



Recent developments in criminal law

The last couple of years have seen big changes made to Irish criminal law, from the abolition of the distinction between felonies and misdemeanours to the creation of new offences dealing with syringe attacks. J Paul McCutcheon outlines the main points of the legislation enacted in 1996 and 1997 affecting substantive criminal law

Where a statute creates new offences, or alters existing offences, it is now usual to abolish pre-existing offences. In addition, the statute might include a transition provision to facilitate the prosecution of offences committed prior to its coming into force.

The *Non-Fatal Offences against the Person Act, 1997* abolished a number of common law offences but it did not contain a transition provision. Doubts arose as to whether an accused could be prosecuted in relation to conduct committed prior to the Act for the common law offence once the Act had come into force (*The People v Kavanagh*, Special Criminal Court, 29/10/97; *Quinlivan v Governor of Portlaoise Prison*, High Court, 9/12/97).

This was settled by the *Interpretation (Amendment) Act, 1997*. The Act provides that the abolition of a common law offence by statute does not affect the previous operation of the law; proceedings may be instituted in respect of the common law offence after the statute has come into force. The Act deals with potential constitutional issues by providing that it is subject to such limitations necessitated by a person's constitutional rights.

Although it was enacted to deal with the immediate difficulty posed by the *Non-Fatal Offences against the Person Act, 1997*, the provisions of the Act apply to any statute which abolishes common law offences.

Criminal Law Act, 1997

The *Criminal Law Act, 1997* abolished the distinction between felonies and misdemeanours and amended the law of participation. Section 7(1) provides for the punishment as a principal offender of a person who 'aids, abets, counsels or procures' the commission of an indictable offence. Section 7(2) deals with conduct after the commission of the principal offence. A person who without reasonable excuse acts with intent to impede the apprehension or prosecution of a person whom he or she knows or believes to be guilty of an offence that attracts a sentence of five years' imprisonment or more is liable. The Act repeals the *Accessories and Abettors Act, 1861*.



and unconsciousness'. The inclusion of mental harm reflects developments in relation to 'actual bodily harm' in the 1861 Act, section 47 (*R v Chan-Fook* [1994] 1 WLR 689; *R v Ireland* [1997] 1 All ER 112).

The intentional or reckless causing of serious harm is an offence under section 4 (*life/unlimited fine*). This is defined 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' (section 1). This is narrower than 'grievous bodily harm' in the 1861 Act (*The People v Messitt* [1974] IR 406; *DPP v Smith* [1961] AC 290).

The precise boundaries between assault, assault causing harm and causing serious harm are difficult to draw, and the definitions in the 1997 Act are liable to be supplemented by judicial interpretation.

Syringe attacks. The *Non-Fatal Offences against the Person Act, 1997* deals with the modern phenomenon of syringe attacks. Section 6 creates two categories of offence. The first involves the use of a syringe in circumstances where the accused intends to infect the victim or where there is a likelihood that the victim will believe that he or she may become infected (*ten years/unlimited fine*). Central to these offences is an intention on the part of the accused to infect the victim or a fear on the victim's part that he or she may be infected; it is not necessary to prove infection, or risk of infection, nor that the syringe or blood was contaminated. The second group of offences involves the use of a contaminated syringe or contaminated blood (*life*). Blood or fluid is contaminated if it contains a disease, virus, agent or organism that could infect a person with a life-threatening disease. The possession of a syringe or blood in a container with intent to injure or threaten injury or to intimidate is an offence under section 7 (*seven years/unlimited fine*).

Poisoning. In many cases, poisoning will amount to the offence of causing serious harm. Section 12 creates a 'residual' poisoning offence (*three years/unlimited fine*) which might be employed where the conduct does not amount to another offence. The offence consists of intentionally or recklessly administering to or causing a person to take a substance which is known to be capable of 'interfering substantially with the [victim's] bodily functions' without his or her consent. A substance which induces sleep or unconsciousness is capable of interfering substantially with one's bodily functions, so spiking a person's drink with a sedative would come within this section.

Intimidation, threats, harassment. The *Non-Fatal Offences against the Person Act, 1997* creates several new offences which deal broadly with threats, intimidation and harassment. There is an overlap with the law of assault in that threats might induce a fear of suffering violence. Nevertheless, it is clear that the law of assault in itself is insufficient to deal with the phenomenon of threatening conduct.

Under section 5 it is an offence to make a threat to a person (intending that it be believed) to kill or cause serious harm to that person or another (*ten years/unlimited fine*). The intent that it be believed by the person to whom it is made distinguishes serious threats from those that are innocuous. It is not necessary to prove that the threat was believed, or had an effect on the person to whom it is made.

An offence of coercion is created by section 9 (*five years/unlimited fine*) in comprehensive terms, and it embraces all imaginable forms of conduct that might be considered intimidatory – using violence, injuring, damaging property, persistently following a person from place to place, watching or besetting premises, following a person in a disorderly manner. Peaceful picketing is excluded from the scope of the offence.

Developments in criminal law

Non-Fatal Offences against the Person Act, 1997

The *Non-Fatal Offences against the Person Act, 1997* simplifies the law and eliminates the arcane distinctions that characterised the common law and the *Offences against the Person Act 1861*. It abolished the common law offences of assault, battery, false imprisonment and kidnapping, and repealed many of the offences contained in the 1861 Act. The result is a simplified statutory scheme.

Assaults. A new summary offence of assault is contained in section 2 (*penalty: six months/£1,500 fine*). The new offence embraces the common law categories of assault and battery; it includes both the application of force and apprehended application of force ('force' is defined as including the application of heat, light, electric current, noise and other forms of energy).

Assault causing harm is an offence under section 3 (*five years/unlimited fine*). 'Harm' is defined as 'harm to body or mind and includes pain

Section 10 creates the offence of harassment 'without lawful authority or reasonable excuse' (*seven years/unlimited fine*). In some cases, conduct which would otherwise amount to harassment might be done on lawful authority or with reasonable excuse, in which case no offence is committed. The forms of harassment against which the section is directed are 'persistently following, watching, pestering, besetting or communicating with the victim'. These may be achieved by any means, including the use of telephone.



Stalking and persistent unwanted communications with a victim constitute harassment. The *mens rea* component of the offence is set out in somewhat ambiguous terms. In section 10(2)(a), it is uncertain whether it is merely the act which must be intentional or reckless, or whether the accused must be shown to have been intentional or reckless as to the consequence of the act, namely seriously interfering with the victim's peace. This point could be crucial since, as a matter of general principle, it must be assumed that intent or recklessness is to be evaluated subjectively. If section 10(2)(a) requires intent or recklessness *both* as to the act *and* the consequence, it leaves open a possible defence that the accused subjectively lacked *mens rea* as to the consequence. The provision would be more effective were the specified intent or recklessness confined to the act. This view is reinforced by the fact that section 10(2)(b) makes specific provision in regard to the consequence and it introduces an objective element.

Endangerment. Two new offences of endangerment have been created. Section 13 creates a general offence of endangerment where the accused intentionally or recklessly engages in conduct that creates a substantial risk of death or serious harm to another (*seven years/unlimited fine*). 'Substantial risk' is not defined, but it is clear that negligible and improbable risks are excluded. The risk created must be one of death or serious harm. The *mens rea* of the offence is intention or recklessness.

An offence of endangering traffic is created by section 14 (*seven years/unlimited fine*). This offence replaces a number of offences that dealt with interfering with railways and so on.

Offences against personal liberty. The common law offences of kidnapping and false imprisonment have been abolished and are replaced by a generic offence of false imprisonment (*life*). The offence of false imprisonment is committed where the accused intentionally or recklessly takes or detains, or causes to be taken or detained, or otherwise restricts the personal liberty of a person without their consent (section 15(1)). It is not necessary to establish any element of abduction or removal, nor is holding for ransom or reward an element of the offence.

Two offences of child abduction are created (*seven years/unlimited fine*). Section 16 applies to the taking of a child under the age of 16 years out of the State by a parent or guardian in defiance of a court order or without the consent of each person whose consent would by law be required. It is a defence to show that the accused had been unable to communicate with those whose consent was required but believed that they would have consented had they been aware of the relevant circumstances or that the accused did not intend to deprive others of their rights in respect of the child.

Defences. Sections 18-20 of the Act provide for the circumstances where the use of force is justified. Cumulatively, these sections broadly reflect the common law on the use of force in legitimate defence or in

effecting an arrest. A case is to be determined on the facts as the accused believed them to be, again matching recent common law developments (*R v Williams (Gladstone)* [1987] 3 All ER 411). Sections 18-20 now comprise the exclusive provisions on the use of force in the circumstances outlined and the common law rules in this respect are abolished. It would appear that these provisions govern the use of fatal and non-fatal force alike. But, if this is the case, the Oireachtas would seem to have overlooked the decision in *The People v Dwyer* ([1972] IR 146). There the accused who used excessive fatal force in self-defence was guilty of manslaughter since he subjectively believed the level of force employed to be necessary.

One construction of sections 18-20 is that an accused now would be entitled to an acquittal since fatal force is necessary on the facts as he believed them to be.

Could the Oireachtas have intended to overrule the decision in *Dwyer*? An alternative, but strained, construction is that sections 18-20 are confined to non-fatal force, with the common law governing the use of fatal force.

Sexual Offences (Jurisdiction) Act, 1996

The *Sexual Offences (Jurisdiction) Act, 1996* extends the law on sexual offences to offences committed with children (defined as persons under 17 years of age) outside the State. The Act deals with the commission of offences abroad and ancillary offences committed within and outside the State. The Act applies to citizens of the State and persons who are ordinarily resident within the State. A person is 'ordinarily resident' within the State if he or she has had their principal residence within the State for 12 months immediately prior to the commission of the offence (section 2(7)).

Jurisdiction is extended where a person commits an act outside the State which (a) constitutes an offence against the law of the place where it is done, and (b) if done within the State would constitute a scheduled offence. The scheduled offences are unlawful carnal knowledge of minors, rape, sexual assault, aggravated sexual assault, rape under section 4, buggery of a person under 17 years of age, gross indecency with a male under 17 years of age, and sexual intercourse with or buggery of a mentally impaired person. In these circumstances, the accused is guilty of the scheduled offence and is liable to the same penalty. It should be noted that if the conduct is not an offence against the law of the foreign country, the Act does not apply even though the same conduct, if committed within the State, would constitute an offence.

Sections 3 and 4 create ancillary offences (*five years/£10,000 fine*). Under section 3, it is an offence to transport, or make an arrangement to transport, a person abroad knowingly for the purpose of enabling that person to commit an offence against which the Act is directed. This provision is clearly directed against those who organise sex tours, but its terms are such that any person who provides a transport service in the knowledge that the traveller intends to commit child sex offences abroad is liable. Since the act must be done 'knowingly', those who act negligently or recklessly would not be guilty. **G**

J Paul McCutcheon is Senior Lecturer in Law at the University of Limerick. This article is a shortened version of a paper presented at a recent seminar hosted by the Centre for Criminal Justice (see Limerick papers in criminal justice No 1).