FRAMING THE CRIME OF ATTEMPT

The Law Commission's long-awaited report on attempt was published on June 25 (Law Com No 102). The report, which is thorough and admirably researched and argued, traces fully the disastrous series of decisions by which the law of attempt has been reduced to incoherence. These culminated in the House of Lords opinions in *Haughton v Smith* [1975] AC 576 and *DPP v Nock and Alsford* [1978] AC 979. The report bravely says (para 2.93) that the law of attempt as determined by these two cases "is over-analytical in its approach, uncertain in its application and produces results which informed public opinion would regard as capricious". Equally bravely, the report adds (App E, para 8) that another troublesome recent decision, *R v Husseyn* (1978) 67 Cr App R 131, led to results "causing frustration and perplexity to prosecuting authorities and bringing the criminal law into disrepute".

The report fully demonstrates that criminal attempt is a difficult concept, which has given rise to much judicial disagreement and consequent bewilderment of the profession (not to mention the public). All the more reason why any new Act should resolve the arguments and give us a clear area of law for the future. This calls for a comprehensive definition. As the report says (para 2.19), in the absence of this "there would be little assistance which a judge could give in directing a jury, and this could lead to unacceptable discrepancies and very marked inconsistencies in jury verdicts in similar cases". Besides, the Law Commission's stated aim is to *codify* the offence (albeit with amendments), and this requires a full and complete presentation of its elements.

After an examination of the problem running to more than 70 pages, the report presents a draft Bill which purports to codify the crime of attempt in a mere dozen lines:
"1. (1) If, with intent to commit a relevant offence, a person does an act -
(a) which goes so far towards the commission of that offence as to be more than a merely preparatory act, or
(b) which would fall within paragraph (a) above but for the existence of any facts or circumstances which render the commission of that offence impossible,
he is guilty of attempting to commit that offence.
(2) For the purposes of subsection (1) above, an intent to commit a relevant offence includes an intention to do something which, if the facts or circumstances of the particular case were as the accused believes them to be, would amount to an intent to commit a relevant offence."

The draft Bill continues in clause 1(3) with a definition of "relevant offence", which may be thought a provocative label: from society's viewpoint no offence is "relevant". The definition covers all crimes triable in England and Wales, excepting the inchoate offences such as conspiracy and aiding and abetting (but not excepting incitement).

Will this 12-line provision ("the draft offence"), if enacted (as the Law Commission proposes) in place of the common law offence of attempt, succeed in placing the law on a clear basis? It is respectfully submitted that it will not. The only certain thing is that if enacted it will produce as much argument and uncertainty as the law it replaces. Why is this?

The answer mainly lies in one of the inveterate vices of our statute law: compression. A clever and sophisticated technique of verbal compression has been evolved by British draftsmen to satisfy the need for brevity while also meeting the desire for detailed and precise regulation. In this instance it has gone too far.

A reading of the draft offence at once reveals that the technique of compression has produced formidable obscurities. In subsection (1), paragraph (a) demands explanation even when standing alone. Then paragraph (b) adapts it with one of those clumsy hypotheses found so useful by modern draftsmen. Subsection (2) entirely consists of a further, more baffling, hypothesis. The draft offence clearly requires considerable background knowledge by anyone attempting to understand it.

Another objection is that the draft offence simply does not codify the law of attempt. While the report deals fully and clearly with the many points that have caused difficulty in this field, the draft offence fails to mention most of them. Moreover it is geared to the rare case, when it should be geared to the common case with an extension for the rare case. It gives the reader little idea of what the law of attempt is about.

Mental Element

The report contains an elaborate discussion of the mental element in attempt (paras 2.10 to 2.18). The draft offence refers elliptically to the accused's "intent to commit a relevant offence" and adds the baffling gloss of clause 1(2). That is all. The draft ignores the possibility that the accused may not be the sole perpetrator, and neglects the opportunity to declare the irrelevance of his knowledge that the full offence is criminal. Indeed the opening words "If, with intent to commit a relevant offence..." are ambiguous on this. Until ultimate resolution of the point by the House of Lords, they would afford defending counsel an opportunity of arguing that the accused must be proved to have known that what he intended amounted to a "relevant offence".

More serious in regard to the mental element is the failure of the draft offence to deal specifically with *conditional* intent, which caused so much trouble in ***R v Husseyn***. Sometimes a criminal erects a condition upon a condition, for example where he decides to try the door handle of a car and *if* it is unlocked to look inside and *if* he then finds anything worth stealing to steal it. The prevalence of this type of wrongdoing is tha main reason why the Home Office are resisting the desire of the House of Commons committee on home affairs to repeal the "sus" law (Vagrancy Act 1824, s4, penalising "every suspected person or reputed thief, frequenting any... street or highway...with intent to commit an arrestable offence").

It seems that the Law Commission may not intend the draft offence to include this type of conditional intent, for the report says (para 2.36):
"Whatever the criticisms which may be made of the 'suspected person' offence, we do not think that it would be legitimate simply to replace it by an artificial extension of the law of attempt...this is a matter which requires separate consideration..."

Yet the report discusses instances of parallel conduct where a would-be thief, in search of stealable objects (which he does not find), goes through a coat pocket (***Scudder v Barrrett*** [1979] 3 WLR 591), or an air traveller's luggage (para 2.62), or a woman's handbag (***R v Easom*** [1971] 2 QB 313). It appears from the comments in the report (App E, para 10) that the Law Commission considers that these cases properly fall within the law of attempt and should be caught by the draft offence. Ye the intent of the would-be thief is clearly conditional, and the condition is not of course satisfied.

Finally on the mental element, the report discusses (para 2.16) attempt to commit an offence of strict liability. It concludes that while the accused need not know that his attempted act is an offence, he must intend to carry out the forbidden act. A car has defective brakes. If a person drives the car, he is guilty although he does not know of the defect. If he merely attempts to drive it, he is not guilty if ignorant of the defect. The draft offence does not make this distinction clear.

Actus Reus

By carefully-reasoned and convincing argument, the report rejects various alternatives to the "proximity" test. These include the "first stage" test (where the first overt act is the criterion), the "commitment" test (letting in preparatory acts if evidence of commitment of the full offence), the "final stage" test (restricting attempt to cases where the offender has done everything that is necessary for him to do), and the

"unequivocal act" test (catching some remote acts but excluding some that are proximate). It also rejects the "substantial step" test put forward by the Law Commission's own Working Party (1973) Working Paper No 50, (para 74 *et seq*). It quotes Lord Dunedin's penetrating remark that the root of the matter is to discover where preparation ends and perpetration begins (*HM Advocate v Camerons* (1911) 6 Adam 456), and plumps for proximity.

The report rightly says that there is no magic formula, and that it is eminently appropriate for a jury to decide whether conduct in a particular case amounts to attempt. "This suggests that a relatively simple definition based on the 'proximity' approach is the best which can be hoped for" (para 2.45). Yet the report shrinks from using the word "proximate", fearing that in practice it might be treated as laying down criteria equivalent to the rejected "final stage" test (para 2.48). Hence clause 1(1)(a) of the draft offence. It is submitted that this is unacceptably vague. You cannot impose a "proximity" test without using the appropriate words, and the word "proximate" is eminently appropriate.

Further Deficiencies

The draft offence is deficient in a number of other ways. The provisions regarding impossibility contrive to be both inadequate and repetitious. If a pick-pocket puts his hand in an empty pocket believing it to contain a wallet, clause 1(1)(b) erects one hypothesis and clause 1(2) another. The results are probably the same, but why compel the statute user to essay twosets of mental gymnastics? The draft fails to saythat error as to the generallaw (for example belief that intercourse with a willing girl of sixteen is criminal) cannot found a charge of attempt, though the report discusses this principle (para 2.88). The draft fails to deal with the merger of attempt in commission of the full offence, though again the report examines this (paras 2.111 to 2.113). The draft does not say that voluntary abandonment of the attempt is no defence, though the report discusses that too (paras 2.131 to 2.133). The draft assumes that an *omission* cannot amount to an attempt. Here the draft follows the report (para 2.105). Yet it surely ought to be an offence for a person having the care of an invalid deliberately to withhold a life-preserving drug, intending the victim to die. And it should be an offence for an employee (whose duty it is to make the employers' premises safe) to leave a window unfastened so that his confederate may enter and steal. Both these omissions are capable of amounting to attempts.

When the Law Commission sets out to tidy up an area of law which has got out of hand it surely ought to do so thoroughly and comprehensively. This report is thorough and comprehensive. Why should the draft Bill by which the report is to be implemented not be the same? A new law inevitably creates uncertainty, but it should not deliberately pave the way for old battles to be fought again. The Law Commission should be bold not timid. By a body with its important functions, the cautious approach to legislative drafting, fearful of saying anything for fear of saying the wrong thing, does not serve the public interest.

It is easy to criticise, and difficult to achieve a draft beyond criticism. So I end this examination of an important contribution to criminal law with a draft of my own. It is intended to remedy the deficiencies mentioned in this article, but no doubt contains deficiencies of its own.

Alternative Draft Offence

Definition of attempt
1. A person ("the offender") is guilty of attempting to commit an offence ("the full offence") if he does an act ("the attempt") in relation to the full offence in circumstances where sections 2 and 3 below are satisfied.

Mental element
2. (1) When making the attempt the offender must intend the acts constituting the full offence to be done, whether by the offender himself or others; and where the full offence is not one of strict liability must in

other respects have the state of mind requisite for commission of the full offence.

(2) The offender's intent may be either unconditional or conditional on the existence of certain facts or circumstances.

(3) If the offender believes any relevant fact or circumstance to be different from what it is in fact then, for the purpose of applying subsections (1) and (2) above and section 3 below, the fact or circumstance shall be regarded as being as the offender believes.

(4) It is immaterial whether or not the offender is aware that the acts which he intends shall be done constitute the full offence, or any other offence.

Act must be proximate

3. The attempt must go so far towards the commission of the full offence as to be proximate to its completion and not merely preparatory.

Impossibility

4. For the purposes of sections 1 to 3 above, it is immaterial that in the circumstances commission of the full offence is impossible; but this shall not be taken as enabling a person to be convicted of attempt when he knows commission of the full offence to be impossible.

Completed and uncompleted attempts

5. (1) For the purposes of sections 1 to 3 above, it is immaterial whether, following the attempt,-

(a) the full offence is in fact complete,

or

(b) in the offender's belief the full offence is complete (it not being so because the offender is mistaken as to some relevant fact or circumstance),

or

(c) to the knowledge of the offender the full offence is incomplete because its commission has been abandoned or detected, or a necessary condition has not been fulfilled, or for any other reason.

(2) Nothing in subsection (1) above shall be construed as enabling a person to be convicted both of attempt and the full offence, or as enabling a person to be convicted of attempt solely because of a mistake by him as to the law.

Exception of certain offences

6. Section 1 above does not apply where -

(a) the full offence would not be triable in England and Wales, or

[continue as in draft offence, clause 1(3)].

Interpretation

7 In the preceding provisions "act" includes omission, and references to the doing of an act shall be construed accordingly.

Postscript

The report has no index or table of cases. May I enter a plea that these be included in future Law Commission reports of this size and importance? Without them proper consideration of the report is rendered more difficult.

[130 NLJ (1980) 725]

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REFRAMING THE CRIME OF ATTEMPT

The legal profession has a duty to the community to ensure that the law is in the best shape possible. This applies to all working lawyers, including judges and magistrates, practising barristers and solicitors, draftsmen and other public officials, workers in reform agencies, jurists, commentators and other academics, legal executives and other ancillaries, and everyone else concerned with operating the system. The duty extends to legislators, whether lawyers or not (but most particularly when lawyers).

All these paid functionaries share a common duty to the community, even if that is often not realised. The duty varies in weight according to office and function, but not one of us should try to escape it.

The above remarks, though generally applicable, are prompted by the appalling state the law has now got itself into over the crime of attempt. It is common sense, and therefore common law, that an attempt to commit a crime must be punishable. It cannot be punished as the crime itself, but must nevertheless be punishable in some lesser degree. That proposition is firmly established, and does not need proving.

The citizen is entitled to demand of the legal profession that it should make suitable arrangements for achieving this. The first requirement is that the law should be clearly stated. After the common law had got itself into a tangle over this, Parliament intervened to straighten things out. Now, as a result of the House of Lords decision in ***Anderton v Ryan*** [[1985] A.C. 560], the law is once again in a tangle. The public has a right to complain that the legal profession has failed in its duty.

What went wrong, and how can the matter this time be successfully put right? This article attempts to answer these questions.

In outline what went wrong was that those responsible for framing the new law of attempt made the mistake of doing so in too few words to convey the necessary meaning. The remedial Act was based on a draft Bill appended to a report by the Law Commission. [Law Com. No. 102.] The Bill defined the offence of attempt in a mere twelve lines. In an article published shortly after the report appeared I pointed out this shortcoming in words which, having regard to subsequent events, bear repeating-

Will this 12-line provision ... if enacted (as the Law Commission proposes) in place of the common law offence of attempt, succeed in placing the law on a clear basis? It is respectfully submitted that it will not. The only certain thing is that if enacted it will produce as much argument and uncertainty as the law it replaces.

["Framing the Crime of Attempt" 130 N.L.J. (1980) 725.]

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I went on to argue that the reason why the new provision would not succeed in its aim of clarifying the law was that it was far too compressed for a codification and failed to set out the new law's response to most of the questions that had given rise to difficulty in the past. Professor Glanville Williams added the weight of his authority to this view. ["I agree with Mr. Bennion that the draft could well be amplified to express certain obvious rules": "Framing the Crime of Attempt - a Reply" 130 N.L.J. 968. Unfortunately what is "obvious" in this context tends to give rise to dispute.]

These comments fell on deaf ears. Although altered in some slight respects, the Law Commission's exiguous draft was passed into law as the Criminal Attempts Act 1981. The resulting confusion has been graphically described by Professor Glanville Williams in a recent article running to no less than fifty pages. ["The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?* 45 C.L.J. (1986) 33.] In the course of it he says-

The Law Commission recommended this legislation because experience showed that the whole subject was an intellectual minefield; so the only thing to do was to fence it off and erect a "Keep out" notice, to prevent the courts from continuing to make asses of themselves, as they had done, and to save purposeless drains upon the public purse in state-subsidised litigation. (To which I would add another object: to save law lecturers and students wasting their time on barren stuff like the matters treated in this article. We all have better things to do.)

Alas for law reform! Parliament proposes, but the Appellate Committee disposes. In *Anderton v Ryan* the law lords re-entered the forbidden ground like wilful schoolboys, as insouciantly as though the dangers had never been revealed. They ignored the scheme of the Act and failed to give any clear meaning to [section 1(2) and (3)].

It may be doubted whether so severe a rebuke has in modern times been administered by a distinguished academic lawyer to our highest appellate court. A grave situation has arisen, requiring a remedy that this time can be assured of success. Otherwise the difficulties surrounding the law of attempt will assume the proportiions of a public scandal (if indeed they have not already done so).

To arrive at how the attempt law might be satisfactorily reframed we need to analyse the problem with some minuteness. We shall then find that the problems are caused by the following factors-

(a) the factual outline for attempt is unusually complex;

(b) the substantive offences to which the law of attempt must relate vary from the very grave (such as murder or treason) to the trivial;

(c) some attempts are covered by substantive offences of a lesser nature (e.g. an attempted rape may constitute an indecent assault), while others are not;

(d) while some acts which would fall within any factual outline of the offence of attempt obviously merit punishment, others equally obviously should escape.

Complexity of the factual outline in attempt

The framework of facts laid down by an enactment for triggering its operation may be conveniently referred to as the factual outline. [See Bennion, *Statutory Interpretation* s. 78: "An enactment lays down a legal rule in terms which show that the rule is triggered by the existence of certain facts. The enactment indicates these facts in outline form (in the Code referred to as the statutory factual outline). Any actual facts which fall within the statutory outline thus trigger the legal thrust of the enactment...".] So, to take a random example, the offence of intentional damage created by the Criminal Damage Act 1971 s. 1(1) is expressed in the following words, of which those I have italicised constitute the factual outline-

A person who without lawful excuse damages any property belonging to another, intending to destroy or damage any such property, shall be guilty of an offence.

[The words of section 1(1) in fact embrace four different offences, namely intentional destruction, intentional damage, reckless destruction, and reckless damage. It is possible by selective comminution to state each offence separately (with some repetition), as I have done in the text with intentional damage. See further *Statutory Interpretation,* p. 182.]

This is not however the ***full*** factual outline for the offence of intentional damage. For one thing the term "property" is equipped by section 10(1) of the Criminal Damage Act 1971 with a complicated definition. An even more complicated definition is given by section 10(2) to (4) to the phrase "belonging to another".

The general law attaches detailed meanings to the terms "person" and "without lawful excuse". The difficult legal concept of intention requires to be correctly understood. And so on. We see that the factual outline even for such a comparatively simple offence as intentional damage is not entirely straightforward.

Suppose a draftsman were now requested to frame a factual outline for the offence of ***attempted*** intentional damage. (Such a request might be given because it had been decided to reform the criminal law by equipping it with specific attempt provisions, rather than a single all-embracing one.) If, like some draftsmen, he were a plain and simple fellow he might produce the following-

A person who without lawful excuse attempts to damage any property belonging to another, intending to destroy or damage any such property, shall be guilty of an offence.

It would be different if, again as some draftsmen are, he were learned and acute, and had moreover read Professor Williams's article cited above. [Note ?.] Then he would wish to deal with some of the possible conundrums (he would be a genius if he managed to deal with them all). He might start with mistake by the perpetrator as to the existence or situation of the property.

The draftsman, having (as all good draftsman should) a powerful imagination, quickly thinks up an example of such a mistake-

Being envious of the new car acquired by his neighbour N, D plants a small bomb near the open ground where N keeps the car. The bomb explodes at the intended time, but the car is not there. N has sold it, having found it too expensive to run.

The draftsman modifies his draft to deal with this, and produces the following-

(1) A person who without lawful excuse attempts to damage any property belonging to another, intending to destroy or damage any such property, shall be guilty of an offence.

(2) Subsection (1) applies notwithstanding that, without the knowledge of the said person, the property has passed into different ownership or already ceased to exist.

We see that, as often happens, during the drafting process our draftsman has jumped on from his example. He has thought of the additional possibility that the car intended to be damaged has already been destroyed (perhaps by another enemy of N's).

Our assiduous draftsman continues to exercise his imagination, putting in provisions to deal with such possibilities as that D damages property that (unknown to him) he in fact owns himself, or fruitlessly tries to inflict damage by casting a voodoo spell, or uses means that are in themselves lawful, or relies on a supervening event that fails to occur, or acts even though strongly suspecting that the property has already ceased to exist.

I have said enough to show that it would be quite difficult to draft a satisfactory provision laying down the full factual outline for an offence of attempted intentional damage. The same would apply to individual attempt provisions relating to most other substantive offences.

Yet in one brief section the Criminal Attempts Act 1981 essays toframe a factual outline covering virtually all the thousands of different indictable offences that exist.

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Definition of the offence of attempt

1.-(1) If, with intent to commit an offence to which this section applies ("the substantive offence"), a

person does an act which is more than merely preparatory to the commission of that offence, he is guilty of attempting to commit the offence. [Same as 1981 s 1(1).]

(2) For the avoidance of doubt, but without prejudice to the generality of subsection (1), it is hereby declared that if a person falls within section 2, 3, 4 or 5 below in relation to the substantive offence, he is guilty of attempting to commit it.

(3) This section applies to [as 1981 s 1(4)].

Mistake as to a material fact

2.-(1) A person falls within this section in relation to a substantive offence if, with intent to commit that offence but being under a mistake as to a material fact, he does an act which-
(a) does not constitute the commission of the substantive offence, but

(b) would, if the facts were as he supposes them to be, constitute the commission of that offence.

(2) Subsection (1) applies even though, the facts being as they are, the commission of the substantive offence is impossible.

Uncertainty as to a material fact

3.-(1) A person falls within this section in relation to a substantive offence if, with intent to commit that offence but being in doubt as to whether or not some material fact exists, he does an act (not being merely preparatory) towards the commission of the offence intending that, if the fact does exist, either the act will constitute the offence or he will go on to complete the offence.

(2) Subsection (1) does not apply where the facts are such that the said act does constitute the substantive offence.

Failure of a supervening event

4.-(1) A person falls within this section in relation to a substantive offence if, with intent to commit that offence, he does an act (not being merely preparatory) towards the commission of the offence intending or hoping that some supervening event will occur to complete the offence.

(2) Subsection (1) does not apply where the supervening event does occur to complete the substantive offence.

Incomplete acts

5. A person falls within this section in relation to a substantive offence if, with intent to commit that offence, he does an incomplete act (not being merely preparatory) towards the commission of the offence

such that if the act had been completed he would fall within section 2, 3 or 4 above.

Avoidance of double jeopardy

6. Section 2, 3, 4 or 5 above applies whether, the facts being as they are, the person in question-

(a) commits no offence (apart from the offence of attempt), or

(b) commits an offence other than the substantive offence,

but where the case is within paragraph (b) he shall not be convicted both of that other offence and of the offence of attempt.

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Our modern legislative pattern, as regards common law rules, is that after the judges have done their best Parliament, with its democratic input, intervenes to straighten things out. Judicial inadequacy derives from failure to adopt correct legislative techniques. Unfortunately Parliament has also failed to adopt correct techniques, and often enjoys no more success than the judges. The inevitable result is to render the law inadequate for modern needs, and thus bring it into disrepute.

A conspicuous example of this combined legislative failure is furnished by the recent history of the criminal law of attempt.

The common law of attempt was built up in the usual way from instance to instance. This inductive process, applied by busy judges reared in a pragmatic school, almost invariably ends up with a body of rules that fail to satisfy the test of consistency and clear principle. So it was with attempt.

At that point Parliament as usual stepped in, using the Law Commission as midwife. The instructing Government department, in this case the Home Office, played a more than usually active role. The result was described by Professor Glanville Williams in these words-

From such an inauspicious beginning, it not surprising that the Criminal Attempts Act 1981 failed its first test. In *Anderton v Ryan* the House of Lords construed it in a way that all commentators save Professor Hogan have united in condemning as foreign to the obvious purpose of the legislation.

The purpose of this article is first to analyse why this legislative failure should have occurred and second to offer a draft Bill on attempts which it is submitted would cure the difficulty.