The Law Reform Commission's Consultation Paper on Inchoate Offences

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Introduction

The aim of this conference paper is to give an account of the Law Reform Commission's work on inchoate offences and in doing so explore issues that arise when codifying criminal law. Earlier this year the Commission published a consultation paper on inchoate offences.[1] The consultation paper describes the substantive law on attempt, conspiracy, and incitement and makes numerous provisional recommendations for codification. The Commission's work in this area, and indeed in other current criminal law projects, aims to feed into Ireland's codification process. I will focus on two main aspects of the Commission's consultation paper. These aspects are, first, the Commission's treatment of defining the *actus reus* of criminal attempt and, second, the Commission's provisional recommendations for reform of the law on conspiracy. In assessing these areas of inchoate liability the Commission has engaged with ideas at the very heart of the modern movement for codification of the criminal law, namely, pursuit of the principle of legality and the desire to have criminal laws that emerge from democratic processes.

[1] Law Reform Commission, *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008), available for download at www.lawreform.ie

The nature of inchoate offences and the scope of the Commission's project

Inchoate, incomplete

"Inchoate" can be taken to mean "not yet completed or fully developed." Inchoate offences are uncompleted crimes. The Commission's paper used "inchoate offences" rather than "incomplete offences" because "incomplete offences," though using plain language, is potentially misleading since inchoate offences are in themselves full or complete criminal offences resulting in punishment. When explaining what these offences are, it is probably best to avoid having to say something like incomplete offences are, among other things, complete offences.

General and specific inchoate offences

If substantive criminal law prohibits or criminalises conduct in order to prevent harm, then a large part of what is criminalised is the actual causing of these harms. Murder is a crime because we see a great harm in death occurring as a result of the intentional actions of persons. Murder is a substantive offence that can be contrasted with the inchoate offence of attempted murder. In attempted murder, by definition, nobody dies at the hands of another. The "harm" has not occurred. Yet criminalisation may attach, and not just because some lesser substantive offence such as assault has occurred.

Inchoate offences are those offences that criminalise behaviour that has worked towards, but not occasioned, the substantive harm that the criminal law aims to prevent. This definition is wide; it captures what we might call inchoate offences in a wide sense. Inchoate offences in the wide sense includes the trio of attempt, conspiracy and incitement. It also includes the host of statutory offences that criminalise behaviour which of itself does not occasion actual harm, though it is associated with leading to harm. The latter are specific inchoate offences. Possession offences are inchoate offences in this sense. The things that it is criminal to possess – drugs, explosives and so on – would not occasion any harm if all that was ever done with them was merely possess them. Driving while over the alcohol limit is another example of a specific inchoate offence.[2]

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[2] One label for these offences is "substantive inchoates." See Paul Roberts "The Presumption of Innocence Brought Home? Kebilene Deconstructed" [2000] 118 LQR 41,at 56. We can also call them special part inchoate offences, see *Consultation Paper on Inchoate Offences* at page 3.

The scope of the Commission's inchoate offences project is confined to the general inchoate offences of attempt, conspiracy, and incitement.[3] These can be thought of as components in the construction of offences. Attempt, conspiracy and incitement stand ready to attach to substantive offences such as murder. They are entirely parasitic; there is no crime of simply attempt or simply conspiracy or simply incitement. A criminal attempt is an attempt to do some particular crime. For incitement you have to incite a crime, and for conspiracy you have to agree with another to do something unlawful.

Attempt, conspiracy and incitement apply across the board; they belong in the general part of the criminal calendar along with principles of *mens rea*, secondary liability, and the general defences. Some particular instances of general inchoate liability have been put on a statutory footing. The Offences Against the Person Act 1861 codified the common law for attempting, inciting or conspiring to commit murder. Section 71 of the Criminal Justice Act 2006 applies to conspiracies to commit "serious offences." Still, unlike the position elsewhere, in Ireland there is no statutory statement of how inchoate liability is to apply generally. It remains the case in Ireland that attempt, conspiracy and incitement attaching to substantive offences is an operation of common law.

Defining criminal attempt

Chapter 2 of the Commission's Consultation Paper on Inchoate Offences is on attempt. Surveying the development of the common law and various codification efforts, the Commission outlines and evaluates several approaches to defining the *actus reus* of attempt.[4] The leading approaches that emerge are the proximate act approach and the last act approach. Both approaches can draw authority from the seminal judgment in *R v Eagleton*.[5] The proximity and last act approaches are both threshold tests that purport to identify the point along the way towards the completion of a crime at which an attempt is committed. To impose liability, the proximate act approach requires the defendant to have done an act that is close to the completion of the crime; an act that is remote from the completion of the crime will not suffice. The

[3] See Law Reform Commission, *Consultation Paper on Inchoate Offences* at pages 3-4.
[4] *Ibid* at pages 21-48.
[5] [1845-60] All ER 363. This case also provided the quite entrenched common law rule that mere preparation for a crime is not enough to be a criminal attempt and is therefore not criminal.

last act approach has a more stringent test – the defendant must have done the last act he or she needs to do in order to bring about the crime they are attempting.

The current position in Ireland

What little Irish case-law there is on attempt tends to favour the proximity approach.[6] The Supreme Court, in the leading case of *The People (Attorney General) v Sullivan*,[7] formulated the question of law as whether the defendant's actions were performed "merely as a preparation for the commission of offences or whether they constituted acts sufficiently proximate to amount to attempts to commit the substantive offences."[8] In *Sullivan* a midwife had submitted some false payment claims, but still needed to submit quite a number of additional claims before she could actually obtain money by false pretences. Answering a case stated, the Supreme Court held that a conviction for attempting to obtain money on false pretences could be entered. This result is easily explicable on the proximate approach, but would need some stretching to explain on the basis of a last act test.

Proximate act v last act

In evaluating these competing approaches the Commission identified indeterminacy to be the chief weakness of the proximate act approach. The notion of proximity is vague; there can be reasonable disagreement on whether a particular act is close to the completion of a crime. The last act approach can provide greater certainty since the concept of a last act can be applied more rigorously than the notion of proximity. Conversely, the proximate act approach is better equipped to pursue the reason for having attempt law in the first place because it is flexible while the last act approach, applied strictly, would tend to exempt from liability what intuitively feel like clear-cut cases of criminal attempt. As between the pursuit of certainty with a last act test or the pursuit of the rationale of attempt with a proximate act test, the Commission opted to provisionally recommend the proximate act approach.[9]

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[6] Note the Commission's identification of the Court of Criminal Appeal's decision in *The People (Attorney General) v Thornton* [1952] IR 91 as possibly applying an "unequivocal act" test for attempt. See *Consultation Paper on Inchoate Offences* at pages 25-26.
[7] [1964] IR 169.
[8] [1964] IR 169, at 195.
[9] Law Reform Commission, *Consultation Paper on Inchoate Offences*, at pages 42-43.

The Commission found Antony Duff's critique of the last act approach to be particularly compelling.[10] Duff demonstrates how for a last act approach to supply the certainty it promises it must be applied very strictly. That is, the last act must be the very last act – if "last act" is applied loosely then the test collapses to a proximity test. To illustrate this, Duff discusses the case of *DPP v Stonehouse*.[11] John Stonehouse, a former Member of Parliament, faked his death by drowning so that his wife could receive insurance money. His wife was not aware of his plan. Stonehouse was discovered prior to the insurance pay out. He was convicted of, among other offences, attempting to obtain money by deception. The House of Lords approved of the conviction using language suggestive of a last act approach.[12] Duff observes that strictly speaking Stonehouse had not done the very last act necessary on his part to complete his crime. Yes he had faked his death but he had not evaded subsequent discovery – Stonehouse had not really satisfied the last act test. This shows the illusory nature of the last act's promise of certainty. In providing certainty it impoverishes the utility of a law of attempt. With a strict last act test it is questionable whether there could ever be conviction for attempted theft or attempted rape since the last acts needed on the part of the would-be thief or would-be rapist are those very acts that complete the substantive crime.[13]

Respecting legality

So the Commission rejected a last act test in favour of a proximate act test. The Commission therefore recommended an approach that it admits is somewhat indeterminate. This is a surprising conclusion since the Commission in the inchoate offences consultation paper and in previous publications on criminal law[14] has strongly defended the paramount importance of the principle of legality, which requires that punishment may apply only for the commission of previously and clearly

[10] Antony Duff, *Criminal Attempts* (Oxford University Press, 1996) at circa 41.
[11] [1978] AC 55.
[12] After quoting the test for attempt from *R v Eagleton* Lord Diplock [1978] AC 55, at 68, stated "the offender must have crossed the Rubicon and burnt his boats. In the instant case… the accused… had done all the physical acts lying within his power that were needed to enable Mrs Stonehouse to obtain the policy moneys."
[13] *Consultation Paper on Inchoate Offences*, at page 29.
[14] *Consultation Paper on Legitimate Defence* (LRC CP 41 – 2006)

defined offences.[15] There is, however, a further observation relied on by the Commission to reconcile, on the one hand, recommending an admittedly vague approach to defining attempts while still celebrating the legality principle.[16]

The observation is that the legality principle applies with varying degrees of demandingness in criminal law depending on the context. For example, consider the difference between the defence of legitimate defence and the defence of duress.[17] Legitimate defence is a justificatory defence and therefore sets limits to what is lawfully permissible. As such, legality requires it be defined as precisely as possible. In contrast, duress is an exculpatory defence which reduces liability on the basis of human weakness. Legality does not require the same degree of precision in defining duress as it does for legitimate defence because there is no sense in which a citizen can make an advance decision to keep within what is lawfully permissible by availing of the defence of duress. This is so because duress applies only where the accused is already outside the bounds of what is lawfully permissible.

Similarly, it is more important in respecting the legality principle that citizens get clear notice of what constitutes substantive offences than that they get clear notice of the precise point at which moving towards a crime becomes a criminal attempt.[18] There is a "rule of law" tradition that says that certain, stable, consistently applied rules promote liberty.[19] Clearly defined prohibitions create space between the rules in which to move securely and freely. Attempting a crime, being a purposive activity, represents a choice to step over the line into the criminal zone. Facilitating citizens to

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[15] See McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 42-50.

[16] See Law Reform Commission, Consultation Paper on Inchoate Offences (LRC CP 48 – 2008) at pages 17-19.

[17] See Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (2004), at paragraph 2.95.

[18] A qualification might be added at this point noting that citizens need to know, generally, that attempting – as well as completing – a crime is criminal. It should be remembered, however, that the *mens rea* requirement for attempt – that of specific intent to commit the target crime – will exclude from liability those who toy with the idea of committing a crime, even if they come very close to it. In other words, the defendant you convict for a criminal attempt should by definition not be able to honestly say that they didn't really mean to commit the crime or that they only wanted to *attempt* it in the belief that criminal liability would not attach unless they completed it.

[19] Explicated in the 20th Century by, among others, Lon Fuller, *The Morality of Law* (Yale University Press, 1965). Also to be found in sources as diverse as Aquinas, Hobbes, Beccaria, and Bentham. See Finbarr McAuley and J Paul McCutcheon, *Criminal Liability* (Round Hall, 2000) at 51-56 for a an account of these philosophers' appreciation of how criminal law can promote liberty as distinguished from the view of criminal law as necessarily antagonistic to individual liberty.

have liberty to enjoy self-shaping lives does not require them to be told exactly how far into the criminal zone they can wander with impunity.[20]

The experience of the Commission in working towards provisional recommendations for an *actus reus* of attempt engaged a tension between certainty and flexibility. There should be, so far as possible, precise definitions in our criminal law, but a court should not be constrained to reach patently undesirable results. By "undesirable results" I do not just mean results that strike one as being intuitively wrong, though partly I mean that. I also mean results that conflict with the clear aims of the criminal law. What was fatal for the last act test for criminal attempts is that a pure version of the last act test defeats the purpose of criminal attempt law.

In sum, on the *actus reus* of attempt the Commission concluded that the proximate act approach was the answer to the question of what the law is. In concluding as to what the law ought to be, the Commission did not come up with a magic new formula[21] but rather evaluated the options already there. It arrived at the proximate act approach on the merits and thus provisionally recommends a codification of the existing common law position.

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[20] This might be what Lord Morris was getting at when he stated, "[t]hose who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in" in the context of defending conspiracy to corrupt public morals from counsel's charges of uncertainty (*Knuller v DPP* [1975] AC 435, at 463). One could rehabilitate this inapposite metaphor by imagining that it operates in an environment where it is stipulated that skating on thin ice is prohibited and the areas of thin ice (as distinguished from the spots where the ice is so thin that it will break under a person's weight) are marked out. Without adding these provisos, Lord Morris's *dictum* appears to simply not respect the legality principle. Indeed, the result reached in *Knuller v DPP* is difficult to square with the legality principle.

[21] Thus, the Commission joins a long list of commentators on criminal attempts in recognising the elusiveness of a formula of words that will successfully distinguish attempts from mere preparation. Gavan Duffy P in *The People (Attorney General) v England* (1947) 1 Frewen 81, at 83: "The extreme difficulty of attaining precision in the conception of an attempt at crime has baffled many a court and this is one of the rare offences that has defied scientific definition in exact language." *Haughton v Smith* [1975] AC 476, at 499, per Lord Reid; Kenny Outlines of Criminal Law (19th ed 1966); 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: "there is no magic formula which can … be produced to define precisely what constitutes an attempt"; *United States v Noreikis* (1973) 7 Cir, 481 F.2d 1177: "the semantical distinction between preparation and attempt is one incapable of being formulated in a hard and fast rule."; *United States v Williamson* 42 MJ 613 (N.M.Ct.Crim.App.1995) "The facts may reveal that the line of demarcation [sic] … is not a line at all but a murky 'twilight zone'"; McAuley and McCutcheon, *Criminal Liability* at 414: "the line between preparation and attempt is not always easy to discern, and probably cannot be drawn with geometric precision."

Getting a handle on conspiracy

For the most part the Commission's provisional recommendations in its consultation paper on inchoate offences are to codify existing law. This law is found in (often conflicting) judicial opinion rather than legislation. From the point of view of accessibility and democratic legitimacy, mere codification is a positive step. For conspiracy, however, the Commission has provisionally recommended codification with a reform element. This reform proposal is to restrict conspiracy to agreements to commit crimes. At present the common law definition of conspiracy[22] is agreement to do unlawful acts where "unlawful" has a much wider meaning than "criminal."

In theory the net of liability cast by conspiracy is extraordinarily wide. Mere agreement is enough; no acts in pursuit of the conspiratorial plan need be undertaken. Add to this the observation that neither the end nor the means of the agreement need be criminal and we see that conspiracy is potentially an immensely powerful tool for rendering otherwise non-criminal events criminal. The reality is, however, that most conspiracies will never come to light. Invariably, it is only the acts done pursuant to a conspiratorial agreement that comes to the attention of the authorities and may then be used as evidence from which to infer the existence of the original agreement.

Criticism of conspiracy

There has been much critical commentary directed at conspiracy for being a tool historically used to stifle social change.[23] While this may not be the case in recent times in Ireland, conspiracy law remains as it was in the 19th Century. In *Parnell's case*[24] the indictment included charges of conspiracy to solicit tenants to refuse to pay their rent and to solicit the public to "boycott" those who cooperated with landlords. The High Court of Justice in Ireland, Queen's Bench Division affirmed the validity of these charges. Parnell's actions were not covered by criminal law when done by a single actor, [25] but given the cooperation of multiple actors, conspiracy was used to transform non-criminal behaviour into criminal behaviour. Other common law

[22] *R v Jones* (1832) 110 ER 485, at 487, per Lord Denman defining conspiracy as an agreement "to do an unlawful act, or a lawful act by unlawful means."
[23] Hocking "Conspiracy as a very enduring practice: Part I" [1998] 8 ICLJ 1.
[24] *R v Parnell* (1881) 14 Cox CC 508.
[25] Common law incitement applies only to encouragement to commit crimes and thus was unavailable where the encouragement is to breach civil law. So if Parnell had been acting alone, in respect of encouraging non-payment of rent and economic and social boycotting, the criminal law had no mechanism to apply to him.

countries[26] have reined in conspiracy by defining it so that it relates to criminal wrongs only; Ireland has not.

As with attempt, the legality principle played a crucial role in shaping the Commission's proposal to restrict conspiracy. The problem with conspiracy from the point of view of legality is the open-ended nature of what conspiracy as an inchoate offence may attach to.[27] With attempt, we know that it can only attach to an offence known to the law.[28] But with conspiracy, it can attach to any instance of unlawfulness, though not necessarily every instance of unlawfulness. So not only is "unlawfulness," in contrast to "criminal," very wide, it is also uncertain in that a court is free to conclude either way whether conspiracy can attach to particular instances of unlawfulness. To be sure, there are precedents guiding the courts regarding many aspects of conspiracy. But for crucial large areas this is not the case. Take the idea of a conspiracy to cause of breach of contract. There are no cases expressly saying that this is a criminal conspiracy.[29] Yet looking at *Parnell's case*, the defendants were indicted, among other things, for in essence planning to bring about breaches of tenancy contracts on a large scale. The court is in control of the expansion and contraction of conspiracy to an extent that pushes beyond the limits of what analogical reasoning can cover and this sits uneasily with the Constitution's identification of the Oireachtas as the exclusive law-making institution.[30]

Conspiracy to corrupt public morals

In terms of certainty, conspiracy hits its nadir with the common law offence of conspiracy to corrupt public morals.[31] This is a specific conspiracy offence rather than an instance of general conspiracy. It is for the jury to decide whether conduct is

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[26] England and Wales: section 1, Criminal Law Act 1977 (though this Act preserved the specific common law conspiracies); Canada: section 465, Canadian Criminal Code (though section 465 includes an offence of conspiracy in restraint of trade).
[27] *Consultation Paper on Inchoate Offences*, at page 99.
[28] Admittedly, there is some uncertainty at common law about whether one can criminally attempt a summary offence. See *Consultation Paper on Inchoate Offences*, at page 56. At least we can be sure that non-criminal things cannot be criminally attempted.
[29] Peter Charleton, Paul Anthony McDermott and Marguerite Bolger, *Criminal Law* (Butterworths, 1999), at 308.
[30] Article 15.2.1.
[31] Hamilton P recognised the existence of this offence in Irish law in *Attorney General (SPUC) v Open Door Counselling* [1988] IR 593. Only the post-1937 English authorities of *Shaw v DPP* [1962] AC 220 and *Knuller v DPP* [1975] AC 435 could be cited as authority for the existence of the offence.

"corrupting". This offence can catch agreements relating to entirely lawful behaviour; the ends or means of the agreement need not be unlawful, they need only have a tendency to immorality.[32]

Conspiracy to defraud

The Commission has invited submissions on the value of retaining the common law offence of conspiracy to defraud. This offence is defined as "an 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 …[or] … to injure some proprietary right of his…"[33] To a significant extent this offence is redundant because where the fraud element is a criminal offence, agreements to pursue it will be caught by the general conspiracy offence. But an instance of dishonesty may come under the definition of fraud in conspiracy to defraud yet not be in itself criminal.

The momentum of the Commission's provisional recommendations would suggest abolishing conspiracy to defraud insofar as it relates to non-criminal wrongs. The Commission, however, has not made this as a provisional recommendation in its consultation paper. The Commission sees conspiracy to defraud as significantly different from conspiracy to corrupt public morals. While there is no common understanding available about what corrupts public morals the notion of fraud does have a popular understanding as being criminal. Additionally, there is available to courts a greater volume of precedent and more precise legal definition for conspiracy to defraud than for conspiracy to corrupt public morals.[34]

This is a sound distinction. In terms of offending the legality principle, conspiracy to corrupt public morals exceeds conspiracy to defraud by a long margin. It remains, however, for the retention of conspiracy to defraud to be justified on the merits. What purpose does it serve that is not already covered by general conspiracy attaching to criminally fraudulent acts? Well, the answer that has been suggested is

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[32] In *Attorney General (SPUC) v Open Door Counselling* [1988] IR 593, at 613, Hamilton P, referring to *Knuller v DPP* [1975] AC 435, stated: "This case is clear authority for the proposition that the offence of conspiracy to corrupt public morals may be committed even when the agreement between two or more persons is to assist in the commission of a lawful act."

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

[34] For the argument in defence of conspiracy to defraud, see McAuley and McCutcheon, *Criminal Liability* at 427-430. The authors' views on this offence were endorsed by the Supreme Court in *Attorney General v Oldridge* [2001] 2 ILRM 125, at 132.

that the offence is useful in covering gaps in theft law.[35] I look forward to a time when we have in Ireland such an excellent criminal code that we need not be particularly worried about gaps in criminal liability.

[35] See 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). The Law Commission for England and Wales has since recommended the abolition of conspiracy to defraud: *Report on Fraud* (No 276 2002)