

REPORT

INCHOATE OFFENCES

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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

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. Since it was established, the Commission has published 160 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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Full responsibility for this publication lies, however, with the Commission.

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Race Relations Board v Applin	[1973] QB 815	Eng
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INTRODUCTION

A Background to the Project

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*¹ and follows the publication in 2008 of its *Consultation Paper on Inchoate Offences*.² This Report sets out the Commission's final recommendations on inchoate offences, that is, attempt, conspiracy and incitement, and also contains a draft *Criminal Law (Inchoate Offences) Bill* to give effect to these recommendations. The Commission received a number of submissions on the *Consultation Paper on Inchoate Offences*, for which it is extremely grateful, and also held a seminar on inchoate offences at its offices on 10 March 2009. The submissions received, and views expressed at the seminar, have greatly assisted the Commission's deliberations leading to the publication of this Report.

2. The Commission's recent examination of areas of substantive criminal law, such as the law of murder and manslaughter,³ defences in criminal law⁴ and, in this Report, inchoate offences, coincides with the work of the Criminal Law Codification Advisory Committee,⁵ which is involved in preparing a *Draft Criminal Code Bill*. The Commission is conscious in this respect that the Advisory Committee has indicated that it proposes to include inchoate offences in the General Part of its inaugural *Draft Criminal Code Bill*.⁶ The Commission hopes that its draft *Criminal Law (Inchoate Offences) Bill* will assist in the development of the Committee's inaugural *Draft Criminal Code Bill*.⁷

¹ Law Reform Commission *Third Programme of Law Reform 2008-2014* (LRC 86 – 2007), Project 19.

² (LRC CP 48 – 2008), referred to as the *Consultation Paper on Inchoate Offences* in the remainder of this Report.

³ Law Reform Commission *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87 – 2008).

⁴ Law Reform Commission *Report on Defences in Criminal Law* (LRC 95 – 2009).

⁵ Established under Part 14 of the *Criminal Justice Act 2006*.

⁶ Criminal Law Codification Advisory Committee *Annual Report 2009* at paragraph 1.04, available at www.criminalcode.ie

⁷ 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*

B The Commission's Overall Approach to Inchoate Offences

3. In this Report, the Commission has reviewed the substantive law on the three general inchoate offences of attempt, conspiracy and incitement. These are "inchoate" because they involve crimes that are not fully formed or completed. The Report deals with attempt, conspiracy and incitement as they apply generally, attaching to any and all specific criminal offences. As is clear from the detailed discussion in the Report, the operation of this general inchoate liability in Ireland has been, for the most part, been developed through judicial case law, common law, rather than legislation. It is equally clear that some aspects of the law on general inchoate liability are uncertain and that there are clear benefits to be derived from placing them on a statutory basis, together with the reforms recommended in this Report. In the wider context of the planned codification of Irish criminal law, well drafted provisions on attempt, conspiracy and incitement in the General Part of a Criminal Code (the General Part would contain general rules of criminal liability) would help to avoid unnecessary duplication with inchoate offences in the Special Part of the Code (the Special Part would contain the specific elements of the main criminal offences).

4. In the Report, the Commission makes its final recommendations on inchoate offences. In light of the submissions which the Commission received, some aspects of inchoate offences, particularly the culpability requirements, have been revisited, and some of the conclusions and recommendations in this Report differ from the provisional recommendations in the Consultation Paper.

5. This Report begins by analysing the nature of inchoate liability and then deals with, in turn, attempt, conspiracy and incitement. This sequence of dealing with the three inchoate offences, especially by discussing attempt first, is intended to assist in explaining the key issues that arise in the context of liability for inchoate offences. Incitement can be seen as furthest removed from the occasion of the substantive offence while attempt is closest, given that attempt uses the notion of a proximate act. Conspiracy can be seen as closer to the completed crime than incitement in that the formation of a conspiracy typically will start with an incitement. An effort to visualise this sequence might go like this: one person suggests to another that they should perform a criminal act (incitement has occurred at this stage), the other person then agrees to do so (a conspiracy has formed), next, the person tries to carry out the criminal act as agreed (a criminal attempt), and if he or she succeeds, the substantive crime is complete. In this sequence incitement is more inchoate than conspiracy, which in turn is more inchoate than attempt. This is perhaps useful for showing

Bill: see Report of the Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Government Publications 24) at paragraph 1.69.

how inchoate liability is engaged as persons move towards crime, but the Commission does not suggest that it can provide a template that applies in all possible scenarios. For example, a conspiracy could conceivably be formed without a clear incitement and, conceivably, an incitement could be delivered in circumstances where it is proximate to the substantive offence.

6. The Commission now turns to outline briefly the content of each Chapter in this Report.

C Outline of Report

7. Chapter 1 explains the scope of the Commission's examination of inchoate offences. The Commission examines what is meant by the general inchoate offences of attempt, conspiracy and incitement and identifies rationales for each. The Chapter also describes the position in practice and in terms of the literature in relation to the punishment of inchoate offences. The Commission outlines a recommended exemption to inchoate liability. The Commission's review of inchoate offences is concerned primarily with substantive law, but Chapter 1 ends with a brief outline of procedural issues such as punishment of inchoate offences.

8. Chapter 2 deals with criminal attempt. The Commission analyses the objective and fault elements of a criminal attempt and recommends placing attempt on a statutory footing and clarifying the existing position regarding the objective elements of attempt. As to the fault elements, the Commission recommends that the culpability required for an attempt offence should correspond to, that is track, the culpability required for the target substantive offence. The Commission also recommends placing on a statutory footing the existing position that impossibility and abandonment are not defences to attempt.

9. In Chapter 3, which addresses conspiracy, the Commission's key recommendation is that it should be limited to agreements to commit crimes only, and this involves a significant change from the existing position under the common law. The Commission also analyses the concept of agreement in conspiracy, and recommends that culpability for conspiracy should track the culpability requirements of the substantive offence or offences to which the conspiratorial agreement relates. The Commission addresses impossibility and abandonment and recommends that the existing position in law be placed on a statutory basis.

10. In Chapter 4, the Commission recommends retention, in statutory form, of the main elements of incitement as it currently stands. This is subject to some modification of the culpability requirements. The Commission addresses in turn the act of incitement, incitement culpability, and the target

offences to which incitement can relate. The Commission also examines so-called impossible incitements and withdrawn incitements and concludes that the existing position (that no defence is available for these) should remain.

11. Chapter 5 contains a summary of the Commission's recommendations.

12. The Appendix contains the Commission's draft *Criminal Law (Inchoate Offences) Bill* to give effect to the recommendations in the Report. In the draft Bill, the Commission has sequenced the three areas discussed in this Report in this order: incitement, conspiracy and attempt. This indicates a gradual movement from relative remoteness in terms of "completion" of a substantive criminal offence to relative closeness in terms of completion. As already mentioned, in the Report itself the Commission discusses the three areas in the following order: attempt, conspiracy and incitement. This is largely because there is a much greater literature and case law concerning attempt, as it is the most commonly used of the inchoate offences. As a result, in the Report the Commission discusses attempt first, because this allows a more complete analysis of the many issues that arise in inchoate liability, and these can then be applied in the discussion of conspiracy and incitement in the succeeding chapters of the Report.

CHAPTER 1 INCHOATE LIABILITY

A Introduction

2.01 In this Chapter the Commission describes the operation of inchoate offences and their place in criminal law. In doing so, it provides a basis for the analysis of attempt, conspiracy and incitement in the following chapters. A number of aspects of inchoate liability common to all three general inchoate offences are also addressed in this Chapter, and these are relevant to the detailed recommendations made later in the Report.

B General inchoate liability

(1) Terminology for describing inchoate offences

2.02 This Report, like the Consultation Paper, uses "inchoate offences" to describe its subject matter, primarily because it is the term most commonly

used in courts and by commentators on criminal law. Terms such as “preliminary offences” and “relational liability” are also used in this Report, but to jettison “inchoate” completely could cause confusion. For this reason this Report continues to use the dominant terminology of “inchoate offences” and “inchoate liability.”

(2) General inchoate liability and specific inchoate offences

2.03 Chapter 1 of the *Consultation Paper on Inchoate Offences* defined the scope of the Commission’s inchoate offences project. It distinguished general inchoate offences from specific inchoate offences. For every offence there are, in principle, ancillary crimes of attempting it, conspiring to commit it, and inciting it. The law on general inchoate offences provides for the construction of these ancillary offences. Specific inchoate offences, on the other hand, are merely crimes that have the character of being “inchoate” in that they criminalise actions preliminary to the completion of harm to a protected interest. Or they criminalise actions and conduct that risk such harm; such harm need not be completed. Possession of a knife in a public place is an example of a specific inchoate offence. Endangerment is another example. Burglary is yet another example, for the offence of burglary can be committed without the appropriation of property or any other substantive harm having occurred during the trespass.

2.04 The general inchoate offences are described as the inchoate offences of attempt, conspiracy and incitement, but they are not self-contained offences. There is no offence of simply “attempt.” Likewise there is no offence of simply “incitement” or “conspiracy.” Rather, attempt, conspiracy and incitement are concepts providing for the construction of offences such as attempted murder, conspiracy to commit theft, incitement to assault, and so on. In light of this it can be suggested that either “inchoate liability” or “inchoate offences” are apt headings under which to group the rules and instructions for the operation of attempt, conspiracy and incitement.

2.05 When a criminal law system uses general inchoate liability it does not have to specifically enact offences such as attempted theft, solicitation of murder, conspiracy to commit robbery, and so on. These exist automatically through the combination of general inchoate liability and the substantive offences of theft, murder, robbery and so on. The ancillary inchoate offences can be constructed efficiently in this way.

2.06 Additionally, the ground covered by inchoate liability can be supplemented. If it is believed that use of particular kinds of drugs is a serious problem, specific offences can be enacted to criminalise a much wider range of activity associated with the problem than traditional inchoate liability will catch. The criminalisation of mere possession of certain items exemplifies this.

2.07 As stated in the Consultation Paper, the general inchoate offences belong in the general part of any criminal code that may be enacted in Ireland. In the literature on codification of criminal law, a minority view has expressed scepticism about the usefulness of general inchoate liability, and which suggests an alternative of having an expanded body of specific offences drafted to cover unwanted conduct preliminary to criminal harm. In practice, general inchoate offences such as attempt continue to be used, and at the same time the Oireachtas in Ireland and parliaments in other states have also enacted specific statutory inchoate offences which have proved useful.

2.08 The relevant question is not, however, about choosing between specific and general inchoate offences. Rather, it is whether the general inchoate offences still have a role to play. The Commission considers that they do. In some cases a person's conduct is more accurately labelled an attempted aggravated robbery, for example, than as an offence such as possession of a firearm with intent to cause harm. General inchoate offences are an efficient way to ensure appropriate criminalisation ancillary to substantive offences. As identified above, they obviate the need to stipulate that attempting the crime is also criminal after each crime's definition. Even in a mature criminal law system with a large body of substantive inchoate offences, general inchoate liability covers much ground and can be employed where specific inchoate offences leave gaps.

(3) *Inchoate liability and secondary liability*

2.09 The Consultation Paper distinguished inchoate liability from secondary liability (or complicity) on the basis that, for secondary liability, a substantive crime must have been completed (or at least attempted) while, for inchoate liability, it is not necessary for a substantive crime to have been completed. In another respect inchoate liability and secondary liability perform similar functions: both doctrines serve to amplify criminal liability in that they facilitate criminalisation for an offence or in relation to an offence for an actor who does not actually satisfy that offence's definition. Together, inchoate liability and secondary liability can be effective in enabling the criminal law system to deal with those who, while not having physically performed a crime, may well be dangerous and blameworthy, and worthy of punishment.

2.10 A question arises as to the interaction of inchoate liability with secondary liability. Can a person be found guilty for attempting to aid and abet another to commit a crime? This question is addressed for each of attempt, conspiracy and incitement in the chapters that follow. In brief, the Commission observes a key distinction between inchoate liability and secondary liability. Secondary liability operates so as to allow for a person who aids, abets, counsels or procures the commission of an offence to be found guilty of that

very offence he or she aided, abetted, counselled or procured.⁸ Inchoate liability, on the other hand, allows for the construction of distinct offences of attempting, inciting or conspiring to commit a whole range of specific offences. In this Report the Commission does not recommend changing this fundamental aspect of inchoate offences, that is, that they – attempt, conspiracy and incitement – attach to offences. Secondary liability is not within the scope of this Report. As a result, the Commission recommends no change to the current position that there is no such inchoate offence as, for example, attempting to aid and abet an offence. There may of course be an inchoate offence of attempting the offence, but not of attempting to assist it, for to assist it is not actually an offence, but rather a basis on which a person can be tried and convicted as if they had actually committed the offence.

2.11 This explains why inchoate offences can potentially attach to other inchoate offences – as in attempting to incite an offence – but not to instances of complicity. By definition, inchoate offences attach to offences only⁹ where “offences” encompasses both substantive and inchoate offences. This and related questions are explored in more detail in the Chapters that follow.

C Inchoate offences and protected persons

2.12 This section addresses an important question that may arise with inchoate liability and with secondary liability. The question concerns the extent to which these doctrines may appear to render criminal those who belong to a class of persons who are considered to be victims of the particular kind of crime. *R v Tyrell*¹⁰ provides the English common law’s approach to this question. In *Tyrell* it was held that a girl under the age of 16 years could not be convicted of aiding and abetting or inciting unlawful sexual intercourse against herself, because the Act that created the offence “was passed for the purpose of protecting women and girls against themselves.”¹¹ The Commission considers that this principle should be preserved as a general principle and accordingly it recommends an exemption as regards inchoate liability in the forms of incitement and conspiracy applying to a protected person. That is, it should be provided that a person shall not be guilty of incitement or conspiracy to commit an offence if he or she is:

⁸ *Criminal Law Act 1997*, section 7(1).

⁹ Conspiracy at common law is exceptional and anomalous in this regard insofar as it relates to non-criminal unlawful acts. See Chapter 3 below.

¹⁰ [1894] 1 QB 710.

¹¹ [1894] 1 QB 710, 712.

- i) the intended victim of the offence, and
- ii) a member of a class of persons the enactment creating the offence is designed to protect.

The following passage will illustrate how the principle is to operate using the example of the equivalent offence to the one that featured in *Tyrell*.

2.13 The current position in Irish law on sexual intercourse involving persons below an age of consent effectively extends the *Tyrell* principle to the substantive offence. Section 5 of the *Criminal Law (Sexual Offences) Act 2006* provides that a “female child under the age of 17 years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse.”¹² Because section 5 of the 2006 Act deals with offences involving sexual intercourse, it does not afford any protection to an underage female charged with an offence involving sexual acts falling short of sexual intercourse contrary to sections 2 and 3 of the 2006 Act.

2.14 However, the *Tyrell* principle, as embodied in the recommended exemption above, would protect such a defendant from liability for inciting or conspiring with someone to commit these acts against herself; and, it goes without saying, would be a bar to liability in the case of an underage female charged with inciting or conspiring with someone to commit an offence involving sexual intercourse against herself contrary to sections 2 or 3 of the 2006 Act.

2.15 By parity of reasoning, the recommended provision would also exempt underage males from liability for inciting or conspiring to commit sexual acts against themselves. Although the issue of pregnancy does not arise in this context, it is clear that part of the purpose of the 2006 Act is to protect children, both male and female, from adult sexual predators.¹³ On this basis, the previously-mentioned underage male incitor or conspirator belongs to a vulnerable class the statute is designed to protect, and, accordingly, would appear to come within the ambit of the *Tyrell* principle embodied in the recommended exemption. The *Tyrell* principle does not arise in respect of attempt as a charge of attempting to commit an offence against oneself would be inept.

2.16 Although the principle itself is clear, the categories of persons to which the *Tyrell* principle applies is uncertain. For the reasons canvassed in the

¹² The constitutionality of section 5 was upheld by the High Court in *D (a minor) v Ireland* [2010] IEHC 101.

¹³ The Long Title to the 2006 Act is: “An Act to provide for offences in relation to the commission of sexual acts with children under the age of 17; and to provide for matters connected therewith.”

preceding paragraph, it appears to apply to the underage victims, whether male or female, of sexual offences. And it would be surprising if it did not also apply to the mentally impaired victims of such offences – for example, to a mentally impaired person who incites or conspires with another to commit an offence (against herself or himself) under section 5 of the *Criminal Law (Sexual Offences) Act 1993*. Section 5 offences include sexual intercourse and buggery with a mentally impaired person; and the marginal note to the section states: “Protection of mentally impaired persons”.

2.17 In short, everything depends on the purpose of the relevant legislation. If the legislation is designed to protect an identified class of persons of which the defendant is a member, the *Tyrell* principle will apply if the defendant was the intended victim of the offence. But the principle does not apply if the legislation is aimed at protecting the public at large, notwithstanding that the defendant was the intended victim of the offence. Thus a masochist who incited or conspired with another to commit the offence of causing serious harm against himself, contrary to section 4 of the *Non-Fatal Offences Against the Person Act 1997*, could not avail of the exemption. Unlike the underage and the mentally impaired under the 2006 and 1993 Acts, respectively, masochists are not members of a vulnerable class which the *Non-Fatal Offences Against the Person Act 1997* is intended to protect.

(1) Report Recommendation on inchoate offences and protected persons

2.18 *The Commission recommends providing that a person is not guilty of incitement or conspiracy to commit an offence if he or she is:*

- i) the intended victim of the offence, and*
- ii) a member of a class of persons the enactment creating the offence is designed to protect.*

D The rationale of inchoate liability

(1) The rationale of criminalising inchoate crime

2.19 Substantive offences seek to prevent, through deterrence, specific harms to protected interests. This goal is aided by the existence of inchoate offences. In preventing unwanted conduct or consequences the criminal law sensibly supplements criminalising the actual occurrence of such harmful conduct or consequences with criminalisation of states of affairs that lead up to, or risk, such harm. Conduct preliminary to the completion of criminal harms is a legitimate target for criminalisation as it clearly risks completion of criminal harms. This rationale applies to attempting, inciting, or conspiring to commit crimes. The rationale also applies to the specific inchoate offences such as endangerment that criminalise the creation of risk (of harm to protected interests) *per se*. Thus, if the aim is to prevent certain types of harm, then it is rational to prohibit risking that harm as well as causing it. This is because the extent to which criminal law deters the commission of crime would be reduced if citizens knew they are potentially liable only if they are successful:¹⁴ they would have incentive to try commit crime, for at least the possibility of failing to complete their criminal endeavour and nonetheless facing criminal punishment is somewhat ruled out.

2.20 Another way of reaching this conclusion is to see the relevant harms of substantive offences as encompassing the sense in which citizens are harmed by having their interests threatened as distinguished from actual interference. If a person learns of an attempt on their life they will feel shock and fear and so on. So too if they learn of a conspiratorial plot to kill them or a solicitation to kill them. They have been in a real sense “harmed,” and it may well be thought that this is so even if the intended victim does not learn of the threat to their life.

2.21 The law also includes inchoate offences that criminalise irrespective of whether a risk is actually created. For example, driving while over the legal

¹⁴ Duff *Criminal Attempts* (Oxford University Press 1996) at 133-134.

alcohol limit is a crime even if it turns out that there was no actual risk of harm (because, say, there were no other cars on the road at the relevant time and the driver was able to drive competently despite having consumed alcohol). The same applies for impossible inchoate offences: a would-be murderer mistakenly puts sugar, not poison into the intended victim's tea – no actual risk of harm need have been created. Nevertheless, this is “murderous” conduct and the criminal law coherently aims to deter it regardless of whether it actually risks death. The same goes for a particularly inept conspiracy.

2.22 The above does not, however, represent the only line of justification for inchoate offences. Perhaps more immediately persuasive as an argument justifying inchoate offences is to point out the parity of blameworthiness between, for example, the person who commits murder and the person who tried their best to kill but failed. A retributivist punishment principle points towards equal punishment for both actors. It even more strongly demands that the attemptor of murder not escape liability solely because of fortuitous non-occurrence of death.

(2) *The rationale of attempt*

2.23 Of the trio of attempt, conspiracy and incitement, the rationale of attempt most closely matches the rationale of inchoate offences generally. It is most readily acceptable that attempting a crime risks that crime being completed and that in striving to prevent that crime it should be sought to deter the attempting of the crime whether such an attempt will prove successful or not. Similarly, it is obvious how the moral culpability of the author of a failed attempt at a crime can be on a par with that of the successful criminal.

(3) *The rationale of conspiracy*

2.24 While attempt instantiates inchoate liability in its simplest form, conspiracy represents inchoate liability at its most complicated. The rationale of conspiracy departs significantly from the basic rationale of general inchoate liability. Sophisticated rationalisations of conspiracy have been articulated.¹⁵ This section provides a summary of efforts to make sense of conspiracy rather than an account of how all the aspects of conspiracy have come to be. Just because a defensible or sound rationale can be offered for a legal rule does not mean it was for defensible or sound reasons that the legal rule was initially made. Accordingly, this rationalisation does not seek to contradict the substantial criticism of the historical development and use of conspiracy.

¹⁵ Dennis “The Rationale of Criminal Conspiracy” (1977) 93 LQR 39 and Katyal “Conspiracy Theory” (2003) 112 Yale LJ 1307.

2.25 It has been noted that the rationale of conspiracy cannot be explained solely in terms of criminalising conduct leading to crime.¹⁶ Neither can a danger-in-numbers argument on its own explain conspiracy. Rather, the rationale of conspiracy is located in identifying the seriousness of the choice made when one agrees to a criminal endeavour. Entering or forming or joining a conspiratorial agreement represents the assumption of obligations in respect of the conspiracy that will come into conflict with, and supersede, one's obligations to obey laws. Analysis of conspiracy law in the United States of America, drawing on economic theory, has elaborated and developed this account of the unique rationale of conspiracy.¹⁷ Katyal draws into two categories the particular characteristics of conspiracies that warrant their punishment and the fact that liability is incurred at such an early stage with conspiracy, that is, a conspiracy is committed usually at *mere agreement* to commit crime with no further acts required. The two categories of reasons that make conspiracies especially threatening to society are:

- i) *The effectiveness of concerted action compared to lone actors:* multiple actors pursuing a criminal enterprise can achieve economies of scale that lone actors cannot. Conspiracies can avail of the efficiencies that come with specialisation and division of labour.
- ii) *The effects of group identity:* the group psychology of a conspiracy tends to reinforce commitment to a criminal enterprise by serving to suppress dissuasion and disillusionment and encourage risk-taking. Because the participant has a sense of commitment to the group, the participant's tendencies to refrain from pursuing the criminal enterprise will be discouraged as the group mentality will encourage the driving ahead with the criminal enterprise. Of course, the group nature of a conspiracy can operate so as to undermine a conspiracy. The larger a conspiracy in terms of participants the greater burden needed to "police" the group so that participants do not share information with the State authorities. The larger the group, the more dispersed the proceeds of crime and hence the scope for disgruntlement and defection. Katyal suggests some of the distinctive features of conspiracy doctrine can be seen as designed to exploit aspects of group identity in order to tackle the peculiar dangerousness of conspiracies. For example, conspiracy liability kicks in at an early stage, that of mere agreement. This makes sense because it is at the stage of agreement that the group identity

¹⁶ Dennis "The Rationale of Criminal Conspiracy" (1977) 93 LQR 39 at 40.

¹⁷ Katyal "Conspiracy Theory" (2003) 112 Yale LJ 1307.

factors come into play and make it difficult for a participant to extract him or herself from the criminal enterprise.

2.26 These observations can be added to the more simple analysis that rationalises conspiracy in terms of general inchoate liability. This analysis points out how criminalising conspiracies facilitates intervention, while facilitating prosecution, before the criminal goals of conspiracies are achieved and thus helps prevent crime. Additionally, the working towards a crime or crimes involved in a conspiracy may constitute highly morally culpable activity that warrants punishment.

(4) *The rationale of incitement*

2.27 The justification of incitement is different from that of attempt in important respects. For one, incitement catches conduct more remote from the substantive harm than attempt. Indeed, on one view, incitement, of the three inchoate offences, criminalises at the furthest distance from the central harm. For a conspiracy, so this view has it, is invariably preceded by an incitement. Incitement is remote because it is a highly contingent matter whether the recipient of the incitement will even be influenced by it, not to mention whether they will go on to complete the incited crime.

2.28 This difference between attempt and incitement rationales tends to weaken the harm prevention rationale of inchoate liability when it comes to incitement. A second difference from attempt, however, serves to strengthen the justification of incitement's place in criminal law in terms of the moral culpability or retributivism rationale. This difference is that an incitement is not just an effort to bring about a crime (as in attempt), but an effort to cause a crime through the action of another person. There is a sense in which the inducing of another to commit crime – this *corruption* of another – is a distinct, highly blameworthy wrong.

E Procedural issues relating to inchoate offences

(1) *Punishment of inchoate offences*

2.29 As stated above, the Commission's Inchoate Offences project does not include under its scope the question of sentencing for inchoate offences. The Commission's examination of inchoate offences is on the substantive law rather than procedural law; the division between substance and procedure here understood such that sentencing is a matter of procedure. It may, however, be helpful to follow on from discussion of the rationale of inchoate crime with discussion of the principles and practice relating specifically to sentencing in respect of the general inchoate offences of attempt, conspiracy and incitement. It is not intended to make recommendations relating to the level of punishment

for inchoate offences;¹⁸ the aim of this section is to identify practices and principles relevant to sentencing for inchoate crime.

(a) Punishment of inchoate offences in practice

2.30 As the general inchoate offences are common law offences, their penalties are not restricted in the manner that statutory offences typically are. Punishment for attempt, conspiracy and incitement is in many instances at the discretion of the court since there is limited statutory provision as to the maximum sentences for attempting, incited or conspiring to commit offences.¹⁹ In terms of the relevant legislative provisions, a lengthy prison sentence could be imposed for a conspiracy to commit theft.²⁰ This sentencing discretion operates, however, within bounds. Sentencing for common law offences today is subject to the jurisdictional limits of the relevant sentencing court, certain constitutional limits,²¹ and the courts' sentencing principles,²² which in turn are developed within constitutional restraints.²³

2.31 In recent years, in the Central Criminal Court, life imprisonment sentences have been imposed for attempted murder,²⁴ but in other attempted

¹⁸ The Commission has previously addressed sentencing generally in Ireland. See Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 1993) and *Report on Sentencing* (LRC 53 – 1996).

¹⁹ Examples of such statutory provisions are sections 2(2) and 3(2) of the *Criminal Law (Sexual Offences) Act 2006*, which provide maximum sentences for attempts at offences of defilement of a child under the ages of 15 and 17.

²⁰ O'Malley *Sentencing Law and Practice* (2nd Ed Thomson Round Hall 2006) at 72.

²¹ Article 15.5.2^o prohibits the Oireachtas enacting a law providing for the death penalty.

²² The dominant sentencing principle, as identified by O'Malley, is proportionality between sentence and the gravity of offence, this principle having been implied by Henchy J in *The State (Healy) v Donoghue* [1976] IR 325, 353. See O'Malley *Sentencing Law and Practice* (2nd Ed Thomson Round Hall 2006), Chapter 5.

²³ *The People (Attorney General) v O'Callaghan* [1966] IR 501.

²⁴ "Man Gets Life Sentence for Attempted Murder" *The Irish Times* 5 May 2007 (subsequently reduced by the Court of Criminal Appeal to 15 years: *The People (DPP) v Larkin* [2008] IECCA 138, [2009] 2 IR 381). "Life for attempted murder" *The Irish Times* 2 April 2008 (subsequently upheld by the Court of Criminal Appeal: *The People (DPP) v Duffy* [2009] IECCA 20, [2009] 2 IR 395).

murder cases, sentences less severe than life have been imposed.²⁵ In *The People (DPP) v Larkin*²⁶ the Court of Criminal Appeal substituted 15 years imprisonment in place of the life sentence imposed by the trial judge for an attempted murder. The Court of Criminal Appeal quoted the trial judge:

“Had the accused been convicted of murder, the mandatory sentence would have been life imprisonment, and it would, in my view, be a logical absurdity to avoid a life sentence merely because the accused is a bad shot.”²⁷

The Court of Criminal Appeal, taking these remarks as indicating a mistaken approach to sentencing for attempted murder, stated:

“It is, in effect, to elide the difference between attempted murder and murder itself. Fortunately, Mr Alquasar [the victim] did manage to avoid the loss of his own life in this incident and while this does not lessen the culpability of the accused, it is nonetheless a factor which the court believes should resonate in a somewhat lesser sentence.”²⁸

2.32 While these remarks of the Court of Criminal Appeal do not absolutely rule out the application of a life sentence for attempted murder, they suggest that attempted murder should generally attract a lesser sentence than murder. The Court did not elaborate on why this is so. Nevertheless, it may be taken as representing a view that attempt offences should generally attract lesser sentences than the substantive crimes to which they relate.

2.33 This does not, of course, preclude a sentence of life imprisonment for attempted murder. Thus, in *The People (DPP) v Duffy*²⁹ the defendant had pleaded guilty to attempted murder and to firearms offences. The trial judge, taking into account the accused’s considerable previous criminal record (including a conviction for murder), had imposed the maximum life sentence on the attempted murder charge. On appeal, the Court of Criminal Appeal upheld the life sentence, and accepted that in the specific context it had been

²⁵ “Suspended term for wife who tried to kill family” *The Irish Times* 24 July 2007 (suspended life sentence); “Man who shot his friend in head jailed for 12 years” *The Irish Times* 29 May 2008; “More Jail Terms for Murderer” *The Irish Times* 6 December 2008 (15 years for attempted murder).

²⁶ [2008] IECCA 138, [2009] 2 IR 381.

²⁷ de Valera J, quoted in *The People (DPP) v Larkin* [2008] IECCA 138, [2009] 2 IR 381, 393 (para 40).

²⁸ [2008] IECCA 138, [2009] 2 IR 381, 393-4 (para 41).

²⁹ [2009] IECCA 20, [2009] 2 IR 395.

appropriate, even taking into account that the accused had pleaded guilty. The Court accepted that, given the accused's previous criminal record, the life sentence did not amount to preventative detention. The Court concluded that: "[h]is behaviour merits a condign sentence and has received it."³⁰

2.34 Drawing from cases and practices in other jurisdictions, O'Malley notes a number of relevant factors for sentencing in attempted murder cases.³¹ These include the omission to take remedial steps to help the victim after having attempted to murder him or her. O'Malley also notes that section 3 of the *Criminal Justice Act 1990*, which covers the offence formerly known as capital murder,³² applies to attempted murder where the murder being attempted would fall under section 3 of the 1990 Act and this form of attempted murder attracts a special sentence.

2.35 Murder under section 3 of the 1990 Act is committed when the victim of the murder is a Garda Síochána acting in the course of his or her duty, or is in another specified group, or the murder is connected with certain activities proscribed by the *Offences Against the State Act 1939*.³³ Section 4(b) of the 1990 Act provides for the sentence for attempted murder under section 3 as "a sentence of imprisonment of not less than twenty years" and the court must "specify a period of not less than twenty years as the minimum period of imprisonment to be served by that person." This is in contrast to the minimum period of 40 years stipulated by section 4(a) for completed murders to which section 3 applies.

2.36 Compared to attempt, there appears to be greater disparity between sentences for conspiracies to commit offences and the substantive offences to which conspiracy may attach. Similarly for incitements vis-à-vis substantive offences. A custodial sentence of six years was imposed on conviction for

³⁰ [2009] IECCA 20, [2009] 2 IR 395, 406 (para 36).

³¹ O'Malley *Sentencing Law and Practice* (2nd ed Thomson Round Hall 2006) at 246-247.

³² *The People (DPP) v Murray* [1977] IR 360.

³³ Section 3(1) lists the scope of the offences under the 1990 Act : "(a) murder of a member of the Garda Síochána acting in the course of his duty, (b) murder of a prison officer acting in the course of his duty, (c) murder done in the course or furtherance of an offence under section 6, 7, 8 or 9 of the Offences Against the State Act 1939, or in the course or furtherance of the activities of an unlawful organisation within the meaning of section 18 (other than paragraph (f)) of that Act, and (d) murder, committed within the State for a political motive, of the head of a foreign State or of a member of the government of, or a diplomatic officer of, a foreign State."

conspiracy to murder and soliciting murder in one case in 2008.³⁴ In 2000 seven years imprisonment was imposed for each count of soliciting murder in respect of a defendant who had already been convicted of murder.³⁵ In 2002 an 18 month prison sentence was imposed on a defendant who had been found guilty of soliciting the murder of his wife.³⁶

(b) Reform arguments relating to punishment of inchoate offences

2.37 In debate about the punishment of attempt offences some have argued that a failed attempt should be punished the same as if it had been successful, other things being equal.³⁷ The sentiments of the sentencing judge in the *Larkin* case³⁸ quoted above echo this view.³⁹ The more prevalent view, however, is that lesser punishment for attempts than for substantive offences is usually appropriate.⁴⁰ This was the view of the Court of Criminal Appeal in the *Larkin* case.⁴¹ The argument for parity of punishment is usually based on observing the equivalence of moral culpability between those who successfully attempt and those who unsuccessfully attempt. Arguments for lesser punishment for attempts are based on a number of reasons:⁴²

- i) Blameworthiness is a function of harm and a mere attempt occasions less, if any, harm;
- ii) Guilt is generally felt more acutely for completed wrongs than for incomplete wrongs and this reflects a valid moral intuition. Public

³⁴ "Clare woman who conspired to kill partner jailed for six years" *The Irish Times* 4 November 2008.

³⁵ "Nevin gets 7 years on each soliciting count" *The Irish Times* 6 June 2000.

³⁶ *The People (DPP) v Creighton*, Court of Criminal Appeal, 15 April 2002. See O'Malley *Sentencing Law and Practice* (2nd Ed Thomson Round Hall 2006) at 248.

³⁷ Feinberg "Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It" (1995) 37 *Ariz L Rev* 117.

³⁸ *The People (DPP) v Larkin* [2008] IECCA 138, [2009] 2 IR 381.

³⁹ See paragraph 1.31, above.

⁴⁰ Herman "Feinberg on Luck and Failed Attempts" (1995) 37 *Ariz L Rev* 143.

⁴¹ *The People (DPP) v Larkin* [2008] IECCA 138, [2009] 2 IR 381.

⁴² See Donnelly "Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment" (2007) 10 *New Criminal Law Review* 392.

opinion reflects this moral intuition and the law, to be democratic, should tend to reflect public opinion;

- iii) The idea of moral luck: the idea that matters of luck may play a role in moral evaluation of people and their actions.⁴³

2.38 In its recent review of homicide law the Commission has recognised that “consequences matter.”⁴⁴ This simple intuition applies aptly in rationalising the current judicial approach whereby punishment for inchoate offences where proscribed harms did not occur will be generally less than if the proscribed harms had occurred. Accordingly, the Commission does not in this Report seek to argue for shift towards an approach that would see punishment for inchoate offences matching punishment for the substantive offence to which an inchoate offence relates.

(2) Further procedural matters relating to inchoate offences

(a) Merger

2.39 When prosecuting for a specific offence it would in many cases be possible to prosecute for an attempt to commit the offence in question. However, it is not acceptable to enter a conviction for both a substantive offence and an attempt to commit it (arising from the same factual instance).⁴⁵ This practice is rationalised by reference to the doctrine of merger, which holds that the attempt offence merges with the substantive offence and becomes one. It is thought that to punish for both completing a crime and attempting the same crime in respect of the same instance of wrongdoing is to punish twice for one wrong. It can be noted for the avoidance of doubt that this does not preclude a prosecution that begins as a prosecution for a substantive offence ending in conviction for attempting the offence.

2.40 The merger doctrine does not apply for incitement. It will not always be the case that an actor can manage, through an instance of wrongdoing, to commit an offence and also incite another to commit the same offence. If the actor does indeed manage this, then they can be fairly punished for both the substantive offence and for incitement. They have committed the wrong of the

⁴³ Enoch and Marmor “The Case Against Moral Luck” (2007) 26 Law and Philosophy 405, at 406.

⁴⁴ Law Reform Commission *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87 – 2008) at paragraph 5.41. See also Law Reform Commission *Consultation Paper on Involuntary Manslaughter* (LRC CP 44 – 2007).

⁴⁵ *The People (Attorney General) v Dermody* [1956] IR 307, at 314.

substantive offence and, in addition, they have committed the wrong of encouraging another to commit an offence.

2.41 For conspiracy, the question of merger is more uncertain. Logically, conspiracy seems to fall between attempt and incitement. To convict and punish for committing a particular crime and for having conspired to commit it seems to punish twice for the same wrongdoing. However, for conspiracy there must have been another person involved in the antecedent agreement to commit the substantive crime, so there is an additional wrong is not present when a mere attempt precedes a substantive offence. In some jurisdictions merger doctrine does not apply to conspiracy with the result that one can be punished for the substantive offence and for conspiring to commit it. Yet in other jurisdictions merger doctrine does apply to conspiracy, with the result that conviction for a substantive offence precludes conviction conspiring to commit that offence (arising out of the same instance of wrongdoing). It has been claimed that omitting to apply merger doctrine to conspiracy tends to increase the danger of conspiracy being used as an oppressive offence.⁴⁶ In Ireland, practice proceeds on the basis that merger applies, that is, a conviction for a substantive offence precludes conviction for conspiring to commit it (in respect of the same factual instance). This is a conventional practice endorsed by judges and implicit in the DPP's guidelines for prosecutors,⁴⁷ but is not specified in statute.

(b) Jurisdiction and inchoate offences

2.42 Criminal law jurisdiction is generally confined to matters occurring within the State's territory, but the Constitution of Ireland provides that the State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law.⁴⁸ Section 10 of the *Offences Against the Person Act 1861*⁴⁹ purports to apply to murder and manslaughter committed outside the jurisdiction by citizens of the State.⁵⁰

⁴⁶ *Hyde v United States* (1911) 225 US 347, 387.

⁴⁷ Director of Public Prosecutions *Guidelines for Prosecutors* (Office of the DPP 2006) at paragraph 6.6.

⁴⁸ Article 29.8.

⁴⁹ The 1861 Act was among the Statutes of the United Kingdom of Great Britain and Ireland 1801 to 1922 retained by the *Statute Law Revision Act 2007*. Section 10 of the 1861 Act was amended by the *Criminal Law Act 1997* to reflect changes in terminology but its substance remained.

⁵⁰ See Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 283-284.

(i) Criminal attempt and jurisdiction

2.43 At common law the position is uncertain but codifications of attempt liability outside of Ireland⁵¹ have made clearer what is likely the common law position. That is, if the substantive offence to which the attempt relates would be triable had the actor completed it, then the attempt at it is also triable. Thus, if murder committed outside of the State by a citizen of the State is triable within the state, so is attempted murder (where the attempt act occurs outside of the State). As outlined and recommended in Chapter 2 below, the provisions on inter-jurisdictional conspiracies could be applied, with the necessary modifications, to inter-jurisdictional attempts.

(ii) Conspiracy and jurisdiction

2.44 Section 71 of the *Criminal Justice Act 2006* provides that agreements in Ireland to commit 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; and a serious offence on an Irish ship or aircraft.

2.45 Section 71 applies only in respect of conspiracies to commit serious offences as defined in the 2006 Act. For other conspiracies there is some guidance in case-law. It is clear that conspiracies formed abroad to perform a crime in Ireland are triable in Ireland once the conspirators come into the jurisdiction while the conspiracy is subsisting. The Supreme Court in *Ellis v O'Dea and Governor of Portlaoise Prison* stated:

“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.”⁵²

2.46 English judgments have gone further, stating that a conspiracy to perform some unlawful act within the jurisdiction, though formed abroad, is justiciable.⁵³ 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. There is also a jurisdictional question about conspiracy formed within the jurisdiction to perform something unlawful abroad.

⁵¹ For example, in England and Wales, the *Criminal Attempts Act 1981*, section 1(1) and (4).

⁵² [1991] ILRM 365, 372.

⁵³ *Samson* [1991] 2 QB 130; *Liangsirprasert v Government of the United States of America* [1991] 1 AC 225.

In *Board of Trade v Owen*⁵⁴ the UK House of Lords (since 2009, replaced by the UK Supreme Court) held that a conviction for conspiracy did not lie in this situation.

2.47 In the *Consultation Paper on Inchoate Offences* the Commission stated that 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 certain class of conspiracy: that where the target of the agreement is a serious offence. The same jurisdictional rules could be applied to conspiracy generally.

(iii) Incitement and jurisdiction

2.48 There is little case law on inter-jurisdictional incitement. However, in *R v Most*⁵⁵ a newspaper article encouraging political assassinations addressed to the world at large was held to constitute incitement to murder. Thus there is some basis in common law for criminalising inter-jurisdictional incitements since the judgment did not limit the basis for the crime to incitement of those within the jurisdiction. The advent of the internet and ease of instant communication between people in different countries would tend to increase the opportunity for incitement to take place across jurisdictions. This suggests that provisions on jurisdiction for incitement ought to be provided in statute. Again, the rules for inter-jurisdictional conspiracies set out in section 71 of the *Criminal Justice Act 2006* provide an apt model, the necessary changes being made.

(c) Procedural rules for conspiracy

2.49 This section endeavours to identify and state a number of procedural rules that are peculiar to trials for conspiracy or that are unusual and feature in trials for conspiracy. As stated above, the Commission's inchoate offences project, and this Report, does not purport to review procedural criminal law relating to inchoate offences. The project is on the substantive law relating to inchoate offences.

(i) Hearsay exception

2.50 In trials for conspiracy there is an exception to the hearsay rule. Statements by a person who is allegedly a party to a conspiracy which are in furtherance of the alleged conspiracy are admissible evidence against all parties to the conspiracy insofar as such statements tend to establish the existence of the conspiracy. This exception applies only after the prosecution have already made out a *prima facie* case of conspiracy. Commentators observe that statements made after arrest would not be admissible under this

⁵⁴ [1957] AC 602.

⁵⁵ (1881) 7 QBD 244.

rule because they most likely would not, at that stage, be in furtherance of the conspiracy.⁵⁶ A similar hearsay exception applies in cases of common design.⁵⁷

(ii) Trial of co-conspirators

2.51 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 (AG) v Keane* held that the deletion of the name of an alleged co-conspirator from a charge does not affect a conviction.⁵⁸ 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.”⁵⁹ Where two defendants are tried together for the same alleged conspiracy, common law holds that the acquittal of one requires the acquittal of the other.⁶⁰ This was how the English courts applied the common law⁶¹ up to the enactment of section 5 of the UK *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*⁶² 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.⁶³ 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.⁶⁴

⁵⁶ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 300.

⁵⁷ Spencer “The Common Design Exception to the Hearsay Rule” (2007) 11 *International Journal of Evidence and Proof* 106.

⁵⁸ *The People (Attorney General) v Keane* (1975) 1 *Frewen* 392.

⁵⁹ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 300.

⁶⁰ *R v Plummer* [1902] 2 KB 339.

⁶¹ *DPP v Shannon* [1975] AC 717, *R v Coughlan* (1976) 64 Cr App R 11.

⁶² (1982) 148 CLR 668.

⁶³ *The People (Attorney General) v Keane* (1975) 1 *Frewen* 392, 399.

⁶⁴ See above at paragraph 1.50.

CHAPTER 2 ATTEMPT

A Introduction

3.01 In this Chapter, the Commission addresses, in turn, the attempt act, the target substantive crime, and attempt culpability. The Court of Criminal Appeal has described a criminal attempt as “an act done by the accused with specific intent to commit a particular crime.”⁶⁵ This definition contains three main aspects – an act, an intention, and a target crime. The Commission recommends that the culpability required for an attempting a specific substantive crime should track the culpability required for that substantive offence. This means that the culpability required for attempted rape is informed by that required for rape, attempted theft culpability by theft culpability, and so on.

3.02 The Commission also deals with other important questions relating to criminal attempt. These are whether it is criminal to attempt to commit a crime which is impossible to successfully complete in the circumstances (impossibility), and whether voluntarily abandoning an attempt to commit a crime is a defence to an attempt charge (abandonment).

(1) *Reform of attempt*

3.03 The law in Ireland governing the imposition of liability for attempting crimes has not, in general, been placed on a statutory footing. An exception is attempted murder under section 11 of the *Offences Against the Person Act 1861*. Thus, long-established common law rules are the basis for charging most instances of attempting to commit crime.⁶⁶ Accordingly, if a person is to be prosecuted for attempting to steal something, they will be charged with “attempt to commit theft contrary to common law.” Theft in this context refers to the statutory offence provided for in section 4 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*; to prosecute for a completed instance of theft the

⁶⁵ *The People (Attorney General) v Thornton* [1952] IR 91, 93.

⁶⁶ In *The People (Attorney General) v Sullivan* [1964] IR 169, 200, Walsh J stated that charges of “attempts to commit statutory offences... remain common law charges.”

charge would be theft contrary to section 4 of the 2001 Act. While “theft” is a statutory offence, “attempted theft” is an ancillary common law offence that incorporates the current definition of theft, which, at the time of writing, is provided by section 4 of the 2001 Act. For the avoidance of doubt, it can be stated that “theft” in “attempted theft contrary to common law” does not refer to any older version of larceny; it refers to the current statutory offence in the 2001 Act.

3.04 The Commission’s *Consultation Paper on Inchoate Offences* examined the law on attempting offences and explored options for reform. One of the main conclusions was that placing general attempt liability on a statutory footing would be beneficial. The Commission repeats this recommendation in this Report. As with all three inchoate offences, the operation of attempt is mostly governed by case law. Many of the relevant cases are from outside the jurisdiction and were decided many years ago. Furthermore, the case law leaves the law uncertain. This is because a number of the cases conflict with others, and the judgments use differing terminology. Ascertaining the law relating to attempt is a difficult task which can lead to error and uncertainty. It is also costly; one needs access to comprehensive collections of law reports and subscription websites to view older cases. Placing attempt liability on a statutory basis would go some distance in addressing these and other problems. First, it would provide democratic legitimacy to this area of law as for the first time elected representatives of the people would be given the opportunity to say what law in this area is to be. Second, statutory provisions would provide a central authoritative source for the relevant law. They would settle the law in choosing one position between the disputed and conflicting approaches in the case law. Third, a statutory framework helps makes the law more accessible.

(2) *Main Report recommendation on reform of attempt*

3.05 *The Commission recommends placing attempt as a general inchoate offence on a statutory basis and abolishing the common law offence of attempt.*

B The act in a criminal attempt

3.06 Discussing general attempt liability involves addressing those areas of difference between an offence and its attempt. It is crucial to identify the principles of attempt liability which provide the instructions for the construction of an ancillary attempt offence. With these principles and the definition of the substantive offence we can construct the related attempt offence. This is the important service rendered by enacting a provision on attempt liability in the context of the general principles of criminal liability, and which might comprise an element of the General Part of any criminal code that might be enacted by the Oireachtas. Thus, any such General Part would contain the principles of

attempt liability that provide for the construction of attempted murder, attempted theft, and attempted arson; this means that the Special Part of a code does not need to define attempted murder as well as murder, attempted theft as well as theft, attempted arson as well as arson, and so on. Using the General Part of any such criminal code in this way is an efficient method of stipulating the ambit of criminal liability.

3.07 The principles of attempt liability cover these areas: (a) the definition of the character of the attempt act in relation to the target substantive offence, and (b) the extent to which culpability requirements must be present in an attempt vis-à-vis its target offence (this will be addressed later in this Chapter). The Commission's *Consultation Paper on Inchoate Offences* undertook this analysis.⁶⁷

3.08 This part of this Chapter revisits the analysis of the attempt act, making final recommendations and endeavouring to clarify areas of difficulty identified in the Consultation Paper.

(1) *Consultation Paper analysis and recommendations on the act in a criminal attempt*

3.09 The Commission's *Consultation Paper on Inchoate Offences* analysed the act part of a criminal attempt. This analysis consists of an assessment of different tests for identifying attempts, that is, tests for distinguishing between efforts towards crime that constitute criminal attempts and efforts towards crime that fall short of constituting criminal attempts. The Consultation Paper's main provisional recommendation in this regard was to place on a statutory footing the existing common law position as set out by the Irish courts. The following revisits this analysis and makes final recommendations for an approach to the attempt act that uses the concept of proximity for identifying criminal attempts.

(2) *Discussion: the act in a criminal attempt*

(a) *Tests for identifying attempt – common law approaches*

3.10 Two rules about the objective or "act" component of a criminal attempt are clear at common law:

- i) For criminal attempt there must be an act; thought alone can never constitute a criminal attempt.
- ii) A merely preparatory act towards a crime will not constitute a criminal attempt.

⁶⁷ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008), at Chapter 2, section B, headed "the components of attempt."

3.11 Beyond these basic rules there is uncertainty and indeed the second of the two rules above contains a degree of uncertainty. The following analyses different tests for identifying criminal attempts. The aim of each test is to supply a method for identifying the threshold of criminal attempts, that is, the dividing line between mere preparations for crime and attempting crime.

(b) *The Sullivan case and the proximate act approach*

3.12 *The People (Attorney General) v Sullivan*⁶⁸ is the leading Irish authority on criminal attempt. It indicates that the test for the act component in a criminal attempt is that an act sufficiently proximate to the complete crime must have been performed. The defendant in *Sullivan* was tried in the District Court for attempting to obtain money by false pretences. The prosecution had introduced evidence that the defendant, a mid-wife, had submitted fabricated reports of births attended. The judge of the District Court was of the opinion that there was insufficient evidence to establish a criminal attempt and stated a case to the High Court seeking a view on this. Both the High Court and, on appeal, a majority of the Supreme Court held that the conclusion by the judge of the District Court that there was insufficient evidence for criminal attempt was not correct and that the trial could proceed.

3.13 The facts of the case were somewhat complicated in that the submission of a fabricated report, if not discovered to be a fake, even though technically a false claim for payment, would not by itself result in extra pay being obtained. This was because the defendant received a fixed salary from her employer and would receive extra pay on top of this salary only for attending births in excess of 25 in a single contract year. Evidence at trial had not established the number of births the defendant had attended for the year in question. Therefore, it was assumed in the defendant's favour that she was below the 25 births mark. This meant that her actions could plausibly be seen not as a complete effort to get extra pay, but rather as laying the groundwork for gaining unearned pay in the future. The *Sullivan* case therefore did not involve an indisputably obvious attempt whereby a person has made a false claim and then waits for their bounty; there was a genuine question whether the defendant's actions were merely preparing for a future crime or were in themselves a criminal attempt.

3.14 Teevan J in the High Court, and Walsh J speaking for the majority in the Supreme Court,⁶⁹ took the view that it was irrelevant whether a false report went to making up the first 25 births or was an additional one – either way a false report was to a mid-wife's credit, and as such could constitute a criminal

⁶⁸ [1964] IR 169.

⁶⁹ Ó Dálaigh CJ agreed with the judgment of Walsh J; Lavery J disagreed.

attempt. The High Court and majority Supreme Court judgments approved the analysis in the English case *R v White*.⁷⁰ In *White* the defendant's mother had died of a heart problem. However, cyanide was found in wine that the defendant had given to his mother, but which she had not drunk. The quantity of cyanide was insufficient to cause death. The English Court of Criminal Appeal held that if the aim was to kill by slow poisoning then one dose of the poison, even though insufficient to bring death by itself, was a proximate act to murder if it was part of a series of acts which together could result in death.

3.15 Walsh J in the Supreme Court identified the law on criminal attempt, stating:

“[I]t is clear ... that mere preparation for the crime is not enough. This has been stated in various forms, as, for example, ‘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.’⁷¹

3.16 The test used by the Supreme Court for identifying a criminal attempt was whether the defendant's actions were “sufficiently proximate” to the completion of the target offence. Walsh J had recognised that a determinate test did not emerge from the case law:

“The cases provide many examples of acts which were considered sufficiently proximate and those which were considered not sufficient to constitute an attempt, but they do not formulate any exhaustive test.”⁷²

3.17 Nonetheless, the *Sullivan* case can be seen as an application of a proximity test or a proximate act test for criminal attempt.⁷³

(c) *The Eagleton case: Proximity or last act?*

3.18 The Supreme Court judgment in *Sullivan* appears to be an application of the leading common law case of *R v Eagleton*,⁷⁴ but there is a question whether the *Eagleton* case sets out a proximity test or a “last act” test.

⁷⁰ [1910] 2 KB 124.

⁷¹ [1964] IR 169, 195-196, Walsh J quoting *R v Eagleton* (1855) Dears 515, 537-538.

⁷² [1964] IR 169, 196.

⁷³ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.09-2.10.

⁷⁴ (1855) Dears 515.

A last act test is more stringent than a proximity test; it requires the accused to have performed the last act needed to be performed by him or her in order to bring about the complete target offence. The Commission has concluded that *Eagleton* supports a proximity test. The key passage in *Eagleton* is:

“The mere intention to commit a misdemeanour is not criminal. Some act is required and we do not think that all acts towards committing a misdemeanour are indictable. 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; and if, in this case, after the credit with the receiving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account or producing the vouchers to the Board, we should have thought that the obtaining credit would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, 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.”⁷⁵

3.19 This influential passage, often cited only in part, is susceptible to different readings. Some doubts can be raised about the idea that it is a straightforward endorsement of a proximity test, which is that the test for an attempt is whether the act done was proximate to the completion of the target crime. This is how the Supreme Court in *Sullivan* read the passage. When the phrase “[a]cts remotely leading towards the commission of the offence are not to be considered as attempts to commit it” is read in isolation, the notion of proximity is the key tool for separating criminal attempts from acts falling short of attempt. Walsh J in *Sullivan* suggested this section of the passage was an expression in the negative of the proximity rule. Remoteness can be seen as the converse of proximity; stipulating that the attempt act is identified by being not remote from the target crime is effectively the same as stipulating that it must be proximate to the target crime.

3.20 Another way of reading the *Eagleton* passage above is to see it as applying a last act requirement as the test for criminal attempt. This is suggested by the identification of acts “immediately connected with” the commission of the offence as criminal attempts. In *Eagleton* the defendant was contracted by a Parish Board of Guardians to supply and deliver loaves of bread of certain weight to the “out-door poor.” The persons entitled to receive this bread had tickets, which the defendant was to collect from them on

⁷⁵ (1855) Dears 515, 537-538; (1855) 6 Cox CC 559, 571; 169 ER 826, 835-836.

delivering the bread and then submit to the guardians for his account to be credited and payment to follow. The jury found that the defendant had delivered bread of deficient weight, which he had known to be deficient in weight. The defendant had submitted the tickets in relation to these loaves and he had obtained credit in account, but the deception was discovered before he received the money. The defendant had been found guilty by the jury of attempting to obtain money from the guardians by falsely pretending he had delivered loaves of proper weight. On appeal, the English Court of Criminal Appeal upheld the conviction. In delivering the Court's decision, Parke B stated:

“[N]o 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.”

This is the language of a “last act” test – the defendant committed a criminal attempt because he had performed the last act needed on his part to bring about the substantive offence.

3.21 Yet it is reasonable to read the *Eagleton* passage as applying a proximate act test which, in turn, is satisfied by the presence of a last act. Every last act is also a proximate act for the purposes of criminal attempts. Not every proximate act is also a last act. If a last act is present then the proximate act test for criminal attempt is certainly satisfied. Perhaps Parke B was identifying the relevant test as whether the attempt act was “sufficiently proximate” to the completion of the offence, and then implicitly concluding that because the defendant had done the last act on his part needed for the completion of the offence, his actions were most certainly “sufficiently proximate” to the completion of the offence. On this reading *Eagleton* endorses the proximate act test.

3.22 The *Consultation Paper on Inchoate Offences* endorsed the identification of the Supreme Court's approach in *Sullivan* as the proximate act approach. It can plausibly be said to be the dominant test at common law.⁷⁶ Furthermore, a number of approaches to defining criminal attempt in various jurisdictions can be easily understood as, in essence, proximity tests, though different language is used.⁷⁷

⁷⁶ *R v Button* [1900] 2 QB 597 and *R v Robinson* [1915] 2 KB 342 can be viewed as applications of a proximity test based on *R v Eagleton* (1855) Dears 515.

⁷⁷ The French Penal Code's “*le commencement d'exécution*,” in Article 121-5 of the French Penal Code; Scotland's perpetration test, *HM Advocate v Camerons* 1911 2 SLT 108; and *dictum* about how the person guilty of criminal attempt must have been “on the job” in *R v Osborn* (1919) 84 JP 63.

3.23 The chief weakness of the proximity test is the vagueness of the notion of proximity, though the indeterminacy of the text should not be overstated.⁷⁸ Other approaches to defining the physical act of attempt were identified and evaluated in the Consultation Paper.⁷⁹ The provisional conclusion reached was that insofar as approaches other than proximity purport to provide greater certainty they led to undesirable results. It can be shown that where the “last act” approach and the “unequivocal act” approach have been adopted they have inevitably collapsed to a proximate act approach. In sum, the alternatives to the proximate act approach – if they really are to be different – turn out to be unworkable.

(d) An unequivocal act requirement in Irish attempt law?

3.24 Another test for identifying criminal attempt is that the attempt act must involve, on its face, the criminal intent to complete the specific target offence. This has been applied in other jurisdictions in its pure form (as for a period in New Zealand)⁸⁰ and in a diluted form (as in some decisions from England and Wales,⁸¹ and in criminal codes based on the American Law Institute’s Model Penal Code). This unequivocality test, in its pure form, must be satisfied independently of evidence which goes to establish a guilty mind. This means that the test results in the following scenario not being a case of criminal attempt:

“An accused person has admitted their intention to steal another person’s car. Witnesses saw the accused trying unsuccessfully to pry open that car’s door in the middle of the night.”⁸²

3.25 Here it can be said that the accused’s action was such that the intention it manifested was ambiguous as between trying to steal the car, trying to “borrow” the car, and trying to get into the car to sleep in it. For the charge of attempted theft, under a pure form unequivocality test, the *mens rea* here is satisfied (assuming the accused’s admission is reliable), but the *actus reus* is not. This is because what the accused did is equivocal between a number of goals, some criminal, some not criminal. It therefore cannot be said that the

⁷⁸ See the analysis in Campbell, Kilcommins and O’Sullivan *Criminal Law in Ireland: Cases and Commentaries* (Clarus Press 2010) at 207.

⁷⁹ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.18-2.42.

⁸⁰ *R v Barker* [1924] NZLR 865.

⁸¹ *Davey v Lee* [1967] 2 All ER 423; *Jones v Brooks* (1968) 52 Cr App R 614.

⁸² This example is based on the English case *Jones v Brooks* (1968) 52 Cr App R 614.

physical act is “unequivocally referable” to the intention to commit the specific target offence.

3.26 In its diluted form the unequivocality test for attempt may well be satisfied in the scenario above. While the action may not be unequivocal as to a specific target, in light of the accused’s admission, it is “strongly corroborative of the actor’s criminal purpose.”⁸³ The approach that appeals to common sense is to see the accused’s admission as resolving the ambiguity regarding the true purpose behind the action of trying to open the car door.⁸⁴

3.27 There may be a view that a version of an unequivocality requirement informs attempt liability in Ireland. There is no express Irish judicial statement to the effect that the act in a criminal attempt must be such that it unequivocally displays an intention to commit the target offence. The Commission’s *Consultation Paper on Inchoate Offences* suggested, however, that the case of *The People (Attorney General) v Thornton*⁸⁵ could be viewed as implicitly applying an unequivocality requirement. The *Thornton* case is revisited below where the Commission suggests that the case is best understood as not indicating that an unequivocality requirement is part of attempt law in Ireland.

3.28 In *The People (Attorney General) v Thornton*⁸⁶ the defendant had on a number of occasions accompanied a girl pregnant by him to a doctor’s surgery. The accepted evidence was that the defendant had on the first two occasions asked the doctor to interfere with the pregnancy. The doctor had responded that this was completely out of the question. The Court emphasised that the charge did not relate to these instances but rather to the conversation during the girl’s third visit to the doctor. The Court identified the crucial evidence given by the doctor: in the doctor’s words:

“He [the defendant] mentioned ‘wasn’t there something called ergot,’
The doctor replied that ‘there was such a substance, but that no self-respecting Catholic doctor would use it.’”⁸⁷

3.29 The Court accepted that there were multiple constructions that could be put on this exchange. That the defendant was trying to find out how to

⁸³ Model Penal Code, section 5.01(2).

⁸⁴ It seems this would have been the conclusion of the Court of Appeal in *Jones v Brooks* (1968) 52 Cr App R 614 had the confession of the defendants contained more incriminating content than it actually did.

⁸⁵ [1952] IR 91.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 96.

administer ergot to produce a miscarriage, that the defendant was inciting the doctor to administer ergot, or that the defendant was leading up to a plain request for delivery of ergot.⁸⁸ The Court concluded that the evidence was “vague and uncertain.”⁸⁹ Though in the opinion of the Court it could be inferred, as a matter of probability, that the accused was trying to get the doctor to supply him with ergot, the Court held that the evidence was incapable of establishing this beyond a reasonable doubt. Accordingly the defendant’s appeal against conviction was allowed.

3.30 The Court of Criminal Appeal stated Mr Thornton’s charge as one of “unlawfully attempting to obtain ergot, knowing that it was intended to be used unlawfully for the purpose of procuring a miscarriage of the ... girl.” Later in the judgment the charge is stated as that the accused “did unlawfully attempt to procure a poison or other noxious thing called ergot, knowing that it was intended to be unlawfully used or employed to procure the miscarriage of the said Mary McDonagh.”⁹⁰ This charge is problematic because it seems to charge an attempt to get something to be used in a crime rather than an attempt at a crime. Though the target statutory offence is not mentioned in the case report, it can be suggested that the charge in *Thornton* was one of attempting to commit the offence under section 59 of the *Offences Against the Person Act 1861*. Section 59 provides it is an offence to “unlawfully supply or procure any poison or other noxious thing ... knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman.”

3.31 The Court of Criminal Appeal in *Thornton* had the following to say about what the jury should be instructed in respect of the nature of attempt liability:

“They should know from a specific direction to that effect, that an attempt consists of an act done by the accused with a specific intent to commit a particular crime; that it must go beyond mere preparation, and must be a direct movement towards the commission after the preparations have been made; that some such act is required, 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.”⁹¹

⁸⁸ [1952] IR 91, 96-97.

⁸⁹ *Ibid* at 97.

⁹⁰ *Ibid* at 92.

⁹¹ *Ibid* at 93.

3.32 The Court cited a number of cases, which included *R v Eagleton*, providing an outline of essentially the same instruction. The *Consultation Paper on Inchoate Offences* tentatively suggested that the Court's approach was informed by an unequivocal test for attempt. The Court cited a proximate act approach,⁹² and it could have quashed Mr Thornton's conviction for the reason that the evidence failed to disclose an act sufficiently proximate to the completion of the suggested target crime. The Court of Criminal Appeal did not, however, ground its decision in this way. Rather, the Court quashed the conviction because the accused's act was equivocal as between different purposes, not all of which relate to the criminal end he was charged with attempting. Hence, the suggestion that *Thornton* involves an implicit application of an unequivocal test.

3.33 Such an explanation of the case is perhaps more complicated than need be. Most likely the Court was simply not satisfied that the evidence established the prosecution's case beyond a reasonable doubt. To require unambiguous evidence is unexceptional in criminal cases, and for this to happen in the context of an attempt case does not, without more, establish that the particular unequivocal test for attempted was applied.

3.34 In sum, the *Thornton* case stands as a useful judicial statement of the principle that mere desire or intention to commit crime is not itself a crime. It provides only tenuous basis for saying that an unequivocal requirement plays some part of attempt liability in Irish law. In any event, it pre-dates by over a decade the Supreme Court's decision in *Sullivan*. *Sullivan* itself makes no reference, either explicit or implicit, to an unequivocal requirement. This analysis accordingly points towards the view that the proximity test alone represents the position in Ireland on the act component of attempt liability.

(e) Defining criminal attempt: alternative approaches and methods

(i) The last act test

3.35 The last act of a criminal attempt is the final act a perpetrator needs to perform in order for the full offence to occur. Under this approach, only when the defendant has performed this last act may attempt liability attach. The last act test promises a degree of certainty, for an act is either the last act or it is not. The problem is that the more the last act approach is geared towards providing 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 supply certainty. But when it is applied strictly it results in an extremely restricted law of criminal attempts. For some crimes the act needed to make the attempt – the last act – is precisely the same act that makes the substantive

⁹² [1952] IR 91, 93.

crime complete.⁹³ Theft and rape are examples. Criminal attempt is made somewhat redundant with a strict last act test.⁹⁴

(ii) The substantial step test

3.36 The American Law Institute's *Model Penal Code* stipulates three categories of criminal attempt. The first two categories⁹⁵ capture situations where the accused has done everything in his or her power to complete an offence, but circumstances are not as he or she believed them to be, or are such that his or her endeavour is thwarted due to reasons external to him or her. It is the third category⁹⁶ in the MPC's attempt definition which supplies a test for ascertaining the threshold of attempt liability. The requirement is for "an act or omission constituting a substantial step in the course of conduct planned to culminate in his commission of the crime." The key concept is "substantial step." The MPC goes on to supply guidance on what constitutes a substantial step: "Conduct shall not be held to constitute a substantial step ... unless it is strongly corroborative of the actor's criminal purpose."⁹⁷ The MPC provides a list of illustrative examples of conduct that is strongly corroborative of the actor's criminal purpose:

- i) lying in wait for, searching out or following the contemplated victim of the intended offence;
- ii) enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission;
- iii) reconnoitering the place contemplated for the commission of the intended offence;
- iv) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the offence will be committed;
- v) 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;
- vi) possession, collection or fabrication of materials to be employed in the commission of the offence, at or near the place contemplated for

⁹³ Duff *Criminal Attempts* (Oxford University Press 1996) at 41.

⁹⁴ Gordon *Criminal Law* (3rd ed Green & Sons 2000) at 209.

⁹⁵ Section 5.01(1)(a) and (b).

⁹⁶ Section 5.01(1)(c).

⁹⁷ Section 5.01(2).

its commission, where such possession, collection or fabrication serves no lawful purpose in the circumstances;

- vii) soliciting an innocent agent to engage in conduct constituting an element of the offence.⁹⁸

3.37 The MPC provision is notable for the wideness of the range of conduct it potentially labels as a criminal attempt. It criminalises attempt at an earlier stage in the lead up to substantive crime than common law approaches. The “substantial step” is not far removed from the “first act.”⁹⁹ It is an easier test to satisfy than a proximity test. A substantial step towards a crime may have been taken without being in any way close to completing it. This is perhaps the most notable feature of the substantial step test, that it includes as criminal attempt conduct what may be characterised as merely preparatory to a crime. A substantial preparatory step is still a substantial step. Thus the MPC departs from the characteristic feature of criminal attempt at common law that mere preparation is not a criminal attempt. This distance from the common law approach is brought out by the MPC’s illustrative examples. These examples include acts that would not have been considered an attempt at common law because they are merely preparatory. As the *Consultation Paper on Inchoate Offences* pointed out, the case of *R v Campbell*¹⁰⁰ (defendant caught about to enter Post Office with imitation gun, sunglasses and threatening note held not to have crossed the threshold of attempt liability) would be decided differently in light of the MPC’s “possession of materials” example. Arguably *Campbell* itself was not a decision required by the common law, but under the MPC framework the English Court of Appeal could not have defensibly reached the result it did in *Campbell*. Likewise, *R v Geddes*¹⁰¹ (defendant caught in boys’ lavatory with kidnapping materials held not to be attempt) would be decided differently under the MPC given the MPC’s “enticing or seeking to entice” example. And *People v Rizzo*¹⁰² was an application of the common law, which the “searching out” of a victim example was included in the MPC in order to reverse.¹⁰³

⁹⁸ Model Penal Code, section 5.01(2).

⁹⁹ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.29-2.36.

¹⁰⁰ [1991] Crim LR 286.

¹⁰¹ [1996] Crim LR 894.

¹⁰² (1927) 246 NY 334, 158 N.E. 888.

¹⁰³ 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.

3.38 It would be a far-reaching change for Irish law to adopt the MPC's substantial step test for criminal attempt. If there is one thing certain in Ireland's current common law approach, it is that conduct merely preparatory to crime is not criminal. The substantial step test would depart from this. It would, in principle, render criminal a vast range of activity which is currently not criminal. This range is vast for it applies to conduct preliminary to every substantive crime in the criminal law.

(iii) Illustrative examples

3.39 The *Model Penal Code* is notable for its use of illustrative examples. It provides a non-exhaustive list of instances where conduct is "strongly corroborative of the actor's criminal purpose," and thus can be considered as satisfying the definition of criminal attempt.

3.40 The Commission's *Consultation Paper on Inchoate Offences* invited submissions on whether illustrative examples should accompany a definition of attempt. Feedback received during the consultation process leading to this Report was sceptical of the benefit of this, and concerns were expressed about the extent to which examples might tend to weaken the authority of the central definition. It was also suggested that, in the wider context of the enactment of a criminal code, illustrative examples would be more suitable for inclusion in a code commentary than in the code itself. Such illustrative examples are common in code commentaries based on the American Law Institute's Model Penal Code. A distinction was made between, on the one hand, listing examples and, on the other, providing a "clarifying definition" or an "exclusionary definition." The Commission agrees that an exclusionary definition may be useful and comfortably sit in a statutory statement on attempt.

(iv) Unequivocality as an ancillary test

3.41 Yet another innovative feature of the MPC definition of criminal attempt is its use of an unequivocality requirement not as simply the test for attempt as it was used in New Zealand, but rather as an additional requirement. Under the MPC a substantial step towards a crime can constitute a criminal attempt, but "[c]onduct shall not be held to constitute a substantial step ... unless it is strongly corroborative of the actor's criminal purpose."¹⁰⁴

3.42 The potentially wide reach of the substantial step test is accordingly tempered by requiring the substantial step to be strongly corroborative of the criminal purpose. The MPC is set up to criminalise at the early stages of working towards crime. The occurrence of substantive harm (victim killed) or indeed an attempt that comes very close to being realised (victim shot but not killed) to some extent speaks for itself in suggesting that such harm really was

¹⁰⁴ Section 5.01(2).

intended. But when substantive harm is still far off there is always much more doubt about whether it is truly being worked towards.

(f) Approach to defining criminal attempt – a conclusion

3.43 In this Report the Commission does not seek to depart from the Consultation Paper's provisional endorsement of the proximity approach to defining criminal attempt. As will be elaborated below, the proximity approach, broadly conceived, encompasses the preparation/perpetration distinction and the more-than-merely-preparatory test. This involves a rejection of the last act, the unequivocality, and the substantial step approaches. The first two of these are unworkable in their pure form and in practice collapse to a proximity approach. The third – the substantial step test of the MPC – has significant merit. Its adoption would, however, involve a substantial change to the law in that it would serve to widen the ambit of attempt liability a great deal.

3.44 As has been acknowledged, the proximity approach is flexible given the malleable nature of the notion of proximity. Flexibility suggests uncertainty and indeterminacy, which in turn cause concern for legality. The worry is that with a flexible test for criminal attempt, the point at which attempt liability is imposed will depend as much on judicial discretion as on legal definition. These are real concerns, but some observations tend to blunt them insofar as they are used to attack the proximity approach. First, as argued in the Consultation Paper, for respecting the legality principle it is crucial that the definitions of target substantive offences are certain; it is much less important to have certainty regarding the exact point at which criminal liability is imposed when working towards a substantive offence.¹⁰⁵ Once a citizen can ascertain what the substantive offences are and can know that, roughly speaking, attempting offences is prohibited, they are well on the way to having fair notice of what not to do in order to avoid criminal sanction. Recall that from the point of view of an actor there is no difference between attempting to do a crime and actually doing it. Indeed, all completed acts were initially attempted. There does not seem to be any additional gain in legality to be achieved by allowing citizens to know to what extent they can work towards a crime without criminal liability attaching to their actions. Second, even with a more certain approach to defining criminal attempt, there will still be very substantial indeterminacy in criminal attempt cases. This is because of the inherent flexibility in characterising the facts in an attempt case. The facts depend on how you look at them; this being an area of law that manifestly bears out legal realist claims that facts decide cases, not law. Had Mr Stonehouse performed the last act needed on his part to commit

¹⁰⁵ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 1.31-1.35.

insurance fraud?¹⁰⁶ He had faked his death and disappeared. The UK House of Lords considered that he had performed the last act. But it can be suggested that he had not performed the very last act needed on his part to complete the fraud, that last act being to make sure it was not found out that he was still alive.¹⁰⁷

3.45 Having recommended an approach to defining criminal attempt based on proximity, it remains to choose a formula of words to express this approach.

(g) The search for a formula of words

3.46 In the *Consultation Paper on Inchoate Offences* the Commission provisionally recommended, in essence, statutory codification of the common law approach to defining the act which must be present in a criminal attempt. In this Report the Commission makes final this recommendation to place on a statutory footing the currently applicable common law approach. There is much benefit in clarifying and rationalising the existing law on the physical aspect of attempt.

3.47 There are, of course, differing interpretations of the common law. It is clear, however, that mere preparation does not suffice for a criminal attempt, and while there may be reasonable disagreement over whether something was mere preparation or not, it will be possible in many cases to make a confident judgment. Furthermore, the differences in terminology do not point to radically different tests, but rather to slightly different tests. As has been suggested¹⁰⁸ the so called last act test has never really been applied strictly.¹⁰⁹ The same goes for the unequivocal test (with the exception of New Zealand, before it was abolished by reforming legislation). Even in those cases where the language of a last act was used, the courts have applied a test much like the proximity test.¹¹⁰ The common law cases can be seen as reasonable efforts to describe what a criminal attempt is and apply it. Thus, attempt liability is triggered or engaged when a person is “on the job,”¹¹¹ that is, perpetrating a

¹⁰⁶ *DPP v Stonehouse* [1978] AC 55.

¹⁰⁷ Duff *Criminal Attempts* (Oxford University Press 1996) at 41.

¹⁰⁸ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.23-2.28.

¹⁰⁹ *DPP v Stonehouse* [1978] AC 55.

¹¹⁰ McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 420.

¹¹¹ *R v Osborn* (1919) 84 JP 63.

crime rather than just preparing for it.¹¹² In French law, this is referred to as when one has passed *le commencement d'exécution*.¹¹³ At this point what a person is doing is more than merely preparatory;¹¹⁴ they may be said to be close or proximate to the crime's completion.¹¹⁵ These different approaches describe the same basic phenomenon. The metaphor of dusk shading into darkness¹¹⁶ aptly describes how a neat distinction between preparation and perpetration is unavailable.

(i) Proximity

3.48 In *The People (Attorney General) v Sullivan*¹¹⁷ the Supreme Court stated that the relevant question in this context is whether the defendant's actions were "sufficiently proximate" to the substantive crime, and since that decision the concept of proximity is central to the definition of attempt. The *Consultation Paper on Inchoate Offences* assessed the use of "proximity" in defining attempt.¹¹⁸ The Commission was of the view that there was both merit and demerit in the distinguishing feature of the proximity test, that distinguishing feature being its flexibility. Flexibility arguably makes for vagueness and indeterminacy, and the case law admittedly illustrates some inconsistency resulting from this. Yet such flexibility can be used to avoid the undesirable results that (apparently) more precise tests for attempt produce. The certainty lacking in the proximity approach can only be pursued through alternative approaches (such as a last act test) at a substantial cost. That cost is the undermining of the rationale of attempt liability.

(ii) Preparation and perpetration

3.49 One of the submissions received by the Commission suggested the approach in Scots law to defining the physical part of attempt. This approach

¹¹² Hence, the preparation/perpetration distinction, which is used as a test for criminal attempt in Scotland.

¹¹³ French Penal Code, Article 121-5. McAuley and McCutcheon *Criminal Liability* (Round Hall 2000) at 418.

¹¹⁴ The rule that mere preparation cannot be a criminal attempt as codified in England and Wales in the *Criminal Attempts Act 1981*.

¹¹⁵ The proximate act test employed in *The People (Attorney General) v Sullivan* [1964] IR 169.

¹¹⁶ McAuley and McCutcheon *Criminal Liability* (Round Hall 2000) at 414.

¹¹⁷ [1964] IR 169.

¹¹⁸ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.18-2.22.

suggests a distinction between preparation and perpetration, so that only if a person has crossed the boundary into the realm of perpetration can attempt liability attach.

3.50 This approach is very similar to the proximate act approach. Both approaches are flexible, providing a guide rather than a precise test for identifying criminal attempts, the difference being in the formula of words employed. The distinction between preparation and perpetration provides an alternative to the concept of proximity, and the notion of perpetration is perhaps more easily understood than the concept of proximity.

(iii) The “more than merely preparatory” formula

3.51 This is the formula employed in the *Criminal Attempts Act 1981* of England and Wales. It has to be doubted whether this definition achieves greater precision than proximity. In the leading Irish cases¹¹⁹ on attempt liability, the principle that mere preparation for crime is not criminal was a starting point to identifying the threshold of attempt rather than something that completed the process. The case law in England and Wales since the 1981 Act has included some results that have been much criticised. In particular the decisions in *R v Campbell*,¹²⁰ *R v Geddes*,¹²¹ and *R v Gullefer*¹²² have been criticised as establishing too restricted a test for attempt. These cases could, arguably, be described as plausible examples where attempt liability is present, yet were held by the appellate courts in England and Wales not to have involved attempts because the facts disclosed conduct that was not more than merely preparatory. The Commission does not suggest that the 1981 Act’s definition of attempt is to blame for these unsatisfactory cases; rather, that they may have involved incorrect interpretations of the 1981 Act in that they paid insufficient attention to “merely” in the definition.

3.52 The Commission in its *Consultation Paper on Inchoate Offences* did not consider this formula of words – “more than merely preparatory” – to be particularly flawed. The Commission did not, however, provisionally recommend its adoption. One disadvantage of the formulation is that it is negative rather than positive. The Commission has previously recommended that statements in legislation should, for the purposes of clarity, be formulated in

¹¹⁹ *The People (Attorney General) v Thornton* [1952] IR 91; *The People (Attorney General) v Sullivan* [1964] IR 169.

¹²⁰ [1991] Crim LR 286.

¹²¹ [1996] Crim LR 894.

¹²² [1990] 3 All ER 882.

the positive rather than the negative.¹²³ “More than merely preparatory” is somewhat inelegant and it purports to define something by what that something is not. It makes sense that mere preparation for crime is not criminal, but it may be somewhat confusing and inaccessible to a person not familiar with the history of the law on attempt. It may, however, be usefully combined with a positive indication of what constitutes a criminal attempt, as explained in the conclusion below.

(iv) Formula of words for the attempt act – a conclusion

3.53 In this Report the Commission makes final its recommendation that the language of proximity be used to define a criminal attempt. It expresses most simply and most faithfully the concept used at common law to identify the threshold of attempt liability. Although the word proximate already contains the notion of closeness, the Commission considers that the phrase that best captures the desired position on the threshold of attempt is “closely proximate.” This echoes the Irish Supreme Court’s use of “sufficiently proximate.”¹²⁴ Furthermore, the phrase “closely proximate” can usefully be supplemented with the addition of the “more than merely preparatory” formula albeit in a slightly condensed form. Thus describing the attempt act as “closely proximate and not merely preparatory” can be recommended for use in defining the objective part of criminal attempt. The addition of “not merely preparatory” has the benefit of ruling out an offence of criminal preparation, which the Commission recommends against introducing.¹²⁵

(h) A question of fact or law?

3.54 There is some variance in the common law world whether attempt is a question of fact or of law. In Ireland in the leading case of *The People (Attorney General) v Sullivan*, Walsh J in the Supreme Court stated:

“In my view each false “claim” put in, whether it be the first or the twenty-sixth, would, in law, be an act sufficiently proximate to constitute an attempt to commit the substantive offence of obtaining by false pretences a sum of £4 4s. 0d., the fee for each case. *This is a question of law only* and it is not open to the learned District Justice to find otherwise, whatever his view of the facts may be.”¹²⁶

¹²³ Law Reform Commission *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61–2000) at paragraph 6.17.

¹²⁴ *The People (Attorney General) v Sullivan* [1964] IR 169, 195, 198.

¹²⁵ See below at paragraph 2.59.

¹²⁶ *The People (Attorney General) v Sullivan* [1964] IR 169, 198. Emphasis added.

3.55 It is stated to be a question of fact in the *Criminal Attempts Act 1981* in England and Wales. The Law Commission for England and Wales had recommended this.¹²⁷ More recently, however, the Law Commission for England and Wales provisionally recommended that attempt be described as a question of law.¹²⁸ This provisional recommendation has not become a final recommendation in the 2009 Report¹²⁹ of the Law Commission for England and Wales. The Commission's *Consultation Paper on Inchoate Offences* provisionally recommended preserving the understanding of attempt to be a question of law.¹³⁰

3.56 In this Report the Commission's final recommendation is that the question is best understood as one of fact; it is ultimately for the trier of fact to decide whether the defendant had progressed sufficiently proximate to the completion of the relevant offence. It is of course open to the trial judge to withhold evidence of proximity from the jury on the basis that the prosecution has not discharged its *prima facie* burden of proof on the issue.¹³¹

(i) Attempt by omission

3.57 The Consultation Paper considered the question of whether a criminal attempt can be committed by omission. It is plausible that where there exists a duty to act, and a failure to act may amount to an offence, there may be an ancillary attempt offence. Thus, for example, where a parent tries to kill their infant by starvation, there may be a case of attempted murder.¹³² A proximity requirement would still apply – in this example, the parent would have to be at a

¹²⁷ 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.

¹²⁸ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007) at paragraphs 14.23-14.25.

¹²⁹ Law Commission for England and Wales *Report on Conspiracy and Attempts* (No 318 2009) at paragraphs 8.162-8.184.

¹³⁰ Law Reform Commission Consultation Paper on Inchoate Offences (LRC CP 48 – 2008), at paragraph 2.75.

¹³¹ As approved by the Court of Criminal Appeal in *The People (Attorney General) v England* (1947) 1 Frewen 81, 84.

¹³² In the English case *R v Gibbins and Proctor* (1918) 13 Cr App R 134, a child, Nelly Gibbins, had died of starvation due to neglect by the defendants, her father and her father's mistress. Attempted murder could have been a relevant charge if the child had been found and saved before she had died.

stage beyond mere preparation and proximate to completing their goal of causing death in order to have crossed the threshold of attempt liability.

3.58 It is clear that attempt liability should be available in cases where a person tries to commit crimes by omission. The problem remains how to acknowledge this position in a statutory provision on attempt given that the test for attempt mentions a proximate *act*. One option is to stipulate that “act” can include an “omission.” It might also be deemed helpful to have express recognition that an attempt can be committed by omission only where the relevant target substantive offence, in the circumstances, can be committed by omission.¹³³ Accordingly the draft Bill appended to this Report includes an interpretation provision that “‘act’ includes an omission where the complete offence is capable of being committed by omission.”

(j) A new offence of criminal preparation?

(i) The case for criminal preparation

3.59 The Commission’s *Consultation Paper on Inchoate Offences* noted the recommendations of the Law Commission for England and Wales regarding the introduction of a new offence of criminal preparation. The Consultation Paper invited submissions on whether this proposed offence ought to be enacted in Ireland. During the Commission’s consultation process leading to this Report, there was no support for the introduction of this offence.

3.60 It is worth noting that this offence of criminal preparation proposed by the Law Commission for England and Wales, and subsequently enacted into law in England and Wales, does not criminalise criminal preparation *per se*. Rather, it is intended to capture those cases not caught as criminal attempt that perhaps should have been caught as criminal attempt. The Law Commission for England and Wales proposed it in reaction to certain much-criticised¹³⁴

¹³³ The Draft Criminal Code of the Law Commission for England and Wales includes in the section on attempt the following clause: “‘Act’ in this section includes an omission only where the offence intended is capable of being committed by an omission.” Clause 49(3) of the Draft Code. Law Commission for England and Wales *A Criminal Code for England and Wales, Volume 1: Report and Draft Criminal Code Bill* (No. 177 1989) at 64. The Commission does not recommend using this precise formula because the use of “intended” reflects a scheme of attempt culpability that differs from what the Commission recommends in this Report.

¹³⁴ For example, in various editions of *Smith and Hogan, Criminal Law* including Ormerod *Smith and Hogan, Criminal Law* (11th Ed Oxford University Press 2005) at 413.

appeal court judgments¹³⁵ on criminal attempts in England and Wales the attempt liability scheme codified in the *Criminal Attempts Act 1981*. It is, therefore, a proposed solution to a problem that has not arisen – nor will inevitably arise – in Ireland.¹³⁶

3.61 Insofar as the proposed preparation offence is conceived as something beyond the specific context that led to its proposal – that is, making up for the restricted nature of attempt – it stretches the net of criminal liability quite wide. A theme of the *Consultation Paper on Inchoate Offences* was the recognition of the undesirability of unduly expanding criminal liability. This is a particularly apt consideration in respect of inchoate liability because inchoate liability is a general part doctrine that will apply to all specific offences.

3.62 Apart from the general principle that criminal liability should not be expanded lightly, there is a real sense in which a general inchoate offence of preparation, which is to apply across the board relating to substantive offences, is simply over-ambitious. It criminalises more behaviour than the criminal justice system could ever process. As such it would widen the gap between the criminal law as stated and the reality of criminal law in practice. Given these concerns, and the absence of a strong case for introducing criminal preparation in Ireland, the Commission does not recommend the introduction of a new offence of criminal preparation.

(3) Report recommendations on the act in a criminal attempt

3.63 *The Commission recommends that the proximate act approach to identifying criminal attempts should be placed on a statutory footing.*

3.64 *The Commission recommends that the question of whether an act was a proximate act to the commission of an offence should be treated as a question of fact.*

3.65 *The Commission recommends that statutory provision should be made recognising that a criminal attempt can be committed by omission where the target offence in the circumstances of the attempt can be committed by omission.*

3.66 *The Commission does not recommend the introduction of a new offence of criminal preparation.*

¹³⁵ For example, *R v Geddes* (1996) 160 JP 697.

¹³⁶ See Ormerod *Smith and Hogan, Criminal Law* (12th Ed Oxford University Press 2008) at 392, footnote 93, asking whether the Law Commission's response may be an overreaction to a small number of bad cases.

C The target of a criminal attempt: what can be criminally attempted?

3.67 This section addresses the question of which substantive offences can be criminally attempted.

(1) Consultation Paper analysis and recommendations on the target of a criminal attempt

3.68 Criminal attempts are entirely parasitic on substantive offences. A criminal attempt must always relate to a particular substantive offence. There is no offence of simply “attempt.” The Commission’s *Consultation Paper on Inchoate Offences* acknowledged this and addressed the question of stipulating which substantive offences can be criminally attempted. It explored the question of whether it is a criminal attempt to attempt summary offences as well as indictable offences, the question of attempt attaching to other inchoate offences, and issues of jurisdiction. The following provides the Commission’s final recommendations on these issues as well as addressing a number of additional issues, namely whether attempt can attach to secondary liability and attempting strict liability offences.

(2) Discussion: the target of a criminal attempt

(a) Attempting summary offences

3.69 It has been said that common law attempt liability is such that only indictable offences can be criminally attempted.¹³⁷ This means that attempting a mere summary offence is not criminalised. Legislative codification of attempt liability in England and Wales stipulated that all indictable offences triable in England and Wales can be criminally attempted and thus excluded attempt from attaching to summary offences.¹³⁸ The *Consultation Paper on Inchoate Offences* suggested that a provision stipulating which type of offences attempt can attach to would be useful for placing on a statutory footing attempt liability in Ireland, but refrained from expressing a provisional view on whether summary, as well as indictable, offences should be included.

3.70 In this Report the Commission expresses the view that the supposed common law position that it is not a criminal attempt to attempt summary offences should be not be recognised in legislation. The rationale of attempt liability – a rationale that draws on both on harm prevention goals and

¹³⁷ 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.

¹³⁸ *Criminal Attempts Act 1981*, section 1(4).

retributivism¹³⁹ – calls for criminalising attempting summary offences. Some significant, non-trivial offences are triable summarily only,¹⁴⁰ so restricting attempt to indictable offences would mean that no attempt charge can lie in respect of these offences. The Commission therefore recommends codification of a position whereby it is a criminal attempt to attempt to commit an offence, whether indictable or summary. For offences that are triable either way, whether the prosecution is summary or on indictment would follow which would be the case had the attempt been completed. Indeed, the leading case on attempt in Irish law, *The People (Attorney General) v Sullivan*,¹⁴¹ arose out of a case stated from a summary prosecution in the District Court for attempting to obtain money by false pretences, an offence for which the current equivalent¹⁴² can be tried summarily or on indictment. To implement this recommendation involves indicating in legislation that attempt can attach to any offence triable in the jurisdiction, omitting the restriction employed in section 1(4) of the *Criminal Attempts Act 1981* of England and Wales to *indictable* offences triable in the relevant jurisdiction.

(b) Attempting strict liability offences

3.71 Discussed below in this chapter is a perceived difficulty with attempt attaching to so-called strict liability offences and other offences that feature non-traditional culpability states such as negligence.¹⁴³ The Commission is of the view that attempts at strict liability offences should be criminal attempts. A person should not be able to escape attempt liability just because the relevant target offence happens to feature strict liability or negligence. The Commission accordingly does not recommend providing that attempt cannot attach to strict liability offences. Further defence of this view is provided below in the context of discussion of attempt culpability.¹⁴⁴

(c) Attempting inchoate offences

3.72 The Consultation Paper expressed a cautionary note on the practice of attaching inchoate offences to other inchoate offences. Such a practice might be called the construction of double inchoate liability. This can occur

¹³⁹ See above at paragraph 1.19.

¹⁴⁰ For example, public order offences such as obstruction.

¹⁴¹ [1964] IR 169.

¹⁴² Making gain or causing loss by deception, section 6, *Criminal Justice (Theft and Fraud Offences) Act 2001*.

¹⁴³ See below at paragraph 2.119.

¹⁴⁴ See below at paragraph 2.120.

where a substantive offence is inchoate in nature. An example is the offence of possession of a firearm without a licence. Is there an offence of attempting to possess a firearm? The issue of double inchoate liability can also arise where general inchoate offences attach to other general inchoate offences. A classic example of this at common law is an attempt to incite,¹⁴⁵ which can be charged where a communication (containing an incitement) fails to reach its intended recipient. Attempt to conspire was also recognised at common law.¹⁴⁶ In England and Wales the *Criminal Attempts Act 1981*¹⁴⁷ abolished attempt to conspire. A Supreme Court decision from Canada in 2006 confirms an earlier Canadian authority in holding that there is no crime in current Canadian law of attempting to conspire.¹⁴⁸ In conceiving examples of an attempt to conspire it turns out that incitement or attempted incitement would in many cases be established. An attempt to attempt would be an illogical construction because the requirement for an act that is more than mere preparation would not be satisfied; if one has merely attempted to attempt a crime one has not in law *attempted* that crime.

3.73 The *Consultation Paper on Inchoate Offences* analysed in some detail the potential for double inchoate liability to be constructed.¹⁴⁹ There are a number of important issues raised. The main problem is the uncertainty and the large judicial discretion regarding whether an inchoate offence can attach to another offence that is already inchoate in nature. As things stand, every offence created by the Oireachtas brings into existence ancillary offences of attempting it, conspiring to commit it, and inciting it. In many instances these may not actually be desired to come into existence and they would criminalise behaviour far removed from the central criminal harm. The Consultation Paper opined that a prominent codified general part outlining, among other things, the scope for relational inchoate offences to attach to special part offences will raise awareness of this potential for double inchoate liability. Accordingly, it could be stated more confidently that the Oireachtas in enacting any particular offence intends its ancillary inchoate offences also and that, if the legislature wishes to rule this out, it must do so expressly. This observation is not a solution to the problem, but rather places the significance of the problem in context.

¹⁴⁵ *R v Banks* (1873) 12 Cox CC 393.

¹⁴⁶ *R v De Kromme* (1892) 17 Cox CC 492.

¹⁴⁷ Section 1(4)(a).

¹⁴⁸ *R v Déry* [2006] SCC 53, affirming *R v Dungey* (1980) 51 CCC (2d) 86.

¹⁴⁹ Law Reform Commission *Consultation Paper on Inchoate Offences* ((LRC CP 48 – 2008) at paragraphs 2.113-2.121.

3.74 As the Consultation Paper outlined¹⁵⁰ care must be taken not to let inchoate liability build on top of inchoate liability to an excessive degree. There are many statutory offences that are inchoate in nature in that they can be committed despite no substantive harm having occurred.¹⁵¹ Prosecutors sensibly refrain from constructing charges such as attempt to incite the commission of endangerment (endangerment being a statutory offence that is inchoate in nature).¹⁵² A sensible rule of thumb could be that charges involving more than two inchoate offences should be avoided. Double inchoate liability may be acceptable at times, but triple inchoate liability and beyond is not.

3.75 In the context of attempt, as recognised above, attempt to attempt an offence is an illogical charge. It can be expressly ruled out in statute and, to this end, the Commission recommends provision being made to state that attempt liability cannot attach to an attempt offence.

(d) Attempt and secondary liability

3.76 Doctrines of complicity or secondary liability serve to render persons liable for crimes they did not themselves perform but to which they are connected in a certain sense. The formula for ascertaining whether they are connected to the crime, or complicit in the crime, in the requisite sense is whether they aided, abetted, counselled or procured the commission (or attempt)¹⁵³ of the crime.¹⁵⁴ Where secondary liability is like and unlike inchoate liability is outlined above.¹⁵⁵ The relevant question here is whether it is criminal to *attempt to aid, abet, counsel or procure a crime*?

¹⁵⁰ *Ibid.*

¹⁵¹ Possession of an offensive weapon in public, for example; there is no requirement for the weapon to have been brandished or to have caused alarm.

¹⁵² Section 13, *Non-Fatal Offences Against the Person Act 1997*.

¹⁵³ The conventional view is that section 2 of the *Criminal Law Act 1997* for the purposes of the Act defines “offence” as including its attempt and thus under section 7 aiding, abetting, counselling or procuring a crime that is attempted, as well as a crime that is completed, engages secondary liability. It is noted that section 7(1) of the 1997 Act refers to an “indictable offence” while section 2 of the same Act provides that an “arrestable offence” includes an attempt at such an offence.

¹⁵⁴ Section 7(1) *Criminal Law Act 1997*.

¹⁵⁵ See above at paragraph 1.09

3.77 The short answer to this question is that this is something that is not criminalised.¹⁵⁶ On the understanding that criminal attempt can only attach to a specific offence known to the law, attempt cannot attach to aiding, abetting, counselling or procuring a crime.¹⁵⁷ This is because aiding, abetting, counselling or procuring a crime is not in itself an offence. Rather, a person who does this may be liable for the specific crime which they were aiding or abetting. As section 7(1) of the *Criminal Law Act 1997* provides:

“Any 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.”

3.78 This analysis rules out attempt liability attaching to secondary liability. Note that this state of affairs whereby attempt cannot attach to secondary liability is contingent upon the law on complicity operating in the peculiar way it does, namely, rendering a secondary participant in a particular crime liable for the particular crime rather than for a distinct crime of being a secondary participant. As noted in Chapter 1, inchoate liability and secondary liability both perform the same broad function of extending criminal liability to those who do not actually satisfy the definition of an offence. But a difference in how the two doctrines operate is that inchoate liability creates ancillary offences (of attempting, inciting and conspiring to commit crimes) whereas secondary liability does not. This explains why inchoate offences may attach to other inchoate offences but not to instances of secondary liability.

3.79 An effort to counsel or procure a crime is likely to be an incitement (regardless of whether the crime is actually carried out). If the putative incitement fails to reach its target, a charge of attempt to incite may be available.¹⁵⁸ Incitements are, in essence, failed attempts to get another to commit a crime. For the most part, an incitement that is acted upon will render the person who made the incitement a secondary participant in the crime. Incitement and attempt share a common history.¹⁵⁹ The law on inchoate liability

¹⁵⁶ This analysis is informed by Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at paragraph 3.3 and Law Commission for England and Wales *Report on Participating in Crime* (No 305 2007) at paragraph 3.3

¹⁵⁷ Attempt may attach to the offence of aiding an abetting suicide contrary to section 2(2) of the *Criminal Law (Suicide) Act 1993* as this is an offence in itself that uses the same formula as used in secondary liability.

¹⁵⁸ *R v Banks* (1873) 12 Cox CC 393.

¹⁵⁹ *R v Higgins* (1801) 2 East 5 was treated as a case of attempt. Its facts – where the defendant tried to get a servant to steal a quantity of twist from his master –

could have developed differently; it could be the case that incitement as a mode of imposing inchoate liability does not exist and that all those instances of encouraging others to commit crimes are caught under attempt liability, specifically as attempts to counsel or procure a crime. So while the logic of attempt liability might point to covering attempts to procure crime, given the existence of incitement, there appears to be no pressing need for it to do so.

3.80 An attempt to aid or abet a crime, as distinct from aiding or abetting a crime, would involve a scenario where a person tries but fails to provide help in some way to the commission of a crime. Examples:

- i) A person, knowing a riot is to take place and wishing to supply materials such as bricks and stones to be used in the riot, mistakenly brings the bricks and stones to a location other than where the riot actually takes place.
- ii) A person lends their van to another believing it will be used to transport stolen goods; in fact, the van is used for an innocuous purpose.

3.81 These examples reveal gaps in criminal liability that may, or may not, be considered problematic. There has been substantial debate and indeed legislative action in England and Wales about the situation where assistance is provided for a would-be crime, as in the second example above, that is not in the end committed or attempted.¹⁶⁰ Incitement does not apply to this situation if the assistance cannot be seen as encouragement. Secondary liability does not apply because no substantive crime was committed (or attempted). This was perceived as a gap in liability. This is explored further in Chapter 4 on Incitement below; the present problem, as illustrated in the first example above, is different in that it involves a failed effort to provide assistance to a crime that is actually performed.

3.82 It is questionable whether this is a limitation of inchoate liability, and attempt specifically, that needs to be addressed. In many instances it may be possible to characterise the offending conduct as an attempt at the commission

show it to be an incitement and thus demonstrate how both an incitement and an attempt can be committed in a single instance. For another example of an act being possibly both an incitement and an attempt see *The People (Attorney General) v Thornton* [1952] IR 91.

¹⁶⁰ The Law Commission for England and Wales in Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) proposed a new offence of encouraging or assisting crime (strictly speaking, two offences with the same *actus reus* but different *mens rea*), which were enacted into law in England and Wales in the *Serious Crime Act 2007*.

of a substantive crime rather than as an attempt to assist the commission of a substantive crime, such is the plenitude of substantive offences. Thus, in the first example above, it may be possible to conceive the actor as having attempted to participate in a riot.¹⁶¹ The importance of not extending the scope of criminal liability unduly tends to restrain the altering of attempt liability so as to cover attempts to aid, abet, procure or counsel a crime. Changing the law in this area may lead to a greater problem than it solves. Furthermore, to alter attempt so that it can attach to secondary liability would be to fundamentally change the logic of the operation of attempt. In light of these considerations, the Commission does not recommend re-shaping the law so as to allow attempt to attach to secondary liability.

(e) Issues of Jurisdiction

3.83 The *Consultation Paper on Inchoate Offences* identified uncertainty at common law regarding attempting a crime that would actually take place outside the jurisdiction and also attempting from outside the jurisdiction to bring about a crime within the jurisdiction. The Consultation Paper provisionally recommended adopting, with the necessary modification, for criminal attempt the rules on cross-jurisdictional conspiracies as set out in section 71 of the *Criminal Justice Act 2006*. This would mean that attempt liability can apply in both scenarios envisaged above. Section 71(1)(b) of the 2006 Act indicates that where a conspiratorial agreement is made within Ireland to commit an offence elsewhere, that offence must be an offence in the country where it is intended to be committed and it must also be an offence in Ireland. Section 71(1)(b) accordingly aims to prevent the Irish criminal justice system prosecuting a person who was trying to commit elsewhere (that is, outside of Ireland) something which by Ireland's standards is not considered criminal, though it may be criminal elsewhere.

3.84 This approach to cross-jurisdictional attempts is defensible in principle and embodies the position that the common law was developing towards. Crucially the statutory provision introduces a welcome degree of certainty. Accordingly, the Commission makes final this recommendation.

(3) Report Recommendations on the target of a criminal attempt

3.85 *The Commission recommends that summary as well as indictable offences can be criminally attempted.*

3.86 *The Commission recommends that attempt should not be permitted to attach to another attempt, but should be permitted to attach to other inchoate offences.*

¹⁶¹ Contrary to section 14 of the *Criminal Justice (Public Order) Act 1994*.

3.87 *The Commission recommends that attempt be permitted to attach to offences that feature strict liability.*

3.88 *The Commission does not recommend altering attempt liability so that attempt can attach to secondary liability.*

3.89 *The Commission recommends providing for cross-jurisdictional attempts on the same basis as section 71 of the Criminal Justice Act 2006 provides for cross-jurisdictional conspiracy.*

D Attempt culpability

3.90 The culpability component of criminal attempt is particularly important. A criminal attempt may involve an objectively harmless act that is rendered criminal by a guilty mind. The mental part assumes paramount importance in criminal attempts. While substantive crimes can be understood as acts punishable because a guilty mind accompanied their performance, attempt crimes, in contrast, involve the presence of a guilty mind, which becomes punishable when acted upon to a certain extent.

(1) Consultation Paper analysis and provisional recommendations on attempt culpability

3.91 The Commission's *Consultation Paper on Inchoate Offences* identified how attempting is generally understood as purposive activity, this following from the ordinary understanding of attempting as *trying*. It has been the view of some courts and commentators that to have a legal definition to the effect that crimes can be attempted recklessly (as distinguished from intentionally) would be to give "attempt" a meaning in law that somewhat departs from the ordinary meaning of attempt. The Court of Criminal Appeal stated in *People (Attorney General) v Thornton* that a criminal attempt is an act done with "specific intent to commit a particular crime."¹⁶² This echoed other jurisdictions' courts' application of the common law.¹⁶³

3.92 This statement from the Court of Criminal Appeal implies that the culpability needed for a criminal attempt is intention and intention alone, this being so even where the substantive crime being attempted features culpability states other than intention. Numerous judicial decisions and criminal law textbooks endorse this suggestion. The Commission's *Consultation Paper on Inchoate Offences* provisionally recommended retention of this understanding,

¹⁶² [1952] IR 91, 93.

¹⁶³ *R v Schofield* [1784] Cald 397; *R v Whybrow* [1951] 35 Cr App R 141; *R v Grimwood* [1962] 2 QB 621; *R v Mohan* [1976] QB 1; *R v Logan* [1990] 2 SCR 731.

that is, the general view that attempts are committed intentionally, not recklessly or otherwise.¹⁶⁴

3.93 In the course of the consultation process leading to this Report, the Commission received submissions and views which have led it to review the provisional recommendation in the Consultation Paper and to conclude that a different approach should be adopted and recommended. The problem with the specific intent approach is that it can result in under-criminalisation. Additionally, in addressing this problem the law tends to become unhelpfully complex. The under-criminalisation problem has arisen in practice in England and Wales in the context of attempted rape: the specific intent approach apparently requires a putative rapist to specifically intend non-consensual sex in order to incur liability for attempted rape even though the requisite culpability for the substantive offence of rape is intention to engage in sexual intercourse intending, or being reckless as to, the absence of consent.¹⁶⁵ The English Court of Appeal in *R v Khan*¹⁶⁶ provided a solution to this problem whereby for attempted rape, recklessness, instead of intent, may suffice in respect of the circumstance element of non-consent. This allowed for conviction for attempted rape of the person who tried to engage in sexual intercourse (where consent was not forthcoming) intending sexual intercourse but being merely reckless as to whether consent was present.

3.94 This approach of the English Court of Appeal in *Khan* is unsatisfactory because it requires *ad hoc* solutions whereby a new culpability scheme is worked out for individual substantive offences as the need arises. Alternatively, the *Khan* approach requires a general culpability scheme for attempt that is excessively complex. It is complex because it must stipulate the framework for attempt culpability that, for the most part, insists on intention and may require elevation of culpability, yet in some instances does not require such elevation.

3.95 The Commission is impressed by an approach that has the merit of simplicity while also avoiding the under-criminalisation problem. This approach – the one that this Report recommends – requires the culpability for an attempt offence to track that of the target substantive offence.

¹⁶⁴ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP-48 2008) at paragraphs 2.86-2.99.

¹⁶⁵ As the law was in England and Wales prior to 2003, and as it still is in Ireland under the *Criminal Law (Rape) Act 1981*, as amended by the *Criminal Law (Rape) (Amendment) Act 1990*.

¹⁶⁶ [1990] 1 WLR 813.

(2) Discussion: Attempt culpability

3.96 This section analyses how attempt culpability relates to the culpability requirements of substantive offences. The recommended approach endeavours to provide a simple solution to this difficult area of criminal law. The recommended approach, in sum, says that the culpability requirements of an attempt offence track the culpability requirements of the target substantive offence. Not all of the objective elements of a substantive offence must be present for the ancillary attempt offence,¹⁶⁷ but culpability requirements in respect of all of the objective elements must nonetheless be present.

3.97 This attempt culpability connects, crucially, with the attempt act. The objective part of a criminal attempt is the act or acts performed that are proximate to the completion of the objective part of the target offence. The fault part of a criminal attempt is the culpability specified in the definition of the target offence. The objective part of an attempt and the fault part of an attempt interact in the following way: in performing the proximate act the person acts with the culpability needed for the target offence to which the attempt relates.

(a) Two problematic examples: attempted rape and attempted murder

3.98 To illustrate the Commission's proposed framework, instances of attempt liability that have given rise to difficulty will be discussed. These instances are attempted rape and attempted murder. The following discussion reveals complexity and confusion in the existing law and the Commission's proposed framework aims to avoid such problematic aspects by proposing the simple approach that attempt culpability track the target offence culpability. Without making an exception to this culpability scheme, but by means of an interpretive stipulation that will apply in respect of all three general inchoate offences when they attach to murder, the culpability for attempted murder will not be the same as that of murder.

(i) The Khan case and attempted rape

3.99 The English case *R v Khan*¹⁶⁸ involved the rape of a 16 year old girl. The defendants at trial were seven young men, three of whom had successfully engaged in sexual intercourse with the girl, the other four trying but failing to engage in sexual intercourse with the girl. The girl had not consented to this conduct. The defendants who had successfully engaged in sexual intercourse

¹⁶⁷ For example, in a case of attempted murder, the requisite result element for murder that the death of human being has been caused will not, by definition, fall to be proved against the defendant.

¹⁶⁸ [1990] 1 WLR 813.

were convicted of rape;¹⁶⁹ those who had failed were convicted of attempted rape. The trial judge had directed the jury such that the culpability for attempted rape was the same as for rape: that is, the requirement that the accused knew the victim was not consenting or was reckless as to whether the victim was consenting.

3.100 On appeal against the attempted rape convictions, it was argued that “recklessness as a state of mind on the part of the offender has no place in the offence of attempted rape.”¹⁷⁰ The English Court of Appeal rejected this argument. The Court held that the trial judge’s direction was sound, stating:

“[T]he intent of the defendant is precisely the same in rape and in attempted rape and the *mens rea* is identical, namely, an intention to have intercourse plus a knowledge of or recklessness as to the woman’s absence of consent.”¹⁷¹

3.101 This finding of the English Court of Appeal in *Khan* was not entirely novel. Previously, the Court of Appeal in *R v Pigg*¹⁷² had approved of a similar direction to the jury to the effect that the *mens rea* for attempted rape was the same as for rape. The importance of *Khan*, however, lies in the fact that the Court was applying section 1 of the UK *Criminal Attempts Act 1981*, which provides that a criminal attempt is committed “with intent to commit an offence.” The Court explained how “recklessness” could feature in the *mens rea* of an attempt offence with the following:

“In our judgment, however, the words ‘with intent to commit an offence’ to be found in section 1 of the Act of 1981 mean, when applied to rape, ‘with intent to have sexual intercourse with a woman in circumstances where she does not consent and the defendant knows or could not care less about her absence of consent.’ The only ‘intent,’ giving that word its natural and ordinary meaning, of the rapist is to have sexual intercourse. He commits the offence because of the circumstances in which he manifests that intent -- i.e. when the woman is not consenting and he either knows it or could not care less about the absence of consent.”¹⁷³

¹⁶⁹ Rape as then defined in section 1(1) of the *Sexual Offences (Amendment) Act 1976* of England and Wales.

¹⁷⁰ [1990] 1 WLR 813, 816.

¹⁷¹ *R v Khan* [1990] 1 WLR 813, 819.

¹⁷² [1982] 1 WLR 762.

¹⁷³ *R v Khan* [1990] 1 WLR 813, 819

There is a crucial distinction employed here between the culpability in respect of sexual intercourse and the culpability in respect of the accused's awareness of the victim's consent. It seems the result reached by the Court in *Khan* could be more efficiently pursued by omitting from the statutory definition of attempt the clause to the effect that a criminal attempt is committed "with intent to commit an offence." Jettisoning this clause would obviate the need to rationalise how recklessness may feature in attempt culpability when statute speaks only of intent. Accordingly, attempt should be defined such that culpability required for the ancillary attempt offence corresponds to that required for the target substantive offence. This allows the sensible result reached in *Khan* to be reached with certainty and without the unnecessary complication of distinguishing between objective elements to ascertain in respect of which an elevation of culpability may be needed when formulating the ancillary attempt offence.

(ii) *The problem of attempted murder*

3.102 The Commission's proposal that attempt culpability track target offence culpability is suggested to apply across the board. However, in respect of the construction of attempted murder the Commission suggests a particular stipulation which will mean that although the fault element for attempted murder is to be constructed as for any other attempt offence, the result will be that the fault element for attempted murder is not the same as the fault element for murder. The fault element for murder is intention to kill or intention to cause serious injury.¹⁷⁴ However, for the purposes of attempted murder culpability this should be understood just as intention to kill. This stipulation is proposed in order to see off the possibility of a person who intended to cause serious injury, but not to kill and who came close to causing death, being convicted of attempted murder. Such a person is not accurately labelled as attempting to kill; the offence of causing serious harm¹⁷⁵ may apply more appropriately to such a case.¹⁷⁶

3.103 The following paragraphs will identify the problems and different approaches to attempted murder *mens rea*. The relevant arguments in the debate about what attempted murder *mens rea* ought to be are set out as well

¹⁷⁴ Section 4(1), *Criminal Justice Act 1964*.

¹⁷⁵ Section 4, *Non Fatal Offences Against the Person Act 1997*.

¹⁷⁶ Depending on whether death was close in the sense that serious injury was caused. It would of course be possible to commit an act proximate to causing death which leaves no injury, for example, a gun shot that does not hit any person.

as the reasons for Commission's conclusion that attempted murder *mens rea* should be restricted to an intention to kill.

3.104 In *The People (DPP) v Douglas and Hayes*¹⁷⁷ the defendant had been convicted of shooting with intent to murder contrary to section 14 of the *Offences Against the Person Act 1861*.¹⁷⁸ The defendant 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 the appropriate offence and, on this basis, the section 14 offence, which did not require shots to actually hit a person, could be established. The Court of Criminal Appeal rejected this reasoning and overturned the conviction.

3.105 *Douglas and Hayes* was not, strictly speaking, a case about attempted murder – it was about the specific offence in the 1861 Act – but it nonetheless indicates, via *obiter dictum*, the approach of the Irish courts to culpability for attempted murder. In *Douglas and Hayes* it is clear that the trial judge misapplied the statutory offence of shooting with intent to murder. The offence required an ulterior intent to commit murder; the trial judge said reckless disregard of the risk of killing sufficed. The Court of Criminal Appeal's decision in *Douglas and Hayes* corrects this misinterpretation. In reaching its decision the Court expressly approved the approach taken in *R v Whybrow*,¹⁷⁹ which is authority for the proposition that performing an act capable of causing death with intent to cause no more than serious injury is murder if it results in death, but not attempted murder if death does not result.

3.106 The English Court of Criminal Appeal in *R v Whybrow* stated:

“In murder the jury is told--and it has always been the law--that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another,

¹⁷⁷ [1985] ILRM 25, approving *R v Whybrow* (1951) 35 Cr App R 141 and *R v Mohan* [1976] QB 1.

¹⁷⁸ Section 14 of the 1861 Act provided: “Whosoever ... shall shoot at any person ... with intent ... to commit murder, shall whether any bodily injury be effected or not, be guilty of a felony...” This provision was repealed by the *Criminal Law Act 1997*. This section 14 offence may be described as a specific inchoate offence. It captures a specific instance of crime that could be covered in any event by the principles of general attempt liability given the existence of the substantive offence of murder.

¹⁷⁹ (1951) 35 Cr App R 141.

inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm.”¹⁸⁰

This passage explicitly acknowledges the Court's view that there is a significant difference between culpability for murder and culpability for attempted murder and makes some effort to rationalise this difference. This passage from *Whybrow* has been endorsed numerous times subsequently for attempt liability generally, not just attempted murder.¹⁸¹

3.107 The *Whybrow* approach to culpability for attempted murder is by no means universally accepted as an interpretation of the common law. The leading Scots authority, *Cawthorne v HM Advocate*,¹⁸² holds, contrary to the position in *Whybrow*, that culpability sufficient for the target offence is sufficient for an attempt at that offence. In this case the defendant had been convicted of attempted murder when he fired shots from a rifle into a room into which four people had retreated. The High Court of Justiciary upheld the conviction where the jury had been instructed that the culpability was the same for attempted murder as for murder. The Lord Justice-General, purporting to state the common law,¹⁸³ stated:

“[A]ttempted murder is just the same as murder in the eyes of our law, but for the one vital distinction, that the killing has not been

¹⁸⁰ (1951) 35 Cr App R 141, 146-147.

¹⁸¹ *R v Grimwood* [1962] 2 QB 621; *R v Mohan* [1976] QB 1.

¹⁸² 1968 JC 32.

¹⁸³ *Cawthorne v HM Advocate* 1968 JC 32, 35.

brought off and the victim of the attack has escaped with his life. But there must be in each case the same *mens rea*...”¹⁸⁴

3.108 This Scots law approach was implicitly rejected by the Court of Criminal Appeal in *Douglas and Hayes*. The Canadian courts formerly¹⁸⁵ favoured the same approach as Scots law, but now¹⁸⁶ endorse the same position as in *Whybrow*. In both *Whybrow* and *Douglas and Hayes* the courts acknowledge that it is somewhat illogical and anomalous for the law to be such that killing with intent to cause serious injury is murder but coming close to killing with intent to cause serious injury is not attempted murder.

(I) *Arguments in favour of attempted murder mens rea including intention to cause serious injury*

3.109 As pointed out in the *Consultation Paper on Inchoate Offences*, general principles of criminal liability should not be unduly skewed in an effort to rationalise their application in the context of murder.¹⁸⁷ That murder can be committed with intent to cause serious injury, as distinguished from intent to kill, has been observed to be problematic in terms of the accurate labelling of wrongdoing, as well as violating the principle that *mens rea* correspond to *actus reus* elements.¹⁸⁸ It is, nevertheless, an established part of the law on murder and is enacted in Ireland in section 4(1) of the *Criminal Justice Act 1964*. In a case on common design in 2008 Lord Bingham in the UK House of Lords stated that for better or worse the law on murder is based on the principle that intending serious injury is sufficient *mens rea* and it is not for the doctrine of secondary liability to subvert that principle by requiring specifically an intent to kill on the part of a participant in a common design in order to find them guilty of murder.¹⁸⁹

3.110 The same could be said about inchoate liability; it is not for attempted murder to jettison the serious injury mode of *mens rea* when this is firmly part of the substantive definition of murder. Furthermore, the Commission has recently

¹⁸⁴ *Ibid* at 36.

¹⁸⁵ *Lajoie v R* [1974] SCR 399.

¹⁸⁶ *Ancio* (1984) 39 CR (3d) 1.

¹⁸⁷ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 2.98.

¹⁸⁸ *Attorney General's Reference (No 3 of 1994)* [1998] 1 Cr App R 91, per Lord Mustill; Lord Goff “The Mental Element in the Crime of Murder” (1988) 104 LQR 30, 48.

¹⁸⁹ *R v Rahman* [2008] UKHL 45, [25].

analysed whether intent to cause serious injury should continue to suffice as *mens rea* for murder and concluded that the weight of argument indicated it should continue to suffice.¹⁹⁰ In terms of moral culpability, given the fragility of the human body, the intentional infliction of serious injury is on a par with intentional killing. This consideration, as well as the pragmatic consideration of avoiding unmeritorious acquittals through a failure to establish beyond reasonable doubt a specific intention to kill, point towards retention of this feature of murder *mens rea*.¹⁹¹

3.111 It may be suggested that to label a person who came close to causing death, intending serious injury only, as guilty of attempted murder is to provide less than fully accurate labelling. If this is so, then it is true of completed murders also; and for the reasons cited in the preceding paragraph, this is something which, on balance, should be accepted. It may additionally be suggested that this strains the notion of attempt, which is associated with the notion of *trying*. The attempted murder label does not correspond entirely well with what the person was *trying* to achieve. This may be so, but the contours of criminal liability do not, and should not, have to cohere at all times with ordinary understanding of the words used. For example, the meaning of “recklessness” in criminal law should be what is most defensible on grounds of principle and policy, not what happens to correspond best with linguistic usage in a community. The reality is that “attempt” in the context of criminal attempt has a technical meaning and does not correspond to ordinary usage.¹⁹² Thus, the argument from ordinary usage has a quite limited pull when it comes to debating options for the definition of criminal attempt.¹⁹³ Finally, there may well be a sense in which attempted murder, as understood in *Whybrow* and *Douglas and Hayes*, is under-inclusive. There may be cases that morally deserve to be classed as attempted murders, whether they would constitute the offence of

¹⁹⁰ Law Reform Commission *Report on Homicide* (LRC 87 – 2008) at paragraphs 2.60-2.67 and 3.78.

¹⁹¹ *Ibid* at paragraph 2.66.

¹⁹² See Chiao “Intention and Attempt” (2010) *Criminal Law and Philosophy* 37, at 39-40, for a strong statement on how the meaning of the word attempt should not decide the question of the appropriate ambit of criminalisation.

¹⁹³ As acknowledged in Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.94-2.95.

causing serious harm¹⁹⁴ or not, because they involve essentially *murderous* conduct.¹⁹⁵

(II) *Arguments against attempted murder mens rea including intention to cause serious injury*

3.112 The chief reason for restricting attempted murder *mens rea* to intention to kill is the principle of fair labelling. The offence applied should faithfully describe and differentiate the wrong committed. Attempted murder should apply to those who tried to kill but did not succeed. The person who, at most, wanted to bring about serious injury did not try to kill. Furthermore, there is an apt offence available to those who intend to bring about serious injury short of death and do so. This is the substantive offence of causing serious harm¹⁹⁶ and thus there is also the ancillary attempt offence relating to it. If attempted murder *mens rea* were to include intent to cause serious harm, then there would be very substantial overlap between attempted murder and the substantive offence of causing serious harm as well as its ancillary attempt offence. Indeed, insofar as the causing of serious harm or injury is proximate to the causing of death,¹⁹⁷ an expansive attempted murder *mens rea* would serve to subsume much of the causing serious harm offence – if the prosecutor can prove the offence of causing serious harm they can, in many cases (but not all),¹⁹⁸ probably also prove attempted murder.

3.113 As to the point made above about how inchoate liability should not be skewed to accommodate murder, the elegance of the proposed approach is that it does not skew the general operation of attempt offences in tracking the

¹⁹⁴ *Non-Fatal Offences Against the Person Act 1997*, section 4.

¹⁹⁵ See Feinberg “Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It” (1995) 37 *Ariz L Rev* 117 for arguments about the parity of blameworthiness of murderous conduct which results in loss of life and that which does not.

¹⁹⁶ *Non-Fatal Offences Against the Person Act 1997*, section 4.

¹⁹⁷ Serious harm is defined in section 1 of the *Non-Fatal Offences Against the Person Act 1997* as “injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.”

¹⁹⁸ Since recklessness, as well as intention, as to the causing of serious harm suffices as *mens rea* for the offence of causing serious harm, there would be a range of occasions captured by the causing serious harm offence but not by attempted murder. Section 4(1), *Non-Fatal Offences Against the Person Act 1997*.

culpability of the target offence. Attempted murder, like every other attempt offence, takes its fault element from the substantive offence to which it relates. It is just that in the case of murder, for the purpose of constructing its ancillary attempt offence, because of statutory stipulation, the fault element is to be understood as an intention to kill. The need to have a different result when it comes to murder has been accommodated without changing or complicating the general approach to attempt offence culpability.

3.114 In respect of Lord Bingham's comments¹⁹⁹ to the effect that it is not for doctrines such as complicity to subvert the peculiar operation of murder *mens rea*, it can be noted that these comments apply to judicial modification of the law, not the legislative modification that the Commission envisages and as such Lord Bingham's comments do not carry the same force. As to the points about moral culpability of those who engage in murderous conduct though they did not intend death, it can be pointed out that the offence of causing serious harm carries a potential sentence of life imprisonment.²⁰⁰

3.115 On balance, the Commission considers attempted murder *mens rea* is most appropriately restricted to intention to kill and this is why it includes in the draft Bill on Inchoate Offences a distinct stipulation that murder *mens rea* be taken as only an intention to kill for the purposes of constructing the ancillary offence of attempted murder.

3.116 By the same considerations the Commission is of the opinion that conspiracy to murder *mens rea* and incitement to murder *mens rea* should be restricted to intention to kill. Accordingly it can be recommended that in respect of constructing all three inchoate offences when they relate to murder that murder *mens rea* be taken as restricted to intention to cause death.

(b) *How the objective part of an attempt connects with its fault element – “acting with the fault element required for the offence”*

3.117 It almost goes without saying that the act (or omission, where relevant) that constitutes the objective part of a criminal attempt must be a voluntary act. The would-be vandal who has set out to damage another's property – harbouring an intention to do so and thus possessing the requisite culpability for the substantive offence of criminal damage – who is pushed and in falling *nearly* damages the paintwork on a car does not commit attempted criminal damage despite the apparent presence of both the objective part of the attempt offence (proximity to the completion of the target offence) and the requisite culpability. The point is that the person must be *acting with* the

¹⁹⁹ *R v Rahman* [2008] UKHL 45, [25].

²⁰⁰ *Non-Fatal Offences Against the Person Act 1997*, section 4(2).

requisite fault element in performing the objective part of the attempt offence. In this example, the would-be vandal when falling is not the author of his or her own actions. The definition of criminal attempt which the Commission will recommend in this Report embodies this idea that the *mens rea* for the relevant attempt will not only co-exist in time but will also inform the act or acts that constitute the objective part of the attempt at a crime.

(c) Culpability for an attempt compared to culpability for its target offence

3.118 The approach that allows attempt culpability to track the target offence culpability, and thus does not require elevation of culpability states for attempt, has the merit of simplicity. The Commission's *Consultation Paper on Inchoate Offences* did not provisionally recommend changing Irish law to adopt this approach for the chief reason that it departs somewhat from the commonly understood notion of "attempting" and attempting crime specifically.²⁰¹ That is, the notion of attempt as the typically intentional activity of *trying*. In the course of the consultation process leading to this Report, the Commission received mixed views on its provisional position, some in support and some which questioned the provisional position taken in the Consultation Paper. Taking these views into account, the Commission has analysed this issue again and has concluded that it should recommend that the culpability states required for an attempt are the same as for the offence being attempted. The discussion of attempted murder and attempted rape above suggests that appropriate criminalisation in respect of rape and murder and their ancillary attempts can be achieved in this way.

3.119 There is much uncertainty in the existing law on attempt in Ireland. This Report's proposal would bring a degree of clarity and certainty and therefore pursue the principles associated with codification of criminal law. It would require a degree of departure from the Court of Criminal Appeal's statement that an attempt is committed with "specific intent to commit a particular crime."²⁰² It would not conflict with the central holding of *The People (DPP) v Douglas and Hayes* nor would it conflict with the *obiter* comments of the English Court of Appeal in relation to attempted murder.²⁰³ The proposed approach can be communicated concisely by stating that in an attempt the defendant must act with the culpability required for the crime being attempted.

²⁰¹ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at 48-53.

²⁰² *The People (Attorney General) v Thornton* [1952] IR 91, 93.

²⁰³ [1985] ILRM 25, approving *R v Whybrow* (1951) 35 Cr App R 141 and *R v Mohan* [1976] QB 1.

(i) On attempting crimes that feature non-traditional forms of mens rea

3.120 Non-traditional forms of *mens rea* in this context refers to culpability states that are distinct from intention, knowledge, and recklessness. Some offences do not require proof of traditional *mens rea* in respect of certain of their objective elements; liability for certain individual objective elements of the offence may be strict or a standard of negligence, as distinct from recklessness, may suffice for the prosecution to establish. The question arises whether the tracking principle should equally apply in respect of attempt attaching to these types of offences, for it may be thought that some sort of elevation of culpability is needed when constructing an attempt at an offence with lesser fault requirements.

3.121 It can be suggested, however, that it is not for attempt doctrine to change or second guess the appropriate *mens rea* in areas where the legislature has opted for the use of strict liability or negligence. The lessening of *mens rea* requirements involves a choice to allow for the causing of harm or risking of harm to be penalised in the absence of serious culpability. Attempt liability using the tracking principle merely carries through this choice, and because an attempt, by definition, will have come close to the prohibited harm, such harm has been *risks*. Consider an example where a person is caught on the verge of tipping pollutants into a river. If the material had entered the water, prosecution of this person would not require proof that he or she knew or should have known the material was harmful to fish life.²⁰⁴ If this is acceptable and correct²⁰⁵ then so too it is in respect of a prosecution for attempted river pollution. The logic and rationale of a strict river pollution offence, that of providing extra incentive to operators to avoid causing pollution and facilitating efficient regulatory enforcement,²⁰⁶ is pursued in respect of the attempt offence also. Finally and importantly, for attempt liability to build in a method of introducing *mens rea* for attempts at strict liability offences would create an excessively complex scheme.

²⁰⁴ The relevant offence is set out in section 171(1)(b) of the *Fisheries (Consolidation) Act 1959*. Its application was analysed by the High Court in *Maguire v Shannon Regional Fisheries* [1994] 3 IR 580.

²⁰⁵ The river pollution offence was recognised as constitutionally valid by the Supreme Court in *Shannon Regional Fisheries v Cavan County Council* [1996] 3 IR 267.

²⁰⁶ See the comments of Lynch J in *Maguire v Shannon Regional Fisheries* [1994] 3 IR 580, 589.

3.122 In maintaining a neat attempt culpability scheme and respecting the rationale of relaxation of culpability requirements in substantive offences it is recommended that attempt liability can attach to so-called strict offences without any modification or introduction of *mens rea*; the tracking principle that is at the heart of the Commission's proposed attempted culpability scheme should apply.

(3) Report recommendations on attempt culpability

3.123 *The Commission recommends that the culpability for attempting a substantive offence ought to track the culpability for that target substantive offence.*

3.124 *The Commission recommends that for the purpose of identifying the fault element for attempted murder the fault element of murder should be taken as an intention to kill. This recommendation applies also in respect of conspiracy to murder and incitement to murder.*

E Criminal Attempt and Impossibility

3.125 The *Consultation Paper on Inchoate Offences* observed that there has been much confusion in common law whether attempt liability may apply where it was impossible in the circumstances for a person to complete the substantive offence he or she was apparently attempting. In the UK, the House of Lords held in the 1970s that factual impossibility precludes attempt liability at common law.²⁰⁷ Thus, the would-be thief who is caught trying to break into a safe which, unknown to him or her, is in fact empty cannot be guilty of attempted theft. As identified above, Ireland's law on attempt is still mostly based in common law. There would at least be an arguable case, therefore, on the basis of the opinion of the UK House of Lords that an impossible attempt is not criminal. This, however, conflicts with a relevant Irish authority. The Supreme Court's decision in *The People (Attorney General) v Sullivan*²⁰⁸ indicates that impossibility is not a defence to a charge of attempt in Irish law.

(1) Legal impossibility and factual impossibility

3.126 There has been little doubt that so-called legal impossibility precludes attempt liability. This refers to where a person has attempted or done something which is not actually criminal though the person believes it is. In *R v Taaffe*²⁰⁹ the defendant had brought sealed packages into England believing them to contain currency and believing that importing currency was a crime. As

²⁰⁷ *Haughton v Smith* [1975] AC 476.

²⁰⁸ [1964] IR 169.

²⁰⁹ [1983] 1 WLR 627.

a matter of law, importing currency 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 performed or attempted the definition of a criminal attempt will not be satisfied.

3.127 The Consultation Paper suggested that the concept of impossibility is neither necessary nor helpful in arriving at the conclusion that attempting or “committing” an imaginary crime is not criminal.²¹⁰ To extrapolate from the position that imaginary crimes cannot be criminally attempted that impossibility is (at least sometimes) a defence to an attempt charge is misleading. Better to think of the imaginary crime scenario as one where the definition of criminal attempt simply cannot be satisfied in the first place for want of an essential ingredient of a criminal attempt, namely, that a valid offence in law is the target of the attempt.

3.128 There has been some conflict in case law and academic writing regarding factual impossibility. Factual impossibility refers to where the facts are such that the particular offence being “attempted” could not possibly have been completed. It was noted in the *Consultation Paper on Inchoate Offences* how judicial opinions vary regarding whether the person who tries to pickpocket an empty pocket (not knowing it is empty) has attempted larceny (theft) despite it being impossible to complete a theft in this situation.²¹¹²¹² The assessment of factual impossibility depends greatly on how the facts are characterised. On one view, every attempt – which was not completed for reasons external to the will of the actor – can be called a factually impossible attempt, because looking back on it, circumstances were such that it could not be completed.²¹³

(2) The Sullivan case and impossible attempts

3.129 In the leading Irish case on criminal attempt, *The People (Attorney General) v Sullivan*, Walsh J’s majority opinion clearly viewed factual

²¹⁰ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 2.130.

²¹¹ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 2.129.

²¹² Contrast *R v Brown* (1889) 24 QBD 357 and *R v Ring* (1892) 17 Cox CC 491 with *R v Collins* (1864) 9 Cox CC 497.

²¹³ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 2.148, which was informed by insights provided Dr Bebhinn Donnelly-Lazarov in a paper subsequently published as Donnelly “Possibility, Impossibility and Extraordinariness in Attempts” (2010) 23 Canadian Journal of Law and Jurisprudence 47.

impossibility as not barring attempt liability. The defendant mid-wife had been charged with attempting to obtain money by false pretences, but would gain the money only if her submitted reports of births attended exceeded 25 in the relevant contract year. Absent evidence of how many birth reports had actually been submitted, the Court assumed in the defendant's favour that she was below 25 birth reports at the relevant time. Therefore, there was the potential for it to be the case that that the defendant could not have actually succeeded in obtaining underserved pay as she may have been well short of the of point she had to reach with too little time to do so. Regarding the defendant's chances of ultimately receiving extra pay Walsh J stated:

“Even, however, if that should have proved impossible in the event, it is, I think not a matter material to the discussion of this point because it has been well established in various cases that the ultimate impossibility of achieving or carrying out the crime attempted is not a defence to a charge of an attempt.”²¹⁴

3.130 This judgment pre-dates the decision of the UK House of Lords in 1975, in *Haughton v Smith* where it held, taking a view contrary to what the relevant cases up to then had established, that a factually impossible attempt was not a criminal attempt. The Commission notes that *Haughton v Smith* is a much criticised decision. While in the *Sullivan* case Walsh J did not cite authority directly when delivering the statement quoted above, elsewhere he implies, in drawing on the English case *R v White*,²¹⁵ that impossibility does not bar attempt liability. In *White* the defendant had put cyanide in his mother's wine, but it was a quantity insufficient to kill. The English Court of Criminal Appeal considered that it would be attempted murder for the defendant to place this cyanide believing, mistakenly, it was sufficient to kill.²¹⁶ Likewise Walsh J suggested that even if the defendant in *Sullivan* had mistakenly believed that the false reports she submitted would directly result in extra pay, her liability would not change.²¹⁷

(3) Why impossibility should not preclude attempt liability

3.131 The *Consultation Paper on Inchoate Offences* favoured the view that the person who tries to break into a safe believing it contains valuable items is

²¹⁴ [1964] IR 169, 196.

²¹⁵ [1924] 2 KB 124.

²¹⁶ *Ibid* at 130.

²¹⁷ [1964] IR 169, 199.

indeed attempting to commit theft regardless of whether in fact the safe contains valuable items.²¹⁸

3.132 In terms of subjectivism and objectivism, the Consultation Paper favoured the subjectivist-leaning position that impossibility should not be a defence. A distinction between *what is attempted* and *what is done in an attempt* was used to base an argument that the subjectivist-leaning assessment is the appropriate perspective for assessing criminal attempts.²¹⁹ An enquiry into attempt liability is concerned with what was attempted, not with what was done in an attempt. This focus is demanded by the reason for having attempt liability in the first place. Criminalising attempts reflects a subjectivist impulse to base liability on subjective fault rather than purely on objective harm. Criminal attempts can be entirely harmless, yet they are still punished on the basis of the failed criminal actor's moral equivalence with the successful criminal actor. In assessing for attempt it is key to note that an actor's attempt is fixed by the actor; what actually happens in the attempt cannot retrospectively change it. Nor can interpretations of what the actor was doing contrary to his or her own.²²⁰

3.133 A question remains as to what way to import this position into a statutory provision on attempt. Ideally, there would not need to be explicit mention that impossibility cannot bar attempt liability. It is true that the views expressed in the Irish *Sullivan* case (1964) that impossibility *does not* preclude attempt liability predates the UK House of Lords' conclusion in *Haughton* that impossibility *does* preclude attempt liability (1975).²²¹ Given that the *Haughton* decision has been much criticised, it is unlikely to be followed in Ireland, but nonetheless the Commission considers that it would be prudent to include a provision on this to avoid any doubt on the point. Accordingly, the Commission recommends that explicit recognition be provided that factual impossibility does not preclude attempt liability. This recommendation is repeated in respect of conspiracy (Chapter 3) and incitement (Chapter 4) below. Accordingly in the Draft Bill appended to this Report this recommendation is implemented by one clause stating that factual impossibility does not preclude liability in respect of attempt, conspiracy or incitement.

²¹⁸ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.150-2.152.

²¹⁹ Donnelly "Possibility, Impossibility and Extraordinariness in Attempts" (2010) 23 *Canadian Journal of Law and Jurisprudence* 47.

²²⁰ Donnelly "Possibility, Impossibility and Extraordinariness in Attempts," (2010) 23 *Canadian Journal of Law and Jurisprudence* 47.

²²¹ *Haughton v Smith* [1975] AC 476.

(4) Report recommendation on attempt and impossibility

3.134 *The Commission recommends that factual impossibility not preclude liability for criminal attempt. This should be stated in statute for the avoidance of doubt.*

F Abandoned attempts

3.135 A question arises as to the liability of a person who is trying to commit a crime but then has a change of heart and desists. Should she escape attempt liability even though her actions had crossed the threshold of attempt? The common law position is clear that abandonment is not a defence. Civil law jurisdictions allow it as a limited defence, as does the Model Penal Code. The *Consultation Paper on Inchoate Offences* set out the arguments for and against the defence, and invited submissions.²²² To enact an abandonment defence would be to make a significant change to the existing law. In this regard, it could be expected for the arguments in favour of its introduction to be compelling. This is not the case, however, since the main reason for the defence - to give would-be offenders an incentive to cease their effort towards a crime - seems unrealistic and potentially self-defeating.

(1) The Sullivan case and abandoned attempts

3.136 Walsh J's judgment in *The People (Attorney General) v Sullivan* provides the same level of guidance as to the position in Irish law on abandonment as it does in relation to impossibility. That is, *obiter dictum* indicates a clear view that abandonment, like impossibility, is not a defence to criminal attempt. In explaining that attempt liability could still be imposed on the defendant mid-wife even if the false birth reports she had submitted would not, without further reports, result in extra pay, Walsh J stated:

“It might also be suggested that even assuming that she had the criminal intent she might have changed her mind and not gone ahead with the plan some time before the twenty-sixth case was reached. That again, in my opinion, is not a consideration to be taken into account in examining this charge, and indeed there is authority for holding that even if there were evidence that she had in fact changed her mind it would not amount to a defence because the offence charged is that of having the intent at the time the act constituting the

²²² Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.157-2.163.

attempt is carried out. That cannot be answered by evidence of a subsequent abandonment of the intent.”²²³

In this passage there is a very clear view that there is no defence of abandonment in Irish law. Unlike in the case of impossibility, interpretations of the common law as regards abandonment are quite consistent in saying it is not a defence.

(2) *The case for and against introducing a defence of abandonment*

3.137 The *Consultation Paper on Inchoate Offences* discussed arguments for and against a defence of abandonment as well as the features of the defence where it exists.²²⁴ The defence is at its most plausible where it is set up as a defence available for preventing crime as distinguished from merely abandoning crime. Thus, in the case where an actor has done all he or she needs to do to bring about a crime, but still has it within their power to prevent the crime being completed, a defence of abandonment might provide an incentive to do so. This claim still suffers from the unrealistic supposition that the actions of a person in this situation could really be affected by consideration of the law. It is already the case that completed crimes are much more likely to result in criminal sanction than mere attempts. Therefore, there is already an incentive to abandon or prevent crimes for which a person would be responsible; could an abandonment defence make this incentive stronger? This is a difficult question to answer with confidence.

3.138 Given that the case for introducing abandonment is not very compelling the Commission in this Report refrains from recommending provision for it in the context of codification of attempt liability. In the absence of specific provision for abandonment, it should be clear that the defence is unavailable. In other words, in contrast to the case of impossibility, it is not needed to expressly state in statute that abandonment is not available as a defence in order for it to be considered not available in this jurisdiction.

(3) *Report recommendation on abandoned attempts*

3.139 *The Commission does not recommend the introduction of an abandonment defence to attempt.*

3.140

²²³ [1964] IR 169, 196.

²²⁴ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.157-2.162.

CHAPTER 3 CONSPIRACY

A Introduction

4.01 In this Chapter the Commission analyses in turn the two main aspects of conspiracy: the conspiratorial agreement and its unlawful target. It examines in detail the culpability requirements of conspiracy. The Commission recommends that criminal conspiracies be restricted to agreements to pursue criminal endeavours. The Chapter also deals with the existing specific conspiracies, especially the offence of conspiracy to defraud. The Commission also addresses the problems of so-called impossible conspiracies and the relevance of withdrawing from or abandoning a conspiracy.

4.02 In this Chapter, the Commission frequently analyses conspiracy as an agreement to commit a crime rather than the common law definition as an agreement to commit unlawful acts. This terminology is used because, in endeavouring to set out a detailed framework for the objective and mental elements of conspiracy, the Commission has envisaged conspiracy as attaching to crimes only. This is because the principal reform needed for conspiracy, in the view of the Commission, is to restrict its scope so it will attach to crimes only; this proposal is prior to the Commission's other proposals for conspiracy.

4.03 A conspiracy at common law is an agreement "to do an unlawful act, or to do a lawful act by unlawful means."²²⁵ A common understanding of conspiracy associates it with secret or devious plotting and scheming by a group of people. Secrecy and deceit are not, however, essential aspects of the legal concept of conspiracy, though it is essential there be at least two people involved. Conspiracy, along with attempt and incitement, is understood to be a general inchoate offence at common law. That is, it applies across the whole range of offences, ready to relate to any specific offence: conspiracy to commit theft, conspiracy to murder, conspiracy to supply drugs, and so on. Conspiracy is, however, unique among the trio because, at common law, it can attach to mere civil wrongs as well as crimes. It can be a criminal conspiracy to agree to commit a merely tortious act.²²⁶ In the classic definition of conspiracy as an

²²⁵ *R v Jones* (1832) 110 ER 485, 487.

²²⁶ *R v Parnell* (1881) 14 Cox CC 508, 518-519; *Kamara v DPP* [1974] 1 AC 104, 123.

agreement to perform an unlawful act, unlawful refers to breaching law generally, not just breaching the criminal law. There are also specific conspiracies at common law including conspiracy to corrupt public morals and conspiracy to defraud. These are not instances of general conspiracy, but are specific offences that incorporate conspiracy doctrine into their definitions.

4.04 Like attempt and incitement, conspiracy in Ireland is primarily based on common law. Recent legislative developments, however, have relevance to conspiracy. Part 7 of the *Criminal Justice Act 2006* contains an offence of conspiracy.²²⁷ It is limited to persons who conspire to commit a serious offence, which is defined as an offence for which punishment of four or more years' imprisonment may be imposed.²²⁸ The 2006 Act does not replace the common law offence of conspiracy but places a certain amount of its operation (when it is serious offences that are conspired to be committed) on a statutory footing. The 2006 Act does not define "conspires."²²⁹

4.05 The *Criminal Justice (Amendment) Act 2009* develops the legislative framework introduced by Part 7 of the *Criminal Justice Act 2006* and is intended to address organised crime. It criminalises "criminal organisations" by, among others things, enacting offences of assisting, directing, and participating in a criminal organisation. Some of this covers ground already covered by general conspiracy attaching to specific offences. There is some new ground covered, however, and there are significant differences between criminal organisations, as defined in the legislation, and conspiracies in the sense of group of people who have formed a conspiratorial agreement.

4.06 There are two main features of conspiracy: first, the concept of agreement, which includes the objective and mental aspects of the offence; and second, the criminal or unlawful activity that the agreement must relate to; that is, the target or goal of the conspiracy. The Commission's *Consultation Paper on Inchoate Offences* reviewed the law on conspiracy.²³⁰ As with attempt, there is uncertainty in the definition of conspiracy. The Consultation Paper proposed codification to address this problem. In addition, the Consultation Paper provisionally recommended limiting conspiracy to agreements to commit crimes instead of its current scope whereby it includes agreements to commit crimes

²²⁷ Section 71 of the *Criminal Justice Act 2006*.

²²⁸ Section 70 of the *Criminal Justice Act 2006*.

²²⁹ The 2006 Act provides clear guidance on jurisdictional issues for conspiracy, which the Commission recommends be extended to apply to conspiracy generally.

²³⁰ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008), at Chapter 3.

and agreements to commit civil wrongs. This Report makes final the Commission's recommendation to limit conspiracy so that it no longer applies to non-criminal wrongs. The Commission emphasises, however, that its proposals in this Report are not intended to alter or affect civil liability for conspiracy.

(1) Main Report recommendation on reform of conspiracy

4.07 *The Commission recommends placing conspiracy as a general inchoate offence on a statutory basis and abolishing the common law offence of conspiracy.*

B Agreement in conspiracy

4.08 In this Part, the Commission examines the concept of agreement in conspiracy. A remarkable feature of conspiracy at common law is that it criminalises at the point of agreement rather than at the occurrence of any acts or any concerted action pursuant to the agreement. Agreement plays the key role. Significantly, the law has not developed very detailed rules on what constitutes agreement for the purposes of conspiracy. The following sections explore the consequences of this feature and propose that agreement in conspiracy should continue to have a flexible ordinary language meaning rather than a technical legal definition.

4.09 This part of the Chapter also addresses some aspects of agreement in conspiracy that require attention. At common law a husband and wife cannot conspire together. The Commission considers this exception anomalous and repeats its recommendation that this spousal immunity rule be abolished.²³¹ An aspect in need of clarification is the view that agreement is not present where only one participant truly intends the agreement be carried out. In the Commission's view, it should be the case that in a two-person conspiracy, if one person has no real intention of carrying out their part of the agreement, but the other person believes otherwise, and the two of them reach ostensible agreement, there can still be said to be a conspiracy. The existing law is uncertain on this question.

(1) Consultation Paper analysis and provisional recommendations on agreement in conspiracy

(a) The concept of agreement in conspiracy

4.10 The Commission's *Consultation Paper on Inchoate Offences* provisionally recommended codification of the existing common law position on agreement in conspiracy. Agreement in conspiracy reflects the ordinary

²³¹ As provisionally recommended in Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008), at paragraph 3.28.

meaning of “agreement.” Agreement in conspiracy has not incorporated or tracked the meaning of agreement in contract law. This is important to note because some problems that arise with conspiracy can be addressed by making use of flexibility in the notion of agreement.

(i) Objective aspects of agreement

4.11 The *Consultation Paper on Inchoate Offences* provided an account of what is required for the objective part of a conspiratorial agreement. The following statements provide a non-exhaustive summary:

- i) Two or more persons²³² are needed for a conspiratorial agreement, though conviction may stand against one alone.²³³
- ii) That two or more have the same unlawful objective – or pursue the same unlawful objective – does not, of itself, amount to conspiracy because mere coincidence of plans and action is said to be insufficient for a conspiratorial agreement.²³⁴ Conspiracy is the agreement behind co-ordinated or concerted action, not the action itself.²³⁵ However, the existence of an underlying agreement might well be inferred in circumstances where there is some degree of concerted action in pursuit of an unlawful objective.²³⁶ Furthermore, there only need be a tacit agreement behind the action.²³⁷

²³² A company can be a party to a conspiracy. However, the corporate veil can only work so far: it has been held there cannot be a conspiracy between a “one man” company and the sole responsible person in that company. *R v McDonnell* [1966] 1 QB 233.

²³³ *The People (Attorney General) v Keane* (1975) 1 Frewen 392. See Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008), at paragraph 3.10.

²³⁴ *Hegarty v Governor of Limerick Prison* [1998] 1 IR 412, 425.

²³⁵ Ormerod *Smith and Hogan, Criminal Law* (12th Ed Oxford University Press 2008) at 404.

²³⁶ *Mulcahy v R* (1868) LR 3 HL 306, 317. See Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008), at paragraphs 3.11-3.13.

²³⁷ Palmer “The Brighton Conspiracy Case” [1958] Crim LR 422, 437. Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 3.16-3.17.

- iii) Negotiations to pursue unlawful goals on which no agreement (at any level)²³⁸ is reached do not amount to conspiracy.²³⁹
- iv) Aspects required for lawful contractual agreements do not have to be present in order for conspiratorial agreements to be said to exist.²⁴⁰ Offer, acceptance, and consideration as required for contracts in contract law are not required for criminal conspiracy.²⁴¹
- v) A person can join an already existing conspiratorial agreement and be considered a party to it.²⁴²
- vi) Until a conspiratorial agreement is concluded or ended the offence of conspiracy is being committed; it is a continuing offence.²⁴³
- vii) There is no need for parties to a conspiratorial agreement to have come into direct contact with each other.²⁴⁴
- viii) Conspiratorial agreements do not need to be reached secretly.²⁴⁵
- ix) Conspiratorial agreements can be conditional.²⁴⁶

²³⁸ If agreement is reached regarding a general matter, with details to be worked out following further negotiations, it may well be that a conspiratorial agreement is present: *May and Butcher Ltd v R* [1934] 2 KB 17.

²³⁹ *R v Walker* [1962] Crim LR 458.

²⁴⁰ *R v Tibbits* [1902] 1 KB 77, 89. Willes J in *Mulcahy v R* (1868) LR 3 HL 306, 317 seemed to imply otherwise, but the Court in *Tibbits* correctly interpreted the judge's statement as made merely for the purpose of rebutting a suggestion in that case that there was criminal intention, but no act and therefore no criminal conspiracy liability. Willes J's point was that agreement alone constitutes the conspiracy.

²⁴¹ Orchard "Agreement in Criminal Conspiracy" [1974] Crim LR 297, at 300.

²⁴² *Simmonds* (1967) 51 Cr App R 317, 322. *Attorney General v Oldridge* [2000] 4 IR 593, 601.

²⁴³ *R v Doot* [1973] AC 807, 823.

²⁴⁴ *Attorney General v Oldridge* [2000] 4 IR 593, 601. See Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008), at paragraphs 3.14-3.15.

²⁴⁵ *R v Parnell* (1881) 14 Cox CC 508.

²⁴⁶ *R v Saik* [2007] 1 AC 18, 31-32. In *Saik* Lord Nicholls was discussing conspiracy under section 1 of the *Criminal Law Act 1977* (England and Wales) but his comments are apt to describe common law conspiracy. A plan to rob a bank

- x) Husband and wife cannot conspire together (this is the spousal immunity rule).²⁴⁷
- xi) It is generally thought that a person cannot conspire with a child below the age of criminal responsibility.
- xii) There is authority suggesting that at common law there is no conspiracy where there is only one party intending the conspiracy succeed.²⁴⁸
- xiii) A person can be guilty of conspiracy to commit a crime despite their co-conspirator being someone who is exempt from liability for the target crime.²⁴⁹
- xiv) A person can be guilty of both a conspiracy to commit a crime as well as the crime itself. However, the Courts have traditionally disapproved of prosecuting for conspiracy as well as the target offence²⁵⁰ and the DPP endeavours to avoid charging conspiracy where the target offences were completed.²⁵¹

4.12 A number of these features are unproblematic, but some are uncertain and some require reform. What follows deals with the problematic issues and provides the Commission's analysis and recommendations.

4.13 In addition to the proposal that agreement in conspiracy have its ordinary meaning, the Consultation Paper made the following provisional recommendations:

might include, explicitly or implicitly, the condition that the plan is to be aborted if an extra security guard is on patrol at the planned time of robbery. Conditional agreements are no less agreements for the purpose of conspiracy. Though there may come a point when a plan is so heavily conditional as to not really be an agreement at all.

²⁴⁷ *Mawji v R* [1957] AC 126, 134. Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 3.25-3.27.

²⁴⁸ *R v O'Brien* [1954] SCR 666.

²⁴⁹ *R v Whitechurch* (1890) 24 QB 420; *R v Duguid* (1906) 75 LJKB 470.

²⁵⁰ *R v Boulton* (1871) 12 Cox CC 87, 93.

²⁵¹ Director of Public Prosecutions *Guidelines for Prosecutors* (Office of the DPP 2006) at paragraph 6.6.

- i) The Commission provisionally recommended the abolition of the rule that spouses cannot conspire together.²⁵²
- ii) The Commission provisionally recommended that conspiracy not be established where only one party to it has criminal capacity.²⁵³
- iii) The Commission provisionally recommended 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.²⁵⁴

4.14 In this Report the Commission repeats the first and third of these but re-considers the second.

(2) Discussion: agreement in conspiracy

(i) The definition of agreement in conspiracy

(I) The threshold of agreement for conspiracy

4.15 There is uncertainty regarding the border between negotiation and agreement for the purpose of conspiracy. There is also uncertainty regarding the precise definition of agreement. A conspiratorial agreement is a looser arrangement than a contractual agreement, yet it is not so loose as to be necessarily present where two or more happen to pursue the same unlawful objective. The phenomenon of tacit agreements brings out the problem. The rationale and logic of conspiracy indicates that tacit agreements should be capable of being conspiratorial agreements. Yet there is likely to be reasonable divergence of opinion regarding whether a particular arrangement was a tacit agreement or more like a coincidence of unlawful objectives.²⁵⁵

(II) Conspiracy and contract law

4.16 When assessing whether facts are capable of supporting a finding of conspiracy, the courts have not required offer and acceptance to be present. Nor have the courts required other aspects of agreements that need to be present for legally binding agreements in contract law. An agreement that satisfies contract law's requirements for a binding agreement would of course be a conspiracy if it has an unlawful or criminal aim. But it is not accurate to suggest that a conspiratorial agreement is an agreement that, if lawful, would be

²⁵² Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 3.28.

²⁵³ *Ibid* at paragraph 3.34.

²⁵⁴ *Ibid* at paragraph 3.35.

²⁵⁵ As in, for example, *Hegarty v Governor of Limerick Prison* [1998] 1 IR 412.

a binding contract. Willes J seemed to suggest in *Mulcahy v R*²⁵⁶ that a conspiracy is an agreement that, if lawful, would be an enforceable contract.²⁵⁷ But it is clear the judge merely wished to illustrate how an agreement in itself is an act and not merely a shared intention and as such was endeavouring to describe a central, clear-cut case of criminal conspiracy rather than the threshold of conspiracy.²⁵⁸

4.17 That agreement in conspiracy is not the same as agreement in contract law is sensible. Lawful contract makers typically desire that legal recognition can be given to their agreement. To this end, they will have incentive to perform certain formalities required by contract law and take steps to record their agreement. Participants in conspiratorial agreements typically desire the opposite. They have incentive to keep evidence of their agreement non-existent; such evidence would be incriminating. It can reasonably be supposed that conspirators will tend to refrain from doing those things that render lawful agreements conspicuous. If conspiracy law was to require similar features to what contract law requires before recognising an agreement as such, then its utility would be greatly undermined. It would fail to catch the very cases that are sought to be caught by having the offence in the first place. Contract law's fastidiousness in acknowledging agreements is entirely inappropriate in conspiracy law.

(III) *Agreement need not have detailed definition in law*

4.18 To what extent have conspiracy cases developed principles and rules on the parameters of agreement? Despite a high number of cases, not many rules can be distilled. And what can be distilled – beyond the basic and obvious requirements such that there need be two or more to make a conspiracy – tend to be rules that tell us what need not be present for conspiracy. For example, they do not have to be secret, parties do not need to know all the details of the conspiracy, parties need not have met in person, and so on.²⁵⁹ There is an apparent judicial reluctance to define positively in detail what a conspiratorial agreement is. Whatever the historical reasons for this, it can be rationalised as having a benefit. For if a detailed positive definition of a conspiratorial agreement is elaborated in law – in statute or judicial decision – then would-be conspirators could, arguably, use their ingenuity to come to an arrangement that

²⁵⁶ *Mulcahy v R* (1868) LR 3 HL 306.

²⁵⁷ (1868) LR 3 HL 306, 317.

²⁵⁸ That Willes J's statement in *Mulcahy v R* should not be understood as stating that the ingredients of a lawful contract need be present in a conspiratorial agreement was the view the court in *R v Tibbits* [1902] 1 KB 77, 89.

²⁵⁹ See above at paragraph 3.11.

functions somewhat as an agreement but which deliberately omits some feature of a conspiracy that the law has specified as required. In other words, if the law says exactly what a conspiratorial agreement is, then it can be circumvented by the artful use of an arrangement that omits an essential feature of the conspiratorial agreement as set out in law.

4.19 So the seeming problem of a lack of detail in the definition of agreement for the purposes of conspiracy law is not a problem; it is a merit. To the question of what “agreement” means in existing conspiracy law, and to the question of what it ought to mean, can be given the same answer: an ordinary language meaning of “agreement” that is not very prescriptive and is somewhat flexible. This conclusion can be reconciled with the legality principle. As identified in the *Consultation Paper on Inchoate Offences*²⁶⁰ the legality principle requires differing degrees of certainty in definition in respect of different kinds of criminal law rules. This is on the understanding of the legality principle as requiring that citizens can get fair notice of what it is that may result in criminal punishment. With attempt law it was suggested that the important aspect of an attempt offence to have certainty about is the definition of the target crime. Citizens must be able to know what it is they must not do or attempt to do; it is not as important that they get to know the precise point at which criminal liability is engaged when they work towards a prohibited result or endeavour to engage in prohibited conduct. Similarly with conspiracy it is vital that those who wish to obey the law can know what is prohibited and that agreeing and planning with others to do something prohibited is, in itself, prohibited. The point of entry into criminal liability is sufficiently flagged up by the ordinary meaning of the practice of agreeing with another. There is no good reason to allow would-be participants in criminal enterprises to enjoy maximum freedom to negotiate criminal plans short of agreeing on them. It can be recognised that, for other reasons, existing conspiracy law in Ireland is in conflict with the legality principle; this is because agreeing to perform non-criminal wrongs as well as crimes can suffice and there is substantial uncertainty as to which non-criminal wrongs it can be a conspiracy to agree to pursue.²⁶¹ It is not a lack of precision in the definition of *agreement* in conspiracy that offends the legality principle.

²⁶⁰ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 1.131-1.135.

²⁶¹ This problem is identified and analysed below at paragraph 3.65.

(ii) When apparent agreement may not be agreement for the purpose of conspiracy

(I) Conspiracy involving persons who will not be criminally liable

4.20 At common law a conspiratorial agreement cannot take place in some instances for want of capacity to conspire, a central example involves an adult and a child under the age of criminal responsibility. There is also the situation where a conspiracy relates to a substantive offence for which one of the parties will not be held liable. An example is where a 16 year old boy and a 16 year old girl agree to have sex, which, if carried out, would be a crime on the part of the boy but not the girl.²⁶²

4.21 The current issue is closely related to the question that arises where a party to a conspiracy lacks the necessary culpability and the other party does not know this. This is a matter of the culpability requirements of conspiracy and will be addressed below. There is also overlap with the problem of impossibility and conspiracy. If one person conspires with another who cannot be held liable (and the first person does not know this), it might be said that the conspiracy is impossible in the circumstances and therefore liability cannot attach. The Commission recommends that impossibility not preclude inchoate liability, with impossible conspiracies specifically addressed later in this Chapter.²⁶³

4.22 There is a view of a conspiracy as a meeting of minds to pursue something criminal. It is assumed to follow that a conspiracy cannot take place where only one party to a putative conspiracy has capacity for criminal liability or where only one party may in the end be criminally liable in respect of the subject matter of the putative conspiracy. This common view does not hold up at all times as an explanation of conspiracy law. For one, under the common law that currently applies in Ireland, the object of a conspiratorial agreement need not be criminal. Conspiracy is hardly the meeting of two or more criminal minds when the object is merely a tort. Second, and more important, it is well established that in a trial for an alleged two-person conspiracy, for example, the acquittal of one does not require the acquittal of the other, nor does the refraining from bringing prosecution against one preclude prosecution of the other. While this does not make an absurdity of calling conspiracy a meeting of criminally minded minds, it does strain it somewhat.

4.23 Given that conspiracy occasionally departs from the notion of a meeting of minds to pursue crime, additional departures from this notion should not be automatically ruled out just because they occasion such a departure. Indeed, it is worth paying greater reference to a more fleshed out rationale of

²⁶² *Criminal Law (Sexual Offences) Act 2006*, sections 3 and 5.

²⁶³ See below at paragraph 3.110.

conspiracy when exploring reform options than the meeting of criminal minds idea.²⁶⁴

4.24 The Commission is of the view that where two people agree to commit a crime and one, unknown to the other, lacks criminal capacity, the person who possesses criminal capacity can still be guilty of a conspiracy offence. This view reflects common sense and is compatible with the rationale of conspiracy and the principles applicable to the imposition of inchoate liability.

(II) *Spousal immunity*

4.25 The *Consultation Paper on Inchoate Offences* provisionally recommended the abolition of the common law rule that husband and wife cannot be guilty of conspiracy in respect of a putative conspiracy involving no person apart from the two spouses.²⁶⁵ The spouses may, of course, be held liable for any criminal acts performed pursuant to the conspiracy. The exception is, nonetheless, a significant one: what may otherwise be a conspiratorial agreement for which criminal liability can attach will not be such if the conspiratorial agreement is between a wife and husband.

4.26 There is little to commend this spousal immunity rule. The Law Commission for England and Wales, writing in 2007, called its continued survival in England and Wales an “embarrassment to a civilised system of law.”²⁶⁶ It offends equality by discriminating in the provision of the benefit of immunity and by perpetuating the notion of a married couple as a single entity, which in turn has inescapable connotations of man possessing woman. Apart from this it is simply anomalous; it represents a lacuna in liability that cannot be rationalised in the context of conspiracy. It can be emphasised that this rule is a relic of the common law, not something associated with, or required by, the protection of marriage and the family in the Constitution of Ireland. There is no constitutional impediment to its abolition. This much is clear, but in any event *Murray v Ireland*²⁶⁷ indicates that marriage rights are not absolute in the face of the operation of criminal law.

²⁶⁴ See above at paragraph 1.24.

²⁶⁵ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 3.28.

²⁶⁶ Law Commission for England and Wales *Consultation Paper on Conspiracy and Attempts* (CP No 183 2007), at paragraph 1.43.

²⁶⁷ [1991] ILRM 465.

(III) *Where only one party to a conspiratorial agreement intends it succeed*

4.27 There are problems raised in the scenario where two people conspire to bring about a crime, but only one of them really intends the conspiracy to succeed; the other perhaps having no true desire for it, secretly planning to subvert it, or having other goals. One question is whether the person who does not really intend the conspiracy to succeed, despite ostensibly agreeing to it, has the requisite culpability for conspiracy – this problem will be addressed below in the section on conspiracy culpability. The other question is whether the person who intends the conspiracy to succeed can be liable for conspiracy notwithstanding a lack of reciprocal intent in the mind of their co-conspirator. A majority of the Canadian Supreme Court in *R v O'Brien*,²⁶⁸ applying the common law in 1954, held that in this scenario there is no conspiracy, and therefore the person who had the full intention that the conspiracy succeed cannot be liable for conspiracy. The Court reached this conclusion on an understanding of conspiracy as an agreement to effect an unlawful purpose, with the proviso that two people cannot agree unless they both truly intend that unlawful purpose to be effected.

4.28 It has been convincingly demonstrated²⁶⁹ that the decision in *O'Brien* was presented as if logically required when in truth it was not logically determined by precedent or by the nature or rationale of criminal conspiracy. The rationale of conspiracy is better served by allowing liability be imposed on the conspirator who really intended the conspiracy succeed while believing their co-conspirator did as well. Consistent with the recommendations in this Report that impossibly not preclude inchoate liability, the Commission will recommend that liability for conspiracy ought to be imposed on the basis of circumstances as the accused believed them to be, not as they in fact were. This enables the person who conspires with an undercover police agent to be guilty of conspiracy notwithstanding the fact that their co-conspirator may lack the requisite culpability for conspiracy.

(b) *The extent to which acts are required for conspiracies*

(i) *The “act” of agreement*

4.29 It is a difficult task to explain the extent to which conspiracy law requires or does not requires acts. As stated above, the basis of conspiracy is agreement. This might be called the “act” of agreement and will involve communication of some sort. Yet it is also sensible to understand agreement

²⁶⁸ [1954] SCR 666.

²⁶⁹ Fridman “*Mens Rea in Conspiracy*” [1956] 19 MLR 276.

as a mental operation. The following two propositions represent the law and are not contradictory (though admittedly confusing):

- i) The crime of conspiracy is the agreement itself, not the acts done pursuant to the agreement.
- ii) There must be an act of agreement. This act will typically be a communication or exchange of communications.

(ii) An “overt act” requirement?

4.30 There is the possibility of including an “overt act” requirement in the definition of conspiracy. With this, mere agreement to pursue criminal activity is not sufficient; there must be an overt act in pursuit of the criminal goal or activity. In those jurisdictions and codes that employ an overt act requirement, the overt act does not have to be a criminal act or an unlawful act; it can be any kind of act, once it is “overt.” In practice not much would change if this requirement was introduced to the definition of conspiracy. This is because conspiracy prosecutions typically disclose some act pursuant to the alleged conspiracy. Indeed, evidence of such acts is adduced to help prove the existence of the conspiratorial agreement. The Commission accordingly does not consider there is a need to introduce a formal substantive requirement for an overt act into the definition of conspiracy.

(c) Conspiracy and jurisdiction

4.31 Section 71 of the *Criminal Justice Act 2006* provides that agreements in Ireland to commit 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; and a serious offence on an Irish ship or aircraft.

4.32 Section 71 applies only in respect of conspiracies to commit serious offences as defined in the 2006 Act. For other conspiracies there is some guidance in case-law. It is clear that conspiracies formed abroad to perform a crime in Ireland are triable in Ireland once the conspirators come into the jurisdiction while the conspiracy is subsisting. The Supreme Court in *Ellis v O’Dea and Governor of Portlaoise Prison* stated:

“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.”²⁷⁰

²⁷⁰ [1991] ILRM 365, 372.

4.33 English decisions have gone further, stating that a conspiracy to perform some unlawful act within the jurisdiction, though formed abroad, is justiciable.²⁷¹ 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. There is also a jurisdictional question about conspiracy formed within the jurisdiction to perform something unlawful abroad. In *Board of Trade v Owen*²⁷² the UK House of Lords held that a conviction for conspiracy did not lie in this situation.

4.34 In the *Consultation Paper on Inchoate Offences* the Commission stated that 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 certain 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) Report Recommendations on agreement in conspiracy

4.35 *The Commission recommends that agreement in conspiracy correspond to the ordinary meaning of “agreement” and not be given a technical definition.*

4.36 *The Commission recommends that conspiracy can be established where only one party has criminal capacity.*

4.37 *The Commission recommends the abolition of the spousal immunity rule in conspiracy.*

4.38 *The Commission recommends that a lack of the requisite culpability on the part of one party to a conspiracy not preclude conspiracy liability from being imposed on the other.*

4.39 *The Commission does not recommend the introduction of an overt act requirement into the substantive definition of conspiracy.*

4.40 *The Commission recommends that the rules in section 71 of the Criminal Justice Act 2006 applying to conspiracies to commit a serious offence be extended to apply to all conspiracies.*

²⁷¹ Samson [1991] 2 QB 130; *Liangsirprasert v Government of the United States of America* [1991] 1 AC 225.

²⁷² [1957] AC 602.

C Conspiracy culpability

4.41 What are the culpability requirements for conspiracy? In addressing this question there are two main aspects to explore: first, the culpability requirements of the substantive offence to which the conspiracy relates and the extent to which they inform conspiracy culpability; and second, the notion of *agreeing* to commit a substantive offence. This part of the Report contains analysis of the existing law and proposes a framework that will introduce a degree of certainty that is currently not present in Irish law. It will be proposed that the culpability of the conspirator be described as acting with the fault element required for the target substantive offence when agreeing to the course of action that would involve the commission of that target substantive offence. Under this scheme it can be said that the essence of the offence is agreement and that the *mens rea* for conspiracy tracks that of the substantive offence to which the conspiracy relates.

(1) Consultation Paper analysis and provisional recommendations on conspiracy culpability

4.42 The *Consultation Paper on Inchoate Offences* observed that there has not been statutory enactment in Ireland on the culpability requirements of general conspiracy.²⁷³ There is not detailed elaboration on the *mens rea* of conspiracy in Irish cases. There are, however, a number of conclusions regarding common law conspiracy *mens rea* that may be drawn from cases applying the common law:

- i) Regarding the act of agreement itself, it seems intention is required. That is, a participant must intend to agree with others rather than, for example, accidentally giving signs of agreement or merely engaging in conduct or performing acts that risk being construed as agreement. This is usually presupposed by the courts rather than something the courts have explicitly required.²⁷⁴
- ii) Regarding the goal or object of the conspiratorial agreement, it seems intention is required. That is, if someone ostensibly agrees to a conspiratorial plan having no real intention that it succeed or not

²⁷³ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 3.05. As was noted above at the outset of this Chapter, the *Criminal Justice Act 2006* places a sub-set of general conspiracy on a statutory footing but does not make a stipulation regarding conspiracy culpability.

²⁷⁴ Though the Canadian Supreme Court explicitly identified this requirement in *R v O'Brien* [1954] SCR 666.

intending to play their part if the agreement envisages a part for them,²⁷⁵ then they are not guilty of conspiracy.²⁷⁶

- iii) Knowledge of the circumstances that render the goal of an agreement unlawful is needed. This may be so even where such knowledge is not required for the substantive offence to which the conspiracy relates.²⁷⁷
- iv) Knowledge may not, however, be needed in respect of all the details, or the precise details, of the conspiratorial plan (provided of course the previous requirement is satisfied).²⁷⁸
- v) Knowledge that what is agreed to be done is unlawful or that merely agreeing to do something unlawful is criminal in itself is not required. This is consistent with the general proposition that ignorance of the law does not excuse criminal liability and awareness of criminality is typically not a prerequisite for guilt.

4.43 A number of the above issues are uncertain and codification would afford a welcome opportunity to address these uncertainties. The Commission's final analysis and recommendations regarding problematic aspects of conspiracy culpability follows in the next section. It should be noted that the Consultation Paper's main recommendation regarding *mens rea* in conspiracy was to place on a statutory basis the common law position that requires a specific intention on the part of a conspirator that the unlawful goal of the conspiratorial agreement be carried out. Taking into account submissions received during the consultation process, and having assessed this matter in preparing the Report, the Commission has concluded that there is great merit in a simpler culpability scheme in which the conspiracy *mens rea* tracks that of the substantive offence to which the conspiratorial agreement relates.

²⁷⁵ Merely agreeing to a plan constitutes the objective component of conspiracy; it is not necessary for the conspirator to agree to perform an active role in carrying out the plan; a conspirator's role may be entirely passive.

²⁷⁶ *R v Thomson* (1966) 50 Cr App R 1. The UK House of Lords decision in *R v Anderson* [1986] AC 27, which dealt with the statutory conspiracy offence under the UK *Criminal Law Act 1977*, stated that such intention is not necessary. *Yip Chiu-Cheung* [1995] 1 AC 111 is a decision of the British Privy Council (the final appeal court for some British Commonwealth states) which dealt with common law conspiracy since the case arose in Hong Kong, so that the UK 1977 Act did not apply.

²⁷⁷ *Churchill v Walton* [1967] 2 AC 224.

²⁷⁸ *R v Porter* [1980] NI 18.

(2) Discussion: conspiracy culpability

(a) The conspirator's attitude to the carrying out of the plan

4.44 A difficult case arises where a party to a conspiracy ostensibly agrees to it but in reality is not committed to the conspiratorial plan or does not truly intend it be carried out. It is obvious that agreement must be voluntary in the sense of being willed: a person who nods their head at a certain moment (because they are nodding off to sleep) cannot be taken as having agreed to a plan, even if it looks to an external observer like they did so agree, if in truth they do not intend to give a signal of assent or know that others have taken them as having agreed. More problematic has been the case where a person intentionally or knowingly gives the signs of agreement but really do not intend the plan to succeed.²⁷⁹

(i) Common law: intention to succeed?

4.45 It can be said²⁸⁰ that at common law it is required that in order to be liable the conspirator must intend the conspiratorial agreement succeed.²⁸¹ In *R v Anderson*²⁸² the UK House of Lords, applying general conspiracy as enacted in section 1 of the English *Criminal Law Act 1977*, held that such intention was not necessary. This, of course, was not an application of the common law, but is pertinent nevertheless as the matter is not beyond doubt at common law. In *Anderson* the defendant had agreed to help others to escape from prison by, among other things, supplying diamond wire capable of cutting steel bars. The defendant had testified that he believed the escape plan was hopeless and that his aim was to supply the diamond wire, demand an advance payment and then abscond, playing no further part in the plan.²⁸³ The question for the UK House of Lords was whether, on this account, the defendant had sufficient *mens rea* for statutory conspiracy. The response of the court was that while intention to play some part in carrying out the agreement was needed²⁸⁴

²⁷⁹ As was supposed in *R v Anderson* [1986] AC 27.

²⁸⁰ This was the view of the Law Commission for England and Wales in its *Report on Conspiracy and Criminal Law Reform* (Law Com No 76 1976) at 1.31-1.37.

²⁸¹ *R v Thomson* (1966) 50 Cr App R 1; *Churchill v Walton* [1967] 2 AC 224.

²⁸² [1986] AC 27.

²⁸³ [1986] AC 27, 36.

²⁸⁴ [1986] AC 27, 39. This statement is considered incorrect for the reason that a conspirator need not play an active role in the carrying out of the conspiratorial plan. Ormerod, *Smith and Hogan, Criminal Law* (12th ed. Oxford University Press 2008) at 415-416.

there was no requirement for the conspirator to intend the criminal goals of the conspiracy ultimately succeed or be carried out.²⁸⁵ The *Anderson* decision was much criticised and subsequent cases tended to avoid applying it.²⁸⁶

4.46 The Commission does not wish to recommend for inclusion in statute an express situation either way on this issue of the conspirator's attitude in respect of the conspiratorial plan. The scheme proposed in this Report will, the Commission considers, be adequate in reaching appropriate conclusions in cases such as *Anderson*. The *Anderson* case is complicated in terms of its facts and ascertaining exactly what agreement the defendant was a part of. Notwithstanding a party's doubts about the potential success of a criminal enterprise they may still reach an agreement to carry out a criminal act or acts and if, in doing so, they possess the mental fault required for the substantive offence or offences marking out the criminal act or acts, they are a fair candidate for criminalisation.

(ii) Conditional plans

4.47 As recognised above, conspiratorial agreements may be conditional. Accordingly, the intentions of the participants may be conditional yet still sufficient for conspiracy culpability. So a conspirator may desire the agreement be fulfilled, but only if circumstances turn out to be as expected or hoped for. For example, an agreement to burgle a house if the house happens to be unoccupied can be a conspiracy just as if the plan was to burgle the house no matter what the circumstances. In this context it is worth noting that the Commission proposes that impossibility not preclude conspiracy liability. This means that, for example, if it is objectively the case that the house targeted for burglary has 24-hour occupancy such that, unknown to the conspirators, their plan as formed is impossible to carry out, their plan can still be a criminal conspiracy. There might come a point, however, when a plan is so fanciful or so conditional as to not amount to an agreement with which the criminal law should be concerned.²⁸⁷ Common sense can be relied on to avoid using the law in these types of cases.

²⁸⁵ [1986] AC 27, 38.

²⁸⁶ Ormerod, *Smith and Hogan, Criminal Law* (12th ed. Oxford University Press 2008) at 414. The critical evaluation of *Anderson* suggests that it was a decision motivated by desire for the criminal law to catch blameworthy inchoate participation in crime that would not otherwise be caught (assuming the prison escape plan was never carried out or attempted).

²⁸⁷ *R v Saik* [2007] 1 AC 18, 31-32. Lord Nicholls provides the example of agreeing to commit an offence on condition that one climb Mount Everest without oxygen.

(b) Conspiracy culpability tracking the culpability requirements of the target offence to which the conspiracy relates

4.48 The key proposal the Commission will make in this respect is that the person who enters a conspiracy must do so with the culpability required for commission of the target substantive offence.

4.49 An example will help illustrate what this means. The offence in Irish law referred to as “common law” rape is committed by a man who engages in sexual intercourse with a woman who does not consent to such intercourse and the man knows she does not consent or is reckless as to whether she is consenting.²⁸⁸ While the man committing this offence presumably must intend to engage in sexual intercourse, he need only have reckless knowledge as to the absence of consent. As in attempt law an issue arises with conspiracy to commit rape. For a conspiracy to commit rape, does the agreement have to be about the pursuit of specifically non-consensual sexual intercourse, or can it be also an agreement to pursue sexual intercourse in spite of an unjustifiable risk of it being non-consensual? Both types of agreement here are an agreement to pursue a plan that will, in all likelihood, occasion the commission of the offence of rape – the possibility that consent may actually be present and thus no offence committed should not serve to excuse liability, just as a conspiracy to effect a bank robbery is still a criminal conspiracy (to commit robbery) notwithstanding the possibility that the bank money may be handed over voluntarily, and with due authorisation, to the would-be robbers before they need to occasion the use of force.

4.50 In terms of what is captured by conspiracy to commit rape, it ought to be, as a matter of fair labelling and appropriate criminalisation, that the ancillary conspiracy offence takes the same stance on the question of the offender’s belief as to consent as the substantive offence of rape. It should apply to would-be reckless rapists as well as would-be specifically intentional rapists. If a particular level of mental culpability would suffice for the completed offence it should suffice for the conspiracy offence.

4.51 A question arises concerning whether the assessment of recklessness as to the absence of consent, for example, is a different enquiry in respect of putative conspirators plotting a course of action on the one hand and an actor acting alone engaging in, or on the cusp of engaging in, sexual intercourse, on the other hand. The answer is that the test for recklessness, as a matter of substantive law, is the same but, as a matter of evidence, the requirements may be different. There would have to be evidence of the content of the conspirators’ agreement to indicate that it seeks its goal to be pursued even if it turns out that consent is not present or if it turns out there is a risk of

²⁸⁸ *Criminal Law (Rape) Act 1981*, section 2(1).

kind sufficient for recklessness that consent it not present. This may be a tough evidential burden, but this is appropriate given that in a conspiracy prosecution no offence need actually have been carried out or attempted.

4.52 This approach that requires the *mens rea* for conspiracy to track that of the substantive offence to which the conspiracy relates is what ought to be as a general approach. Some consequences of this are explored in the next section.

(c) Conspiracy culpability tracking that of the target offence: some consequences

4.53 This section addresses a challenge to the idea that conspiracy culpability should track that of the offence to which the conspiracy relates. Concern may arise about conspiracy attaching to offences featuring non-traditional forms of *mens rea*. The conclusion will be, however, that on balance the simplicity of the approach to conspiracy culpability that has it tracking that of the relevant substantive offence should not be compromised in an effort to see off potential over-criminalisation problems that are theoretically possible but unlikely to feature in practice.

4.54 The English case *Churchill v Walton*²⁸⁹ involved a charge of conspiracy to commit a particular statutory offence. This statutory offence was described as an “absolute offence.” It was committed by selling diesel, designated for home and plant use, for road use without having paid the appropriate difference in tax. The appellant in *Churchill* had been convicted of conspiracy to commit this statutory offence. He had worked as a book-keeper for one of the companies involved and had played his part in facilitating the sale of the diesel, but apparently without awareness that the appropriate tax had not been paid.²⁹⁰ The UK House of Lords allowed the defendant’s appeal. The key point of the judgment was that what the accused intends to do must be an unlawful act.²⁹¹ The selling of the diesel *per se* was not unlawful; it was only unlawful if sold without the appropriate tax having been paid. In order to conspire to sell diesel without paying the appropriate tax one would need some degree of knowledge that the appropriate tax has not been paid. In *Churchill v Walton* it was held that the culpability required for conspiring to commit an offence that features strict liability is not the same as, but is more stringent than,

²⁸⁹ [1967] 2 AC 224.

²⁹⁰ *Ibid* at 232. It is not apparent from the judgment why the charge was conspiracy to commit the statutory offence rather than the statutory offence itself given that it seems the activity was carried out to some extent rather than just agreed to be done.

²⁹¹ *Ibid* at 237.

the culpability required for the complete offence. That is, conspiracy might feature an elevation of culpability requirements vis-à-vis the substantive offences to which it relates.

4.55 Although it seems to reach the correct result on its facts, that is, non-criminalisation, *Churchill v Walton* does so via a view of conspiracy culpability that leaves matters unclear and uncertain. Resting the judgment on the idea that the accused must have *intended* to do an unlawful act²⁹² leaves open an under-criminalisation problem. Namely, that in requiring an elevation of culpability in respect of a conspiracy offence vis-à-vis the target substantive offence it may have elevated it too high by requiring intention.

4.56 Thus, the Commission recommends that the *Churchill v Walton* approach, although an application of the common law, should not be followed in Ireland. Rather, the Commission's proposed approach whereby the conspiracy *mens rea* is to track the related substantive offence *mens rea* should be enacted in statute. In addition to departing from *Churchill v Walton*, some further consequences are detailed in the following paragraphs.

4.57 The development of conspiracy *mens rea* in England and Wales has been quite torturous. General conspiracy was put on a statutory footing in the *Criminal Law Act 1977*, and this enactment has been the subject of much critical commentary.²⁹³ The decision of the UK House of Lords in *R v Saik*²⁹⁴ has largely clarified statutory conspiracy under section 1 of the UK *Criminal Law Act 1977*. The defendant operated a bureau de change in London. He pleaded guilty to conspiracy to launder money with the proviso that he did not know the money he exchanged was the proceeds of crime but that he merely suspected it was so. For the substantive offence of laundering money such suspicion in respect the money being the proceeds of crime was sufficient culpability. The question was whether it was sufficient culpability for the ancillary conspiracy offence. The UK House of Lords concluded that, under section 1(2) of the UK *Criminal Law Act 1977*, the defendant's suspicion – as distinct from awareness – that the money was of criminal origin was not sufficient for conspiracy culpability.

4.58 The scheme proposed by the Commission in this Report would reach a different conclusion; insofar as the defendant possessed the fault required for the substantive offence of money laundering at the time of making the agreement to process the money, he had sufficient culpability. This conclusion

²⁹² *Ibid.*

²⁹³ Ormerod "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185, 192-194.

²⁹⁴ [2006] UKHL 18; [2007] 1 AC 18.

is arrived at more rapidly and more certainly than under the UK 1977 Act. There is, of course, a difference in the scope of criminalisation, but it can be pointed out that under the Commission's proposed scheme, the fault considered apt for the substantive offence is simply relied on; it is neither watered down nor elevated. If it does seem to result in harsh criminalisation, this can be seen as a product of whatever fault element has been chosen for the substantive offence. Money laundering could be about those who knowingly process criminal profits or it could be about those who recklessly, as well as knowingly, process criminal profits. The legislature makes a choice on this and, it can be suggested, it is not for conspiracy doctrine to change or subvert this choice in the absence of legislative instruction otherwise. It is noted that the Law Commission for England and Wales considered the approach in *Saik* too generous to the accused.²⁹⁵

4.59 In conclusion, the Commission does not seek to endorse the culpability scheme whereby conspiracy *mens rea* may be elevated as articulated in *Churchill v Walton*²⁹⁶ (common law) and *R v Saik*²⁹⁷ (statutory conspiracy in England and Wales).

(d) A framework for conspiracy culpability – a summary

4.60 Under the scheme for conspiracy culpability proposed in this Report the following is required for conspiracy liability:

- i) A conspiratorial agreement must have been entered into and,
- ii) in doing so, a conspirator must at least have the kind of culpability required for the substantive offence to which the conspiracy relates.

(3) Report recommendations on conspiracy culpability

4.61 *The Commission recommends the following rules on conspiracy culpability:*

- i) A conspiratorial agreement must have been entered into and,*
- ii) in doing so, a conspirator must at least have the kind of culpability required for the substantive offence to which the conspiracy relates.*

²⁹⁵ Law Commission for England and Wales *Report on Conspiracy and Attempts* (Law Com No 318 2009) at paragraph 2.65.

²⁹⁶ [1967] 2 AC 224.

²⁹⁷ [2006] UKHL 18.

D The activity to which a conspiracy relates

4.62 A crucial feature of conspiracy is the activity it specifies as criminal to plan or agree to do, which can be called the target of a criminal conspiracy. In this regard, the most substantial provisional recommendation for reform in the *Consultation Paper on Inchoate Offences* was to restrict conspiracy to agreements to pursue criminal activity so that conspiracy can no longer relate to non-criminal unlawful activity.

4.63 At common law it is a conspiracy to agree to do an unlawful act or a lawful act by unlawful means. In this context, “unlawful” is not restricted to what is criminal but can also include a civil wrong, such as conspiring to encourage non-payment of rent. Indeed, in Ireland in the 19th century Charles Stuart Parnell, the leader of the Irish Parliamentary Party and one of the leaders of Irish Land League was tried, along with others, for conspiracy to encourage non-payment of rent as part of the Land League’s campaign for land reform at that time.²⁹⁸ 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 presiding judges at the trial in the Queen’s Bench Division in Ireland affirmed the validity of these charges. Although Parnell’s actions were not covered by criminal law when done by a single actor, the Court held that, given the co-operation of multiple actors, it was possible on a charge of conspiracy to transform non-criminal behaviour into criminal behaviour.²⁹⁹ Thus, common law conspiracy can transform non-criminal wrongs into crime when two or more people are involved and make an agreement.

(1) Consultation Paper analysis and provisional recommendations on the activity to which a conspiracy relates

4.64 Having surveyed the operation of general conspiracy at common law, the Commission’s *Consultation Paper on Inchoate Offences* provisionally recommended a significant reform. At common law it is a criminal conspiracy to agree to do something that will amount to a crime or a civil wrong. The Commission suggests this should be changed so that it will be a criminal conspiracy to agree to do something that will amount to a crime and that it should no longer be a criminal conspiracy to agree to do something that will amount to a mere civil wrong. This is a reform that has been made in most common law jurisdictions some years ago, and it may be considered long

²⁹⁸ *R v Parnell* (1881) 14 Cox CC 508.

²⁹⁹ Ultimately, in the *Parnell* case itself, the jury failed to agree a verdict, so the defendants were not convicted. For an account of the trial and other similar trials with a strong political flavour in the 19th century, see Dungan, *Conspiracy: Irish Political Trials* (Prism: Royal Irish Academy 2009).

overdue for Ireland. In this Report the Commission makes final this recommendation.³⁰⁰

(2) Discussion: the activity to which a conspiracy relates

4.65 Not only is the unlawfulness limb in the definition of common law conspiracy very wide, it is also uncertain. The *Consultation Paper on Inchoate Offences* endeavoured to list the types of arrangements that it may be a criminal conspiracy to agree to pursue. The following counts as “unlawful” and thus may satisfy the target of a conspiracy, that is, it can be a criminal conspiracy to agree to bring about the following:

- i) Indictable offences and summary offences.
- ii) Incitement.
- iii) Torts.
- iv) Breaching constitutional rights.
- v) Breaching contracts.

4.66 Only the first of these categories, summary and indictable crimes, actually satisfies the unlawfulness requirement with certainty. Cases that involve conspiracies to breach contracts³⁰¹ or conspiracies to cause breaches of contracts³⁰² can be identified. Yet at least one textbook is hesitant about stating that a conspiracy to cause a breach of contract is a criminal conspiracy.³⁰³

(i) Conspiracy to commit indictable offences

4.67 It is relatively unproblematic that an agreement to commit an indictable offence can be a conspiracy. If there is to be a general conspiracy inchoate offence it should be capable of attaching to indictable offences. Section 71 of the *Criminal Justice Act 2006* describes conspiracy in relation to “serious offences,” which are defined as those capable of resulting in four years’ imprisonment on conviction. Serious offences can be understood as

³⁰⁰ Whether this change would alter the outcome of a case similar to the *Parnell* case is a moot point. Some of the suggestions by Parnell and his supporters to deal with traders by a “boycott” (a word of Irish origin, named after Captain Charles Boycott, a land agent at that time) might now involve criminal offences under the *Competition Act 2002*.

³⁰¹ *R v Cooke* [1986] AC 909.

³⁰² *R v Parnell* (1881) 14 Cox CC 508.

³⁰³ Charleton, McDermott and Bolger *Criminal Law* (Butterworths 1999) at 308.

constituting a quite substantial sub-set of indictable offences. The Commission sees no need to restrict general conspiracy to serious offences as distinguished from indictable offences.

(ii) Conspiracy to commit summary offences

4.68 A case could be made for providing that agreements to commit merely summary offences will not constitute criminal conspiracies. This is not an option the Commission proposed in its *Consultation Paper on Inchoate Offences*, but suggestions to this effect were helpfully raised at the Commission's *Seminar on Inchoate Offences*. A remoteness principle lies behind the suggestion. Agreements to commit crime may be very remote from the actual commission of crime. Offences marked as summary offences are so because of their relative low level of harm. Given the relative lack of seriousness of summary offences the rationale of conspiracy – harm prevention, moral blameworthiness, and the danger in co-ordinated action – is weakened in respect of summary offence conspiracies. The case is bolstered by noting that in practice conspiracy charges, simply because of their complexity if not also for other reasons, will be taken on indictment and it might be though inappropriate that agreements to commit summary offences get tried on indictment whereas actually committing summary offences will not.

4.69 Militating against these reasons it can be noted that traditionally conspiracies are considered dangerous because of the effectiveness of multiple actors. So while isolated commission of summary offences may not be all that harmful, widespread and repeated summary offences facilitated by co-ordinated action pursuant to a conspiracy is a different story.³⁰⁴ In addition, the strong arguments in favour of reining in conspiracy from its current wide and uncertain ambit do not compel restricting conspiracy any further than as an agreement to commit crimes, both summary and indictable.

4.70 The Commission considers the most important reform needed for conspiracy is to rein it in from attaching to non-criminal wrongs and does not see a pressing reason to recommend further restricting conspiracy at this point in time.

(iii) Conspiracy to commit inchoate offences

4.71 Conspiracies to attempt, incite, or conspire to commit crimes have in some cases been recognised. The Consultation Paper raised some difficulties regarding conspires to merely attempt crimes as well as conspiracies to conspire. While a conspiracy to conspire is indeed not a sensible charge, a conspiracy to attempt could conceivably make sense. Suppose the conspirators believe they will ultimately fail in their efforts if they carry out their

³⁰⁴ This view can be found in *R v Parnell* (1881) 14 Cox CC 508, discussed above.

plan but intend to carry it out nonetheless for some reason, perhaps for the expressive act of attempting. So uncovering a plot to assassinate a world leader where the plotters know full well they cannot really succeed might result in a charge of conspiracy to attempt murder. The definition of conspiracy could be satisfied in this instance and it might be useful if the facts were considered to warrant criminalisation. Of course, if the plotters believed they might succeed, however unlikely this actually is, the appropriate charge would be conspiracy to commit murder. Indeed, except in the most unusual type of case, unless the putative conspiracy to attempt an offence can be construed as a conspiracy to commit that offence, it may not be an appropriate case for conspiracy liability.

4.72 The possibility of a conspiracy to conspire is more clearly a redundant charge. A conspiracy to conspire to do something, unless it can be seen as a straightforward conspiracy to do that something, is not an apt conspiracy candidate. This is because a putative agreement to merely agree to do something (criminal), not to actually do it, may not amount to an agreement to do something criminal at all.

4.73 In order to see off potential uncertainty and confusion, it could usefully be said that insofar as conspiracy can attach to any offence, this does not include attempting or conspiring to commit an offence.

4.74 As the Consultation Paper outlined care must be taken not to let inchoate liability build on top of inchoate liability to an excessive degree. There are many statutory offences that are inchoate in nature in that they are committed though no substantive harm need have occurred. Prosecutors sensibly refrain from constructing charges such as a conspiracy to incite the commission of endangerment (endangerment³⁰⁵ being a statutory offence that is inchoate in nature). A rule of thumb could be that charges involving more than two inchoate offences should be avoided. Double inchoate liability may be acceptable at times but triple inchoate liability and beyond is not.

4.75 The Model Penal Code and the enacted US Codes it has inspired use a neat method of recognising that conspiracies to attempt or solicit (that is, incite) offences are themselves criminal conspiracies. The Codes insert in the conspiracy definition the words “or an attempt or solicitation to commit such conduct constituting the target offence.” For the avoidance of doubt it can be noted that there would be no such thing as a conspiracy to attempt *simpliciter*; it would have to be a conspiracy to attempt a specific offence.

4.76 In this Report the Commission reiterates as a final recommendation the view expressed in the Consultation Paper that inchoate liability not be expanded excessively by joining together inchoate offences. At the same time,

³⁰⁵ Section 13, *Non-Fatal Offences Against the Person Act 1997*.

the Commission acknowledges that conspiracy to incite an offence may be a sensible charge in some cases.

(iv) Conspiracy to commit strict liability offences

4.77 Consistent with the recommendations in this Report as to attempt and incitement, the Commission does not recommend that conspiracy attaching to strict liability offences should be precluded. In addition the Commission notes that there is no need expressly to recognise that there can be conspiracies to commit strict liability offences, as the general definition will cover this.

(v) Conspiracy to aid, abet, counsel or procure the commission of an offence?

4.78 As pointed out above, it is not actually a distinct offence to aid, abet, procure or counsel the commission of an offence. Rather, doing so may result in being tried and punished as if one had committed the offence.³⁰⁶ On this understanding of secondary liability (and on the understanding that only agreements to commit crimes will be criminal conspiracies) an agreement to aid, abet, procure or counsel the commission of an offence will not satisfy the definition of conspiracy. If such an agreement is actually carried out, of course, its participants may engage secondary liability under section 7(1) of the *Criminal Law Act 1997*. Also, given the flexible notion of agreement in conspiracy and how easy it is to join an already existing conspiracy (one need not meet the others or know all the details of the conspiracy), many efforts at assistance to a conspiracy, and agreements to assist the conspiracy, would result in one being included among the co-conspirators.³⁰⁷ The Commission also notes that a specific substantive offence may feature the notion of aiding and abetting and conspiracy may attach to such an offence. For example, section 2 of the *Criminal Law (Suicide) Act 1993* makes it an offence to aid, abet, counsel, or procure another's suicide. It would be possible to conspire to commit this offence and in England and Wales this has been recognised in respect of an equivalent statutory offence.³⁰⁸

4.79 The Commission does not consider there is a pressing need for conspiracy to be capable of attaching to aiding, abetting, procuring or counselling crime. Secondary liability only comes into play when a substantive

³⁰⁶ Section 7(1), *Criminal Law Act 1997*.

³⁰⁷ In the English case *R v Anderson* [1986] AC 27, the defendant was tried as a conspirator even though it could be said that he had agreed to assist the conspiracy rather than be a central participant.

³⁰⁸ *R v Reed* [1982] Crim LR 819.

offence is completed; this should not be changed via alteration of conspiracy doctrine.

(vi) Conclusion as to scope of unlawfulness in conspiracy

4.80 Conspiracy, as defined at common law, is an extraordinary tool for expanding criminal liability. It provides that the existence of agreement can render otherwise non-criminal activity criminal. That conspiracy has a very wide ambit is problematic in itself, but the problem is made much worse by the fact that conspiracy's ambit is so uncertain. An agreement to breach a contract, for example, may or may not be considered a conspiracy. Precedents can be found where what was criminalised as a conspiracy was essentially an agreement to breach various contracts. Yet, on the other hand, it is fair to suppose that every day there are agreements to breach contractual obligations (by not honouring them and so on) and the criminal law (specifically conspiracy) is not sought to be applied or even thought appropriate. This state of affairs represents what the legality principle and the rule of law says ought not be, that is, inconsistent application of uncertain laws with the resulting potential for implementation to be arbitrary.

4.81 Codification of criminal law provides a good opportunity to reform conspiracy in this way because it is precisely for reasons associated with codification efforts – legality and democratic control of the contours of criminal liability – that conspiracy should be limited to attaching to crimes only.

(3) Report recommendations on the activity to which a conspiracy relates

4.82 *The Commission recommends that conspiracy be limited to agreements the carrying out of which will involve the commission of a criminal offence.*

4.83 *The Commission recommends that conspiracy can attach to summary offences as well as indictable offences.*

4.84 *The Commission recommends that conspiracy can attach to incitement but not to attempt or conspiracy.*

4.85 *The Commission recommends that conspiracy can attach to strict liability offences.*

4.86 *The Commission does not recommend altering conspiracy so that it is capable of attaching to secondary participation in crime.*

E The specific common law conspiracies

4.87 Specific common law conspiracies are those offences that use the concept of conspiracy but exist not through the operation of general conspiracy

but rather have been created by courts as stand alone offences. The most prominent³⁰⁹ of these are:

- i) conspiracy to corrupt public morals
- ii) conspiracy to effect a public mischief
- iii) conspiracy to outrage public decency
- iv) conspiracy to defraud

4.88 These are not just instances of general conspiracy in operation because, crucially, there is no necessary unlawfulness requirement for these offences, such a requirement being essential for general conspiracy. So for conspiracy to corrupt public morals, for example, an agreement to do something strictly lawful – which may have the effect of corrupting public morals – can suffice.³¹⁰

(1) Consultation Paper analysis and provisional recommendations on the specific common law conspiracies

4.89 The Consultation Paper provisionally recommended the abolition of conspiracy to corrupt public morals, conspiracy to effect a public mischief, and conspiracy to outrage public decency. It considered the argument for abolishing these offences to be compelling.

4.90 The Consultation Paper considered conspiracy to defraud to be exceptional among the specific common law conspiracies. Although, like the other specific common law conspiracies, it covers instances of agreements to commit non-criminal breaches of contracts and other non-criminal frauds, it is, unlike the others, a relatively frequently used offence, and in respect of which there has been positive judicial opinion and in the academic literature. The Consultation Paper invited submissions on whether this offence should be retained.

(2) Discussion: evaluation of the specific common law conspiracies

4.91 These offences pose serious difficulties in terms of legality. Not only do they have the extraordinary function of rendering criminal quite lawful activity merely because two or more agree to pursue it, there is also great uncertainty as to what constitutes, for example, the corruption of public morals. The Commission notes the two-fold vagueness here: uncertainty as to what “to

³⁰⁹ Various other colourful examples can be found throughout the common law world. The Commission’s inchoate offences project deals only with the conspiracies that can plausibly be said to be part of Irish law.

³¹⁰ *Attorney General (SPUC) v Open Door Counselling Ltd* [1988] IR 593, 613.

corrupt” means and uncertainty regarding the ambit of “public morals” and the method for ascertaining public morals. Similar comments can be said about effecting a public mischief and outraging public decency. The problem is that precedent is of little guidance because of the shifting nature of public morals and public decency. In 1973, in *Knüller v DPP*³¹¹ the UK House of Lords held that activity designed to promote contact between homosexual men was against public morality. Even if this decision might, at one time, have been followed in Ireland, this could hardly be the case now, particularly in the light of the enactment by the Oireachtas of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, which provides for the recognition in law of the status of civil partnership between same-sex couples. Indeed, if the *Knüller* case was to be applied, it is at least arguable that quite a number of publications in Ireland and the UK, not to mention social website operators, conspire every day to corrupt public morals.

4.92 The Commission notes that conspiracy to corrupt public morals was recognised as a valid offence by the High Court in 1986.³¹² In 1999, however, Geoghegan J stated in the High Court that he was “impressed by the argument that certain types of vague conspiracies which might have been regarded as an offence under the old common law might now be regarded as too uncertain to render them triable under the Constitution.”³¹³ The Commission suggests that Geoghegan J may have had in mind conspiracy to corrupt public morals, to effect a public mischief, or to outrage public decency. The UK House of Lords, applying the common law, said there was no offence of conspiracy to effect a public mischief³¹⁴ but have recognised conspiracy to outrage public decency.³¹⁵ These offences are not used in Ireland.³¹⁶ Only conspiracy to defraud has any genuine claim to be a useful offence currently in Ireland and the Commission addresses this separately below. The abolition of the common law conspiracies to corrupt public morals, to effect a public mischief, and to outrage public decency would therefore be no loss to the criminal law. Abolition would also,

³¹¹ [1973] AC 435.

³¹² *Attorney General (SPUC) v Open Door Counselling Ltd* [1988] IR 593.

³¹³ *Myles v Sreenan* [1999] 4 IR 294, 299.

³¹⁴ *DPP v Withers* [1975] AC 842.

³¹⁵ *Knüller v DPP* [1973] AC 435.

³¹⁶ In *DPP (Vizzard) v Carew* [1981] ILRM 91, Hamilton J in the High Court recognised the offence of “effecting a public mischief.” This leaves open the possibility of using general conspiracy to construct an offence of conspiracy to effect a public mischief. For strong criticism of the *Carew* case see McAleese “Note on Criminal Law – Public Mischief” (1982) 4 DULJ 110.

the Commission considers, bring the very welcome development from the point of view of the legality principle by removing doubt about the availability of these exceptionally vague offences. The Commission therefore recommends the abolition of the common law conspiracies to corrupt public morals, to effect a public mischief, and to outrage public decency.

(3) Report recommendation on the specific common law conspiracies

4.93 *The Commission recommends the abolition of the common law conspiracies to corrupt public morals, to effect a public mischief, and to outrage public decency.*

(4) Conspiracy to defraud

4.94 The *Consultation Paper on Inchoate Offences* did not provisionally recommend the abolition of the common law offence of conspiracy to defraud. Instead, submissions were invited on whether it should be retained. In the UK House of Lords decision *Scott v Metropolitan Police Commissioner*³¹⁷ Viscount Dilhorne defined a conspiracy to defraud as:

“[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 ...”

4.95 This definition has been repeatedly cited in the UK and in Ireland as expressing the definition of conspiracy to defraud. In the *Scott* case Lord Diplock added this:

“Where the intended victim of a 'conspiracy to defraud' is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough”³¹⁸

4.96 Much of what constitutes conspiracy to defraud would be caught under the operation of general conspiracy. For example, if a person agrees with another to make a false insurance claim he or she may be committing a

³¹⁷ *Scott v Metropolitan Police Commissioner* [1975] AC 819, 840.

³¹⁸ [1975] AC 819, 841.

conspiracy to do one or more of the crimes³¹⁹ in the *Criminal Justice (Theft and Fraud Offences) Act 2001*. He or she will also likely commit conspiracy to defraud under the definition above. There is, however, a range of conduct that satisfies the definition of conspiracy to defraud but which involves non-criminal “frauds.” Plausible examples include trading while insolvent prior to company law regulation of such behaviour,³²⁰ and possibly performing a “nixer” at work,³²¹ or adversely possessing another’s land with a view to obtaining a freehold.³²² In each case, for conspiracy to defraud, as with all conspiracies, the behaviour needs to be agreed to be pursued by two or more and need not actually be performed.

4.97 In 1992 in its *Report on the Law Relating to Dishonesty*,³²³ the Commission considered conspiracy to defraud. Its recommendation was to for no change to the existing law.³²⁴

(a) Recent use of conspiracy to defraud

4.98 Conspiracy to defraud has featured in a number of cases in relatively recent years in Ireland and in England and Wales. The following survey will analyse the status of the offence, its parameters, and the question of whether and to what extent it is subsumed by the operation of general conspiracy combining with fraud offences.

(i) Irish cases on conspiracy to defraud

³¹⁹ There is no substantive offence of simply fraud in Irish law, but there are fraud offences such as counterfeiting and forgery, *Criminal Justice (Theft and Fraud Offences) Act 2001*. In addition, offences under the head of “theft” in the Act – making gain or causing loss by deception, for example – would in many instances be applicable to fraud schemes.

³²⁰ *R v Parker and Bulteel* (1916) 25 Cox CC 145.

³²¹ In Ireland a “nixer” is a commonly used term that refers to work or payment in the black or grey economy. In *R v Cooke* [1986] AC 909 the defendants had sold their own goods for their own gain when they were meant to be selling their employer’s goods. By analogy, an employee who works on their employer’s time for their own gain to the detriment of their employer would be also commit the offence.

³²² Provided, of course, there is an element of dishonesty, which may well be present in the claim to property knowing it is another’s.

³²³ (LRC 43 – 1992), Chapters 10 and 34.

³²⁴ *Ibid* at paragraph 34.13.

4.99 In *Myles v Sreenan*³²⁵ the applicant sought to be released from an extradition order. He faced conspiracy to defraud charges in England where the allegation against him was, among other things, that he and others, in an effort to get the public to buy shares in a company, had dishonestly included misleading information in an offer for sale document. The misleading information was to the effect that the offer was fully underwritten where the reality, as known to the applicant and his collaborators, was not so.³²⁶ The applicant submitted that there was no offence in Ireland corresponding to conspiracy to defraud and that the common law offence of conspiracy to defraud had not been carried over with the enactment of the Constitution in 1937 due to its catching agreement to commit illegality short of crime being too vague and uncertain.³²⁷

4.100 The applicant was unsuccessful in these submissions. First, regarding the correspondence issue Geoghegan J in the High Court observed that reading the indictment as a whole it alleged conduct capable of satisfying conspiracy to defraud as defined in *Scott v Metropolitan Police Commissioner*. Second, Geoghegan J was quite sure that conspiracy to defraud had been carried over on the enactment of the Constitution. Regarding the applicant's argument that the conspiracy to defraud offence was unconstitutionally vague, the judge stated:

“Counsel for the applicant fully admits that it could not apply to conspiracy to commit a crime. I think that by the same token the ingredients of the offence of conspiracy to defraud and the meaning of ‘defraud’ have been so clearly established over the centuries that the question of uncertainty does not arise and I see no reason why the common law offence of conspiracy to defraud would not have been carried over under the Constitution.”³²⁸

This assumes the ingredients of the offence to be so clearly established that there is no question of uncertainty. In this passage Geoghegan J also tacitly acknowledges that the ground covered by “defraud” in conspiracy to defraud is wider than fraud in the sense of those substantive offences that capture fraud-like scenarios.

³²⁵ [1999] 4 IR 294, 296-297.

³²⁶ *Myles v Sreenan* [1999] 4 IR 294, 296-297.

³²⁷ *Ibid* at 297.

³²⁸ *Ibid* at 299-300.

4.101 In *Attorney General v Oldridge*³²⁹ the respondent was also endeavouring to resist an extradition order. The case against him in the United States was that he had committed “wire fraud” by his participation in a scheme to defraud three banks. The respondent’s role was that of having given the banks assurances during a “lulling phase” so that they would not sue. The respondent submitted that there was no corresponding offence in Irish law to “wire fraud.” The judge of the District Court tended to agree with this submission. A case was stated to the High Court and then appealed to the Supreme Court where the Court identified conspiracy to defraud as the relevant corresponding offence in Irish law.

4.102 The elaborate scheme at the background to the *Oldridge* case involved two basic phases. The first part was the obtaining of large loans from the banks on foot of lies.³³⁰ The Court opined that what was done in this part would correspond with the offence of obtaining money by false pretences.³³¹ The respondent only played a part in the second phase of the scheme, the “lulling phase” where he gave false assurances to the banks to assuage their concerns about defaulting loan repayments. Keane CJ, delivering the Court’s judgment, did not think the activity in the second phase – the “lulling phase” – amounted to obtaining money by false pretences, but that it did amount to conspiracy to defraud, which was identified by quoting the definition from *Scott v Metropolitan Police Commissioner*.³³² Keane CJ then went on to approve Geoghegan J’s comments³³³ and the comments of McAuley and McCutcheon³³⁴ to the effect that conspiracy to defraud is not unconstitutionally vague because its ingredients are established by case law.

4.103 *Oldridge*, in addition to providing Supreme Court endorsement of the constitutionality of conspiracy to defraud, indicates that the fraud aspect of the offence is substantially wider than the substantive offence of obtaining money by false pretences. This is significant because obtaining money by false pretences, or in its modern guise under the *Criminal Justice (Theft and Fraud*

³²⁹ [2000] 1 IR 593.

³³⁰ *Ibid* at 595-596.

³³¹ *Ibid* at 600. This offence was subsequently, in effect, replaced with the offence of making gain or causing loss by deception, section 6, *Criminal Justice (Theft and Fraud Offences) Act 2001*.

³³² [1975] AC 819, 840.

³³³ *Myles v Sreenan* [1999] 4 IR 294, 299-300.

³³⁴ McAuley and McCutcheon *Criminal Liability* (Round Hall 2000) at 429.

Offences) Act 2001, making gain or causing loss by deception,³³⁵ of all the current substantive fraud offences, has potentially the widest reach; it would be this offence – combining with general conspiracy to create an offence of conspiracy to make gain or cause loss by deception – that would be the leading candidate for capturing what conspiracy to defraud currently covers in the event of conspiracy to defraud being abolished. The *Oldridge* case indicates, however, that if conspiracy to defraud is abolished there would be a net loss in terms of fraudulent conduct covered as criminal.

(ii) Recent conspiracy to defraud cases from England and Wales

4.104 The UK House of Lords has recently taken a more rigorous approach than previously to conspiracy to defraud.³³⁶ *Norris v Government of the United States of America* and *R v Goldshield* both involved price-fixing cartels. At issue for the House of Lords was whether mere price-fixing arrangements could amount to conspiracy to defraud. The House reviewed the common law authorities and concluded:

“The common law recognised that an agreement in restraint of trade might be unreasonable in the public interest, and in such cases the agreement would be held to be void and unenforceable. But unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, such agreements were not actionable or indictable.”³³⁷

4.105 It can be noted that the “aggravating features” listed here are not necessary elements in the definition of conspiracy to defraud. Insofar as “fraud” itself is part of the definition of conspiracy to defraud it requires dishonesty but not deceit.³³⁸ In *Norris* and *Goldshield* the UK House of Lords was of the opinion that the criminalisation of mere price-fixing would run contrary to the principle of legality in Article 7 of the European Convention on Human Rights for the reason that there was no precedent identifying such behaviour as criminal. Yet the English High Court (sitting as a Divisional Court of three judges), which the UK House of Lords overruled, had concluded that the definition of conspiracy to defraud encompassed price-fixing cartels.³³⁹ This was also the

³³⁵ Section 6, *Criminal Justice (Theft and Fraud Offences) Act 2001*.

³³⁶ *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920 and *R v Goldshield Group* [2008] UKHL 17, [2009] 1 WLR 458.

³³⁷ *Norris v Government of the United States of America* [2008] 1 AC 920, 933.

³³⁸ Ormerod *Smith and Hogan, Criminal Law* (11th Ed Oxford University Press 2005) at 420.

³³⁹ [2007] EWHC 71 (Admin); [2007] 1 WLR 1730.

view of commentators.³⁴⁰ The decision of the UK House of Lords can accordingly be seen as tightening up the scope of conspiracy to defraud to make it more compatible with contemporary demands of legality.

(b) Conspiracy to defraud: evaluation

4.106 The Irish Courts have repeatedly asserted that the ingredients of conspiracy to defraud are clearly established by authorities. However, that the offence has featured regularly for a long time does not mean its parameters are clear. The offence remains vague and problematic. The problem is that its definition is wide enough to seemingly catch conduct that might not be considered to warrant criminalisation. The offence is capable of encompassing sharp practice in business. Vendors agree with each other not to reveal shortcomings of the products they sell. Sharp practice that traditionally might have been met with the response "buyer beware," and is now more comprehensively addressed by consumer protection law, could in principle be a conspiracy to defraud. Yet the reality is that the offence is not used in this way. This is either because the offence is defined less than precisely in the repeatedly quoted *Scott*³⁴¹ passage, or because the offence's definition is overbroad. Either way, the offence offends the legality principle.

4.107 It has been said that the vice of conspiracy to defraud is also its virtue.³⁴² By this is meant that its vagueness means that it is flexible enough to catch novel harmful conduct as criminal. It is useful in this way, and there is no evidence that it is being used excessively in Ireland for this reason. It is also a useful offence for prosecuting complex cases. With conspiracy to defraud the prosecution can adduce evidence of a range of activity and suggest the existence of a background agreement (to defraud) can be inferred. In some cases this might be a less risky approach, in terms of the prosecution collapsing, than having to show concrete instances of a substantive fraud offence being committed. Additionally the use of specimen charges – where only a few instances from a whole range of conduct is charged – may result in a punishment that does not truly reflect what was done.³⁴³ A conviction for conspiracy to defraud would facilitate more proportionate punishment and

³⁴⁰ Lever and Pike, "Cartel Agreements, Criminal Conspiracy and the Statutory 'Cartel Offence' " [2005] ECLR 90, 95.

³⁴¹ *Scott v Metropolitan Police Commissioner* [1975] AC 819, 840.

³⁴² Ormerod, *Smith and Hogan, Criminal Law* (12th ed. Oxford University Press 2008) at 421. A similar point was made in Law Reform Commission *Report on the Law Relating to Dishonesty* (LRC 43 – 1992) at paragraph 34.9.

³⁴³ Law Commission for England and Wales *Report on Fraud* (Law Com No 276) at paragraph 1.5.

accurate labelling of the wrong committed. These claims in favour of conspiracy to defraud must be qualified with the observation that conspiracy to defraud, like all conspiracy offences, involves a rather imperfect labelling of criminal activity, for it criminalises the actual or supposed agreement behind the harmful activity rather than the activity itself.

4.108 The Commission acknowledges that there are valid arguments in favour of abolishing conspiracy to defraud but, on balance, refrains from recommending its abolition in this Report.

(c) Report recommendation on conspiracy to defraud

4.109 *The Commission does not recommend the abolition of conspiracy to defraud.*

F Conspiracy and impossibility

4.110 This part of the Chapter concerns the question of whether it is a criminal conspiracy for two or more to agree to a specific course of action that would amount to a crime if circumstances were as they believed them to be, but for whatever reason, in the circumstances as they really are, cannot possibly amount to a crime.

(1) Consultation Paper analysis and provisional recommendations on conspiracy and impossibility

4.111 The *Consultation Paper on Inchoate Offences* identified the relevant authority on the position in Ireland on impossibility in conspiracy liability. Walsh J in *The People (Attorney General) v Sullivan*³⁴⁴ said, *obiter*, that an impossible attempt is still a criminal attempt. As the Consultation Paper suggested, it is difficult to see why the position would be different for conspiracy: take the facts of *Sullivan* involving the submission of false reports of work done and consider whether the court's approach would have been different had the defendant been acting in concert with another pursuant to a putative agreement to obtain money by false pretences. It is suggested that *Sullivan* could be used to argue that impossibility is no defence to a conspiracy in Irish law.

4.112 This picture is complicated because, subsequent to *Sullivan*, there is a UK House of Lords decision³⁴⁵ (admittedly, of course, not binding on any Irish court) that at common law impossibility does indeed preclude liability for conspiracy. This creates some possible uncertainty as to the position in Ireland because the UK House of Lords was applying the common law, not statutory

³⁴⁴ [1964] IR 169.

³⁴⁵ *DPP v Nock* [1978] AC 979.

conspiracy, and the finding as to the relevance of impossibility was central to the decision. While this approach has not been applied in Ireland, the Commission considers that this is a point on which there should be clarity, in order to avoid any doubt on the matter.

4.113 The Consultation Paper provisionally recommended without qualification that impossibility should not bar conspiracy liability. Just as in an attempt what is attempted is what the person believes they are attempting rather than what an objective or *ex post* assessment suggests, so too what would-be conspirators agree to do is what they believe they are agreeing to do. They can still agree to do something even though unknown to them circumstances are such that they will not be able to do it.

(2) Discussion: impossibility no bar to liability for conspiracy

4.114 In this Report the Commission repeats the proposal that impossibility should not be a defence to conspiracy. This is in keeping with the Commission's proposals regarding the relevance of impossibility to attempt and incitement liability. It is also consistent with the rationale of inchoate liability and corresponds with the view that a conspiracy that will not be successful is still a conspiracy, just as a conspiracy that fails is still a conspiracy. It avoids anomalous, unmeritorious acquittals of the sort that occurred in *Haughton v Smith*³⁴⁶ and in *DPP v Nock*.³⁴⁷

4.115 To avoid any doubt, the Commission notes that, under this approach, where two or more persons conspire to do something they believe wrong and criminal, but in fact it is not prohibited, they do not commit conspiracy. This scenario has sometimes been referred to as legal impossibility, but it is more accurately described as simply a case where conspiracy has not occurred because of the absence of criminality or unlawfulness regarding what the agreement is aimed at. People cannot be guilty of imaginary crimes. So too they should not be held inchoately liable for efforts towards imaginary crimes.

(3) Report recommendation on conspiracy and impossibility

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

G Withdrawal from a conspiracy

4.117 In this Part, the Commission considers the situation where a conspiracy has formed but one or more of its members no longer wish to be a

³⁴⁶ [1975] AC 476.

³⁴⁷ [1978] AC 979.

part of it. The key issue is whether they can potentially alter their liability for conspiracy and, if so, what must they do to achieve this?

(1) Consultation Paper analysis and provisional recommendation on withdrawal from a conspiracy

4.118 The *Consultation Paper on Inchoate Offences* referred to comments made in *The People (Attorney General) v Sullivan*³⁴⁸ suggesting that abandonment does not alter attempt liability as providing a basis for saying abandoning or withdrawing from a conspiracy will not exculpate a conspirator. It can be added that the approach throughout common law jurisdictions (such as the UK and the USA) does not recognise such a defence.

4.119 The Consultation Paper pointed out how a simple change of mind, even if voluntary and sincere, cannot sensibly be sufficient to warrant a defence to conspiracy. If there is to be a defence it must be one along the lines of that in the American Law Institute's Model Penal Code, which is availed of if one thwarts the success of the conspiracy.

4.120 The Consultation Paper did not take a provisional position recommending for or against the introduction of a defence of withdrawal from a conspiracy, but invited submissions on the matter.³⁴⁹

(2) Discussion: the case for and against a new defence of withdrawal from conspiracy

4.121 There is clearly some merit that the law on conspiracy should make things difficult for criminal groups to function effectively. The sense of group loyalty among conspirators can be strained on an ongoing basis by holding out the possibility that a member can extricate themselves from the conspiracy and thereby escape liability. The availability of a defence of withdrawing from a conspiracy would be a way of doing this. This is a significant point because it identifies a reason for having a withdrawal defence for conspiracy that does not apply in respect of having such a defence for attempt or incitement.

4.122 Nevertheless, the availability of a mechanism for getting out of a conspiracy might result in more readily entering the conspiracy in the first place. Also, there is a justifiable sense of unfairness in allowing a disloyal conspirator escape liability. His or her withdrawal may be entirely self-serving and not motivated by commendable reasons. Mitigating these concerns is the requirement, present in the American Law Institute's Model Penal Code, that a defence of withdrawal is available only to conspirators who actually thwart the success of the conspiracy.³⁵⁰ When the defence is available on this limited

³⁴⁸ [1964] IR 169.

³⁴⁹ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) 3.87.

³⁵⁰ Section 5.03(6) of the Model Penal Code.

basis it provides an incentive to undermine conspiracies while also acknowledging the lesser blameworthiness of those who prevent a conspiracy having been part of it in the first place vis-à-vis those who do not.

4.123 While there has never been a defence of withdrawal available for conspiracy at common law, it has long been the case that it is of relevance regarding how the criminal law system treats a conspirator. Thwarting a conspiracy or otherwise subverting it may result in one not being prosecuted or being prosecuted on less serious charges than otherwise. And having withdrawn from a conspiracy may be significantly to a defendant's benefit in a plea in mitigation at sentencing stage. So, even absent a substantive defence of withdrawal, there are substantial incentives for conspirators to abandon or otherwise do things contrary to their conspiratorial obligations.

4.124 Given that there is scope, albeit quite limited, for withdrawing from secondary liability and common designs,³⁵¹ it may be suggested that conspiracy ought to have a similar avenue for exculpation. However, as the Law Commission for England and Wales has recently observed,³⁵² withdrawal from a common design can be measured by the effect such withdrawal had in negating the harm associated with the substantive offence, but in conspiracy cases there need be no substantive offence committed. In this respect, the Commission has concluded that it should not recommend the introduction of such a defence.

(3) Report recommendation on withdrawal from a conspiracy

4.125 *The Commission does not recommend the introduction of a new defence of withdrawal from a conspiracy.*

³⁵¹ *R v Becerra and Cooper* (1975) 62 Cr App R 212.

³⁵² Law Commission for England and Wales *Report on Conspiracy and Attempts* (Law Com 318 2009) at paragraphs 2.43.

CHAPTER 4 INCITEMENT

A Introduction

5.01 Incitement, by contrast with a criminal attempt (which involves trying to commit a crime), involves trying to get another person to commit a crime. A person who commands or encourages or asks or implores another to perform a crime may incur inchoate liability regardless of whether the other person actually is encouraged towards the crime or performs it. Incitement in this context is a general inchoate offence; it can apply in respect of all offences. Thus, to ask another person to appropriate property without the consent of the owner may be incitement to theft; to command someone to punch another may be incitement to assault, and so on. In Ireland, as with other aspects of inchoate liability, the operation of general incitement remains primarily based on common law.

5.02 In this Chapter, the Commission deals in turn with the three key aspects of incitement: the act of incitement itself, incitement culpability, and what crimes can be incited. The Chapter also addresses the issues of whether it is incitement to encourage a crime that, in the circumstances, will be impossible to commit and also the issue whether, having delivered an incitement, a person can withdraw it and thereby avoid incitement liability. The Commission also follows the approach taken in the *Consultation Paper on Inchoate Offences* of referring to the person who incites another person as the “incitor” and the person who is incited as the “incitee.”

5.03 As with the other two inchoate offences dealt with in the Report, the Commission confirms the provisional view expressed in the *Consultation Paper on Inchoate Offences* that incitement as a general inchoate offence should be placed on a statutory footing and that the common law offence of incitement be abolished.

(1) *Main Report recommendation on reform of incitement*

5.04 *The Commission recommends placing incitement as a general inchoate offence on a statutory basis and abolishing the common law offence of incitement.*

B The act of incitement

5.05 This part of the Chapter deals with the basic definition of the act of incitement. Inciting a crime is often referred to as soliciting crime, particularly in cases of soliciting murder.³⁵³ An incitement is identified by its character – that is, the conduct of inciting or encouraging crime – rather than by a result it may cause. Crucial to note about incitement is that incitements to crime that have no effect whatsoever in influencing someone else towards crime can still be criminal incitements.

(1) Consultation Paper analysis and provisional recommendations on the act of incitement

5.06 The *Consultation Paper on Inchoate Offences* concluded that the formula “commands, encourages, or requests”³⁵⁴ neatly sums up the range of actions that can constitute incitement. The Commission repeats this recommendation in this Report but recommends that this formula be supplemented such that the act of incitement is defined in statute as “commands, encourages, requests, or otherwise seeks to influence another person ...”

(2) Discussion: the act of incitement

5.07 A communication to someone else encouraging them to do something criminal constitutes incitement. A specific crime needs to be incited, but it does not need to occur or be attempted, hence the inchoate nature of incitement. Guidance as to the features of common law incitement is provided by the following propositions.

- i) The definition of the act of incitement is capacious, illustrated by the following non-exhaustive list: “suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.”³⁵⁵

³⁵³ This particular instance of incitement liability was placed in statute by section 4 of the *Offences Against the Person Act 1861*.

³⁵⁴ From the American Law Institute's Model Penal Code.

³⁵⁵ *Per* Holmes JA in *S v Mkosiyana* (1966) 4 SA 655, 658. This passage of Holmes JA has been quoted approvingly: *R v Goldman* [2001] EWCA Crim 1684; [2001] Crim LR 822, McAuley and McCutcheon *Criminal Liability* (Round Hall Press 2000) at 431, Ormerod, *Smith & Hogan Criminal Law* (12th ed Oxford University Press 2008) at 438.

- ii) The communication of incitement must reach its intended recipient (intercepted incitements may be prosecuted as an attempt to incite).³⁵⁶
- iii) Mere encouragement is sufficient for incitement; there does not have to be a reward or inducement offered in exchange for carrying out the incited crime.³⁵⁷ However, from an evidential point of view in respect of proving the fault element for incitement the presence of an offer of reward may be pivotal insofar as it can reveal that the actor truly did mean for his or her incitement to be acted upon.³⁵⁸
- iv) The incited act does not need have been carried out;³⁵⁹ the encouragement need not have even had any actual influence or likelihood of success.³⁶⁰
- v) The communication of incitement need not be delivered directly to its recipient.³⁶¹
- vi) Incitements do not have to be directed at a specific person and can be made at large.³⁶²
- vii) Incitement need not be explicit; it can be implicit.³⁶³
- viii) Incitements can take the form of threatening commands or instructions.³⁶⁴
- ix) Making one's assistance available, without actually providing encouragement, for the commission of crime does not amount to incitement.³⁶⁵

³⁵⁶ *R v Banks* (1873) 12 Cox CC 393.

³⁵⁷ *R v Marlow* [1997] EWCA Crim 1833, (1998) 1 Cr App R 273.

³⁵⁸ As in *The People (Attorney General) v Capaldi* (1949) 1 Frewen 95.

³⁵⁹ *The People (DPP) v Murtagh* [1990] 1 IR 339, 342.

³⁶⁰ *DPP v Armstrong* [2000] Crim LR 379.

³⁶¹ *R v Jones* [2007] EWCA Crim 1118; [2008] 1 QB 460.

³⁶² *R v Most* (1881) 7 QBD 244.

³⁶³ *R v Marlow* [1997] EWCA Crim 1833, (1998) 1 Cr App R 273.

³⁶⁴ *Race Relations Board v Applin* [1973] QB 815.

³⁶⁵ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 22.

5.08 Incitement has not received the same quantity of attention as attempt and conspiracy. The critical commentary of the Law Commission for England and Wales changed this trend and has resulted in legislative change in England and Wales. The criticism of incitement included the claim that there was a gap between it and secondary liability that meant the person who provides assistance – but not encouragement – to a criminal endeavour that is neither completed nor attempted escapes criminal liability. The Commission’s *Consultation Paper on Inchoate Offences* considered the proposal of the Law Commission for England and Wales to replace incitement with a new inchoate offence of encouraging or assisting crime but did not provisionally recommend such a change for Irish law.³⁶⁶

(a) A formula to describe the act of incitement

5.09 The formula “commands, encourages, or requests” neatly sums up almost the whole range of actions that can constitute incitement. This formula is from the American Law Institute’s Model Penal Code. In its three words it captures the main kinds of incitements: forceful (“commands”), gentle (“encourages”), and business-like or matter-of-fact (“requests”). There are other words that could achieve much the same effect: “orders, persuades, or solicits” for example. The Commission in this Report does not wish to depart from its provisional recommendation that “commands, encourages, or requests” is the appropriate formula to use in placing the act of incitement within a statutory frame. The Commission does, however, recommend that the formula should be supplemented. As the formula appears in the Model Penal Code it is a closed list. A concern is that a particular encouragement to crime may not fall within any of the three listed modes of action. In achieving neatness and clarity the formula may lose the expansiveness of the meaning of incitement at common law. One approach is to simply use “incites” in a statutory formulation and not define it further.³⁶⁷ It is then up to the courts and ultimately the trier of fact to decide whether what was done amounted to incitement. This may lead to variability in the results reached. A better approach is to maintain the guidance provided by the Model Penal Code formula but make the modes of commission a non-exhaustive list. Thus the Commission recommends setting out the meaning of incite as command, encourage, request, *or otherwise seek to influence* another to commit an offence.

³⁶⁶ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at 4.40-4.47.

³⁶⁷ Clause 47(1)(a) of the Draft Criminal Code for England and Wales, Law Commission for England and Wales (No 177 1989).

(b) Incitement and jurisdiction

5.10 There is little case-law on inter-jurisdictional incitement. However, in *R v Most*³⁶⁸ a newspaper article encouraging political assassinations addressed to the world at large was held to constitute incitement to murder. Thus there is basis in common law for criminalising inter-jurisdictional incitements. The advent of the internet and ease of instant communication between people in different countries would tend to increase the opportunity for incitement to take place across jurisdictions. This suggests that provisions on jurisdiction for incitement ought to be provided in statute. As suggested for attempt and conspiracy, the rules for inter-jurisdictional conspiracies set out in section 71 of the *Criminal Justice Act 2006* provide an apt model for incitement, the necessary changes being made.

(3) Report recommendations on the act of incitement

5.11 *The Commission recommends that the formula “commands, encourages, requests, or otherwise seeks to influence” another to commit a crime be used to define the act of incitement.*

5.12 *The Commission recommends providing for cross-jurisdictional incitements on the same basis as section 71 of the Criminal Justice Act 2006 provides for cross-jurisdictional conspiracy.*

C Incitement culpability

5.13 This part of the Chapter is concerned with the culpability needed to be guilty of incitement. An incitor must be culpable in respect of his or her delivery of an incitement; an accidental publication of what amounts to an encouragement to crime would not, for example, trigger incitement liability. In addition, the culpability requirements of the target crime incited play a pivotal role in informing the culpability requirements for incitement. This Report proposes a framework for incitement culpability. It will be based on the idea that the culpability required for an incitement tracks that required for the offence being incited.

(1) Consultation Paper analysis and provisional recommendations on incitement culpability

5.14 The Commission’s *Consultation Paper on Inchoate Offences* outlined and provisionally recommended the understanding of incitement culpability as intention that the incited act be carried out.³⁶⁹ Intention in this context was

³⁶⁸ (1881) 7 QBD 244.

³⁶⁹ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at 4.19-4.30.

taken to include oblique intention as well as direct intention. This approach is similar to the analysis of attempt culpability that sees intention to commit the target substantive offence as the culpability required for criminal attempts. It is based on the ordinary meaning of attempting and of inciting as *trying* to bring about crime. The Consultation Paper identified further questions regarding incitement culpability, specifically the extent to which “knowledge” or “belief” as distinguished from “intention” may suffice for incitement culpability. In respect of incitement culpability, as with the other inchoate offences already discussed, this Report departs from the Consultation Paper’s approach. The Consultation Paper’s intention-based approach suffers from that weakness that it can lead to under-criminalisation. In addressing this under-criminalisation problem while maintaining an intention-based approach, an excessively complex scheme results. As with the other inchoate offences, the Commission in this Report proposes a scheme based on the tracking principle.

(2) Discussion: incitement culpability

(a) Incitement culpability: an overview

5.15 In considering incitement culpability there are a number of different aspects that can be isolated. One aspect is the incitor’s state of mind in respect of the very act of communication that may constitute the incitement. A second aspect is whether the incitor truly intends the incitement to be acted upon. A third aspect is the culpability requirements of the incited offence and to what extent they must be attributable to the mind of the incitor. It might be also suggested that a fourth aspect is the state of mind of the incitee and the need for them to have the culpability for the incited offence. This fourth aspect overlaps with an issue of the target of an incitement and is only in a derivative sense relevant to the incitor’s state of mind.

5.16 The central principle which the Commission will recommend for codification is that the culpability needed for an incitement will track the culpability of the substantive offence to which the incitement relates. For example, to be guilty of inciting theft, a person will need to be acting with the *mens rea* for theft in making the incitement. This is a departure from the scheme provisionally recommended in the Consultation Paper and the reasons for the change in opinion are set out below. The proposed approach has the merit of addressing the different aspects identified in the preceding paragraph without becoming unduly complicated.

(b) Culpability as to the act of incitement

5.17 The very act of incitement is a communication. There must obviously be a degree of wilfulness in respect of the making of this communication. A person could keep a private diary setting out desires for particular offences to

be committed and how their commission would be heroic and so on.³⁷⁰ If by accident this diary was published or read by others, it seems incitement is not committed despite the diarist truly desiring the substantive offences be committed. This is because the diarist did not take the conscious decision to incite; they did make an incitement to crime, merely desired it, and to punish them in the circumstances would be to punish wicked thoughts alone, albeit ones reduced to private writing.

5.18 It might be said that writing down such thoughts is something worth discouraging, that if the diary being “published” results from negligence or recklessness on the part of the diarist then they can be said to have incited crime. There may be reasonable disagreement about this. Though it cannot be stated with certainty, it seems that common law incitement draws the line before recklessness. That is, to commit incitement one must have culpability greater than recklessness in respect of the act of communicating.³⁷¹ The law on incitement could draw the line the other side of recklessness, with the result that those who recklessly communicate words of incitement may be liable for incitement. This would not be absurd,³⁷² but is not going to be advocated in this Report for the reason that it departs too much from the concept of incitement – that of trying to get another to commit a crime.

5.19 The Commission considers that this aspect of incitement culpability is adequately addressed and implicit in the description of an incitement as a command, encouragement, request or other effort to influence another towards crime. Voluntariness is a basic prerequisite to an act of incitement – a person talking in their sleep cannot be held guilty of incitement notwithstanding the content of their speech. Apart from the general principles as to voluntariness and automatism such a person cannot be said to have commanded or encouraged anything. The same applies for the non-intentional revelation of thoughts, the content of which might amount to an incitement. Again, such a person – the diarist in the example above – has not requested or commanded or otherwise sought to influence another towards crime.

³⁷⁰ In *R v Most* (1881) 7 QBD 244 the defendant had published an article celebrating anarchism and calling for the assassination of political leaders. The current example envisages writing of similar content which is not put forward for publication.

³⁷¹ *R v Most* (1881) 7 QBD 244, *R v Higgins* (1801) 2 East 5.

³⁷² The concept of reckless incitement has been enacted in the UK in a specific statutory scheme designed to criminalise the encouragement of terrorism: *Terrorism Act 2006*.

(c) Whether the incitor truly intends their words of incitement to be acted on

5.20 A person may intentionally communicate a desire or request or words of encouragement in respect of the commission of criminal acts or omissions, but they may be entirely inappropriate for criminalisation because they were made in jest or otherwise not intended to be acted on. It is crucial for incitement that the incitor truly believes his or her words might be taken seriously in the sense to be acted on or to potentially really influence another towards a crime. Incitement liability would, it might be suggested, amount to an unconstitutional restriction of freedom of expression otherwise. It is implicit in the cases of incitement at common law that the tribunal of fact had to be entirely satisfied that the words of incitement were intended by the incitor to be acted on.

5.21 Again this issue is adequately addressed – because it is something that almost goes without saying – is in the definition of incitement. A person who, purely in jest, suggests a particular outcome which would amount to the commission of a crime has not really commanded or encouraged such an outcome. Of course, a real incitement could be cloaked behind a façade of jest; it will be a matter for trier of fact in an individual case to infer to true attitude of the accused.

(d) Incitement culpability tracking that of the offence to which it relates

5.22 The conventional view at common law,³⁷³ endorsed in the Commission's *Consultation Paper on Inchoate Offences*,³⁷⁴ is that for the inchoate offence of inciting an offence a defendant is required to have the culpability state of intention and this is so even if culpability states other than intention suffice for the particular substantive offence to which the instance of incitement relates. This Report calls for a reconsideration of this view. It suggests that incitement culpability should track that of the substantive offence to which it relates. This approach avoids potential under-criminalisation and has the merit of simplicity.

5.23 As with attempt and the analysis of *R v Khan*³⁷⁵ in the above Chapter on attempt, a potential under-criminalisation problem can be usefully illustrated in the context of inchoate liability for the offence of rape. Common law rape,³⁷⁶

³⁷³ *R v Most* (1881) 7 QBD 244, 248 and 251.

³⁷⁴ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 4.30.

³⁷⁵ [1990] 2 All ER 783.

³⁷⁶ Codified in Ireland in section 2 of the *Criminal Law (Rape) Act 1981*.

involving non-consensual sexual intercourse by a man against a woman, requires either intention or recklessness on the part of the man as to whether the woman consents. In a case of incitement to rape the question arises whether the offence is made out against the person who encourages a man to have sexual intercourse with a woman in circumstances where, from the would-be incitor's point of view, it is not certain that the woman would not consent to this course of conduct, but there may be an unjustifiable risk that she will not consent. In other words, where intercourse is encouraged with recklessness as to whether such intercourse will be consensual, can liability for incitement to rape be imposed? The conventional view that incitement requires intention has considerable difficulty accommodating a positive answer here; it cannot *prima facie* acknowledge recklessness as sufficing in the description of incitement to rape *mens rea*. It is uncontroversial that reckless rape should be classed as rape along with intentional rape; the criminal law does not label as rapists only those who specifically seek non-consensual sex, it also captures those who go ahead with sexual intercourse reckless as to whether it is consensual or not. This important choice, reflecting society's view about the moral blameworthiness of carrying out sexual intercourse that is not consented to, should not be subverted by inchoate liability. It is not for inchoate liability doctrine to alter this choice about blameworthiness in respect of rape. On this view, those who, in a sense, recklessly incite rape, along with those who intentionally incite rape, should be capable of attracting liability for incitement to rape. This would provide accurate and fair labelling of the conduct involved.

5.24 As with attempted rape this result can be reached by employing distinctions between the conduct and the circumstances of rape. As was the practice in *R v Khan*³⁷⁷ this would involve for incitement an *ad hoc* approach that means that incitement culpability for some incitement offences would be the same as their related substantive offences while for other incitement offences the culpability for the incitement offence would be more restricted (intention alone) than for the related substantive offence (intention, recklessness, negligence).

5.25 A simpler, more workable and more consistent approach that addresses the under-criminalisation problem is available. It is the tracking approach the Commission wishes to recommend; it says the fault element for an inchoate offence follows the fault element of the substantive offence to which the inchoate offence relates. To incite rape one must, with the culpability required for the substantive offence of rape, encourage another to the action that constitutes the offence.

³⁷⁷ [1990] 2 All ER 783.

(e) Incitement culpability: a summary

5.26 Incitement *mens rea* can get very complex because at issue is the mind of the incitor as well as the mind of the incitee. The Commission is of the opinion that the approach that results in the most appropriate criminalisation is also, happily, the simplest approach. This approach requires incitement culpability to track the relevant target substantive offence culpability. It requires the incitor to act with the culpability required for the incited offence when making the incitement.

(3) Report recommendations on incitement culpability

5.27 *The Commission recommends that the fault element for inciting a particular substantive offence should track that of the substantive offence.*

D The target of an incitement: the person and act incited

5.28 This section is about the conduct or acts incited in an incitement. It is clear that to be guilty of incitement one must incite criminal acts. Inciting conduct that is merely a breach of civil law is not criminal incitement at common law. There are, however, a number of statutory offences which in effect criminalise the incitement of non-criminal wrongs³⁷⁸ – these are special instance offences that happen to use the concept of incitement, but are not examples of the general inchoate offence of incitement and are therefore not within the scope of this Report.

5.29 That criminal offences can be incited is expressed in the definition of incitement in that the incited act or acts, if to be carried out, would involve the commission of an offence. A number of difficulties arise regarding this simple stipulation that incitement relates only to crime. In particular, there is the question of whether it is incitement to encourage someone to do what very much appears to be criminal conduct but for some reason will not be criminal in the circumstances. For example, is it criminal incitement to command a child below the age of criminal responsibility to take items from a shop without paying for them? If the child does as instructed – which would be an act of theft if done by a criminally responsible person – they will not be committing a crime³⁷⁹ and for incitement a crime must be incited. In the following sections this Report will revisit this and other questions and provide the Commission's final recommendations for what a codified statement of incitement should be.

³⁷⁸ *Prohibition of Incitement to Hatred Act 1989*. Notwithstanding its title, this legislation uses “stir up” rather than “incite” to define the *actus reus* of its offence.

³⁷⁹ The person who so instructed has likely committed the substantive offence of theft if the child carries out their instructions successfully.

(1) Consultation Paper analysis and provisional recommendations on the target of an incitement

5.30 The *Consultation Paper on Inchoate Offences* provisionally recommended no change from the common law position that incitement liability can attach only where the incited acts, if carried out, would amount to a substantive offence.³⁸⁰

5.31 An important issue which was dealt with under the heading of incitement *mens rea* in the Consultation Paper is the scope for incitement to apply for encouraging the commission of acts that are criminal in nature but for some reason will not result in liability for the person who carries them out. This question is addressed below.

(2) Discussion: the target of an incitement

(a) Indictable offences and summary offences

5.32 Certainly, indictable offences can be criminally incited. There may be some doubt about inciting summary offences at common law. However, *R v Curr*³⁸¹ indicates that a summary offence can be criminally incited at common law.

5.33 As with attempt and conspiracy suggestions can be made for limiting the operation of incitement to indictable offences. This would mean it would be criminal incitement to incite indictable crimes, but not summary crimes. However, the arguments for proposing this are not compelling. Additionally, for the sake of consistency and simplicity as between the three general inchoate offences it is reasonable to preserve the current position in incitement that both summary and indictable offences can be criminally incited. Similarly, consistent with the recommendations in this Report as to attempt and conspiracy, the Commission does not recommend that incitement attaching to strict liability offences should be precluded. In addition the Commission notes that there is no need expressly to recognise that there can be a incitement to commit strict liability offences, as the general definition will cover this.

(b) Inciting inchoate offences

5.34 As identified in the Consultation Paper there are authorities at common law for incitement to incite³⁸² and incitement to conspire.³⁸³ The

³⁸⁰ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at 4.39

³⁸¹ [1968] 2 QB 944.

³⁸² *R v Sirat* (1985) 83 Cr App R 41.

³⁸³ *R v De Kromme* (1892) 17 Cox CC 492.

Consultation Paper doubted whether there could be an incitement to attempt for the reason there may be a lack of *mens rea*.³⁸⁴

(i) Inciting an attempt

5.35 The Law Commission for England and Wales has suggested that, in principle, the construction of an offence of incitement to attempt a crime should be possible.³⁸⁵ It should be borne in mind that incitement to attempt will only arise in a very unusual type of case; in most cases of incitement the defendant would have urged the full offence.

5.36 The wrong of incitement is not just bringing about some substantive harm but also in causing, or trying to cause, another to break the law. That the complete crime may be impossible in the circumstances should not alter the incitee's attempt liability if he or she acts on the incitement and thus the wrong of incitement – that of getting another person to breach the criminal law – is present. This view may lead to the suggestion that the incitor should be capable of incurring liability for inciting an attempt at a crime as distinct from inciting the crime. However, the culpability scheme that the Commission proposes, where the culpability required for incitement is the same as that for the incited offence, would generally preclude liability for inciting a mere attempt.

(ii) Inciting conspiracy and inciting incitement

5.37 The law ought to be such that incitements to incite and incitements to conspire to commit offences should be capable of being prosecuted. This practice should be limited though. That so many statutory offences are inchoate in nature poses additional problems: can one incite a conspiracy to commit a statutory offence where the particular statutory offence is itself inchoate in nature, a possession offence, for example? The *Consultation Paper on Inchoate Offences* explored this problem.³⁸⁶ The good sense of prosecutors not to construct, and judges not to recognise, inchoate liability beyond two layers ("attempt to incite endangerment"³⁸⁷) or illogical combinations (attempt to attempt) should be enough protection.

³⁸⁴ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraph 4.37.

³⁸⁵ Law Commission for England and Wales *Report on Inchoate Liability for Assisting and Encouraging Crime* (No 300 2006) at 32.

³⁸⁶ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 2.113-2.121.

³⁸⁷ This is three layers of inchoate liability since the substantive offence of endangerment is inchoate in nature.

(c) Inciting secondary participation in crime

5.38 The question arises whether it is criminal incitement to encourage conduct that amounts not to the actual commission or a crime but rather to the assistance or other secondary participation in a crime. One person instructs another to bring rocks and other debris to the scene of a planned riot-like disturbance. Is this an incitement in and of itself regardless of whether any acts follow?

5.39 As with attempt and conspiracy, the attaching of the inchoate offence of incitement to secondary participation seems to be excluded by definition. This is on the understanding that incitement connects with an offence and aiding, abetting, counselling or procuring a crime is not actually an offence but rather a way of incurring liability as if one had actually committed the relevant offence.³⁸⁸ Simester and Sullivan³⁸⁹ point out a trial judge in England espousing this view.³⁹⁰ The English Court of Appeal in *R v Whitehouse*³⁹¹ rejected the charging of a father for inciting his daughter to aid and abet him to commit incest with her, but it is clear that this charge was rejected not because of the inability of incitement to connect with secondary participation in crime *per se*, but rather because the daughter could neither be guilty of incest nor of aiding and abetting incest in the circumstances.

5.40 As with attempt and conspiracy, the Commission sees no compelling reason to fundamentally alter the nature of inchoate liability so as to facilitate incitement to attach to secondary liability for crime.

(3) Issues regarding the criminality of the incited act

5.41 Key to the definition of incitement is that what is incited is an offence. Accordingly, an essential part of a comprehensive definition of incitement will be that the incited act, if carried out, would amount to an offence. There may, however, be circumstances where the incited act, if carried out, would objectively amount to criminal behaviour but for some reason the person who would perform it, the incitee, could not be held liable for its commission. This may lead to unmeritorious evasion of criminal liability on the part of the incitor. Accordingly, some important exceptions should be appended to the definition of incitement. These are identified presently. But first, an alternative approach

³⁸⁸ Section 7(1), *Criminal Law Act 1997*.

³⁸⁹ Simester and Sullivan *Criminal Law Theory and Doctrine* (Hart Publishing 3rd Ed 2003) at 273.

³⁹⁰ *R v Bodin* [1979] Crim LR 176.

³⁹¹ *R v Whitehouse* [1977] QB 868.

that might be used to address these problems, which has merit but which the Commission is not proposing, is identified.

5.42 An alternative approach to the problem of the incitee who would not be criminally liable, which the Commission does not see sufficient reason to propose, is that incitement liability follow a development in secondary liability whereby the incited person only need be capable of committing the physical elements of the incited crime and that their lack of culpability should not preclude incitement liability being incurred by their incitor. This would be a rejection of the idea that the incitor must intend or believe “that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.”³⁹² This approach would achieve the same desirable results but it involves altering fundamentally the basic definition of incitement. The approach favoured below is to leave the basic definition of incitement intact but to append provisos that address particular instances where incitement liability might be under-inclusive.

(a) *The problem where the incitee will not be guilty of an offence if they carry out the incited act*

5.43 For various reasons an incited person, if they were to carry out the incitement, may not be guilty of an offence notwithstanding that what they do has the objective character of an offence.

(i) *The deceived incitee*

5.44 A clear problem is presented, for example, in the case of inciting a rape if it is supposed the person incited, the incitee, is instructed by the incitor such that they believe their victim is consenting even though such is not the case.³⁹³ Suppose a husband encourages a man to have sex with his wife saying (disingenuously) that if she resists this is pretence and in truth she is consenting. Intuitively this is a plausible case of incitement to rape because the incitor here seems no less blameworthy simply by virtue of the fact that the incitee may lack *mens rea*. The potential for such an incitement to lead to substantive harm is no less and indeed may be higher given the aspect of

³⁹² Clause 47(1)(b) of the Draft Criminal Code for England and Wales prepared by the Law Commission for England and Wales.

³⁹³ This is the scenario in the English case *DPP v Morgan* [1976] 1 AC 182, in which the acts of non-consensual sex were actually carried out and completed. The current problem considers the question of liability for incitement to rape if it was the case that the encouragements in *Morgan* had not been acted on. *R v Cogan and Leak* [1976] QB 217 involves the same problem, but, as in *Morgan*, the incited acts were completed and thus the question of incitement liability is superseded by questions of complicity.

deception. It is not clear that this example can be incitement to rape under the definition proposed in this Report, that definition being such that the incited acts, if carried out, would involve the commission of an offence because it might be that the incitee engages in sexual intercourse genuinely believing consent is present.

5.45 There may be milder forms of deception, as illustrated in *R v Curr*.³⁹⁴ In this case the incited offence required knowledge on the part of a person committing it that it was impermissible to cash certain welfare vouchers on behalf of another. Could the defendant evade liability for incitement on the basis that, had the persons he incited carried out his instructions, likely they would not commit an offence? The English Court of Appeal in *Curr* answered yes to this question. This leaves incitement liability under-inclusive.

5.46 To address this problem the Commission proposes a proviso to the definition of incitement to the effect that a person may be found guilty of incitement to commit an offence although the incitee lacks the requisite fault for the incited offence as a result of the deception of the incitor. This facilitates criminalisation in the incitement to rape example as well as the *R v Curr* scenario.

(ii) Incited person incapable of crime

5.47 A problem also arises where the incitee lacks criminal capacity for the incited offence. The rationale of incitement applies where persons are sought to be manipulated into committing crime even though they will not be held liable for doing so. That an incitor knows that the person they incite will not be held liable, because they are legally insane, for example, does not reduce the incitor's blameworthiness. A substantial wrong is perpetrated against children and insane persons when they are used as instruments of crime and the law has a legitimate interest in preventing such persons from being incited towards crime.³⁹⁵

³⁹⁴ [1968] 2 QB 944. See Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 4.32.-4.33.

³⁹⁵ Admittedly an attempt charge may lie against the person who tries to manipulate a child to steal for them, for example. Attempted theft would be the relevant charge, but the person instructing the child would have to cross the threshold of attempt liability by being sufficiently proximate to the completion of the full offence of theft, and thus it may be important whether incitement is available. If the child actually carries out the task as instructed, the person who instructed them may be liable as the principal offender, this being so without the need to engage secondary liability.

(iii) Incited person would have a defence of duress

5.48 It is clear that incitements can take the form of commands or instructions backed by threats.³⁹⁶ The definition of incitement proposed in this Report encompasses incitements taking this form. Depending on the seriousness of the threat and the type of offence incited, a person who carries out an incited act because they are threatened to do so may have a good defence of duress and therefore not be criminally liable.³⁹⁷ There is potential for the incitor who delivered a particularly threatening incitement to evade incitement liability on the basis that the incited act, if carried out, would not amount to the commission of an offence (because the defence of duress would apply to excuse the incitee). This would occasion an obviously unacceptable gap in incitement liability. Accordingly, the Commission recommends the inclusion of a proviso that incitement liability can apply notwithstanding that the incitee would have available to them a defence of duress were they to act upon the incitement.

(iv) Incited person exempted from liability

5.49 The stipulation that for incitement to apply the incited act or acts must be a crime if carried out by the recipient of the incitement leaves incitement unavailable in some situations that clearly warrant criminalisation. It was on this basis that the defendant in *R v Whitehouse*,³⁹⁸ who importuned his 15-year-old daughter to have sex with him, had his conviction for inciting incest quashed.³⁹⁹ In that case the defendant had, according to the English Court of Appeal, pleaded guilty to an offence unknown to the law. This was because a 15 year old girl, though capable of crime generally, was, because of her age, exempted from liability for the substantive offence of incest with her father. The prosecution's attempt to argue that the defendant could alternatively have been convicted of inciting his daughter *to aid and abet him* to commit incest similarly failed, the Court applying the *Tyrell* principle⁴⁰⁰ that laws aiming to protect a class of person could not be used to criminalise a person in the class.⁴⁰¹

³⁹⁶ *Race Relations Board v Applin* [1973] QB 815.

³⁹⁷ As in *R v Bourne* (1952) 36 Cr App R 125.

³⁹⁸ *R v Whitehouse* [1977] QB 868.

³⁹⁹ *R v Whitehouse* [1977] QB 868, 873. The girl unequivocally rejected her father's efforts, so there was no question of substantive liability, as distinguished from inchoate liability.

⁴⁰⁰ *R v Tyrell* [1894] 1 QB 710. See above at paragraph 1.12.

⁴⁰¹ *R v Whitehouse* [1977] Q.B. 868, 875.

5.50 The possibility of attempted incest was not argued in the English Court of Appeal in *Whitehouse*. The defendant had pleaded guilty only to incitement to incest and there was restraint on how much alteration of his indictment the Court of Appeal could sanction. In any event, it may be that the defendant's actions fell short of attempt for want of proximity, and certainly there may be incitements to incest that do not amount to attempts to commit incest. The *Whitehouse* case represented an unmeritorious evasion of criminal liability and can be said to have exposed a lacuna in criminal liability. The options in its wake included altering the way incitement liability works, introducing a new form of inchoate liability, or criminalising the specific scenario. The specific criminalisation approach was taken in England and Wales and, some years later, in Ireland.⁴⁰²

5.51 In this Report the Commission proposes that incitement liability does not need to be altered to accommodate criminalisation for incitement in the *Whitehouse* scenario. An exception can be appended to the incitement definition to the effect that a person can be guilty of incitement notwithstanding that the person incited is exempt from liability for the offence in questions.

(b) *The contingency of incitements*

5.52 It is useful to note at this point that there is no aspect of the meaning of incitement that requires a degree of likelihood that the incitement will actually be acted upon. The person delivering the incitement cannot truly know the mind of the person they are inciting nor can they predict exactly how events will turn out. But they can have belief and expectations as to the mind of the incited person and as to how events will unfold. The appropriate test for assessing whether they have sufficient culpability is supplied by the culpability requirements for the target offence. Just as it is considered sufficiently culpable for the offence of rape to engage in non-consensual intercourse reckless as to the presence of consent, so too it is sufficiently culpable to encourage a man to engage in intercourse with a woman reckless as to whether she would consent to it. In the example of incitement to rape the notion of running an unjustifiable risk in the concept of recklessness provides the site where the incitor's belief as to how events will unfold can be assessed. The same will apply for the whole host of offences that may be incited. There is no need for incitement principles to supply any additional instructions other than that the incitor must act with culpability required for the relevant substantive offence.

⁴⁰² In the UK, section 54 of the *Criminal Law Act 1977* was enacted to cover the gap exposed in *Whitehouse*. The position is now covered in the UK by the *Sexual Offences Act 2003*. In Ireland, section 6 of the *Criminal Law (Sexual Offences) Act 1993*, as amended by section 2 of the *Criminal Law (Sexual Offences) (Amendment) Act 2007*, covers this matter.

(4) Report recommendations the target of an incitement

5.53 *The Commission recommends that summary offences as well as indictable offences can be criminally incited. The Commission also recommends that incitement can attach to strict liability offences.*

5.54 *The Commission recommends that inchoate offences, with the exception of attempt, can be incited but charges that contain more than two layers of inchoate liability should not be constructed. The Commission does not recommend altering conspiracy so that it is capable of attaching to secondary participation in crime.*

5.55 *The Commission recommends, for incitement, the incited act or acts, if performed, must involve the commission of an offence, but some exceptions should be made for certain scenarios, including where:*

- i) the person incited lacks the fault element for the offence as a result of deception by the defendant,*
- ii) the person incited has a defence of duress,*
- iii) the person incited lacks capacity to commit the offence,*
- iv) the person incited is exempt from liability for the offence, or*
- v) the identity of the person incited is unknown.*

E A new inchoate offence of assisting or encouraging crime?

5.56 A person who merely assists, without encouraging, another to perform a crime that is not, in the end, committed or attempted will not be guilty of incitement. Neither will rules of secondary liability render such a person liable; this is so because no substantive crime has been completed or attempted. Thus, there is a perceived gap in criminal liability. The Law Commission for England and Wales proposed a new inchoate offence of assisting or encouraging crime. In effect, this would replace incitement with a significantly wider new inchoate offence. With some modification the proposals of the Law Commission for England and Wales have been enacted into law in the United Kingdom by Part 2 of the *Serious Crime Act 2007*.

(1) Consultation Paper analysis and provisional recommendation

5.57 *The Consultation Paper on Inchoate Offences* refrained from endorsing this recommendation of the Law Commission for England and Wales for the reasons that the perceived gap in liability is not a pressing problem and

that the new offence itself would serve to unduly broaden the net of criminal liability.⁴⁰³

(2) Discussion: retaining incitement

5.58 In this Report the Commission does not alter its view on replacing incitement with a new offence of assisting or encouraging crime.

5.59 First, the concept of incitement is well established and quite easily grasped. Soliciting a killing is a key example of incitement. Incitement to murder articulates reasonably well the wrong involved. It describes what is done in soliciting murder perhaps more accurately than “assisting and encouraging murder.” A valuable coincidence between common understanding of criminal liability and its legal definition would be lost if the concept of incitement was to be replaced.

5.60 Second, there is a significant difference in the blameworthiness between those, on the one hand, who would provide assistance to a crime that is not actually attempted and those, on the other hand, who encourage crime that is not actually attempted. The incitors of crime are more blameworthy than those who would be utilised in some way. The incitor creates crime; the other merely helps facilitate it if it is to go ahead anyway. That the scope of common law inchoate liability excludes non-encouraging assistance of crime is defensible. The reasons for having incitement in the first place do not logically compel its expansion or replacement so as to encompass the non-encouraging assistants of un-attempted crimes. This is not to make a circular argument whereby the current scope of incitement is justified by reference to a rationale that is inferred from the current scope of the incitement, but is merely to point out there is substantial and apparent moral difference between inciting crime and being available to help with it.

5.61 Third, as stated above, inchoate liability differs from secondary liability. There is nothing *per se* anomalous in an instance of non-encouraging assistance attracting secondary liability if a crime is completed or attempted, but not attracting inchoate liability if the target crime is un-attempted. It is rational if the law is more concerned with those who play a role in completed crimes than those who play no role in complete crimes but might have done so.

5.62 For these reasons the Commission has concluded, and so recommends, that the offence of incitement (which the Commission has already recommended should be put on a statutory footing) should not be replaced with a new relational inchoate offence of assisting or encouraging crime.

⁴⁰³ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 4.43-4.47.

(3) Report recommendation on assisting or encouraging crime

5.63 *The Commission recommends that the offence of incitement (which the Commission has recommended should be put on a statutory footing) should not be replaced with a new relational inchoate offence of assisting or encouraging crime.*

F Incitement and impossibility

5.64 The problem of so-called impossible incitements is engaged where, in the circumstances of a specific incitement to crime, the incited crime cannot possibly be completed. For example, a woman solicits someone to kill her husband, but, unknown to her, the husband had died of a heart attack earlier the same day. Is this incitement to murder?

(1) Consultation Paper analysis and provisional recommendation on incitement and impossibility

5.65 The *Consultation Paper on Inchoate Offences* provisionally recommended for incitement, along with attempt and conspiracy, that impossibility should not preclude liability.⁴⁰⁴ In the example above of the woman soliciting someone to kill her husband not knowing he is already dead the essential ingredients of incitement to murder are present. She has the requisite culpability, she is no less blameworthy had her husband been still alive at the time. As the Consultation Paper suggested, the key insight into assessing liability for inchoate offences is to assess what was done at the time of the incident in light of circumstances as the defendant believed them to be. This is the appropriate perspective to take rather than an *ex post* all-knowing perspective.

(2) Discussion: impossibility ought not preclude incitement liability

5.66 In this Report the Commission makes final its provisional recommendation that impossibility ought not to preclude liability for incitement. This is the common sense approach that avoids the undesirable instances of under-criminalisation that may result when impossibility is seen as a defence to incitement.⁴⁰⁵

⁴⁰⁴ Law Reform Commission *Consultation Paper on Inchoate Offences* (LRC CP 48 – 2008) at paragraphs 4.52-4.58.

⁴⁰⁵ See discussion above on impossible attempts (paragraph 2.131) and impossible conspiracies (paragraph 3.114).

(3) Report recommendation on incitement and impossibility

5.67 *The Commission recommends that impossibility should not preclude liability for incitement.*

G Withdrawn incitement

5.68 Suppose a person has solicited or incited another to commit a crime but they subsequently ask the person not to do it, that is, they withdraw the request for the crime. Should this alter their liability for incitement?

(1) Consultation Paper analysis and provisional recommendation on withdrawn incitement

5.69 The Consultation Paper identified that at common law withdrawing an incitement had no affect on liability, but may well have relevance at other stages of the criminal process. The Model Penal Code provides an example of how to set up a defence of withdrawal, or as the MPC calls it, renunciation of criminal purpose.⁴⁰⁶ It was noted that the MPC defence is quite restricted. Simple revocation of the incitement is not sufficient; the person who made the incitement has got to prevent the commission of the incited act. Additionally this must be done in circumstances showing a complete and voluntary renunciation of criminal purpose. Such renunciation is not complete if it is just to postpone the criminal conduct until another time, and it is not voluntary if it is motivated by an increased probability of detection.⁴⁰⁷

5.70 The Commission did not express a provisional view but invited submissions on whether a defence to incitement should be introduced to allow liability to be excused for the reason that person had prevented the incited act from occurring.

(2) Discussion: the case for and against a new defence of withdrawn incitement

5.71 The main argument for having this defence available is that in the long run harm might be prevented because its availability gives people who have made incitements an incentive to try prevent bad consequences from resulting. The bad consequences here are that another person will commit a crime, this being bad in itself and may well involve substantive harm to a victim or victims. It is well noted that there are unverifiable and perhaps unrealistic assumptions about human conduct underlying this argument. It could be

⁴⁰⁶ Section 5.02 of the Model Penal Code.

⁴⁰⁷ Applying section 5.01(4) of the MPC.

suggested that the general inhibition of making incitements might be eroded if persons know they can undo the criminal liability they have engaged.

5.72 If the defence was to be available it would have to be the very limited defence as set out in the Model Penal Code. That is, simple withdrawal of the incitement is not enough; the incited harm must be prevented. If the defence was more easily satisfied, there would be scope for unmeritorious acquittal. Another problem is that the introduction of the defence would likely involve a reverse burden of proof, which would be a departure from the presumption of innocence. The alternative, that the absence of withdrawal must be proved by the prosecution, would serve to make prosecutions for incitement more difficult. This is so not just because of general difficulties in proving absence of something, that is, proving a negative, but also because in many cases incitements could be made and then immediately taken back. A clever incitor of crime could make an incitement and withdraw it straightaway despite not really intending to withdraw it. They could behave strategically to make a potential prosecution more difficult.

5.73 Yet a restricted defence may throw up anomaly. In the case of an incitement that has no chance of being acted on, because it was quite inept or its recipient is of a character not susceptible to persuasion towards crime, the defence is never available. For if the incited acts are not going to be committed there is no chance to prevent their commission. Yet, more dangerous incitements – ones that are likely to be effective – do result in opportunity to avail of the defence. This situation is somewhat anomalous in that, other things being equal, the more likely the incitement will be effective, the more scope for its maker to exculpate themselves.

5.74 In light of these difficulties and given that the argument for the introduction of the defence is not very persuasive the Commission in this Report does not recommend the introduction of a defence of withdrawal in respect of incitement to crime.

(3) Report recommendation on withdrawn incitement

5.75 *The Commission does not recommend a new defence to an incitement charge for having prevented the incited act from occurring.*

5.76

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report may be summarised as follows.

A General

6.01 The Commission recommends providing that a person is not guilty of incitement or conspiracy to commit an offence if he or she is:

- i) the intended victim of the offence, and
- ii) a member of a class of persons the enactment creating the offence is designed to protect. [paragraph 1.18]

B Attempt

6.02 The Commission recommends placing attempt as a general inchoate offence on a statutory basis and abolishing the common law offence of attempt. [paragraph 2.05]

6.03 The Commission recommends that the proximate act approach to identifying criminal attempts should be placed on a statutory footing. [paragraph 2.63]

6.04 The Commission recommends that the question of whether an act was a proximate act to the commission of an offence should be treated as a question of fact. [paragraph 2.64]

6.05 The Commission recommends that statutory provision should be made recognising that a criminal attempt can be committed by omission where the target offence in the circumstances of the attempt can be committed by omission. [paragraph 2.65]

6.06 The Commission does not recommend the introduction of a new offence of criminal preparation. [paragraph 2.66]

6.07 The Commission recommends that summary as well as indictable offences can be criminally attempted. [paragraph 2.85]

6.08 The Commission recommends that attempt should not be permitted to attach to another attempt, but should be permitted to attach to other inchoate offences. [paragraph 2.86]

6.09 The Commission recommends that attempt be permitted to attach to offences that feature strict liability. [paragraph 2.87]

6.10 The Commission does not recommend altering attempt liability so that attempt can attach to secondary liability. [paragraph 2.88]

6.11 The Commission recommends providing for cross-jurisdictional attempts on the same basis as section 71 of the *Criminal Justice Act 2006* provides for cross-jurisdictional conspiracy. [paragraph 2.89]

6.12 The Commission recommends that the culpability for attempting a substantive offence ought to track the culpability for that target substantive offence. [paragraph 2.123]

6.13 The Commission recommends that for the purpose of identifying the fault element for attempted murder the fault element of murder should be taken as an intention to kill. This recommendation applies also in respect of conspiracy to murder and incitement to murder. [paragraph 2.124]

6.14 The Commission recommends that factual impossibility not preclude liability for criminal attempt. This should be stated in statute for the avoidance of doubt. [paragraph 2.134]

6.15 The Commission does not recommend the introduction of an abandonment defence to attempt. [paragraph 2.139]

C Conspiracy

6.16 The Commission recommends placing conspiracy as a general inchoate offence on a statutory basis and abolishing the common law offence of conspiracy. [paragraph 3.07]

6.17 The Commission recommends that agreement in conspiracy correspond to the ordinary meaning of “agreement” and not be given a technical definition. [paragraph 3.35]

6.18 The Commission recommends that conspiracy can be established where only one party has criminal capacity. [paragraph 3.36]

6.19 The Commission recommends the abolition of the spousal immunity rule in conspiracy. [paragraph 3.37]

6.20 The Commission recommends that a lack of the requisite culpability on the part of one party to a conspiracy not preclude conspiracy liability from being imposed on the other. [paragraph 3.38]

6.21 The Commission does not recommend the introduction of an overt act requirement into the substantive definition of conspiracy. [paragraph 3.39]

6.22 The Commission recommends that the rules in section 71 of the *Criminal Justice Act 2006* applying to conspiracies to commit a serious offence be extended to apply to all conspiracies. [paragraph 3.40]

6.23 The Commission recommends the following rules on conspiracy culpability:

- i) A conspiratorial agreement must have been entered into and,
- ii) in doing so, a conspirator must at least have the kind of culpability required for the substantive offence to which the conspiracy relates. [paragraph 3.61]

6.24 The Commission recommends that conspiracy be limited to agreements the carrying out of which will involve the commission of a criminal offence. [paragraph 3.82]

6.25 The Commission recommends that conspiracy can attach to summary offences as well as indictable offences. [paragraph 3.83]

6.26 The Commission recommends that conspiracy can attach to incitement but not to attempt or conspiracy. [paragraph 3.84]

6.27 The Commission recommends that conspiracy can attach to strict liability offences. [paragraph 3.85]

6.28 The Commission does not recommend altering conspiracy so that it is capable of attaching to secondary participation in crime. [paragraph 3.86]

6.29 The Commission recommends the abolition of the common law conspiracies to corrupt public morals, to effect a public mischief, and to outrage public decency. [paragraph 3.93]

6.30 The Commission does not recommend the abolition of conspiracy to defraud. [paragraph 3.109]

6.31 The Commission recommends that impossibility should not bar liability for conspiracy. [paragraph 3.116]

6.32 The Commission does not recommend the introduction of a new defence of withdrawal from a conspiracy. [paragraph 3.125]

D Incitement

6.33 The Commission recommends placing incitement as a general inchoate offence on a statutory basis and abolishing the common law offence of incitement. [paragraph 4.04]

6.34 The Commission recommends that the formula “commands, encourages, requests, or otherwise seeks to influence” another to commit a crime be used to define the act of incitement. [paragraph 4.11]

6.35 The Commission recommends providing for cross-jurisdictional incitements on the same basis as section 71 of the *Criminal Justice Act 2006* provides for cross-jurisdictional conspiracy. [paragraph 4.12]

6.36 The Commission recommends that the fault element for inciting a particular substantive offence should track that of the substantive offence. [paragraph 4.27]

6.37 The Commission recommends that summary offences as well as indictable offences can be criminally incited. The Commission also recommends that incitement can attach to strict liability offences. [paragraph 4.53]

6.38 The Commission recommends that inchoate offences, with the exception of attempt, can be incited but charges that contain more than two layers of inchoate liability should not be constructed. The Commission does not recommend altering conspiracy so that it is capable of attaching to secondary participation in crime. [paragraph 4.54]

6.39 The Commission recommends, for incitement, the incited act or acts, if performed, must involve the commission of an offence, but some exceptions should be made for certain scenarios, including where:

- i) the person incited lacks the fault element for the offence as a result of deception by the defendant,
- ii) the person incited has a defence of duress,
- iii) the person incited lacks capacity to commit the offence,
- iv) the person incited is exempt from liability for the offence, or
- v) the identity of the person incited is unknown. [paragraph 4.55]

6.40 The Commission recommends that the offence of incitement (which the Commission has recommended should be put on a statutory footing) should not be replaced with a new relational inchoate offence of assisting or encouraging crime. [paragraph 4.63]

6.41 The Commission recommends that impossibility should not preclude liability for incitement. [paragraph 4.67]

6.42 The Commission does not recommend a new defence to an incitement charge for having prevented the incited act from occurring. [paragraph 4.75]

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The Commission is conscious that the draft Bill could be enacted by the Oireachtas either as a separate Bill or as part of the proposed *Criminal Law Code Bill* that would arise from the deliberations of the Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*: see www.criminalcode.ie. In drafting the Bill, the Commission has used a particular drafting formula, as it did in its *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87–2008) and *Report on Defences in Criminal Law* (LRC 95–2009) and is conscious that the precise drafting formula to be used in the context of codification is a matter for the drafters of the code. The Commission also notes that the draft Bill does not include provisions concerning the recommendations in paragraphs 2.89, 3.40 and 4.12, which concern cross-jurisdictional procedural matters. The Commission has confined the draft Bill to setting out the substantive law on inchoate liability, and has excluded the procedural matters that arise in the cross-jurisdictional context (which the Commission recommends be based on section 71 of the *Criminal Justice Act 2006*).

DRAFT CRIMINAL LAW (INCHOATE OFFENCES) BILL 2010

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
2. Interpretation
3. Incitement to commit an offence
4. Conspiracy to commit an offence
5. Attempt to commit an offence
6. Inchoate offences and impossibility
7. Inchoate offences and complicity
8. Inchoate offences and exemption for protected persons
9. Effect on common law

DRAFT CRIMINAL LAW (INCHOATE OFFENCES) BILL 2010

BILL

Entitled

AN ACT TO SET OUT IN STATUTORY FORM THE ELEMENTS OF THE INCHOATE CRIMINAL OFFENCES OF INCITEMENT, CONSPIRACY AND ATTEMPT, TO PROVIDE FOR THE REPEAL OF THE COMMON LAW OFFENCES OF INCITEMENT, CONSPIRACY AND ATTEMPT AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title and commencement

1.—(1) This Act may be cited as the Criminal Law (Inchoate Offences) Act 2010.

(2) This Act comes into operation on such day or days as the Minister for Justice and Law Reform may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory note

This is a standard section setting out the short title and commencement arrangements.

Interpretation

2.—In this Act—

“act” includes an omission where the complete offence is capable of being committed by omission;

“fault element required for the offence” means, in relation to the offence of murder, an intention to kill.

Explanatory Note

Section 2 deals with two matters of interpretation affecting *sections 3 to 5*.

The definition of “act” implements the recommendation in paragraph 2.65 that a criminal attempt can be committed by omission where the target offence in the circumstances of the attempt can be committed by omission.

The definition of “fault element required for the offence” (that is, the culpability element) implements the recommendations in paragraph 2.124 that, for the purpose of identifying the fault element for incitement to murder, conspiracy to murder and attempted murder, the fault element of murder should be taken as an intention to kill. This excludes implied malice from the scope of the concept of the fault element in *sections 3 to 5*, and is designed to ensure that a charge of incitement, conspiracy or attempt to murder would not be possible in respect of a defendant who merely intended to cause serious injury to his or her victim.

Incitement to commit an offence

3.—(1) A person is guilty of incitement to commit an offence if he or she—

- (a) acting with the fault element required for the offence,
- (b) commands, encourages, requests, or otherwise seeks to influence another person to do an act or acts which, if done, would involve the commission of the offence by the other.

(2) This section applies to any offence, except attempt, triable in the State.

(3) A person may be found guilty of incitement to commit an offence although—

- (a) the person incited lacks the fault element for the offence as a result of deception by the defendant,
- (b) the person incited has a defence of duress,
- (c) the person incited lacks capacity to commit the offence,
- (d) the person incited is exempt from liability for the offence, or
- (e) the identity of the person incited is unknown.

(4) In this section, “the person incited” means the person at whom the incitement was directed.

Explanatory Note

Section 3 implements the recommendation in paragraph 4.04 that the offence of incitement be placed on a statutory footing.

Subsection 1(a) implements the recommendation in paragraph 4.27 that the culpability (fault element) for inciting a substantive offence should track the culpability for that target substantive offence. *Subsection 1(b)* implements the recommendation in paragraph 4.11 that the formula “commands, encourages, requests, or otherwise seeks to influence” another to commit a crime be used to define the act of incitement.

Subsection 2 implements the recommendation in paragraph 4.53 that summary offences as well as indictable offences can be criminally incited. It also implements the recommendation in paragraph 4.54 that inchoate offences, with the exception of attempt, can be incited but charges that contain more than two layers of inchoate liability should not be constructed. It also implements the recommendation in paragraph 4.53 that incitement can attach to strict liability offences.

Subsection 3 implements the recommendation in paragraph 4.55 that the incited act or acts, if performed, must involve the commission of an offence, but that some exceptions should be made for certain scenarios, where: (a) the person incited lacks the fault element for the offence as a result of deception by the defendant, (b) the person incited has a defence of duress, (c) the person incited lacks capacity to commit the offence, (d) the person incited is exempt from liability for the offence, or (e) the identity of the person incited is unknown.

Conspiracy to commit an offence

4.—(1) A person is guilty of conspiracy to commit an offence if he or she—

(a) acting with the fault element required for the offence,

(b) agrees with another person or persons that an act or acts shall be done which, if done, would involve the commission of the offence by one or more of the parties to the agreement.

(2) This section applies to any offence, except attempt and conspiracy, triable in the State.

(3) A person may be found guilty of conspiracy to commit an offence although—

(a) the person or persons with whom he or she agrees lacks or lack capacity to commit the offence,

(b) no other person has been or is charged with such conspiracy,

- (c) the identity of any other party to the agreement is unknown, or
- (d) any other party appearing from the indictment to have been a party to the agreement has been or is acquitted of such conspiracy, unless in all the circumstances his conviction is inconsistent with the acquittal of the other.

Explanatory Note

Section 4 implements the recommendation in paragraph 3.07 that the offence of conspiracy be placed on a statutory footing.

Subsection 1(a) implements the recommendation in paragraph 3.61 that a conspirator must at least have the kind of culpability required for the substantive offence to which the conspiracy relates. This ensures that the culpability for conspiracy tracks the culpability for the target substantive offence. *Subsection 1(b)* implements the recommendation in paragraph 3.35 that agreement in conspiracy is to correspond to the ordinary meaning of “agreement” and not be given a technical definition. It also implements the recommendation in paragraph 3.82 that conspiracy be limited to agreements the carrying out of which will involve the commission of a criminal offence.

Subsection (2) implements the recommendation in paragraph 3.83 that conspiracy can attach to summary offences as well as indictable offences. It also implements the recommendation in paragraph 3.84 that conspiracy can attach to incitement but not to attempt or conspiracy. It also implements the recommendation in paragraph 3.85 that conspiracy can attach to strict liability offences.

Subsection (3) implements the recommendation in paragraph 3.36 that conspiracy can be established where only one party has criminal capacity. It also implements the recommendation in paragraph 3.38 that a lack of the requisite culpability on the part of one party to a conspiracy not preclude conspiracy liability from being imposed on the other.

Attempt to commit an offence

5.—(1) A person is guilty of attempt to commit an offence if he or she—

- (a) acting with the fault element required for the offence,
 - (b) does an act that is closely proximate, and not merely preparatory, to the commission of the offence.
- (2) This section applies to any offence, except attempt, triable in the State.

Explanatory Note

Section 5 implements the recommendation in paragraph 2.05 that the offence of attempt be placed on a statutory footing.

Subsection (1)(a) implements the recommendation in paragraph 2.123 that the culpability for attempting a substantive offence should track the culpability for that target substantive offence. *Subsection (1)(b)* implements the recommendation in paragraph 2.63 that the proximate act approach to identifying criminal attempts should be placed on a statutory footing.

Subsection (2) implements the recommendation in paragraph 2.85 that summary as well as indictable offences can be criminally attempted. It also implements the recommendation in paragraph 2.86 that attempt should not be permitted to attach to another attempt, but should be permitted to attach to other inchoate offences. It also implements the recommendation in paragraph 2.87 that attempt be permitted to attach to offences that feature strict liability.

Inchoate offences and impossibility

6.— A person may be guilty of incitement, conspiracy or attempt to commit an offence although the commission of the offence is factually impossible.

Explanatory Note

Section 6 implements the recommendations in paragraphs 2.134 (attempt), 3.116 (conspiracy) and 4.67 (incitement) that factual impossibility is not a defence to a charge in respect of any of the three inchoate offences.

Inchoate offences and complicity

7.—A person may not be found guilty of incitement, conspiracy or attempt to aid, abet, counsel or procure the commission of an offence.

Explanatory Note

Section 7 implements the recommendations in paragraphs 2.88 (attempt), 3.86 (conspiracy) and 4.54 (incitement) that the draft Bill is not to make provision for inchoate liability for aiding and abetting a criminal offence. Thus, incitement, conspiracy and attempt all relate to commission rather than complicity.

Inchoate offences and exemption for protected persons

8.—A person is not guilty of incitement or conspiracy to commit an offence if he or she is—

- (a) the intended victim of the offence, and
- (b) a member of a class of persons the enactment creating the offence is designed to protect.

Explanatory Note

Section 8 implements the recommendation in paragraph 1.18 of the Report. It codifies the common law principle that a person regarded as the victim of an offence cannot at the same time be treated as aiding and abetting or inciting the offence, irrespective of any persuasion or pressure he or she has brought to bear towards the commission of the offence by another person

Effect on common law

9.—(1) Subject to the remaining provisions of this section, the following offences are abolished from the coming into force of this Act—

- (a) the common law offence of incitement,
- (b) the common law offence of conspiracy, and
- (c) the common law offence of attempt.

(2) To the extent that it survives, whether at common law or otherwise, the rule that spouses are incapable of conspiring together is abolished.

(3) To the extent that they exist or survive, the following common law offences are abolished—

- (a) conspiracy to corrupt public morals,
- (b) conspiracy to effect a public mischief, and
- (c) conspiracy to outrage public decency.

(4) The common law offence of conspiracy to defraud is retained.

Explanatory note

Subsection (1) implements the recommendations in paragraphs 2.05 (attempt), 3.07 (conspiracy) and 4.04 (incitement) that the statutory offences provided for in the draft Bill are to replace the respective common law offences.

Subsection (2) implements the recommendation in paragraph 3.37 to abolish the spousal immunity rule in conspiracy.

Subsection (3) implements the recommendation in paragraph 3.93 that the common law offences of conspiracy to corrupt public morals, conspiracy to effect a public mischief and conspiracy to outrage public decency be abolished.

Subsection (4) implements the recommendation in paragraph 3.109 that conspiracy to defraud should be retained.