materials” example. Or *R v Geddes*⁸⁹ (defendant caught in boys’ lavatory with kidnapping materials) in light of the MPC’s “enticing or seeking to entice” example. *People v Rizzo*⁹⁰ was an application of the common law, which the “searching out” of a victim example was included in order to reverse.⁹¹

2.57 The MPC’s drafting technique of using illustrative examples has the merit of giving practical guidance to courts, juries, and indeed police and citizens on when the threshold of attempt is crossed. Dennis argued that a list of illustrative examples should have followed the England and Wales Criminal Attempts Act’s definition of attempt.⁹² The Law Commission for

⁸⁸ [1991] Crim LR 286.

⁸⁹ [1996] Crim LR 894.

⁹⁰ 246 NY 334, 158 N.E. 888 (1927).

⁹¹ Wechsler, Jones and Korn “The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy” (1961) 61 Columbia Law Review 571 at 595.

⁹² Dennis “The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement: (1) The Elements of Attempt” [1980] Crim LR 758 at 771-772.

England and Wales have suggested the use of examples in its latest proposals for an offence of criminal preparation.⁹³

2.58 The use of illustrative examples may serve to clutter up the criminal code. And this might be especially undesirable in the general part of the code in that the specificity of the illustrative examples is out of character among general principles of liability. This concern about cosmetics perhaps could be addressed by moving the list of illustrative examples to an appendix to a criminal code. More difficult to address are concerns about illustrative examples undermining the central definition of attempt. The illustrative examples are not meant to be exhaustive, nonetheless their existence may raise doubt about would-be attempt scenarios not included.

2.59 Given that the use of illustrative examples in criminal statute in Ireland would be entirely novel, compelling arguments are needed for the idea to gain momentum. These are not apparent. Finally, it is noteworthy that recent re-codification proposals in the United States have moved away from the MPC's method of including illustrative examples for attempt and incitement⁹⁴ and that existing criminal codes in the United States employing the MPC's definition of attempt do not have the MPC's illustrative examples.⁹⁵

(f) *Canada*

Section 24 of *The Criminal Code of Canada* provides,

“(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.”

This text is almost identical to the text of Canada's original Criminal Code of 1892, which was based on the English Draft Code of 1879, which was

⁹³ The preparation offence is envisaged as supplementing criminal attempt. See discussion in Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraphs 16.26-16.57.

⁹⁴ *Final Report of the Illinois Criminal Code Rewrite and Reform Commission* (2003) and *Final Report of the Kentucky Penal Code Revision Project* (2003). Professor Paul H Robinson was the reporter in these instances.

⁹⁵ Kentucky, Illinois and Georgia are examples.

drafted by James Fitzjames Stephen, whose drafting aimed to codify the common law.⁹⁶

2.60 Section 24(1) provides that doing or omitting to do *anything* for the purpose of carrying out an intention to commit crime is an attempt. Thus from this provision alone it looks as if Canada adopts the wide first act (and omission) test for attempts. However, section 24(2) indicates that mere preparation is not criminal. Hence, section 24 puts on a statutory footing what was already settled at common law, namely, that an act is required for an attempt, but a merely preparatory act is not enough.

(g) Defining the *actus reus* of attempt

2.61 Of the four approaches – proximity, first act, last act, and unequivocality – the criticisms of the proximity approach are the least compelling. Thus, the approach that most likely represents the law in Ireland⁹⁷ is also the approach with the least serious problems.

2.62 The first act approach draws the net of criminal liability too widely, both from a practical point of view and a moral point of view. Both the last act approach and the unequivocality approach, in their pure forms, disserve the rationale of inchoate offences. In trying to rescue these approaches one arrives at a proximity approach.

2.63 One option is to supplement a proximate act approach with a version of an unequivocality requirement. This is arguably the most accurate way to codify the existing law on attempt in Ireland in light of the Court of Criminal Appeal’s decision in *The People (Attorney General) v Thornton*.⁹⁸ The following statement from an old edition of Archbold *Criminal Pleading, Evidence and Practice* expresses a proximate act approach tempered with an unequivocality requirement:

“It is submitted that the *actus reus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.”⁹⁹

⁹⁶ In *R v Maunder* (1966) 1 CCC 328, 377 it was stated that section 24 of the Criminal Code of Canada “is, in effect, a codification of the common law.”

⁹⁷ *People (Attorney General) v Sullivan* [1964] IR 169.

⁹⁸ [1952] IR 91.

⁹⁹ Quoted in *Davey v Lee* [1967] 2 All ER 423, 425. See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 418-422.

2.64 What formula of words should be used to codify the proximate act approach? This boils down to a choice between using the word “proximate” or either of “more than merely preparatory” or “not remotely connected with...”. Using “proximate” is simpler and avoids the tangles that the others can lead to given that they are negative definitions. Any promise of greater certainty in the more convoluted formulations is illusory. Additionally, a proximate act definition can be consistent with impossible attempts constituting attempts since the evaluation of the proximate act will be made from the actor’s perspective rather than an objective bystander’s perspective.

2.65 *The Commission provisionally recommends codification of the proximate act approach to defining the actus reus of attempt and invites submissions on which formula of words should be used.*

2.66 *The Commission invites submissions on whether a list of illustrative examples should accompany a definition of attempt.*

(h) Act and omission

2.67 It is accepted that there should be attempt liability for an omission where the target special part offence is one that can be committed by omission.¹⁰⁰ The classic example is trying to starve a baby by omitting to feed it.¹⁰¹ There has been comment on conceptual difficulties with the notion of attempting by omission,¹⁰² but really these concerns are no different to the concerns with liability for omission per se; no extra difficulty is added by the notion of attempt. It just has to be remembered that attempt by omission attaches only to a special part offence only in circumstances where that special part offence may be committed by omission. What should a code provision on attempts say about attempted omissions or attempting by omission? Some Code provisions do not explicitly refer to omissions,¹⁰³ some do.¹⁰⁴

¹⁰⁰ See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 445, footnote 267.

¹⁰¹ See Dennis “The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement: (1) The Elements of Attempt” [1980] Crim LR 758 at 770-771 and using *Gibbins and Proctor* (1918) 13 Cr App R 134. See also *R v Instan* [1893] 1 QB 450, cited by Dennis “The Criminal Attempts Act 1981” [1982] Crim LR 5 at 8, footnote 15.

¹⁰² See Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.105 saying attempt concept not meaningful in relation to omissions.

¹⁰³ Section 1 of *Criminal Attempts Act 1981* (England and Wales); Australian state codes including section 44 of the *Australian Capital Territory Criminal Code 2002* and section 4 of the *Northern Territory Criminal Code*.

2.68 The Law Commission for England and Wales has recently addressed this issue.¹⁰⁵ The Law Commission for England and Wales endorses its previous recommendation¹⁰⁶ that a code provision on attempt should explicitly provide that an omission may constitute an attempt where the special part offence attempted is one that can be committed by omission. That this is so might be thought so obvious as to not need to be included in a code provision on attempt.

2.69 *The Commission invites submissions on whether there should be explicit recognition that where a substantive offence can be committed by omission, attempting that offence can also be committed by omission.*

(i) A question of fact or law?

2.70 This Consultation Paper does not purport to address criminal procedure for inchoate offences. But some procedural issues get caught up in the statutory definition of the substantive law. Some statutory provisions on attempt¹⁰⁷ expressly deal with whether the jury or the judge ultimately decides if the evidence establishes a criminal attempt. These statutory provisions do this by specifying whether the existence of an attempt is a question of law or a question of fact.

2.71 If the existence of an attempt is a question of law the procedure is that the judge decides whether the facts (as accepted by the jury) are sufficient to constitute an attempt. The procedure is the same as this if the existence of attempt is a question of fact, save for one significant difference: the jury get to second guess (and possibly overrule) the judge's opinion whether particular facts (if accepted) amount to a criminal attempt.

2.72 In *The People (Attorney General) v England*¹⁰⁸ Gavan Duffy P upheld the trial judge's decision that the facts disclosed in evidence could not in law amount to a criminal attempt. This suggests an understanding of attempt as an issue of law, for otherwise the Court of Criminal Appeal would have said that the matter should have been left to the jury even if the trial judge considered the evidence incapable of establishing attempt liability. In

¹⁰⁴ Section 24 of the *Criminal Code of Canada*; section 5.01 of the Model Penal Code; section 72 of the *New Zealand Crimes Act 1961*; section 27 of the *Samoa Crimes Ordinance 1961* section 27.

¹⁰⁵ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007).

¹⁰⁶ Clause 49(3) of *A Criminal Code for England and Wales* in Law Commission for England and Wales *Report and Draft Criminal Code Bill* (No 177 1989).

¹⁰⁷ *Criminal Attempts Act 1981* (England and Wales). Section 24(2) of the Canadian Criminal Code.

¹⁰⁸ (1947) 1 Frewen 81, 84.

England and Wales prior to the Criminal Attempts Act 1981 the House of Lords, applying the common law, indicated the question of attempt was one of fact.¹⁰⁹ This approach was recommended by the Law Commission for England and Wales¹¹⁰ and codified in the Criminal Attempts Act 1981.

2.73 The Law Commission for England and Wales now considers the approach in the 1981 Act to be problematic in that the jury get to interpret the law and conceivably could decide that a clear case of attempt (last act having been performed, requisite *mens rea* established) was not an attempt. This would be a departure from the usual procedure in criminal trials.¹¹¹

2.74 It makes sense to opt for the approach in the UK Criminal Attempts Act 1981 to the fact/law issue only if it is sought to avoid having a precise substantive definition of attempt whereby the question of what is an attempt is left to be decided by the jury on a case by case basis. This is the option canvassed by Ian Dennis in 1980,¹¹² though it is clear that Dennis mentioned this option as one that might be opted for out of exasperation with the elusiveness of a definition of attempt. It follows that once it is sought to have a legal definition for attempt it makes sense to have the issue of attempt one of law. There is no reason to depart from standard criminal procedure save in the exceptional scenario of having attempt liability decided by juries on an *ad hoc* basis unconstrained by legal parameters.

2.75 *The Commission provisionally recommends that the issue of what can constitute a criminal attempt should be a question of law.*

(i) Attempt and the target substantive offence

2.76 Another procedural requirement that may have impact on substantive law is that a conviction for a particular offence precludes a conviction for attempting that particular offence. This is an example of where a seemingly procedural law can have a bearing on the substantive law; that is, where prosecution has to prove (1) an intent to commit a specific

¹⁰⁹ *DPP v Stonehouse* [1978] AC 55.

¹¹⁰ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraphs 2.50-2.52.

¹¹¹ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraphs 14.23-14.25. The Law Commission for England and Wales thus recommends changing the existing rule, which put in place what was recommended in Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraphs 2.50-2.52.

¹¹² See Dennis "The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement: (1) The Elements of Attempt" [1980] Crim LR 758 at 768.

crime; (2) an overt act toward the commission of that crime and (3) a failure to consummate the crime.¹¹³ It is not necessary that attempt be defined this way in order to preclude conviction for both an offence and its attempt.

2.77 Some criminal codes expressly rule out conviction for the target offence if there has been conviction for attempting it.¹¹⁴ In any event, it is quite clear that conviction for the target offence of an attempt precludes conviction for its attempt and vice versa.¹¹⁵ It is probably not necessary for a code provision on attempt to state this.

(j) *Attempt and criminal preparation*

2.78 In late 2007 the Law Commission for England and Wales published “Conspiracy and Attempts – a Consultation Paper”.¹¹⁶ The main recommendation relevant to the *actus reus* of attempt is Proposal 15, which proposes that the offence of attempt be split into two offences: an offence of attempt and an offence of criminal preparation. The *actus reus* of attempt is the doing of the “last acts” towards completing a crime. The *actus reus* of criminal preparation is “conduct preparatory to the commission of an offence”, but this conduct “must go sufficiently far beyond merely preparatory conduct so as to amount to part of the execution of the intention to commit the intended offence itself.”¹¹⁷ These proposed offences carry the same *mens rea* requirement and the same punishment (in that punishment relates to the target offence, but does not have to be more if the offence was attempted rather than prepared).

2.79 The Law Commission for England and Wales consider the application of attempt in England and Wales under the *Criminal Attempts Act 1981* unsatisfactory. The Court of Appeal’s decision in *R v Geddes*¹¹⁸ illustrates, for the Law Commission for England and Wales, the unduly restrictive scope of criminal attempt that the 1981 Act has put in place. In *Geddes* an attempt was held, on appeal, not to be made out where the defendant had entered the lavatory in a boys’ school equipped with materials useful in effecting a kidnap. The Court of Appeal viewed the defendant as

¹¹³ *State v Reeves* (1996) 916 S.W.2d 909, extracted in *Dressler Cases and Materials on Criminal Law* (3rd ed Thomson West) at 763.

¹¹⁴ An example is section 44(8) of *Australian Capital Territory Criminal Code 2002*.

¹¹⁵ See discussion of common law doctrine of merger in Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 278.

¹¹⁶ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007).

¹¹⁷ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraph 12.6-12.7.

¹¹⁸ (1996) 160 JP 697; [1996] Crim LR 894.

having readied himself to make a kidnap but not having actually tried to do so. Thus the requirement of an act more than merely preparatory to the commission of the offence was not satisfied.

2.80 The key motivation for the two-offence proposal of the Law Commission for England and Wales is to preserve the label “attempt” given its value in conveying much about the actor’s culpability and dangerousness, while also making sure that the conduct that just falls outside the ordinary meaning of “attempt” is still caught by means of the criminal preparation offence. The latter was intended to be caught by the 1981 Act, according to the Law Commission for England and Wales, but the more than merely preparatory formula as applied in *Geddes* results otherwise.

2.81 The proposed attempt offence relies on the notion of “last acts”. It is “last acts”, not “last act”. The plurality of last acts refers not to the last act in an attempted murder plus the last act in an attempted theft, and so on, but rather to the last few acts in any one offence. So, for example, the last acts of murder might include the taking aim with a gun and the pulling of the trigger. When there is more than one last act towards a particular offence it is questionable whether “last” is an accurate word to use. If “last act” is not restricted to the very last single act, then there is not really a last act requirement.

2.82 The proposed offence of criminal preparation is a strange offence. In sum, its *actus reus* is “more than merely preparatory preparation”. It seems strange to label an offence something – here, criminal preparation – that does not constitute the offence in its pure form. The offence X is not committed where all that is done is X.

2.83 Strange this may be, there is nothing illogical about it. There really does exist more than merely preparatory preparation, referred to also as “executory preparation”.¹¹⁹ With the Law Commission for England and Wales’ proposal to provide illustrative examples of criminal preparation as a guide this can be appreciated. The proposed offence of criminal preparation is to include, but is not limited to, the following:

“(1) D gains entry into a building, structure, vehicle or enclosure or (remains therein) with a view to committing the intended offence there and then or as soon as an opportunity presents itself.

(2) D examines or interferes with a door, window, lock or alarm or puts in place a ladder or similar device with a view there and then to gaining unlawful entry into a building, structure or vehicle to commit the intended offence within.

¹¹⁹ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraph 16.42.

(3) D commits an offence or an act of distraction or deception with a view to committing the intended offence there and then.

(4) D, with a view to committing the intended offence there and then or as soon as an opportunity presents itself:

(a) approaches the intended victim or the object of the intended offence, or

(b) lies in wait for an intended victim; or

(c) follows the intended victim.”¹²⁰

2.84 If it is desired to catch this type of conduct as criminal the question is whether the concept of attempt, coupled with the numerous special part offences that criminalise preparatory acts, achieve this?

2.85 *The Commission invites submissions on whether a general offence of criminal preparation is desirable.*

(2) *The mens rea of attempt*

(a) *The specific intent requirement*

2.86 An attempt involves trying to do something; trying to do something usually means that the something is intended.¹²¹ Of course, trying to do something does not necessarily mean you intend it. An example of trying to do something without intending it is kicking a toughened glass window in order to demonstrate its toughness. You are trying to break it, but you intend it not to break.¹²²

2.87 Haugh J in *The People (Attorney General) v Thornton*¹²³ described a criminal attempt as an act done with “specific intent to commit a particular crime.” For the avoidance of doubt it is worth pointing out that “intent to commit a particular crime” does not mean that a thought such as “I intend to commit the criminal offence of X” must be attributable to the criminal defendant. In Ireland, as elsewhere, criminal liability is imposed regardless of whether the accused knew that what he or she was doing was criminal. The maxim “ignorance of the law is no excuse” generally applies.

¹²⁰ D refers to the defendant. Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraph 16.47 (footnotes omitted).

¹²¹ See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 259, Marlin, “Attempts and the Criminal Law: Three Problems” (1976) 8 *Ottawa L Rev* 518, 527.

¹²² Example taken from Horder “Varieties of Intention, Criminal Attempts and Endangerment” (1994) 14 *Legal Studies* 335.

¹²³ [1952] IR 91, 93.

The accused who pleads, no matter how sincerely, that they did not know that what they were doing was criminal is generally not entitled to any relief from liability. That the accused did not know or realise their act was prohibited may well effect their treatment by the criminal justice system at stages other than trial for liability, for example, at sentencing stage. So, strictly speaking, for an attempt the guilty person does not have to intend to do a particular crime, but rather must intend to do an act, which happens to be contrary to the criminal law.

2.88 There are two significant aspects of Haugh J's description of the *mens rea* of attempt. First, intent, rather than other states of mind (recklessness, negligence) is required. Intention in this respect is direct intention. Direct intention can be identified by asking how an actor feels about a consequence not materialising.¹²⁴ So if the enquiry is whether an actor's (direct) intention was to kill, then the question to ask is whether the actor would have considered what he did a failure if a killing did not result. In attempt liability, even where the target offence is one for which a state of mind different from intent suffices, the person allegedly attempting that target offence must intend to commit it in order to be guilty of criminal attempt. The substantive offence of endangerment is committed by intentionally or recklessly engaging in conduct creating a substantial risk of death or serious harm.¹²⁵ But to convict for attempted endangerment it would need to be established that the defendant intentionally engaged in the putative risky conduct (which as it so happened created no actual risk – this being why attempt, rather than the complete offence, is charged).

2.89 The second significant aspect of the *mens rea* of attempt is that the core of the target offence must be intended. In other words, the *mens rea* of attempt must relate exactly to the target offence. This requirement can be illustrated using the example of attempted murder. Murder requires *mens rea* of either intent to cause death or intent to cause serious injury.¹²⁶ But for attempted murder, intent to cause death is required; intent to cause merely serious injury will not suffice. This is the common law position,¹²⁷ which

¹²⁴ Duff *Intention, Agency and Criminal Liability* (Blackwell 1990) at 61.

¹²⁵ Section 13(1) of the *Non-Fatal Offences Against the Person Act 1997*.

¹²⁶ The Commission has recently made final its recommendation that *mens rea* for murder be expanded to include a certain type of reckless killing. See Law Reform Commission *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) and *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP-2001).

¹²⁷ *R v Schofield* [1784] Cald 397, 403; *R v Whybrow* [1951] 35 Cr App R 141.

the Court of Criminal Appeal has approved in *The People (DPP) v Douglas and Hayes*.¹²⁸

2.90 In *Douglas and Hayes* the accused had been convicted of shooting with intent to murder contrary to section 14 of the *Offences Against the Person Act 1861*. The accused had fired shots at an occupied Garda car. The trial judge was of the opinion that, had the shots caused death, murder would have been committed. On this basis according to the trial judge the section 14 offence, which does not require shots to actually hit a person, could be made out. The Court of Criminal Appeal rejected this reasoning and overturned the conviction.

2.91 In *Douglas and Hayes* the trial judge incorrectly applied the statutory offence of shooting with intent to murder. The offence required intent to murder; the trial judge said reckless disregard of the risk of killing sufficed. The *ratio* the Court of Criminal Appeal decision in *Douglas and Hayes* corrects this misinterpretation. Additionally, *obiter dictum* in *Douglas and Hayes* clearly approves (despite calling the situation “anomalous”) of *R v Whybrow*¹²⁹ and *R v Mohan*,¹³⁰ which are authority for the proposition that shooting with intent to cause no more than serious injury is murder if it results in death, yet not attempted murder if death does not result. A Scots authority, *Cawthorne v HM Advocate*,¹³¹ which holds, contrary to the position in England and Wales, that *mens rea* sufficient for the target offence is sufficient for an attempt at that offence was implicitly rejected by the Court of Criminal Appeal in *Douglas and Hayes*. The Canadian courts formerly¹³² favoured the same approach as Scots law, but now¹³³ endorse the same position as Ireland and England.

(i) *Attempting crimes of recklessness?*

2.92 Since the Irish courts appear to endorse the position that intent alone suffices as a state of mind for the *mens rea* of attempt, it follows that crimes of recklessness cannot be attempted – that is, they are logically precluded since one cannot intentionally try to do something recklessly. This statement requires qualification. Consider the case of manslaughter,

¹²⁸ [1985] ILRM 25, approving *R v Whybrow* (1951) 35 Cr App R 141 and *R v Mohan* [1976] QB 1.

¹²⁹ (1951) 35 Cr App R 141.

¹³⁰ [1976] QB 1.

¹³¹ 1968 JC 32; 1968 SLT 330.

¹³² *Lajoie v R* [1974] SCR 399. For criticism of *Lajoie* see Marlin “Attempts and the Criminal Law: Three Problems” (1976) Ottawa L Rev 518 and MacKinnon “Making Sense of Attempts” (1982) 7 Queen’s LJ 253.

¹³³ *Ancio* (1984) 39 CR (3d) 1.

which is often thought of as the most prominent example of a crime of recklessness. Whatever about the practice in courts, attempted voluntary manslaughter – but not attempted involuntary manslaughter – is a logically possible crime. Voluntary manslaughter is partially excused intentional killing. The defence of provocation, which is available to a defendant who “lost control” as a result of something said or done by the person they killed, reduces murder to voluntary manslaughter. Suppose having been provoked (in the legal sense) a person tries their very best to beat their provoker to death, but yet the provoker survives. In this case attempted (voluntary) manslaughter would be a coherent charge. It is noted that some Australian jurisdictions have a crime of attempted manslaughter on the statute book.¹³⁴

(ii) ***Changing the intent requirement***

2.93 There has been debate whether less culpable mental states than intent should suffice for criminal attempt.¹³⁵ The suggestion is that the *mens rea* for attempting a particular crime need only be the *mens rea* that suffices for that particular crime. One argument against having mental states other than intent is that the meaning of the word “attempt” is such that attempts must be intended.¹³⁶ This might be called an argument from the etymology of “attempt”. The counter-argument says criminal law should not be held back from development simply because of the ordinary meaning of words.¹³⁷

2.94 Of course, the contours of criminal liability should not be confined to tracking linguistic usage. But that is not to deny advantages in having criminal concepts that cohere with the ordinary meaning of the words used to describe these concepts. The legality principle requires that citizens who are subject to laws get a fair opportunity to conform their behaviour so as to keep within the legally permissible. There will always be some distance between what the law actually is and the average citizen’s knowledge of what the law is and thus there will be shortfall in satisfaction of the legality principle. But the distance between criminal law and citizens’ knowledge of it is reduced where there is a coincidence between the ordinary meaning of the words used to describe criminal law concepts and legal officials’ understanding of those criminal law concepts. The ordinary meaning of attempt is “trying” to do something. Trying is purposive

¹³⁴ Section 270AB of the *South Australia Criminal Law Consolidation Act 1935*.

¹³⁵ See Enker “*Mens Rea and Criminal Attempt*” (1977) *Am B Found Res J* 845, at 848.

¹³⁶ This argument is implicitly invoked in McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 445; Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 259; Smith “Two Problems in Criminal Attempts” (1957) 70 *Harv L Rev* 427 at 434.

¹³⁷ Enker “*Mens Rea and Criminal Attempt*” (1977) *Am B Found Res J* 845 at 847, Holmes *The Common Law* (Boston Little Brown 1881); Binchy “Criminal Liability, Attempting Non-Criminal Acts – Part III” (1972) 106 *ILTSJ* 17, at 18.

activity. Purposive activity is intentional activity. If attempt in criminal law keeps to intentional activity it will, in this respect, keep close to the ordinary meaning of attempt.

2.95 This is not the end of the argument, but it does provide a default position such that in the absence of persuasive reason suggesting otherwise, criminal attempt should conform to its ordinary meaning.

(iii) Oblique intention

2.96 The foregoing analysis is complicated by a consideration of oblique (or indirect) intention. An actor obliquely intends something when, though it is not their aim to bring it about, they know it is practically certain to be a consequence of their action. There is much debate over how exactly to define oblique intention and there is an issue of the scope for oblique intention to slide into a form of recklessness. This is what the House of Lords were concerned to counter in *R v Woolin*¹³⁸ where a consequence must be foreseen as a virtual certainty of an action in order for it to have been obliquely intended. Does the intentional activity connoted by the ordinary meaning of attempt encompass any sort of oblique intention as distinguished from direct intention? The answer may well be that it does not. Even when oblique intention is described with maximum effort to distinguish it from recklessness, as per the House of Lords in *Woolin*, it still falls outside the kind of intention envisaged in the ordinary meaning of attempt. The person who plants a bomb set to explode on an aeroplane during flight, hoping to profit from an insurance pay-off, has the purpose to defraud, not to kill. If his purpose is not realised, we say he tried and failed to do something. And this something is the fraud, not the causing of deaths.¹³⁹

2.97 The question is whether criminal attempt should depart somewhat from the ordinary meaning of attempt in order to have oblique intention as well as direct intention constitute its *mens rea*? There is good reason to do so. In terms of culpability and harm there is little between the person who blows up the aeroplane for monetary gain and the person who blows it up as an act of terrorism.¹⁴⁰ So if the bomb does not explode – it's discovered and defused say – the rationale of inchoate offences is pursued by having the law such that attempted murder could be charged rather than just attempted theft (leaving to one side the host of other offences, possession of explosives and so on, that may have been committed in the example).

¹³⁸ [1999] 1 AC 82, At 145.

¹³⁹ Ashworth *Principles of Criminal Liability* (5th ed Oxford University Press 2006) at 177.

¹⁴⁰ See Hart "Intention and Punishment" in Hart *Punishment and Responsibility* (Oxford University Press 1968) at 126-127.

2.98 Almost all debate about oblique intention and its differentiation from recklessness arises out of murder cases. Indeed, the Commission has recently published its final recommendations for the *mens rea* of murder.¹⁴¹ What is suitable for the special part offence of murder is not necessarily suitable for general part attempt liability; it is thought a bad thing when general principles of criminal law are distorted by efforts to improve an individual offence. In any event, the Commission's proposals for murder involve expanding murder *mens rea* to include a form of recklessness rather than an alteration of intention. For the avoidance of doubt it is noted again that the *mens rea* of attempting a crime is a distinct matter from the *mens rea* for the complete crime. It makes sense to talk about reckless murders, but it does not make sense to talk about attempted reckless murders.

2.99 *The Commission provisionally recommends that the mens rea of attempt should continue to be intention, where intention means both direct and oblique intention.*

(iv) Consequences and circumstances

2.100 An important distinction between consequences and circumstances is used to enable the prosecution of attempting certain special part offences. The offence of common law rape is non-consensual sexual intercourse knowing the victim is not consenting or being reckless as to whether the victim is consenting. A straightforward application of the specific intent requirement for the *mens rea* of intent would indicate that attempted rape is committed only where the accused intended to have non-consensual sexual intercourse. This would make it difficult to secure convictions for attempted rape given the difficulty in proving that the accused did not just intend intercourse, but intended non-consensual intercourse. In *R v Khan*¹⁴² the English Court of Appeal addressed this problem, holding that a conviction for attempted rape can lie where the defendant intends intercourse while being reckless as to the circumstances of whether the victim is in fact consenting. That is, the *mens rea* of attempted rape is intent to have sexual intercourse being reckless as to whether consent is given. The consequence is sexual intercourse and this must be intended. The circumstance is non-consent; the defendant need not intend this, he need only be reckless as to it.

2.101 Distinguishing between the consequences intended and the circumstances existing where a person attempts a crime was an innovation of

¹⁴¹ See Law Reform Commission *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) at 51-62.

¹⁴² *R v Khan* [1990] 2 All ER 783.

a Working Party assisting the Law Commission for England and Wales.¹⁴³ The consequences/circumstances distinction is attractive because it provides a way of surmounting a difficulty in prosecuting for attempted rape the defendant who was trying to have sex with a non-consenting woman, reckless as to whether the woman was consenting. The difficulty is that there may be no evidence, such as a confession, that the accused specifically intended to have *non-consensual* intercourse. Here is what intuitively is a case of attempted rape, not just a case of (aggravated or not) sexual assault. This behaviour may be more accurately described as attempted rape. The *Khan* approach uses the consequences/circumstances distinction to make this description possible in law.

2.102 A difficulty is that there is no objective method or criteria for distinguishing consequences from circumstances. The *Khan* court was satisfied that the consequence of rape is sexual intercourse and the circumstances of rape is non-consent. Another court, however, might view the consequence of rape as non-consensual sexual intercourse.¹⁴⁴ Indeed, the crime of rape *is* non-consensual sex. The event which our criminal law identifies as unwanted is non-consensual sex; it is not that society wants to discourage sex *per se* yet decides only to criminalise non-consensual sex. So why not call non-consensual sex the consequence which the would-be rapist must intend in order to be convicted of attempted rape? The point is that the *Khan* identification of the consequence of the crime of rape is not the only defensible answer; there is another no less defensible approach that, if taken, no longer results in achieving the goal of facilitating prosecution for attempted rape. It is not that the consequence/circumstance distinction led the *Khan* court to the right answer; rather it is that the *Khan* court had a result in mind (a legal framework that catches those reckless-as-to-presence-of-consent attempted rapes) and the consequence/circumstance distinction provided a convenient rationale. The Law Commission for England and Wales in 1980 stated, “to ask in the case of every offence what is a circumstance and what is a consequence is in our view a difficult and artificial process which may sometimes lead to confusion.”¹⁴⁵

¹⁴³ Law Commission for England and Wales *Working Paper on Codification of the criminal law: general principles: inchoate offences: conspiracy, attempt and incitement* (WP No 50 1973) at 61.

¹⁴⁴ See Duff *Criminal Attempts* (Oxford University Press 1996) at 13. See also Buxton “The Working Paper on Inchoate Offences; Incitement and Attempt” [1973] *Crim LR* 656, 661; and Buxton “Circumstances, Consequences, and Attempted Rape” [1984] *Crim LR* 25, 29.

¹⁴⁵ Law Commission for England and Wales *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraphs 2.11 - 2.12.

2.103 Glanville Williams, who was a member of the Working Party who proposed the consequences/circumstances distinction in 1973, has defended its usefulness by employing a further distinction between result-crimes and conduct-crimes.¹⁴⁶ Unlike murder, the result of which is death, rape is a conduct-crime, not a result-crime. In response to Williams, Richard Buxton argued that Williams' result/conduct-crime distinction does not ameliorate the indeterminacy of the consequences/circumstances distinction, but merely moves the indeterminacy on to the question of whether a crime is a conduct crime or a result crime.¹⁴⁷ There is no authoritative guide to which crimes are conduct-crimes and which are result-crimes.

2.104 *Khan* (and *R v Pigg*¹⁴⁸) stand as authority for the law in England prior to 1981. The Law Commission for England and Wales in 1980 expressly declined to recommend the consequence/circumstance for inclusion in statute. The *Criminal Attempts Act 1981* accordingly did not use it. The Report on Codification of the Criminal Law of 1985¹⁴⁹ of the Law Commission for England and Wales again rejected it. But the Report of 1989,¹⁵⁰ having briefly noted there may be difficulty in applying the distinction, nonetheless recommends it, commenting that it is workable for crimes such as rape and obtaining property by deception.

2.105 The consequences/circumstances distinction may have difficulty standing up to rigorous analysis, yet it is capable of working reasonably well in practice. It can be employed without contradicting the aim of keeping criminal attempt in line with the common notion of attempt as purposive activity. That is, it is coherent to say the *mens rea* of attempt is intention while allowing one of the elements – the circumstance element – of the target offence to be satisfied by recklessness.

2.106 With codification in mind it is an open question whether the definition of attempt requires, or should contain, an express statement of the consequences/circumstances distinction. The attempt provision could state without more, as per Haugh J in Thornton, that the *mens rea* of attempt is intent to commit a specific crime and leave it to the courts to employ the

¹⁴⁶ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 32. Williams and the literature he criticises use the crime of abduction rather than rape as an illustrative example, but the observations about abduction would apply to rape also.

¹⁴⁷ Buxton "Circumstances, Consequences, and Attempted Rape" [1984] Crim LR 25.

¹⁴⁸ [1982] 1 WLR 762.

¹⁴⁹ Law Commission for England and Wales *Report on Codification of the Criminal Law* (No 143 1985) at paragraph 14.30.

¹⁵⁰ Clause 49(2) of Draft Code in Law Commission for England and Wales *A Criminal Code for England and Wales, Volume 1: Report and Draft Criminal Code Bill* (No. 177 1989).

consequences/circumstances distinction where necessary. The interpretation of the common law in the English cases could be cited as persuasive authority. Alternatively, the attempt provision could explicitly endorse the distinction. This is done in the Draft Criminal Code for England and Wales, Clause 49(2) provides:

“[A]n intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.”¹⁵¹

2.107 *The Commission invites submissions on whether the definition of mens rea for criminal attempt should employ an express consequences/circumstances distinction.*

(3) *The target of an attempt*

(a) *Special part offences*

2.108 It is key, and perhaps obvious, to note that criminal attempts relate or attach to substantive (or special part) offences. A criminal attempt is an attempt to commit a specific offence, which can be called the target offence. Under the common law scheme of attempt liability, it is not that some “attempts” (in the general sense of the word) are criminal. Rather, attempting crimes is criminal. Criminal attempts are entirely parasitic on the special part offences.

2.109 At this stage it is worth recording what the law’s view is on which crimes it is criminal to attempt to commit, for it is not simply the case that it is clearly a criminal attempt to attempt any and all crimes. Which specific offences or what type of offence qualify as the target offence? Commentators suggest that at common law it is not an offence to attempt a summary offence, that only indictable offences can be criminally attempted.¹⁵² No clear authority is cited for this proposition; it seems to be just a “generally accepted view.”¹⁵³ Proceeding on the basis that only attempts to commit indictable offences are criminal, some exceptions remain.

¹⁵¹ Law Commission for England and Wales *A Criminal Code for England and Wales, Volume 1: Report and Draft Criminal Code Bill* (No. 177 1989).

¹⁵² Ormerod, *Smith & Hogan Criminal Law* (11th ed Oxford University Press 2005) at 416. Law Commission for England and Wales *Working Paper on Codification of the criminal law: general principles: inchoate offences: conspiracy, attempt and incitement* (WP No 50 1973) at 73-74 and *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at 54-55.

¹⁵³ Law Commission for England and Wales *Working Paper on Codification of the criminal law: general principles: inchoate offences: conspiracy, attempt and incitement* (WP No 50 1973) at 73.

(b) Inchoate offences

2.110 Attempt to incite is recognised at common law.¹⁵⁴ The classic example of attempt to incite occurs where a communication intended to incite a crime is intercepted and never reaches its intended recipient. Incitement is not made out because the communication never reached its intended recipient, but on any test for attempt, attempted incitement is made out. Some cases of attempted incitement could be viewed as cases of incitement where it so happens that the recipient refuses to act on the incitement.¹⁵⁵

2.111 Attempt to conspire is also recognised at common law.¹⁵⁶ In England and Wales the *Criminal Attempts Act 1981*¹⁵⁷ abolished this offence. A Supreme Court decision from Canada in 2006 confirms an earlier Canadian authority in holding that there is no such crime in current Canadian law.¹⁵⁸ In thinking up examples of an attempt to conspire it seems that incitement or attempted incitement would almost always be made out.

2.112 There is no crime of attempt to attempt because the requirement for an act that is more than mere preparation would not be satisfied. In addition, it can be said that merely attempting to attempt a crime would not occasion the requisite *mens rea* since aiming to bring about a mere attempt means that the target substantive offence is not sought to be completed and, therefore, is not intended.

(i) A note on double inchoate liability

2.113 In *Shergill*¹⁵⁹ the court declined to acknowledge a crime of attempting to commit the statutory offence of facilitating the entry of non-EU citizens into the UK.¹⁶⁰ This case shows judicial unease with a relational inchoate offence attaching to what is already an inchoate offence presented as a special part offence via its enactment in statute.

2.114 There is good reason to be uneasy about inchoate offences attaching to other inchoate offences (“double inchoate crimes”¹⁶¹ or double

¹⁵⁴ *R v Banks* (1873) 12 Cox CC 393; *Ransford* (1874) 13 Cox CC; *R v Chelmsford Justices ex p Amos* [1973] Crim LR 437; *R v Goldman* [2001] Crim LR 822.

¹⁵⁵ *R v Goldman* [2001] Crim LR 822; *Morton v Henderson* (1956) JC 55.

¹⁵⁶ *R v De Kromme* (1892) 17 Cox CC 492.

¹⁵⁷ Section 1(4)(a).

¹⁵⁸ *R v Déry* [2006] SCC 53 affirming *R v Dungey* (1980) 51 CCC (2d) 86.

¹⁵⁹ [2003] CLY 871. See Ormerod Smith & Hogan: Criminal Law (11th Ed Oxford University Press 2005) at 411.

¹⁶⁰ Section 25 of the *Immigration Act 1971*.

¹⁶¹ See Robbins “Double Inchoate Crimes” (1989) 26 Harv J on Legis 1.

inchoate liability) because such practice moves the net of criminal liability out very far from the central prohibited harm. UK anti-terrorism legislation provides a rather extreme example. The offence of encouragement of terrorism under the *Terrorism Act 2006* is made out, among other ways, by publishing a statement that is understood by some members of the public to indirectly encourage them to assist someone to prepare to train to threaten to commit acts of violence against property in order to advance an ideological or political aim. This description is arrived at by combining the definitions in the statute. It sounds an absurd thing to criminalise because it is so far removed from an actual act of terrorism. It encroaches on personal liberty, in particular, freedom of expression. No person has yet been prosecuted for the encouragement of terrorism offence, though it has been in force in the UK since mid-2006. This in itself is little consolation for those concerned about having well-constructed substantive criminal law because it means there is great disparity between what the law says is criminal and what is actually getting recognised as criminal by the criminal justice system.

2.115 If double inchoate liability is thought a problem then the question is whether judges can legitimately decline to acknowledge relational inchoate offences attaching to some special part inchoate offences? This to be done where there are statutory inchoate offences and general part provisions providing for relational inchoate offences to attach to all offences. Alternatively, the question could be put, by what criteria may judges refuse to countenance double inchoate liability?

2.116 First of all, it is noted that some relational inchoate offences are restated in statutes. A prime example is attempted murder, which is codified in section 11 of the *Offences Against the Person Act 1861*.¹⁶² This is enumerating in statute what should already be available to charge at common law. It is important to resist inferring an offence of attempt to attempt murder just because “attempted murder” is presented in statute as a substantive stand alone offence which attempt as a general relational offence can attach to. An offence of attempt to attempt murder, apart from sounding absurd, simply cannot satisfy the definition of attempt. Logic and common sense is all a judge needs to resist recognising attempted attempts.

2.117 Incitement to incite hatred under the *Prohibition of Incitement to Hatred Act 1989 Act* would be a different matter since the incitement to hatred offence enacted in the 1989 Act is not a restatement of a pre-existing relational inchoate offence but rather a completely new offence since the thing incited – hatred – was not, and is not, an offence.

¹⁶² Other prominent examples are section 4 of the *Offences Against the Person Act 1861* (soliciting murder) and section 71 of the *Criminal Justice Act 2006* (conspiracy to commit a serious offence).

2.118 Given the existence of murder as a special part offence and attempt as a relational offence ready to attach to special part offences it is, or at least should be, unnecessary to enact a specific crime of attempted murder such as the 1861 Act does. With codification, including explicit general part provisions providing for attempt, conspiracy and incitement to attach to special part offences, any remaining uncertainty about whether a specific special part offence of attempted murder is needed is eliminated. There is no reason for section 11 of the 1861 Act to survive comprehensive codification. This and other offences that do no more than enumerate a particular instance of relational inchoate liability do not require an explicit prohibition in the general part of a criminal code from the same relational inchoate offence attaching to them because prosecutors and judges will recognise the problem.

2.119 There remains the problem, however, of special part offences that can be characterised as inchoate offences in the wide sense in that they proscribe conduct that does not actually occasion the harm which the law seeks to prevent. Possession of a knife in public is an example.¹⁶³ This is an inchoate offence in the wide sense, but is not an instance of inchoate relational liability since mere possession would not occasion an attempt. Furthermore, the inchoate nature of the possessing a knife offence is not as apparent as, say, attempted murder. There's no logical bar to recognising attempt, incitement or conspiracy to commit this possession offence. The problem is with the widening of the net of criminal liability. Assuming that injury and apprehension of injury from knives on the streets is the central harm sought to be reduced or prevented here, the law, in penalising mere carrying of the knife in public, catches conduct one step removed. Criminalising the attempting, inciting or conspiring to carry the knife in public would be catching conduct, roughly speaking, two or more steps removed.

2.120 The court, in deciding whether to recognise an offence of, say, inciting the possession of knife in public has no clear answer available to it. This is in contrast to where the question is recognising attempting attempted murder, a question to which the court has a secure answer based on the illogic of such an offence. It cannot be said with certainty that in enacting the possession of a knife in public offence the legislature intended the ancillary offence of inciting such possession also. Accordingly, the court is left with strong discretion in deciding whether to recognise the ancillary offence. This sits uneasily with the constitutional principle that the

¹⁶³ Section 9 of the *Firearms and Offensive Weapons Act 1990*.

Oireachtas has sole law-making power¹⁶⁴ and the democratic principles behind the argument for codification of criminal law.¹⁶⁵

2.121 This problem is, however, somewhat alleviated with the completion of a codified general part. A prominent general part outlining, among other things, the scope for relational inchoate offences to attach to special part offences will raise awareness of this practice. Accordingly, it could be stated more confidently that the Oireachtas in enacting any particular offence intends its ancillary inchoate offences also and that, if it wishes to rule this out, it must do so expressly.

(c) *Issues of jurisdiction*

2.122 Is there a criminal attempt in Ireland where the target offence would be committed outside the jurisdiction? And what about an attempt-act abroad towards a target offence in Ireland? Bearing in mind the need for the attempt-act to be sufficiently proximate to the completion of the target offence, there is limited guidance from case law.¹⁶⁶

2.123 In Victoria, Australia the *Crimes Act 1958*¹⁶⁷ provides that an attempt inside the State to commit an indictable offence outside the State is triable in Victoria, as is an attempt outside the State to commit an indictable offence within the State. This provides a model for what statute can say about jurisdiction for attempts. This model's assertion in claiming jurisdiction is consistent with recent statutory development in Ireland about jurisdiction for conspiracy to commit a serious offence.¹⁶⁸ It is worthwhile to have the jurisdictional rules consistent for the three general inchoate offences of attempt, conspiracy and incitement since the same considerations apply to all three.

2.124 *The Commission provisionally recommends that intra-jurisdictional attempts be expressly recognised as attempts triable within the jurisdiction.*

¹⁶⁴ Article 15 of the Constitution of Ireland. However, Hamilton P in *Attorney General (SPUC) v Open Door Counselling* [1988] IR 593, 610 suggested the courts have a legitimate constitutional function in extending the criminal law in order to protect fundamental rights. As noted in Hogan and Whyte *Kelly, The Irish Constitution* (4th ed LexisNexis 2003) at 1051-1052, subsequent cases demonstrate a judicial view much in contrast with Hamilton P's in that they categorically rule out judicial extension of the criminal law. See *Corway v Independent Newspapers* [1999] 4 IR 484 and *de Gortari v Smithwick (No 2)* [2001] 1 ILRM 354.

¹⁶⁵ See Chapter 1 of Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 2004).

¹⁶⁶ See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 283-284.

¹⁶⁷ Section 321O.

¹⁶⁸ Section 71 of the *Criminal Justice Act 2006*.

(d) Codifying the target offence

2.125 Some code provisions on attempt as a relational offence expressly stipulate which categories of crime it is criminal to attempt. The *Criminal Attempts Act 1981* of England and Wales provides that the target of a criminal attempt must be triable in England and Wales as an indictable offence and expressly excludes some categories.¹⁶⁹

2.126 It is apparent that if the provisions on attempt as a relational offence in the general part of a criminal code are to be comprehensive¹⁷⁰ then the target of a criminal attempt must be specified. The *Criminal Attempts Act 1981* of England and Wales provides a model for this. The general part provision on attempt, after providing it is an attempt to commit an offence, could say that this applies to any offence which, if it were completed, would be triable in Ireland as an indictable offence.

2.127 There is a question whether this should be limited to indictable offences. Perhaps not much turns on this question given that only a minority of special part offences are exclusively summary offences. Summary offences are still offences and as such the rationale of relational inchoate offences applies. In any event, a code provision on attempt should make certain the matter.

2.128 *The Commission invites submissions on whether both indictable and summary offences should be capable of being criminally attempted.*

C Impossible attempts

(1) Categories of impossible attempts

2.129 Is it, and should it be, criminal to attempt the impossible? As a matter of description of what the common law is, there is no simple answer. Sometimes at common law impossibility has been held to bar attempt liability,¹⁷¹ sometimes not.¹⁷² Types of impossibility need to be differentiated and defined in order to identify patterns in the case law. Some judges and writers have used a dual classification of factual and legal impossibility; some have insisted on greater differentiation within these categories.¹⁷³ The adjectives “legal” and “factual” are unhelpful because

¹⁶⁹ Section 1(4) of the *Criminal Attempts Act 1981*. Excluded target offences include conspiracy as a relational inchoate offence.

¹⁷⁰ See Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 2004) at 49.

¹⁷¹ *Haughton v Smith* [1975] AC 476.

¹⁷² *R v Whyte* [1910] 2 KB 124.

¹⁷³ *Haughton v Smith* [1975] AC 476.

either label could be applied to a case of impossibility depending on which way it is looked at.¹⁷⁴ Consider the famous case of *Haughton v Smith*.¹⁷⁵ The defendant received what he believed was “stolen” corned beef. But the corned beef was actually under the control of the police. The police had searched the van transporting the corned beef and then allowed the van to continue its journey under covert police supervision. So *Haughton* is described as a case of factual impossibility – the defendant could not have committed the substantive offence of receiving/handling stolen goods in the circumstances because the goods he received were not in fact stolen. But the state of being “stolen” is a construct of the law. Nothing intrinsic to the corned beef changed when the police discovered it; yet in the view of the law the corned beef changed from being “stolen” to “not stolen”. Additionally, it is a matter of law that the goods in question must be “stolen” for the purpose of establishing the offence of handling stolen goods. It is easy to imagine a different legal regime where stolen goods are considered stolen until returned to their true owner. With these rather obvious and uncontroversial observations in mind one could comfortably describe *Haughton* as a case of legal impossibility: it was impossible for the defendant to commit the substantive offence of handling stolen goods in the circumstances because the law is such that receiving or handling goods that are under control of the police does not constitute the offence.

2.130 Instead of “factual” and “legal”, more elucidating phrases can be used when categorising impossible attempts. So what is often called a case of legal impossibility can be called a case of an “imaginary crime”. This is where a person attempts to do, or in fact does, something which they think is criminal, but is actually not criminal. *R v Taaffe*¹⁷⁶ is an example. The defendant brought sealed packages into England believing them to contain currency and believing that importing currency was a crime. As a matter of law, importing currency is not, and was not, a crime. The English Court of Appeal held that no criminal attempt was made out because one cannot criminally attempt to do what is not criminal; where an imaginary crime is attempted the definition of a criminal attempt will not be satisfied. The imaginary crime case is best viewed not as a case of impossibility at all, but rather simply as a case where the definition of attempt – which requires the target of an attempt to be criminal – is not made out.

2.131 The “factual” impossibility label is applied to the situation where the accused attempts to do something, which is indeed a crime, but because

¹⁷⁴ The argument here is influenced by HLA Hart, “The House of Lords on Attempting the Impossible” in *Hart Essays in Jurisprudence and Philosophy* (Clarendon, Oxford, 1983) at 367-391.

¹⁷⁵ [1975] AC 476.

¹⁷⁶ [1983] 1 WLR 627.

of facts unknown to them, cannot possibly be achieved. A classic example is the “missing booty” case where the defendant tries to pickpocket an empty pocket. It is impossible to commit theft in this situation, but the actor does not know this. In *R v Brown*¹⁷⁷ and *R v Ring*¹⁷⁸ pick-pocketing an empty pocket was held to be an attempt to steal. But earlier, in *R v Collins*,¹⁷⁹ the opposite was held.¹⁸⁰

2.132 Another type of case is the “insufficient means” case, a central example is where a would-be burglar is caught trying to pry open a window with a jemmy that is entirely inadequate for the job. The House of Lords suggested, *obiter*, in *Haughton v Smith*¹⁸¹ that a criminal attempt can be made out here. In *R v Whyte*¹⁸² a conviction for attempted murder was upheld where the defendant, intending to kill, had put poison in the victim’s drink, but the quantity of the particular poison was inadequate to cause death. This case supports the proposition that impossibility due to insufficiency of means does not preclude attempt liability.

2.133 Another type of case is the “mistaken identity” case. An example is where a person shoots at a tree or a scare-crow mistaking it for someone he intends to shoot dead. The much cited example of the man who takes his own umbrella, thinking it belongs to another, fits this category.¹⁸³

(2) *Irish judicial comment on impossible attempts*

2.134 No Irish case on attempt turns on the issue of impossibility, but there is *dictum* suggesting impossibility is no defence to a charge of attempt. In finding that the submission of fictitious birth reports in *Sullivan* was capable of constituting an attempt, Walsh J stated that his finding would be no different even if it was impossible for Sullivan to have passed the 25 birth report mark in the relevant contract year.¹⁸⁴ That is, even if it was impossible in the circumstances for Sullivan to obtain money by false pretences she could still be convicted for attempting to do so. It is difficult to classify the *Sullivan* case as a type of impossibility because no particular reason why there might be impossibility was suggested.

¹⁷⁷ (1889) 24 QBD 357.

¹⁷⁸ (1892) 17 Cox CC 491.

¹⁷⁹ (1864) 9 Cox CC 497.

¹⁸⁰ See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 436-437.

¹⁸¹ [1975] AC 476.

¹⁸² [1910] 2 KB 124.

¹⁸³ Baron Bramwell’s example from *R v Collins* (1864) 9 Cox CC 497, 498.

¹⁸⁴ [1963] IR 169, 196-197.

2.135 Perhaps Walsh J, when imagining impossibility in *Sullivan*, had something in mind along the lines that Sullivan's false reports would inevitably be discovered before she could receive extra pay. If this is so the American case of *State v Henthorn*¹⁸⁵ has some parallels. The defendant had written into her doctor's prescription for codeine, a controlled drug, an extra "1" thus turning a refill of "1" into "11". The pharmacist gave the defendant her first prescription and contacted the police since he knew that a codeine prescription could be legally refilled at most five times in six months. On appeal the defendant's conviction for attempted fraudulent acquisition of a controlled substance was overturned. The defendant's effort at fraud was a hopeless one in the circumstances. Perhaps Walsh J in *Sullivan* wished to rule out the possibility of acquittal on such grounds.

(3) ***The debate about impossible attempts***

2.136 Proposals and arguments about impossible attempts tend to be made from two opposing perspectives. Subjectivism recommends the accused be treated on the basis of circumstances as he or she believed them to be. This approach treats bludgeoning a dead body with belief it is alive as attempted murder.¹⁸⁶ This approach can be called "fault-centred".¹⁸⁷ In contrast, objectivism can be called "act-centred". This approach recommends that bludgeoning a dead body is not attempted murder no matter what the actor believes because it is simply not possible to commit murder on a dead body.

(a) ***The Criminal Attempts Act 1981 of England and Wales***

2.137 In England and Wales, the Criminal Attempts Act 1981 favours the subjectivist approach and thus criminalises impossible attempts. S. 1(2) provides "A person may be guilty of attempting to commit an offence ... even though the facts are such that the commission of the offence is impossible." Additionally, section 1(3) provides for attempt *mens rea* to be attributed to the accused who would be considered to have the requisite intent if the facts of the case had been as the accused believed them to be.

2.138 Despite the clear subjectivist principles of the 1981 Act, the House of Lords in *Anderton v Ryan*¹⁸⁸ reached an objectivist result. One year later the Lords did an about-turn, overruling *Anderton v Ryan* in the

¹⁸⁵ 218 Wis.2d 526, 581 N.W.2d 544 (Wis.App.1998).

¹⁸⁶ In *Dlugash* 363 NE 2d 1155 (1977, New York) shooting a corpse intending to kill was upheld as attempted murder.

¹⁸⁷ Ashworth *Principles of Criminal Law* (5th ed Oxford University Press 2006) at 449-451.

¹⁸⁸ [1985] AC 560.

case of *R v Shivpuri*.¹⁸⁹ In *Anderton v Ryan*, Ryan was the victim of a burglary. When describing what was taken from her home she confessed to a police officer that her video recorder “was a stolen one” though she could not be sure it was stolen.¹⁹⁰ The prosecution, having adduced no evidence that the particular video recorder was actually stolen, concentrated on a charge of attempted handling of stolen property. The House of Lords considered whether section 1(3) of the 1981 Act compelled a court to recognise attempt convictions based on the defendant’s erroneous view of fact that, if correct, would mean he or she had committed an offence. A majority of the Court concluded that the statute did not compel this result. If it did, according to Lord Roskill, the results would be remarkable. For example, a man who has sex with a woman of age believing, in error, she is underage would be guilty of attempted unlawful carnal knowledge. According to Lord Roskill, the legislature would have to use more “drastic” language than it did in the 1981 Act to enact this.¹⁹¹

2.139 In *Shivpuri* the defendant admitted to customs officials that he was carrying a suitcase containing prohibited drugs. In fact, the substance in his case was not a prohibited drug. The House of Lords, overruling *Anderton*, held that a conviction for attempting to be knowingly concerned in dealing with a prohibited drug could stand. Lord Halisham, *obiter*, hinted that *Shivpuri* could have been distinguished on the facts from *Anderton*. Ryan’s intention was to buy a video recorder cheaply; it was not her intention to buy a stolen machine.¹⁹² This sits uneasily with the legal meaning of intention, which includes oblique intention. Besides, it could be said of *Shivpuri* that he intended to make some money, not to transport drugs.

(i) ***Evaluation of the subjectivist approach***

2.140 The subjectivist approach has been said to lead to punishing people for their wicked intentions alone because it jettisons the requirement for an *actus reus*. In *Haughton v Smith*¹⁹³ Lord Morris said that “to convict [the defendant] of attempting to handle stolen goods would be to convict him not for what he did but simply because he had a guilty intention.”¹⁹⁴ There are compelling reasons against a law that punishes on the basis of yet-to-be-acted-upon guilty intentions. But this criticism simply does not apply to the

¹⁸⁹ [1987] AC 1.

¹⁹⁰ [1985] AC 560, 562.

¹⁹¹ [1985] AC 560, 580.

¹⁹² See [1987] AC 1, 22.

¹⁹³ [1975] AC 476.

¹⁹⁴ [1975] AC 476, 501.

subjectivist approach to impossibility. The defendant in a *Shivpuri* type case does not have a mere wicked intention; he has the intention plus he acts on it. Shivpuri himself did in fact transport a case. From his own point of view he is doing the *actus reus* of the offence, which here is the carrying of a prohibited substance. Furthermore, what he has done must satisfy the test for the *actus reus* for attempt, for example, he must have done a “more than merely preparatory” act.

2.141 Nonetheless, there is a concern that the subjectivist approach to impossible attempts casts the criminal net too widely. In reality, the man who steals his own umbrella thinking it belongs to someone else will not come to the attention of police.¹⁹⁵ The subjectivist approach may go too far in principle regarding what it catches as criminal.

2.142 In both *Shivpuri* (transporting a suitcase from India to England for a large sum of money) and *Anderton v Ryan* (buying a video recorder at a very cheap price) the defendants’ false beliefs about that what they were doing were nonetheless plausible in the circumstances. As such, what these people did risked substantive criminal harm, the relevant criminal harm here being the distribution of prohibited drugs (*Shivpuri*) and the contribution to the market in stolen goods (*Anderton v Ryan*). On another day, Shivpuri might well have been given real drugs to transport; Ryan’s video recorder might well have been stolen, but could not be considered so in a criminal court since the prosecution had not sought to prove it. The rationale of inchoate offences – that of preventing criminal harm and achieving consistent moral punishment – calls for criminalising the actions of Ryan and of Shivpuri.

2.143 What about where the defendant’s belief that they are doing something criminal is not just erroneous in the circumstances, but also entirely implausible? Consider the person who sticks pins in a doll of likeness to their enemy¹⁹⁶ in the belief it will cause injury – must the subjectivist approach label this a criminal attempt, or is there scope for distinguishing between plausible beliefs? This Voodoo practitioner poses little threat to society; they do not in any way increase the risk of criminal harm occurring. To ask the question more generally, what limits should be placed on the scope for persons to inculcate themselves through their beliefs under a subjectivist approach?

¹⁹⁵ Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 425.

¹⁹⁶ Example adapted from Jeremy Horder’s book review of Duff *Criminal Attempts* (Oxford University Press 1996), which appears in (1997) 113 LQR 688.

(ii) Evaluation of the objectivist approach

2.144 The objectivist approach does not accord with the ordinary meaning of attempt. In ordinary description someone trying to take money from an empty pocket is attempting to steal just as if the pocket contained money. The failure to correspond to ordinary language is a disadvantage because it may hinder the pursuit of legality. The more accurately the law is understood, the easier it is to obey it.

2.145 Another problem with the objectivist approach is that the more robust it is, the more it undermines the rationale of inchoate offences. The goals of preventing criminal harm and applying consistent punishment are undermined if a conviction cannot be achieved in a *Haughton v Smith* type of case. Antony Duff argues that his objectivist framework for attempts would accommodate conviction in the *Haughton v Smith* case, though it may be doubted whether he retains theoretical consistency in doing so. The objectivist Article 49 of the Italian Penal Code provides that liability shall be precluded when, owing to the lack of fitness of the action or non-existence of its object, the harmful or dangerous event is impossible.¹⁹⁷ This has been interpreted so that conviction is achieved in “empty pocket” type cases. Again, it may be questioned whether this practice in Italian courts is consistent with the objectivist text of Article 49.

(4) The irrelevance of impossibility

2.146 The subjectivist approach is more consistent with the notion of attempt than the objectivist approach. To say someone attempted something is to make an evaluation of what that person thought they were doing, not what they actually did. Attempts are subjective. The debates and problems with impossibility can be seen as arising from a failure to appreciate this key insight.

2.147 A distinction between “what is attempted” and “what is done in an attempt” helps resolve much of the difficulty with so-called impossible attempts.¹⁹⁸ “What is attempted” is what the actor was attempting to do and this is what the law on criminal attempt is concerned with. “What is done in an attempt”, on the other hand, is what has happened from an objective point of view. “What is attempted” should not be equated with “what is done in an attempt”. They are different things. Of course, a criminal trial is a very limited format for assessing subjective perspectives. It is commonplace for subjective states of mind to be inferred from objective facts. The fact that a

¹⁹⁷ English translation adapted from Rocco *The Italian Penal Code* (Sweet & Maxwell, 1978) at 16 and McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 441.

¹⁹⁸ Donnelly “Possibility, Impossibility and Extraordinariness in Attempts” (forthcoming).

man carried away his own umbrella does not imply he attempted to steal an umbrella, though he may have had this intention. Additional evidence – perhaps a confession he believed he was taking someone else’s umbrella – changes the scenario by providing an insight into his state of mind which may well persuade us that he was trying to steal an umbrella (what is attempted) rather than merely carrying away his own umbrella (what is done in an attempt). This distinction is used by Bebhinn Donnelly to reach the key conclusion that “[an actor’s] attempt is fixed by [that actor], what actually happens in the attempt or indeed contrary interpretations of what it is that [the actor is] attempting cannot retrospectively alter its substance.”

2.148 Another key advance in theorising about impossible attempts is to recognise the unhelpful nature of the concept of impossibility.¹⁹⁹ In a very real sense all attempts, looking back on them, were impossible attempts. Where an actor has shot at another and the bullet has missed by a matter of inches we can say that in the circumstances (the gun aimed slightly askew) it was impossible to commit murder. Impossibility does not differentiate which attempts are criminal and which are not because it is present in them all. Additionally, the phrase “attempting the impossible” does not make sense since by definition an actor who attempts something believes it is possible, otherwise there would be no point in attempting it and to do so would be irrational. Of course, we can think of examples where somebody tries to do something believing it is impossible. This may be rational: an author trying to write 10,000 words in a day in the hope that reaching for beyond their capacity will help them achieve their capacity. We can question whether such a person is really attempting to write 10,000 words; perhaps in truth they are attempting to write as many words as they can.

2.149 As for the problem of the subjectivist approach leading to criminalisation of the (seemingly) harmless voodoo practitioner and other hopelessly inept attempts, this problem should not be thought fatal for the subjectivist approach because these kinds of cases are wholly exceptional. They are unlikely to be detected, and given the requirement of *mens rea*, the voodoo practitioner would have to really believe in the efficacy of voodoo.²⁰⁰ Such an actor might be most appropriately processed as criminal but excused on the basis of extreme irrationality or insanity. Perhaps criminalisation is appropriate since the voodoo practitioner might turn to

¹⁹⁹ Donnelly “Possibility, Impossibility and Extraordinariness in Attempts” (forthcoming).

²⁰⁰ Smith “Attempts, impossibility and the test of rational motivation” in Gower (ed) *Auckland Law School Centenary Lectures* (Auckland Legal Research Foundation 1983) at 25.

more effective methods on realising voodoo doesn't work.²⁰¹ Such aberrant cases should not be allowed to distort and unduly complicate attempt liability.

2.150 The Commission accordingly provisionally favours defining criminal attempt such that it can label as criminal the person who pick-pockets an empty pocket, the person who receives non-stolen goods believing them to be stolen, and the person who despite their best efforts beyond mere preparation simply lacks the means to achieve their criminal purpose. The only category of attempt traditionally included under discussion of impossible attempts for which the Commission provisionally recommends liability should not attach is the imaginary crime scenario. But in this scenario the concept of impossibility does not do the work in rendering the action outside the scope of attempt liability. What renders it outside the scope of attempt liability is the absence of an essential aspect of a criminal attempt: that the target of the attempt is an actual currently valid special part offence.

2.151 Though the position in Ireland on impossible attempts cannot be stated with certainty, most likely it is the same subjectivist approach that the Commission wishes to provisionally recommend.²⁰² Another way of expressing this position is to observe that impossibility is no defence.

2.152 *The Commission provisionally recommends that impossibility should not bar attempt liability.*

D Abandonment of an attempt

(1) *The relevance of abandonment to attempt liability*

2.153 Abandonment or withdrawal in the context of attempt liability refers to where the actor wilfully discontinues his or her efforts to bring about a crime, in other words, where an actor ceases a criminal attempt. The common law approach is that abandonment has no relevance to the issue of attempt liability – the attempt is either committed by the time of the abandonment or it is not. In *R v Taylor*²⁰³ the jury acquitted the defendant on facts that had him poised to drop a lighted match on a haystack. The appeal court allowed this acquittal to stand on the understanding that the defendant was acquitted for lack of *mens rea* – he did not really intend to light the hay,

²⁰¹ Smith “Attempts, impossibility and the test of rational motivation” in Gower (ed) *Auckland Law School Centenary Lectures* (Auckland Legal Research Foundation 1983) at 37 and 42.

²⁰² Based on Walsh J’s *obiter dictum* in the Supreme Court decision in *The People (Attorney General) v Sullivan* [1964] IR 169.

²⁰³ (1859) 1 F & F 511; 175 ER 831.

just to make it look like he would – rather than because he had abandoned a criminal attempt.

2.154 In *R v Lankford*²⁰⁴ the English Court of Criminal Appeal stated:

“In some cases it would be open to the jury to find that a voluntary change of heart at some point in the proceedings enabled them to say that there had been no attempt; in other cases a point might be reached where, even if a man voluntarily desisted, he had already been guilty of the attempt. Much, of course, depended on the degree of proximity of the acts in question.”

The first half of this *dictum* if taken in isolation might be understood as suggesting a defence of abandonment. Really, it is just restating the basic *actus reus* requirement that the defendant progress beyond preparation and into the realm of attempt.²⁰⁵ It would, however, be possible to argue on behalf of a defendant that evidence of subsequent abandonment casts doubt on whether he had the requisite intention to complete the crime in the first place.²⁰⁶ In the Canadian case of *Frankland*²⁰⁷ the fact that the accused had ceased his efforts to have sex with a non-consenting girl when she started to cry was considered relevant to the issue of attempt liability not because abandonment would preclude liability, but because it tended to raise doubt that the defendant intended *non-consensual* sex. The Ontario Court of Appeal thought the jury should have been given direction to consider whether the girl’s crying signalled to the accused her non-consent and this caused him to stop as it had never been his intention to have non-consensual sex.

2.155 Canada,²⁰⁸ Australia,²⁰⁹ and England²¹⁰ take the common law approach for attempt and the other relational inchoate offences. In *The People (Attorney General) v Sullivan* Walsh J confirmed, *obiter*, that Ireland takes the common law approach in relation to attempts. The finding that the defendant’s submission of fictitious births was capable of constituting a criminal attempt would be no different, in the view of the Supreme Court, if

²⁰⁴ [1959] Crim LR 209.

²⁰⁵ See Wasik “Abandoning Criminal Intent” [1980] Crim LR 785, 786-787.

²⁰⁶ *DPP v Stonehouse* [1978] AC 55; [1977] 3 WLR 143, 150, per Lord Diplock.

²⁰⁷ (1985) 23 CCC (3d) 385.

²⁰⁸ *R v Kosh* (1965) 44 CR 185; *R v Goodman* (1832) 22 UCCP 338. There are no recent cases; the Supreme Court of Canada has not had occasion to address the issue.

²⁰⁹ *R v Page* [1933] ALR 374.

²¹⁰ *R v Lankford* [1959] Crim LR 209.

the defendant had abandoned her quest to gain money for work she had not done.²¹¹

2.156 In contrast to the common law approach, the American Law Institute's Model Penal Code provides for each of the three inchoate offences an affirmative defence of renunciation of criminal purpose.²¹² Mere voluntary renunciation of criminal purpose suffices as a defence to attempt. American courts' interpretation of the common law had tended to recognise the defence even before codification.²¹³ The German Penal Code recognises a general defence of abandonment, which can be made out by preventing the completion of the target criminal activity.²¹⁴ A number of other jurisdictions have some version of the defence.²¹⁵ The Italian Penal Code, unusually for a civil law jurisdiction, does not recognise abandonment as a defence to attempt liability. Voluntarily preventing the target offence can, however, result in a one third to one half reduction in punishment for attempt.²¹⁶

(2) *A defence of abandonment?*

2.157 There are a number of arguments in favour of having an abandonment defence.

- i) When the law allows for someone to escape attempt liability because they voluntarily desisted, it respects citizens as responsible agents who are open to persuasion to desist from their would-be criminal endeavours.²¹⁷ This could be called an argument from moral autonomy. This argument might be thought to lack appreciation of the reality of attempting crime. That is, those who attempt crime have already made their choice about what they want to do. We respect people by ensuring their freedom to desist from crime; we do not have to additionally ensure freedom for those who voluntarily try to commit crime to subsequently turn back at any and all points of their specific criminal endeavour.

²¹¹ [1964] IR 169, 196-197.

²¹² Sections 5.01(4), 5.02(3), and 5.03(6) of the Model Penal Code.

²¹³ See Wechsler, Jones and Korn "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy" (1961) 61 Columbia Law Review 571 at 615-616, citing, among other cases, *Weaver v State* 116 Ga 550, 42 SE 745 (1902); *Parker v State* 29 Ga App 26, 113 SE 218 (1922).

²¹⁴ Section 24 of the German Penal Code.

²¹⁵ France, Norway, Malta, Switzerland.

²¹⁶ Article 56 of the Italian Penal Code. See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 451.

²¹⁷ Duff *Criminal Attempts* (Oxford University Press 1996) at 395-396, and at 388-389.

- ii) Having an abandonment defence gives the would-be criminal working towards a crime a prudential reason or motive to desist from completing that crime. This, it might be supposed, would result in a number of what otherwise would have been completed crimes being abandoned and hence less criminal harm than if there was no such defence. A weakness of this argument is that it is speculative, and perhaps unrealistic,²¹⁸ to suppose that would-be criminals weigh up the pros and cons of continuing their efforts towards crime right up to the final moment, and even if they do, that the defence of abandonment could have much impact, given that there is always strong reason to desist since uncompleted crimes are much less detected than completed crimes.²¹⁹ In addition, if an abandonment defence provides a real incentive to desist an embarked-on crime it also provides a real, albeit less powerful, incentive to embark on crime in the first place since it makes embarking on crime not the “fatal” decision it otherwise is from the point of view of an actor crossing into the area of criminal liability. In other words, with an abandonment offence the actor lacks an incentive to refrain from working towards crime – that once he crosses the threshold of attempt there is, in theory, no escaping criminal liability – that he has when there is no abandonment defence.²²⁰

2.158 Arguments against having a defence of abandonment include:

- i) Once a criminal attempt, which is a complete offence in itself, is made out why should liability further depend on the particular reason why the target offence of the attempt was not completed? In criminal law generally, subsequent regret or remorse does not alter liability. Giving back stolen money does not alter liability for theft, for example. (Such behaviour may have relevance to legal issues other than liability, sentencing being the chief example.) This is logical: we cannot change the past, yet the defence of abandonment, in effect, allows what was in law a criminal attempt at one point in time to be changed to not-a-criminal attempt at a time in the future.²²¹ This can be called the argument from logic. The Law Commission for England and

²¹⁸ Stuart *Canadian Criminal Law* (4th ed Carswell 2001) at 671.

²¹⁹ See Fletcher *Basic Concepts of Criminal Law* (Oxford University Press 1998) at 183.

²²⁰ See Wechsler, Jones and Korn “The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy” (1961) 61 *Columbia Law Review* 571 at 617-618.

²²¹ This expresses the reasoning that common law courts have provided in declining to acknowledge a defence of abandonment. See *Kosh* (1965) 44 CR 185.

Wales has stated that “[t]he availability of the defence would be logically indefensible.”²²² A major problem for this argument is that it could be deflected by redefining criminal attempt so that an attempt is not made out in the first place if it was abandoned voluntarily. In other words, build in a non-abandonment requirement into the definition of attempt. For example, attempt is committed where an actor “does any act toward the commission of [a] crime, but fails or is prevented or intercepted in the perpetration thereof”.²²³ The French Penal Code’s definition of attempt would achieve this effect. Article 121-5, translated: “An attempt is committed where, being demonstrated by a beginning of execution, it was suspended or failed to achieve the desired effect *solely through circumstances independent of the perpetrator’s will.*” (Emphasis added) This definition implies that if the attempt fails because of reasons dependent or connected with the perpetrator’s will then the definition of attempt is not satisfied.

- ii) Some abandoned attempts still cause great “harm”. For example, the would-be rapist who discontinues his efforts at the last minute may still have caused immense fear and anxiety.²²⁴ Of course, depending on the facts there are other offences available to charge, aggravated sexual assault for example. But what the would-be rapist did is properly labelled attempted rape rather than some degree of sexual assault. This could be called an argument from fair labelling.

(a) *What should constitute abandonment?*

2.159 If a defence of abandonment is thought desirable it remains to be worked out when it should be available. A requirement that the abandonment be voluntary almost goes without saying, for to recognise involuntary abandonment also would contract criminal attempt so much as to effectively abolish it. Where the defence is available the meaning of voluntary is more restricted than the ordinary meaning of the word. To be a voluntary abandonment in law the defendant must have ceased his work towards substantive crime for reasons such as:

²²² Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at paragraph 6.57.

²²³ Quoted in Wechsler, Jones and Korn “The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy” (1961) 61 *Columbia Law Review* 571 at 616.

²²⁴ Duff *Criminal Attempts* (Oxford University Press 1996) at 396.

- i) The would-be perpetrator had a change of heart; he or she decides to discontinue for moral reasons.
- ii) The would-be perpetrator decides prudentially to obey the law. That is, they decide, all things considered, they will be better off if they do not break the law.

2.160 In contrast, the following reasons, though in some sense acted on “voluntarily”, are not recognised as being sufficient for voluntary abandonment:

- i) The would-be perpetrator is faced with a very high probability of getting “caught” whether by law enforcement officers or otherwise. Section 5.01(4) MPC: “Renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor’s course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose.”
- ii) The would-be perpetrator realises their pursuit of a substantive offence will not give them the satisfaction they seek. This should be wide enough to encompass the person who desists because he realises he will not be able to achieve what he is trying to do.²²⁵
- iii) The completion of the substantive offence is merely postponed. Section 5.01(4) MPC: “Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.” Nevertheless, there is a German case²²⁶ where the defence was held available to a defendant who had desisted from raping on a promise of consensual sex at a later point.

2.161 Even if, in principle, the arguments in favour of having a defence of abandonment outweigh those against, putting the defence in place poses further difficulties:

- i) What type of reverse onus, if any, to place on the accused?
- ii) Specifying what is voluntary.

²²⁵ See Stuart *Canadian Criminal Law* (4th ed Carswell 2001) at 671, Fletcher *Basic Concepts of Criminal Law* (Oxford University Press 1998) at 183.

²²⁶ See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 451 citing the German case, Judgment of 7 BGHSt, 1995, 296. Case discussed by Fletcher *Basic Concepts of Criminal Law* (Oxford University Press 1998) at 183.

2.162 In light of these difficulties the French model for defining attempt, which builds the absence of abandonment by the actor into the positive definition of attempt, is of interest. The French approach does not require procedural departure from the presumption of innocence entailed by a reverse onus and it avoids the problem of deciding what is voluntary by focusing analysis on the reason why the attempt failed. Only if the reason is independent of the actor's will can attempt liability attach. However, opting for this mode of definition sets up a much less restrictive regime in terms of the potential for abandonment to render an actor free of attempt liability than does the regime under the MPC. Given that Ireland currently has the common law position that abandonment is irrelevant to attempt liability it might be thought that going for the approach in the French Penal Code would be too dramatic a change.

2.163 *The Commission invites submissions on whether abandonment should have relevance to attempt liability.*

CHAPTER 3 CONSPIRACY

A Introduction

3.01 A conspiracy is a criminal agreement. At common law, an agreement may ultimately have a lawful objective and yet be a criminal conspiracy.¹ This is apparent in Lord Denman's definition of conspiracy as agreement "to do an unlawful act, or a lawful act by unlawful means."² This definition of conspiracy has been applied by Irish courts on a number of occasions.³ It is key to note that "unlawful" in this context does not equate with "criminal". An agreement to commit a tort, for example, may be a conspiracy because tortious conduct, though not criminal, may satisfy the unlawfulness aspect of conspiracy.⁴

3.02 The focus of this Chapter is the inchoate offence of conspiracy that attaches to substantive offences and to some instances of unlawful behaviour. This offence of conspiracy may be called relational conspiracy or general conspiracy. There are also a number of specific conspiracy offences identified by judges as existing at common law. Conspiracy to defraud and conspiracy to corrupt public morals are prominent examples. These specific conspiracies differ from relational conspiracy in that they are free-standing offences that have their target (of the agreement) stipulated, albeit rather vaguely. Discussion and judgments on these specific conspiracies are, however, very relevant to discussion on general conspiracy because the concept of agreement – the basis of conspiracy – is essentially the same for relational conspiracy as for free-standing conspiracies.

¹ *R v Journeyman Tailors* (1721) 8 Mod 10.

² *R v Jones* (1832) 110 ER 485, 487. It has been suggested by commentators that Lord Denman subsequently rejected his own definition of conspiracy. See, for example, Charleton, McDermott and Bolger *Criminal Law* (Butterworths 2000) at 296, Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 359. But in the case cited as revealing the supposed rejection – *R v Peck* (1839) 9 A and E 686, 690 – Lord Denman interjects "I do not think the antithesis very correct" when counsel quotes the definition. This literally signals approval, not rejection of the previous *dictum*. Furthermore, there is nothing in the *Peck* decision that indicates a retreat from the expansive *Jones* definition.

³ *R v Parnell* (1881) 14 Cox 508, *Connolly v Loughney* (1953) 87 ILTR 49, *Hegarty v Governor of Limerick Prison* [1998] 1 IR 412.

⁴ *Parnell' Case* (1881) 14 Cox 508, *Kamara v DPP* [1973] 2 All ER 1242.

Agreement forms the basis of both the *actus reus* and *mens rea*.⁵ Agreement is necessarily a mental operation and thus constitutes the *mens rea*, yet agreement – the act of agreement – is the *actus reus*

3.03 Section 71 of the *Criminal Justice Act 2006* contains an offence of conspiracy. It is limited to persons who conspire to commit a serious offence. Serious offence is defined as an offence for which a punishment of four or more years' imprisonment may be imposed.⁶ In this respect, the section 71 offence is much more restricted than common law relational conspiracy in terms of what it can attach to. The 2006 Act does not, however, state that the common law relational offence is being replaced. Neither does the statute define "conspires".

3.04 The 2006 Act stipulates jurisdictional claims such that the target of a section 71 conspiracy formed in Ireland can be an offence to be committed outside of the jurisdiction provided it constitutes a serious offence in the country where it will occur and if done in Ireland would be a serious offence. Section 71 also claims jurisdiction over conspiracy formed abroad where the target offence is to be committed in Ireland or to be committed abroad if against an Irish citizen or stateless person normally resident in Ireland.

3.05 Conspiracy in Ireland is still very much a matter of common law. In late 2007 the alleged actors in a foiled raid attempt in Celbridge, Co. Kildare were charged with conspiracy to commit theft contrary to common law.⁷ Section 71 can be seen as a codification of that subset of common law relational conspiracy that is committed where a serious offence, as distinguished from minor offences and non-criminal wrongs, is agreed to be pursued as an end or as a means. The 2006 Act gives detailed guidance on jurisdictional issues of law that are uncertain at common law, but this applies to section 71 conspiracy, not to conspiracy generally. Significantly, the absence of any definition of conspiracy in the 2006 Act means that even where a trial falls under the ambit of section 71, recourse to common law will be required.

B Agreement in conspiracy

3.06 Agreement for the purpose of conspiracy has its ordinary meaning; it is an act of communication – or tacit understanding – between

⁵ Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 374.

⁶ Section 70 of the *Criminal Justice Act 2006*.

⁷ See Lally "Seven Charged over Attempted Robbery" *The Irish Times* 6 November 2007.

two or more persons involving resolution to do something. This process might involve an express exchange of promises, but need not. Case law indicates that agreement in conspiracy need not amount to what is needed for a binding contract in contract law.⁸ But at least one authority implies that a conspiratorial agreement is such that it would be an enforceable contract if lawful.⁹ Yet the courts have not insisted there be consideration present for conspiratorial agreements, nor have they analysed such agreements in terms of offer and acceptance.¹⁰ The conspirator merely needs to be a party to the agreement; she does not have to be involved in the “making” of it.¹¹ So long as the agreement exists – that is, until it is carried out or abandoned – the offence of conspiracy is being committed. It is a continuing offence.¹²

3.07 The concept of agreement in conspiracy is one of the less controversial aspects of conspiracy. Codification would involve providing that conspiring is an act of agreement where agreement has its ordinary meaning rather than a technical meaning as in the law of contracts.

3.08 *The Commission provisionally recommends that conspiracy continue to be based on the concept of agreement, which should have its ordinary meaning.*

3.09 There are further issues arising with the *actus reus* of conspiracy, which are addressed presently.

(1) Parties to agreement

3.10 It is obvious that at least two people are needed for a conspiratorial agreement. However, in practice in Ireland and elsewhere it is possible to convict only one person for a particular conspiracy. The Court of Criminal Appeal in *The People (Attorney General v Keane)* held that the deletion of the name of an alleged co-conspirator from a charge does not affect a conviction.¹³ In line with this position, there is a practice whereby a charge of conspiracy does not have to name the party with whom the accused is alleged to have conspired; the indictment can allege a conspiracy with “a person or persons unknown.”¹⁴ Where two defendants are tried

⁸ *Leigh* (1775) 1 C & K 28n; 174 ER 697n; 2 Camp 372; 170 ER 1188n; *Tibbits* [1902] 1 KB 77. See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 298.

⁹ Willes J in *Mulcahy v R* (1868) LR 3 HL 306, 317.

¹⁰ Orchard “Agreement in Criminal Conspiracy” [1974] Crim LR 297, at 300.

¹¹ *Simmonds* (1967) 51 Cr App R 317, 322; *R v Murphy* (1837) 173 ER 502, approved by Keane CJ in *Attorney General v Oldridge* [2001] 2 ILRM 125, 133.

¹² As the House of Lords recognised in *R v Doot* [1973] 1 All ER 940.

¹³ *People (AG) v Keane* (1975) 1 Frewen 392.

¹⁴ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 300.

together for the same alleged conspiracy, common law holds that the acquittal of one requires the acquittal of the other.¹⁵ This was how the English courts applied the common law¹⁶ up to the enactment of section 5 of the *Criminal Law Act 1977*, which reversed the rule. In a contrasting application of the common law, the High Court of Australia held in *R v Darby*¹⁷ that, whether tried separately or jointly, the acquittal of one co-conspirator does not necessitate the other's acquittal. It is less than certain what the position is in Ireland, though a recommended practice would be to have separate trials for co-conspirators where the evidence against one is stronger than against the other because, for example, one has made an admission. A guilty plea by one party to a conspiracy charge should not prejudice the trial of another party.¹⁸ Nor can the confession of one party be used against another. However, the declaration of one party in furtherance of the alleged conspiracy is admissible evidence against all parties insofar as it establishes the existence of the conspiracy. This is a recognised exception to the hearsay rule; it applies only after the prosecution have already made out a *prima facie* case of conspiracy. It is also observed that declarations made after arrest would not be admissible under this rule because they could not, at that stage, be in furtherance of the conspiracy.¹⁹

(a) Shared intention and inferring agreement

3.11 That more than one person happen to share the same intention to do the same unlawful thing is not sufficient for a conspiracy - “[a] conspiracy consists not merely in the intention of two or more but the agreement of two or more ...”²⁰ That is not to say that there must be direct evidence of a verbal or written exchange revealing the existence and content of agreement between conspirators. The Court of Criminal Appeal in *The People (Attorney General) v O'Connor and O'Reilly*²¹ held that, in the absence of evidence of an express agreement, its existence can be inferred from evidence supporting other charges against the accused. The other charges in this case were offences of breaching Emergency Orders regulating the sale of certain commodities. These offences were the substantive offences that the defendants were accused of conspiring to commit.

¹⁵ *R v Plummer* [1902] 2 KB 339.

¹⁶ *DPP v Shannon* [1975] AC 717, *R v Coughlan* (1976) 64 Cr App R 11.

¹⁷ (1982) 148 CLR 668.

¹⁸ *People (AG) v Keane* (1975) 1 Frewen 392, 399.

¹⁹ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 300.

²⁰ *Mulcahy v R* (1868) LR 3 HL 306, 317.

²¹ (1943) 1 Frewen 42.

3.12 *The People (Attorney General) v Keane*²² illustrates how an agreement can be inferred from evidence of activity that has the appearance of being done pursuant to agreed actions. *Keane* concerned prosecutions for conspiracy to cause explosions.²³ There was no direct evidence of an agreement between the alleged conspirators. But there was a notebook in the defendant's (Keane's) handwriting containing diagrams and notes for making explosives; Keane's finger-prints were on a box containing a bomb timing device found in the lock-up garage of a co-conspirator named Murray; and at the premises of another co-conspirator named Longmore there was found an explosives-making manual and a time-table with Keane's finger-print on it. Walsh J in the Court of Criminal Appeal sums up the trial court's conclusion:

“On this evidence the Court was satisfied that there was clearly an association between the parties concerned ... and that it related to the making of explosive devices and that the object of making these explosive devices was to cause explosions within the State.”²⁴

Walsh J, in affirming the defendant's conviction, went on to say that there was sufficient evidence on which to find the defendant conspired to cause explosions with Murray, but not with Longmore.

3.13 The Court of Criminal Appeal's holding in *O'Connor and O'Reilly*²⁵ and in *Keane*²⁶ is consistent with the common law practice as revealed in the English cases and described by Dennis: “the existence of the agreement is invariably inferred from overt acts apparently performed pursuant to the agreement.”²⁷

(b) Contact between conspirators

3.14 Walsh J in *The People (Attorney General) v Keane*²⁸ stated it was not necessary for co-conspirators to have met in person in order for a conspiratorial agreement to be found.²⁹ This opinion accords with 19th

²² (1975) 1 Frewen 392.

²³ Causing explosions being an offence under section 3 of *Explosive Substances Act 1883*.

²⁴ (1975) 1 Frewen 392, 395.

²⁵ (1943) 1 Frewen 42.

²⁶ (1975) 1 Frewen 392.

²⁷ Dennis “The Rationale of Criminal Conspiracy” (1977) 93 LQR 39 at 40.

²⁸ (1975) 1 Frewen 392.

²⁹ (1975) 1 Frewen 392, 397.

Century common law authorities,³⁰ which were endorsed by the Supreme Court in *Attorney General v Oldridge*.³¹ Keane CJ speaking for the Court quoted the following passage of Coleridge J's judgment in *R v Murphy* with approval:

“It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty.”³²

3.15 This holding has been affirmed in England³³ and is also consistent with interpretations of the common law that acknowledge how third parties can act as a “go between” thus there being no need for conspirators to have directly communicated with each other. American courts in purporting to apply the common law recognise “wheel” and “chain” conspiracies.³⁴ A wheel conspiracy involves a person in the middle acting as a go-between for a number of different participants. A chain conspiracy involves actors who may have contact with only one other participant, but are still part of an overall effort.³⁵

(c) ***Tacit agreement***

3.16 The High Court in *Hegarty v Governor of Limerick Prison*³⁶ indicated that a mere coordination of plans cannot satisfy the agreement requirement for conspiracy. In that case the DPP became aware that there was a problem with the lawfulness of the prisoner's detention. Having been in communication with the gardaí, the prison authorities released the prisoner. The prisoner was then immediately re-arrested by the gardaí outside the prison. Geoghegan J held that there was no conspiracy here because there was no agreement and, in any event, there was no unlawfulness element.

3.17 In light of *Hegarty* Irish law on agreement in conspiracy has departed slightly from interpretations of common law elsewhere. *Dicta* in

³⁰ *R v Murphy* (1837) 173 ER 502; *R v Rankin* (1848) 7 St Tr (NS) 712, 787. But there are older cases such as *Attorney v Starling* (1664) 83 ER 1164, 1167, 1179, 1184; implying the contrary: that is, that conspirators must have met in person at some stage.

³¹ [2000] 4 IR 593; [2001] 2 ILRM 125.

³² *R v Murphy* (1837) 173 ER 502. Approved by Keane CJ in *Attorney General v Oldridge* [2001] 2 ILRM 125, 133.

³³ *R v Doot* [1973] AC 807, 823.

³⁴ *United States v Bruno* (1939) 105 F 2d 921.

³⁵ See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 301-302.

³⁶ [1998] 1 IR 412, 425.

the *Brighton Conspiracy Case*³⁷ states that a “tacit understanding” between putative conspirators as to what they were to do is sufficient for a conspiratorial agreement. Such a “tacit understanding” was apparently present in the reported facts of *Hegarty*, yet Geoghegan J said it was not enough to constitute conspiratorial agreement.

(d) Location of agreement

3.18 Questions of jurisdiction arise regarding agreements formed in one country to do something in another country that is unlawful in that other country.³⁸ Section 71 of the *Criminal Justice Act 2006* provides that agreements in Ireland to do serious offences (for which four or more years’ imprisonment can be imposed) abroad is a section 71 conspiracy. Also constituting section 71 conspiracies are agreements abroad to commit a serious offence in Ireland, a serious offence against an Irish citizen or resident abroad, or a serious offence on an Irish ship or aircraft.

3.19 For conspiracies falling outside section 71 there is case law on jurisdictional matters applying the common law. In *R v Doot*³⁹ the defendants, while outside England, had agreed to import illegal drugs into England. The House of Lords held that the defendants could be guilty of conspiracy because it is a continuing offence and there was evidence that the defendants had come into English territory in order to carry out their plan. The Supreme Court agreed with this view in *Ellis v O’Dea and Governor of Portlaoise Prison* stating:

“It would be the very negation of an adequate criminal jurisdiction and an absurdity if a person joining in a ... conspiracy ... could escape responsibility by reason of the fact that he has committed no overt act within the jurisdiction.”⁴⁰

3.20 English judgments have gone further, stating that a conspiracy to do something unlawful within the jurisdiction, though formed abroad, is justiciable.⁴¹ And this is so without any of the conspirators having come into the jurisdiction. This position is effectively what section 71 of the 2006 Act provides for serious offence conspiracies.

3.21 There is also a jurisdictional question about conspiracy formed within the jurisdiction to do something unlawful abroad. In *Board of Trade*

³⁷ [1958] Crim LR 422, 437.

³⁸ See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 279-285.

³⁹ [1973] AC 807.

⁴⁰ [1991] ILRM 365, 372.

⁴¹ *Samson* [1991] 2 QB 130; *Liangsirprasert v Government of the United States of America* [1991] 1 AC 225.

*v Owen*⁴² the House of Lords held that a conviction for conspiracy did not lie in this situation.

3.22 The Canadian Criminal Code provides that it is a conspiracy under Canadian law to agree abroad to do something in Canada if such agreement would be a conspiracy if done in Canada⁴³ and it is also a conspiracy to agree in Canada to do something abroad that if to be done in Canada would be conspiracy.⁴⁴

3.23 The law on conspiracy could benefit from having certainty introduced regarding issues of jurisdiction. Section 71 of the *Criminal Justice Act 2006* pursues this aim, but is confined to a limited class of conspiracy, that where the target of the agreement is a serious offence. The same jurisdictional rules could be applied to conspiracy generally.

3.24 *The Commission provisionally recommends that jurisdiction be claimed for cross border conspiracies generally.*

(e) Capacity of parties to conspire

3.25 Agreements between certain persons cannot constitute conspiracies. Husband and wife cannot conspire together at common law.⁴⁵ Charleton, McDermott and Bolger explain this “spousal immunity” rule as flowing from the law’s view of spouses as a single entity possessing a single will.⁴⁶ There is no recent Irish judicial pronouncement on this rule. There are, however, a number of legal developments suggesting that spouses are no longer always in law considered to be one person. In *The State (DPP) v Walsh*⁴⁷ Henchy J explained the common law defence of marital coercion:

“In an effort to compensate the wife for her inferior status, and in particular to make up for her inability to plead benefit of clergy, as her husband could, the law concocted the fiction of a prima facie presumption that the act done by her in the presence of her husband was done under coercion.”⁴⁸

⁴² [1957] AC 602.

⁴³ Section 465(4).

⁴⁴ Section 465(3).

⁴⁵ *R v Robinson* (1746) 1 Leach 37; *R v Whitehouse* (1852) 6 Cox CC 38; *Kowbel v R* [1954] SCR 498; *Mawji v R* [1957] AC 126.

⁴⁶ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 319.

⁴⁷ [1981] IR 412.

⁴⁸ [1981] IR 412, 448-449.

Henchy J went on to state, *obiter*, that the rule was invalid for inconsistency with the Constitution's equality guarantee⁴⁹ due to the rule's presupposition of a wife's inferior status.⁵⁰

3.26 In *United States v Dege*⁵¹ the US Supreme Court declined to apply the common law rule that spouses cannot conspire together. The rule was preserved in England and Wales in the *Criminal Law Act 1977*,⁵² but the Law Commission for England and Wales has recently called for its abolition.⁵³

3.27 The marital coercion rule necessarily presupposes that a wife has an inferior status to her husband; the spousal immunity rule does not. The spousal immunity rule, therefore, does not offend equality to the same extent as the marital coercion rule.⁵⁴ Nevertheless, it is anomalous that a married couple should be exempt from conspiracy liability. There seems to be no explanation available beyond the outdated notion of husband and wife as a single entity. It is not thought that agreements between spouses to pursue crime was intended to be protected under the constitutional right to marital privacy recognised in *McGee v Attorney General*.⁵⁵ The Constitution has been interpreted as requiring a certain amount of privilege for communications within marriage.⁵⁶ This may have implications for matters of evidence, but does not impact on substantive liability. If there is an argument that the spousal immunity rule is required by the constitutional protection of marriage, it will have to address *Murray v Ireland*.⁵⁷ In *Murray v Ireland* the Supreme Court held that the constitutional rights flowing from marriage were suspended on imprisonment for the commission of crime. This implies that marriage rights may be limited in order to secure

⁴⁹ Article 40.1.

⁵⁰ Henchy J also suggested the rule had been "swept away by legislation and by judicial decisions": [1981] IR 412, 449.

⁵¹ (1960) 364 US 51.

⁵² Section 2(2)(a).

⁵³ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraphs 9.28-9.29.

⁵⁴ The same could be said about the common law rule of evidence that one spouse was not a competent witness against the other, yet the Court of Criminal Appeal in *The People (DPP) v T* (1988) 3 Frewen 141 indicated that this rule would be unconstitutional. See Hogan and Whyte *Kelly: The Irish Constitution* (4th ed LexisNexis 2003) at 1842. See also Law Reform Commission *Report on Competence and Compellability of Spouses as Witnesses* (LRC 13 – 1985).

⁵⁵ [1974] IR 284.

⁵⁶ *Attorney General for England and Wales v Brandon Book Publishers Ltd* [1986] IR 597.

⁵⁷ [1985] IR 532 (High Court), [1991] ILRM 465 (Supreme Court).

the operation of criminal justice. Codification presents an opportunity for eliminating uncertainty about the existence of the spousal immunity rule by expressly abolishing it.

3.28 *The Commission provisionally recommends the abolition of the rule that spouses cannot conspire together.*

3.29 The common law provides limited guidance on whether there is a conspiracy where one of the two parties (assuming a two person conspiracy for explanatory purposes) is exempt from liability for the target unlawful act. For example, where a man and an underage girl plan (that is, conspire) to elope together, the girl cannot be liable for the target offence of abduction, the man can. The common law is unclear as to the girl's potential liability for conspiracy. In *R v Whitechurch*⁵⁸ it was held that a non-pregnant women (under section 58 of the *Offences Against the Person Act 1861* a non-pregnant women cannot be liable for attempting to procure her own miscarriage) could be guilty of conspiracy to procure an abortion. This suggests that a person who cannot be guilty of a target offence can be guilty for conspiring to commit the target offence.⁵⁹ An important principle that was not applicable in the *Whitechurch* case, but would apply in the example of the underage girl eloping, is that offences which exist for the protection of a certain class of person should not be applied so as to criminalise that class of person.⁶⁰ This principle indicates that the girl in the elopement example would not be liable for conspiring to commit the crime of abduction since the crime of abduction is there to protect the girl.

3.30 The more important question from a practical point of view is whether the man in the abduction scenario may be guilty of conspiracy. The answer at common law is that the man may indeed be guilty of conspiracy. In *R v Duguid*⁶¹ the court affirmed the defendant's conviction (for conspiracy to take a child aged under 14 years out of the possession of whoever was legally guarding the child) even though the defendant's co-conspirator (the child's mother) was statutorily immune from prosecution for this offence.

3.31 The Law Commission for England and Wales has helpfully distinguished⁶² between, on the one hand, the situation where one party to a

⁵⁸ (1890) 24 QBD 420.

⁵⁹ See Dennis "The Rationale of Criminal Conspiracy" (1977) 93 LQR 39 at 54-55.

⁶⁰ *R v Tyrrell* [1894] 1 QB 710, *R v Whitehouse* [1977] QB 868.

⁶¹ (1906) 75 LJKB 470, described by Dennis "The Rationale of Criminal Conspiracy" (1977) 93 LQR 39 at 55.

⁶² Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at 144-152.

conspiracy is exempt from liability (for example, a defence of duress is available) or is a legally protected person (as in the elopement example above) and, on the other hand, the situation where one party to a conspiracy simply lacks criminal capacity (for example, a child below the age of criminal responsibility). The rule for the first situation is that liability for conspiracy can attach to the party who is not in the legally protected class of persons. This restates *R v Duguid*.⁶³ The Law Commission for England and Wales now proposes that all parties here be liable for conspiracy, but that the persons exempt from liability for the target offence would have a defence.⁶⁴

3.32 The current rule in England and Wales⁶⁵ for the second situation above involving the child incapable of crime is that neither party can be liable for conspiracy. This is rationalised by the Law Commission for England and Wales as flowing from the fact that conspiracy, the essence of which is a meeting of minds, cannot exist where only one mind has the capacity for crime.⁶⁶ Some other offence needs to be relied on to catch the non-morally innocent party.

3.33 The Commission sees no need to provisionally recommend other than a rationalisation of what is most likely the current law in Ireland.

3.34 *The Commission provisionally recommends that conspiracy not be made out where only one party to it has criminal capacity.*

3.35 *The Commission provisionally recommends that exemption from liability for the target offence of a conspiracy on the part of one or more parties should not cause other parties to the conspiracy to escape conspiracy liability.*

(2) *The mens rea of conspiracy*

3.36 A conspiracy is an agreement to do something unlawful. The agreement must be entered intentionally and with knowledge or belief of what the agreement is about. Furthermore, there must be intention that the agreement be carried out. Ormerod⁶⁷ thus suggests three aspects make up the *mens rea* of conspiracy:

⁶³ (1906) 75 LJKB 470, described by Dennis “The Rationale of Criminal Conspiracy” (1977) 93 LQR 39 at 55.

⁶⁴ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraph 10.31.

⁶⁵ Section 2(2)(b) of the *Criminal Law Act 1977*.

⁶⁶ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at 150-151.

⁶⁷ See Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 374-382. Ormerod is concerned to describe the current law in England and Wales,

- i) Intention to enter the agreement (intention to agree).
- ii) Knowledge or belief of the circumstances of carrying out the agreement and what the agreement entails (knowledge).
- iii) Intention that the details of the agreement or plan be carried out (intention to succeed).

(i) Intention to agree

3.37 Irish courts have not had occasion to spell out this requirement expressly. It has been taken as given that conspirators must intend to agree to the unlawful enterprise. That is, it is not sufficient that they nod their head at the appropriate time and thus give the outwards appearance of agreement if they do not truly intend to agree. Here, as in other respects, agreement in conspiracy differs from agreement in contract law. The Canadian courts have expressly isolated this aspect of the mental requirements for conspiracy, saying it is essential for conspiracy that the conspirators have intention to agree.⁶⁸

(ii) Knowledge

3.38 The conspirator does not have to know or believe that what is being contemplated is actually unlawful or that merely agreeing to it is criminal since, as ever in criminal law, ignorance of the law is no excuse. And “[i]t does not matter how prosaic the unlawful act may be or how ignorant the conspirators may be of the fact that the act is prohibited by [] statutory provision.”⁶⁹ In other words, the knowledge requirement applies to facts (the content of the agreement and the circumstances in which it is to be carried out), not law. Complete or extensive knowledge of the details of the plan is not required to satisfy the knowledge requirement.⁷⁰

(iii) Intention to succeed

3.39 It has been suggested that the conspirator must intend the agreement to be carried out.⁷¹ This means that the conspirator must intend that the consequences the agreement specifies (to be brought about) actually happen, not just that agreement happens. The House of Lords, interpreting the common law, insisted on this element in *Churchill v Walton*.⁷²

which is covered by statute. His classification, however, applies aptly to the common law.

⁶⁸ *O'Brien* [1954] SCR 666, 668.

⁶⁹ Per Asquith J in *Clayton* (1943) 33 Cr App R 113, 119.

⁷⁰ *R v Porter* [1980] NI 18.

⁷¹ *Mulcahy* (1868) LR 3 HL 306, at 317; *Yip Chiu-cheung* [1994] 2 All ER 924.

⁷² [1967] 2 AC 224.

Subsequently, in *R v Anderson*,⁷³ the House of Lords, applying section 1 of the *Criminal Law Act 1977*, said it was not necessary for the accused to intend the conspiracy to ultimately succeed once he had agreed to it. However, courts have not strictly followed the *Anderson* approach. *R v McPhillips*⁷⁴ is an example. The defendant was among a group who planned to explode a bomb at a disco when in full swing. The Court of Appeal of Northern Ireland held that the defendant could not be guilty of conspiracy to murder because he – unlike his co-conspirators – had intended to give a warning call so that the disco would be evacuated by the time the bomb exploded. It is noted that *McPhillips* can be distinguished from *Anderson* on the basis that *McPhillips* should not be guilty of conspiracy due to the fact that he joined the conspiratorial agreement with the purpose of frustrating it and thus may qualify for acquittal on public policy grounds.⁷⁵ Nonetheless, the *McPhillips* decision as well as a number of English Court of Appeal decisions can be seen, as Ormerod suggests, as judicial discomfort with the *Anderson* holding that it is not essential for the accused to intend the conspiracy succeed in order to be guilty of that conspiracy.

3.40 In *R v Saik*⁷⁶ Lord Nicholls, speaking for the House of Lords, described the *mens rea* of conspiracy as including intention that the act or acts agreed on be in fact carried out.

3.41 The experience in England and Wales and Northern Ireland is instructive for Ireland. The *Anderson*⁷⁷ decision is unsatisfactory and has generated much critical comment;⁷⁸ the approach of the House of Lords in *Saik*⁷⁹ is preferable.

3.42 *The Commission provisionally recommends that the mens rea of conspiracy include a requirement for intention that the conspiratorial plan actually be carried out.*

⁷³ [1986] AC 27.

⁷⁴ (1990) 6 BNIL.

⁷⁵ See Ormerod *Smith & Hogan: Criminal Law* (11th Ed Oxford University Press 2005) at 376.

⁷⁶ [2006] UKHL 18; [2006] 2 WLR 993.

⁷⁷ [1986] AC 27.

⁷⁸ Ormerod “*Mens Rea in Conspiracy*” (2006) *Current Legal Problems* 185.

⁷⁹ [2006] UKHL 18; [2006] 2 WLR 993.

C The unlawfulness requirement

(1) The meaning of unlawful

3.43 A conspiracy is an agreement to do something unlawful or something lawful by unlawful means. “Unlawful” in this context has a wide definition; it describes a much wider range of conduct than “criminal”.

(a) Criminal unlawfulness

(i) Special part offences

3.44 Summary offences, as well as more serious offences, satisfy the unlawfulness requirement at common law.⁸⁰

(ii) Inchoate offences

3.45 Conspiracy to incite has been recognised in 1999 in England.⁸¹ In *R v James and Ashford*⁸² convictions for conspiracy to incite a specific offence were overturned. The Court stated: “even if it is possible (as it may be) for there to exist a conspiracy to incite one person to incite ultimate users, that was certainly neither the thrust nor the factual position proved in the present case.” Conspiracy to incite has also been recognised in Canada.⁸³ Conspiracy to attempt has been recognised in the United States.⁸⁴ But it cannot be said that this is a logically sound crime because if the *mens rea* of conspiracy is intention to bring about an unlawful result how can this be satisfied by intending that an unlawful result is merely attempted? By definition, intending something to be merely attempted implies the absence of intention that it be completed. Conspiracy to conspire suffers the same logical flaw. The *mens rea* of conspiracy cannot be satisfied by agreeing to merely conspire as opposed to seeing through the completion of an unlawful act.

3.46 The concerns expressed in Chapter 2 above⁸⁵ about attempt attaching to other inchoate offences apply with equal force to conspiracy attaching to other inchoate offences.

⁸⁰ *R v Blamires Transport Services Ltd* [1964] 1 QB 278.

⁸¹ *R v Booth* [1999] Crim LR 144.

⁸² (1985) 82 Cr App R 226.

⁸³ *Nernich* (1915) 24 CCC 256.

⁸⁴ See Robbins “Double Inchoate Crimes” (1989) 26 Harv J on Legis 1.

⁸⁵ At paragraphs 2.113-2.121.

(b) Non-criminal unlawfulness

(i) Torts

3.47 In *Parnell's case*⁸⁶ it was held that some conduct, merely tortious when done by a single actor, is a criminal conspiracy when planned or organised by multiple actors in concert. *Kamara v DPP*⁸⁷ is a more recent example from England. In this case there was a conviction for conspiracy to trespass where the trespass in question was a non-criminal trespass.

(ii) Breaching constitutional rights

3.48 Geoghegan J in *Hegarty v Governor of Limerick Prison*⁸⁸ left open the question whether there can be a conspiracy to infringe a person's constitutional rights. The *Hegarty* decision was decided on grounds other than this question. The applicant's case had failed on at least two grounds – the need to establish agreement and the need to establish that carrying out this agreement would breach the applicant's constitutional rights – prior to the issue of whether a breach of constitutional rights is unlawful for the purposes of conspiracy. *Hegarty* should not be read as ruling out breach of constitutional rights constituting the unlawfulness aspect of conspiracy.

(iii) Breaching competition law

3.49 *Connelly v Lochney*⁸⁹ is a conspiracy case from the 1950s where it was held that an agreement was not a criminal conspiracy because what was done pursuant to the agreement was neither criminal nor tortious. The agreement in question was between members of a retailers' association to refuse to trade with the complainant for the reason that the complainant was pricing goods below the association's agreed minimum retail price. The practice of the retailers' association in setting up and attempting to enforce a price fixing arrangement would be in breach of Irish competition law at present, though it was not in breach of the relevant trade union law of the day.

3.50 *Connelly* clearly cannot be taken as authority suggesting breach of competition law norms does not satisfy the unlawfulness element of conspiracy. Horizontal price fixing is illegal in Ireland now; it was not in the 1950s. Hence, what was not a conspiracy in the 1950s could be a conspiracy now given the development of competition law.

⁸⁶ (1881) 14 Cox 508.

⁸⁷ [1973] 2 All ER 1242.

⁸⁸ [1998] 1 IR 412.

⁸⁹ (1953) 87 ILTR 49.

(iv) ***Breaching contract***

3.51 There is no case law establishing that breach of contract suffices for the unlawfulness aspect of conspiracy.⁹⁰ A number of conspiracy to defraud cases, however, involve what might be described as agreements to breach contract.⁹¹

(v) ***Breaching European Union law***

3.52 There are no cases on whether breaching EU law constitutes the unlawfulness aspect of conspiracy. The question here is perhaps misconceived. The EU is a source of law rather than a type of law. The question to ask in assessing whether conspiracy can attach to any particular law that comes ultimately from the EU is what type of law it is? If it is a criminal offence then clearly its breach satisfies the unlawfulness requirement.

D Specific common law conspiracies

3.53 There are a number of specific common law conspiracy offences. Conspiracy to defraud is a leading example. These conspiracy offences differ from conspiracy as a relational offence, the latter being the focus of this Chapter. Whereas conspiracy as a relational offence attaches to yet-to-be-identified specific unlawfulness (from the general sphere of unlawfulness), the specific conspiracies are free-standing and set out in advance what they attach to, albeit without much precision.

3.54 It is useful, perhaps indispensable, to consider the specific conspiracies when considering conspiracy as a relational offence because the concept of agreement is the same for both, and the arguments for and against restricting conspiracy are applicable to both.

(I) ***Conspiracy to defraud***

3.55 The Irish superior courts have repeatedly affirmed in recent years the existence of the common law offence of conspiracy to defraud.⁹² The following definition was endorsed by the High⁹³ and Supreme Courts:⁹⁴

⁹⁰ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 308.

⁹¹ *R v Cooke* [1986] AC 909.

⁹² *O'Sullivan v Conroy*, Barr J, High Court, 31 July 1997; *Myles v Sreenan* [1999] 4 IR 294; *AG v Oldridge* [2000] 1 IR 593; [2001] 2 ILRM 125; *People (DPP) v O'Brien* CCA 17 June 2002.

⁹³ *Myles v Sreenan* [1999] 4 IR 294.

⁹⁴ *Attorney General v Oldridge* [2000] 1 IR 593; [2001] 2 ILRM 125.

“[A]n agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.”⁹⁵

3.56 In *Myles v Sreenan*⁹⁶ the High Court rejected an argument that conspiracy to defraud had not survived, due to vagueness, the enactment of the Constitution of Ireland.

(2) *Conspiracy to corrupt public morals*

3.57 In *Attorney General (SPUC) v Open Door Counselling Ltd*⁹⁷ the High Court was asked to declare that the conduct of the respondent organisations constituted conspiracy to corrupt public morals. The organisations gave non-directive counselling to pregnant women and were prepared to refer such women to abortion-performing clinics in England. Hamilton P remarked:

“Such an agreement could constitute a conspiracy to corrupt public morals as the defendants’ services are available to the public and well-advertised.”

But the Court would not declare that the alleged offence was being committed, since it was a matter for a jury to decide based on the particular circumstances of a case.

3.58 In *Attorney General (SPUC) v Open Door Counselling Ltd*⁹⁸ Hamilton P cited the House of Lords’ decision in *Knulier v DPP*⁹⁹ as “clear authority” that the offence “may be committed even when the agreement ... is to assist in the commission of a lawful act.”¹⁰⁰ This helps reveal how conspiracy to corrupt public morals is a distinct free-standing offence and not just an instance of relational conspiracy. This is because relational conspiracy is restricted to agreements to do unlawful acts (or lawful acts by unlawful means); there is an essential “unlawfulness” component. In contrast, what *Knulier* asserts and the *SPUC case* accepts, is that “unlawfulness” is not an essential component of conspiracy to corrupt public morals.

⁹⁵ *Scott v Metropolitan Police Commissioner* [1975] AC 819; [1974] 3 All ER 1032, 1039, per Viscount Dilhorne.

⁹⁶ [1999] 4 IR 294.

⁹⁷ [1988] IR 593; [1987] ILRM 477.

⁹⁸ [1988] IR 593; [1987] ILRM 477.

⁹⁹ [1973] AC 435; [1972] 2 All ER 898.

¹⁰⁰ [1988] IR 593; [1987] ILRM 477.

3.59 The use of “lawful act” in the *SPUC case* could, however, be read as merely referring to the fact that the abortion procedures, though criminal in Ireland, were lawful in England provided certain conditions were met.¹⁰¹ But in light of *Knüller* and its approval in the High Court it is clear that conspiracy to corrupt public morals really is an offence that is wider than common law conspiracy as a relational offence. The conduct considered capable of constituting conspiracy to corrupt public morals in *Knüller* was the publishing of information allowing adult male homosexuals to meet for sex. This publication was produced, and presumably planned, after the decriminalization in England of sexual acts between adult males. The following passage of Lord Reid’s judgment in *Knüller* was quoted approvingly by Hamilton P in the *SPUC case*:

“I find nothing in the Act to indicate that Parliament thought or intended to lay down that indulgence in these practices [sexual acts between men] is not corrupting. I read the Act [*Sexual Offences Act 1967*] as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no licence is given to others to encourage the practice. So if one accepts Shaw’s case¹⁰² as rightly decided it must be left to each jury to decide in the circumstances of each case whether people were likely to be corrupted.”

3.60 So there is a zone where conduct though not criminal or in breach of any other area of law is still not to be – if one wishes to avoid being a criminal – encouraged or facilitated by two or more. How do people know what conduct is in this twilight zone? The answer of the English and Irish courts: where a jury would consider that in the circumstances such conduct is “corrupting”. Case law suggests some qualities that might help pick out what this is: erstwhile illegality¹⁰³ or illegality elsewhere.¹⁰⁴

(3) *Other specific common law conspiracies*

(a) *Conspiracy to outrage public decency*

3.61 In *Knüller*¹⁰⁵ the House of Lords inferred from a number of discrete precedents (keeping a disorderly house, indecent exhibition, and others) the existence of a general common law offence of outraging public

¹⁰¹ Those conditions set out in section 1(1) of the UK’s *Abortion Act 1967*.

¹⁰² *Shaw v DPP* [1962] AC 220.

¹⁰³ *Knüller v DPP* [1973] AC 435.

¹⁰⁴ *Attorney General (SPUC) v Open Door Counselling* [1988] IR 593.

¹⁰⁵ *Knüller v DPP* [1973] AC 435.

decency, which has an ancillary inchoate offence of conspiracy to outrage public decency.¹⁰⁶ Thus conspiracy to outrage public decency is a relational offence, that is, an inchoate offence parasitic on a substantive offence.

3.62 There does not appear to be any Irish judicial recognition of this offence. Additionally, there would be a question mark over the constitutionality of an Irish court engaging in a similar enterprise to what the House of Lords did in *Knüller* – a process of induction where a general offence is extracted from a number of specific offences.

(b) Conspiracy to effect a public mischief

3.63 In *DPP v Carew*¹⁰⁷ Hamilton J recognised the substantive offence of effecting a public mischief. Hence, it can be said there is implicit Irish judicial recognition of conspiracy to effect a public mischief. This is implicit because the existence of the substantive offence entails the existence of the ancillary conspiracy offence. There is a House of Lords decision¹⁰⁸ stating there is no such offence known to the law. This House of Lords decision predates, but is not mentioned in, Hamilton J's judgment in *Carew*.¹⁰⁹ There are some cases from Australia recognising the offence.¹¹⁰ Where it is recognised, public mischief is the substantive offence and agreeing to pursue it constitutes conspiracy.

E Restricting conspiracy

3.64 Having surveyed the unlawfulness aspect of relational conspiracy and the specific common law conspiracy offences the big question is whether, and to what extent, conspiracy should be reined in? The options include:

- i) Restricting relational conspiracy to agreement to do criminal acts whether those criminal acts are the goal of the agreement or side effects of pursuing the agreement's goal.
- ii) Abolishing the specific common law conspiracies.

3.65 The same motivation drives these two suggestions, that of restricting conspiracy to those agreements relating to substantive crime. Yet

¹⁰⁶ And presumably also attempt and incitement to outrage public decency, though these examples of inchoate offences were not mentioned in *Knüller*.

¹⁰⁷ [1981] ILRM 91.

¹⁰⁸ *DPP v Withers* [1975] AC 842.

¹⁰⁹ See McAleese "Note on Criminal Law – Public Mischief" [1982] 4 DULJ 110.

¹¹⁰ *R v Boston* (1923) 33 CLR 386; *R v Howes* (1971) 2 SASR 293. See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 307.

it would be possible to follow one and not the other. This was done in England and Wales with the passing of the *Criminal Law Act 1977*, which restricted relational conspiracy to agreement relating to crime, yet left intact the specific common law conspiracies.

(1) *Arguments for and against restricting conspiracy to agreements to commit crimes*

3.66 Arguments for restricting conspiracy to agreements relating to crimes include:

- i) The argument from legality. The legality principle states that persons should be punished only where their behaviour contravenes a clearly defined and previously promulgated rule of criminal law. Conspiracy when not restricted to relating to criminal offences violates this principle because it is uncertain and open-ended. It is no coincidence that conspiracy has been associated with the suppression of political campaigns for it provides courts with a huge area of discretion within which to criminalise conduct that unsettles the status quo.¹¹¹
- ii) The argument from consistency, where the consistency sought is that between law as stated and law in action. Like the legality principle this principle is part of the rule of law ideal. Conspiracy when not restricted to criminal matters violates this principle because it criminalises a very wide range of behaviour that is not in reality – and perhaps could never be – processed through the criminal justice system. In other words, conspiracy over-criminalises, it over-reaches in its ambition. The greater the short-fall between what the law indicates to be criminal and what it processes as criminal the more the rule of law is undermined.

3.67 Arguments for retaining conspiracy as relating to unlawfulness include:

- i) The argument from efficacy. Conspiracy, being wide and flexible, can be used to catch novel conduct (where more than one person is involved), which though not previously labelled as criminal may nonetheless be harmful and immoral.
- ii) The so-called argument from “thin-ice” can be articulated in an effort to meet the legality argument mentioned above. Lord Morris in *Kneller v DPP*¹¹² said “those who skate on thin ice can hardly expect to find a sign which will denote the precise spot

¹¹¹ Sayre “Criminal Conspiracy” (1922) 35 Harv L Rev 393, at 413.

¹¹² [1973] AC 435, 463.

where they will fall in.” The ice-skating metaphor is inapt – and thus makes the argument appear simply unconcerned about legality – given that there is nothing remotely “bad” about ice-skating. The basic idea¹¹³ underlying the argument from thin ice is that when persons do things that are dishonest or are somewhat like criminal behaviour they cannot legitimately complain if the criminal justice system subsequently processes them as criminal.

(2) *The case for retaining conspiracy to defraud*

3.68 When restricting conspiracy it may be thought desirable to not jettison all conspiracy offences that do not relate to substantive criminal acts. McAuley and McCutcheon make a case¹¹⁴ for distinguishing conspiracy to defraud from the other specific common law conspiracies and indeed from conspiracy relating to unlawful, but not criminal, acts. First, it is pointed out that even in jurisdictions that have limited conspiracy to relating to criminal offences,¹¹⁵ the free-standing offence of conspiracy to defraud has been maintained. Second, the usefulness of the offence historically in addressing gaps in theft law is demonstrated.¹¹⁶ Third, the argument from legality that is used against conspiracy to defraud is addressed. Unlike conspiracy to corrupt public morals, which violates the legality principle because there is no common understanding of what the boundaries of public morals are, with conspiracy to defraud the examples of dishonesty, deceit, and misrepresentation that make up the fraud aspect of the offence “might be said to be included in the popular understanding” of theft.¹¹⁷ This point, expressed so tentatively, is difficult to dispute. But the authors go on to make the point more forcefully:

“Although the definition of conspiracy to defraud is undoubtedly hydra-headed, its incriminating features have been clearly and consistently delineated by the courts for at least two centuries. Indeed, the authorities effectively mark the spots at which the imprudent skater is likely to come to a watery end. Seen in this light, it is doubtful if the definition of conspiracy to defraud would fall foul of the rule against retrospection in Article 15.5 of the Irish Constitution.”¹¹⁸

¹¹³ For explication see Duff *Criminal Attempts* (Oxford University Press 1996) at 394 and McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 429.

¹¹⁴ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 427-430. Endorsed by Keane CJ in *Attorney General v Oldridge* [2001] 2 ILRM 125, 132.

¹¹⁵ United States and England and Wales.

¹¹⁶ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 428-429.

¹¹⁷ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 429.

¹¹⁸ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 429.

3.69 This view that conspiracy to defraud is consistent with the Constitution has proved to be an accurate prediction of the High Court's view.¹¹⁹ So too the Supreme Court has expressly endorsed the authors' assertion that the offence has some measure of certainty.¹²⁰ This does not preclude debate about reforming or abolishing conspiracy to defraud since it is emphatically not the case that unconstitutionality is a prerequisite for legislative reform, nor is it the case that all parts of the quoted passage, though approved of by the Chief Justice, are beyond dispute.

(3) *Developments and recommendations elsewhere*

3.70 In 1973 the Law Commission for England and Wales recommended that the law should recognise only conspiracies to commit crimes. This recommendation was enacted in the *Criminal Law Act 1977* (UK).

3.71 The Law Commission for England and Wales has examined conspiracy to defraud on multiple occasions. The Law Commission repeatedly recommended the offence be preserved, if only as a temporary measure for fear of gaps in its absence,¹²¹ before finally in 2002 recommending its abolition.¹²²

3.72 The Canadian Criminal Code has been interpreted by the Supreme Court of Canada as restricting conspiracy to conspiracy relating to statutory offences.¹²³ The position in Canada, accordingly, is that the common law specific conspiracies are abolished.¹²⁴

3.73 Finally, it is noted, for the avoidance of doubt, that conspiracy to defraud at common law includes agreements to do criminal acts that might be grouped under the heading "fraud", for example, counterfeiting and forgery under the *Criminal Justice (Theft and Fraud Offences) Act 2001*. Conspiracy to defraud at common law also includes agreements to do acts which may not be criminal but which dishonestly cause deprivation or injury to another's proprietary right and accordingly satisfy the definition of conspiracy to defraud.¹²⁵ Abolishing conspiracy to defraud involves

¹¹⁹ *Myles v Sreenan* [1999] 4 IR 294.

¹²⁰ *Attorney General v Oldridge* [2001] 2 ILRM 125, 132.

¹²¹ Law Commission for England and Wales *Working Paper on Codification of the criminal law: general principles: inchoate offences: conspiracy, attempt and incitement* (WP No 50 1973), *Report on Conspiracy and Criminal Law Reform* (No 76 1976), and *Report on Criminal Law: Conspiracy to Defraud* (No 228 1994).

¹²² *Report on Fraud* (No 276 2002).

¹²³ *R v Galewicz* [1980] 2 SCR 493.

¹²⁴ See Stuart *Canadian Criminal Law* (4th ed Carswell 2001) at 678.

¹²⁵ *Scott v Metropolitan Police Commissioner* [1974] 3 All ER 1032, 1039.

abolishing the latter but not the former category of conspiracy. This is so because conspiracy as a general relation offence attaching to all offences will still catch the former category of agreements to do criminal fraudulent acts.

(a) Conclusion

3.74 The arguments in favour of restricting conspiracy to agreements to do criminal, as opposed to merely unlawful, things are compelling. As things stand, a non-criminal activity can be held by the Courts to become criminal when agreed to be done by two or more actors. This offends the legality principle because there is a lack of advance notice of what it is criminal to do. It also offends the Irish Constitution's democratic principle that the Oireachtas has exclusive law-making power since it is the courts and not the Oireachtas that decides which unlawful, though non-criminal, activity it is a conspiracy to agree to do. For consistency, restricting conspiracy in this way should be accompanied by an abolition of the specific common law conspiracies. In this regard, however, special considerations apply to conspiracy to defraud.

3.75 *The Commission provisionally recommends that conspiracy be limited to agreements to do criminal acts and that the common law offences of conspiracy to corrupt public morals, to outrage public decency, and to effect a public mischief be abolished.*

3.76 *The Commission invites submissions on whether conspiracy to defraud should be retained.*

F Impossible conspiracies

(a) The current position

3.77 An impossible conspiracy describes where there is agreement to do something unlawful (whether the unlawful thing is an end or a means), but circumstances are such that it is simply not possible for that particular unlawful thing to be done.

3.78 There is no Irish case addressing an impossible conspiracy, but there is English authority on the common law position. In *DPP v Nock and Alsford*¹²⁶ the House of Lords held that at common law there was no liability for conspiring to do a specific criminal act that was in the circumstances impossible. In *Nock* the defendants admitted that they intended to extract cocaine from a white powder in their possession. The white powder, contrary to the defendants' belief, could never yield cocaine. The House of Lords held that, because the agreement was specific to extracting cocaine from the particular batch of white powder, the defendants could not be

¹²⁶ [1978] AC 979.

convicted. Lord Scarman stated *obiter* that had the agreement been more general – for example, an agreement to enter into a general cocaine-producing business together – a conviction for conspiracy could lie. This was so since the goal of this (more general) agreement would not be impossible in virtue of the particular white powder having no capacity to yield cocaine.¹²⁷

3.79 In *The People (Attorney General) v Sullivan*¹²⁸ there is *obiter dictum* suggesting an impossible attempt is still an attempt. *Sullivan* could be cited in support of a claim that impossible conspiracies are still conspiracies in Irish law. For suppose that the defendant in *Sullivan* had not been acting alone but had been in cahoots with someone in her efforts to get extra pay through deception. It is difficult to imagine the Supreme Court having being more indulgent to the defendant had she been acting pursuant to an agreement than they were to her when she was acting alone. In sum, in light of Supreme Court *dictum* in *Sullivan*, for the law on inchoate offences to be consistent, the position in Ireland regarding impossible conspiracies is that they are still conspiracies. This is at odds with the interpretation of the common law applied in England, as outlined above.¹²⁹ It is noted that statute in England and Wales now criminalises impossible conspiracies.

(b) *The debate about impossible conspiracies – conclusion*

3.80 It is noted that debate about impossibility regarding inchoate offences invariably focuses on attempt.¹³⁰ Considerations for conspiracy and for incitement flow from the analysis of attempt.

3.81 There is much attraction in the common sense approach that a conspiracy is a conspiracy and just because circumstances beyond the knowledge of the conspirators mean that the specific criminal plan will not be realised does not change this. So called impossible conspiracies should still be criminal. Where what the would-be conspirators plan to do is not really criminal (or unlawful) even though they think it is, the definition of conspiracy is simply not made out and, therefore, the notion of impossibility is not needed to prevent liability from attaching.

3.82 *The Commission provisionally recommends that impossibility should not bar liability for conspiracy.*

¹²⁷ [1978] AC 979, 996.

¹²⁸ [1964] IR 169.

¹²⁹ At paragraph 3.78.

¹³⁰ See discussion above at paragraphs 2.129-2.152.

G Abandonment of a conspiracy

(a) *The position at common law*

3.83 Abandoning a conspiracy refers to where one or more of the parties to a conspiracy withdraw or discontinue agreeing to, or being a party to, the conspiracy. The question is whether this means they (the withdrawing parties) have a defence to, or are otherwise not liable for, conspiracy. As with impossible conspiracies the position in Ireland regarding abandoned conspiracies is unclear. The parallel inference to that made above¹³¹ can be made: because the Supreme Court in *Sullivan*¹³² stated, *obiter*, that an abandoned attempt is still an attempt, so too abandoned conspiracies are still conspiracies. This position would accord with the dominant common law position.

3.84 The arguments for and against allowing a defence of abandonment for attempt are relevant to conspiracy. But there is an important consideration relevant to whether the law should allow a defence of abandonment for conspiracy that is not present regarding abandoned attempts. For the most part, with attempts a simple discontinuance of the attempt means the substantive offence will not come about. If the actor abandons her effort, yet the substantive offence nonetheless occurs, then a charge for the substantive offence, rather than for attempting it, is appropriate. This is obvious; it is mentioned here merely to emphasise that the law on abandoning attempt does not really have to cover the situation where an abandoned attempt nonetheless results in the target offence occurring. But with conspiracy, and incitement for that matter, simple withdrawal might have no effect in stopping the substantive offence (or unlawful acts) from happening, since the other parties involved may continue on towards the target. The way to account for this factor is to stipulate that in order to qualify for an abandonment defence the withdrawing party must not merely withdraw but must take a positive step towards preventing the completion of the substantive offence or unlawful acts. Indeed this consideration can be seen at work in section 5.03(6) of the Model Penal Code, which provides:

“It is an affirmative defence that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”

¹³¹ See above at paragraph 3.79.

¹³² [1964] IR 169.

3.85 Under the MPC it is not enough to make an effort to prevent the aim of the conspiracy being realised; it is required to achieve the result of preventing it, and furthermore, the conspiracy must have failed precisely *because* of the withdrawing party's work to foil it. In contrast, for attempt under the MPC, it is a defence that the actor "abandoned his effort to commit the crime or otherwise prevented its commission". It is noted that it is not essential to make the abandonment defence for conspiracy as exacting as it is in the MPC. Nevertheless, the MPC model has the advantage (from the point of view of being relatively acceptable to those who adhere to the common law position) that, insofar as it allows for only a very restrictive defence, its adoption does not represent a radical change from the common law position where there is no such defence.

(b) Conclusion

3.86 As with attempt,¹³³ it may in principle be desirable to have a law on conspiracy that takes account of abandonment. But for conspiracy, simple abandonment is not sufficient to deserve exculpation. Also, the option open with attempt regarding building in the absence of abandonment into its positive definition is not open for conspiracy. Accordingly, an affirmative defence along the lines of the MPC provision is the relevant option.

3.87 *The Commission invites submissions on whether there should be a defence available to a charge of conspiracy for thwarting its success.*

¹³³ See above at paragraphs 2.153-2.163.

CHAPTER 4 INCITEMENT

A Introduction

4.01 It is a criminal offence to incite a crime. In Ireland the common law offence of incitement¹ has been left unaltered by statute, though new incitement offences, such as incitement to hatred, have been enacted.² Incitement to hatred, however, is not an instance of common law incitement as there is no crime of hatred and common law incitement attaches only to crimes.

B The components of incitement

4.02 The *actus reus* of incitement is the act of inciting, a communication to someone else that seeks to persuade or pressure them to commit a crime. The *mens rea* of incitement is intention that the incitement be acted upon. For the purpose of discussing incitement this Paper will refer to the person delivering the incitement as the incitor and the intended recipient will be referred to as the incitee. It is key to note that the incitee does not have to act upon the incitement. If the incitee does indeed perform the incited crime, the incitor may be in turn be liable for that crime via secondary liability. Nor does the incitee even have to be influenced in any way towards committing the incited crime.³

(1) *The actus reus of incitement*

(a) *Commanding, encouraging or requesting*

4.03 A much quoted judicial passage from South Africa illustrates the breadth of the *actus reus* of incitement:

“An inciter ... is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind

¹ *R v Higgins* (1801) 2 East 5 is the seminal case recognising incitement as an offence. See Scott “The Common Law Offence of Incitement to Commit Crime” (1975) 4 Anglo-Am L Rev 289.

² *Prohibition of Incitement to Hatred Act 1989*.

³ *People (DPP) v Murtagh* [1990] 1 IR 339, 342.

may take many forms, such as a suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.”⁴

When incitement to murder is charged in Ireland it is charged as soliciting murder contrary to section 4 of the *Offences Against the Person Act 1861*. The formula prescribed for constituting the offence is “solicit, encourage, persuade, or endeavour to persuade, or [] propose to any person, to murder any other person ...”⁵

4.04 The English Court of Appeal in *R v Marlow*⁶ suggested “encourage” captures the *actus reus* of incitement as well as any other word. But according to the English courts,⁷ pressure and threats can also constitute incitement. “Encourage” might tend to obscure this form of incitement. The same can be said about “request” – as in the incitor requests the incitee do a criminal act. “Persuade” somewhat conveys the act of incitement so long as it is remembered that a guilty incitor need not have succeeded in persuading the incitee to act; “persuasion” alone implies a degree of success which is not at all necessary for guilt. In the United States, incitement is called solicitation. This word emphasises a central example of incitement where someone requests the performance of a criminal act for reward.

(i) Requirement for incitement to reach incitee

4.05 Under common law the communication must reach the person sought to be incited. As O’Brien CLJ stated, “[t]here must be evidence that the incitement reached the persons intended to be affected wherever they are ...”⁸ To repeat the definition given by Holmes JA: “An inciter ... is one who *reaches* and seeks to influence the mind of another to the commission of a crime.”⁹ If the communication does not reach the intended recipient – suppose a letter containing the encouragement to commit crime is intercepted by the police – then attempt to incite can be charged.¹⁰ The American Law Institute’s Model Penal Code (MPC) takes a different

⁴ Holmes JA in *S v Mkosiyana* (1966) 4 SA 655, 658, quoted in *R v Goldman* [2001] Crim LR 822; [2001] EWCA Crim 1684, McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 431, Ormerod, *Smith & Hogan Criminal Law* (11th ed Oxford University Press 2005) at 351.

⁵ Section 4 of the *Offences Against the Person Act 1861*.

⁶ [1997] Crim LR 897.

⁷ *Race Relations Board v Applin* [1973] QB 815, *R v Evans* [1986] Crim LR 470.

⁸ *R(Lanktree) v M’Carthy* (1902-1903) 3 New Irish Jurist & Loc. Gov’t Rev. 76, 81.

⁹ *S v Mkosiyana* (1966) 4 SA 655, 658. Emphasis added.

¹⁰ *R v Sirat* (1985) 83 Cr App R 41, *R v Ransford* (1874) 13 Cox CC 9, *R v Banks* (1873) 12 Cox CC 393.

approach to that of the common law. It effectively includes attempted incitement under the scope of incitement by providing that it is not necessary for the communication to reach the incitee. Section 5.02(2) of the MPC provides it “is immaterial ... that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication”.

(ii) *No requirement for incitement to actually encourage*

4.06 The Court of Criminal Appeal¹¹ has recognised as settled that the incitement does not have to succeed in order for the offence of incitement to be made out. That is, the incitement does not have to be acted upon. Furthermore, though the incitement must reach the mind of another and seek to influence it, it does not have to actually influence their mind; it is not necessary that the incitee have contemplated doing the incited offence as a result of the incitement. Accordingly, it is possible to convict for incitement where the person incited, the incitee, is an undercover police officer.¹²

(iii) *Communications falling short of incitement*

4.07 In *The People (Attorney General) v Capaldi*¹³ the Court of Criminal Appeal held, *obiter*, that a mere expression of desire that a certain (criminal) outcome happen is not an incitement. In *Capaldi* the defendant indicated to a doctor that he would like for a girl to have an abortion and that there was ample money available for such a service. The Court held that it was open to the jury to find that this communication by the defendant was an effort at persuasion and hence an act of incitement. According to the Court, the defendant’s mentioning of money was crucial in rendering his action capable of being considered an incitement; if he had mentioned merely that he wished for the girl to have an abortion, liability for incitement could not attach.

4.08 Care needs to be exercised with this *obiter dictum* outside of the particular facts of *Capaldi*. Certainly it cannot be concluded that an expression of desire for an outcome can *never* be incitement. In some contexts what is mere expression of desire may operate just as effectively as an express request or encouragement to do a crime. The *mens rea* of the speaker is key. That is, whether the expression of desire is made with the intention that the listener will go on to bring about the outcome desired. Consider a “crime boss” expressing their desire for some person to be harmed, or one party to an extra-marital affair saying to her lover how she

¹¹ *People (DPP) v Murtagh* [1990] 1 IR 339, 342.

¹² See *DPP v Armstrong* [2000] Crim LR 379, *R v Goldman* [2001] Crim LR 822.

¹³ (1949) 1 Frewen 95.

wishes her husband would die. In these examples the *mens rea* may well be such that the expression of desire is rendered criminal incitement.

4.09 In addition, it can be noted that *Capaldi*¹⁴ proceeds on the basis that there is authority for the proposition that mere expression of desire is not incitement. The principal authority cited is the *dicta* of Le Blanc J in *R v Higgins* stating:

“It is contended that the offence charged ... is no misdemeanour because it amounts only to a bare wish or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done, namely, an actual solicitation of a servant to rob his masters, and not merely a wish or desire that he should do so.”¹⁵

It is crucial to note – as was not done in *Capaldi* – that this *dicta* distinguishes from incitement mere wish or desire, not the mere *expression of wish or desire*. The central question for the Court of Criminal Appeal in *Capaldi* was really one of *mens rea* – whether the defendant really intended to induce the doctor to perform an abortion. The defendant’s appeal would have been difficult to make out when centred on this issue. Hence, the defence appeal centred on a claim that the jury was not properly instructed on the difference between mere expression of desire and incitement. As a result of this defence strategy, the judgment disposes of the case by reference to the difference between an expression of desire and an incitement, and an opportunity for a judicial statement of the *mens rea* of incitement was missed.

(iv) *Communication need not be direct*

4.10 Incitement can occur despite the incitor not having met, nor even communicated directly with, the incitee. For example, where a person pays a subscription fee to a child pornography website, they may be liable for inciting the distribution of child pornography despite the payment receiving process being automated.¹⁶ The incitee in this case is the person operating the child pornography business, who is capable of being encouraged to continue their criminal enterprise by people paying subscription fees.

¹⁴ (1949) 1 Frewen 95.

¹⁵ *R v Higgins* (1801) 2 East 5, 22. Quoted in *The People (Attorney General) v Capaldi* (1949) 1 Frewen 95, 96-97.

¹⁶ *R (O) v Coventry Magistrates’ Court* [2004] Crim LR 948.

(v) ***Incitement need not be directed to any specific person***

4.11 Incitement at common law does not require a specific individual be incited. In *R v Most*¹⁷ a newspaper article encouraging political assassinations addressed to the world at large constituted incitement to murder. Indeed incitement has been used in more recent prosecutions against advocates of terrorism. Soliciting murder¹⁸ was the most serious charge secured against some Islamic extremists who encouraged Muslims to attack non-Muslims.¹⁹

(vi) ***Implicit incitement***

4.12 The English courts have held that advertising a device that detects police speed traps could be incitement even though there was no express encouragement to use the device.²⁰ A similar result was reached by the English Court of Appeal in *Marlow*²¹ where the defendant had written a book explaining how to cultivate cannabis plants. Liability for incitement could attach despite the book not having expressly encouraged the criminal activity it explained.

(vii) ***Assistance falling short of incitement***

4.13 Someone who helps or facilitates another in the commission of a crime is liable for that crime. The *Criminal Law Act 1997* provides, “[a]ny person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.”²² But where someone, for example, lends a van for the purpose of trafficking drugs, liability will not attach to the lender if the special part crime of trafficking drugs is not completed or attempted. Incitement does not catch the person who assists unattempted crimes if the “assistance” did not involve encouragement or another action that can constitute incitement.

¹⁷ (1881) 7 QBD 244.

¹⁸ Contrary to section 4, *Offences Against the Person Act 1861*. Soliciting murder, that is, incitement to murder is contained in this 1861 Act in Ireland and England. The provision merely states the common law offence. Unlike incitement to hatred in Ireland’s *Prohibition of Incitement to Hatred Act 1989 Act* (and indeed the offence of encouragement of terrorism in section 1 of the UK’s *Terrorism Act 2006*), the 1861 Act did not enact a new incitement offence because it would exist anyway at common law by virtue of the general relational inchoate offence of incitement attaching to the special part offence of murder.

¹⁹ *R v El-Faisal* [2004] EWCA Crim 456, *R v Abu Hamza* [2006] EWCA Crim 2918.

²⁰ *Invicta Plastics Ltd v Clare* [1976] RTR 251; [1976] Crim LR 131.

²¹ [1997] EWCA Crim 1833; [1997] Crim LR 897.

²² Section 7(1).

Thus there is a perceived gap in criminal liability at common law which is discussed in more detail below.²³

(b) Code options for incitement

4.14 The *actus reus* of incitement has not generated as much controversy as the *actus reus* of attempt. Questions arising when codifying incitement are discussed in this section. More wide-reaching reform options for incitement are discussed below.

(i) Defining incitement

4.15 To what extent should a code provision on incitement seek to define the *actus reus* of incitement? In the Draft Criminal Code of the Law Commission for England and Wales the verb “incite” was preferred to “encourage” and no further explanation or definition of “incite” was thought necessary. Under this approach the common law cases and, in particular, the definition provided by Holmes JA²⁴ would continue to be relied on for more detailed meaning of the act of incitement. A different approach was opted for in Victoria where, in a definitions section, the criminal code provides that “incite includes to command, request, propose, advise, encourage, or authorise”.²⁵ The American Law Institute’s Model Penal Code (MPC) uses “commands, encourages or requests” to, in effect, summarise the Holmes JA definition in less words again. This formula was called vague by commentators who went on to endorse “commands, induces, entreats, or otherwise endeavours to persuade”.²⁶ Nevertheless, recent codification proposals in America have repeated the MPC formula.²⁷ For incitement to murder, Irish law already relies on the formula “solicit, encourage, persuade, or endeavour to persuade, or [] propose”.²⁸ The Canadian Criminal Code employs “counsels” to describe incitement.²⁹

4.16 It is noted that the verb(s) used in a code provision to describe the *actus reus* of incitement also, in most codes, provide the sole guidance on the *mens rea* of incitement. The code provisions seem to presuppose that the

²³ See below at paragraphs 4.40-4.47.

²⁴ *S v Mkosiyana* (1966) 4 SA 655, 658.

²⁵ Section 2A(1) of the *Crimes Act 1958* (Victoria).

²⁶ Weisman and Graae “Statutory Proposal on Inchoate Crime” (1979) 22 Howard LJ 217.

²⁷ *Final Report of the Kentucky Penal Code Revision Project of the Criminal Justice Council* (2003). *Final Report of the Illinois Criminal Code Rewrite and Reform Commission* (2003). The Reporter on these reports was Paul H Robinson.

²⁸ Section 4 of the *Offences Against the Person Act 1861*.

²⁹ Section 464 of the *Criminal Code of Canada*.

verbs used to describe a physical action also entail the state of mind with which that action is done. In other words, to use an example, to say someone “commanded” someone else is to imply that what was done was intentional. However, this idea of the action entailing the state of mind that accompanies it can only go so far. It is easy to imagine someone “encouraging” another unintentionally, for example, an Islamic cleric condemns Western culture in harsh words might in fact “encourage” his audience towards terrorist acts though this is not his purpose, his purpose being to point out immoral behaviour as he sees it. The UK’s *Terrorism Act 2006*, section 1, has enacted an offence of encouragement of terrorism, which can be made out on the basis of what a public audience was likely to infer they were being encouraged to do, rather than what the speaker believes he is encouraging. Celebrating or praising terrorist acts (very widely defined) is provided to be a ground for inferring encouragement of terrorism and the 2006 Act expressly provides that the offence can be committed recklessly. This new offence, therefore, criminalises a much wider sphere of conduct than common law incitement.

(c) ***The actus reus of incitement – conclusion***

4.17 The MPC’s formula of “commands, encourages or requests” provides a neat summary of what incitement encompasses and has proved popular in recent codification movements in the United States. It could be used as a statement of common law incitement in the general part of a criminal code.

4.18 *The Commission provisionally recommends that the formula “commands, encourages or requests” be used to codify the actus reus of incitement.*

(2) ***The mens rea of incitement***

4.19 Under the definition of incitement in the Draft Criminal Code of the Law Commission for England and Wales a person is guilty of incitement if he “incites another ... and ... intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.”³⁰ On a number of occasions the English courts have stated that this definition is an accurate description of common law incitement.³¹ This is questionable, however, since the Law Commission for England and Wales’s definition includes “intends or believes” while the common law judgments tend to imply “intends” only. There is, however, a dearth of judicial definition of the *mens rea* of incitement. In the seminal case of *R v*

³⁰ Clause 47 of Draft Criminal Code in *A Criminal Code for England and Wales, Volume 1: Report and Draft Criminal Code Bill* (No 177 1989).

³¹ *R v Goldman* [2001] Crim LR 822; *DPP v Armstrong* [2000] Crim LR 379; *R (O) v Coventry Magistrates’ Court* [2004] Crim LR 948.

*Higgins*³² the definition of incitement is not elaborated on beyond “solicit”. In *R v Most*³³ “intends” is explicitly mentioned when describing solicitation of murder. As with “attempt”, “incite” connote intentional activity; to say that the defendant incited or solicited a crime is to imply that they did so intentionally.

(a) Intention and knowledge

4.20 Had the Law Commission for England and Wales’s definition used “intends and believes” rather than “intends or believes” it would have been closer to describing the existing common law position.³⁴ Indeed the Law Commission for England and Wales in 2006³⁵ approved a statement of the *mens rea* of incitement as intention plus knowledge.³⁶ In this context, intention applies to the consequences of the incitee receiving the incitement or encouragement to crime. Knowledge includes belief and refers to the need for the incitor to know that all the circumstances and facts were in place such that, if the incitee carries out the incitement, a crime will be committed.

4.21 Consistency between *mens rea* for attempt and incitement in both requiring intention can be somewhat explained historically by reference to the common ancestry of incitement and attempt. *R v Higgins* was a classic case of incitement: the defendant solicited a servant to steal. Yet the convoluted indictment boiled down to attempted larceny, and the appeal court treated the case as one of attempt.³⁷ The same normative arguments for keeping *mens rea* restricted to intention for attempts apply to incitement.³⁸

4.22 Direct intention, where the incitor’s aim is to cause a specific crime is clearly sufficient. There are cases suggesting oblique intention, where the incitor’s primary aim is something other – for example, making money – than causing a specific crime also suffices.³⁹

³² (1801) 2 East 5, 102 ER 269.

³³ (1881) 7 QBD 244, 248 and 251.

³⁴ Though a strong case can be made the other way in light of cases such as *Invicta Plastics* [1976] Crim LR 131, which is discussed below at paragraph 4.27.

³⁵ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 34.

³⁶ The statement was from Ormerod *Smith & Hogan: Criminal Law* (11th ed Oxford University Press 2005) at 353-354.

³⁷ See McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 430.

³⁸ See Stannard “Making up for the Missing Element: A Sideways Look at Attempts” (1987) 7 *Legal Studies* 194.

³⁹ *Invicta Plastics Ltd v Clare* [1976] Crim LR 131, [1976] RTR 251.

4.23 It is noted that while the *actus reus* of incitement does not require the incitee to actually be incited, the *mens rea* requires the incitor intend the communication to actually incite its recipient. For example, the law does not catch as incitement words that are meant to be a joke or are otherwise not delivered seriously. Though new special part offences in the UK such as encouragement of terrorism could conceivably be committed by a speaker who intends merely to joke or engage in satire. This is so because recklessness suffices as *mens rea* for this new statutory offence.⁴⁰

4.24 Given the maxim “ignorance of the law is no excuse” it can be suggested that it is not necessary for the incitor to know or believe that the incited act, if carried out, amounts to a criminal offence. If a customer in a shop requested material that constitutes child pornography they may be guilty of inciting distribution of child pornography.⁴¹ Liability for this offence is unaffected by the fact that the customer was unaware that child pornography was criminalised or was unaware that the material he or she requested constituted child pornography under the relevant legislation.⁴²

4.25 But it is necessary for the accused to know or believe that the person they are inciting will have the particular state of mind that happens to satisfy the *mens rea* for the crime incited.⁴³

4.26 The requirement that the defendant have knowledge of the circumstances in which the incited act will be carried out can be satisfied other than by showing actual knowledge. If a defendant wilfully shuts his eyes to the reality of the circumstances he cannot claim to have no knowledge of them. In this regard it might be said that recklessness as to circumstances suffices as a component of the mental element of incitement, even though at the same time intention as to consequences is required.⁴⁴

(b) *Modifications of the intention requirement*

4.27 There are a number of cases from England that purport to apply the common law but serve to complicate the account of the *mens rea* of incitement described thus far. There is suggestion, for instance, that the incited act need not be intended if the incitor believes it is likely to be carried

⁴⁰ Section 1(2)(b)(ii) of the *Terrorism Act 2006*.

⁴¹ Contrary to section 5 of the *Child Trafficking and Pornography Act 1998*.

⁴² Section 2 of the *Child Trafficking and Pornography Act 1998* provides the definition of child pornography.

⁴³ *R v Curr* [1968] 2 QB 944.

⁴⁴ See Williams *Textbook of Criminal Law* (2nd ed Stevens & Sons 1983). See discussion of the consequences/circumstances distinction in Chapter 2 above at paragraphs 2.100-2.107.

out as a result of the incitement.⁴⁵ In *Invicta Plastics Ltd v Clare*⁴⁶ the defendants had advertised a device that could, among other things, be used for detecting road speed traps, such use without a licence was criminal. The Divisional Court was satisfied that a conviction for incitement could be maintained despite it not being established that the defendants intended the devices to be used. It was sufficient that they believed it likely the devices would be used. Perhaps too much should not be read into this decision since on the facts it could be inferred that the defendants intended the devices to be used as that would mean satisfied customers leading on, it might be supposed, to more profit. In other words, the defendants in *Invicta* can be considered as having oblique intention that their devices be used in a criminal manner.

4.28 A particularly problematic case is *R v Shaw*.⁴⁷ The defendant, an employee of a car leasing company, had induced a colleague to accept false invoices as authentic and issue cheques on them. The defendant was charged with incitement to obtain money by deception. The defendant testified at trial that his purpose was to expose flaws in his employer's security arrangements. The Court of Appeal held that if the jury believed the defendant's testimony they were entitled to acquit. The problem with this decision is that for the purpose of incitement the relevant *mens rea* is the intention that relates to what the incitee will do, not what is the incitor's overall purpose. The incitee in this case was unaware – and no effort had been made by the defendant to make him aware – that the scam had an ultimately laudable objective. Therefore, were the incitee to carry out what he was encouraged to do (in fact, the incitee in *Shaw* had issued one cheque on foot of a bogus invoice) he would be committing a crime and this is precisely what the defendant intended, this being so even if the defendant's testimony is assumed to have been truthful. The definition of incitement was made out in the facts of *Shaw*; commentators regard the decision as anomalous.⁴⁸

(c) **Mens rea of incitement – conclusion**

4.29 The *Shaw* decision is unsound. It departs from common law incitement and there is no apparent reason why the law should go in that

⁴⁵ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 34. Ormerod *Smith & Hogan: Criminal Law* (11th ed Oxford University Press 2005) at 354.

⁴⁶ [1976] Crim LR 131; [1976] RTR 251.

⁴⁷ [1994] Crim LR 365.

⁴⁸ See Smith's commentary on the case: [1994] Crim LR 366. Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 335. Heaton *Criminal Law Textbook* (Oxford University Press 2006) at 514.

direction. The analysis of criminal attempt in Chapter 2 above,⁴⁹ which suggested attempt have its ordinary meaning and therefore be considered intentional activity, applies to incitement. As with attempt the notion of intention for incitement should encompass both direct and oblique intention.

4.30 *The Commission provisionally recommends that the mens rea of incitement should remain as intention that the incited act be carried out.*

(3) *The conduct incited*

(a) *Requirement for potential criminal liability of incitee*

4.31 A specific crime must be incited for common law incitement. Significantly, the person incited, the incitee, must be capable of being guilty of the crime they have been incited to do. In *R v Whitehouse*⁵⁰ the English Court of Appeal held that the defendant could not be convicted of inciting his 15 year old daughter to commit incest (by having sex with him) because, in the event she complied with the request, she would not be liable for incest; such offences exist to protect rather than criminalise girls of her age. Incitement was not made out in *Whitehouse* because in the circumstances (the incitee being exempted from liability for incest) what was incited was not really criminal. After *Whitehouse* in England a specific crime was enacted of inciting a girl under 16 to commit incest, which in turn was replaced with an offence that protected boys also. The holding in *Whitehouse* still stands, however, as a general common law rule for incitement.

4.32 *Whitehouse* can be viewed as a case where the definition of incitement was not fully made out because what was encouraged was not criminal in the circumstances. The case of *R v Curr*⁵¹ can be understood on this basis too. The decision has been criticised for distorting the *mens rea* of incitement⁵² in that it confuses the *mens rea* of the incitee for the *mens rea* of the incitor. The defendant in *Curr* operated a lending scheme where he gave advance cash for family allowance vouchers, which he then had some women cash in at a later date. At issue was whether the women he employed to cash in the vouchers knew what they were doing was impermissible, it being criminal to obtain payment for vouchers that did not belong to the claimant (outside certain circumstances) *knowing* that it was impermissible to do this. The Court of Appeal held that the defendant was entitled to an acquittal of the incitement charge if indeed the women did not know what they were doing was impermissible. This decision might be

⁴⁹ See above at paragraphs 2.93-2.95.

⁵⁰ [1977] 3 All ER 737.

⁵¹ [1968] 2 QB 944.

⁵² Heaton *Criminal Law Textbook* (Oxford University Press 2006) at 514.

understood as allowing acquittal on the basis of lack of *mens rea* on the part of the defendant – that somehow if the incitee does not in fact have *mens rea* then the incitor also does not have the requisite *mens rea* either. If the decision rests on this basis it is clearly incorrect. Rather, to make sense of the *Curr* decision, it must be seen as recognising that if the incitee when carrying out the incited act lacks a crucial *mens rea* element (in this case knowledge that claiming payments for someone else’s vouchers was not permitted) then the definition of incitement is not made out just as it is not made out in *Whitehouse*, that is, for want of something criminal to have been incited. Considering common law incitement as consisting of three ingredients – (1) an act, (2) *mens rea*, and (3) relation to a special part crime – the conviction in *Curr*, it is here suggested, did not stick for want of ingredient (3) rather than for want of ingredient (2).

4.33 The requirement that the incitee would be criminally liable if he or she carry out the incited conduct has a number of implications. It means that a child deemed incapable of crime cannot be incited. It has been recognised that where an adult instructs a child to steal something, the adult – prior to the child actually obtaining the item – may be guilty of an attempt to steal since the adult has tried to commit theft through an innocent agent. A logical implication that a court would likely not recognise arises where the incitement takes the form of pressure and threats such that the incitee would have a defence of duress in the event they carry out the incited conduct. It is difficult to imagine a court allowing a defendant to avoid incitement liability on the basis his or her incitement was of a threatening nature.⁵³

(b) What can be incited?

(i) Inciting summary offences

4.34 In *R v Curr*⁵⁴ it was held that a summary offence suffices at common law for the crime incited.

(ii) Inciting crime against oneself

4.35 It is possible to incite a crime to be committed against yourself, provided that the absence of consent is not an element of the incited crime.⁵⁵ So you can be guilty of incitement to murder where you encourage somebody to kill you; but you are logically precluded from inciting someone to assault you.

⁵³ See Heaton *Criminal Law Textbook* (Oxford University Press 2006) at 513.

⁵⁴ [1968] 2 QB 944.

⁵⁵ Christie *Inchoate Crimes: Incitement, Conspiracy and Attempts in Scottish Criminal Law* (Edinburgh Sweet & Maxwell 2001).

(iii) *Inciting non-criminal conduct*

4.36 Legislation has made it criminal to incite some non-criminal conduct. An example is the *Prohibition of Incitement to Hatred Act 1989*. Hatred alone, even when racist, is not a crime. But the 1989 Act makes it criminal to incite racial hatred (among other types of hatred). Incitement to hatred is not an example of the common law relational incitement because the conduct incited, in the absence of the legislature enacting an offence of simply racial hatred, is not criminal. Rather, incitement to hatred is a special part offence that so happens to use the concept of incitement, albeit with some additional novelty.⁵⁶

(iv) *Inciting inchoate offences*

4.37 There is case law suggesting an inchoate offence can be the conduct incited. Incitement to conspire was recognised at common law.⁵⁷ Often, inciting an agreement to commit a crime would amount to an incitement to commit that crime. In England and Wales, incitement to conspire has been expressly abolished by statute,⁵⁸ but there has been no such development in Ireland. Incitement to attempt has not been recognised in any case, but it is believed to be a possible crime.⁵⁹ This is doubtful, however, since the *mens rea* requirement for incitement of intention that the incited act be carried out is not present if the incited act is merely intended to be attempted. Incitement to incite has been recognised at common law.⁶⁰ In contrast to attempting to attempt or conspiring to conspire, incitement to incite is a plausible charge. Once again the concerns about double inchoate liability expressed in Chapter 2 above⁶¹ apply.

(v) *Conclusion*

4.38 Regarding the question of what can be criminally incited, the Commission sees to no reason to provisionally recommend other than a rationalisation of the common law position, that is, incitement attaches to crimes.

⁵⁶ For example, the 1989 Act uses “stir up” rather than “incite” to describe the offence. See Daly “Reform of the Prohibition of Incitement to Hatred Act 1989 – Part I” (2007) 17 ICLJ 16.

⁵⁷ *R v De Kromme* (1892) 17 Cox CC 492.

⁵⁸ Section 5(7) of the *Criminal Law Act 1977* (Eng).

⁵⁹ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 32.

⁶⁰ *R v Sirat* (1985) 83 Cr App R 41, *R v Evans* [1986] Crim LR 470.

⁶¹ See above at paragraphs 2.113-2.121.

4.39 *The Commission provisionally recommends that all and only acts for which the incited person can be criminally liable can be incited.*

C Issues unique to incitement

(1) A perceived gap in liability

(a) The limits of incitement

4.40 Incitements that result in completed or attempted crimes engage secondary liability.⁶² But not all instances of (what would be) secondary liability (if the target crime is completed or attempted) result in incitements. Incitement is not committed by the person who assists (without encouraging) crimes that are never even attempted. Furthermore, in this situation, secondary liability does not apply because the target crime is neither completed nor attempted. There seems to be inconsistency in that those who help – but do not actually encourage – others to commit crime are not criminally liable if the target crime is not in the end carried out. Yet it is thought that those who assist unattempted crime are no less blameworthy than those who assist completed crime.⁶³ There is a gap in liability. It has been said that in England and Wales conspiracy as a relational offence⁶⁴ and conspiracy to defraud have been distorted and strained in an effort to compensate for this gap.⁶⁵ This is part of the argument proposing a new scheme of criminal liability for assisting and encouraging crime.

(b) Assisting and encouraging crime

4.41 The Law Commission for England and Wales have proposed two new offences,⁶⁶ which have recently been enacted into law in England and Wales in the *Serious Crime Act 2007*. The *actus reus* is the same for both of these new offences: an act capable of encouraging or assisting the commission of a criminal act. For one of the two new offences (“the intent offence”), the *mens rea* is intention that the criminal act be committed. For the other (“the belief offence”), the *mens rea* is belief that the

⁶² Section 7 of the *Criminal Law Act 1997* read in conjunction with section 2 of the same Act.

⁶³ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 21-23.

⁶⁴ Which in England and Wales is statutory conspiracy: section 1(1) of the *Criminal Law Act 1977*.

⁶⁵ Spencer “Trying to Help Another Person to Commit a Crime” in P Smith (ed) *Essays in Honour of JC Smith* (Butterworths 1987), Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006).

⁶⁶ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006).

encouragement or assistance will in fact encourage or assist plus a belief that the criminal act will be committed.⁶⁷ Liability for these offences is not dependent on the target offence being committed or attempted. Thus, it is envisaged by the Law Commission for England and Wales that these new offences will replace incitement as a relational offence, and supplement rather than replace existing law on secondary liability. The Law Commission for England and Wales acknowledges the scope for overlap between the new offences and secondary liability.

4.42 It might be thought that the intent offence is more serious of the two. The punishment for both new offences is, however, the same – it relates to that of the target offence and can be equal to it. But the intent offence would be the more difficult to establish; it subsumes the belief offence: as instances of the intent offence would also constitute the belief offence, but not vice versa. Significantly, the new scheme rules out attributing intention to assist or encourage crime on the sole basis that such assistance or encouragement was a foreseeable consequence of what was done.⁶⁸ Sullivan observes that this provision is crucial for differentiating the intent and belief offences given the general practice of inferring intention of foreseen consequences.⁶⁹

(c) Conclusion

4.43 It is important to note that the proposed offences engage principles and theory lying behind general part secondary liability. They also serve to greatly alter general part incitement. The Law Commission for England and Wales worked on a report on secondary liability⁷⁰ at the same time as the report proposing the new assisting and encouraging crime offences.⁷¹ In order to evaluate fully the new offences it would be necessary to survey and evaluate the existing framework on secondary liability.

4.44 That said, some preliminary concerns about the proposed offences can be noted. One concern is that the belief offence in particular casts the net of liability very wide. “Encourage or assist” is expansive; possibly more so than the sum of “encourage” and “assist” because it is easier to put a

⁶⁷ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 48.

⁶⁸ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 151. section 18 of draft Bill.

⁶⁹ Sullivan “Inchoate Liability for Assisting and Encouraging Crime – The Law Commission Report” [2006] Crim LR 1047, 1049.

⁷⁰ Law Commission for England and Wales *Report on Participating in Crime* (No 305 2007).

⁷¹ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006).

borderline case into a general “assist or encourage” category than it is to have to put it in either “assist” or “encourage”. Add to this the inchoate nature of the offences – currently assisting someone in crime is only criminal if the crime is completed. The idea that there is a gap in need of plugging can be questioned. Not all behaviour that might be criminalised should be criminalised. A hypothetical case mentioned⁷² is where a taxi driver becomes convinced he is driving his passengers to a destination where they will commit a robbery. From the point of view of his own safety he prudently carries them to their destination without protest. The taxi driver has assisted crime and under the new scheme he may be guilty regardless of whether the crime is carried out or whether it truly was planned to be carried out by the passengers.

4.45 The Law Commission for England and Wales’s proposed scheme includes a defence of reasonableness to the belief offence. Two reasons cast doubt on how successful this defence would be in preventing conviction of those who ought not to be convicted, or indeed the prosecution of those who ought not even to be prosecuted in the first place. One reason is the vagueness and uncertainty of the defence – reasonableness is undefined – different officials at different stages of the criminal process may have a different idea of the circumstances in which the defence operates. The second reason is that the defendant bears the burden of proving the defence. As such it is a departure from the presumption of innocence, which is founded among other things on the very real concern about the difficulties that the ordinary accused faces in proving things in court against the better equipped State.⁷³

4.46 On balance the Commission is not convinced of the need to replace incitement with a new offence of assisting or encouraging crime. The Commission is particularly concerned that the new offence would cast the net of criminal liability too wide.

4.47 *The Commission provisionally recommends that the common law offence of incitement should not be replaced with a new relational inchoate offence of assisting or encouraging crime.*

(2) Free speech

4.48 The act of incitement is essentially a speech act; criminalising incitement restricts speech. As such, incitement interferes with freedom of expression rights contained in the Constitution⁷⁴ and the European

⁷² See Sullivan “Inchoate Liability for Assisting and Encouraging Crime – The Law Commission Report” [2006] Crim LR 1047, at 1054 for a variant.

⁷³ See Roberts “Taking the Burden of Proof Seriously” [1995] Crim LR 783.

⁷⁴ Article 40.6.1°(i).

Convention on Human Rights.⁷⁵ Incitement offences have not had their constitutionality challenged in the Irish courts. However, there have been challenges elsewhere.

4.49 In *R v Marlow*⁷⁶ the author of a book describing how to grow and harvest cannabis was convicted for inciting drug offences. The conviction in *Marlow* was for a statutory incitement offence under section 19 of the *Misuse of Drugs Act 1971*. This offence applies as common law incitement applies, that is, as a relational inchoate offence; hence, the *Marlow* decision can be taken as an interpretation of the common law. The defendant author in *Marlow* sought a declaration from the European Court of Human Rights that his conviction was in violation of Article 10 of the European Convention on Human Rights protecting freedom of expression. The application was declared inadmissible.⁷⁷ The European Court of Human Rights acknowledged that the applicant's right to freedom of expression had been interfered with and that decriminalisation of cannabis had been pursued in a number of Convention States. But the Court held that the interference was justified and it was within the State's margin of appreciation to criminalise incitement to produce cannabis.

4.50 On a number of occasions in the 20th Century the United States Supreme Court has been asked to strike down sedition and incitement offences as unconstitutional under the 1st Amendment of the US Constitution. The leading decision is *Brandenburg v Ohio*⁷⁸ in which the Supreme Court set out requirements that must be present in order for an incitement offence to survive constitutional scrutiny. The Court stated that mere advocacy of illegal action could not be punished, only "advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

4.51 It has been observed that this holding is at odds with existing criminal incitement in the United States and elsewhere.⁷⁹ In particular, the *Brandenburg* test requires a likelihood that the speech will produce the illegal action it encourages. As has been repeatedly emphasised above,⁸⁰ common law incitement and its statutory equivalents can be committed once the communication reaches the incitee even where there was little or no

⁷⁵ Article 10.

⁷⁶ [1997] Crim LR 897.

⁷⁷ *Marlow v United Kingdom* [2001] EHRLR 444.

⁷⁸ (1969) 395 US 444.

⁷⁹ Alexander "Incitement and Freedom of Speech" in Kretzmer and Hazan (eds) *Freedom of Speech and Incitement Against Democracy* (Kluwer 2000) at 113-114.

⁸⁰ See above at paragraphs at 4.02 and 4.06.

chance that the incited act would be carried out. For example, in *R v Goldman*⁸¹ an undercover police officer was requested to supply child pornography, something which there was no likelihood of happening. The Court nonetheless affirmed the conviction.

D Impossible incitements

4.52 The Irish courts have not had occasion to comment on the relevance of impossibility to incitement liability. The question is whether incitement is precluded where the circumstances are such that it is impossible for the offence incited to occur if the incitement is carried out? The question could also be phrased in terms of a defence by asking whether it is a defence to a charge of incitement to show that, even if the alleged incitement was carried out, no offence could have been committed given the circumstances. To illustrate with an example, is it incitement to murder to instruct the murder of a particular person who, unbeknownst to you, is already dead?

4.53 The English courts have had occasion to discuss impossible incitements. Unlike impossibility in relation to attempt and conspiracy, English statute has not touched on impossible incitement with the result that the English courts have been endeavouring to apply the common law. The common law position, as interpreted by the English Courts, is that incitement cannot be committed where the particular target offence cannot be committed.

4.54 One type of case that might be thought of as involving an impossible incitement is where no crime will be committed by the incitee if the incitement is acted on. In *R v Whitehouse*⁸² the Court of Appeal held that a father could not be guilty of inciting incest when he encouraged his 15 year old daughter to have sex with him since, if the daughter acted on the encouragement, she would not be criminally liable since the offence of incest exists to protect, not criminalise a person in her position. The Court of Appeal held that in the circumstances the accused could be charged with inciting his daughter to aid and abet him in committing incest. In the aftermath of *Whitehouse* the UK Parliament enacted a specific offence of inciting a girl under 16 to have incestuous sexual intercourse.⁸³ *Whitehouse* is still authority for the proposition that liability for incitement does not lie where the incitee would not be guilty of a crime if he or she carries out the

⁸¹ [2001] Crim LR 822.

⁸² [1977] 2 WLR 925.

⁸³ Section 54 of the *Criminal Law Act 1977*.

conduct incited. This position was reaffirmed by the Court of Appeal in *R v Clayton*.⁸⁴

4.55 In *Whitehouse* the definition of incitement is simply not made out in the first place because the essential component that a crime be incited is not present. Hence, *Whitehouse* is typically discussed in the context of the elements of incitement rather than in the context of impossibility. In *R v Fitzmaurice*⁸⁵ the defendant, on the advice of his father, asked some men to take part in a robbery. Unknown to the defendant he was being set up by his father; the planned robbery was a sham. The Court of Appeal held that the case turned on the specificity of the robbery incited. If what was incited was a robbery with specific details and that robbery was impossible in the circumstances a conviction for incitement could not stand. The Court in *Fitzmaurice* concluded that the robbery incited was of a general nature and thus not impossible in the circumstances.

4.56 Earlier, the English Court of Appeal in *R v McDonough*⁸⁶ held that incitement could be made out where the defendant had encouraged a person to handle stolen lamb carcasses that the defendant believed were in a particular freezer when in fact no such carcasses existed.

(i) **Conclusion**

4.57 As with attempt and conspiracy the common sense approach that relies on the ordinary meaning of incitement suggests that impossibility should not preclude liability.⁸⁷

4.58 *The Commission provisionally recommends that the impossibility should not preclude liability for incitement.*

E Abandonment of an incitement

4.59 Abandonment in the context of inchoate offences refers to the situation where someone proceeding towards crime discontinues his or her efforts, no longer intending that the crime be completed.⁸⁸ The question is whether liability for an inchoate offence should still attach in light of the would-be perpetrator's abandonment of criminal intention. "Abandonment" is perhaps inapposite when focusing on incitement given that, unlike attempt and conspiracy, once its threshold has been passed the incitor need play no

⁸⁴ [2005] EWCA Crim 2827; [2006] 1 Cr App R 20.

⁸⁵ [1983] 1 All ER 189. *Fitzmaurice* applied *DPP v Nock and Alford* [1978] AC 979, discussed above at paragraph 3.78.

⁸⁶ (1962) 47 Cr App R 37.

⁸⁷ See discussion of impossible attempts above at paragraphs 2.129-2.152.

⁸⁸ See above at paragraphs 2.153-2.163.

further part in bringing about the target crime. As such an incitor cannot logically “abandon” an incitement once it has been delivered. What he or she can do is make an effort to undo any effect the incitement may have had. For example, a person who originally solicited a contract killing might later request the killing not be carried through.

4.60 There has been no Irish judicial discussion of this issue. The American Law Institute’s Model Penal Code provides for a defence of renunciation of criminal purpose:

“It is an affirmative defence that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”⁸⁹

This defence is onerous. It is not enough for the incitor just to try, no matter how earnestly, to undo what he or she might have⁹⁰ set in motion. He or she has got to succeed. Nor is it enough that the incited crime did not come to pass in circumstances where the incitor was seeking to undo the incitement. Rather, the non-occurrence of the incited crime has to be *because of* the incitor’s actions in undoing the incitement.

4.61 *The Commission invites submissions on whether it should be a defence to an incitement charge to have prevented the incited act from occurring.*

⁸⁹ Section 5.02 of the Model Penal Code.

⁹⁰ Of course it is not necessary for incitement that the incitement was actually an operative factor in making an inctee proceed towards crime.

CHAPTER 5 PROVISIONAL RECOMMENDATIONS

5.01 The Commission's provisional recommendations:

A Attempt

(1) Actus reus of attempt

5.02 The Commission provisionally recommends codification of the proximate act approach to defining the *actus reus* of attempt and invites submissions on which formula of words should be used. [Paragraph 2.65]

5.03 The Commission invites submissions on whether a list of illustrative examples should accompany a definition of attempt. [Paragraph 2.66]

5.04 The Commission invites submissions on whether there should be explicit recognition that where a substantive offence can be committed by omission, attempting that offence can also be committed by omission. [Paragraph 2.69]

5.05 The Commission provisionally recommends that the issue of what can constitute a criminal attempt should be a question of law. [Paragraph 2.75]

5.06 The Commission invites submissions on whether a general offence of criminal preparation is desirable. [Paragraph 2.85]

(2) Mens rea of attempt

5.07 The Commission provisionally recommends that the *mens rea* of attempt should continue to be intention, where intention means both direct and oblique intention. [Paragraph 2.99]

5.08 The Commission invites submissions on whether the definition of *mens rea* for criminal attempt should employ an express consequences/circumstances distinction. [Paragraph 2.107]

(3) Target of an attempt

5.09 The Commission provisionally recommends that intra-jurisdictional attempts be expressly recognised as attempts triable within the jurisdiction. [Paragraph 2.124]

5.10 The Commission invites submissions on whether both indictable and summary offences should be capable of being criminally attempted. [Paragraph 2.128]

(4) *Impossible attempts*

5.11 The Commission provisionally recommends that impossibility should not bar attempt liability. [Paragraph 2.152]

(5) *Abandoned attempts*

5.12 The Commission invites submissions on whether abandonment should have relevance to attempt liability. [Paragraph 2.163]

B Conspiracy

(1) *Actus reus of conspiracy*

5.13 The Commission provisionally recommends that conspiracy continue to be based on the concept of agreement, which should have its ordinary meaning. [Paragraph 3.08]

5.14 The Commission provisionally recommends that jurisdiction be claimed for cross border conspiracies generally. [Paragraph 3.24]

5.15 The Commission provisionally recommends the abolition of the rule that spouses cannot conspire together. [Paragraph 3.28]

5.16 The Commission provisionally recommends that conspiracy not be made out where only one party to it has criminal capacity. [Paragraph 3.34]

5.17 The Commission provisionally recommends that exemption from liability for the target offence of a conspiracy on the part of one or more parties should not cause other parties to the conspiracy to escape conspiracy liability. [Paragraph 3.35]

(2) *Mens rea of conspiracy*

5.18 The Commission provisionally recommends that the *mens rea* of conspiracy include a requirement for intention that the conspiratorial plan actually be carried out. [Paragraph 3.42]

(3) *The target of a conspiracy*

5.19 The Commission provisionally recommends that conspiracy be limited to agreements to do criminal acts and that the common law offences of conspiracy to corrupt public morals, to outrage public decency, and to effect a public mischief be abolished. [Paragraph 3.75]

5.20 The Commission invites submissions on whether conspiracy to defraud should be retained. [Paragraph 3.76]

(4) *Impossible conspiracies*

5.21 The Commission provisionally recommends that impossibility should not bar liability for conspiracy. [Paragraph 3.82]

(5) *Withdrawal from a conspiracy*

5.22 The Commission invites submissions on whether there should be a defence available to a charge of conspiracy for thwarting its success. [Paragraph 3.87]

C Incitement

(1) *Actus reus of incitement*

5.23 The Commission provisionally recommends that the formula “commands, encourages or requests” be used to codify the *actus reus* of incitement. [Paragraph 4.18]

(2) *Mens rea of incitement*

5.24 The Commission provisionally recommends that the *mens rea* of incitement should remain as intention that the incited act be carried out. [Paragraph 4.30]

(3) *The target of an incitement*

5.25 The Commission provisionally recommends that all and only acts for which the incited person can be criminally liable can be incited. [Paragraph 4.39]

(4) *Retaining incitement*

5.26 The Commission provisionally recommends that the common law offence of incitement should not be replaced with a new relational inchoate offence of assisting or encouraging crime. [Paragraph 4.47]

(5) *Impossible incitements*

5.27 The Commission provisionally recommends that the impossibility should not preclude liability for incitement. [Paragraph 4.58]

(6) *Withdrawn incitements*

5.28 The Commission invites submissions on whether it should be a defence to an incitement charge to have prevented the incited act from occurring. [Paragraph 4.61]



The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to all legislative changes.

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ADDRESS
35-39 Shelbourne Road Dublin 4 Ireland

TELEPHONE
+353 1 6377600

FAX
+353 1 6377601

EMAIL
info@lawreform.ie

WEBSITE
www.lawreform.ie

The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975