The Law Commission

(LAW COM. No. 76)

CRIMINAL LAW

REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM

Laid before Parliament by the Lord High Chancellor pursuant to section 3 (2) *of the Law Commissions Act* 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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THE LAW COMMISSION

Item XVIII of the Second Programme

CONSPIRACY AND CRIMINAL LAW REFORM

To the Right Honourable the Lord Elwyn-Jones,
Lord High Chancellor of Great Britain

INTRODUCTION

A. GENERAL

1. In our *First Programme of Law Reform*[1] we recommended that the law of conspiracy and common law misdemeanours should be examined by the Criminal Law Revision Committee. In accordance with this recommendation the Home Secretary referred these items to that Committee for examination and some work was done on this reference by a sub-committee.

2. In our *Second Programme of Law Reform*[2] we recommended a comprehensive examination of the criminal law with a view to its codification. As one of the first tasks in this exercise we recommended that we should make an examination of the general principles of the criminal law with the assistance of a Working Party. The constitution of this Working Party is given in Appendix 2.

3. In October 1970 it was decided that the work of the Criminal Law Revision Committee on conspiracy should be taken no further but that conspiracy should be dealt with by the Law Commission and its Working Party in their examination of general principles.

4. Since the submission of our First Programme it has also been decided that it would be inadvisable to deal with common law offences by attempting to consider them all in one comprehensive exercise, for they exist in many branches of the law. Their abolition and replacement, where necessary, by modern statutory offences is essential to the codification of the criminal law, which, of course, entails an examination of all areas of the law. The proper time to examine any particular common law offence is during the examination of the whole area of the law in which it falls and it has been decided that this is the practice which we and other law reform agencies will in future follow in the continuing task of codification.

5. The Law Commission's Working Party examined conspiracy in the context of inchoate offences generally and, in June 1973, we published a Working Paper[3] prepared by them. Consultation on this Working Paper is concluded. It included a seminar at All Souls College, Oxford, in April 1974, which you attended[4].

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[1] (1965) Law Com. No. 1, Item XIV.
[2] (1968) Law Com. No. 14, Item XVIII.
[3] Working Paper No. 50, "Inchoate offences."
[4] A list of those who participated in this seminar is in Appendix 3.

6. The consultation on Working Paper No. 50 has been helpful[5] and the provisional proposals of the Working Party relating to conspiracy have generally met with a wide measure of approval. We are now able to make recommendations.

B. SCOPE OF REPORT

7. Probably the most important recommendation we make in this report is that conspiracy should only be an offence if the object of the agreement is itself a criminal offence. We deal in detail with this recommendation and the effects of its implementation in Part I of this report. These effects were foreseen by the Working Party and led to our publishing a number of working papers[6] dealing with various branches of the law, an examination of which was made necessary by this recommendation. Our consultation on all these working papers has been concluded[7] and detailed recommendations for reform of the law are made in Parts II to VI of this report. Those recommendations, without which the implementation of our main recommendation would leave unacceptable gaps in the law, are included in the draft Bill which is Appendix 1 to this report. In addition, in relation to offences of entering and remaining on property, and offences against public morals and decency, dealt with respectively in Parts II and III of this report, we have taken this opportunity of making recommendations for the abolition of common law offences in these fields, and their replacement by statutory offences where necessary. In respect of offences of entering and remaining on property we have also made recommendations for the modernisation of the ancient statutory offences of forcible entry and forcible detainer, a task we have been asked specifically to undertake.

8. In the examination of offences against public morals and decency we have necessarily had to consider questions relating to the obscenity of films, and we have made recommendations which will have the effect of making all films subject, in effect, to the same rules as to obscenity which at present govern the articles which come within the Obscene Publications Acts 1959 and 1964 and performances which come within the Theatres Act 1968. We think it important to emphasise at this early stage of our report that we have no remit to consider the wide subject of obscenity generally. We are aware (and consultation has emphasised this) that disquiet is being evinced at the operation of the obscenity laws. This disquiet has been expressed to us forcibly both by those who think that the law operates too harshly and by those who think that the law should be made a more effective weapon to stamp out obscenity. In Part III we refer to some of the criticisms which those with whom we have consulted have levelled against the obscenity laws and their operation but we reiterate that we are not considering these general questions in this report nor have we any remit so to do.

9. In Parts IV and V we deal with conspiracies to effect a public mischief and conspiracies to commit a civil wrong. In these parts we make no recommendations

[5] A list of those who submitted comments is in Appendix 4.

[6] Working Paper No. 54, "Offences of entering and remaining on property"; Working Paper No. 57, "Conspiracies relating to morals and decency"; Working Paper No. 63, "Conspiracies to effect a public mischief and to commit a civil wrong". See further, para. 1.12, below.

[7] Lists of those who submitted comments are in Appendices 4-5 and 7-8. Our consultation on Working Paper No. 57 also included a seminar at Jesus College, Cambridge; a list of those who participated in this seminar is in Appendix 6.

for legislation in the draft Bill. So far as conspiracy to effect a public mischief is concerned, our task has been lightened by the decision of the House of Lords in *Withers* v. *D.P.P.*[8] which has ruled that conspiracy to effect a public mischief is not a separate head of criminal liability. Our consideration of the effect of this decision has led us to take the view that, in consequence of that decision and of other recent developments, the law may not now be fully adequate to meet current needs. But we must stress at the outset that the possible inadequacies of the law to which we draw attention in Part IV of this report do not arise as a result of our recommendations as to the general law of conspiracy which we make in Part I. These inadequacies occur in branches of the law which are unrelated to the subject matter of the draft Bill annexed to this report and we do not, therefore, consider it to be the proper vehicle for any reform of the law to meet them.

10. In Part VI we deal with the rarely used offence of contempt of statute and recommend its abolition. This subject has no relevance to the other parts of the report and we deal with it now because it has no obvious connection with any other particular field of law likely to be the subject of further scrutiny by a law reform agency. On consultation our recommendation has proved wholly uncontroversial.

11. Following our usual practice we have made recommendations for maximum penalties for the new criminal offences which we recommend should be created. For the new statutory offence of conspiracy the penalties we propose are related to the gravity of the offence or offences agreed to be committed. For the other offences which we recommend be enacted we have, in deciding what the maximum penalty should be, been guided by two main principles. First, we have taken into account what we think is the worst possible example of the offence in question. Secondly, we have taken into account the present pattern of maximum penalties for broadly comparable offences. We are, however, aware that the Home Secretary has recently asked the Advisory Council on the Penal System "to consider the general structure and level of maximum penalties available to the courts, in particular in respect of the more serious criminal offences" and "to assess how far they represent a valid guide to sentencing practice". A sub-committee of the Advisory Council under the chairmanship of Mr. Louis Blom-Cooper, Q.C., has been set up and we shall keep in touch with them during their deliberations. No doubt all maximum penalties including those recommended in this report will be looked at closely in the light of any recommendations the Council make.

PART I

CONSPIRACY

A. THE NEED FOR AN OFFENCE OF CONSPIRACY

1.1 In the normal course, the criminal law provides sanctions to punish the achievement of prohibited objectives such as, for example, personal injury or damage to property. Except in the case of offences of strict liability or offences of negligence (which are usually less serious and of a regulatory nature) the law

[8] [1974] 3 W.L.R. 751.

further requires for liability that the defendant to a charge shall have achieved the prohibited consequence with the necessary mental element. The mental element required varies with different types of offence and is differently expressed. The formation of an intention necessarily precedes the achievement of the intended consequence and, during the period between these two events, there exists a clear social danger which ought if possible to be avoided. The law recognises the absurdity which would be entailed if, knowing that someone was on the way to achieving a prohibited event, it could only stand by until the event had happened. The law, therefore, steps in under some circumstances at an earlier stage than completion of the intended consequence and makes certain conduct during that time criminal. This it does by use of the inchoate common law offences of attempt, incitement and conspiracy and by a number of statutory devices. It has, however, always stopped short of making mere intention punishable[1] no matter how conclusively (for instance by comprehensive confession) it can be proved. There must have been a beginning at least of the conduct intended eventually to result in the prohibited consequence, or some act of incitement or conspiracy beyond the mere forming of an intention.

1.2 The nature of the conduct which (together with proof of the necessary mental element) renders a person subject to criminal sanctions before the full achievement of his purpose varies. The definition of that conduct for the purposes of the common law offence of attempt is a peculiarly difficult problem in jurisprudence with which we shall grapple in a later report. All that one can say with complete confidence is that it must be something more than mere preparation. For some specific offences, however, the necessary conduct has been pushed by statute much further back towards mere intention. Possession of an article intended to be used in the commission of an offence can be enough, as in the Prevention of Crime Act 1953[2], the Theft Act 1968[3] and the Criminal Damage Act 1974[4]. Our *Report on Offences of Damage to Property* (which led to the Criminal Damage Act) is explicit—

> "The essential feature of the proposed offence is to be found not so much in the nature of the thing—for almost any everyday article, from a box of matches to a hammer or nail, can be used to destroy or damage property—as in the intention with which it is held."[5]

The Official Secrets Act 1920[6] ranges even further back towards mere intention and makes punishable the doing of "any act preparatory to the commission of an offence". Incitement is a special case in that the conduct punished is not that of the person who, if not prevented, may commit the substantive offence.

1.3 Conspiracy essentially consists of an agreement between two or more persons to effect some "unlawful" purpose. In that it consists of nothing more

[1] The nearest English law has ever got to making mere intention punishable was in the Treason Act 1351, "where a man doth compass or imagine the death of our Lord the King", but, by a somewhat forced construction of later words in the statute, the courts have long required, in addition, the proof of an "overt act".
[2] Sect. 1.
[3] Sect. 25.
[4] Sect. 3.
[5] (1970) Law Com. No. 29; (1970-71) H.C. 91, para. 60.
[6] Sect. 7.

than the articulation of a common intention by making an agreement it is, of all the preparatory offences, the one which can occur at the earliest time.

1.4 The Working Party considered the question whether it was right to retain the traditional distinctions between the three inchoate offences of conspiracy, attempt and incitement or whether they should all be subsumed under one concept of committing a preparatory act[7]. The provisional conclusion reached was that this apparent simplification would raise more difficulties than it would solve. The great majority of the views expressed on consultation were in favour of retaining conspiracy as a separate offence and there was little support for the idea of creating one all-embracing preparatory offence.

1.5 Another question which was raised on consultation was whether there was any need for a crime of conspiracy at all. But only a very small minority of those who commented on the provisional proposals raised this doubt. The great majority of the views expressed were in favour of retaining conspiracy as a separate offence. The view of the Working Party[8] was that the most important reason for retaining conspiracy as a crime was that it enabled the criminal law to intervene at an early stage before a contemplated crime had actually been committed and most of those who commented agreed with this. We accept this argument and feel that the necessity that there should be proof of an agreement is a sufficient safeguard against the danger of punishing conduct too far removed from an actual crime.

1.6 Another reason adduced for the retention of conspiracy as a crime is that it provides a useful means whereby persons who plan or organise crimes but take no active part in them can more easily be brought to justice. It is, of course, true that, strictly, proof that someone has planned or organised crime is all that is needed to make him guilty of the offence itself if it is committed, but it is said to be easier to explain to a jury the simple requirement of proof of an agreement than to make it clear that someone who has not actually "done" anything can be guilty, by reason of complicity, of the substantive crime. We accept that there is some merit in this argument.

B. THE OBJECTIVE OF CONSPIRACY

1. The present law

1.7 Conspiracy differs from other inchoate offences (whether common law or statutory) in a number of ways. The most important difference lies in the nature of the objective which will make the preparatory step in its direction criminal. In all inchoate offences except conspiracy the objective must itself be an offence. Conspiracy goes further. Agreement to commit an offence is, of course, one instance of the crime of conspiracy. However, in addition, an agreement to effect some "unlawful" object, not itself an offence if committed by one person, can amount to the crime of conspiracy. This is because of the wide meaning which has been given to "unlawful" in this context. The exact extent of these "unlawful" objects (other than crimes) is far from clear. A person remains liable to be prosecuted for conspiracy even if the object of the agreement has been

[7] Working Paper No. 50, para. 3.
[8] *ibid.*, para. 12.

achieved[9]. The extended meaning of "unlawful" thus leads to the result that, so long as two or more combine, they can, in certain circumstances, be punished for doing something which would not be criminal if one of them alone had done it.

2. Working Party's consideration and proposals

1.8 In paragraphs 8–14 of Working Paper No. 50 the Working Party considered at length the question whether criminal conspiracy should be confined to agreements to commit offences. The paragraphs were as follows—

"*Should criminal conspiracy be confined to agreements to commit offences?*

8. The lack of clear definition of those "unlawful" aims which may make an agreement an unlawful conspiracy has been one of the major criticisms of the law of conspiracy. A second and related criticism is that, in creating and extending criminal liability for combinations to achieve "unlawful" ends, the courts have searched with undue diligence to discover different heads of liability[12].

9. In the light of these criticisms, we feel that we should begin by declaring our attitude to considerations of this nature. It seems to us not merely desirable, but obligatory, that legal rules imposing serious criminal sanctions should be stated with the maximum clarity which the imperfect medium of language can attain. The offence of conspiracy to do an unlawful act offends against that precept in two ways. First, it is impossible in some cases even to state the rules relating to the object of criminal agreements except in terms which are at best tautologous and unenlightening[13]. Secondly, in those cases where at least a statement of the offence is possible, that statement covers such a wide range of conduct that it is impossible to decide (assuming a set of facts established) whether an offence has been committed or not[14]. It seems to us, therefore, that the offence of conspiracy to do an unlawful, though not criminal, act ought to have no place in a modern system of law. Nevertheless, it is necessary to examine the arguments which might be used to support the present position.

10. It is often said that the jury is the best safeguard against oppressive prosecutions, and can be relied upon to reflect public feeling at any given time[15]. We consider, on the contrary, that the role of the jury in some areas of conspiracy is one of the most unsatisfactory aspects of the law. It is true that a jury is sometimes called upon to apply its collective

[12] These criticisms would not, of course, apply to conspiracies to commit crimes.

[13] See, *e.g.*, Willes J. in *Mulcahy* v. *Reg.* (1868) L.R. 3 H.L. 300 defining the innominate category of conspiracy to injure in well-known terms as "an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means". This definition has proved fruitful. In *Mogul Steamship Co.* v. *McGregor* (1889) 23 Q.B.D. 598, 617 Bowen L.J. described the tort of conspiracy to injure as "a combination of several persons against one with a view to harm him". *Russell on Crime* (12th ed.) Vol. 2, p. 1490 says "A combination without justification to insult, annoy, injure or impoverish another person is a criminal conspiracy".

[14] These observations would not apply to conspiracies to commit torts or breaches of contract. Whether these are in fact criminal conspiracies is, however, itself a difficult question to answer.

[15] See, *e.g.*, *Shaw* v. *D.P.P.* [1962] A.C. 220, *per* Viscount Simonds at 269, Lord Tucker at 289, Lord Morris at 292 and Lord Hodson at 295.

[9] See para. 1.64, below.

values to sensitive questions[16]. We, however, regard it as a matter for regret that it leads to the substitution of the judgment of the jury for a clear and satisfactory statement of a rule of law. The jury is traditionally regarded as a guardian of individual freedom, but this is because it is the tribunal of fact, not because it is a law-giving agency, the role it assumes in many conspiracy cases. To ask the jury not only whether the accused did the acts alleged, but whether he ought to be punished, seems to confuse two roles, fact-finding and legislative. A jury may be influenced very strongly by a judge's direction, not only on the facts, but more important, on the elements of the offence. Though the combined effect of the decisions in *Shaw*[17], *Knuller* v. *D.P.P.*[18] and *R.* v. *Bhagwan*[19] is to deny the existence of a judicial power to create new offences relating to morals, decency, or "public mischief", the asserted effect of such a denial is minimised by the facility with which a novel set of facts may be subsumed under an existing head of liability in conspiracy.

11. It used to be argued that the very fact that a conspiracy to do certain acts involves the concerted efforts of two or more makes it in itself a dangerous thing, justifying greater attention than the law would give to a corresponding act done by one person. The validity of this argument, of course, cannot be tested empirically. This argument is perhaps less persuasive, however, in cases involving no more than two people where one person only is charged with conspiracy with another "unknown", particularly if he is at the same time charged with other substantive offences without conspiracy. Further, the court has to find the criminal—"unlawful"—element in the object of the agreement. The agreement itself becomes criminal only because of its object, and therefore the numbers involved are irrelevant to criminal liability once it is shown that a minimum of two only agreed, of whom only one need be charged. It may be that a combination of, say, a dozen, is formidable; but it is difficult to see how much gravity is added to one man's conduct by the agreement of one other.

12. It is also said that, as an inchoate offence, conspiracy enables the criminal law to intervene at an early stage of the commission of a crime. This is true, and we would not dispute that this will continue as the most important rationale of conspiracy to commit crimes. But it is hard to see how this could be relevant where the agreement is not to commit a crime (or even a tort) but to commit what may or may not later be characterised as an "unlawful" act. The very issue in such a case will be whether the defendants have committed a crime by making their agreement. Therefore, the power to intervene at an early stage does not seem to be a material consideration in deciding whether criminal conspiracy should extend beyond agreements to commit crimes. Further, conspiracy to do an "unlawful", as distinct from a criminal, act is generally charged where the contentious conduct has been completed. The object is to obtain a conviction where the prosecution feels that another charge may fail, which it would clearly do where the "unlawful" act is not also a criminal act. Inchoate offences may widen the net to catch incipient criminal behaviour, but here, in a dubious area of

[16] Under, for instance, the Obscene Publications Act 1959.
[17] [1962] A.C. 220.
[18] [1972] 2 All E.R. 898.
[19] [1972] A.C. 60.

non-criminality, a theoretically inchoate offence is used to stretch the substantive law.

13. If this is acknowledged, it can still be argued that the use of conspiracy charges to enlarge the range of criminal liability in particular cases is itself desirable. It cannot be foreseen what the dishonest or immoral may do and conspiracy has therefore a useful role in ensuring that those who indulge in reprehensible conduct do not go unpunished. We do not dissent from the proposition that the manifestations of viciousness may be infinite. But, even assuming for the sake of argument that all were agreed what conduct ought to be punished, we do not think that the proper role of conspiracy is to provide a means of convicting those whose conduct would not otherwise have been punishable. It may be true that there is a danger of cases in which justice is apparently evaded. We regard this as an inevitable and acceptable price to pay in order to avoid the creation of oppressive "catch-all" offences. If there are to be such offences, we believe that their creation is a matter for Parliament, and to make such offences depend upon the existence of a combination is, in our view, unacceptable.

14. This argument emphasises the importance we place on the necessity for certainty in the criminal law. As values change, the fields in which the law takes a part, or from which it abstains, may also change. What should and should not be the subject of interference by the criminal law is a controversial question, and one which is certain to arise in the context of offences which may be thought necessary to replace existing areas of conspiracy liability. The extended form of conspiracies to do acts other than crimes, however, is one which we feel has no place in a modern system of criminal law. Our view is reinforced by another factor: our deliberations are conducted in the context of the long-term aim of codifying the criminal law. A law of conspiracy extending beyond the ambit of conspiracy to commit crimes has, in our view, no place in a comprehensively planned criminal code."

1.9 From this extract it will be seen that the Working Party came, very emphatically, to the conclusion that the object of a conspiracy should be limited to the commission of a substantive offence and that there should be no place in a criminal code for a law of conspiracy extending beyond this ambit. An agreement should not be criminal where that which it was agreed should be done would not amount to a criminal offence if committed by one person. In our introduction we provisionally agreed with this proposal[10]. It was the conclusion at which a sub-committee of the Criminal Law Revision Committee had previously arrived. It met with a very wide measure of approval on consultation. Our final opinion is that it should be implemented as soon as possible.

3. Difficulty of implementation

1.10 The proposal to limit conspiracy in this way is fundamental to our proposals but the difficulties in implementing it were recognised by the Working Party[11] and by most of those whom we consulted. It arises from the

[10] Working Paper No. 50, Law Commission Introduction, para. 3.
[11] *ibid.*, para. 62(*a*).

use to which prosecuting authorities have put what has been called the "protean crime of conspiracy"[12]. Where there has been conduct which it has been thought merited punishment but there has been no substantive offence which could be charged, a conspiracy charge (so long as more than one person was involved) has proved a useful weapon in the armoury of the criminal law. Although opinions may differ as to some of the uses to which a charge of conspiracy has been put there is no doubt that its use has often filled a gap in the criminal law which ought properly, we think, to have been filled by specific legislation.

1.11 The Working Party therefore recommended that before this major proposal was implemented an examination of the relevant areas of the law should be carried out by the Law Commission with a view to identifying and, where necessary, filling gaps which a limitation of the offence of conspiracy in the way proposed would leave. The use of conspiracy charges has ranged over a very wide area of the criminal law and the task of examining the whole field has proved a long and heavy one.

1.12 The Working Party considered briefly what parts of the law would require examination[13]. We have undertaken this examination in five Working Papers and (save for conspiracy to defraud and offences against the administration of justice) concluded consultation on them. They are—

(*a*) *Conspiracy to defraud.* A Working Paper[14] was completed for publication on 24 May 1974.

(*b*) *Conspiracy to trespass.* A Working Paper on offences of entering and remaining on property[15] was completed for publication on 17 April 1974 and included a consideration of conspiracy to trespass.

(*c*) *Conspiracies relating to morals and decency.* A Working Paper[16] was completed for publication on 31 August 1974. It was published contemporaneously with a Working Paper on Vagrancy and Street Offences by a Home Office Working Party with whom we consulted.

(*d*) *Offences against the administration of justice* (Conspiracy to pervert the course of justice). A Working Paper[17] was completed for publication on 20 March 1975.

(*e*) *Conspiracies to effect a public mischief and to commit a civil wrong.* A Working Paper[18] was completed for publication on 18 April 1975.

1.13 It was our original intention to report separately on each of these subjects before reporting on the general aspects of conspiracy; but we have decided to report on conspiracy itself in advance of our reports on fraud and offences against the administration of justice. We do, however, deal in this report with the other three areas of the law, namely, conspiracy to trespass[19],

[12] See *Withers* v. *D.P.P.* [1974] 3 W.L.R. 751, 760, *per* Lord Diplock.
[13] Working Paper No. 50, paras. 15-32.
[14] Working Paper No. 56.
[15] Working Paper No. 54.
[16] Working Paper No. 57.
[17] Working Paper No. 62.
[18] Working Paper No. 63.
[19] Part II, below.

conspiracies relating to morals and decency[20] and conspiracies to effect a public mischief and to commit a civil wrong[21]. The reasons for our decision to report on conspiracy in advance of our reports on fraud and offences against the administration of justice differ and we deal with each separately.

(a) Conspiracy to defraud

1.14 The use of conspiracy in the field of fraud was examined in detail in Working Paper No. 56. In our introduction to the Working Party's paper on inchoate offences[22] we stated that our preliminary research seemed to show that it would be mainly in the field of fraud that a limitation of conspiracy would leave unacceptable gaps in the law. This forecast has proved accurate. It comes as a surprise to most laymen that English law knows no generalised criminal offence of fraud. There are, of course, a very large number of statutory offences covering a wide field of fraudulent conduct but human ingenuity is great and charges of conspiracy to defraud (which is a generalised and widely defined offence) have undoubtedly been used to bring within the ambit of the criminal law conduct which most people would think merited punishment but which might otherwise have gone unpunished. The use of conspiracy charges in the field of fraud, whilst, in our opinion, sometimes undesirable, does not merit to the same extent criticism which can properly be levelled at their use in other areas. Nor is the offence of conspiracy to defraud limited to what we have called in Working Paper No. 56 the "economic field". It also includes "public fraud" which, in the past[23], has also been prosecuted as conspiracy to commit a public mischief.

1.15 In Working Paper No. 56 we identified a number of lacunae which the proposed restriction of conspiracy would leave in the field of fraud and we made provisional proposals for filling them[24]. We are still consulting as to whether our proposals are satisfactory and as to the best way they can be implemented. Our aim is eventually to produce a draft "fraud" Bill which will, we hope, take its place beside the Theft Act 1968 in the Code. This is a difficult task and raises problems both of policy and of technique. It will take us a considerable time from the time our consultation is concluded.

1.16 It is the length of time which it will take us to finalise our report on fraud which has convinced us that we ought not to delay this report. We are, however, sure that any legislation passed in advance of the implementation of our proposals as to fraud will have to exclude from its ambit conspiracy to defraud. This will have to remain a common law offence pending our report on fraud offences generally. There is precedent for this in modern reforming legislation in the retention of the common law offence of cheating the revenue by section 32(1) of the Theft Act 1968. We hope that eventually implementation of our recommendations on fraud will lead to the abolition of the common law offence of conspiracy to defraud (and also of cheating the revenue). In the meantime, however, we advise that the common law offence of conspiracy to defraud

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[20] Part III, below.
[21] Parts IV and V, below.
[22] Working Paper No. 50, Law Commission Introduction, para. 4.
[23] In *Withers* v. *D.P.P.* [1974] 3 W.L.R. 751, the House of Lords has recently held that the law knows no such generalised offence as conspiracy to effect a public mischief.
[24] See Working Paper No. 56, para. 84, for a summary of these proposals.

should be specifically retained and provision for this is made in the draft Bill annexed to this report.

(b) Offences against the administration of justice

1.17 Our consultation so far on Working Paper No. 62 has confirmed our provisional view that the criminal code should contain a separate section dealing comprehensively with offences against the administration of justice. We have begun the preparation of a report dealing with this area of the law. However, we do not think that there is any reason why we should delay submitting the present report on conspiracy until after we have submitted a report on those offences, which are receiving further detailed consideration.

1.18 It is a prerequisite of the codification of the criminal law that all common law offences should be abolished and, where necessary, be replaced by modern offence-creating legislation. In our consideration of those areas of the law which we have examined as part of our study of the law of conspiracy we have taken the opportunity of examining also the common law offences (other than conspiracy offences) which exist in each field[25]. If, in any area of the law, it is found that, apart from conspiracy, there is a common law or statutory offence in existence which comprehends the conduct at present also rendered punishable by the use of a conspiracy charge, the implementation of our recommendation that conspiracy should be limited to agreements to commit crimes will not in any way dismantle the armoury of the criminal law. This is the situation in relation to offences against the administration of justice.

1.19 In Working Paper No. 62 we examined offences relating to the administration of justice. There is no doubt that there exists at common law an offence of perverting the course of justice without any requirement of conspiracy[26], and the restriction of conspiracy to conspiracy to commit an offence will result in no narrowing of the law in this area. Clearly, therefore, there is no reason why implementation of our proposals as to conspiracy should have to await implementation of our proposals for reform and restatement in statutory form of offences against the administration of justice.

C. THE ELEMENTS OF CONSPIRACY

1. Introduction

1.20 In the preceding paragraphs we have dealt with the major question raised by our inquiry into the law of conspiracy and made our main recommendation that in future the crime of conspiracy should be limited to agreements to commit crimes. We now examine in detail the law relating to conspiracy and make recommendations which will, if implemented, result in the replacement by statute of the common law offence of conspiracy. Many of our recommendations accord closely with the proposals made provisionally by the Working Party in Working Paper No. 50, most of which were found acceptable by the majority of those whom we consulted. A majority do no more than restate in statutory form

[25] There are, of course, other fields of the law in which the same examination will have to be made. The most important of these is the sphere of public order where common law offences such as affray, unlawful assembly, riot and rout still exist and are used.

[26] *R.* v. *Grimes* [1968] 3 All E.R. 179; *R.* v. *Panayiotou* [1973] 1 W.L.R. 1032.

the rules of the common law; others, such as our recommendations as to penalties, involve changes in the law.

2. The agreement

1.21. The whole basis of the offence of conspiracy lies in the agreement and it is the rules governing the making and content of the agreement which we first examine. We shall consider the nature of the agreement, the mental element required in those making the agreement, the object of the agreement (in so far as any further rules are required in addition to the requirement, already stated, that the object of the agreement must be the commission of the substantive offence) and the parties to the agreement.

1.22 The present law makes it clear that each conspirator must agree that the object of the conspiracy should be pursued. Nothing less than full agreement will suffice; mere negotiation is not sufficient[27] nor is common purpose without agreement (although if an offence is actually committed common purpose may involve complicity in crime). It is not, however, necessary that all the parties to the agreement should have evinced their consent at the same time or on the same occasion, nor indeed that each should have been in communication with every other or should be aware of each other's identity. But it is essential that each of the conspirators should entertain a common purpose in relation to the specific offence or offences which are its object[28]. In dealing with what are known as "wheel" and "chain" conspiracies, the Court of Appeal recently stated the law thus—

> "The essential point in dealing with this type of conspiracy charge, i.e. 'wheel' or 'chain' conspiracies where the prosecution have brought one, and only one, charge against the alleged conspirators, is to bring home to the mind of the jury that before they can convict anybody upon that conspiracy charge, they have got to be convinced in relation to each person charged that that person has conspired with another guilty person in relation to that single conspiracy . . . there must not be wrapped up in one conspiracy charge what is in fact a charge involving two or more conspiracies."[29]

1.23 Since the essential element in conspiracy is the agreement, it is clear that to be guilty of conspiracy a person must be proved to have agreed with at least one other person.

3. Corporations

1.24 In English law a corporation can be criminally liable for a wide range of criminal offences, including offences requiring a mental element. In their Working Paper on Corporations[30], our Working Party has discussed whether and to what extent corporations should be subject to the criminal law. We have not yet reported on the criminal liability of corporations but, as the law stands, there is clearly no reason in principle why a corporation should not be liable for conspiracy so long as the individual making the criminal agreement is acting

[27] *R.* v. *Walker* [1962] Crim. L.R. 458.
[28] *R.* v. *O'Brien* (1974) 59 Cr. App. R. 222.
[29] *R.* v. *Ardalan* [1972] 1 W.L.R. 463, 469-470.
[30] Working Paper No. 44, "The criminal liability of corporations."

"as the company". However, in *R.* v. *McDonnell*[31] the defendant was charged with conspiracy with a company of which he was the director and the sole person responsible for the acts of the company. The count so charging him was quashed. This was, we think, a correct decision. In order to convict a corporation of an offence requiring a mental element it is necessary to identify someone whose guilty mind and activities are, for these purposes, to be treated as those of the company itself; if all that has happened is that the individual has made a decision on his own, he cannot be taken to have agreed with another.

4. The mental element

(*a*) *Introduction*

1.25 We hope soon to report to you on the Mental Element in Crime, following consultation on our working paper on this topic[32]. In that report we shall recommend that, in the Criminal Code and, so far as possible, in all future offence-creating legislation, the basic concepts upon which the mental element in crime should be framed are intention, knowledge and recklessness either in regard to the consequences of a course of action or in regard to the circumstances surrounding a course of action. But we shall also point out that, in legislation already on the statute book, the mental element for different crimes is expressed in a bewilderingly different number of ways. In this report we are primarily concerned with the mental element required for the offence of conspiracy but, because, on our recommendations, conspiracy will be an offence only if there is an agreement that an offence shall be committed, we have to take into account the mental element, if any, required for all offences, whether created by statute or existing at common law.

(*b*) *The mental element in relation to the agreement itself*

1.26 We have already recommended that a conspiracy should require the full agreement of two or more natural persons[33] (although one may be acting on behalf of a limited company) and this, in itself, provides the main requirement of a mental element. It is necessary that the minds of the alleged conspirators should have come together in agreement. We have also recommended that before an agreement amounts to a criminal conspiracy it must be an agreement that a crime be committed. This raises the problem of what must be the mental attitude of those agreeing towards the ultimate objective, for in many cases conduct is only criminal if accompanied by a particular state of mind. For example, damaging the property of another in the mistaken belief that there is a right to do the damage is not an offence[34]. Therefore, an agreement to damage another's property in the mistaken belief that there is a right to do the damage, would not be an agreement to commit the crime.

(*c*) *The mental element in respect of the objective*

(i) *General*

1.27 For most serious crimes English law requires both the doing of a prohibited act, the *actus reus*, and a mental element in the defendant, the *mens*

[31] [1966] 1 Q.B. 233.
[32] Working Paper No. 31, "The Mental Element in Crime."
[33] See paras. 1.23 and 1.24, above.
[34] Criminal Damage Act 1971, ss. 1 and 5; see *R.* v. *Smith* [1974] 1 Q.B. 354.

rea. Whilst, as we have said, this mental element is described in many ways, it may consist basically either of an intention to bring about a prohibited consequence or an awareness that there is a risk that a prohibited consequence may result from an act. In addition, and usually in the case of less serious crime, there are offences which require no mental element but only a failure by the defendant to comply with an objective standard (negligence offences), and offences of strict liability which require no more than the doing of the prohibited act.

1.28 An example of the difference in criminality between the same act done with different mental elements is provided by sections 18 and 20 of the Offences against the Person Act 1861. The act prohibited by each section is the act of wounding someone; by section 18 the act of wounding someone with intent "to do some grievous bodily harm to any person" is made punishable with imprisonment for life; by section 20 the act of wounding someone "unlawfully and maliciously" but without any other stated mental element is punishable with five years' imprisonment. "Maliciously" in this context has been construed as importing an awareness that the defendant's act may have the consequence of causing physical harm to some person; the defendant must knowingly take the risk of injuring someone[35].

1.29 Other offences are framed in terms which require the doing of some prohibited act with knowledge of some circumstances surrounding the act or with an awareness of a risk that some circumstance surrounding the act may exist. Section 14(1) of the Trade Descriptions Act 1968 prohibits the act of making certain false statements in the course of any trade or business; the mental element required is either knowledge that the statement is false[36] or recklessness as to the truth of the statement[37].

1.30 It would be impracticable to give in this report a full account of all the different ways in which offences are framed. We shall deal with the subject in greater detail in our report to you on the Mental Element in Crime.

(ii) *The present law*

1.31 There is very little authority in the English law of conspiracy as to what mental element a defendant has to have in relation to the substantive offence at the time when he agrees to pursue a course of conduct which, if completed, would result in the commission of that offence. This dearth of authority is probably due to the fact that in nearly all cases proof of an agreement to pursue a course of conduct which will necessarily result in the commission of a criminal offence itself is conclusive proof that those so agreeing intended that the offence should be committed.

1.32 In *R.* v. *Thomson*[38], on a charge of conspiracy to defraud, the defendant's defence was that he had led his alleged co-conspirators to believe that he was agreeing with them to carry out an unlawful purpose when in fact he had no intention of doing anything of the kind. After remarking that the researches of counsel seemed to show that the problem had never been resolved

[35] *R.* v. *Mowatt* [1968] 1 Q.B. 421.
[36] Sect. 14(1)(*a*).
[37] Sect. 14(1)(*a*). There is a deeming provision in s.14(2)(*b*); in order that our example may be kept simple we ignore this provision.
[38] (1965) 50 Cr.App.R. 1.

by any English court and citing certain Canadian and American authority, Lawton J. held that, in conspiracy, the prosecution must prove not only an agreement between the alleged conspirators to carry out an unlawful purpose, as signified by words or other means of communication between them, but also an intention in the mind of any alleged conspirator to carry out the unlawful purpose.

1.33 There seems to be no authority as to whether it is possible to be guilty of conspiracy to commit an offence where the requirement of the substantive offence is recklessness and not intention. In *R.* v. *Mohan*[39], however, the question was raised in respect of the inchoate offence of attempt. The defendant was alleged to have driven a car at a policeman intending to injure him. He was charged with attempting to cause grievous bodily harm with intent and, upon that charge, he was acquitted. He was also charged with attempting by wanton driving to cause bodily harm to the policeman. The jury, being directed that it was sufficient for the prosecution to prove that the defendant was reckless as to whether bodily harm would be caused by wanton driving, convicted him. The conviction was quashed by the Court of Appeal (Criminal Division). The judgment of the Court contains these passages—

> "The attraction of this argument is that it presents a situation in relation to attempts to commit a crime which is simple and logical, for it requires in proof of the attempt no greater burden in respect of mens rea than is required in proof of the completed offence. The argument in its extreme form is that an attempt to commit a crime of strict liability is itself a strict liability offence. It is argued that the contrary view involves the proposition that the offence of attempt includes mens rea when the offence which is attempted does not and in that respect the attempt takes on a graver aspect than, and requires an additional burden of proof beyond that which relates to, the completed offence."[40]

> "An attempt to commit crime is itself an offence. Often it is a grave offence. Often it is as morally culpable as the completed offence which is attempted but not in fact committed. Nevertheless it falls within the class of conduct which is preparatory to the commission of a crime and is one step removed from the offence which is attempted. The court must not strain to bring within the offence of attempt conduct which does not fall within the well established bounds of the offence. On the contrary, the court must safeguard against extension of those bounds save by the authority of Parliament. The bounds are presently set requiring proof of specific intent, a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not."[41]

1.34 The most recent leading case on the mental element required for conspiracy is the decision of the House of Lords in *Churchill* v. *Walton*[42]. This decision was concerned with an alleged conspiracy to commit an offence of strict liability. Section 200(2) of the Customs and Excise Act 1952 prohibited

[39] [1975] 2 W.L.R. 859.
[40] *ibid.*, at pp. 862-3.
[41] *ibid.*, at p. 867.
[42] [1967] 2 A.C. 224.

the use in a vehicle of heavy oil upon which a rebate had been allowed unless an amount equal to the rebate had been paid to the Commissioners. The appellant, a book-keeper, had been found guilty of conspiring to contravene the section by joining in an agreement to use fuel in vehicles on which the rebate had not in fact been repaid, although he did not know that the rebate had not been repaid and was not dishonest. The House of Lords quashed the conviction.

1.35 The prosecution argued that, because no mental element was required to render the use of the oil in a vehicle an offence, an agreement so to use the oil needed no more than the agreement to do the prohibited act (using the oil) to render the agreement criminal as a conspiracy. The House rejected this argument. Viscount Dilhorne (with whose speech the other Law Lords agreed) said—

> "In cases of this kind, it is desirable to avoid the use of the phrase 'mens rea,' which is capable of different meanings, and to concentrate on the terms or effect of the agreement made by the alleged conspirators. The question is, 'What did they agree to do?' If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realise that such an act was a crime. If, on the facts known to them what they agreed to do was lawful, they are not rendered artificially guilty by the existence of other facts, not known to them, giving a different and criminal quality to the act agreed upon."[43]

1.36 We think that this passage from Viscount Dilhorne's speech provides us with the basic principle as to the mental element in conspiracy which we should use in our formulation of the new statutory offence we propose. The important question is "What did they agree to do?". If what they agreed to do would amount, if done, to an offence then the subsidiary question may have to be asked whether, on the facts known to *them*, it would still be an offence. If that question is answered in the negative then *Churchill* v. *Walton* is clear authority, so far as offences of strict liability are concerned, that the defendants should be acquitted.

1.37 To summarise, there is clear authority that an agreement to commit an offence which itself requires a mental element of intention is only conspiracy if the defendant himself also has that intention[44]. There is also clear authority that, where a conspiracy to commit an offence of strict liability is charged, the prosecution has to prove that the defendant knew the facts which would make what was agreed to be done an offence[45]. For the inchoate offence of attempt there is clear authority that where recklessness as to a consequence is sufficient for the substantive offence, nevertheless full intention is needed for the inchoate offence[46].

1.38 These decisions all accord with what the law should, in our opinion, be. There is, however, no direct authority as to whether, on a charge of conspiracy to commit an offence of negligence, the prosecution have to prove that the defendant knew the facts which would make the course of conduct agreed upon

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[43] [1967] 2 A.C. 224 at p. 237.
[44] *R.* v. *Thomson* (1965) 50 Cr. App. R. 1.
[45] *Churchill* v. *Walton* [1967] 2 A.C. 224.
[46] *R.* v. *Mohan* [1975] 2 W.L.R. 859.

an offence. Nor is there direct authority as to what the law should be where the charge is of conspiracy to commit an offence which requires recklessness. We think, however, that it is reasonably clear from such authority as there is that what the law requires before a charge of conspiracy can be proved against a defendant is that he should intend to bring about any consequence prohibited by the offence and should have full knowledge of all the circumstances or facts which need to be known to enable him to know that the agreed course of conduct will result in a crime. This follows, we think, from the main requirement of conspiracy, emphasised both by Viscount Dilhorne and Lawton J., that the defendant must agree that an offence shall be committed.

(iii) *Recommendations*

1.39 We think that the law should require full intention and knowledge before a conspiracy can be established. What the prosecution ought to have to prove is that the defendant agreed with another person that a course of conduct should be pursued which would result, if completed, in the commission of a criminal offence, and further that they both knew any facts which they would need to know to make them aware that the agreed course of conduct would result in the commission of the offence.

1.40 We should make it clear that the principles we propose do not mean that ignorance of the law will excuse a defendant. If he knows the necessary facts, his mere failure to know that, within the context of those facts, the proposed course of conduct will amount to an offence will not lead to his acquittal[47]. And, of course, in many cases he will not need to have knowledge of any facts external to those implicit in the agreement itself. To agree to set up a business of buying stolen goods will be a criminal conspiracy even though no goods may yet have been stolen; the conspirators do not need to know any extrinsic facts for them to be aware that the planned course of conduct will result in the commission of criminal offences.

1.41 The conclusion we have reached in paragraph 1.39 differs from the provisional proposal made by the Working Party in their working paper[48]. Their formulation provisionally proposed, was framed in terms of intention and recklessness as to circumstances and consequences. We have decided that such a formulation would not be satisfactory in legislation which will lay down rules which will have to apply generally to agreements to commit offences themselves framed in very many ways and not always differentiating between circumstances and consequences. The working paper proposals are also somewhat less stringent in their requirements as to the mental element. However, we think that the stringency we recommend is fully justified by the fact that conspiracy is essentially an inchoate offence which is committed before any prohibited event has in fact taken place. We think it will be helpful if we give some examples of the way in which our formulation of the offence of conspiracy will operate in practice. We base our examples upon existing offences. We deal first with offences formulated in terms of consequences and then with those formulated in terms of circumstances.

[47] This is in accordance with the general principle that ignorance of the law is no defence.
[48] Working Paper No. 50, paras. 48-53.

(iv) *Consequences*

1.42 There are two ways in which consequences may be dealt with in the formulation of offences.

(i) The prohibited consequence, for example, wounding, or damaging another's property, can be subsumed under an actual prohibition of the conduct resulting in consequences; in such a situation the prohibited conduct, wounding, is the same as the prohibited consequence, wounding. For offences so formulated the requirement that there should be agreement to indulge in the prohibited conduct necessarily involves an intention to bring about the prohibited consequence. Offences so framed can require in the defendant a mental element of either intention or recklessness (risk taking) but conspiracy will require nothing less than intention. It ought not to be a conspiracy to commit an offence under section 20 of the Offences against the Person Act 1861 to agree to throw a heavy object from a window into a crowded street, although if the object were thrown and it wounded someone the offence itself would have been committed. There has been no agreement that a course of conduct should be pursued which will necessarily result in the commission of a criminal offence[49]. It may do so and it may not.

(ii) An act otherwise lawful can be rendered criminal if it is done with a specified intention. Examples are forging a will (which is only prohibited if done with intent to defraud[50]) and doing acts calculated to interfere with the peace and comfort of residential occupiers (which is only prohibited if it is done with intent to make them give up occupation[51]). In such cases an agreement to do the act will only be criminal if there is the intention thereby to bring about the prohibited consequence. To agree to forge a will or to let off fireworks under a tenant's window as practical jokes is not to agree on a course of conduct which, if completed, will result in the commission of these criminal offences.

(v) *Circumstances*

1.43 There are a number of different ways in which offences may be formulated to deal with circumstances.

(i) The formulation may require knowledge of or belief[52] in a circumstance before an act becomes criminal, for example, making a false statement knowing it to be false or handling stolen goods knowing or believing them to be stolen. An agreement to make a statement will not be an offence unless the defendants know the statement to be false and an agreement to handle goods will not be an offence unless the defendants know or believe the goods to be stolen[53].

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[49] The conduct might amount to some other offence.

[50] Forgery Act 1913, s.2(1).

[51] Rent Act 1965, s.30(2).

[52] We agree with Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 498 that the addition of the word "believing" in the Theft Act 1968, s.22, does not, in fact, add anything to the word "knowing"; *cf.*, Theft Act 1968, s.12, driving a vehicle knowing it to have been taken without authority.

[53] The agreement postulated here is not the same as the agreement in para. 1.40. The hypothetical fact situation here is one where A and B agree to handle certain specific goods: to be guilty of conspiracy they must know those goods to be stolen.

(ii) The formulation may require that the defendant is reckless as to a circumstance, for example, making a false statement recklessly[54]. An agreement to make a statement will not be an offence unless the defendants know that it is false. An agreement to make a statement which the defendants do not know is false is not an agreement to pursue a course of conduct which, on the facts known to them, will constitute an offence. If all they know is that there is a risk that the statement is false then they will not be agreeing to pursue a course of conduct which, on the facts known to them, will necessarily result in the commission of a criminal offence. Of course, if they proceed to make the statement and it is false they will be guilty of the substantive offence.

(iii) The formulation may require that a belief in the non-existence of a circumstance shall not be sufficient unless it is held on reasonable grounds. This can be framed either as a defence with the burden on the defendant or as part of the definition of the mental element, for example, it is an offence to sell a firearm to a person under the age of seventeen. It is a defence "to prove that the person charged with the offence believed the other person to be of or over the . . . age and had reasonable ground for the belief."[55] If A and B agree to sell a firearm to a person under seventeen and believe, but on unreasonable grounds, that he is not over seventeen, they will not be guilty of conspiracy. They must know that the person to whom they intend to sell the firearm is under seventeen.

(iv) The formulation may be "strict" as to a circumstance, for example, taking an unmarried girl under the age of sixteen out of the possession of her parent against his will[56]. If A and B agree to take an unmarried girl out of possession believing her to be over sixteen there would be no conspiracy unless they knew that she was under sixteen. This, of course, is the present law on the authority of *Churchill* v. *Walton*[57].

5. Conspiracy to commit other inchoate offences

1.44 We have already recommended that the object of the agreement should be to commit a particular crime or particular crimes. This indeed is our major proposal for reform of the law. In their working paper the Working Party considered in detail the question whether and, if so, to what extent it should be a criminal offence to agree to commit another inchoate offence, either of incitement or attempt[58]. Whatever the theoretical position might be, we cannot envisage any circumstances in which it is likely to be necessary to charge someone with a conspiracy to attempt to commit an offence[59]; such an agreement would always be an agreement to commit the offence itself. It is, however, possible

[54] Prevention of Fraud (Investments) Act 1958.

[55] Firearms Act 1968, ss.21(5) and 24(1) and (5). *cf.*, the special defence under the Sexual Offences Act 1956, s.6(3).

[56] Sexual Offences Act 1956, s.20(1): *R.* v. *Prince* (1875) L.R. 2 C.C.R. 154.

[57] [1967] 2 A.C. 224.

[58] Working Paper No. 50, paras. 46-47.

[59] Unless, of course, the substantive offence is itself framed in terms of attempting to achieve a prohibited object. *R.* v. *Westcott and Others*, *The Guardian* 1 October 1975, *The Times* 11 December 1975.

to envisage an agreement being made to incite someone to commit an offence and, were this situation to occur and be discovered before any actual incitement took place, we can see no reason why the conspirators should not be guilty of the offence of conspiracy. We do not think that any special rules are required in relation to conspiracy to incite; incitement is itself an offence at common law.

6. Exclusion of certain agreements

1.45 In Working Paper No. 50 the Working Party made provisional proposals to exclude agreements between certain classes of persons from the ambit of conspiracy. These were—

(*a*) an agreement between husband and wife; and

(*b*) an agreement with someone who is himself exempted from criminal liability for the substantive offence.

We deal with both of these situations separately, the second being complicated by the fact that there are different reasons for exemption from criminal liability, each of which requires separate treatment.

(a) Agreement between husband and wife

1.46 Although it seems to be the law that a husband and wife can be accomplices in crime and that one can be guilty of inciting the other to commit a crime[60], a man cannot at present conspire with a person who is his wife at the time when the agreement is made[61]. There are arguments which favour both the abolition of this rule and its retention. It may be argued that husband and wife are treated as separate persons for the purpose of the criminal law in the context of offences against the person and against property. Furthermore, the Criminal Law Revision Committee has proposed[62] that spouses should be competent as prosecution witnesses in all cases, and compellable in cases of violence to the other spouse and offences of violence or sexual offences against children; and they also propose that the privilege against disclosure of marital communications (which is limited to communications to the spouse giving the evidence) should be abolished. These proposals may lead to the conclusion that the status of husband and wife may be so radically altered that the present rule applying to conspiracy cases ought to be abolished.

1.47 The other view is that, so long as the institution of marriage remains as it is known today, it would be wrong to make a husband and wife liable for conspiracy, since it would represent a factor tending to undermine the stability of the marriage. A change in the law to permit a spouse to be charged with conspiracy with his or her spouse might offer excessive scope for improper pressure to be applied to spouses in particular cases; where, for example, a husband refuses to confess to the commission of a crime, he would be open to the threat that his wife would be charged with conspiracy with him. Such a

[60] *R.* v. *Manning* (1849) 2 C. and K. 903 n.; *Archbold* (37th ed., 1973), para. 47.

[61] This is universally stated to be the law by the writers of treatises and books and is supported by the Privy Council's decision in *Mawji* v. *R.* [1957] A.C. 526 and by such earlier cases as *R.* v. *Robinson* (1746) 1 Leach 37 and *R.* v. *Whitehouse* (1852) 6 Cox C.C. 38. There is, however, no direct English authority on the point.

[62] See (1972) Cmnd. 4991, 11th Report, Evidence (General), pp. 92 *et seq.*, and clause 9 of the draft Bill.

change in the law in this respect could, therefore, bring practical disadvantages which might outweigh its possible advantages.

1.48 The Working Party was divided as to whether a conspiracy charge should lie in respect of an agreement between spouses[63]. Our consultation reflected the same division of opinion although the majority view was that there should be no change in the law. In a recent Report[64] the Law Reform Commissioner for Victoria has recommended that the rule should remain unaltered giving, in addition to the second reason stated in the preceding paragraph, these reasons for his proposal—

> "(1) The stability of marriages is still a matter of the first importance in our society; and an important aid to that stability, it may be thought, is the maintenance between spouses of a confidential relationship in which hopes and fears, and plans for joint action and mutual assistance, can be discussed without any inhibiting thought of subsequent public disclosure. But if public trials of husband and wife were taking place in our courts today, upon charges of conspiracy in respect of communications between themselves only, this, it may well be considered, would be likely to have a significant effect in discouraging marital confidences and consequently the quality of marital relationships.
>
> (2) Again, the changed status of married women has not affected the duty of spouses to provide comfort and support for each other. Married persons, therefore, at the time of making any agreement that might be charged against them as a conspiracy, will commonly be faced with an apparent conflict between their duty to each other and their duty to society. And in such circumstances the making of the agreement may be much less reprehensible than the making of a like agreement between persons owing no duties to each other. Indeed, as was pointed out by Warren C. J. in *U.S.* v. *Dege* [(1960) 364 U.S. 51, dissenting] a wife may, simply by virtue of the close and confidential life that she shares with her husband, do things "that would technically be sufficient to involve her in a criminal conspiracy, though far removed from the arm's length agreement typical of that crime." And a husband, of course, could face corresponding difficulties.
>
> (3) . . . the addition of the agreement of one spouse to the project of the other is less likely than the agreement of a stranger would be, to bring in additional resources or make the agreement a formidable one."[65]

1.49 We agree with the view expressed by the majority of our own Working Party and by the Law Reform Commissioner for Victoria and we recommend no change in the law which exempts from the crime of conspiracy agreements between spouses.

(b) Agreements with persons exempted from criminal liability

(i) *General*

1.50 The Working Party identified four situations in which one party to an agreement would himself be exempt from criminal liability. Whilst the Working

[63] Working Paper No. 50, para. 36.
[64] Law Reform Commissioner (Victoria), Report No. 3, *Criminal Liability of Married Persons* (Melbourne, June 1975).
[65] *ibid.*, para. 65, p. 27.

Party concluded provisionally that the non-exempt party should in none of these situations be liable for conspiracy[66], those whom we consulted had varied views, some thinking that the non-exempt party should be liable for conviction in some of the situations considered. It is, therefore, necessary for us to deal with them separately.

(ii) *Agreements with children*

1.51 It is possible for a person to make an agreement to commit a crime with a child under the age of criminal responsibility who is incapable of forming the intent necessary for the crime which he is agreeing to commit. The Working Party's view was that, on the law as it now is, this would not preclude the non-exempt person from being convicted of conspiracy[67]. The majority of those whom we consulted thought that no charge of conspiracy should lie in respect of an agreement with a person not criminally responsible because of childhood. If the offence is actually committed the responsible person will be guilty even though he does not do the act himself on the basis that he committed the offence through an innocent agent.

(iii) *Agreements with people who are not liable for prosecution for the substantive offence*

1.52 Perhaps a more common case than that postulated in the previous paragraph is one in which A agrees with B (who is normally responsible in law) for the commission of a particular crime in respect of which B is not liable to prosecution. For example, a man conspires with a woman not in fact pregnant to procure her abortion[68], or a man conspires with a mother that he should remove her child from the custody of its lawful guardian[69]. In neither case would the woman have been guilty of the substantive offence had it been committed because the statute creating the relevant offence expressly excludes her liability. There is, however, authority that the woman in the first example given is guilty of conspiracy. In *R.* v. *Whitchurch*[70], on these facts, the woman was found guilty of conspiring to procure her own abortion, although not pregnant. We consider that this decision went against the intent of Parliament through its circumvention of the limitation of responsibility imposed by statute and should be overruled by legislation.

1.53 So far as the non-exempt party to the sort of agreement mentioned in the last paragraph is concerned, the majority of those whom we consulted thought that he ought not to be guilty of conspiracy.

1.54 Another example of an agreement with a person who is himself exempt

[66] Working Paper No. 50, para. 43.

[67] Working Paper No. 50, para. 38. No authority was cited. This paragraph also dealt with conspiracy with a mentally disordered person. This we do not deal with specifically because a purported agreement with a person who is so mentally disordered as to be incapable of forming the intent necessary for the substantive offence will not be an agreement within clause 1(1) of the draft Bill and will, therefore, not amount to conspiracy.

[68] Sect. 58 of the Offences against the Person Act 1861 provides that it shall be an offence for "a woman *being with child* with intent to procure her own miscarriage" to administer "poison or use an instrument"; people other than the woman commit the offence "*whether she be or be not with child*" (emphases added).

[69] Sect. 56 of the Offences against the Person Act 1861 creates offences of child stealing but provides that "no person . . . who shall be the mother of the child" shall be liable to be prosecuted.

[70] (1890) 24 Q.B.D. 420.

from criminal responsibility may arise in the case of someone whose conduct is an integral element in the commission of an offence by another. In their Working Paper on Complicity, the Working Party proposed that such a person should not be guilty of complicity in that offence[71]. This problem is of practical importance where the commission of that person's offence involves the completion of a transaction with a second person, as in the case of offences which take place on a sale or supply of goods or services in breach of the penal provisions of a statute (for example, selling intoxicants without a licence or supplying them to persons under age). The essential involvement of the buyer or customer in transactions of this kind means that, in many cases, an offence will be committed by the completion of the transaction with him. Since an agreement is a prerequisite to such sale or supply, he will, therefore, have agreed to the commission of the offence. At present, there is no authority whether he would be liable for conspiracy, although there is nothing in the law to prevent such a finding; nor is there authority as to the conspiracy liability of the seller in such cases, where, in principle, the case for liability is stronger. We think that this problem is essentially one which ought to be considered in relation to complicity and we do not, in this report, make any recommendation for legislation. We do not think that it has any practical importance.

(iv) *Agreements with victims*

1.55 In the case of some sexual offences, abduction or child stealing, it is possible that the intending offender may make an agreement with his victim for the commission of the offence[72]. It is theoretically possible that, in these circumstances, a charge of conspiracy might be brought and, in that event, the intending offender would probably be found guilty. However, we know of no case in which this situation has ever arisen and we do not believe it has any practical importance. The great majority of those whom we consulted thought that no conspiracy charge should lie against either offender or victim in such circumstances.

(v) *Conclusion as to exempted persons*

1.56 In most of the fact situations described under the four headings above the party who, for whatever reason, incurs no criminal liability for the ultimate offence, is probably not guilty of the offence of conspiring to commit it. On the present state of the authorities the only exception to this general principle is the decision in *R.* v. *Whitchurch*[73]. In some of the instances described, such as the child under age, the party is regarded as incapable of forming a criminal intent. In others, the party may be so capable, but policy reasons exclude the party's liability for the substantive offence. Whatever the basis upon which these cases may be rationalised, where there is an agreement between an exempt and a non-exempt party, we recommend that the exempt party should not be guilty of conspiracy. This recommendation accords with the view expressed by the Working Party[74] and, on consultation, no one disagreed.

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[71] Working Paper No. 43, Proposition 8.

[72] *e.g.*, offences of child stealing under s.56 of the Offences against the Person Act 1861 (see n. 69, above) or offences of abduction under ss. 18 to 20 of the Sexual Offences Act 1956.

[73] (1890) 24 Q.B.D. 420; but see also *R.* v. *Sockett* (1908) 72 J.P. 428. See para. 1.52, above.

[74] Working Paper No. 50, para. 42.

1.57 The considerations which apply to the non-exempt party in these cases are more complex. It might appear at first sight that there is no reason why he should not be prosecuted for conspiracy. Where one person is by statute expressly exempted from liability for his or her activity, for example, the exception in section 56 of the Offences against the Person Act 1861[75], it may nevertheless be thought desirable that the non-exempt party in a conspiracy to do the prohibited act should be penalised for agreeing to do what would be an offence on his part. On balance, however, we have come to the conclusion that the non-exempt party should in none of the cases under discussion be liable for conspiracy. This will eliminate the theoretical problems which attend the alternative solution, such as whether all the necessary elements of conspiracy can be held to exist where one party to the alleged agreement is, by reason of mental disorder, incapable of forming the necessary intent. This recommendation accords with the views expressed by the majority of those whom we consulted and we do not think that, in practice, it will in any way hinder the enforcement of the law. The situations described are in the highest degree unlikely to become known until a substantive offence has in fact been committed.

1.58 Accordingly we recommend that where the only agreement is between a person and one or more other persons who are exempt for one of these reasons from criminal liability in respect of the act which it is agreed shall be done no charge of conspiracy in respect of the agreement should lie against anyone.

D. PROCEDURE

1. Conviction of one only of two or more conspirators

1.59 The Working Party made a proposal to deal with the case where one only of two or more conspirators is found to have conspired, and recommended the abolition of the present rule that he must be acquitted. The Working Party considered this question in paragraphs 59-61 of Working Paper No. 50, which are set out below—

> "8. *Conviction of one only of two or more conspirators*
>
> 59. It is well settled that if three or more persons are charged with conspiracy and tried together, and there is evidence against only two of them, these two may properly be found guilty despite that acquittal of the remainder. But where there is evidence against only one of those charged and the remainder are acquitted, that one cannot be convicted. The authorities are fully considered in *R.* v. *Plummer*[84] and the origin of the rule discussed. It appears to be based upon the principle that "one being acquitted on the record, the conviction of his companions on the same record must be directly repugnant and contradictory to the other."[85] If, however, the conspiracy is charged as being between two named persons and a person or persons unknown, acquittal of one of the named persons will not automatically result in the acquittal of the other[86], for in such circumstances there is not any inconsistency on the face of the record. Nevertheless, the court may, in such a case, where there has been acquittal

[84] [1902] 2 K.B. 339; and see *Kannangara* v. *R.* [1951] A.C. 1.
[85] *R.* v. *Plummer*, at 346.
[86] *R.* v. *Thompson* (1851) 16 Q.B. 832; *R.* v. *Anthony* [1965] 2 Q.B. 189.

[75] See n.69, above.

of one and conviction of the other named conspirator, still look to the evidence to determine whether or not the conviction is or is not justified on the basis that the convicted person conspired with the person unknown[87]. Despite dicta that the rule applicable in joint trials might follow in the case of separate trials[88], this has not yet been finally decided, though *R.* v. *Plummer* is authority for the conclusion that where three persons are jointly charged with conspiring together and two are acquitted, judgment passed on the third on a plea of guilty is bad and cannot stand.

60. The rule has been criticised in some of the cases in which it has been applied as being technical[89] and more recently in the text books[90]. Indeed, the application of the rule automatically and without regard to the evidence in every case may well seem to result in a disregard of realities. For example, A and B are charged with conspiracy and both plead not guilty: after the prosecution has opened its case, A changes his plea to guilty and the jury convict him on the direction of the judge. But B's statement to the police is held to be inadmissible, with the result that at the close of the prosecution's case the jury is directed to acquit B. Under the present law, the judge has to tell A to change his plea to not guilty and direct that he should be acquitted. We believe it plain in such a case that the conviction of A should be allowed to stand. It is true that on the face of the record the two verdicts appear to be inconsistent, but that is a purely technical reason for allowing to escape a person whom the evidence proves to be guilty, for as against that person all that has to be proved is that he conspired with another who, so far as the first is concerned, is shown to have conspired with him and to have had the capacity to do so. We feel that there are sufficient safeguards in the appeal procedure to ensure that, if a jury has convicted only one of two conspirators where there was no basis on the evidence for differentiating between the two, such a verdict will not be allowed to stand. If, on the other hand, there is a real basis for such differentiation we believe it to be wrong that a man against whom there is sufficient evidence of conspiracy should be acquitted. As we are proposing a change of the present law we should welcome views on our provisional proposal.

61. Where there is a separate trial of each conspirator, with possibly different evidence being available in each, we are clear that there is similarly no need for the rule that the later acquittal of one of two alleged conspirators should result in the acquittal of the other who has already been found guilty. If the later trial throws doubt on the correctness of the verdict in the earlier trial there will be a remedy in an appeal out of time, or, in an appropriate case, by the grant of a pardon. Here again, however, we welcome comment.

[87] See cases cited in n. 86.

[88] *R.* v. *Cooke* (1826) 5 B. & C. 538 and *R.* v. *Ahearne* (1852) 6 Cox C.C. 6.

[89] *R.* v. *Plummer* [1902] 2 K.B. 339, 350; *R.* v. *Manning* (1883) 12 Q.B.D. 241.

[90] Smith & Hogan *Criminal Law* (2nd ed.) p. 155; G.L. Williams *Criminal Law* (2nd ed.) para. 213."

1.60 These questions have now been considered in detail by the House of Lords in *D.P.P.* v. *Shannon*[76]. In this case D1 was charged with, and pleaded guilty to, conspiring with D2 to handle stolen goods and handling stolen goods.

[76] [1974] 3 W.L.R. 155.

D2 was also charged with, but tried at a later date for, conspiring with D1 and with the same substantive offence. At D2's trial the jury could not agree, and at the subsequent hearing he was acquitted of the substantive offence; whereupon, since the Crown offered no evidence on the conspiracy charge, a verdict of not guilty was entered in respect of it. D1 appealed successfully against his conviction for conspiracy to the Court of Appeal, but the House of Lords held that where conspirators were tried separately it was no ground of itself for quashing the conviction of one of the two, whether following his plea of guilty or after verdict of a jury, that subsequently his co-conspirator was acquitted or had his conviction quashed. The Court of Appeal's decision was accordingly reversed. Lord Morris said—

> "If on a charge that A and B conspired with each other there are separate trials it may well happen that the available evidence at the trial of one of them is not the same as the available evidence at the trial of the other. If A is first tried the jury cannot convict unless on the evidence they are satisfied that he did conspire with B. That necessarily involves that the jury are satisfied that B conspired with A. But that conclusion of the jury for the purposes of that trial cannot affect B or be evidence against B if and when he is later separately tried. If A has been fairly and properly tried with the result that on the evidence adduced he was properly convicted I see no reason why his conviction should be invalidated if for any reason B on his subsequent trial is acquitted. The reasons for the acquittal of B may have nothing to do with A."[77]

1.61 The House of Lords also considered the question, not directly in issue in the case, as to what the position should be where two conspirators are tried together. Lord Morris (with whom Lord Reid agreed) thought that even where the evidence is strong against one but weak against the other "it would be wiser to adhere to the 'rule' and that summings up should give effect to it."[78] On the other hand Viscount Dilhorne[79] and Lord Simon of Glaisdale[80] expressed the view that the rule as a rule should be discarded and that the judge's direction to the jury should be "founded on common sense and general principle and no longer on a technicality."[81] Lord Salmon, whilst accepting that there might be very rare cases where the "rules" might not apply, thought that "the judge should . . . in all save the most exceptional cases, continue to direct the jury that they should convict or acquit both."[82] Whilst therefore all the Law Lords thought that, in most cases, the direction to the jury ought to be to acquit or convict both, a majority at least thought that there should be no inflexible rule of law to this effect.

1.62 It will be seen that the decision in *Shannon's* case accords with the view taken by the Working Party in regard to separate trials of conspirators in paragraph 61 of Working Paper No. 50 quoted above. The view as to joint trials expressed in paragraph 60 of the working paper accords exactly with that

[77] [1974] 3 W.L.R. 155, at p. 182.

[78] *ibid.*, at p. 184. The "rule" referred to is to the effect that if one is acquitted the other must also be found not guilty.

[79] *ibid.*, at p. 189–190.

[80] *ibid.*, at p. 195–196.

[81] *ibid.*, at p. 196.

[82] *ibid.*, at p. 200.

expressed by Viscount Dilhorne and Lord Simon and differs only perhaps in emphasis from that expressed by Lord Salmon.

1.63 The proposals of the Working Party met with general agreement on consultation and we have concluded that they ought to be implemented by legislation. We therefore recommend that there should be no rule of law that a person should be entitled to an acquittal on a charge of conspiracy merely because another person or persons with whom he is found to have agreed are acquitted, whether they are tried at the same time as him or separately. It must, however, be made clear that this abolition of what was thought to be the old common law rule does not mean that, in a proper case (and most joint trials will be such cases), the judge should not direct the jury that, on the particular facts of that case, the cases of both defendants must stand or fall together.

2. Consummated conspiracies

(*a*) *The present position*

1.64 It is clear on the authorities that a conspiracy does not "merge" with the substantive offence, the object of the conspiracy, when that offence has been committed, and that a person may be convicted both of the conspiracy and of the substantive offence. Charges of conspiracy are, indeed, frequently joined with one or more further counts in the indictment charging substantive offences at which the conspiracy is alleged to have been aimed. This practice constitutes a major difference between conspiracy and the other inchoate offences. In all the others, if the substantive offence has been completed, there is no point or purpose in charging in addition a preparatory offence or offences committed on the way to consummation. A person need not be charged with both an offence and its attempt: if he is charged with an attempt when the full offence has been committed, statute provides that he can be found guilty as charged[83]; if charged with the full offence he may be convicted of an attempt to commit it. Where a crime incited is actually committed the inciter becomes guilty of the crime itself as an accomplice. Conspiracy charges are, however, frequently brought in cases where the object of the agreement (though itself an offence if committed by one person) has been achieved.

(*b*) *Criticism of the present position*

1.65 There has been strong judicial criticism of the joinder of conspiracy counts, particularly when widely framed, with counts charging one or more substantive offences at which the conspiracy is alleged to have been aimed. The Working Party summarised the objections under four heads[84]—

(i) inclusion of a conspiracy count adds to the length and complexity of trials and, in particular, complicates the task of summing up to a jury[85];

(ii) a conspiracy count tends to obscure questions of fact vital to a decision on the substantive charges[86];

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[83] Criminal Law Act 1967, s.6(4).

[84] Working Paper No. 50, para. 54.

[85] *R.* v. *Griffiths* [1966] 1 Q.B. 589, 594.

[86] *R.* v. *Dawson* [1960] 1 W.L.R. 163.

(iii) joinder of a conspiracy and substantive offences tends to produce inconsistent verdicts[87];

(iv) evidence relevant to the conspiracy count may have, despite any warning against relying on it, a prejudicial effect on an accused in relation to one or more of the substantive counts[88].

(c) *Consideration by the Working Party*

1.66 The Working Party, having considered the cases in which these criticisms were formulated, concluded that the main criticism has been not so much of the joinder of a conspiracy count as the way in which conspiracy counts have been very widely drawn, citing as examples the cases of *R.* v. *Griffiths*[89] and *R.* v. *Dawson*[90]. They also expressed the view that the last of the criticisms was not soundly based as a matter of strict law, pointing out that the rules as to admissibility of evidence are the same in conspiracy as in all other cases where a common enterprise is relied upon[91]. In our introduction to the working paper we commented on this conclusion—

> "The Working Paper also deals with the practice of joining a count for conspiracy with counts charging substantive offences alleged to be the object of the conspiracy. One of the criticisms that has been widely made of this practice is that it widens the scope of evidence admissible against each defendant; and it is argued that the evidence may be only remotely connected with some defendants, but of a highly prejudicial nature. The Working Party consider this objection to be not soundly based, and point out that the result is the same in all cases where a common enterprise is alleged. It may be, however, that the practical effect of the rules is to work greater hardship in the case of conspiracy, where the definition of the offence includes the element of agreement. Proof of the agreement must often be by inference from a potentially wide range of facts. It is not always easy for a jury to distinguish between evidence relevant only to a charge of conspiracy and evidence relevant only to a charge of a substantive offence. Some, but perhaps not all, of the risks of injustice which may arise from this source are dealt with in paragraph 54 (iv) of the Working Paper [referred to in paragraph 1.65 above]. This is a matter on which our commentators may wish to express their views generally."[92]

1.67 The Working Party reached the provisional conclusion that there should be no change in the law which permits the joinder of charges of conspiracy with the substantive offences committed in pursuance of the illegal agreement. They expressed their main reason for this conclusion thus—

> "While there may be some substance in the other objections mentioned

[87] *e.g.*, a verdict that two accused are not guilty of the substantive offence alleged against them, but guilty of conspiracy to commit it, although the evidence clearly shows that it was committed, *R.* v. *Cooper and Compton* (1947) 32 Cr. App. R. 102; or a verdict of guilty of the substantive offence but not guilty of conspiracy, *R.* v. *Sweetland* (1957) 42 Cr. App. R. 62.

[88] *R.* v. *Dawson* [1960] 1 W.L.R. 163, 170 *per* Finnemore J.: "We think that W is really a typical example of a man who was sunk by means of a mass of evidence about frauds of different kinds, with the great majority of which he had no connection either direct or indirect, and in which he took no part whatsoever."

[89] [1966] 1 Q.B. 589.

[90] [1960] 1 W.L.R. 163.

[91] Working Paper No. 50, para. 54.

[92] *ibid.*, Law Commission Introduction, para. 5, pp. vi and vii.

in the last paragraph, there are, in our view, practical reasons for maintaining what is believed to be the present position, namely that conspiracy should be chargeable even though the offence which was its object has been committed, and that both the substantive offence or offences and a conspiracy to commit it or them should be chargeable in the same indictment and triable together. The basic justification for this is that, if it is not permissible, there are certain situations where persons who should be convicted may easily escape. In the first place the prosecution may be uncertain at the start of a trial on a charge of committing a substantive offence that the evidence will in the end establish that charge. It may be that, because vital evidence is ruled inadmissible, or because a witness fails to convince the jury, there is insufficient evidence to establish the commission of the offence, although there is strong evidence to establish a conspiracy to commit it. Conversely, the evidence required to establish a conspiracy may fall down, although there is evidence to establish the commission of the substantive offence against one of the defendants. If there are not before the jury counts charging in the first case a conspiracy as well as the substantive offence, and in the second case a substantive offence as well as a conspiracy, a defendant who deserved to be convicted may well escape. Furthermore, there are a significant number of cases where, although the evidence available to the prosecution permits the formulation of substantive charges against one or more defendants, the evidence available against others is not sufficiently specific to permit the drafting of substantive counts against those others which would comply with the requirements of the Indictments Act 1916 as giving proper information to the defendants of the offences charged."[93]

(d) Consultation on Working Paper

1.68 Nearly all those whom we consulted agreed with this provisional conclusion whilst sharing the belief that the practice should be only exceptionally resorted to. The main justification for joinder was seen by the Society of Public Teachers of Law and the Bar Council as being the procedural one that a conspiracy count enables involved criminal activities, in which different persons participated in different ways, to be seen in their overall context. A conspiracy count could "be used to charge in one count a number of persons who had taken part in various ways in the commission of a crime, or series of crimes, and the gravity of whose acts could only be judged in the light of the whole criminal enterprise, particularly where the exact extent of individual participation was not clear"[94]. The Prosecuting Solicitors' Society of England and Wales expressed the same point of view, pointing out that "a conspiracy charge enables the reality of the wrongdoing itself to be covered compendiously in a way which may not be possible by substantive charges".

(e) Conclusion: a new rule of practice

1.69 In the light of our consultation we do not think that we ought to recommend any change in the substantive law which at present permits the joinder of a conspiracy charge with the consummated offence which was

[93] Working Paper No. 50, para. 55.

[94] From the comments of the Society of Public Teachers of Law.

the subject of the agreement. Nevertheless, we are very mindful of the objections which are properly made of this practice and we have some sympathy with the view expressed to us by The Law Society that the prosecutor should never be permitted to join counts in this way but should always be required to elect whether to proceed on the conspiracy count or the counts charging substantive offences. The Working Party suggested that the practice should only be followed after due weight has been given to the complications which may flow from a joinder. They invited views as to whether or not it should be the practice for a judge always to require justification from the prosecution for proceeding to trial on an indictment including substantive counts and a related conspiracy count. The practice suggested for consideration was that if the prosecution fail to justify joinder they should be required to elect whether to proceed on the substantive counts or on the conspiracy, and in the event of an acquittal of any defendant on the count or counts proceeded with, to undertake not to proceed against him on the count or counts left on the file[95].

1.70 Most of those whom we consulted agreed with the general proposition that, in cases where the prosecution cannot justify joinder, they should be required to elect. Opinion was divided as to whether the judge should always require the prosecution to justify a joinder. The majority of the Bar Council thought that this should be a rule of practice; such a rule would, they thought, "be a positive contribution towards the administration of justice". The Society of Public Teachers of Law agreed. As we have said, The Law Society went even further and thought that joinder should never be permitted.

1.71 In the light of our consultation we have concluded that we should recommend that it be made a rule of practice that, in the case where an indictment contains substantive counts and a related conspiracy count, the prosecution should be required to justify the joinder to the judge or, failing justification, to elect whether to proceed on the substantive or conspiracy counts. We do not think that there should be any statutory rules as to what should amount to adequate justification; this should be left to the judge's discretion. We think that this recommendation can best be implemented by a practice direction.

3. Restrictions on prosecution

(*a*) *The present law*

1.72 The prosecution of offenders is sometimes made subject to special requirements. For some offences prosecutions cannot be brought unless they are instituted within a limited time of the commission of the offence; for the prosecution of others, the prior consent of the Attorney General, the Director of Public Prosecutions or some other official is required. It seems probable, however, that both these restrictions can be circumvented by charging a conspiracy, so long as more than one person was implicated in the commission of the substantive offence.

(i) *Time limits*

1.73 In *R.* v. *Simmonds and Others*[96], the defendants were charged, *inter alia*, with conspiracy to cheat and defraud the revenue of purchase tax on wireless

[95] Working Paper No. 50, para. 58.

[96] [1969] 1 Q.B. 685.

receiving sets. It was contended that this charge was not in reality a common law conspiracy but a conspiracy to commit the statutory offence of evading purchase tax which was subject to a time limit of three years[97] and that, because the charge had not been brought within three years of the date on which the conspiracy was formed, it was statute barred. This defence failed on a number of grounds but, obiter, the Court of Appeal considered what the position would have been if the conspiracy charged had been a conspiracy to commit the statutory offence. The court held that "it is well settled that such a charge [of conspiracy to commit the statutory offence] lies even though the defendant thereby loses the protection of a time limit applicable to the statutory offence, and becomes liable to a penalty which may far exceed the maximum for a statutory offence"[98]. We deal later in this report with the question of penalties for conspiracy; here we are concerned with the first part of this obiter dictum.

(ii) *Consent to prosecution*

1.74 We have been told on consultation that charges have been successfully brought for conspiracy to commit substantive offences requiring prior consent to prosecution without obtaining such consent for the conspiracy charge. We have ourselves been unable to trace any reported case where this happened[99].

(b) Conclusion

1.75 It is not in accordance with our basic approach to conspiracy that charges of conspiracy should be used in this way to circumvent restrictions placed upon the prosecution of substantive offences. If an offence has been committed for which prosecution is statute barred we do not think that this legislative restriction should be circumvented by using the inchoate offence of conspiracy nor do we think that a necessary consent to prosecution should be overridden in the same way. We therefore recommend that conspiracies to commit offences should be subject to the same procedural limitations as to time and consent as the offences themselves. There is a theoretical difficulty so far as time limits are concerned: if there is an agreement to commit an offence which has a time limit for prosecution placed upon it the offence of conspiracy has been committed and, even though the substantive offence is never consummated, the conspirators (subject to any possible defence of withdrawal[100]) remain guilty. We do not think that we ought to recommend any time limit in such circumstances which would require complicated provisions to deal with a situation highly unlikely to arise in practice. We do not think that any prosecuting authority would bring a charge of conspiracy where, for example, three years has elapsed since the agreement and nothing has been done, even if, in such circumstances, they could prove the original agreement. Our recommendation is, therefore, that where an offence has been committed and prosecution for the offence is statute barred no charge of conspiracy based upon an agreement to commit that offence should lie. And any consent necessary for the prosecution of an offence should be also required for prosecution of a conspiracy to commit the offence.

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[97] Finance Act 1944, s.17 and Purchase Tax Act 1963, s.34(4).

[98] [1969] 1 Q.B. 685, 695.

[99] *cf.*, *R.* v. *Assistant Recorder of Kingston-upon-Hull, Ex parte Morgan* [1969] 2 Q.B. 58, where the charge was one of incitement.

[100] See paras. 1.76–1.79, below.

4. Withdrawal

1.76 Our recommendations will not alter the rule that a person is guilty of the crime of conspiracy as soon as the agreement is concluded; it is immaterial whether the contemplated crime is consummated or not. Therefore, unless specific provision is made for a defence of withdrawal, he would remain guilty of the offence even though he repented and withdrew from the agreement before its consummation and even though, by his efforts, the commission of the crime was prevented altogether.

1.77 If, in fulfilment of the objective of a conspiracy, a crime is in fact committed, the conspirators will, of course, be guilty as accomplices in the substantive offence. The Working Party considered complicity in crime in Working Paper No. 43[101]. In that paper they made the provisional proposal that a person who has incited or given help towards the commission of an offence should not be guilty as an accessory if he genuinely withdraws from participation in time to make it possible for the offence not to be committed, and either communicates his withdrawal to the principal or takes reasonable steps in an endeavour to prevent the offence being committed[102]. By definition, of course, the communication of his withdrawal or the steps he takes must have been ineffective in preventing the commission of the substantive offence (otherwise there would be no crime which he could be charged with aiding and abetting). But a successful defence of withdrawal to a charge of complicity in crime would, unless some provision is made for a defence of withdrawal from conspiracy, leave the defendant still guilty of that offence.

1.78 The Working Party was divided as to whether a defence of withdrawal should be available to a charge of conspiracy[103]. In Working Paper No. 50 they considered the defence of withdrawal in regard to all three common law inchoate offences[104].

1.79 We have not yet reported on complicity. We published in 1974 a working paper prepared by the Working Party on Defences of General Application[105]. Consultation on this paper has been concluded but we have not yet started work on preparing a report. We think that withdrawal as a defence to a charge of complicity in crime would be a defence of general application and should be considered in that context. We also think that withdrawal as a defence to an inchoate offence should be considered in the same context as withdrawal as a defence to a charge of complicity. We do not, therefore, make any recommendations as to the defence of withdrawal from conspiracy in this report. Until we do report we think that the case of a genuine withdrawal from conspiracy, particularly where the withdrawal has led to the prevention of the contemplated crime, will in most cases be covered by the prosecution's discretion not to bring charges against the person withdrawing or by the court's discretion as to sentence.

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[101] "Parties, Complicity and Liability for the Acts of Another".
[102] *ibid.*, at p. 70, Proposition 9.
[103] Working Paper No. 50, para. 143.
[104] *ibid.*, paras. 137–143.
[105] Working Paper No. 55.

E. CONSPIRACY TO COMMIT A SUMMARY OFFENCE

1. The present law

1.80 Despite earlier doubts[106], there is now clear authority that conspiracy to commit any offence (even a summary one[107]) is itself a criminal offence. In *R.* v. *Blamires Transport Services Ltd.*[108], the Court of Criminal Appeal held that a company of haulage contractors, and its managing director, were guilty of conspiring together and with other officials of the company to permit and encourage drivers of lorries to make false records of their daily driving over a period of six months and to drive their motor vehicles without taking the statutory rest periods. The legislation creating these substantive offences provided that they were purely summary offences.

1.81 Unlike incitement (which in certain circumstances is triable summarily with the consent of the accused[109]), conspiracy is triable only on indictment.

2. Should conspiracy to commit a summary offence be a crime?

1.82 We have considered the question whether conspiracy to commit a summary offence should continue to be criminal. By "summary offence" we mean an offence which is expressed in the enactment creating it only to be triable summarily (by some such phrase as "punishable on summary conviction") even though the defendant or the prosecution[110] is given the right to trial on indictment by virtue of section 25 of the Magistrates' Courts Act 1952 (where the maximum penalty exceeds three months) or by the enactment itself (as in sections 7 and 9 of the Conspiracy and Protection of Property Act 1875[111]). The question whether conspiracy to commit a summary offence should be a crime was considered by the Working Party and they concluded, though finding the arguments for and against finely balanced, that conspiracy to commit one summary offence should no longer be an offence, but that conspiracy to commit more than one summary offence should be an offence. The main argument which led them to this provisional conclusion was stated thus—

> "Again, while it is true that some summary offences are less serious than some indictable offences, the distinction between them by no means always represents the true dividing line between offences of minor and major gravity. The offence charged in *R.* v. *Blamires* for example, might be considered far more serious than the theft of a small amount of money, the penalty for which is in theory far higher. While it is true that there are few reported cases of conspiracy and incitement to commit summary offences, some would argue that this is not necessarily a real indication of the frequency with which such charges are brought. It is also true that the legislature has chosen to make the offence in *Blamires*' case, for example, only a summary offence despite its potentially serious effect upon the persons

[106] See Williams, *Criminal Law* (2nd ed., 1961), para. 221.

[107] We deal with the various procedural categories of crime when we consider penalties for conspiracy. See para. 1.88, below.

[108] [1964] 1 Q.B. 278.

[109] Magistrates' Courts Act 1952, s.19(8) and 1st Schedule, para. 20.

[110] Rarely the prosecution is given the right to elect trial on indictment with no enhancement of penalty, *e.g.*, the Witnesses (Public Inquiries) Protection Act 1892, s.3.

[111] See para. 1.89, below; we speak of sub-headings (*a*), (*b*) and (*c*) in that paragraph as summary offences and the remainder as indictable offences.

directly concerned (that is, the long-distance lorry drivers) but at the same time the legislature must equally be taken to have known that, in serious cases involving a conspiracy, it is possible to prosecute conspiracy to commit that offence on indictment with an unlimited penalty."[112]

1.83 Most of those who commented on the Working Party's proposals agreed that conspiracies to commit summary offences should be crimes. There was a good deal of doubt about the suggested limitation to an agreement to commit more than one offence. The Society of Public Teachers of Law thought it might prove difficult to operate in practice and the Magistrates' Association thought it illogical. The Bar Council, The Law Society and the Society of Public Teachers of Law all thought that conspiracies to commit summary offences should be criminal but should only be triable on indictment. The Justices' Clerks Association agreed and thought that the consent of the Director of Public Prosecutions should be obtained first.

1.84 Ideally we think that the best method of deciding when conspiracy to commit a minor offence should be criminal is that advocated by R. S. Wright, J. in *The Law of Criminal Conspiracies and Agreements* published in 1873—

> "Whoever undertakes the task of criminal legislation ought to consider the different kinds of minor offences separately, and to specify in the written law the kinds in which the guilt is liable to be treated as enhanced by combination."

And at page 84 he added—

> "it would not be difficult to reduce to a small number the cases in which there may be ground for such treatment."

In 1976, however, the task of trawling through the whole "criminal legislation" is a much more formidable one than it was 100 years ago. Such a task would be wholly impracticable for present purposes.

3. Conclusion

1.85 In the light of our consultation we have concluded that there will be occasions—though they will be rare—upon which conspiracies to commit summary offences ought themselves to be the subject of penal sanctions. We think that, because in general summary offences are not concerned with conduct which causes very grave damage to society and have a much lesser element of criminality than offences which Parliament has decided should be triable on indictment, mere agreement to commit them should only rarely be the subject of prosecution. We think that the only justification for prosecuting as conspiracy an agreement to commit summary offences is the social danger involved in the deliberate planning of offences on a widespread scale. The facts of *R.* v. *Blamires*[113] provides a typical example of the sort of case which we have in mind.

1.86 We have considered how this use of a conspiracy charge can be restricted to serious cases of the kind mentioned in the last paragraph. We do not favour the idea that there should be a specific requirement that more than one summary offence should be planned. Such a provision by specifically allowing

[112] Working Paper No. 50, para. 107.
[113] [1964] 1 Q.B. 278; see para. 1.80, above.

conspiracy to be charged where more than one summary offence is to be committed might seem to indicate that conspiracy should be charged not only where a widespread commission of offences is contemplated but also where there was merely more than one offence planned. We agree also with the view expressed to us that such a provision might prove difficult to operate in practice[114].

1.87 It is very difficult and probably undesirable to attempt to devise a strict statutory definition of "widespread" which will restrict charges of conspiracy in the way we want. We think that the best way of controlling the bringing of charges of conspiracy to commit summary offences is by the exercise of discretion in prosecution. We therefore recommend that a charge of conspiracy to commit summary offences should only be brought with the consent of the Director of Public Prosecutions. We also recommend that all conspiracies, including a conspiracy to commit summary offences, should be triable only on indictment.

F. PENALTIES FOR CONSPIRACY

1. The present law

1.88 Penalties for common law offences are at large unless they are limited by statute. Conspiracy is a common law offence for which no specific statutory penalty is generally[115] provided. From this it follows that it may be punished by an unlimited term of imprisonment and an unlimited fine. This is so whether the object of the conspiracy is itself a very serious offence punishable with a high maximum penalty or a summary offence punishable only by a fine.

1.89 The Working Party considered the question of what the penalty for agreeing to commit "offences" should be and, as a separate question, what the penalty for agreeing to commit "summary" offences should be. This is, however, an over-simplification of the problem. There is, in English law, a procedural difference between indictable and summary offences, but offences are triable either on indictment or summarily depending on circumstances. The precise procedural categories are—

(*a*) Offences described in the enactment creating them as summary offences (by some such phrase as "punishable on summary conviction") which carry a maximum penalty of three months' imprisonment or less. These are purely summary offences: they cannot be tried on indictment.

(*b*) Offences triable summarily and carrying no more than three months' maximum imprisonment which, nevertheless, give the person charged the right to trial by jury. Section 7 of the Conspiracy and Protection of Property Act 1875 is an example of this rare class of offence.

(*c*) Offences described as summary offences but which carry a maximum penalty greater than three months' imprisonment. Section 25 of the

[114] See para. 1.83, above.

[115] Specific statutory penalties are provided for a few types of conspiracy, *e.g.*, conspiracy to murder by s.4 of the Offences against the Person Act 1861 and conspiracy to commit summary offences in contemplation or furtherance of a trade dispute by s.3 of the Conspiracy and Protection of Property Act 1875.

Magistrates' Courts Act 1952[116] gives a person charged with such an offence the right to trial by jury which, if exercised, turns the summary offence into an indictable one.

(*d*) Offences which are described in the enactment as both indictable and summary (with different maximum penalties provided). Section 18 of the Magistrates' Courts Act 1952 provides that such offences shall be tried on indictment unless the magistrates on the application of the prosecution (and subject to the consent of the person charged where necessary) decide to try the case summarily.

(*e*) Offences which are described in the enactment as indictable but which come within section 19 and Schedule 1 of the Magistrates' Courts Act 1952. These offences can be tried summarily in certain circumstances (one of which is the consent of the defendant). The circumstances are set out in section 19 of the Act and the maximum punishment on summary trial is six months' imprisonment and a fine not exceeding £400. The common law offences of incitement to commit a summary offence or an offence in the schedule and attempting to commit any any offence that is both indictable and a summary offence or is an offence within the schedule are included in the schedule.

(*f*) Offences which are only triable on indictment. In the absence of some special statutory provision, common law offences are only triable on indictment. The inchoate offences of conspiracy, incitement and attempt are common law offences. We have seen that some attempts and incitements (paragraph (*e*) above) can be tried summarily but conspiracy can only be tried on indictment.

Throughout this report we refer to (*a*), (*b*) and (*c*) as summary offences and (*d*), (*e*) and (*f*) as indictable offences.

1.90 On indictment the punishment for conspiracy and incitement is generally at large but the punishment for attempts is governed by section 7(2) of the Criminal Law Act 1967, which limits any sentence of imprisonment to that provided in any enactment for the offence attempted; this, of course, leaves at large the punishment for attempt to commit a common law offence for which no maximum penalty is provided by any enactment.

1.91 From this summary it will be seen that there are at least seven different situations which have to be considered—

(*a*) conspiracy to commit an offence which is triable only on indictment; the offence may be a common law offence with the penalty at large[117]; it may be a common law offence where the penalty is provided by statute[118]; or it may be a statutory offence[119];

(*b*) conspiracy to do an unlawful act (if our recommendations are implemented, conspiracy to defraud will be the only remaining offence in this class);

[116] Assault and some offences under the Sexual Offences Acts 1956 and 1967 are excepted from this, and are thus purely summary offences although punishable with a greater maximum penalty than three months' imprisonment.

[117] *e.g.*, affray.

[118] *e.g.*, murder and rape.

[119] *e.g.*, burglary.

(*c*) conspiracy to commit an offence which is described in the enactment as indictable but which is made triable summarily by the provisions of section 19 of the Magistrates' Courts Act 1952 (see paragraph 1.89(*e*) above);

(*d*) conspiracy to commit an offence which is described in the enactment as both indictable and summary (paragraph 1.89(*d*) above);

(*e*) conspiracy to commit a summary offence which carries a maximum penalty of more than three months' imprisonment (paragraph 1.89(*c*) above);

(*f*) conspiracy to commit an offence where the maximum penalty is three months' imprisonment or less but where the defendant has a right to elect trial on indictment (paragraph 1.89(*b*) above); and

(*g*) conspiracy to commit an offence triable only summarily (paragraph 1.89(*a*) above).

1.92 We have seen[120] that conspiracy does not "merge" with the substantive offence which was the object of the agreement and one result has been that, on occasions, a conspiracy charge (the penalty for which is at large) has been met with a higher penalty than would have been permitted for the consummated substantive offence. Some examples, which come from several of the different categories of conspiracy listed in the previous paragraph, are considered below.

1.93 In *Verrier* v. *D.P.P.*[121] there was a conspiracy between three people to defraud the insurance company insuring the life of one of the conspirators by falsely pretending that he had died at sea. His life was insured for £150,000. It was intended that it should appear that he had been drowned when a yacht sank. In sinking the yacht another conspirator was drowned and no claim on the insurers was made. Had the scheme been successful the substantive offence committed would have been obtaining money by false pretences which carried a maximum penalty of five years' imprisonment. The trial judge described the conspiracy as "a gigantic, ambitious and indeed impudent fraud". He imposed a sentence of seven years' imprisonment. This was upheld by the House of Lords[122] "because there were grounds for treating the conspiracy as an offence different from and more serious than the substantive offence". In reaching this conclusion Lord Pearson, with whose speech the other Law Lords agreed, relied directly upon the following passage from R. S. Wright J. on *Conspiracies* in which are mentioned cases where the agreement or concurrence of several persons in the execution of a criminal design may be a proper ground for aggravation of their punishment—

> "Such would be cases in which the co-operation of several persons at different places is likely to facilitate the execution or the concealment of a crime or in which the presence of several persons together is intended to increase the means of force or to create terror, or cases of fraud in which suspicion and ordinary caution are likely to be disarmed by the increased credibility of a representation made by several persons."[123]

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[120] See para. 1.64, above.

[121] [1966] 2 A.C. 195.

[122] *ibid.*, at p. 223.

[123] Wright, *Law of Criminal Conspiracies and Agreements*, pp. 81–2.

There are also dicta in *R.* v. *Field, Field and Wheater*[124] that an unlawful combination to obstruct the police may, by the very fact of the combination, be an offence of a more serious character than obstruction of the police by one person and might properly be treated as a different and more serious crime[125].

1.94 In *R.* v. *Morris*[126] the evidence showed that the appellant had been engaged in smuggling on an extensive scale for many months. He was sentenced to four years' imprisonment for conspiracy to contravene the customs laws, although two years was the maximum imprisonment provided for a single contravention. In *R.* v. *Blamires*[127] the agreement alleged was one to permit and encourage drivers of lorries to make false records of their daily driving over a period of six months in contravention of the Road and Rail Traffic Act 1933 which provided as penalty a fine of £20 for a first offence and of £50 for subsequent offences. A fine of £1,000 was imposed on the company's managing director. The justification for the penalties imposed in these two cases was that the agreement was one to contravene the law on a large or continuing scale.

1.95 From these examples it will be seen that there are two ways in which the imposition of a greater penalty for conspiracy than for the substantive offence is said to be justified. The first is that expressed by R. S. Wright J. in the passage cited in paragraph 1.93 above, the second is that there may be circumstances in which conspiracy involves the contravening of a law upon a large and continuing scale, as in the cases referred to in paragraph 1.94 above.

2. Consideration of the present law

1.96. In their working paper[128] the Working Party expressed the provisional view that there was no justification for regarding conspiracy to commit a single offence as more serious than committing the offence itself. They did not think it right that where an offence is committed by two or more persons acting together it should be possible for the prosecution to secure an increased penalty by charging them with conspiracy instead of with the substantive offence[129]. The majority of those who commented in writing upon the proposals agreed with this view. Included in this majority were the Bar Council, The Law Society and the Society of Public Teachers of Law.

1.97 We have considered this provisional proposal in the light of our consultation and of the opinions expressed at the seminar at All Souls College. We think it was right. In making provision for a particular maximum penalty by statute, we believe that Parliament must, where indictable offences are concerned, be taken to have envisaged the worst possible case of the actual commission of that offence. Accordingly, the existence of a prior conspiracy to effect the commission of that offence is not, in our view, a circumstance of aggravation which should increase the maximum so provided. If it is thought

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[124] [1965] 1 Q.B. 402, 423.

[125] The imposition of a sentence of imprisonment for 25 years in *D.P.P.* v. *Lonsdale* (22 March 1966) for conspiracy to contravene s.1(1) of the Official Secrets Act 1911 is a further example, as the maximum penalty under the Act for contravening s.1(1) is imprisonment for 14 years.

[126] [1951] 1 K.B. 394.

[127] [1964] 1 Q.B. 278; see para. 1.80, above.

[128] Working Paper No. 50, para. 118.

[129] *ibid.*, para. 118.

that the penalty provided for the case where a single person commits an offence is inadequate, Parliament itself should, in our view, provide a higher penalty for that offence or, alternatively, for that offence where a specified number of persons participate in it. This has been done in the past. For example, the Game Act 1831, section 30, provides for a fine of £50 for trespassing by five or more persons in pursuit of game, but for a fine of £20 if less than five persons are involved; and section 23 of the Larceny Act 1916 (now repealed) increased the penalties for robbery and assault with intent to rob from fourteen and five years' imprisonment respectively to life imprisonment if two or more persons were involved. On the other hand, when Parliament fixed a penalty for conspiracy to commit the most serious offence of all, murder, it was ten years' imprisonment at a time when murder itself was a capital offence[130].

1.98 The second justification for imposing a higher penalty for conspiracy than for the substantive offence, namely, that a conspiracy may involve contravening the law on a large and continuing scale, was felt by the Working Party to have more merit. In Working Paper No. 50 they suggested dealing with this situation in two ways. As to "indictable" offences they suggested provisionally that where a conspiracy to commit more than one indictable offence of the same nature was established the maximum penalty should be twice that provided for the substantive offence[131]. As to summary offences, they suggested that conspiracy to commit one summary offence should not be an offence but that conspiracy to commit more than one summary offence should be an offence triable on indictment, with a maximum penalty of two years' imprisonment[132].

3. Conclusion as to indictable offences

1.99 The proposal that a conspiracy to commit more than one indictable offence[133] should carry a double maximum penalty met with almost universal disapproval on consultation. It was said to be both unworkable and unnecessary and the Society of Public Teachers of Law pointed out that there was no logical reason for stopping at doubling the penalty; they asked why the maximum penalty should not be limited to the maximum for the substantive offence since, if the substantive crimes were not carried out (however many were purposed), the conspiracy would have been far less socially dangerous than the commission of one of them.

1.100 We have considered the double penalty proposal in the light of our consultation. We have decided that we ought not to recommend it. If more than one substantive indictable offence is actually committed, then they are charged separately and the legal maximum penalty which can be imposed is multiplied by the number of substantive offences of which any defendant is convicted; sentences of imprisonment can be made consecutive. If conspiracy charges are only used in cases where the substantive offences have not been consummated, which in general we believe should be the case, then we think that the maximum for one substantive offence is entirely adequate.

1.101 Conspiracy to commit a common law offence for which no statutory maximum penalty has been provided should continue to have its penalty at

[130] Offences against the Person Act 1861, s.4.
[131] Working Paper No. 50, para. 125(2).
[132] *ibid.*, para. 125(3).
[133] See para. 1.98, above.

large until the relevant common law offence is reduced to statutory form and given its own maximum penalty. Conspiracy to commit a common law offence for which a statute provides a maximum penalty should carry a maximum penalty which is the same as the penalty for the offence. The punishment for conspiracy to defraud, which is a common law offence for which no statutory maximum penalty is provided, should continue to be at large until our forthcoming report on fraud is implemented. If an indictable offence does not carry a punishment of imprisonment or carries, on trial on indictment, a lesser penalty than one year's imprisonment, the maximum penalty for conspiracy to commit that offence should be one year's imprisonment[134].

1.102 Implementation of the recommendation which we make in paragraphs 1.99-1.101 above, that the maximum penalty for conspiracy to commit an offence or offences punishable on indictment should be the same maximum penalty as the substantive offence, would create an anomaly in respect of conspiracy to murder, for which a maximum penalty of ten years' imprisonment is provided by section 4 of the Offences against the Person Act 1861[135]. We have concluded that it would not be right when reducing to statutory form the law of conspiracy to leave this specific penalty provision on the statute book and therefore recommend that section 4 be amended to exclude the offence of conspiracy to murder. This will mean that conspiracy to murder will be punishable under the general provisions we propose with a maximum penalty of life imprisonment. We have consulted the Criminal Law Revision Committee, who are at present reviewing offences against the person, on this recommendation and they are in agreement with it. It is their view that the maximum penalty for the other offences under section 4 should also be increased to life imprisonment; we accept this and accordingly so recommend.

1.103 We do not consider that there should be any limitation on the amount of the fine which can be imposed for conspiracy to commit an indictable offence. In paragraph 1.105 below we make the same recommendation in respect of conspiracies to commit summary offences.

4. Conclusion as to summary offences

1.104 The Working Party's provisional proposal was that the penalty for conspiracy to commit more than one "summary" offence should be two years' imprisonment. By "summary offence" they meant offences which are expressed in the enactment creating them to be only triable summarily (by some such phrase as "punishable on summary conviction"). Their recommendation was made in the context of their provisional proposal that conspiracies to commit summary offences should only be punishable if the agreement was to commit more than one such offence. We have, however, rejected this specific proposal[136], although we agree that conspiracy to commit summary offences should, as a general rule, only be punishable in cases where there is deliberate planning of widespread crime.

1.105 For conspiracy to commit summary offences[137] we think that the

[134] In line with our recommendation as to summary offences. See paras. 1.104–1.105, below.
[135] The section also makes it an offence to "solicit, encourage, persuade, or endeavour to persuade, or ... propose to any person, to murder any person".
[136] See para. 1.86, above.
[137] See para. 1.89, above.

maximum punishment of two years suggested by the Working Party is too high. In the sort of cases we have in mind a heavy fine will, we think, be usually the most suitable punishment. We think one year's imprisonment and an unlimited fine would be a sufficient maximum penalty.

5. Summary of conclusions as to penalties

1.106 We recommend the following comprehensive rules as to maximum penalties—

(*a*) for conspiracy to commit murder or any other offence the sentence for which is fixed by law, imprisonment for life;

(*b*) for conspiracy to commit an offence for which a sentence extending to imprisonment for life is provided or to commit an indictable offence punishable with imprisonment for which no maximum term of imprisonment is provided, imprisonment for life;

(*c*) for conspiracy to commit any other indictable offence, the period available as a maximum for that offence or one year's imprisonment, whichever is the greater;

(*d*) for conspiracy to commit summary offences, one year's imprisonment;

(*e*) the penalty for conspiracy to defraud should remain at large;

(*f*) there should be no limit on the amount of fine which can be imposed for conspiracy.

G. CONSPIRACY AND PROTECTION OF PROPERTY ACT 1875

1.107 In one case[138] charges of conspiracy to commit offences under section 7 of the Conspiracy and Protection of Property Act 1875 were brought against some pickets in a trade dispute. On these charges two of the defendants were sentenced to terms of imprisonment of three and two years respectively[139].

1.108 Section 7 of the Act provides that the maximum punishment for the offence of intimidation therein defined shall "on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned", be three months' imprisonment. Section 9 provides that "where a person is accused before a court of summary jurisdiction of [an offence under the Act punishable by imprisonment], the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly". The accused, and the accused only, is therefore given the right to trial by jury with no risk of any greater penalty than that provided on summary conviction.

[138] *R.* v. *Jones* (1974) 59 Cr. App. R. 120.

[139] The two defendants were given the same concurrent sentences for the offence of unlawful assembly. The jury also found them guilty of the common law offence of affray but their conviction on this count was quashed on appeal on the ground that more than one affray had been charged in one count in the indictment.

1.109 Section 3 of the Act provides that where a person is convicted of "an agreement to do or procure to be done any act in contemplation or furtherance of a trade dispute which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person". It seems reasonably clear that Parliament intended that the punishment for a conspiracy to commit an offence under section 7 of the Act should be subject to the same maximum penalty of three months' imprisonment as is provided for the substantive offence[140]. But, by giving the accused the right to trial on indictment (though with no risk of any increased penalty) the draftsman, we think unwittingly, took the offences created by section 7 out of the purview of the limitation provided in section 3.

1.110 It was the policy of the legislature in 1875 to relax the provisions of the law of conspiracy in favour of those engaged in trade disputes. In particular, section 3 of the 1875 Act limited the penalty for a conspiracy to commit, in contemplation or furtherance of a trade dispute, an act punishable only on summary conviction to the penalty prescribed for that offence. Any change in this policy would be a political rather than a legal matter, and on the assumption that the policy is to remain unchanged we think the special rule in section 3 should be retained. It is more restrictive as respects the penalty than the general rules we have recommended in paragraph 1.106 above.

1.111 If this policy is accepted in regard to summary offences, it would seem illogical that a conspiracy to commit, in contemplation or furtherance of a trade dispute, an offence under section 7 (or under any other section) should carry a heavier penalty than that prescribed for the offence itself. An offence under, for example, section 7 is triable on indictment at the election of the accused by virtue of section 9, but without any consequential enhancement of the penalty and as a concession to the accused, and it ought therefore to follow that this should also be the maximum penalty available in the case of conspiracy. Of course, this recommendation will not affect the rules which we propose as to penalties in cases where the defendant is charged with a substantive offence other than one created by the 1875 Act. Nothing in the rules we propose would curtail the power of the court to impose the sentence which was imposed on the unlawful assembly count in *R.* v. *Jones*[141].

H. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS FOR LEGISLATION

1.112 A separate inchoate offence of conspiracy should continue to have a place in the criminal law (paragraphs 1.5–1.6).

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[140] *Hansard* (House of Lords), 26 July 1875, Vol. 226, Col. 37. The Lord Chancellor said that "it was quite possible, taking a particular area of acts, to say what should be a crime committed by one person, irrespective of any acts of conspiracy, and then, knowing the punishment affixed to individual acts, it was open to Parliament to say – 'We will not sanction any higher punishment, even when these acts are committed by more than one person'. This was what had been done here. A particular punishment had been assigned to individual acts, and then the clause prevented the general law of conspiracy from enlarging the criminal character of those particular acts".

[141] (1974) 59 Cr. App. R. 120.

1.113 The crime of conspiracy should be limited to agreements to commit criminal offences: an agreement should not be criminal where that which it was agreed to be done would not amount to a criminal offence if committed by one person (paragraph 1.9 and clauses 1(1) and 6(1)).

1.114 In the legislation recommended in this report we advise that the common law offence of conspiracy to defraud should not be abolished; it should continue as a common law offence until we report comprehensively on fraud and our recommendations are implemented (paragraph 1.16 and clause 6(2)).

1.115 We shall in due course report comprehensively on offences against the administration of justice but, because perverting the course of justice is itself a substantive offence, the offence of conspiracy to pervert the course of justice does not require to be specifically dealt with in the legislation we recommend (paragraphs 1.17–1.19).

1.116 To be guilty of conspiracy a person must have agreed with at least one other person (paragraph 1.23 and clause 1(1)).

1.117 A person should not be guilty of conspiracy if the only person with whom he has agreed is a corporation of which he is acting as the sole agent (paragraph 1.24).

1.118 A person should be guilty of conspiracy if he agrees with another person that an offence shall be committed. Both must intend that any consequence specified in the definition of the offence will result and both must know of the existence of any state of affairs which it is necessary for them to know to be aware that the course of conduct agreed upon will amount to the offence (paragraph 1.39 and clause 1(1), (2) and (3)).

1.119 No special rule is required in respect of conspiracies to commit other inchoate offences (paragraph 1.44).

1.120 A person should not be guilty of conspiracy if the only person with whom he agrees is his spouse (paragraph 1.49 and clause 2(2)(*a*)).

1.121 Where the only agreement is between a person and one or more other persons who are exempt for the reasons mentioned in paragraphs 1.51 to 1.55 of the report from criminal liability in respect of the act which it agreed shall be done, no charge of conspiracy in respect of the agreement shall lie against anyone (paragraph 1.58 and clause 2).

1.122 A person should not be entitled to an acquittal on a charge of conspiracy merely because another person or persons with whom he is found to have agreed are acquitted, whether they are tried at the same time as he or separately (paragraph 1.63 and clause 6(4)).

1.123 It should be a rule of practice that, in the case where an indictment contains substantive counts and a conspiracy count based upon an agreement to commit the offences charged in the substantive counts, the prosecution should be required to justify the joinder to the judge. If, in the exercise of his discretion, the judge decides not to allow joinder, the prosecution should be required to elect whether to proceed on the substantive or conspiracy counts (paragraph 1.71).

1.124 Where an offence has been committed and prosecution for the offence is statute barred no charge of conspiracy based upon an agreement to commit that offence should lie (paragraph 1.75 and clause 4(3)).

1.125 Where prosecution of an offence requires the consent of any person the same consent should be required for prosecution of a conspiracy to commit that offence (paragraph 1.75 and clause 4(2)).

1.126 The question whether a defence of withdrawal should be provided on a charge of conspiracy will be considered in the context of offences of general application and be the subject of a recommendation in a later report (paragraph 1.79).

1.127 Conspiracy to commit any offence including a purely summary one should be an offence (paragraph 1.85 and clause 1(1)).

1.128 Conspiracy to commit summary offences should only be prosecuted in cases where there is deliberate planning of offences on a widespread scale (paragraph 1.85).

1.129 The consent of the Director of Public Prosecutions should be required for the prosecution of an offence of conspiracy to commit an offence which is expressed in the enactment creating it only to be triable summarily (whether or not the defendant or prosecution is given the right to trial on indictment) (paragraph 1.87 and clause 4(1)).

1.130 The offence of conspiracy should only be triable on indictment (paragraph 1.87 and clause 3(1)).

1.131 The rules as to maximum penalties should be—

(*a*) for conspiracy to commit murder or any other offence the sentence for which is fixed by law, imprisonment for life;

(*b*) for conspiracy to commit an offence for which a sentence extending to imprisonment for life is provided or to commit an indictable offence punishable with imprisonment for which no maximum term of imprisonment is provided, imprisonment for life;

(*c*) for conspiracy to commit any other indictable offence, the period available as a maximum for that offence or one year's imprisonment, whichever is the greater;

(*d*) for conspiracy to commit summary offences, one year's imprisonment;

(*e*) the penalty for conspiracy to defraud should remain at large;

(*f*) there should be no limit to the amount of fine which can be imposed for conspiracy (paragraph 1.106 and clause 3).

1.132 There should be no alteration in the special rule laid down by section 3 of the Conspiracy and Protection of Property Act 1875 (paragraph 1.110).

1.133 The maximum penalty for conspiracy to commit an offence under sections 5 or 7 of the Conspiracy and Protection of Property Act 1875 should be three months' imprisonment (paragraph 1.111 and clause 3(5)(*b*)).

PART II

CONSPIRACY TO TRESPASS: OFFENCES OF ENTERING AND REMAINING ON PROPERTY

A. INTRODUCTION

2.1 We were originally asked to examine the Statutes of Forcible Entry 1381-1623 and relevant common law offences and to recommend legislation appropriate to modern conditions to replace the present law in regard to forcible entry and detainer. We were required to carry out this examination in the light of the then Government's decision not to create at that stage an offence of criminal trespass.

2.2 At that time we had not started our examination of the gaps which might be left in the law and which would need to be filled if conspiracy were to be limited to conspiracy to commit an offence as proposed by the Working Party in Working Paper No. 50. Nor had the House of Lords enunciated the circumstances in which at common law conspiracy to trespass might amount to a criminal offence[1].

2.3 As a result of these developments our terms of reference were widened and we were in addition asked to consider in what circumstances entering or remaining on property should constitute a criminal offence or offences and in what form any such offence or offences should be cast. It was on this basis that we issued our Working Paper on Offences of Entering and Remaining on Property[2]. We now deal with the subject in the context of this report on conspiracy.

2.4 We are primarily concerned with what criminal offences are required in the area of entering and remaining on property, but the civil law and the remedies it provides are, of course, relevant to this question. It is necessary, therefore, to have in mind the remedies available to persons whose property is unlawfully occupied or trespassed upon. The common law provides an action for the recovery of possession of land, which may be brought in the High Court or in a county court[3]. By virtue of Order 44, rule 3(2) of the Rules of the Supreme Court a writ of possession to enforce a judgment or order giving possession cannot be issued without leave of the court, which cannot be granted unless every person in actual possession has had notice of the proceedings. Where there is a continued trespass to land there is also a remedy by way of injunction[4]. In addition, rules of court[5] provide a special remedy and procedure where property is occupied by persons (other than tenants holding over) who are in occupation without licence or consent. There is provision for the grant of an order that the plaintiff "do recover possession of the land", and there is no need to obtain leave of the court for the issue of a writ of possession. There are special provisions in regard to the service of the originating summons, allowing this to be left at or sent to the premises, or, where the persons in occupation

[1] *Kamara* v. *D.P.P.* [1974] A.C. 104.
[2] Working Paper No. 54, 28 June 1974.
[3] *Halsbury's Laws of England* (3rd ed.), vol. 32, p. 371.
[4] *ibid.*, vol. 38, p. 749.
[5] Order 113 of the Rules of the Supreme Court, and Order 26 of the County Court Rules.

cannot be identified, by affixing the summons to the premises. Decisions on cases arising out of the application of these orders show that they have effectively provided a speedier and less technical procedure for the recovery of property[6].

B. PRESENT LAW

1. Introduction

2.5 It is important to bear in mind that at common law simple trespass upon property has never been a criminal offence, and even conspiracy to trespass is not, in the absence of some further factor, indictable[7]. Some statutory offences penalise trespass upon particular property such as railway property[8], or an enclosed garden set aside in a public place for the inhabitants[9]. Some statutes penalise trespass with a prescribed end in view, as for example, trespass with the intention of committing rape or theft or inflicting grievous bodily harm[10], or trespass in pursuit of game [11]. Section 20 (1) of the Firearms Act 1968 makes it an offence, with a penalty of up to five years' imprisonment on indictment, for a person to enter or be in any building as a trespasser and without reasonable excuse while having a firearm with him.

2.6 Statutory exceptions such as these aside, entering or remaining on property as a trespasser does not constitute a criminal offence unless—

(1) the conduct can be brought within the offences of forcible entry or detainer, either at common law or under the Statutes of Forcible Entry, or

(2) there is a conspiracy to trespass which amounts to a criminal offence by the criteria laid down in *Kamara* v. *D.P.P.*[12], or

(3) there is a remaining on which amounts to resisting a Sheriff in the execution of a High Court writ of possession[13].

Frequently, of course, some other offence is committed in the course of entering or remaining on property, such as criminal damage, assault, unlawful assembly, possession of an offensive weapon in a public place[14] or some other public order offence.

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[6] *McPhail* v. *Persons unknown* [1973] Ch. 447 decided that the court had no discretion to suspend the operation of an order under Order 113; *University of Warwick* v. *de Graaf and Others* [1975] 3 A11 E.R. 284 dealt with what steps need be taken to identify those in unlawful occupation; and *Westminster C.C.* v. *Chapman and Others, The Times* 19 April 1972, decided that meticulous compliance with the rules for service may in some circumstances not always be required; and see *Burston Finance Ltd.* v. *Wilkins and Others, The Times* 17 July 1975, and *R.* v. *Wandsworth County Court, ex p. Wandsworth B.C., The Times* 18 July 1975.

[7] *R.* v. *Turner* (1811) 13 East 228; *Kamara* v. *D.P.P.* [1974] A.C. 104 and see para. 2.20, below.

[8] Railway Regulation Act 1840, s. 16. The penalty is a fine of £5. See too British Railways Act 1965, s. 35(6), which provides for a fine of £25.

[9] Town Gardens Protection Act 1863, s. 5. The penalty is a fine of £2 or 14 days' imprisonment. and the section gives a police constable power to arrest a person he sees committing the offence,

[10] Theft Act 1968, s. 9. This is burglary and carries a penalty of up to 14 years' imprisonment.

[11] Game Act 1831, s. 30. The penalty is a fine of £20, or £50 if more than four persons are nvolved.

[12] [1974] A.C. 104. We discuss these criteria in paras. 2.19–2.21, below.

[13] Sheriffs Act 1887, s. 8(2).

[14] Prevention of Crime Act 1953, s. 1.

2. Forcible entry and detainer

(a) Common law

2.7 At common law it is an offence, punishable with a fine and imprisonment, to make forcible entry upon, or to keep possession of, lands or tenements with menaces, force and arms and without the authority of the law[15]. To establish that the entry or detainer is forcible there must be proof of such force as constitutes a public breach of the peace, or such conduct as constitutes a riot or unlawful assembly[16]. This penal remedy grew from the need, as society developed, to provide greater protection for the King's peace and for property rights against the unlawful depredations of individuals and of armed bands seizing and holding lands or tenements[17]. It was frequently invoked in early times when the civil remedies available for establishing title to land and even for recovery of possession were very complex and set about with many legal pitfalls[18].

(b) Forcible Entry Acts 1381-1623

2.8 The main statutory provision is to be found in the Forcible Entry Act 1381 which provides—

> "that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner."

2.9 This Act has never been interpreted as penalising the peaceful, though unlawful, entry on property. It does, however, provide a test for the force required which is different from that required for the common law offence. It is sufficient under the statute that the force (whether directed against the property, or threatened against the person) is such as to be likely to deter a person minded to resist the entry[19]. In addition the Act also penalises forcible entry even by a person who is entitled to possession or who has a legal right of entry[20].

2.10 The Forcible Entry Act 1429 filled certain gaps in the operation of the Acts of 1381 and 1391, which empowered and required the justices to take action where forcible entry was followed by forcible detainer. The 1429 Act imposed on the justices a duty to execute the provisions of the Statutes where there had been a forcible entry (whether or not it was followed by detainer) and where there was forcible detainer (whether or not it had been preceded by a forcible entry). It also contained provisions of a civil character enabling the justices summarily to restore possession to the person dispossessed, and provided that proceedings for forcible detainer could not be taken against a person who had been in possession for three years. The Forcible Entry Act 1588 reaffirmed this exception, and the Forcible Entry Act 1623 gave to a tenant for a term of years the civil protection afforded by the Statutes.

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[15] *Russell on Crime* (12th ed., 1964), p. 279.
[16] *Archbold's Criminal Pleading, Evidence and Practice* (38th ed., 1973), para. 3608.
[17] L. Owen Pike, *History of Crime in England*, vol. 1, p. 249.
[18] Holdsworth, *History of English Law*, vol. III, pp. 3–28, vol. IV, pp. 487–8.
[19] *Milner* v. *Maclean* (1825) 2 C. and P. 17.
[20] *Newton* v. *Harland* (1840) 1 Man. and G. 644, (subject to qualifications raised in *Hemmings* v. *Stoke Poges Golf Club Ltd.* [1920] 1 K.B. 720).

2.11 The civil actions which developed from the 1381 Act and those specially created by the 1429 Act are today of no significance. Indeed, the latter Act was repealed except as to criminal proceedings by the Civil Procedure Act Repeal Act 1879[21]. There are now other remedies available in both the High Court and the county courts which are less technical and which are intended to provide a reasonably expeditious means of recovering possession of land and tenements[22]. These remedies have replaced the jurisdiction of the justices to give repossession, which had in fact fallen into disuse and for which no modern procedure was provided[23].

(*c*) *Analysis of the present law of forcible entry and detainer*

2.12 The basis underlying both forcible entry and forcible detainer is the concern of the criminal law to preserve the peace. The offences are said to be committed by violently entering or keeping possession of lands or tenements with menaces, force and arms. Although it is a requirement of the common law offences that the offender's conduct must be likely to cause a breach of the peace[24], this is not an essential element of the offences under the statutes. It would seem that it is sufficient that the force (whether directed against property, or threatened against the person) is such as to be likely to deter a person minded to resist the entry[25]. There have been many decisions on the question of what constitutes violence or force necessary for the offences, and they are perhaps most succinctly summarised as follows[26]—

> "In order to constitute the offence it is not necessary that there should be actual violence to the person of anyone. It is sufficient if there is any kind of violence in the manner of entry, as by breaking open the doors of a house, whether any person be therein or not, or by threats to those in possession giving them just cause to fear that bodily hurt will be done to them, if they do not give up possession, or by going to the premises armed or with such an unusual number of persons as plainly show that force will be resorted to. A mere trespass will not support an indictment for forcible entry. There must be proof of either such force, or such a show of force, as is calculated to prevent any resistance."

There is no requirement that there must be more than one person involved before there can be forcible entry or detainer, though the involvement of more than one person may make it easier to prove that there was force or violence.

2.13 The question of what conduct will constitute the requisite degree of force must always depend upon the circumstances of the case. In regard to forcible detainer the following statement of the law from *R.* v. *Robinson*[27] is of assistance—

> "Accumulating in premises an unusual number of people or unusual weapons or making preparations of such a kind [in this case the erection

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[21] Sect. 2 and Schedule, Part I.
[22] See para. 2.4, above.
[23] Coleman and Scott, "Forcible Entry and Detainer: Substance and Procedure", (1970) 134 J.P.N. 364 at p. 380.
[24] See para. 2.7, above.
[25] *Milner* v. *Maclean* (1825) 2 C. and P. 17.
[26] *Halsbury's Laws of England* (3rd ed.), vol. 10, p. 591.
[27] [1971] 1 Q.B. 156, 162.

of barricades] which indicate in themselves that any attempt to enter will be opposed by force may amount to forcible detainer of the premises even though the owner is deterred and never makes an attempt [to enter]."

In that case there was no active resistance to the police who finally effected entry in support of the execution of a High Court order for possession of the building. But it was held that the whole course of conduct of those in occupation was indicative of an intention to use force to deter the true owner from resuming possession of the property, and that this in the circumstances constituted the force necessary to make the defendants guilty of forcible detainer.

2.14 Many of the writers who have dealt with forcible entry suggest that "entry" bears the technical meaning which the word carries in the field of real property[28], and signifies "the act of going on land or doing something equivalent with the intention of asserting a right in the land."[29] This approach was not followed in *R.* v. *Brittain*[30] in which the Court of Appeal relied upon the ordinary meaning of the word entry to uphold a conviction for forcible entry where the intention of those who forced their way into another's house was to attend a bottle party at which they were not wanted.

2.15 It has long been recognised that the offences are by their nature offences against another's possession of the land entered or detained, and that it is not necessary for the prosecution to establish the title of the person against whom the property is entered or detained[31]. Nevertheless, it is accepted that possession and not mere custody of the property must be proved[32]. Thus in a case[33] where the owner sought to remove by force from his tied cottage a former servant, whose employment had ended, but who refused to leave the cottage, it was held that the servant had mere custody and not possession of the cottage. There was, therefore, no breach of the Statute of Forcible Entry. If the purpose of the legislation is to prevent breaches of the peace, distinctions between possession and custody are, in our view, without any substantial merit in the context of the use of force to evict a person from property that he is physically occupying.

2.16 Cases such as *Scott* v. *Matthew Brown & Co.*[34] and *Collins* v. *Thomas*[35] indicate that a mere trespasser does not, by the very act of trespass, immediately and without the acquiescence of the person displaced, give himself against that person what the law understands by possession. Thus, since it is possession which the law requires to be invaded before there is an offence, the person displaced would not commit an offence of forcible entry if he used force in that situation to expel the trespasser. The significance of these cases has been revived by a restatement of their effect in dicta by Lord Denning M.R., in *McPhail* v.

[28] *Hawkins, Pleas of the Crown* (1716), Book 1, ch. 64, s. 20; Wood's *Institutes* (1772), p. 426; Blackstone's *Commentaries*, Bk IV, Ch. XI. 8; Stephen's *Digest of the Criminal Law* (1877) Art. 79; and *Russell on Crime* (12th ed., 1964), p. 279. Compare Dalton's *Country Justice* (5th ed., 1635), p. 196.
[29] Jowitt, *Dictionary of English Law.*
[30] [1972] 1 Q.B. 357.
[31] *R.* v. *Child* (1846) 2 Cox C.C. 102; Stephen's *Digest of the Criminal Law*, Art. 99.
[32] *Halsbury's Laws of England*, (3rd ed.), vol. 10, p. 597.
[33] *Hemmings* v. *Stoke Poges Golf Club Ltd.* [1920] 1 K.B. 720, 743 *per* Scrutton L.J.
[34] (1884) 51 L.T. 746.
[35] (1859) 1 F. & F. 416; 175 E.R. 788.

Persons Unknown[36]. The question at issue was whether the court granting an order for possession under Order 113 against unlawful occupiers had a discretion to suspend the operation of the order for a period. On the facts it appeared that the owner had not acquiesced in the unlawful occupation. In holding that the court had no discretion to suspend the operation of its order, Lord Denning referred to the owner's right of self-help as a factor weighing against the existence of the discretion. He said that on the facts the trespassers had not acquired possession of the property, and that therefore the owner would not have been liable criminally under the Statutes of Forcible Entry: this applied only to the expulsion of one who was in possession even if he had resorted to force to expel the trespassers. Comment[37] on this decision suggests that Lord Denning oversimplified the matter by concluding from the fact that the owners had never acquiesced in the squatters' presence on the property that the squatters had never gained possession. These criticisms indicate the difficulties under the present law of determining when it is and when it is not an offence for a person deprived of his property to resort to force to obtain occupation of it.

3. Conspiracy to Trespass

2.17 In *R.* v. *Turner*[38] Lord Ellenborough held that an agreement to commit a civil trespass was not indictable. This accords with the generally expressed view that a conspiracy to commit a tort (not in itself a crime) is not a criminal offence unless the tort involves fraud, malice or violence. Lord Campbell in *R.* v. *Rowlands*[39] thought that the decision in *R.* v. *Turner* was wrong on the facts, because there was evidence of an agreement to oppose with offensive weapons any interference with the trespassers.

2.18 In *R.* v. *Bramley*[40] a number of persons were convicted of conspiring together and with others unknown to incite people to trespass upon real property in London. The question of whether their conduct was criminal was left to the jury to decide in the light of all the circumstances[41]. This was a case arising out of the immediate post-war housing shortage when empty properties were occupied by homeless families.

2.19 These cases have now to be viewed in the light of the decision of the House of Lords in *Kamara* v. *D.P.P.*[42] The facts in this case were that about a dozen students from Sierra Leone, holding political opinions contrary to those of the party in power there, agreed together to occupy the premises of the Sierra Leone High Commission in London and to hold a demonstration there to obtain publicity for their grievances. In pursuance of the agreement a number of them entered the premises, purported to arrest the caretaker, threatened another caretaker with a toy pistol which he took to be genuine, locked a number of the staff in a room having physically held or pushed a number

[36] [1973] Ch. 447.
[37] (1973) 89 L.Q.R. 458; D. Yates, "Squatters and Possession Orders", (1973) 123 New L.J. 764; D. Macintyre, "Squatters – Recovery of Possession", [1973] C.L.J. 220.
[38] (1811) 13 East 228.
[39] (1851) 17 Q.B. 671.
[40] (1946) 11 Jo. Crim. Law 36.
[41] On the question of whether the issue should have been left to the jury in this way, see *Kamara* v. *D.P.P.* [1974] A.C. 104, 130 and *cf.*, *R.* v. *Withers* [1974] Q.B. 414, 422, now reversed on appeal, [1974] 3 W.L.R. 751.
[42] [1974] A.C. 104.

of them, and used a telephone to report their actions to the press and television news staff. The demonstration came to an end when the police eventually intervened without having to resort to force. The students were charged, *inter alia*, with conspiracy to enter as trespassers the premises of the High Commission of Sierra Leone in London. They were convicted, their conviction was upheld by the Court of Appeal, and they appealed to the House of Lords. The point in regard to conspiracy before the House of Lords was whether an agreement to commit a trespass could be an indictable conspiracy and, if so, in what circumstances.

2.20 Lord Hailsham of St. Marylebone L.C., with whom Lord Morris and Lord Simon of Glaisdale agreed, dealt in some detail with the law of conspiracy and with what tortious conduct, if agreed upon, could be the subject of a conspiracy charge. He accepted the oft-stated proposition[43] that the courts should, by the criminal law, protect individuals from certain wrongs arising from acts done by a number of persons which, had they been done by a single wrongdoer, would have given rise to a civil remedy only. But he was not prepared to hold that every conspiracy to trespass was an indictable offence. He held[44] that a conspiracy to trespass could be a criminal offence, but only in certain circumstances and where there was some sufficient additional factor. It was a sufficient additional factor, he considered, that the conspiracy to trespass involved the invasion of the domain of the public, and he gave as examples the invasion of a building such as the embassy of a friendly country or of a publicly owned building. The Lord Chancellor went on to define other circumstances in which a conspiracy to trespass (or to commit any other tort) would be indictable, namely where the execution of the combination—

(i) would infringe the criminal law in other respects, as by breaching the Statutes of Forcible Entry, the Criminal Damage Act 1971 or the criminal law of assault, or

(ii) would necessarily involve and be known and intended to involve the infliction of something more than purely nominal damage, as where it was intended to occupy the premises to the exclusion of the owner by expelling him or otherwise effectively preventing him from enjoying his property.

2.21 Lord Cross stated the matter somewhat differently. He held[45] that an agreement by several to commit acts, which if done by one would amount only to a tort, might constitute a criminal conspiracy if the public had a sufficient interest, that is to say, if the carrying into execution of the agreement would have consequences sufficiently harmful to call for penal sanctions. He cited as an example an agreement to trespass which, because of the nature of the property to be trespassed upon, or of the means to be employed in carrying out the trespass, or of the object to be achieved by it, might call for a penal sanction. As formulated by Lord Cross, the offence of conspiracy to trespass would be a wider one than that formulated by the Lord Chancellor, and could apply in circumstances very different from those of the case that was before the House.

[43] *e.g.*, *per* Lord Bramwell in *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co. Ltd.* [1892] A.C. 25, 45, and *per* Barry J. in *R.* v. *Parnell* (1881) 14 Cox C.C. 508, 520.
[44] [1974] A.C. 104, 130.
[45] *ibid.*, at p. 132.

4. Failure to comply with an order for possession

2.22 In both the High Court and in the county courts it is possible for the law of contempt to be invoked to punish those who refuse to comply with an order of the court. The person in contempt can at the instance of the other party be committed to prison (in theory indefinitely) and fined an unlimited amount.

2.23 Any resistance to the sheriff in the execution of a writ is an offence for which the sheriff may arrest the resister. Section 8(2) of the Sheriffs Act 1887 provides—

> "If a sheriff finds any resistance in the execution of a writ he shall take with him the power of the county, and shall go in proper person to do execution, and may arrest the resisters and commit them to prison, and every such resister shall be guilty of a misdemeanour."[46]

A sheriff may thus call on the police for assistance in executing a writ and any resistance to the police will be an obstruction of them in the execution of their duty. This must be contrasted with the position of a county court bailiff. He is not statutorily entitled to call upon the police for assistance in executing a warrant for possession, although he is entitled to such assistance when executing a distress warrant or a warrant of committal[47]. It is an offence to assault a bailiff[48], but resistance falling short of assault is not criminal.

2.24 There is, therefore, under the present law an ultimate sanction of imprisonment against a person who refuses to comply with a court order for possession by means of proceedings for contempt, whether the order is obtained in the High Court or in a county court, and additionally under the Sheriffs Act 1887 if the order is an order of the High Court.

C. THE PROBLEM OF REFORM

1. Present day conditions

2.25 The social conditions under which the Statutes of Forcible Entry were enacted have long since passed into history. Whilst this does not necessarily mean that the criminal offences which the Statutes created serve no useful purpose, it is not out of place to examine whether they are appropriate to present day conditions. It seems that the main purposes of the Statutes were partly to prevent powerful local persons from seizing property or recovering it by force, and partly to provide more effective and immediate civil remedies to persons displaced by such actions than were available in the local courts or from the King's judges. Today the High Court and the county courts are readily accessible and their writs and orders are comparatively easy to obtain and enforce. In civil matters the powers of the justices of the peace are limited to a narrow field and the general policy is not to enlarge that field.

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[46] By s. 7(1) of the Criminal Law Act 1967 the penalty is imprisonment for not more than 2 years.

[47] County Courts Act 1959, ss. 120(4) and 158(2). Formerly, under s. 142 of the County Courts Act 1888, there was a duty on the police to assist a bailiff in executing a warrant for possession.

[48] County Courts Act 1959, s. 30.

2.26 In present day conditions instances of taking occupation of another's property by violence are comparatively uncommon. On the other hand there has been a re-emergence of the problem of squatting, that is, unlawful taking over of premises by individuals or groups of persons[49] who make at least a temporary home in property that is empty awaiting either occupation or demolition and redevelopment. This does on occasion lead to at least the display of force to maintain the unlawful occupation. Some public concern has also been expressed about the occupation of residential premises when the lawful occupier is temporarily away. There is in addition the phenomenon of the occupation of premises, usually peaceful at the outset, as a protest. Instances of this may be concerned, for example, with the occupation of university premises as a protest against a decision of the university authorities, with the occupation of a factory to keep production going despite a decision by the management to close the factory, or with the occupation of diplomatic premises as a protest against the policies of a foreign state. We have to consider whether criminal offences are appropriate in any of these cases.

2. Criticisms of the present law

(a) The Statutes of Forcible Entry

2.27 One disadvantage of the Statutes of Forcible Entry is that they are cast in archaic terms and unless read in the context in which they were enacted can easily be misinterpreted. Some recent correspondence in legal journals has suggested that the Forcible Entry Act 1381 penalises entry where entry is not given by law, without the necessity of proving any force. Taken literally the Act may bear this meaning, but no textbook and no case suggests that in its context this is the correct meaning. In addition, the nature of the occupation of the property by the person dispossessed, which must be established before forcible entry upon it becomes an offence, requires difficult distinctions to be drawn between possession and custody. This in turn leads to a lack of any clear definition as to when the use of force by a person entitled to occupation may amount to an offence. Thirdly, there is the possible doubt arising out of *R.* v. *Brittain*[50] as to whether any entry is sufficient to constitute the offence or whether entry is limited to entry with an intention to assert a right in the land.

2.28 These factors in themselves are reasons at least for clarifying and modernising the law, but more important are the different conditions which now prevail compared with those which prevailed when the Statutes were enacted. In very few of the cases where property is unlawfully occupied is the entry forcible, and in any event we know of no cases where the offence of forcible entry has been used in any of the many squatting incidents that have occurred. Forcible detainer has been relied upon in one or two reported cases involving

[49] This must be distinguished from the occupation of rundown property due for demolition, which is occupied *with the permission* of owners until required for redevelopment. Local authorities in particular frequently allow such occupation on licence. In these circumstances the local authority may receive no rent and in any event will expect the occupants to leave when the premises are required for demolition.

[50] [1972] 1 Q.B. 357.

squatting[51], and the offence has been charged in a few unreported cases, of which we give details for the ten years 1964-1973 in the following table—

	Forcible entry or detainer as a principal charge	*Forcible entry or detainer as a subsidiary charge*
1964-1969	—	—
1970-1973	6	21

All these charges, for details of which we are indebted to the Home Office, were brought under the Statutes of Forcible Entry and none was brought at common law.

2.29 Having regard to the undoubtedly large number of incidents of squatting and the like over these years it is noteworthy that it was considered necessary to use the offences under the Statutes as the main weapon against such occupation only in a very few cases. It also seems clear from, for example, such a case as *R.* v. *Mountford*[52] that, although forcible detainer was there the principal charge, there was criminal conduct, such as the manufacture of petrol bombs and other explosive devices, which could have been the subject of other serious criminal charges. Even in *R.* v. *Robinson*[53] where the illegal occupiers were careful not to resist the police or to have offensive weapons available when the police broke in, there was almost certainly conduct which amounted to an unlawful assembly.

(b) Conspiracy to trespass

2.30 Although the decision of the House of Lords in *Kamara's* case does not make every conspiracy to trespass—and so every trespass by more than one person—a criminal offence, it does mean that a very wide range of conduct is within the ambit of the criminal law. The test based upon trespass which necessarily involves the infliction of something more than purely nominal damage has a far-reaching effect, as does the test based upon trespass which involves the invasion of the domain of the public. Until the decision in *Kamara* v. *D.P.P.*[54] the only instance that we had been able to find of reliance upon the common law offence of conspiracy to trespass was in the outbreak of squatting immediately after the last war when a charge of conspiracy to incite to trespass was successfully preferred[55]. Since *Kamara's* case there have been at least two prosecutions for conspiracy to trespass where protesters have entered and remained on the premises of embassies[56].

2.31 The state of the common law following this decision clearly illustrates

[51] *R.* v. *Robinson* [1971] 1 Q.B. 156; *R.* v. *Mountford* [1972] 1 Q.B. 28.
[52] [1972] 1 Q.B. 28.
[53] [1971] 1 Q.B. 156.
[54] [1974] A.C. 104.
[55] *R.* v. *Bramley* (1946) 11 Jo. Crim. Law 36.
[56] Twenty-one Iranians were charged in respect of trespass on the Iranian Embassy: *The Times* 2 May 1975; and nine Ukrainians were charged in respect of trespass on the Soviet Embassy: *The Times* 6 May 1975.

the dangers of the lack of a clear definition of those "unlawful" aims which may make an agreement a criminal conspiracy. It is not necessary to go beyond even the first proposition, that an agreement to trespass which involves the invasion of the domain of the public is a criminal conspiracy, to perceive the uncertainty in the definition of the offence[57]. For example, the question may be asked whether the "domain of the public" includes not only publicly owned property, but also privately owned property to which the public has access such as a cricket or football ground.

2.32 The questions which are likely to arise under the test of whether the execution of the combination necessarily involves and was known and intended to involve the infliction of something more than purely nominal damage are also likely to be diffuse and difficult to answer. The test would, of course, clearly exclude an agreement by two hikers to cross another's land by a private path doing no damage even when they acted in defiance of his rights, but at what stage would the agreement amount to a criminal conspiracy? If a number of people agreed to walk along the path at five-minute intervals throughout the day, knowing that this would upset and annoy the owner of the property, would this be sufficient?

2.33 If the criterion of Lord Cross is applied even wider questions arise, for the test he favoured is whether the conspiracy is such that carrying it out would have consequences sufficiently harmful to call for penal sanctions[58]. This is, he indicated, a matter to be considered by the judge as a question of law on the facts alleged in the indictment. In the case of a conspiracy to trespass he indicated that circumstances making the conspiracy criminal might be related to the nature of the property to be trespassed upon, the means to be employed in carrying out the trespass[59] or the object to be achieved by it. The result is that whether there was an offence disclosed in any indictment would depend upon the view of the judge as to whether the facts alleged constituted an offence.

2.34 Consultation was almost unanimously against any offence in the nature of conspiracy to trespass. We do not think that it would be satisfactory to take as a basis of a new statutory offence of trespass an offence dependent upon a test such as that in *Kamara's* case. Nor do we think that the question of what conduct constitutes an offence, particularly in the area of trespass in which sensitive questions so frequently arise, should be one for the decision of the judge in each particular case, as would be the position if we were to adopt as the basis of an offence the law as found by Lord Cross in *Kamara's* case[60].

(c) Failure to comply with an order for possession

2.35 The civil law of contempt does in general provide an effective remedy against those who defy a court order, but it is not particularly well suited to cases of squatting. There is of necessity some delay in obtaining a warrant of committal and there is additional expense to the plaintiff, and the execution of the warrant can give rise to the same difficulties as execution of the writ of

[57] See para. 2.20, above.
[58] See para. 2.21, above.
[59] Including, for example, the number of people involved in the conspiracy: *R.* v. *Bramley* (1946) 11 Jo. Crim. Law 36.
[60] [1974] A.C. 104, 132.

possession. In this area we feel that it is more satisfactory that there should be a clearly defined criminal offence with a prescribed penalty, rather than that it should be necessary to rely entirely on the law of contempt, with its unlimited sanction.

2.36 So far as we are aware section 8(2) of the Sheriffs Act 1887 is not normally relied upon to prosecute those who resist a sheriff, and its existence is not generally appreciated. It was sought to be relied upon where there was resistance to the sheriff by squatters in the Church of England Hostel in Endell Street, London, but we understand that the proceedings were abandoned due to a doubt as to the validity of the writ. The terms of the section are somewhat out of date in referring to the sheriff going "in proper person" and with "the power of the county". Nonetheless it appears to provide a simple deterrent to resistance to the sheriff.

2.37 Figures given to us by the Office of the Sheriff of Greater London show that from March 1973 to December 1974 the Sheriff received 197 writs of possession against squatters and persons unknown. Cases in which the sheriff's officers have to break down the door because of barricades erected to resist eviction occur in about 5 per cent of writs of possession, of which there were 691 in the year 1974/75. When this figure is taken with the warrants of possession executed by the county court bailiffs the number of cases in which there is resistance to execution is no doubt greatly increased.

D. PROPOSALS IN WORKING PAPER No. 54

2.38 We issued a working paper in June 1974 in which we proposed that—

(1) the Forcible Entry Acts should be repealed and the common law offences of forcible entry and detainer and conspiracy to trespass (as defined in *Kamara* v. *D.P.P.*) should be abolished;

(2) in place of the offences repealed and abolished there should be two new offences, namely—

(*a*) without lawful authority entering property by force adversely to any person in physical occupation of it or entitled to occupy it, and

(*b*) being unlawfully on property and failing to leave as soon as reasonably practicable after having been ordered to leave by a person entitled to occupation.

2.39 We have had the views of a wide range of bodies and individuals on these proposals[61]. Those who commented included government departments, professional associations, university proctors and student organisations, local authorities and welfare organisations, housing trusts and property owning companies, political and trade union organisations and police organisations. We have also had the advantage of consultation with senior police officers on the question of whether any changes in the law are required to enable them to deal with trespass and public order offences. In addition we were fortunate in being able to be represented at a seminar held by the School of Advanced Urban Studies of the University of Bristol where the whole question of squatting was

[61] For a full list see Appendix 5.

discussed by representatives of central and local government and by others concerned with the problem.

2.40 On consultation there was no disagreement in principle with our proposal to abolish the common law offences of forcible entry and detainer and of conspiracy to trespass, as defined in *Kamara's* case, and to replace them so far as was necessary with statutory offences. Nor was there any disagreement with our proposal to repeal the Statutes of Forcible Entry. There was, however, some divergence of views as to the detail of our proposal for a revised offence of forcible entry. In particular it was strongly felt that a person excluded from his property, and particularly from his own home, should be entitled to use reasonable force to enter it without being guilty of a criminal offence. There was also some detailed comment upon the definition of the degree of force necessary as an element of the offence, and upon the application of this definition in practice when the property entered is not physically occupied.

2.41 The most controversial of the proposals was to create an offence of remaining on property as a trespasser after having been ordered to leave. As is apparent from our working paper we were always very conscious of the width of such an offence. We appreciated that there would have to be limitations upon it and we discussed some possible limits in paragraphs 53–57 of the working paper; but we did not find it easy to frame clear and simple provisions to exclude from the operation of the offence those situations in which we thought its application would not be appropriate. We had no doubt that the new offence should not cover the case of a tenant remaining on after the expiry of his tenancy, and that it should not apply where one who has been sharing another's residential accommodation has had the arrangement terminated. The wider exceptions gave us more difficulty, and we finally decided to put forward two alternative solutions. The first aimed to take account of the nature and duration of the illegal occupation, the other to take account of the need of the person with the right to occupy the property. We mentioned as a third possibility limiting the criminal offence to cases where there was a substantial interference by the trespassers with the use of the property by the person entitled to occupy it.

2.42 Views were sharply divided on the acceptability of the proposed offence of remaining on property as a trespasser after having been ordered to leave. Some commentators were strongly in favour of the creation of this offence. These were mainly organisations concerned with the administration and ownership of property. Others were strongly opposed to such an offence. Some of these considered that such a provision would be an unacceptable limitation of the right of peaceful protest; some considered that such a provision would unduly limit action in support of industrial disputes; and some considered it inappropriate to meet the practical initiative of the homeless with criminal sanctions. But among those who were opposed to the offence were organisations who based their opposition on the wider social ground that a criminal offence which might be applied at an early stage in a delicate situation could aggravate the social tensions involved. Among these were the Law Reform and Procedure Committee of the Senate of the Inns of Court and the Bar, who considered that the remaining-on offence should not apply to private premises, whether residential or business, and the Association of Chief Police Officers, who saw danger in new areas of confrontation with misguided but well-meaning members of the public which could be avoided by not extending the criminal law. In addition,

a number of local authorities with experience of squatting problems and some university proctors were opposed to the introduction of the criminal law in this area.

2.43 It is, however, also true that there are considerable problems in relation to squatters which are not adequately covered by the present law. The unlawful occupation can and does on occasion cause considerable hardship to individuals, property owning bodies and local authorities.

2.44 Our consultation and discussions with a number of local authorities have shown that squatting is, in a number of areas, a serious problem. For example, in the London Borough of Lambeth alone there are over 400 properties occupied by squatters and of these about half form part of the Borough Council's permanent housing accommodation. This unlawful occupation of property not only obstructs the Borough's plans for the rehabilitation and rebuilding of houses, but also disrupts its planned distribution of property to those who are on the official waiting list for accommodation. It has become a common way of obtaining precedence over others who have been awaiting accommodation for a considerable time, because even when eviction orders are obtained against squatters local authorities will, as a matter of policy, not enforce them without finding some alternative accommodation for those to be evicted, even if only on a bed and breakfast basis.

2.45 Court proceedings necessarily take time[62] and involve considerable work for council officers who have to investigate the circumstances of each unlawful occupation, to prepare affidavits and take all the necessary legal steps to ensure the proper service of process. Visiting houses occupied by squatters is, we were told, often extremely difficult and unpleasant as many squatters are obstructive and some abusive. On many occasions there is difficulty in executing a warrant for possession and, even when it has been executed, difficulty is experienced in preventing further occupation either by the same squatters or by others.

2.46 Some local authorities were against the creation of a general offence of remaining on property, whilst others thought that such an offence would be useful to them in obtaining repossession of unlawfully occupied property. We have noted, however, that in some of the cases to which our attention was drawn the enforcement of court orders was attended by violent resistance. It seems that in very few of these cases (although in some there were quite serious assaults and other offences committed by the resisters) were criminal proceedings taken. The criminal law has not in practice, therefore, proved to be a particularly useful weapon in these situations.

2.47 Civil proceedings by their very nature do not produce an instantaneous result. Investigation of the circumstances of an occupation, preparation of the necessary papers, arranging a suitable day for the hearing, securing the services of the sheriff or bailiff and the organisation of the execution of the writ or warrant all take some time. In addition, there is very seldom any likelihood of the

[62] We understand from our consultations that in the county courts the time between discovery of the occupation and obtaining repossession is commonly about two months, although in a very urgent case this could be reduced to about four weeks. In the High Court the period is usually a little longer.

recovery of costs from those in occupation. Another real problem which faces the owner, particularly in the case of a local authority owning many hundreds of properties, is to ensure that, once the illegal occupants have been removed, they or others do not move back and so require the whole process to be started afresh.

2.48 Although the views expressed to us have by no means been unanimous, the very helpful consultations we have had with a number of local authorities, both formally and informally, the opinions given to us by senior police officers, by some university officials and by a wide range of other individuals and organisations lead us to think that the answer does not lie in the creation of the remaining-on offence we originally proposed. We have given very careful thought to the creation, in place of this wide offence, of an offence limited to unlawful entry upon and occupation of property in the nature of squatting. But even this is beset by difficulties of definition and would create problems for the police and other authorities. We have reached the conclusion that a general criminal offence of remaining on property as we originally proposed is not a suitable means to employ in these situations where the circumstances vary so greatly from case to case.

E. OUTLINE OF RECOMMENDED OFFENCES

2.49 The principal factors which are, in our view, relevant in determining what offences are required in this area are—

(*a*) the concern of the law to prevent breaches of the peace,

(*b*) the need to ensure that persons should not with impunity be able to prevent those entitled to use property from using it, and

(*c*) the undesirability of extending the criminal law into areas where its application may in some circumstances be inappropriate.

It will, we think, be helpful to set out very briefly the offences which, with these principles in mind, we recommend and then to discuss more fully the detail of the offences and justification for them.

2.50 We recommend that the offences of forcible entry and detainer, whether at common law or under the Statutes, should be abolished. In place of these offences, and of conspiracy to trespass (which, following upon the central recommendation in Part I that the offence of conspiracy be limited to conspiracy to commit an offence, will cease to be an offence), we recommend two main offences related to the occupation of property and three connected offences.

2.51 The two main offences we recommend are—

(1) Without lawful authority, using or threatening violence for the purpose of securing entry to any premises on which another person is present and against the will of that person, knowing that there is a person on the premises and that entry will be against that person's will. Measures taken by a person to regain his own living accommodation which, until he was deprived of it, he was using as such, will not make him liable for this offence.

(2) Failing to leave residential premises when ordered to do so by the person who until he was displaced was using the premises as his living accommodation, provided that there was entry as a trespasser and continuation as a trespasser. It is to be a defence that the defendant believed on reasonable grounds that the person ordering him to leave was not the displaced residential occupier.

2.52 The three subsidiary offences we recommend are—

(1) Without lawful authority or excuse, having an offensive weapon (as defined in the Prevention of Crime Act 1953) on premises upon which the defendant is a trespasser having entered as such.

(2) Entering or remaining as a trespasser on the premises of a diplomatic mission, consular premises, or the premises of international organisations having diplomatic inviolability.

(3) Resisting or obstructing any sheriff or sheriff's officer or officer of a county court seeking to execute an order for possession of premises made under a procedure available only on a claim alleging that the premises were occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered or remained in occupation of premises without the licence or consent of the person claiming possession or any predecessor in title of his[63]. It should be a defence for the defendant to prove that he believed with reasonable cause that the person he was resisting or obstructing was not such an official.

F. THE NEW ENTRY OFFENCE

1. Introduction

2.53 The law has long recognised the importance which people attach to their land and buildings, and particularly to the land and buildings which they occupy. It is in recognition of this that the law accords to an occupier the right to use reasonable force against the person to prevent unauthorised entry upon his property. We do not think that any lessening of this right would be generally acceptable, and we would not propose it, for it probably acts to a certain extent as a deterrent to those who may be minded unlawfully to enter another's property, either with or without force. It follows from the very existence of this right, however, that a breach of the peace is likely to occur if a person unlawfully seeking to enter premises against the will of a person on the premises uses or threatens violence to achieve his aim. Accordingly, there should, in our view, be an offence of using or threatening violence in order to enter premises against the will of another on the premises as an added deterrent, and to mark the law's disapproval of such conduct. It may be argued that offences such as assault, criminal damage to property and the public order offences are sufficient

[63] *i.e.*, an order for possession made under O. 113 of the Rules of the Supreme Court or under O. 26 of the County Court Rules.

to act as a deterrent[64]. But it is our view that using violence to enter premises on which another is present should be a special category of offence and should be treated separately.

2.54 It can be argued that the use or threat of violence to enter property should be an offence even when there is no one on the property, to cover the situation where the occupier is temporarily absent. The reason for not recommending that the new offence should extend to that situation is that the main purpose of this offence is to prevent breaches of the peace. In addition, the second offence we recommend of remaining on in residential property after being ordered to leave will cover the case where the residential occupier was displaced when he was temporarily absent from the premises. The test to apply, therefore, is the simple one of whether another person is on the property. Where there is no one on the property and, therefore, no real likelihood of a breach of the peace developing, the existing offences of, for example, criminal damage and, in appropriate circumstances, unlawful assembly are a sufficient deterrent. If the violence involves the participation of a group of people there will almost certainly be an unlawful assembly; if it involves damage or threats of damage to the property there will be an offence under the Criminal Damage Act 1971; if it involves the use of an offensive weapon, there will almost certainly be an offence under our new offence of having an offensive weapon on premises entered as a trespasser[65], and probably also under the Prevention of Crime Act 1953, as access to most premises will be by way of a public place.

2.55 The common law also recognises the right of a person with a right to occupy it to use reasonable force to take occupation of property of which he has been wrongfully deprived. This right is, however, subject to the limitation imposed by the Forcible Entry Acts (although the precise extent of this limitation is not entirely clear[66]), and other specific restrictions imposed, for example, by the Rent Act 1965[67]. There is, in our view, very much less justification for allowing such resort to force in the case where an owner or a person entitled to occupation is out of occupation but seeking to gain it, than in the case of an occupier repulsing intruders. Once self-help of this nature is allowed it is difficult to know where the line is to be drawn; while it may be thought acceptable for a person to eject a trespasser from his dwelling house occupied while he was away for the day, it may be thought far less acceptable to allow the use of a strong-arm gang to obtain occupation of a building planned for redevelopment but which squatters have been occupying for some time. Not only is the use of violence undesirable in itself, but the threat it poses to the squatters may lead them to resist, and so provoke a violent clash[68].

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[64] It may be, too, that, despite the context in which it was enacted, s. 30(1) of the Rent Act 1965 is in sufficiently wide terms to cover a trespasser unlawfully depriving even an owner-occupier of residential property of his occupation. It certainly covers depriving a person who occupies residential property under a lease: see s. 30(5).

[65] See para. 2.52(1), above.

[66] See para. 2.16, above.

[67] Sect. 30(2), which makes it an offence for any person to do any act calculated to interfere with the peace or comfort of a residential occupier of premises with intent to cause him to give up occupation of the premises, is aimed primarily at landlords seeking to make a tenant give up occupation of the premises. It is, however, cast in wider terms and may overlap with the new offences we recommend. Such an overlap is, we think, tolerable as the offences are aimed at a different type of mischief.

[68] In *The Guardian* 27 July 1973, an incident was reported where a gang of workmen was sent in to demolish a building in which a group of squatters was living. Apparently no criminal proceedings were taken.

2.56 The civil law affords to the person entitled to occupation, but excluded from it, a relatively simple remedy for regaining his occupation without the exercise of self-help, particularly since the introduction of the procedures by Order 113 in the High Court and Order 26 in the county courts[69]. The administration of justice requires that the law proceed with some deliberation to ensure that there is adequate time for affected parties to be represented and to ensure that all relevant facts are before the court. These considerations are, however, of little moment to the person deprived of property which he was using until unlawfully excluded from it, particularly when it is his own living accommodation that is involved.

2.57 Consultation has shown that many people believe that a right to eject a trespasser is one that ought not to be diminished. This is particularly so in the case of individual householders who believe, as do associations and professional bodies such as the Senate of the Inns of Court and the Bar, that self-help should be available to eject trespassers from residential property. There is clearly a similarity between the right to use reasonable force to prevent a trespasser from entering property and the right to eject one who has entered. Balancing such a right of self-help against the need to deter any breach of the peace, we take the view that there should be a right of self-help against a trespasser who is occupying property which, until he was unlawfully deprived of it, a person was using as his own living accommodation (though not necessarily his sole accommodation), whether or not he was present when the trespasser entered. This will enable a person to take reasonable steps to eject a trespasser. Consequently we do not think that the offence of using violence to enter premises should apply to recovery of one's own residential accommodation. Where a person uses more force than is reasonably necessary, then the ordinary sanction of the criminal law will be available to the party subjected to the use of excessive force. For example, the offence of assault or some more serious offence may have been committed. We do not, however, favour excepting from the offence the use of violence to obtain re-entry to premises other than one's own residential accommodation. We think that to except from the offence the use or threat of violence to recover possession of other premises might too readily lead to breaches of the peace which it is the aim of our recommendations to preserve, without giving any real advantage to the owner. It must not be thought, however, that the existence of an offence which penalises the use of violence to enter such premises when they are illegally occupied confers any right on the trespassers.

2.58 Although the new offence will not apply to a displaced residential occupier seeking to recover his own residential accommodation, self-help may not be of much avail when those in occupation are numerous and aggressive or, even where they are not, where the person excluded is either unwilling or unable to resort to force to recover his premises. This is one reason which leads us to recommend the other main offence of failing to leave the living accommodation of another when ordered to do so. We discuss this offence in paragraphs 2.69-2.80 below.

2. Violence

2.59 We have said that an essential element of an offence should be the

[69] But see para. 2.45, above and n. 62.

use of violence and we use the word "violence" rather than "force" in reference to this new offence. Our consultation has shown that many think of the offence of forcible entry as an offence akin to breaking and entering, which can be committed merely by breaking in through a door or a window. The true nature of the offence is, as we have shown in paragraph 2.12 above, one of violence.

2.60 We considered whether it was necessary to define what is meant by violence along the lines on which we defined "force" in the working paper, as an application, display or threat of force which would be likely to dissuade a person of reasonable fortitude, for fear of violence to his person, from offering lawful resistance. This definition was criticised on many grounds by those who commented on the paper. Some thought that to test whether there was an offence by reference to the effect of his conduct upon a particular person might place too onerous a liability on the defendant who might not appreciate the effect of his conduct upon a timid person. Others thought that to test liability by reference to the effect upon a person of reasonable fortitude might provide too little protection for the timid person. Yet others suggested that the offence should be committed not only when entry was obtained by force but also when it was obtained by a trick or by, for example, the use of a skeleton key.

2.61 On reconsideration, we think that, provided it is clear that violence includes not only violence against the person, but also violence against property, there is no need to define the word. "Violence" will cover any application of force to the person, but it carries a somewhat restricted meaning in relation to property, which is not so in regard to the word "force". Forcing a Yale-type lock with a piece of plastic, or a window catch with a thin piece of metal, would almost certainly amount to force, but not to violence, and, on the basis that such conduct is unlikely of itself to cause a breach of the peace, we would not want it to be within the offence. On the other hand, splintering a door or a window or its frame would be covered by the word violence. We appreciate that there may be some situations where there may be doubt as to the side of the line on which the conduct falls, but we feel that the word "violence" carries the right flavour, and that it can safely be left to be decided as a question of fact whether or not there was violence within the everyday meaning of the word[70]. There were others among those we consulted who suggested that the offence should be committed not only when entry was obtained by force but also when it was obtained by a trick. We think that to implement this suggestion would be inconsistent with the approach we have adopted that the offence is akin to a public order offence and we do not recommend this possible extension.

2.62 We recommend that violence should include both violence against the person and violence against property, but that otherwise it should be left undefined.

3. Entering

2.63 A breach of the peace is as likely to occur where violence is used in order to enter property whether the object is a temporary entry or a long-term occupation. The offence should not require that the entry be for any particular purpose, and

[70] *cf.*, *Brutus* v. *Cozens* [1973] A.C. 854, 861.

entry for a limited purpose, as in *R.* v. *Brittain*[71], and unconnected with any assertion of a right in the property, would be within the offence we recommend.

4. Premises

2.64 Apart from covering violent entry on to land and buildings, it is our view that the offence should also cover entry on portable houses, vehicles or vessels that are inhabited. Recent Irish legislation[72] is very much wider and, in addition to caravans and mobile homes, covers trains, omnibuses, vessels and aircraft not in flight, but it seems to us that the need to provide for such a wide coverage has not been demonstrated either by our consultation or by instances brought to our notice. In our view the premises covered by the offence would be sufficiently wide if extended only to movable structures, vehicles or vessels, such as portable houses, caravans or houseboats, designed or adapted for human habitation, which cannot be regarded as real property. So defined the extended meaning of the premises covered would be consistent with buildings, entry into which is burglary under section 9 of the Theft Act 1968[73].

5. Against the will of the person on the premises

2.65 It should be an essential element of the offence that the entry be against the will of the person on the premises, and that the defendant knows this. This will ensure that in the rare type of case where a person uses violence to enter premises to rescue another who is incapacitated or unaware of the danger, there will be no liability. We think that the mental element should be so framed that the defendant be required to know that there is another person on the premises and that entry will be against that person's will.

6. Without lawful authority

2.66 It is necessary to qualify the entry by violence as being without lawful authority to allow, for example, the bailiffs and those acting under their authority to execute a court order, and the police to act within the scope of their authority under laws relating to search and arrest and to the prevention of crime. The lawful authority which will take an entry by violence outside the ambit of the proposed offence must be an authority not merely to enter, but to enter by violence.

7. Penalty

2.67 Prosecutions for forcible entry are generally brought under the Forcible Entry Statutes[74] which provide no specific term of imprisonment for those convicted. Where a statute makes an offender liable to imprisonment, but the sentence is not by any enactment either limited to a specific term or expressed to extend to imprisonment for life, the person so convicted is liable to imprisonment for not more than two years[75]. The offence we have recommended is

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[71] [1972] 1 Q.B. 357.
[72] Prohibition of Forcible Entry and Occupation Act 1971.
[73] In that Act an "inhabited vessel or vehicle" includes any such vehicle or vessel at times when the person having a habitation in it is not there as well as when he is.
[74] *Archbold* (38th ed., 1973), para. 3608; and see, too, para. 2.28, above.
[75] Criminal Law Act 1967, s. 7(1).

similar in character to the offence under the Statutes, and we think that the maximum penalty under the Statutes is adequate for the most serious cases. Accordingly we recommend that it should be triable on indictment with a maximum penalty of imprisonment for two years or a fine or both. But we are also of the view that the offence should be triable summarily with the consent of the accused and in that case the maximum penalty, in accordance with the Magistrates' Courts Act 1952, section 19(6), will be imprisonment for six months or a fine of £400 or both.

2.68 Since the penalty we have recommended is less than five years' imprisonment, the offence will not be an arrestable offence under section 2 of the Criminal Law Act 1967. But since the offence is one that is primarily concerned with avoiding a breach of the peace, it would seem appropriate for there to be a power of arrest at least by the police. There will have to be a specific provision giving the power to a police constable who with reasonable cause suspects that the offence has been, or is being, committed to arrest without warrant a person whom he suspects with reasonable cause to be guilty of the offence. It would, we think, be anomalous to give a power of arrest to a private citizen, to effect which he might have to use violence to enter the property that the offenders were occupying, when he himself is penalised for violent entry upon premises unless he has been occupying them as his living accommodation.

G. OCCUPATION OF RESIDENTIAL PREMISES

2.69 As we have said in paragraph 2.58, the right of self-help for the person seeking to recover his living accommodation may in many cases not be of great assistance in recovering possession of the property where, for a variety of reasons, there may be reluctance to use force. For a person to be deprived of living accommodation which until the deprivation he had been using as such, causes obvious hardship if there is a delay of even a day or so in recovering possession. This may be so whether the accommodation is that person's sole accommodation, or accommodation, such as a flat in London or a week-end home, which is not in continuous physical occupation.

2.70 Trespass upon, followed by continued occupation of, another's living accommodation by two or more persons acting in agreement is at present almost certainly within the offence of conspiracy to trespass as defined by Lord Hailsham in *Kamara* v. *D.P.P.*, because the continued trespass would necessarily involve the infliction of something more than nominal damage. Implementation of our recommendation that conspiracy be restricted to conspiracy to commit an offence will mean that such conduct would no longer be criminal as a conspiracy to trespass.

2.71 It is our view that there should be a criminal sanction to deter the unlawful occupation of property actually used as living accommodation by another, not only on the grounds of the consequent hardship but also because such conduct is very likely to cause serious annoyance which could easily lead to a breach of the peace. Indeed, more than one organisation strongly opposed to our original proposal for a remaining-on offence suggested that there was room for an offence in this area. Such an offence would penalise, for example, those who move into and remain in the living accommodation of a person away on holiday.

2.72 It then becomes necessary to consider whether the criminal sanction should cover any other circumstances. The only other situations meriting attention which have been drawn to our notice are those where the planned occupation of residential property has been frustrated by its unlawful occupation by squatters very shortly before the property is occupied as living accommodation.

2.73 Extension of the offence to property which, when the unauthorised occupation begins, is not actually occupied as a dwelling would cause serious difficulties for the police. It would be necessary to limit the offence to the circumstances outlined in the last paragraph so as to exclude the substantially different case of unlawful occupation of a house standing empty and not intended for immediate occupation as living accommodation. The police would therefore have to be satisfied that the complainant had a right to occupy the house and intended to occupy it as his dwelling. This is a very different matter from their being satisfied that he has been excluded from a dwelling which he had actually been using as his home. The distinction between those properties where the ingredients for the extended criminal offence would exist and those where they would not, would be bound to lead to anomalies. In particular, the situation where a purchaser requiring possession had completed his purchase would be different from that which would exist where he had merely exchanged contracts. Similar differences would arise between the case where a tenant had actually obtained a tenancy and the case where he was on the point of doing so. It is also fair to say that the displaced residential occupier of a dwelling will be particularly tempted to take the law into his own hands and that it is in his case that the need for a criminal offence seems most pressing.

2.74 Nevertheless it might be necessary to conclude that the difficulties outlined above must be accepted because of the extent of the problem. Some of the cases of which we are aware relate to private property in which the purchaser has not yet taken up residence. We have considerable sympathy with those people who suffer annoyance, inconvenience and expense because the planned occupation of property they have acquired is frustrated by unauthorised occupation before they are able to move in. However, cases of this type are few and we do not think that they are sufficient to warrant extension of the offence in the way suggested. Most of the cases of this type relate to local authority housing where unauthorised occupation often causes disruption of plans for redevelopment and renovation of premises, and rehousing. Distress is also caused to those on the authority's waiting list who are prevented at the last minute from taking occupation of premises allocated to them. We do not underestimate these problems but we do not think that the extension of the offence in the way indicated would be a satisfactory solution. The effect of such an extension would be to make the conduct of squatters in certain circumstances subject to a criminal sanction as well as civil liability. But in fact there is little evidence to suggest that the criminal sanction would be invoked in practice. In many cases squatters commit offences such as criminal damage but even in such cases there seems to be some reluctance to resort to the criminal law. It may be that the real answer in the case of local authority housing lies in more immediate use of civil remedies rather than criminal sanctions. These considerations convince us that the offence should be limited to property actually being used as a residence at the time of occupation.

2.75 We, therefore, recommend that there should be a criminal offence to deter the occupation of premises in these circumstances, although we recognise that the offence must be strictly defined. We think that the elements of the offence should be—

(*a*) that there should be presence as a trespasser, after entry as a trespasser,

(*b*) upon premises,

(*c*) which excludes another who is occupying the premises as a residence, and

(*d*) that the trespasser should have failed to leave upon being required to do so by the person entitled to residential occupation or his agent.

2.78 The requirement that there must be presence as a trespasser after entry as a trespasser will exclude from the ambit of the offence a person remaining on after the expiry of a tenancy or licence. The requirement that he should have failed to leave when told to do so will exclude from the offence a simple trespasser who entered for some purpose other than to displace the lawful occupier. The requirement that another was using the premises as his living accommodation will mean that the offence will be restricted to cases where there is interference only with the residential use of the premises.

2.79 The offence as so far discussed does not require any mental element on the part of the defendant. The offence can, however, only be committed by someone who has entered as a trespasser and in the normal case that person will be aware that he is a trespasser. Even if he was unaware at the time of entering that he was a trespasser, he will appreciate this as soon as he is required to leave by someone whom he knows to be the displaced residential occupier. But we think that there may be circumstances where the defendant believes on reasonable grounds that the person requiring him to leave is not the displaced residential occupier. In our view, therefore, a defence should be provided to cover such circumstances.

2.80 The offence should be a summary one carrying a maximum penalty of six months' imprisonment and a fine of £400. In our view, a clearly defined offence of this nature, of which the elements will in most relevant circumstances be readily susceptible of proof, will result in those deprived of their living accommodation being able successfully to obtain police assistance in recovering it. To that end there should be a power in a constable to arrest as outlined in paragraph 2.68 above.

H. TRESPASSING WITH AN OFFENSIVE WEAPON

2.81 In consequence of our recommendations for repeal forcible detainer will no longer of itself be an offence. In many cases resistance by force or by a display or threat of force directed against those who wish lawfully to enter the occupied premises will involve the commission of some other offence such as assault or criminal damage. There are, however, some situations, such as that disclosed by the facts in *R.* v. *Robinson*[76], where there may not have been any battery or even any direct threat of assault, but where there is nevertheless a

[76] [1971] 1 Q.B. 156; see para. 2.13, above.

clear indication that violence will be relied upon to maintain occupation. Such conduct may well cause alarm to those in the area, and in any event is conduct which most people would regard as unjustifiable on any ground, if not criminal. If, however, it can be discouraged without the creation of a specific—and of necessity somewhat complex—criminal offence, we would favour that course.

2.82 In most cases of any moment preparations for violent resistance will have been made by the unlawful occupiers. If this involves the barring and barricading of doors and windows there will probably be offences of damage to property, but in some cases there may have been only the assembly of weapons or missiles for future use. It is our view that it would be both appropriate and adequate to make it an offence for a person to have an offensive weapon upon property which he has entered as a trespasser.

2.83 Under section 1 of the Prevention of Crime Act 1953 it is an offence to have without lawful authority or excuse an offensive weapon[77] in a public place. This is punishable on summary trial with imprisonment of up to three months and a fine of £200 and on indictment with imprisonment of up to two years and a fine. It seems to us that it is a justifiable extension of the criminal law to penalise a person who has entered premises as a trespasser, and as a trespasser has an offensive weapon, when it is already an offence to have such a weapon in a public place where he is entitled to be. We stress that the recommended offence will cover only a person who has entered, and remains, as a trespasser, and so will not apply to, for example, a tenant holding over. We recommend that the penalties should be the same as those provided in the Prevention of Crime Act 1953. There should be power for a police constable to arrest any person whom he reasonably suspects to be committing this offence[78].

I. TRESPASSING ON FOREIGN MISSIONS

2.84 Implementation of our recommendation as to conspiracy will also mean that there will be some narrowing of the law in the field of trespass by more than one person in "the domain of the public", which was dealt with as conspiracy to trespass in *Kamara* v. *D.P.P.*[79]. It was to fill part of the gap that would be left that the Law Reform and Procedure Committee of the Senate of the Inns of Court and the Bar proposed that the remaining-on offence canvassed in our working paper should apply in what Lord Hailsham has called "the domain of the public". They appreciated the difficulty of defining "the domain of the public" and suggested a definition by reference to categories of premises which would include, for example, hospitals, airport buildings, railway stations, etc., and also foreign embassies.

2.85 It is our view that in relation to public buildings of this nature there is no need to provide an offence of remaining on since the present public order offences, particularly offences such as unlawful assembly and obstruction of the police, are sufficient, as well as allowing a certain discretion to the police as to

[77] Offensive weapon is defined as "any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him" (s. 1(4)).

[78] The power of arrest under the Prevention of Crime Act 1953 is given only where the constable is not satisfied of the person's identity or place of residence, or has reasonable cause to believe it is necessary to arrest him to prevent the commission of another offence for which the weapon may be used. Such a limitation seems inappropriate in respect of possession of an offensive weapon by a trespasser on premises where he has no right to be.

[79] [1974] A.C. 104.

how to proceed. This they may lose if for example, the authority in charge of such a public building were able to demand police intervention because demonstrators had refused to leave when ordered to do so. The police are, we understand, satisfied that they have sufficient powers under the present law, without relying on conspiracy to trespass, and very much value the flexibility which they have in dealing with difficult situations. In addition, a list of public buildings would of necessity be arbitrary, and the provision of such an offence might give the impression that there was a need for measures to deal with a situation of emergency when in fact this has not been shown to exist.

2.86 Special considerations apply to trespass on foreign embassies by reason of our international obligations towards them. The Vienna Convention on Diplomatic Relations signed in 1961 and set out in the schedule to the Diplomatic Privileges Act 1964, requires the receiving State to take all appropriate steps to protect the premises of a mission against any intrusion or damage and to prevent any disturbance of the peace of a mission or impairment of its dignity. There are similar obligations in respect of the premises of a consular post under the Vienna Convention on Consular Relations, and the premises of an international organisation accorded diplomatic inviolability by or under the International Organisations Act 1968. Cases of trespass which involve the commission of some other offence such as forcible entry, assault or criminal damage give no difficulty. The offenders can be dealt with for those offences. Trespass on a mission which involves more than one person can now be prosecuted as conspiracy to trespass. But if this offence is abolished a non-violent trespass involving more than one person will no longer be an offence.

2.87 At present it would seem that, even without recourse to conspiracy to trespass, the criminal law is adequate to cover the cases of the same type as *Kamara's* case where there is violence or threats of violence, or wrongful imprisonment of embassy staff. But cases of peaceful occupation of, for example, a waiting room in an embassy, such as occurred recently, may not be adequately covered without an additional offence. It is doubtful whether in every case it would be possible to charge an unlawful assembly as there may be no disturbance nor even the probability of the disturbance, of the public peace, which is an essential element of that offence.

2.88 We recommend that it should be made an offence to enter or remain upon as a trespasser the premises of a diplomatic mission, of a consular post or of an international organisation accorded diplomatic inviolability under the International Organisations Act 1968. The offence should be indictable with a maximum sentence of one year's imprisonment, but also triable summarily with the consent of the accused in terms of section 19 of the Magistrates' Courts Act 1952. There should be a power for a police constable to arrest a person whom he suspects on reasonable grounds to be committing the offence. Proof that the premises are of the nature specified should be by certificate by or under the authority of the Secretary of State.

J. RESISTING A SHERIFF OR BAILIFF

1. General

2.89 There is an increasing tendency[80] for those occupying property without

[80] See paras. 2.26 and 2.37, above.

licence or any other authority seriously to obstruct court officials seeking to enforce court orders for the restoration of property to the owner or person entitled to occupation. This obstruction may be active, involving at least a show of force against the officials, or it may be passive, involving a refusal to leave, sometimes accompanied by a barring and barricading of the means of access.

2.90 It is our view that court officials and sheriffs' officers should know that they have the full power of the law behind them in enforcing court orders of this nature. It is an area of the law in which there should be no room for doubt or argument, particularly as the merits of the case will have been considered before the order was granted, and we think that there should be clear criminal provisions upon which both officials of the county courts and the High Court and sheriffs' officers can rely. A criminal offence in this area with a limited penalty will, we feel, be of use as a deterrent to the flouting of orders of courts, and yet will not carry with it the uncertainties and delays inherent in the law of contempt. The penalty for contempt of court is at large, and in our view it is more satisfactory for there to be a prescribed maximum penalty for conduct of this nature.

2.91 These arguments are, of course, of general application, but we have limited our recommendation to resistance to an officer of the court or sheriff seeking to enforce what can most succinctly be described as orders for possession granted under Order 113 of the Rules of the Supreme Court or under Order 26 of the County Court Rules. It is mainly in relation to the enforcement of orders for possession under these Orders that the problem of enforcement has arisen on a widespread scale. We appreciate that the offence we recommend will put the enforcement of orders of this nature in a special position as compared with other court orders, but it would be plainly outside the scope of our present task to consider the whole question of the enforcement of orders of court in general, and we have not consulted on that question.

2. Detail of offence

2.92 We recommend that it should be an offence to resist or obstruct any sheriff, bailiff or officer of the court (whether of the High Court or of a county court) seeking to execute a writ of possession issued under Order 113 of the Rules of the Supreme Court or a warrant of possession issued under Order 26 of the County Court Rules. The offence should extend to obstruction, so that it would cover passive resistance, such as refusing to move out of the premises and making it necessary for the officers of the court physically to remove those refusing to go. It should be a defence for the defendant to prove that he believed, and had reasonable cause to believe, that the person he resisted or obstructed was not an officer of the court.

2.93 In considering the penalty appropriate for this offence we have borne in mind two factors. In the first place, the objective of the law here is, as we have said, to provide court officials with the unequivocal backing of the law in their duty to enforce orders of court. Once the defendants concerned have been arrested, that objective has in substance been fulfilled, since the court officials may thereupon repossess the premises in question. It seems to us, therefore, that, while a period of imprisonment may be appropriate as a penalty in the most blatant case of defiance of a court order, no purpose would be served in

making this an indictable offence with a high maximum sentence. A second consideration, however, of equal importance, arises out of those cases which have been drawn to our attention upon consultation, where organisers of squatting have moved from house to house in order to ensure resistance to the execution of an order. It seems that this is an increasingly common practice. To deal with instances of habitual resistance to court orders by the same individuals, there must be available an adequate maximum penalty for the offence we recommend. Having regard to these factors, we recommend that the offence should be summary only, but punishable with a maximum of six months' imprisonment or a fine of £400 or both. There should be power in a constable or officer of the court to arrest a person on reasonable suspicion that he has committed this offence.

K. SUMMARY OF RECOMMENDATIONS

2.94 The common law offences of forcible entry and detainer should be abolished, and the Forcible Entry Acts 1381–1623 should be repealed (paragraph 2.50 and clause 15).

2.95 (*a*) It should be an offence without lawful authority to use or to threaten violence for the purpose of securing entry to premises on which another is present, against the will of that person, knowing that another is present and that entry would be against his will (paragraphs 2.53 and 2.65 and clause 7(1)).

(*b*) Measures taken by a person to regain his own living accommodation which, until he was deprived of it, he was using as such, should not make him liable for this offence (paragraph 2.57 and clause 7(3)).

(*c*) Premises should include, as well as land and buildings, any movable structure, vehicle or vessel designed or adapted for human habitation (paragraph 2.64 and clause 14(5)).

(*d*) Violence should include violence against the person and against property (paragraph 2.62 and clause 7(4)(*a*)).

(*e*) Entry should include entry for any purpose (paragraph 2.63 and clause 7(4)(*b*)).

(*f*) The offence should be triable on indictment with a maximum penalty of imprisonment for two years and a fine, and triable summarily with the consent of the defendant under section 19 of the Magistrates' Courts Act 1952 (paragraph 2.67 and clauses 7(5) and 12(1)).

(*g*) There should be a power in a police constable to arrest on reasonable suspicion that a person has committed this offence (paragraph 2.68 and clause 7(6)).

2.96 (*a*) It should be an offence for a person who has entered as a trespasser, and continues as a trespasser upon, premises which another was, until he was dispossessed, lawfully using as his living accommodation, to fail to leave when required to do so by or on behalf of a displaced residential occupier (paragraph 2.75 and clause 8(1)).

(*b*) It should be a defence for the defendant to prove that he believed and had reasonable cause to believe that the person requiring him to leave was not a displaced residential occupier or a person acting on his behalf (paragraph 2.79 and clause 8(2)).

(*c*) The offence should be triable summarily and carry a maximum penalty of imprisonment for six months and a fine of £400, and there should be a power of arrest in a constable (paragraph 2.80 and clause 8(3) and (4)).

2.97 It should be an offence for a trespasser who entered premises as a trespasser to have upon the property, without lawful authority or excuse, an offensive weapon as defined in the Prevention of Crime Act 1953. The offence should be punishable on summary trial with a maximum of three months' imprisonment and a fine of £200, and on indictment with a maximum of two years' imprisonment and a fine. There should be a power of arrest in a police constable on reasonable suspicion that a person is committing this offence (paragraph 2.83 and clause 9).

2.98 (*a*) It should be an offence to enter, or remain upon, as a trespasser the premises of a diplomatic mission, of a consular post, or of an international organisation accorded diplomatic inviolability under the International Organisations Act 1968. Proof that the premises are of the nature specified should be by certificate by or under the authority of the Secretary of State (paragraph 2.88 and clause 10(1), (2) and (4)).

(*b*) The offence should be indictable with a maximum sentence of imprisonment for one year and a fine, and triable summarily with the consent of the defendant under section 19 of the Magistrates' Courts Act. There should be power for a police constable to arrest a person whom he suspects on reasonable grounds to be committing the offence (paragraph 2.88 and clauses 10(5) and (6) and 12 (1)).

2.99 (*a*) It should be an offence to resist or obstruct any sheriff, bailiff or officer of a sheriff, or officer of a county court seeking to execute a writ of possession issued under Order 113 of the Rules of the Supreme Court or a warrant of possession issued under Order 26 of the County Court Rules. It should be a defence for the defendant to prove that he believed and had reasonable cause to believe that the person he resisted or obstructed was not such an official (paragraph 2.92 and clause 11(1), (2) and (3)).

(*b*) This should be a summary offence punishable with a maximum of six months' imprisonment and a fine of £400. There should be power in a constable or officer of a court to arrest on reasonable suspicion that a person has committed this offence (paragraph 2.93 and clause 11(4) and (5)).

PART III

CONSPIRACIES RELATING TO PUBLIC MORALS AND DECENCY

A. INTRODUCTION

3.1 The Law Commission's Working Paper No. 57, "Conspiracies relating to morals and decency," discussed conspiracies to corrupt public morals and conspiracies to outrage public decency. It made provisional proposals as a result of which these two forms of conspiracy would cease to exist. The paper

pointed out that these types of conspiracy were closely connected with certain common law offences: the cognate generic offences at common law of corrupting public morals and outraging public decency, the existence of which is supported by recent authority, together with the narrower, specific offences of indecent exposure at common law, public exhibition of indecent acts and things, keeping a disorderly house, obscene libel and conspiracy to debauch. Codification of the criminal law will necessarily entail the eventual abolition of all common law offences, and it was therefore considered appropriate, in accordance with our *Second Programme of Law Reform*[1], to examine in our working paper these common law offences together with the two types of conspiracy under review.

3.2 This part of the present report now sets out our final recommendations in regard both to conspiracies in the sphere of public morals and decency and to the common law offences referred to in the last paragraph.

3.3 Our work in this area of the law proceeded contemporaneously with that of a Working Party set up by the Home Office to examine the law on Vagrancy and Street Offences. The Working Party issued a Working Paper simultaneously with our Working Paper No. 57, and because of certain overlaps which would otherwise have occurred in the work of the two bodies in this area of the law, we consulted closely with the Working Party and with the Home Office in order to eliminate duplication of effort and to ensure that the proposals made by the Commission and by the Working Party were complementary to each other. We refer later in more detail to this co-ordination of our work, in the section of this report setting out our recommendations[2]. For reasons which will be apparent in that section, we have taken the view that there is no reason why we should not submit our recommendations in advance of any recommendations which may be made by the Home Office Working Party. Accordingly, while fully taking into account the area of the law to which the Working Party's provisional proposals relate, we are proceeding to our final report in relation to public morals and decency independently of their ultimate recommendations.

Scope of the recommendations

3.4 One comment about the scope of our work must be emphasised before we embark on an exposition of the law and the problems to which it has given rise. Our work in the sphere of the law relating to public morals and decency arises directly from the Commission's general consideration of the law of conspiracy and, in particular, from the central recommendation that criminal conspiracies should for the future be limited to those in which the objective is the commission of a criminal offence[3]. This has made necessary the examination of the possible gaps in the law which may result from the implementation of that recommendation and also, incidentally, the examination of the more specific common law offences closely interlinked with the conspiracy offences.

3.5 It will, we think, be clear from the scope of our examination of the law that we are in no way concerned with a *general* review of the law relating to obscenity, whether in connection with obscene books, films, theatrical performances or otherwise. The test of obscenity in relation to books, records and

[1] (1968) Law Com. No. 14, Item XVIII.
[2] See para. 3.101 *et seq.* and para. 3.120 *et seq.*
[3] See para. 1.9, above.

certain categories of films was laid down by Parliament in the Obscene Publications Act 1959[4]. The test of obscenity in relation to presentations of plays was laid down even more recently by the Theatres Act 1968. Many prosecutions are successfully brought every year under the 1959 Act in respect of obscene books[5]. It is true that the test of a "tendency to deprave and corrupt" which is common to the two Acts has been subject to some judicial criticism[6]; but consideration of this criticism would be quite outside the scope of this report, the central concern of which is the law of conspiracy.

3.6 Consequently, while we have found it necessary in the course of our review of the law to recommend certain amendments to legislation dealing with obscenity, the amendments are confined to those which are made necessary because of the gaps which would otherwise arise as a result of the implementation of our other recommendations as to the law of conspiracy and related common law offences. For example, as regards cinematograph exhibitions, it will be seen[7] that we have been concerned in the main only to rectify the problems raised by the application of the law of conspiracy and the common law to films exhibited on licensed and unlicensed premises[8]; and in examining the solution to these problems we have found it unnecessary to review the operation of the existing legislation as a whole.

3.7 With this limitation in mind, we turn to an exposition of the law as it now stands. This exposition comprehends both the two main types of conspiracy charge with which we are concerned in this part of the report and the other common law offences which have a close connection with them. Thereafter we indicate the gaps in the law which would be left by the abolition of these offences and we refer to the provisional proposals made to remedy these gaps in our Working Paper No. 57. In each case we reconsider these proposals in the light of our consultation upon that paper and make our final recommendations.

B. PRESENT LAW

1. Conspiracy

(a) *Conspiracy to corrupt public morals.*

3.8 The offence of conspiracy to corrupt public morals was firmly established as a result of two major cases, *Shaw* v. D.P.P.[9] and *Knuller* v. *D.P.P.*[10]. We describe these cases briefly in the following paragraphs.

Shaw's case

3.9 In *Shaw's* case the defendant published a directory of Soho prostitutes

[4] See s. 1(1); the 1959 Act was amended by the Obscene Publications Act 1964. See further, para. 3.38, below.

[5] In 1971 there were 196 convictions under the Obscene Publications Act. In 1972 this rose to 216, and in 1973 to 250. And during July 1974–June 1975, 123 search warrants under s. 3 of the Act were executed in the Metropolitan Police district alone, resulting in the seizure of 94,000 articles: *Hansard* (House of Commons), 15 October 1975, Vol. 897, Col. 744.

[6] See *e.g.*, *D.P.P.* v. *Whyte* [1972] A.C. 849, 862 *per* Lord Wilberforce; *R.* v. *Police Comr., Ex p. Blackburn* [1973] 1 Q.B. 241, 250 (*per* Lord Denning M.R.) and 257 (*per* Phillimore L.J.).

[7] See para. 3.86, below.

[8] See para. 3.52, below.

[9] [1962] A.C. 220, referred to throughout this part of the report as *Shaw's* case.

[10] [1973] A.C. 435, referred to throughout this part of the report as *Knuller's* case.

which gave their names, telephone numbers, prices and (by means of abbreviations) details of various sexual perversions offered. The booklet, which was sold, was a successful advertising medium which attracted men of all ages. Shaw was prosecuted on an indictment containing three counts—

(i) publishing an obscene article, contrary to section 2 of the Obscene Publications Act 1959;

(ii) living on the earnings of prostitution, contrary to section 30 of the Sexual Offences Act 1956; and

(iii) conspiracy to corrupt public morals.

He was convicted on all three counts.

3.10 The prosecution gave three reasons why the count alleging conspiracy to corrupt morals had been added. First, there was a conflict of authority as to the scope of the offence of living on the earnings of prostitution. Secondly, there was doubt as to whether the directory was covered by the 1959 Act. Finally, a further reason was stated to be that "on this much graver charge of conspiracy the punishment is at large and not limited to the two years under the Act"[11].

3.11 The Court of Criminal Appeal held that there was a generic common law offence consisting of "conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual)"[12]. Conspiracy to corrupt public morals was therefore an offence.

3.12 The House of Lords (Lord Reid dissenting) based its affirmation of the conviction on the grounds that "a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury"[13]. The House took the view that there remained in the courts as custodians of public morals a residual power, where no statute had yet intervened to supersede the common law, to superintend those offences which were prejudicial to the public welfare[14]. It was specifically accepted that the jury was the final arbiter as to whether in any particular case the conduct in question amounted to a conspiracy to corrupt public morals[15].

Knuller's case

3.13 In *Knuller's* case[16] the defendants published a magazine called "IT", the circulation of which was about 38,000. Readers might have included some 10,000 school children, and most of the remaining readership were students or young persons. There was in the magazine one column of advertisements headed "Males". In this were inserted advertisements of which some certainly amounted to solicitation of homosexuals and some to offers of homosexual prostitution[17]. The only real distinction between this case and *Shaw's* case was that the column of advertisements constituted only a small part of the

[11] [1962] A.C. 220, 254.
[12] *ibid.*, at p. 233 (C.C.A.).
[13] *ibid.*, at p. 290 (*per* Lord Tucker).
[14] This statement of principle has to be read in the light of *Knuller's* case: see para. 3.14, below.
[15] *ibid.*, at p. 269 (*per* Viscount Simonds), p. 289 (Lord Tucker), p. 292 (Lord Morris) and p. 294 (Lord Hodson).
[16] [1973] A.C. 435.
[17] This was the view taken of them by the Court of Appeal: see [1972] 2 Q.B. 179.

whole publication whereas, in *Shaw's* case, the Ladies' Directory had been wholly devoted to the advertisement of prostitution. The defendants were charged with two counts of conspiracy: to corrupt public morals and to outrage public decency. The Court of Appeal dismissed their appeal against conviction on both counts. The House of Lords (Lord Diplock dissenting) affirmed the Court of Appeal's decision on the count of conspiracy to corrupt public morals, but (for differing reasons) allowed the appeal on the count of conspiracy to outrage public decency[18].

Elements of conspiracy to corrupt public morals

3.14 One factor relating to the charge of conspiracy to corrupt public morals emerged clearly from *Knuller's* case. It was emphasised in the course of the speeches in the House of Lords that the decision in *Shaw's* case was not to be taken as affirming or lending support to the doctrine that the courts have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment[19]. Whether in fact the elements of the offence of conspiracy to corrupt public morals could be defined with sufficient particularity to prevent conduct of a type hitherto not penalised being punished by means of this kind of conspiracy charge is a question to which we refer again later[20]. But we think it beyond dispute that, as it emerges from *Shaw's* case and *Knuller's* case, the offence is extremely broad in scope. It was emphasised by the House of Lords that the word "corrupt" was a strong one: there must be something like depraving[21]; to "corrupt" means "to debauch the morals of [the magazine's] readers"[22]; and there should be conduct destructive of the very fabric of society, a social "rust and moth"[23]. But in the end it is for the jury to decide whether morals are corrupted. The indictments in the two cases referred to an "intent to debauch and corrupt" morals but, although there must, of course, be an agreement to do the acts charged—such as the publication—the intent to debauch and corrupt appears to be necessarily inferred from these acts.

(b) Conspiracy to outrage public decency

3.15 We have noted that the second count against the defendants in *Knuller's* case charged them with conspiracy to outrage public decency. Although allowing the appeal on this count the majority of the House of Lords held that this type of conspiracy offence (and perhaps also the generic common law offence of outraging decency independent of conspiracy)[24] exists at common law and is capable of being used to prosecute indecent publications which are "lewd, disgusting and offensive". It is not clear from *Knuller's* case precisely what meaning is to be attributed to "outrage to decency". To Lord Morris, printed matter which "could rationally be regarded as lewd, disgusting and offensive" and which would outrage "the sense of decency of members of the public"[25]

[18] We refer again to this second count at para. 3.15, below.
[19] *ibid.*, at p. 457 (*per* Lord Reid), pp. 464–5 (Lord Morris), p. 490 (Lord Simon) and p. 496 (Lord Kilbrandon).
[20] See para. 3.17, below.
[21] [1973] A.C. 435, 456 (Lord Reid).
[22] *ibid.*, at p. 462 (Lord Morris).
[23] *ibid.*, at p. 491 (Lord Simon).
[24] See further para. 3.22, below.
[25] [1973] A.C. 435, 469.

would clearly be caught by the offence. Lord Simon said that the words "outrage" and "corrupt" were both very strong: " 'Outraging public decency' goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people."[26] Whatever may be its precise meaning, however, it seems clear that the test of "depraving and corrupting", whether as embodied in the Obscene Publications Act 1959 or as used in connection with conspiracy to corrupt, is, for the purpose of securing a conviction, a more exacting test than "lewd and disgusting"[27].

(c) Criticisms of the conspiracy charges.

3.16 The charges of conspiracy used in *Shaw's* case and *Knuller's* case have been subject to criticism on a number of grounds. Some, such as the criticism that it has enabled a higher penalty to be imposed than would otherwise have been the case, are common to other forms of conspiracy charge. Others relate more specifically to the particular types of conspiracy charge brought in these cases. It has, for example, been asserted that a charge of conspiracy to outrage public decency may enable prosecutions to be instituted against written matter where, because of the more exacting standard required to obtain a conviction under the statute, a corresponding prosecution would be unlikely to succeed under the Obscene Publications Act 1959. Similarly it has been alleged that the charge of conspiracy to corrupt enables the prosecution to evade in substance, if not in the letter, section 2(4) of that Act, which provides that no prosecution at common law should take place when the essence of the offence is that obscene material was published. And again, it has been pointed out that there is probably no defence of public good available upon these charges of conspiracy as there is under the 1959 Act[28].

3.17 Whatever substance there may be in the criticisms referred to, they are for our present purposes, of minor significance. In the context of the codification of the criminal law and the elimination of those conspiracies having an "unlawful" but not criminal objective, we attach far greater weight to the disadvantages ensuing from the uncertain extent of the two conspiracy offences under consideration. We have pointed out[29] that in *Knuller's* case the House of Lords emphasised that the courts had no residual power so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment. Yet it may be maintained, in our view convincingly, that the existence of these wider, generalised conspiracy offences effectively gives the courts such a residual power in this field. Support for this proposition may be gathered from the two leading cases of *Shaw* and *Knuller* themselves[30].

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[26] [1973] A.C. 435, 469 at p. 495.

[27] See *R.* v. *Secker & Warburg* [1954] 1 W.L.R. 1138 and *R.* v. *Anderson* [1972] 1 Q.B. 304.

[28] See s. 4(1). This is discussed further at para. 3.69, below. For the possibility that such a defence might be available at common law see *Knuller's* case [1973] A.C. 435, 465 (*per* Lord Morris); and as to obscene libel, see *R.* v. *de Montalk* (1932) 23 Cr. App. R. 182.

[29] See para. 3.14, above.

[30] See *Shaw's* case [1962] A.C. 220 for the possibility that a charge of conspiracy might lie in the case of an agreement to further homosexual practices (*per* Lord Tucker at p. 285), to promote lesbianism (*ibid.*), to encourage fornication and adultery (*per* Lord Hodson at p. 294). And see *Knuller's* case [1973] A.C. 435 for a similar possibility in regard to advertisements seeking extra-marital sexual relations (*per* Lord Morris at p. 460). However, in *Kamara* v. *D.P.P.* Lord Cross of Chelsea said that agreement to commit adultery would not amount to a criminal conspiracy: [1974] A.C. 104, 132.

3.18 In our working paper[31] we stated our opinion that residual powers of this kind were incompatible with the objective, stated in Working Paper No. 50 and quoted in Part I of this report[32], that "legal rules imposing serious criminal sanctions should be stated with the maximum clarity which the imperfect medium of language can attain." We conceded that, if the common law in this field were to be abolished, "wicked conduct may go unpunished until legislation can be passed to fill the gap." But this, we said, is "the inevitable price which has to be paid for an acceptable degree of certainty as to the conduct to be penalised by the law. It is one which we believe to be worth paying." Upon consultation, whilst a few disagreed, the large majority of our commentators, some very firmly, agreed with this proposition. While it may be that some among the minority did not appreciate that codification of the criminal law must entail the eventual abolition of all offences at common law, we think it right at this point to explain briefly why in any event we do not believe that widely drafted offences of uncertain scope would be acceptable in this area of the law.

3.19 The main argument put forward in favour of the widely drawn offence is that it would be capable of dealing with anti-social forms of behaviour which may not yet have manifested themselves but which may do so at some future time. That may be so; but it must be observed that the assertion by the House of Lords of the existence of wide offences at common law in *Shaw's* case and *Knuller's* case caused considerable disquiet. Whether that feeling was merited in those particular cases is a matter which in the present context does not concern us[33]. But we think that there would be considerable hostility towards the creation of new offences of uncertain breadth to replace the common law, which might be capable of being used in situations not at present regarded as truly "criminal"; and the very existence of such offences, in our view, would tend to bring the law itself into disrepute. The view expressed by those desirous of having widely drafted offences in this area would evoke more sympathy if it were shown that Parliament was slow to act in situations arousing widespread concern. But this is not the case. Parliament has shown itself willing to enact remedial legislation in recent times both where the operation of existing law reveals unforeseen defects and where new forms of anti-social behaviour have required immediate action[34].

3.20 The view we have taken is reinforced by the fact that, as we shall indicate in the next section of this part of the report[35], the two wide conspiracy offences under consideration have been used either as alternative charges where other charges have also been successfully brought or, alternatively, to fill only minor and easily identifiable lacunae in the armoury of the law. We adhere to the view expressed in our working paper[36], with which a majority of those commenting upon it agreed, that these lacunae can easily be filled by legislation which, in

[31] Working Paper No. 57, para. 44.

[32] See para. 9 of Working Paper No. 57, quoted in para. 1.8, above.

[33] It is relevant to note that in *Shaw's* case the defendant was convicted of two other offences, under the Sexual Offences Act 1956, s. 30 and the Obscene Publications Act 1959; and in *Knuller's* case the defendants could probably have been charged successfully with other offences: see [1973] A.C. 435, 457 (*per* Lord Reid) and 481 (*per* Lord Diplock).

[34] In the area of the law concerning obscenity we cite as an instance of the former the Obscene Publications Act 1964, passed to remedy defects in the Obscene Publications Act 1959 revealed by court decisions; and, as an instance of the latter, the Children and Young Persons (Harmful Publications) Act 1955, passed to combat the epidemic of horror comics.

[35] See section C, below.

[36] See Working Paper No. 57, paras. 44 and 75.

the sensitive sphere of obscenity and public morality, can be confined to narrowly circumscribed offences designed to meet the specific situations for which their need has been demonstrated.

(*d*) *Possible generic common law offences independent of conspiracy*

3.21 In *Shaw's* case it was argued by the prosecution that the conviction of the defendant on a charge of conspiracy to corrupt public morals could be supported "on two alternative grounds: (1) that conduct calculated and intended to corrupt public morals is indictable as a substantive offence and consequently a conspiracy to this end is indictable as a conspiracy to commit a criminal offence; alternatively (2) a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury"[37]. In dismissing the appeal, as we have seen, the Court of Criminal Appeal rested their decision on the first of these grounds[38]. However, the House of Lords held that the conviction could be supported on the second ground and did not decide the case on the first ground. But Lord Tucker said that he was not to be taken as rejecting it[39].

3.22 In *Knuller's* case, the second count in the indictment was one of conspiracy to outrage public decency. As we have indicated, the defendants' appeal against their conviction on this count succeeded, but for widely differing reasons. Lord Reid and Lord Diplock allowed the appeal on the ground that the offence of conspiracy to outrage public decency was an offence unknown to the law[40]; it followed that, in their opinion, no generic substantive offence of outraging public decency existed. Lord Simon of Glaisdale and Lord Kilbrandon allowed the appeal on the ground of misdirection but both held that the offence of conspiracy to outrage public decency existed[41]. In fact, both of these members of the House of Lords went further and held that there existed a substantive common law offence of outraging public decency. Lord Morris (dissenting on this count, because he held that there was no misdirection) was of the opinion that the appellants' counsel had accepted that there was an offence of conspiracy to outrage public decency and he did not consider specifically whether or not a substantive offence existed[42]. He did, however, cite with approval *R.* v. *Mayling*[43] where a conviction for outraging public decency irrespective of conspiracy was upheld by the Court of Criminal Appeal.

3.23 It would seem, therefore, still to be open to the House of Lords to hold that there are no substantive offences of corrupting public morals and outraging public decency[44]. On the present state of the authorities, however, it seems that such offences do exist and that courts of first instance and the Court of Appeal would be bound so to hold. It may be observed that such offences are open to precisely the same criticisms as we have canvassed in paragraphs 3.16–3.20 above, and their retention would in any event be incompatible with the objective

[37] [1962] A.C. 220, 289–290 *per* Lord Tucker.
[38] *ibid.*, at p. 233 (C.C.A.); see para. 3.11, above.
[39] *ibid.*, at p. 290.
[40] [1973] A.C. 435, 457 and 469 *et seq.*
[41] *ibid.*, at p. 493 and p. 497.
[42] *ibid.*, at p. 467.
[43] [1963] 2 Q.B. 717; see para. 3.25, below.
[44] As distinct from the common law offence of public exhibition of indecent acts and things where the indictment may, it seems, state that the exhibition outrages public decency.

of codification. Their abolition would leave no lacunae in the armoury of the criminal law other than those left by the abolition of conspiracy to corrupt and to outrage.

(e) *Relationship between conspiracy and individual common law offences*

3.24 We mentioned in the introduction to this part of the report that we are examining certain common law offences of relatively limited application, in addition to the two generalised conspiracy offences. That examination is made necessary by the very close inter-relationship of all these offences. The offences concerned are (1) indecent exposure at common law, (2) public exhibition of indecent acts and things, (3) keeping a disorderly house, (4) obscene libel, and (5) conspiracy to debauch an individual. There can be no doubt that these offences exist[45]. Indeed, Lord Reid in *Shaw's* case[46] and both Lord Reid and Lord Diplock in *Knuller's* case[47] took the view that the authorities cited in argument in these cases were in all instances examples of one or another of these offences. These same authorities, however, were taken by some other members of the House of Lords[48] to be no more than examples of the generic common law offence of outraging public decency. In view of our recommendation that all these offences, both generic and specific, should be abolished[49], it is unnecessary for us to consider in detail whether this is so. But in order fully to understand the purpose of our recommendations for the creation of new offences, it is necessary to describe the areas of conduct penalised by the more specific common law offences. These are therefore outlined in the following paragraphs.

2. Individual offences at common law

(a) *Indecent exposure*

3.25 The range of conduct falling within common law indecent exposure includes exposure by males and females of the whole body or sexual organs[50], sexual intercourse in public[51], nude bathing[52] and homosexual conduct in public[53]. However, in no reported case relating to sexual intercourse in public have the defendants actually been convicted of the common law offence, and in what appears to be the only reported case involving simply exposure by a female, the indictment was quashed "because nothing appears immodest or unlawful"[54]. In the most recent case, *R.* v. *Mayling*[55], where the indictment referred to an "outrage to public decency", the authorities on indecent exposure were cited. The defendant was convicted in respect of sexual activity in public.

[45] As to pre-*Shaw* commentaries, see *e.g.*, Stephen's *Digest of the Criminal Law* (9th ed., 1950), pp. 171–173, 177, 180; *Russell on Crime* (11th ed., 1958), pp. 1633–43, 1646 *et seq.*

[46] [1962] A.C. 220, 276–277.

[47] [1973] A.C. 435, 458 and 474.

[48] Thus see *Shaw's* case [1962] A.C. 220, 285–89 (*per* Lord Tucker) and *Knuller's* case [1973] A.C. 435, 467 (*per* Lord Morris) and more especially 492–3 (*per* Lord Simon).

[49] See para. 3.143, below.

[50] *e.g.*, *R.* v. *Sedley* (1663) 1 Sid. 168, 1 Keb. 620; *R.* v. *Rouverard* (1830) unrep. (see Parke B. in *R.* v. *Webb* (1848) 3 Cox C.C. 183, 184); *R.* v. *Holmes* (1853) Dears. 207; *R.* v. *Thallman* (1863) 9 Cox C.C. 388.

[51] *R.* v. *Elliot and White* (1861) Le. & Ca. 103. See also *Carnill* v. *Edwards* [1953] 1 W.L.R. 290.

[52] *R.* v. *Crunden* (1809) 2 Camp. 89; *R.* v. *Reed* (1871) 12 Cox C.C. 1.

[53] *R.* v. *Bunyan and Morgan* (1844) 1 Cox C.C. 74; *R.* v. *Harris and Cocks* (1871) L.R. 1 C.C.R. 282.

[54] *R.* v. *Gallard* (1733) W.Kel. 163, where D ran "in the common Way naked down to the Waist".

[55] [1963] 2 Q.B. 717.

3.26 The offence requires a certain number of actual or potential witnesses[56] and an act occurring in a "public" place[57]. This act has to be indecent, but according to the most recent authority, there is no need for the witnesses to say that they were in fact outraged or disgusted by what they saw[58]. The only intention required is the intention to do the act; there is no need to intend to outrage or disgust another. In this it differs from indecent exposure under section 4 of the Vagrancy Act 1824 (at present under review by the Home Office Working Party) which penalises exposure by a male (not necessarily in public) with intent to insult a female.

(*b*) *Public exhibition of indecent acts and things*

3.27 The public exhibition of indecent things seems to have been established as an indictable offence by cases decided in the eighteenth and nineteenth centuries[59]. But two of the cases sometimes cited, *Herring* v. *Walround*[60] and *R.* v. *Clark*[61], concerned dead bodies and therefore might equally well be regarded as within the common law offence of failure to bury a body[62]. Indeed the first of these two cases did not involve a criminal charge at all. But in another case, *R.* v. *Lynn*[63], it was held to be an indictable offence to disinter a corpse from a graveyard, as being highly indecent and *contra bonos mores*, "at the bare idea alone of which nature revolted". And in *R.* v. *Saunders*[64], the defendant showmen were convicted of keeping a booth on Epsom Downs for the purpose of an indecent exhibition to those who paid. In *R.* v. *Grey*[65] a herbalist put in his shop window adjoining the highway a picture of a man covered in eruptive sores, "the effect of which was disgusting to the last degree" and "calculated to turn the stomach". Willes J. held that he could be found guilty of a nuisance even though his motive was innocent and there was "nothing indecent or immoral in the exhibition". In so far as these cases disclose a consistent principle, they seem to indicate a species of public nuisance[66], where to do the act is enough to constitute the offence, and innocent motive is irrelevant.

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[56] See *R.* v. *Watson* (1847) 2 Cox C.C. 376: *held*, exposure to one witness not enough to support an indictment; *R.* v. *Webb* (1848) 3 Cox C.C. 183: *held*, if indictment alleges exposure to more than one witness, this must be proved. But see *R.* v. *Mayling* [1963] 2 Q.B. 717, 724 where it was held that "more than one person must . . . *have been able* to see the act" (emphasis added) which may mean that, for this offence, witnesses need only be potential, not actual.

[57] *e.g.*, the top deck of an omnibus (*R.* v. *Holmes* (1853) Dears. 207); a roof of a private house which would have been seen only from other houses (*R.* v. *Thallman* (1863) 9 Cox C.C. 388); areas within sight of houses (*R.* v. *Reed* (1871) 12 Cox C.C. 1); a place where the public habitually went although without right to do so (*R.* v. *Wellard* (1884) 14 Q.B.D. 63) and also public urinals if the exposure is in fact public (*R.* v. *Harris and Cocks* (1871) L.R.1. C.C.R. 282, but compare *R.* v. *Orchard and Thurtle* (1843) 3 Cox C.C. 248).

[58] *R.* v. *Mayling* [1963] 2 Q.B. 717. Such evidence, if required, could apparently be given by a police officer. What happens if the witness is willing is not clear. In *R.* v. *Wellard* (1884) 14 Q.B.D. 63, D had paid several little girls to go and see him, and in this sense they may have been willing, but were too young to establish "consent", even if it affected liability.

[59] See *e.g.*, Stephen's *Digest* (9th ed., 1950), p. 173; *Russell on Crime* (12th ed. ,1964), p. 1429.

[60] (1682) 2 Cha. Ca. 110.

[61] (1883) 15 Cox C.C. 171.

[62] See *R.* v. *Stewart* (1840) 12 A. & E. 773.

[63] (1788) 2 T.R. 733; and see *R.* v. *Hunter* [1973] 3 W.L.R. 374 (conspiracy to prevent burial). Today Lynn would presumably be guilty of an offence under the Criminal Damage Act 1971; compare *R.* v. *Farrant, The Times* 12 and 15 June 1974.

[64] (1875) 1 Q.B.D. 15.

[65] (1864) 4 F. & F. 73.

[66] Formerly, offences against public morals, including public exhibition of indecent acts, were treated by writers as falling within the rubric of public nuisance, but this is not now always so; compare *Archbold* (38th ed., 1973), para. 3822 and *Russell on Crime* (12th ed., 1964), pp. 1423 and 1429, with Smith and Hogan *Criminal Law* (3rd ed., 1973), p. 620.

3.28 It has recently been established that the showing of a film on licensed premises may be indicted as an indecent public exhibition. In the case of *R.* v. *Jacey (London) Ltd. and Others*[67] the owners and manager of a cinema were charged with, and found guilty of, showing a film depicting grossly indecent performances, although the film had been granted a certificate for public viewing by the Greater London Council. We refer again to this case below[68]. In another recent unreported case[69], the proprietor of a restaurant was found guilty of presenting an indecent exhibition when lesbian acts were performed before customers who then participated in live sex acts in the restaurant. In addition, the participants were convicted of taking part in an indecent exhibition.

(*c*) *Keeping a disorderly house*

3.29 Keeping a disorderly house is a firmly established offence which has been charged at common law for over two hundred years. Formerly, at common law a disorderly house was not defined but included any house which a jury found to be open to and frequented by persons conducting themselves so as to violate law and good order[70]. Where several defendants are concerned in the running of a disorderly house, they have on occasion been indicted for "conspiracy to corrupt the morals of and to debauch persons resorting to" the house[71]. A broad definition was advanced by counsel in *R.* v. *Quinn and Bloom*[72] which the Court of Criminal Appeal accepted—

> "a house conducted contrary to law and good order in that matters are performed or exhibited of such a character that their performance or exhibition in a place of common resort (*a*) amounts to an outrage of public decency or (*b*) tends to corrupt or deprave or (*c*) is otherwise calculated to injure the public interest so as to call for condemnation and punishment."

This definition is, perhaps, in regard to (*c*), incompatible with the decisions in *Shaw's* case and *Knuller's* case as explained in the latter[73]. A further requirement of the offence is that there must be some element of persistence in keeping the house[74].

3.30 A wide variety of premises have been the subject of disorderly house charges. Thus, while brothels are now largely covered by statute[75], common law liability is invoked where premises are made available for sexual activity but may fall short of being a brothel[76]. Again, while public places of refreshment and entertainment, such as public houses, are now in large measure regulated

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[67] Central Criminal Court, 5 July 1975; see *The Times* 6 July. There was in addition a charge of keeping a disorderly house.

[68] See para. 3.47, below.

[69] *R.* v. *Dulieu and Others* (Chelmsford Crown Court, 20 January 1975); see *The Times* 21 January.

[70] *R.* v. *Berg* (1927) 20 Cr. App. R. 38.

[71] *ibid.*, *R.* v. *Dale* (1960) unrep., cited in *Shaw's* case [1962] A.C. 220, 288.

[72] [1962] 2 Q.B. 245, 255 where the court expressly followed the principle of *Shaw's* case as then understood.

[73] See para. 3.14, above. It seems also that heavier sentences are considered appropriate if the matters performed or exhibited fall within (*b*) rather than (*a*): see *R.* v. *Griffin and Farmer* (1974) 58 Cr. App. R. 229.

[74] *R.* v. *Brady and Ram* (1963) 47 Cr. App. R. 196.

[75] Sexual Offences Act 1956, ss. 33–36 and Sexual Offences Act 1967, s. 6.

[76] *R.* v. *Berg* (1927) 20 Cr. App. R. 38; *R.* v. *Prendergast* [1966] Crim. L.R. 169; *R.* v. *Blake* [1966] Crim. L.R. 232; *R.* v. *Andrews* [1967] Crim. L.R. 376. See also *R.* v. *Scully* (Central Criminal Court, 25 Sept. 1974) reported in *The Times* 26 September 1974.

by statute[77], there are occasions where the charge of keeping a disorderly house is considered appropriate[78]. The charge is also brought in some instances of the showing of films, or live entertainment not falling within the definition of a "play" in the Theatres Act 1968[79]. We refer again to these cases below[80]. Gaming houses used to be subject to this common law liability, but this has now been abolished by section 53(2) of the Gaming Act 1968. They are now entirely dealt with by statute[81].

(*d*) *Obscene libel*

3.31 The offence of obscene libel was established at common law early in the eighteenth century[82] and was, until the Obscene Publications Act 1959, the offence charged at common law in respect of obscene publications. In the leading case of *R.* v. *Hicklin* the test of obscenity was defined as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such a publication might fall"[83].

(*e*) *Conspiracy to debauch an individual*

3.32 Three cases appear to have established that it is an offence to conspire to debauch an individual or, as Lord Reid put it in *Shaw's* case, "to conspire to seduce a young girl"[84]. The conduct in these cases would today most probably be charged as a contravention of statutory provisions which have been enacted since they were decided[85], and the defendants would be liable as principals or secondary parties, or for attempting to commit the offences.

C. CONSPIRACY AND COMMON LAW OFFENCES: THEIR PRESENT FUNCTIONS AND RECOMMENDATIONS FOR THEIR REPLACEMENT

3.33 Since the decision in *Shaw's* case[86] charges of conspiracy to corrupt public morals and also (as we shall point out) conspiracy to outrage public decency have been used to penalise a variety of activities. In the present section of this paper we shall describe what those activities are and indicate why, having regard to the availability of the more specific common law offences

[77] See Gaming Act 1845, s. 11; Public Health Acts Amendment Act 1890; Home Counties (Music and Dancing) Licensing Act 1926; Hypnotism Act 1952; London Government Act 1963, s. 52 and Sch. 12; Licensing Act 1964, s. 4 and ss. 175–177; Private Places of Entertainment (Licensing) Act 1967; Late Night Refreshment Houses Act 1969, ss. 7–9. All save the Acts of 1845, 1964 and 1969 have been amended by the Local Government Act 1972.

[78] See *e.g.*, *R.* v. *Griffin and Farmer* (1974) 58 Cr. App. R. 229, n. 73, above.

[79] See *R.* v. *Brady and Ram* (1963) 47 Cr. App. R. 196, and also para. 3.36, below and n. 67, above.

[80] See paras, 3.36 and 3.47, below.

[81] Betting, Gaming and Lotteries Act 1963 and Gaming Act 1968.

[82] See *R.* v. *Curl* (1727) 2 Str. 788; 1 Barn. K.B. 29.

[83] (1868) L.R. 3 Q.B. 360, 371, *per* Lord Cockburn C.J.

[84] [1962] A.C. 220, 277. The cases are *R.* v. *Delaval* (1763) 3 Burr. 1434; *R.* v. *Mears and Chalk* (1851) 4 Cox C.C. 423, 2 Den. 79; and *R.* v. *Howell* (1864) 4 F. & F. 160.

[85] Notably Sexual Offences Act 1956, ss. 22–24 (procuring a woman to become a prostitute, procuring a girl under 21, detaining a woman against her will in a brothel) and Children and Young Persons Act 1933, s. 3 (allowing a young person to reside in a brothel).

[86] [1962] A.C. 220; see para. 3.9, above.

already described and to the existence of legislation dealing with matters of obscenity and indecency, it was thought necessary to bring the charges of conspiracy. We shall, in addition, describe other activities in the area of public morals and decency which at present can be penalised only by charges of conspiracy or the related common law offences. In relation to each of these varieties of activity we indicate what conduct should, in our view, be subject to criminal sanctions for the future, and we make recommendations for legislative changes which would enable the conspiracy offences and both the wide and the more specific common law offences to be abolished.

1. Cinematograph exhibitions

(a) The conspiracy cases

3.34 Some forty cases between *Shaw's* case and *Knuller's* case involved charges of conspiracy to corrupt public morals or to outrage public decency or both. Only one of these was reported[87]. The Director of Public Prosecutions has made available to us the details of these cases, thus enabling us to determine why the charges of conspiracy in them were thought to be necessary.

3.35 Of these cases, by far the largest group (some two-thirds) related to the showing of pornographic films on private, unlicensed premises to which members of the public were admitted on payment. Charges in these cases were brought variously against the organisers, projectionists and doormen concerned with the shows, and against touts soliciting custom. In a few of these cases, some of the defendants were also found guilty of other offences, such as keeping a disorderly house or conspiracy to outrage public decency. Some defendants were also found guilty of conspiracy to corrupt public morals in relation to "live sex shows" being held on the same premises.

3.36 A more detailed description of a representative sample of this group of cases will indicate how the conspiracy charges were brought, either in isolation or as alternatives to other charges at common law or under statute. We select four such cases, in three of which the premises concerned were in Soho. In the first case[88] a film projectionist, his receptionist, his money collector and fourteen touts were all charged with conspiracy to corrupt; some were also charged with conspiracy to outrage public decency and keeping a disorderly house. All save three touts were convicted of conspiracy to corrupt public morals. The other charges were not proceeded with save against two of the touts for keeping a disorderly house, both of whom were convicted. In the second case[89] a projectionist, doorman and tout were charged with conspiracy to corrupt and conspiracy to outrage; the pleas of not guilty to the first charge were accepted, but all pleaded guilty to the second. In the third case[90] on similar facts a projectionist and three touts were all found guilty both of conspiracy to corrupt and of conspiracy to outrage. The last case[91] is a typical

[87] *R.* v. *Anderson* [1972] 1 Q.B. 304 (the "Oz" case).
[88] *R.* v. *Caney and Others:* Central Criminal Court, 27 July 1966.
[89] *R.* v. *Kelly and Others:* Central Criminal Court, 19 December 1972. The indictment for conspiracy to outrage in this, and in some other cases, imported at the same time the concept of corrupting and depraving: the defendants "conspired together . . . to commit acts outraging public decency by exhibiting certain lewd . . . films . . . the exhibition whereof would have tended to corrupt and deprave [Her Majesty's] subjects".
[90] *R.* v. *Barry and Others:* Central Criminal Court, 23 September 1966.
[91] *R.* v. *Ledbury and Others:* Gloucester Assizes, 4 July 1967.

in that the premises were in Gloucester, where the defendants were tried. A projectionist and tout were found guilty on several counts of conspiracy to corrupt, one of which related also to a "live sex show". The defendants' pleas of not guilty to charges of keeping a disorderly house and of offences under section 2(1) of the Obscene Publications Act 1959[92] were accepted.

(*b*) *The Obscene Publications Act 1959*

3.37 The conspiracy charges in the cases described above were brought because of the existence of certain defects in the Obscene Publications Act 1959, which made it impossible to bring charges under the Act even though it seems probable that the Act had been intended to cover most of the situations which arose in these cases.

3.38 By section 2 of the Obscene Publications Act, any person who publishes an obscene article, whether for gain or not, commits an offence[93]. For the purposes of the Act, an article is by section 1(1) deemed to be obscene "if its effect or (where the article comprises two or more distinct items) the effect of any one of these items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it". Under section 1(2), an "article" means "any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures". The test of obscenity embodied in the Act is similar but not identical to that propounded in *R.* v. *Hicklin*[94] as the test for the common law offence of obscene libel. But so long as the Act is in force, a charge at common law cannot be brought in respect of an "article" which is "published", since section 2(4) of the 1959 Act provides that "a person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene". Section 1(3)(*b*) of the 1959 Act provides that a person "publishes" an article, who "in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it". There is a proviso to section 1(3)(*b*) which exempts from its operation—

(i) "anything done in the course of television or sound broadcasting"; and

(ii) "anything done in the course of a cinematograph exhibition . . . other than one excluded from the Cinematograph Act 1909 by" section 7(4) of that Act.

As to (i), television and broadcasting are subject to their own system of controls, statutory and non-statutory[95], and we do not refer to them again in the present context.

3.39 The position as to films is more complicated. The Cinematograph Act 1909 provides by section 1 that "no cinematograph exhibition shall be given

[92] Publishing or possessing for publication an obscene article; see para. 3.38, below.
[93] The maximum penalties are on summary conviction £100 or six months' imprisonment and on indictment a fine and three years' imprisonment (s. 2(1)).
[94] (1868) L.R. 3 Q.B. 360; see para. 3.31, above.
[95] The BBC by Charter of 26 March 1964, varied in 1974 (see (1964) Cmnd. 2385 and (1974) Cmnd. 5721) and the IBA under the Independent Broadcasting Authority Act 1973; see ss. 4–5 of that Act.

other than in premises licensed for the purpose". By section 3, penalties[96] for contravention are provided. Section 7 of this Act and section 5 of the Cinematograph Act 1952 exempt certain premises from the requirement that they must be licensed. The main exemptions are in respect of—

(*a*) exhibitions to which the public are not admitted, provided by section 5(1) of the Cinematograph Act 1952. It is this provision which allows clubs to exhibit films without a licence;

(*b*) exhibitions to which the public are admitted without payment, provided by the same section[97];

(*c*) exhibitions in a private dwelling-house to which the public are not admitted whether on payment or otherwise, provided by section 7(4) of the Cinematograph Act 1909;

(*d*) exhibitions on premises on not more than three occasions in any week given by an exempt organisation, for which provision is made by section 5(3) of the 1952 Act. An exempt organisation under section 5(4) is one which is certified to be a non-profit-making organisation by the Commissioners of Customs and Excise.

3.40 The exhibition of a film on licensed premises (to which we refer again below) was not intended to be covered by section 1(3)(*b*) of the 1959 Act[98]. But the evident object of the proviso to section 1(3)(*b*), to include other exhibitions of films within the scope of the Act, was not achieved. As a consequence of that proviso, the only film exhibitions to which the 1959 Act does apply are those within category (*c*) in the last paragraph, exhibitions in a private dwelling-house to which the public are not admitted, whether on payment or otherwise. It does not apply to exhibitions on other exempted premises or occasions, such as exhibitions by commercial clubs, exempted from licensing requirements by virtue of the Cinematograph Act 1952. Furthermore, it does not apply to exhibitions on premises which, in breach of the provisions of the 1909 Act, are not licensed. This means that the only penalty available (without recourse to conspiracy to corrupt) for showing an obscene film on (illegally) unlicensed premises is the monetary penalty provided by the 1909Act [99]. This clearly unintended lacuna in the proviso is the reason why the charges of conspiracy to corrupt public morals described above were brought.

(c) Proposals in Working Paper No. 57 and subsequent developments.

(i) *Proposals in Working Paper No. 57*

3.41 Our Working Paper No. 57 put forward certain proposals to eliminate the lacuna in the law described above which, at the time when that paper was

[96] A fine of £200; see Criminal Justice Act 1967, s. 92(1) and Sch. 3, Part I. The licence (if any) may also be revoked by the local council: see s. 3 of the 1909 Act as amended by Local Government Act 1972, s. 204(5).

[97] By virtue of s. 5(2) of the 1952 Act the first two exemptions do not apply to exhibitions for a children's club, unless the exhibition is in a private dwelling or given as part of the activities of an educational or religious institution.

[98] See para. 3.46, below.

[99] See n. 96, above. It may also be that a charge of obscene libel would lie. Sect. 2(4) of the 1959 Act excludes charges of common law offences only where the essence of the offence is the *publication* of obscene matter; but exhibition of these films is, by virtue of the proviso to s. 1(3)(*b*), not a "publication" for the purposes of the Act. See further Zellick, "Films and the Law of Obscenity" [1971] Crim. L.R. 126.

completed for publication[100], were thought by the Commission to be adequate for that purpose. Subsequent developments, however, have shown that those provisional proposals would not of themselves eliminate the problems which have since arisen in this area of the law.

3.42 Briefly, our provisional proposals involved the extension of the Obscene Publications Act to the exhibition of all films[101] save for exhibitions on licensed premises. In the result, the exhibition of a film having a certificate for viewing granted by the British Board of Film Censors or by local authorities would not, therefore, on our provisional proposals have been subject to criminal sanctions. The recent developments which have caused us to reconsider these proposals are set out in the following paragraphs.

(ii) *Possible changes in licensing arrangements by local authorities*

3.43 We have seen that the Cinematograph Act 1909 provides that, with certain stated exceptions, cinematograph exhibitions may only be given in premises licensed for the purpose. Licensing arrangements are in the hands of local authorities by virtue of section 2 of the 1909 Act. In granting licences they are bound to give effect to the requirements of section 3 of the Cinematograph Act 1952[102]. This makes it the duty of the authorities, in granting licences, to impose conditions or restrictions prohibiting the admission of children to exhibitions of films designated by them as unsuitable for children under sixteen. In practice, councils usually impose such conditions in relation to children under eighteen, in accordance with the Home Office's Model Licensing Conditions mentioned below. But these requirements do not affect the discretionary powers of licensing authorities to impose other conditions and restrictions in the grant of licences under the 1909 Act[103]; and it is under these discretionary powers that individual local councils may regulate the content of films for exhibition to various audiences, including adults. Normally, approval is given if the films have the certificate for viewing granted by the British Board of Film Censors[104], a non-statutory body which acts on behalf of both the film industry and the local authorities with the traditional consent of both. Since licensing in England and Wales is exclusively on a local basis, all complaints regarding the Board's decisions on the part, for example, of distributors and exhibitors are, in practice, made to individual local authorities. Thus, in cases where the Board's decision is not accepted, local councils have the power to grant their own local certificates or, alternatively, to refuse certificates. They usually exercise this power in accordance with criteria laid down by the Home Office in its Model Licensing Conditions[105]. These

[100] In August 1974.

[101] To this we suggested a small exception relating to the showing of films on a domestic occasion in private premises to which we refer at para. 3.77, below.

[102] Exhibitions in licensed premises must also comply with regulations made by the Secretary of State under s. 1 of the 1909 Act in relation to the matters specified in s. 2 of the Cinematograph Act 1952: *i.e.*, matters of safety and the health and welfare of children. See Cinematograph (Safety) Regulations 1955, S.I. 1955 No. 1129 as amended, and Cinematograph (Children) (No. 2) Regulations 1955, S.I. 1955 No. 1909.

[103] See Cinematograph Act 1952, s. 3(2).

[104] We refer to this hereafter as the Board.

[105] The current Model Licensing Conditions for use by local authorities require (inter alia) that no film be exhibited unless it has received a U, A, AA or X certificate of the Board, or is a current newsreel. But other films may, notwithstanding these conditions, be exhibited if the licensing authority's permission is first obtained and any conditions attaching to it are complied with.

conditions are advisory, not mandatory, in character. In 1970 the Home Office Model Licensing Conditions were revised, with the unanimous consent of individual local authorities, to provide that: "No person apparently under the age of 18 years shall be admitted to any exhibition at which there is to be shown any film which has received an X certificate from the British Board of Film Censors". For practical purposes, then, the discretionary powers of local authorities operate in relation to films exhibited to persons aged eighteen and over.

3.44 At its meeting on 28 January 1975 the Greater London Council considered a proposal that it should cease to exercise its discretion to censor films for adults and that its Film Viewing Board should be abolished. The resolution to this effect was, however, defeated, and the Film Viewing Board therefore retains its discretionary power to censor films in accordance with the criteria laid down by the G.L.C. Licensing Committee[106]. It is believed that, had the resolution referred to above been carried, some other local authorities in major urban centres would have taken steps to follow a similar course.

3.45 In this present review of the law of conspiracy, we are in no way concerned with the powers and duties of local authorities in relation to cinematograph exhibitions. The action of the G.L.C., however, is of relevance to our review of the law to this extent: if local authorities cease to exercise their discretionary powers in regard to censorship, it is clear that any proposal to abolish the relevant common law offences and to exclude from the sanctions of the criminal law the showing of an obscene film on licensed premises (as we proposed in Working Paper No. 57) would leave some film exhibitions, at any rate in certain areas of the country, subject neither to the criminal law nor to the censorship effected by the grant of local certificates. This possibility was not envisaged at the time when our provisional proposals were put forward.

(iii) *Application of the common law to cinematograph exhibitions on licensed premises*

3.46 We have mentioned that it was not the intention of Parliament that section 1(3)(*b*) of the Obscene Publications Act 1959 should apply to the exhibition of films on licensed premises which were subject to local authority certificates or to the censorship of the Board. That much is evident from the debates upon the Bill. It is clear[107] that both the sponsors and the then Government were content that such exhibitions should be excluded from the definition of "publication" in section 1(3)(*b*) and should be left subject to such sanctions as there might be at common law—since they "have in practice not been prosecuted in the past and . . . are most unlikely, so far as can be contemplated, to be prosecuted in the future"[108].

3.47 The expectation that cinematograph exhibitions on licensed premises would not be prosecuted at common law has, as we have seen[109], proved to be unfounded. The film, the exhibition of which in a licensed cinema has recently been held to be an indecent public exhibition at common law, had a certificate

[106] We refer again to these criteria at para. 3.59, below.
[107] See *Hansard* (House of Lords), 22 June 1959, Vol. 217, Col. 73 *et seq.* and (House of Commons), 22 July 1959, Vol. 609, Col. 1446.
[108] *ibid.*, (House of Lords), Col. 74 (*per* Viscount Kilmuir, L.C.).
[109] See para. 3.28, above.

for exhibition granted by the G.L.C., although refused one by the Board. A private prosecution is now proceeding on charges of the same common law offence against the owners of a licensed cinema for exhibiting a film granted a certificate by the Board; the President and former Secretary of that organization were also charged as aiders and abettors in the commission of that offence, but these charges were dismissed in the committal proceedings. The possibility of such proceedings was in fact envisaged as long ago as 1956[110].

3.48 Our recommendation for the abolition of the common law offences in this area means that we have to consider whether adequate control of films shown on licensed premises is provided by existing censorship arrangements, or whether some criminal sanction is required.

(iv) *Distribution of films*

3.49 Section 1(3)(*a*) of the Obscene Publications Act 1959 provides that, for the purposes of the Act, a person publishes an article who "distributes, circulates, sells, lets on hire, gives or lends it, or who offers it for sale or for letting on hire". Differing opinions have been expressed as to whether this paragraph, as distinct from paragraph (*b*) which has already been discussed, applies to films intended for exhibition upon licensed premises[111]. Although the position is far from clear, it may be that Parliament did contemplate that the provision should so apply[112].

3.50 Further light on the question was shed by two decisions given upon the private prosecution brought under the 1959 Act against the distributors of the film "Last Tango in Paris"[113]. In the first decision upon a preliminary point, Lord Widgery C.J., as we noted in Working Paper No. 57[114], held that a publication under section 1(3)(*a*) of a film to be shown on licensed premises could form the subject of a charge under the Act, because the proviso to section 1(3)[115] applied, not to paragraph (*a*) but to paragraph (*b*). The exclusion of films upon licensed premises from the ambit of what may be "published" therefore applied only to the "showing" and not to the "distributing". But in the second decision in November 1974 Kenneth Jones J. held that, since the type of publication relied on was letting on hire to the cinema licensee, and since there was no evidence to show that the film would have tended to deprave or corrupt him, the necessary elements of the offence, which required "publication" of an article which was "obscene" within the meaning accorded to the term in section 1(1) of the Act[116], had not been established. The distributor could not, therefore, be liable.

3.51 The liability under section 1(3)(*a*) in respect of films shown on licensed premises is not a matter which is directly in issue as a consequence of the present exercise upon conspiracy and related common law offences. Nevertheless, if as

[110] See Minutes of the House of Commons Select Committee on Obscene Publications, 1956, p. 31, quoted in Zellick, "Films and the Law of Obscenity" [1971] Crim. L.R. 126, 147.

[111] See *e.g.*, Zellick *op. cit.*, pp. 131–134.

[112] See *Hansard* (House of Commons), 24 April 1959, Vol. 604, Cols. 811–812.

[113] The charges were brought against United Artists Corporation; the first decision was reported in *The Guardian* 22 May 1974, the second in *The Times* 28 November 1974. The transcript of the latter has been made available to us. The question is now under reference by the Attorney General to the Court of Appeal under the Criminal Justice Act 1972, s. 36.

[114] Para. 67, n. 161.

[115] See para. 3.38, above.

[116] See para. 3.38, above; see further, para. 3.62, below.

a result of our examination of the law in this area new criminal offences are shown to be required, it will be necessary to consider whether persons who distribute films for exhibition should be under the same liability as those who actually exhibit them.

(d) The range of problems for consideration.

3.52 At the risk of repetition, we think it right to re-emphasise at this point that this part of the present report is not concerned with a review of the law relating to obscenity as a whole. We are not proposing to alter the test of obscenity laid down by the Obscene Publications Act 1959 or the Theatres Act 1968[117]. Nor are we concerned with the definition of what constitutes an "article" under the 1959 Act, or the terms of the basic offence and the public good defence provided by that Act. These matters are not under review. Essentially we are concerned only to rectify the problems raised by the application of the law of conspiracy and the common law offences to films exhibited on licensed and unlicensed premises. Incidental matters which arise in these contexts must, of course, be considered, but there seem to us to be no more than four limited problems which require our close examination. These are—

(i) the criminal offences, if any, which should apply in respect of the exhibition of films;

(ii) if criminal offences are provided in respect of (i), the possible defences which should also be provided;

(iii) if criminal offences are provided in respect of (i), possible exceptions to the general application of those offences;

(iv) possible restrictions upon institution of proceedings.

We examine these in turn.

(i) *Criminal liability in respect of the exhibition of films*

3.53 The proposals made in Working Paper No. 57 have to some extent been affected by the subsequent developments described above. This does not necessarily mean that they would not, with some modification, be a possible solution to the problem under discussion. Nevertheless, we think the recent developments referred to have made it necessary to consider the whole range of possible options and the arguments which may be raised for and against them—bearing in mind, however, that we are not here concerned with possible modifications of the basic schemes provided by the Obscene Publications Act 1959 and the Theatres Act 1968. There seem to us to be at least five distinct procedures by which it would be possible to provide some control of the exhibition of films, and we consider them separately in the following paragraphs.

Absence of criminal sanctions

3.54 The first possibility would be to leave films outside the purview of the criminal law altogether[118]. Censorship would be provided only by the grant

[117] We discuss this Act further at para. 3.88, below.

[118] The only exception to this would be the monetary penalties provided by the Cinematograph Act 1909; see para. 3.39, above.

of local authority certificates, either in accordance with the individual criteria laid down by councils for their own viewing committees, or by grant of certificates to those films which had the approval of the British Board of Film Censors. In referring to this possibility, we bear in mind that this course was favoured by the Working Party on the Obscenity Laws convened by the Arts Council in 1969; a draft Bill annexed to the Working Party's Report was intended to give effect to its recommendations. And it is also relevant to note that an Obscene Publications (Amendment) Bill introduced in 1969 was intended to have the same effect. In neither case was it intended to limit the scope of the Bills to films; their provisions were intended to abolish or repeal virtually all existing offences relating to obscenity.

3.55 While we are aware that this course would have some support, it is not one which we can recommend in the present context. A serious objection to it, bearing in mind that we are not dealing with legislation relating to obscene matters in general, is that it would single out films alone from those things included in the term "article" under the 1959 Act[119] as objects for the removal of penal sanctions. Even more importantly, it would create a fundamental distinction between the treatment of film exhibitions and performances of plays, which are subject to the Theatres Act 1968. While not ruling out the possibility of exempting the exhibition of films from criminal sanctions, we think this could only properly be considered in the context of a general review of legislation relating to obscenity at some future date. Accordingly, we do not explore this possibility further.

Extension of licensing arrangements

3.56 The Cinematograph and Indecent Displays Bill, which was debated at length in Parliament during 1973, provided by clause 1 for all cinematograph exhibitions promoted for private gain to be subject to the control of the licensing authorities; if payment was required for admission and it was publicly advertised, there was to be a rebuttable presumption that the exhibition was promoted for private gain. By the terms of the Bill, all other film exhibitions (such as those given by film societies) were to be subject to the Obscene Publications Act 1959.

3.57 It is clear that the provisions of this Bill were intended to provide effective control of those film exhibitions which have in recent years been the subject of conspiracy charges. But we stated in our working paper[120] that we were unaware of any demand for an extension of licensing arrangements and that there might be some practical difficulties in the implementation of this course. This led us provisionally to reject it. Recent developments have persuaded us that our provisional view was correct. It is clear that the desirability of local authorities continuing their own censorship control is being questioned within some of these bodies, and at a time when this question is being discussed, it would seem inopportune to seek to elaborate this form of control. There is, in addition, the question raised by the recent successful prosecution of a film having a local authority certificate whether, assuming that the local authority exercises this function, it does so upon acceptable criteria. We discuss this further in the following paragraphs.

[119] Sect. 1(2); see para. 3.38, above.
[120] Working Paper No. 57, "Conspiracies relating to morals and decency", para. 87.

The proposals in Working Paper No. 57 and possible variants

3.58 The working paper's proposals, as we have indicated, involved extension of the Obscene Publications Act 1959 to the exhibition of all films save those given on licensed premises. At the time our working paper was completed for publication we were unaware of the unwillingness on the part of certain local authorities to exercise control over films to be shown on licensed premises. If an authority were to cease to exercise this control[121], abolition of the common law offences would mean that the showing of films on licensed premises would not be subject to any legal control. It was to meet this situation that it was suggested to us that the 1959 Act should apply in every case to film exhibitions except where the exhibition had been certified for viewing either by the British Board of Film Censors or by the licensing authority for the premises in which the exhibition was shown. Thus if in any case the local authority had divested itself of this power the 1959 Act would apply, unless the film had been certified by the Board. For two reasons we do not think we can accept this. In the first place, it does involve giving statutory recognition to the Board, which is at present an entirely non-statutory body. This objection applied equally to our own provisional proposal, but we are persuaded that it would be an unsatisfactory course having regard to the history of the body[122] as an entirely voluntary one which acts essentially as an adviser to the local authorities rather than as an official censor. Of course, that objection would not apply to a statutory censorship board acting in an official capacity. Such a board has been mooted from the earliest history of the cinema[123], but we do not advert to this possibility further save to point out that official censorship of films is but one step from official censorship of the other articles, including books, listed in section 1(2) of the 1959 Act.

3.59 The second objection to the partial extension of the 1959 Act under discussion lies in the criteria that may be adopted for the control exercised by local authorities. The criteria upon which the G.L.C. viewing committee bases itself[124] are clearly intended to have regard to the effect of current legislation relating to obscenity and other matters. But we understand that at least one local council has decided that it will for the future, without viewing films, approve for local exhibition any film either on conditions implicit in the certificate issued by the Board or, if it has no such certificate, as a film with an X certificate. It seems reasonably clear that in these circumstances the 1959 Act, as so extended, would not cover films which have no Board certificate in cases where the local authority, in divesting itself of any responsibility for exhibition, has exercised no effective control. Such films would, therefore, effectively be subject to no control at all. Since we have taken the view that, as a matter of principle it would, having regard to the continued sanction of the 1959 Act and the Theatres Act 1968 in other fields, be anomalous for films alone to be excepted from control by the criminal law, the partial extension of the 1959 Act would clearly be unsatisfactory.

[121] In fact a proposal to this effect was defeated at a meeting of the G.L.C. in January 1975. See para. 3.44, above.

[122] See March Hunnings, *Film Censors and the Law* (1967) p. 48 *et seq.* and Phelps, *Film Censorship* (1975).

[123] March Hunnings, *op. cit.* p. 55 *et seq.*

[124] No film is passed for exhibition where, in brief, (i) it is likely to encourage or incite to crime, to lead to disorder or to stir up hatred against any section of the public, or (ii) taken as a whole, its effect would be such as to tend to deprave and corrupt persons who are likely to see it.

Extension of the Obscene Publications Act 1959

3.60 The extension of the Obscene Publications Act 1959 to penalise the exhibition of films which are obscene within the meaning of the Act would appear to be the simplest means of dealing with the exhibition of films when our recommendations in regard to conspiracy and related common law offences are implemented. Subject to our comments in the following paragraphs, we further take the view that it would be the most satisfactory course. In brief, it would mean that all exhibitions of films, whether or not having the certificate of the Board or subject to local authority approval, would be subject to the test of whether they tended to deprave or corrupt[125].

3.61 We can envisage certain objections to this course. The most obvious are that it is either too stringent, or, alternatively, not stringent enough. The first criticism, it seems to us, would really amount to an objection to the criminal law being applied at all to the exhibition of films. While we are aware of the support that this view commands, we have stated already that it is not one which commends itself to us in the present context. Nevertheless, it is obvious that in certain situations, particularly in domestic circumstances, it may be inappropriate for the Act to operate. This is a matter to which we refer again later[126]. The opposite view, that since the 1959 Act would provide insufficient protection, an alternative criterion should be applied, is also one with which we deal separately[127]. But it is worth pointing out, in the first place, that "deprave and corrupt" under the Act has, at least potentially, a wide meaning. As Salmon L. J. remarked in a leading case[128]: "The depravity and corruption may . . . take various forms. It may be to induce erotic desires of a heterosexual kind or to promote homosexuality or other sexual perversions or drug-taking or brutal violence". Secondly, some of the misgivings over the operation of the Act in other spheres may relate to the way in which the defence of public good in the Act has been used. This, too, is a question with which we deal in more detail later[129]. Finally, we think it important to note that one criticism of the manner in which the Act has operated in recent years[130] may be of less account in the context of the control of films. This criticism relates to the "aversion argument" sometimes raised by the defence upon charges under the Act in respect of obscene material, particularly books, to the effect that many people are so revolted by such material as to be turned away from it; hence the material cannot fall within the definition of obscenity—"to deprave and corrupt persons who are likely . . . to read it". But in most of the cases in which the question of the obscenity of films is likely to be in issue, the persons "likely to see" them are those who will have in fact paid (whether directly or through membership of a club) in order to do so. It will, we think, be at least difficult to argue that the persons "likely to see" the films will have been so revolted as to be turned away from them, when those very persons have paid, perhaps heavily, in order to see the exhibition of the films in question.

3.62 A further difficulty lies in the question of the distribution of films. We have seen that is has recently been held that, while section 1(3) (*a*) of the 1959

[125] See para. 3.38, above.
[126] See para. 3.77, below.
[127] See para. 3.67, below.
[128] *R.* v. *Calder and Boyars* [1969] 1 Q.B. 151, 172.
[129] See para. 3.69, below.
[130] See *R.* v. *Police Comr., Ex p. Blackburn* [1973] 1 Q.B. 241, 250 (*per* Lord Denning M.R.).

Act (which includes within the modes of "publishing" an article both distributing and letting on hire) is capable of application to films intended for exhibition, no offence was committed by a distributor under section 2(1) of the 1959 Act when the distributor "published" a film by letting it on hire to the licensee of a cinema. This was because section 1(1) of the Act, when it refers to "persons likely to see" the film, meant persons likely to see it as a result of a publication *to them*; and in this instance there was no evidence that the film would have tended to deprave or corrupt the licensee or even that he saw it. Hence the prosecution were unable to prove the elements of the offences charged[131].

3.63 In considering this problem, it must be borne in mind that the practical effect of our recommendation to extend the 1959 Act to the publication of films generally will be to eliminate the consequences of the proviso to section 1(3)(*b*)[132], which at present excludes from the scope of "publication" for the purposes of the Act the "showing, playing or projecting" of films upon licensed premises. Consequently the showing of an obscene film by a cinema licensee to a cinema audience will, in an appropriate case, constitute an offence.

3.64 Where a charge is brought under section 2(1) of publishing an obscene article, section 2(6) of the 1959 Act[133] applies, so that, not only the original publication may be considered, but any further publication if the latter could reasonably have been expected to follow the former. And where the charge is one of having an obscene article for publication for gain, section 1(3)(*b*) of the Obscene Publications Act 1964[134] applies, so that the obscenity of an article is to be determined by reference to the initial publication contemplated and to such further publication as could reasonably be expected to follow that initial publication.

3.65 In the context of proceedings against a distributor similar upon the facts to those instituted against United Artists' Corporation, the effect of our recommendations, taken with the provisions set out in the last paragraph, will be as follows—

(*a*) In regard to a charge of publishing an obscene article, the further publication of the film by the licensee in showing it to the cinema audience is one which could "reasonably have been expected", and it may therefore be taken into account; hence, if there is evidence that the film would be likely to tend to deprave or corrupt that audience, the distributor himself may be found guilty.

(*b*) In regard to a charge of having in possession an obscene article for publication, a further publication of the film on the part of the licensee by the showing of it to a cinema audience is one that "could reasonably be expected to follow" the publication which it may be inferred that the

[131] The two counts were (1) having an obscene article for publication for gain, and (2) publishing an obscene article, both contrary to section 2(1) of the 1959 Act as amended by the Obscene Publications Act 1964.

[132] See para. 3.38, above.

[133] "In any proceedings against a person under this section the question whether an article is obscene shall be determined without regard to any publication by another person unless it could reasonably have been expected that the publication by the other person could follow from publication by the person charged."

[134] "The question whether the article is obscene shall be determined by reference to such publication for gain of the article as in the circumstances it may reasonably be inferred [that the defendant] had in contemplation and to any further publication that could reasonably be expected to follow from it, but not to any other publication."

distributor had in contemplation. Hence, again, if there is evidence that the film would be likely to tend to deprave or corrupt that audience, the distributor may be found guilty.

3.66 We therefore conclude that our recommendations will effectively remedy the gap in the law which has been revealed by recent cases; and, provided that the distributor has available to him the same defences and provisions with regard to consent to institution of proceedings as are under our recommendations to be available to all other defendants, we believe that this is as a matter of policy the desirable result.

Application of an alternative test

3.67 It has been represented to us that there are valid reasons for requiring a less stringent test in order to secure a conviction in respect of the exhibition of films than the test of a "tendency to deprave and corrupt" which is applicable to books under the Obscene Publications Act 1959. Among the factors which have been suggested to us as indicating the desirability of some different test we would mention the following: while a book merely describes and reaches the mind through words only, a film vividly re-presents and reaches the eyes and ears through the realistic reproduction of actual events; the reaction of a reader depends largely on his imagination, but reaction to a film depends on the vividness of presentation, which may be heightened by the use of close-ups and the techniques of trick-photography and other means[135]; the reaction of the reader of a book may be terminated by ceasing to read it, whereas the cinema audience is a largely captive one; and finally, films reach a much larger and more socially varied element of the population whose behaviour may more easily be swayed than that of the reader of a book or a theatre audience. But even if these arguments have any validity, they do not, in our view, point to the desirability of a different test for application to films from that embodied in the 1959 Act. If a film is more immediate and vivid in conveying its message, and is thereby likely to affect its audience more readily than a book conveying the equivalent message by means of words, then it seems to us that this can only mean that the film will more readily be held obscene, if, indeed, it is harmful; its "tendency to deprave and corrupt" will be greater than the book. In other words, the arguments advanced in relation to the immediacy of films and the techniques of trick-photography, close-ups and the like are essentially matters which it is relevant to consider as evidence of the tendency of a particular film to deprave and corrupt; they are irrelevant to the question whether films should be subject to a different test from other articles. Furthermore, it may be observed that films are, under the 1959 Act, already "articles" which may be "published" under that Act, and only an apparent accident in drafting[136] prevented the Act from applying to all films save those shown on licensed premises. It may, therefore, be maintained that Parliament has already demonstrated to a limited extent the view that the test under the 1959 Act is appropriate for application to films.

Conclusion

3.68 Our conclusion from the foregoing survey is that the provisions of the

[135] It is relevant to note here the possible use of single frame images having a content different from that of surrounding frames.

[136] See para. 3.40, above.

Obscene Publications Act 1959 should be extended to all film exhibitions. Subject to the questions of specific exception in domestic circumstances and of the defence of public good, which we discuss below, the extension of the Act should in our view be comprehensive. Given the existence of a defence of public good, we can see no reason why, for example, clubs of any kind, whether commercial or non-commercial in character, should not be subject to the same legal controls as those applying to the commercial cinema. Our view is, therefore that the offence of publishing an obscene article in section 2(1) of the 1959 Act should apply without exception to the "publishing" of an "article" consisting of a film, and clause 16 of the draft clauses in Appendix 1 amends the provisions of the Act to give effect to this recommendation.

(ii) *Defences to criminal liability*

3.69 Discussion of possible defences to the proposed liability for film exhibitions under the Obscene Publications Act 1959 must inevitably centre upon the defence of public good provided by section 4(1) of that Act. This states that—

> "A person shall not be convicted of an offence against section two of this Act[137], and an order for forfeiture shall not be made under [section 3], if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern."

In the result, the jury are required (1) to decide whether the article, taken as a whole, tends to corrupt and deprave a substantial proportion of those into whose hands it is likely to fall; then, if so, (2) to weigh against this the merit alleged by the defence, and (3) to reach a decision as to whether publication should be penalised[138]. By section 3(1) of the Theatres Act 1968 a parallel defence is provided in respect of performances of plays, presentations of which are penalised by that Act. It is somewhat differently worded—

> "A person shall not be convicted of an offence under section 2 of this Act[139] if it is proved that the giving of the performance in question was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning."

It will be noted that the latter formulation omits the words "or of other objects of general concern".

3.70 The difference between the two forms of defence was the subject of debate in Parliament during the passage of the Theatres Bill[140]. It was pointed out that, particularly in the context of the theatre, the additional words used in the 1959 Act rendered the scope of the defence uncertain without, seemingly, providing any real advantage. One example which was given[141] was that of a play the overall effect of which was to discourage the use of drugs; in such a case, even though some details of it might be regarded as obscene, it was

[137] See para. 3.38, above.
[138] *R.* v. *Calder and Boyars Ltd.* [1969] 1 Q.B. 141, 172 *per* Salmon L. J.
[139] See para. 3.88, below.
[140] *Hansard* (House of Lords), 20 June 1968, Vol. 293, Col. 921 *et seq.*
[141] *ibid.*, Col. 928, *per* Viscount Dilhorne.

observed that the defence would not be required as the play as a whole would not come within the definition of obscenity contained in the Bill.

3.71 In considering the appropriate form of defence to be applied to cinematograph exhibitions which will, under our recommendations, be brought within the scope of the 1959 Act, we have had to bear in mind once again that we are not engaged upon a full-scale review of the law of obscene publications, but only upon a limited amendment to it to accommodate the results of our examination of conspiracy and related common law offences. Consequently we are not in a position to recommend any amendments to section 4 of the 1959 Act as it applies to articles other than films. However, we do consider that we are entitled to have regard to Parliament's latest consideration of the appropriate form to be given to a defence of public good, embodied in section 3 of the Theatres Act 1968. It must be remembered that, when the 1959 Act was under discussion, it was unnecessary for Parliament to consider the appropriateness of the defence to films shown upon licensed premises since it was the intention to exclude such films from the scope of the Act[142]. On the other hand, it is noteworthy that, when Parliament did consider performances upon licensed premises in the context of theatres, it chose a defence of a more restricted character.

3.72 We are aware that there is a good deal of disquiet about the manner in which the defence in the 1959 Act has operated, in particular in relation to books. The final words of the defence "or of other objects of general concern" have, it appears, occasioned the submission of a defence argument, supported by expert evidence under section 4(2), that the obscenity of a book is in itself beneficial for certain sectors of the public who require such books to satisfy their needs. We are unaware of any decision on appeal supporting this interpretation of section 4(1) of the 1959 Act. Nevertheless, the argument we have described has, we understand, succeeded at first instance on many occasions in recent years, in consequence of which the general words have been subject to pointed judicial criticism[143].

3.73 The nature of the provisional proposals in our working paper upon conspiracies relating to morals and decency[144] did not directly raise the question of the appropriate defence in relation to films and we have not, therefore, had the benefit of full consultation upon the question. Nevertheless, we have received a considerable amount of comment, unanimously adverse, upon the way in which section 4 of the 1959 Act has been used in recent years. In particular, the Senate of the Inns of Court and the Bar were of the opinion that the use of the section had brought about a situation which was undesirable. We have taken account of these views but we differ among ourselves as to whether or not it would be preferable to apply to cinematograph exhibitions the test which Parliament in 1968 thought satisfactory in relation to the performance of plays.

3.74 One of us[145] believes that if the defence of public good in section 4 of the Obscene Publications Act 1959 really is open to criticism the logical

[142] See para. 3.46, above.

[143] In *R.* v. *Police Comr., Ex p. Blackburn* [1973] 1 Q.B. 241 Lord Denning M. R. said at p. 250 that the argument was "quite contrary to what Parliament intended", while at p. 247 Phillimore L. J. said "I should have thought it was high time that the phrase 'or of other objects of general concern' was eliminated from section 4".

[144] Working Paper No. 57, para. 89.

[145] Mr. A. L. Diamond.

conclusion is that it should be reconsidered not only in relation to films but also in relation to books and other articles. Films are not to be compared only with plays: there is a closer analogy with books and documents. The Theatres Act 1968 is concerned with the performance of plays, and each performance is a unique event. Films are objects in themselves, as is indeed recognised in the 1959 Act by their inclusion within the definition of an "article" in section 1; the text of a play is similarly an "article" within the 1959 Act. Films are not only objects of entertainment, and we are not concerned only with the commercial cinema where films are exhibited on licensed premises or in societies and clubs. Films have themselves an archival and historical value as social records, as well as being used for industrial, educational, scientific and anthropological purposes. We have not raised in our consultation the question whether any legitimate object would be omitted if the grounds on which the publication of an article could be justified as being for the public good were to be limited to those expressly stated in the 1959 Act or the 1968 Act or even a combination of them[146]. It is, in the view of one of us, important that the grounds on which the public good of publication may be proved should be as wide as possible so far as is consistent with the general policy of the 1959 Act. In these circumstances it seems to him that the proper way to bring films within the Obscene Publications Act 1959 is by amendment of section 1(3) of the Act, and that the existing text of section 4 should continue to apply to films until it is reconsidered as a whole.

3.75 The majority of us take the view that, within the limited aims of this report as explained above, it would not be appropriate to devise a new form of words specially applicable to the exhibition of films, but they see the problem as one of choosing in respect of films either the formula provided by the 1959 Act or that set out in the 1968 Act. In making their choice, they feel unable to ignore the representations which have been made in regard to the manner in which the defence under the 1959 Act has operated. Furthermore, they believe that there is a genuine parallel to be drawn between the conditions in which the great majority of films will be seen by viewers and the performance before an audience of a play. The precise terms of the defence in the 1968 Act, in its reference to "drama, opera, ballet" etc., may also, in the view of the majority, be thought more appropriate to films than the matters set out in section 4 of the 1959 Act, which seem more closely applicable to books; while, on a fair construction of the word "learning", which appears in the Theatres Act defence, it is probable that everything that ought to be covered in a defence applying to films would in fact be adequately covered. The preference of the majority, therefore, is for a defence of public good in relation to films in terms similar to that applicable to theatrical performances under the 1968 Act. This preference is fortified by the knowledge that in our consultations with those who will be most directly concerned with our recommendations in this section of the report (the film industry and film societies) there was agreement that this form of defence would be appropriate.

3.76 Our conclusion, in the light of the arguments set out in the foregoing paragraphs, is that a special defence of public good should be available in respect of films, under the 1959 Act as amended in accordance with our

[146] "Science" is omitted from s. 3 of the Theatres Act 1968 and in *R.* v. *Calder and Boyars Ltd.* [1969] 1 Q.B. 151, 172, Salmon L. J. referred to the "sociological or ethical merit" of a book.

recommendations. This defence should specify the grounds of public good in terms identical with those set out in the Theatres Act 1968: that is, "in the interests of drama, opera, ballet or any other art, or of literature or learning"[147].

(iii) *Exceptions to the application of criminal sanctions*

3.77 In our working paper[148] we proposed that exhibitions of films upon a domestic occasion on private premises should not be subject to any criminal sanction. This proposed exception was based upon section 7(1) of the Theatres Act[149], which uses the term "private dwelling". We thought the slight extension of the term to "premises", which would include outhouses and other buildings annexed to a dwelling, would be justified, although we welcomed comment upon this change of wording.

3.78 The rationale of this proposed exception to the operation of the criminal law was the parallel to be found under the Obscene Publications Act 1959 which is so drafted that mere possession of a book for the personal gratification of its reader is not penalised. Analogously, we took the view that possession of an obscene film entirely for the purpose of domestic viewing, or the actual screening of such a film for this purpose, ought not to attract criminal sanctions. While this viewpoint met with the sympathy of most of our commentators, some criticisms of detail were made. One of them pointed out that even the showing of an obscene book to a friend was, technically, an offence under the 1959 Act and that, consequently, the exception could not be dealt with in the Act in the same way as for books. Further, as a matter of principle it would be undesirable for the exception to apply to those selling obscene films for domestic viewing. These are, in our view, drafting matters which we think can be surmounted without difficulty. More fundamental were the objections that the exception was wide enough to permit three undesirable situations arising—

(i) obscene films shown on domestic occasions to children invited or permitted to be present;

(ii) charges being made for domestic shows, which could give rise to small-scale club activities specialising in obscene film shows; and

(iii) because of the potential width of "premises", film exhibitions in garages and other buildings within the curtilage.

These objections have caused us to reconsider the ambit of the exception.

3.79 There are various forms which an exception may take—assuming, as we do, that an exception is desirable. One is provided by the Cinematograph Act 1909 which, as we have seen[150], excepts from the ambit of the Act's provisions "an exhibition given in a private dwelling-house to which the public are not admitted, whether on payment or otherwise". Another possibility, as we mentioned in our working paper, would be to exclude film exhibitions which are not "public performances" as defined in the Theatres Act[151]. We do not

[147] Mr. Diamond does not agree with this recommendation.
[148] Working Paper No. 57, para. 89.
[149] See para. 3.98, below.
[150] See para. 3.39, above.
[151] See Working Paper No. 57, para. 92. Such performances are defined in s. 18 of the Theatres Act (for certain limited purposes under the Act) as "any performance in a public place within the meaning of the the Public Order Act 1936 and any performance which the public or any section thereof are permitted to attend, whether on payment or otherwise." Under s. 9 of the Public Order Act 1936 as amended by s. 33 of the Criminal Justice Act 1972, "public place" "includes any highway and other premises or place to which at the material time the public have or are permitted access, whether on payment or otherwise."

favour an exception in either of these terms, since they both depend to some extent upon what is "public" or "private", a question which has given rise to considerable debate in other contexts[152]. We think the exception provided in the Theatres Act, providing as it does the double qualification of a "domestic occasion" and a "private dwelling," ought to form the basis of the exception. But further modifications are required to meet the criticisms of the exception proposed in the working paper. In the first place, we do not think that any exception to the operation of the Obscene Publications Act 1959 in relation to the showing of films should extend to an exhibition at which persons under the age of sixteen are present. This age we consider appropriate as corresponding to that referred to in the Cinematograph Act 1952, under which local authorities have a statutory duty to regulate the exhibition of films shown to children on premises licensed by them. Secondly, we do not think the exception should apply to exhibitions for which a charge is made, whether that charge is for the exhibition itself or for incidental "expenses" (such as the provision of drinks) incurred in connection with it. Moreover, we propose to revert to the term "private dwelling" used in the Theatres Act[153] in order further to limit the premises in relation to which the exception operates. In short, we recommend that the 1959 Act should not apply to anything done in the course of a cinematograph exhibition in a private dwelling on a domestic occasion at which no person under sixteen is present, so long as no charge is made for the exhibition or for anything else provided on that occasion. It follows from the terms of this recommendation that the exception should in our view be limited to the showing, playing or projecting of films in the stated circumstances; it should not extend to the sale or distribution of films (or the other methods of "publication" specified in section 1(3)(*a*) of the 1959 Act) intended for domestic viewing.

(iv) *Restrictions on institution of proceedings*

3.80 Section 8 of the Theatres Act 1968 provides that proceedings in respect of (among other matters) an obscene performance of a play may not be instituted in England and Wales "except by or with the consent of the Attorney-General". There is, however, no corresponding provision in the Obscene Publications Act 1959 in respect of proceedings against books or the other articles, including films, specified in the Act. Clearly, it is for consideration whether some such restriction as is to be found in the 1968 Act is appropriate in relation to the new provisions we are recommending as to films, whether the consent required by that of the Attorney General or the Director of Public Prosecutions.

3.81 There are, of course, certain differences between plays and films in this context which would seem to make a blanket requirement of consent inappropriate or difficult to operate. One reason given[154] for including the provision in the Theatres Act was the very serious results of a prosecution of a play; and certainly it seems to us that those results, including the loss involved to the directors, producers, and (incidentally) the performers of a play in defending a prosecution, are not paralleled to the same extent in the case of films. Some at least of those which might attract prosecution under the 1959 Act, if amended in

[152] Thus see the cases cited in *Halsbury's Statutes of England*, (3rd ed.), vol. 35, p. 312.

[153] See, as to the meaning of this term in other contexts, *G. E. Stevens (High Wycombe) Ltd.* v. *High Wycombe Corporation* [1962] 2 Q.B. 547; *Tendler* v. *Sproule* [1947] 1 All E.R. 193.

[154] See *Hansard* (House of Commons), 23 February 1968, Vol. 759, Col. 867.

accordance with our recommendations, are produced quickly and cheaply on extremely low budgets. But, perhaps more significantly, since many films are made for worldwide distribution, the destruction of prints in this country would constitute a relatively minor part of the investment involved, at any rate for those financing their production. In any event, the sheer number of films shown upon unlicensed premises would appear to render it impracticable for consent to be sought for every occasion upon which a decision is made by the police to prosecute.

3.82 On the other hand, we do think that there are valid parallels to be drawn between the public performance of plays and exhibitions of films upon licensed premises. Under section 2 of the Theatres Act, no premises can be used for the public performance of a play except under and in accordance with the terms of a licence granted by the licensing authority. Similarly, under section 1 of the Cinematograph Act 1909, cinematograph exhibitions, subject to certain exceptions, may not be given elsewhere than in premises licensed for the purpose in accordance with the provisions of the Act. It seems to us that the other reasons given in Parliament for the imposition of consent to institution of proceedings in respect of performances of plays, that is, the desire for uniform standards to apply throughout the country and the discouragement of vexatious or frivolous prosecutions, apply with at least equal force in respect of film exhibitions upon premises licensed under the 1909 Act.

3.83 It is true that the parallel between the licensing systems applying to plays and films is not an exact one. A licence for the use of premises for the public performance of plays cannot, under section 1(2) of the Theatres Act, contain any term, condition or restriction as to the nature of the plays which may be performed under the licence or as to the manner of performance. But, as we have seen, a licence for a cinematograph exhibition can and, at present, almost invariably does contain terms and conditions relating to the nature of the films to be exhibited on the premises; and in addition the unofficial censorship of the British Board of Film Censors applies to almost every film there exhibited. To that extent, this merely reinforces the argument that some form of consent to institute proceedings is desirable in the case of cinematograph exhibitions taking place on licensed premises. But we do not think that this consent should be dependent upon the existence of a scheme of prior censorship. We would point out, in the first place, that in 1968 Parliament thought it right in the case of obscene performances of plays to require consent to institution of proceedings even though, as we have noted, the licensing authorities are under the Theatres Act unable to impose any form of censorship. We think it would be inconsistent to provide in respect of cinematograph exhibitions that consent should be dependent upon the further requirement of a scheme of prior censorship operating in relation to particular licensed premises[155]. It must also be borne in mind that the requirement of consent provides only a limited form of protection; consent to the institution of proceedings will not necessarily mean that no private prosecution may be brought. It may well be that there is a somewhat larger number of licensed cinema premises than theatres[156]. But if the

[155] In this connection, it must be borne in mind that in regard to cinematograph exhibitions local authority involvement necessarily extends in any event to regulation of the suitability of films to be shown to children by virtue of the duty imposed under s. 3 of the Cinematograph Act 1952: see para. 3.43, above.

[156] We are informed that there are some 1,300 cinemas licensed under the Cinematograph Act 1909.

analogy we have drawn between licensed premises is, as we believe, a valid one, the question of numbers cannot in itself be a factor affecting the decision of policy to be made. In any event, it must be observed that consent under the Theatres Act would still be required in respect of a broader spectrum of theatrical presentations, since consent under section 8 is required even in respect of proceedings against private performances of plays[157].

3.84 We have considered whether there are any other cinematograph exhibitions in respect of which, as a matter of policy, it would be desirable to impose a requirement of consent. In this connection we have examined the exemptions for non-commercial exhibitions granted by section 5 of the Cinematograph Act 1952[158]. Of the three classes of exempted exhibition for which that section makes provision, we think that the two referred to in subsection (1), that is, exhibitions to which the public are not admitted and exhibitions to which the public are admitted without payment, should have no requirement as to consent. But as to the third class, exhibitions given by an "exempted organisation" under subsections (3) and (4)[159], there seems to us to be good reason for requiring consent; many non-profit-making film societies operate under this exemption and, having regard to their function and purpose and the often specialised character of the films exhibited by them, it is, in our view, desirable to provide them with protection against the possibility of frivolous or vexatious proceedings. It is, however, important to bear in mind again the limited character of this protection: the requirement of consent will not mean that no private prosecutions may be brought. As we have made clear[160], the provisions of the Obscene Publications Act 1959, if amended in accordance with our recommendations, will apply to film society exhibitions as it will to all other exhibitions save those given on domestic occasions.

3.85 The considerations discussed in the foregoing paragraphs lead us to recommend that, where it is alleged that an offence has been committed under section 2(1) of the Obscene Publications Act 1959 in respect of a film exhibited or to be exhibited—

(i) on premises licensed for a cinematograph exhibition under the Cinematograph Act 1909; or

(ii) at an exempted exhibition by an exempted organisation under section 5(3) of the Cinematograph Act 1952,

no proceedings under section 2(1) of the 1959 Act shall be instituted except by or with the consent of the Director of Public Prosecutions[161]. Clause 17 of the annexed clauses makes provision for this, and is so drafted that the protection it gives is capable of applying to exhibitors and distributors alike. It provides further that an order for forfeiture of an article seized by warrant under section 3 of the 1959 Act shall not be made by virtue of section 3(3) of the Obscene Publications Act 1959 in cases where consent to institution of proceedings under section 2 of the 1959 Act is needed, unless the warrant under

[157] Unless they fall within s. 7(1) of the Act: see para. 3.98, below.

[158] See para. 3.39, above. The section dispenses with the licensing requirements of the Cinematograph Act 1909 in regard to such exhibitions.

[159] See further, para. 3.39(*d*), above.

[160] See para. 3.68, above.

[161] The consent of the D.P.P. is stipulated after consultation with the departments concerned.

which the article was seized was issued on information laid by or on behalf of the Director of Public Prosecutions.

(*e*) *Recommendations as to films*

3.86 Our recommendations as to films, if implemented, will not in any way affect the work of local authorities in licensing premises for cinematograph exhibitions or in certifying films for exhibition. They are limited to the following matters—

(i) All cinematograph exhibitions, whether or not held upon premises licensed for the purpose, should be subject to control under the Obscene Publications Act 1959. For this purpose, the Obscene Publications Act 1959 should be widened to cover the "publication" of all films, in particular the showing, playing or projecting of films in accordance with section 1(3)(*b*) of the Act. We think this may be achieved by amending the proviso to section 1(3)(*b*). This amendment would also in appropriate cases enable a distributor who distributes, sells or lets on hire a film to an exhibitor to be convicted of an offence under the Act.

(ii) There should be a special defence of public good available in respect of films which are the subject of proceedings under the Obscene Publications Act. This should provide that "publication" of a film may be justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning.

(iii) There should be no offence committed under the 1959 Act if a cinematograph exhibition involving the showing, playing or projecting of obscene films is given upon a domestic occasion in a private dwelling, provided that no person under the age of sixteen is present and no charge is made for the exhibition or for anything else provided on that occasion.

(iv) There should be a limited restriction upon institution of proceedings; this should provide that where it is alleged that an offence has been committed under section 2(1) of the Obscene Publications Act 1959 in respect of a film exhibited or to be exhibited—

(*a*) on premises licensed for a cinematograph exhibition under the Cinematograph Act 1909; or

(*b*) at an exempted exhibition by an exempted organisation under section 5(3) of the Cinematograph Act 1952,

no proceedings under section 2(1) of the 1959 Act shall be instituted except by or with the consent of the Director of Public Prosecutions. This restriction should apply whether the proceedings in question are to be instituted against a distributor or an exhibitor. Corresponding provision should be made in cases of the issue of warrants for seizure leading to forfeiture proceedings under section 3(3) of the Obscene Publications Act 1959.

2. Live performances not subject to the provisions of the Theatres Act

(*a*) *The conspiracy cases*

3.87 We have noted that in some of the conspiracy cases brought in connection with the exhibition of films, the charges also concerned the presentation of performances involving live sex[162]. Such conduct has also been penalised by charges at common law of presenting and participating in an indecent public exhibition[163] or, where there has been the necessary element of repetition or continuity in the conduct, keeping a disorderly house[164]. A further group of conspiracy cases which we have examined involved making and participating in obscene films. Besides the findings on the counts of conspiracy to corrupt, some of the defendants were also found guilty of conspiracy or aiding and abetting in offences under section 2(1) of the Obscene Publications Act 1959. For example, in one case[165] the owners (husband and wife) of premises where obscene photographs and films, a camera and ladies' underwear were found, were charged with conspiracy to corrupt by inducing persons to resort to the premises "for the purpose of watching obscene films and taking part in and watching disgusting and immoral acts and exhibitions and for the purpose of fornication", and with conspiracy to contravene section 2(1) of the 1959 Act; similar charges were brought against their "butler". All three were convicted on both conspiracy charges. In this case a professional photographer, who was also charged on the two counts of conspiracy, was found guilty of the second only, that of contravening the 1959 Act.

(*b*) *The Theatres Act 1968*

3.88 Activities of the kind described above do not fall within the definition of a "play" provided by the Theatres Act 1968[166]. By section 2 of this Act a performance of a play is deemed obscene upon a test similar to that set out in section 2(1) of the 1959 Act[167] and, under section 2(2), a person who, whether for gain or not, presents or directs an obscene performance of a play, whether in public or private, commits an offence. We have drawn attention to the differences between the "public good" defence provided under this Act and the 1959 Act, and to the provision in the 1968 Act which excludes from the ambit of the Act "a performance of a play given on a domestic occasion in a private dwelling"[168]. Because of the limitations of the Act, which was not intended to bring within its compass live strip-shows and the like, resort must be had to the common law in order to penalise such performances, whether by charges of conspiracy to corrupt, keeping a disorderly house or indecent public exhibition.

(*c*) *Proposals in Working Paper No. 57*

3.89 We took the view in our Working Paper No. 57[169] that the type of

[162] See para. 3.36, above.
[163] See para. 3.28, above.
[164] See paras. 3.29–3.30, above, and *R.* v. *Brady and Ram* (1963) 47 Cr. App. R. 196.
[165] *R.* v. *King and Others*: Central Criminal Court, 29 September 1967.
[166] Under s. 18 a play is "(*a*) any dramatic piece . . . given wholly or in part by one or more persons actually present or performing and in which the whole or a major proportion . . . involves the playing of a role; and (*b*) any ballet given wholly or in part by one or more persons present and performing . . .".
[167] See para. 3.38, above.
[168] See paras. 3.69 and 3.77, above, and see para. 3.98, below.
[169] Para. 94.

activity under discussion would, to the extent that was necessary, be met for the future by the creation of an offence in parallel with that in section 2 of the Theatres Act, which would penalise the presentation of any live performance not falling within the definition of a "play" in that Act, whether in public or in private, and whether for gain or not. To fall within that proposed offence the conduct would have had to be "obscene" in accordance with the Theatres Act test—that is "if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all the relevant circumstances, to attend it." We doubted whether a "public good" defence was either necessary or relevant in relation to this kind of activity, but we proposed an exception in regard to performances given on domestic occasions in private premises in parallel with that in section 7(1) of the Theatres Act.

3.90 Upon consultation our provisional proposals evoked relatively little comment. One which was made, however, doubted the correctness of the view expressed in our working paper[170] that although we did not think our proposal would affect "average" strip-shows, since it was doubtful if these would on the stated test be regarded as obscene, any such show which did fall within that test should be penalised. It was pointed out[171] that, unlike those visiting a theatre, people visiting strip-clubs knew precisely the kind of performance to which they were to be exposed; and it was doubtful "whether on liberal principles adults ought to be protected against their will by a scheme of censorship". It must be observed, however, that the offence was not by any means aimed solely at the strip-club[172]; but, if indeed the activities in such clubs were such as did tend to deprave and corrupt, we cannot believe that there would be wide support for any proposal to exclude them from the ambit of such an offence. To take only the most obvious examples, many strip-shows, whether involving males or females, are doubtless now regarded as socially acceptable. But that tolerance does not, we think, extend to live displays of bestiality or other sexual perversions; and if we are correct in this, legal controls are required in place of the common law offences we propose to abolish which are at present available to deal with them.

(d) Revised recommendations

3.91 In the light of our consultations, we do not think it necessary to make any major changes to the proposal outlined in our working paper. Nevertheless there are certain aspects of it which require explanation and reconsideration.

3.92 In order to clarify the terms of the offence, we now think it should be expressed as penalising those who present, organise or participate in obscene live performances or displays. The element of human conduct is essential, but it does not seem to us to be necessary to confine the individuals penalised only to those presenting, since the line between presentation and participation may in practice sometimes be difficult to draw, while the reference to organisation seems to us an appropriate counterpart to the term "direction" which is used in the offence concerning obscene performances of plays in the Theatres Act. The word "display" is added since the description of the conduct which we think

[170] Para. 91.

[171] See also L. H. Leigh, "Indecency and Obscenity, Indecent Exposure" [1975] Crim. L.R. 413, 419.

[172] The second case referred to in para. 3.28 above, for example, did not fall within this category.

should be penalised as a "performance" may not in all cases be entirely apt. The conduct should, as in section 2 of the Theatres Act, be penalised whether it takes place in public or private since the activities of commercial clubs are, we think, as apt for control under the test of obscenity in this context as commercial clubs giving cinematograph exhibitions[173]. But in order to limit the ambit of the offence, we think that an exception to its general application should be provided in terms similar to that provided in the case of cinematograph exhibitions[174]. Accordingly, for the reasons already set out in relation to that exception[175], we recommend that no offence should be committed if the conduct takes place on a domestic occasion in a private dwelling where no person under the age of sixteen is present and where no charge is made for seeing the performance or display or for anything else provided on that occasion. This exception would, we believe, exclude from the scope of the offence events occurring at private parties or in the course of domestic entertainments which it is not our intention in any way to affect.

3.93 We have further reconsidered the question of providing a public good defence. All of our commentators who remarked on this agreed with our provisional view that such a defence was unnecessary in this context. Nevertheless, it must be observed that the Acts of 1959 and 1968 indicated Parliament's desire that a defence should be provided in respect of other spectacles, whether in public or private, and it seems to us now that, in the interests of consistency, there should be some form of defence. It may be that the occasions when it could be invoked successfully will be infrequent, but having regard to the fairly limited scope of the Theatres Act definitions, such occasions are by no means impossible to envisage. It will be recalled that the definition of a "play" in that Act embraces dramatic performances which involve the playing of a role, and ballets. Thus it might not include performances of, for example, tribal dancing and other exotic entertainments, which may not be ballets and in which the question of whether those participating are or are not playing "roles" might constitute a fine aesthetic or ethnographic point. Such presentations might, therefore, fall within the "performances" to be penalised by our proposed offence. Accordingly, we think a public good defence should be provided, which we think should be similar in wording to that in the Theatres Act.

3.94 We have also considered, as we have in the case of films, whether there should be any restriction upon institution of proceedings in parallel with the provision in the Theatres Act. We believe that there are no grounds for such a restriction. The offence under consideration is concerned fundamentally with the many occasions at present capable of prosecution under the common law offences which we are recommending should be abolished. Consent is, of course, not required for the institution of proceedings under any of these, and we think it would be inappropriate to make any such provision here.

3.95 The penalties which we recommend for this offence are the same as those for the offence in section 2 of the Theatres Act 1968; that is, on summary conviction, a fine of up to £400 or up to six months' imprisonment, or on indictment, a fine or imprisonment for a maximum of three years, or both.

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[173] See para. 3.68, above.

[174] See para. 3.79, above.

[175] *ibid.*

3.96 Accordingly we recommend that—

(i) It should be an offence for a person (whether for gain or not) to present, organise or participate in any live performance or display which is obscene. In this context such a performance or display shall be deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to see it.

(ii) A "live performance or display" should include any live activity which does not fall within the definition of a "play" in the Theatres Act 1968.

(iii) There should be a defence of public good whereby a person shall not be convicted if it is proved that the giving of the performance or display was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning.

(iv) The offence should not apply to any activity taking place on a domestic occasion in a private dwelling, provided that no person under sixteen is present and no charge is made for the performance or display or for anything else provided on that occasion.

(v) The penalties for the offence should be the same as those provided in section 2 of the Theatres Act, that is—

(*a*) on summary conviction, a fine not exceeding £400 or a term of imprisonment not exceeding six months; or

(*b*) on conviction on indictment, a fine, or imprisonment for a term not exceeding three years or both.

3. Performances of plays in private dwellings

3.97 In parallel with section 2(4) of the Obscene Publications Act 1959[176], section 2(4) of the Theatres Act 1968 contains a prohibition on proceedings at common law. But the breadth of the prohibition is greater. It applies where—

(*a*) the essence of the common law offence is that the performance was obscene, indecent, offensive, disgusting or injurious to morality, or

(*b*) the offence is one under section 4 of the Vagrancy Act 1824, consisting of wilfully exposing to public view an indecent exhibition;

and it continues—

> "no person shall be proceeded against for an offence at common law of conspiring to corrupt public morals, or to do any act contrary to public morals or decency, in respect of an agreement to present or give a performance of a play, or to cause anything to be said or done in the course of such a performance."

3.98 It has been pointed out to us on consultation that the exception relating to performances on domestic occasions in section 7(1) of the Theatres Act, to which we have already referred in the context of films and live performances, states that "nothing in sections 2 to 4 of this Act" shall apply to performances

[176] See para. 3.38, above.

of plays on domestic occasions in private dwellings. This means that the prohibition upon prosecutions at common law in section 2 set out above does not apply. At present, therefore, such performances may be so prosecuted[177]. But we are recommending the abolition of the common law in this area; and its disappearance would in consequence take such performances outside the control of the criminal law.

3.99 It may well be that the occasions upon which performances within this category require criminal sanctions are extremely rare; at any rate, we are not aware of any prosecutions having been brought in respect of private performances of plays. Nevertheless, with the disappearance of the common law, we think there is a strong case for subjecting such performances to the more stringent exception which we are recommending in relation to films and other live performances. Accordingly, we recommend that section 7(1) of the Theatres Act, so far as it applies to England and Wales, should be amended to state that the exception it provides should apply only if persons under the age of sixteen are not present and no charge is made for the performance or for anything else on the occasion when it is given.

4. Indecent exposure

(*a*) *The review of the Vagrancy Act 1824*

3.100 Common law indecent exposure is one of those offences which have a very close relationship with the two conspiracy offences with which in this section of the report we are concerned. Having regard to the citation of authority in *Knuller's* case[178] it may indeed be that indecent exposure at common law is no more than one example of the generic offence of outrage to public decency there held by the majority to exist; but whether this is the case is a matter which, for present purposes, it is unnecessary to pursue further.

3.101 We have seen that much of the conduct dealt with by the common law offence is also capable of being prosecuted under the Vagrancy Act 1824. In fact, the vast majority of charges of indecent exposure are brought under that Act. The Home Office Working Party which is considering the replacement of the Vagrancy Acts have provisionally proposed an offence which is intended to deal with cases of "exhibitionism" which at present are almost invariably prosecuted under the Vagrancy Act[179]. Having regard to the terms of that Act, our own task in the present context is limited to a consideration of whether there is any other behaviour in this area which should be the subject of criminal sanctions; and if so, what form any new offence to deal with that behaviour should take. Our earlier outline of the common law offence[180] shows that it deals not only with exposure of the male genital organs, but also with sexual conduct taking place in public which does not necessarily involve such exposure, such as sexual intercourse. Because of its requirement that a witness or witnesses must have been able to see the conduct in question, the common law offence may be regarded as a form of public nuisance offence, and its main use is, in fact, in dealing with conduct which partakes of that character. But it is relevant to

[177] The possibility of such prosecutions was envisaged but considered unlikely in debates upon clause 7 of the Bill: *Hansard* (House of Lords), 20 June 1968, Vol. 293, Col. 953 *et seq.*

[178] See para. 3.24, n. 48, above.

[179] See n. 183, below.

[180] See para. 3.25, above.

note that some of the cases which could be prosecuted at common law are now dealt with by alternative means. We instance in this respect, first, nude bathing which is an offence by both sexes under some local bye-laws[181] and, secondly, the summary prosecutions which are brought against persons of both sexes under the Metropolitan Police Act 1839, section 54 and the Public Order Act 1936, section 5, for "insulting behaviour" in cases of "streaking" and other similar manifestations[182].

(*b*) *Proposal in Working Paper No. 57*

3.102 Having regard to the terms of the offence proposed by the Home Office Working Party in their Working Paper[183] issued simultaneously with our Working Paper No. 57, we took the view that no further criminal sanction was needed to deal with male nudity in public. We were further of the opinion that, since male exhibitionism was a well-recognised phenomenon which had no counterpart in the female, no offence was required to penalise female nudity. The only new offence which we considered to be necessary was one designed to penalise sexual intercourse or other sexual activities which, when occurring in public, the great majority of people would find offensive. We therefore proposed a summary offence, with a maximum sentence of a fine of £100, penalising sexual intercourse or other overt sexual behaviour taking place in such circumstances that the participants knew or ought to have known that their behaviour was likely to be seen by other persons to whom the behaviour was likely to cause offence[184].

(*c*) *Further consideration of indecent behaviour and revised recommendations*

(i) *Exposure by males*

3.103 Our provisional view that no new offence was required to replace indecent exposure at common law in so far as that offence deals with exposure by males was put forward upon the assumption that the offence proposed by the Home Office Working Party would be sufficiently wide to penalise all such cases as required the sanction of the criminal law. We are, however, reporting independently of the Working Party, and we have, therefore, to ensure that the conduct penalised by any offences which we now recommend in this report is sufficiently broad in scope to permit the abolition of the offence of indecent exposure at common law without reference to legislative proposals that may in future be made in regard to the Vagrancy Act.

3.104 It seems to us that the only type of conduct by males which requires

[181] The Public Health Act 1936, s. 231 provides that a local authority may make bye-laws with respect to public bathing and may (*inter alia*) by such bye-laws regulate, so far as decency requires, the costumes to be worn by bathers. Among the model forms of Good Rule and Government bye-laws issued by the Home Office for the guidance of local authorities there is, *e.g.*, a bye-law about indecent bathing, which provides that no person shall within 200 yards of any street or public place, bathe from the bank or strand of any water, or from any boat thereon, without wearing a dress or covering sufficient to prevent indecent exposure of the person; this offence applies to both sexes.

[182] Such as females in topless costumes in public. See further para. 3.104, below.

[183] The offence as set out in para. 161 of that working paper consisted in "the exposure of the male genital organs in circumstances such that the exposer knew or ought to have known that his exposure was likely to be seen by persons to whom the exposure was likely to cause offence".

[184] See Working Paper No. 57, para. 82.

consideration is certain kinds of exposure where the element of intent to insult a female required by the terms of the Vagrancy Act is absent. Some of these are already dealt with by legislation; for example, gross indecency taking place in public between male persons would be penalised by section 13 of the Sexual Offences Act 1956; while nude bathing is, as we have noted, largely dealt with under bye-laws. Cases of "streaking" are, as we have pointed out, penalised at present by charges of "insulting behaviour" under the Metropolitan Police Act 1839 and (outside the Metropolitan Police district) the Public Order Act 1936[185]. Our working paper commented[186] that having regard to the decision in *Brutus* v. *Cozens*[187], according to which the term "insulting" in these provisions must be given its natural meaning, it might be regarded as doubtful whether, in some of the prosecutions for "streaking", all of the requisite elements of the offence are fulfilled. Successful prosecutions, however, continue to be brought under these Acts[188] in circumstances where the courts are apparently satisfied that the behaviour is insulting, and for the present we think that they provide sufficient criminal sanction. When public order offences generally come to be considered, this will be the proper time to decide whether any greater clarification is needed.

3.105 This survey indicates to us that the only type of male conduct hitherto penalised solely by common law indecent exposure is conduct of the kind of which the defendant in *R.* v. *Mayling* was convicted: that is, exposure in a public place (such as public conveniences) where the solitary character of the conduct makes a charge under section 13 of the Sexual Offences Act 1956 impossible, and where the evidence cannot support a charge of solicitation under section 32 of that Act. The isolated character of the reports of charges brought on indictment at common law in respect of this type of conduct is in itself evidence that it is only on rare occasions that the other statutory offences referred to are found to be inadequate in scope; and in our view the offence which we recommend below in regard to sexual behaviour in public will be sufficiently broad in scope to deal with such infrequent cases without the necessity for creating any further specific offence to cover them. Consequently, we adhere to the view taken in our working paper that no further offence should be created to penalise male exposure.

(ii) *Exposure by females*

3.106 Upon consultation a considerable number, although by no means all, of our commentators took the view that female exposure should be penalised in the same way as male exposure, and that this should be accomplished by extending the offence proposed by the Home Office Working Party to the female. However, no comment was made upon the difficulties of definition this would inevitably

[185] By s. 54 (13) of the 1839 Act a fine of £20 may be imposed on anyone within the Metropolitan Police district who, in any thoroughfare or public place "shall use any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned." Sect. 5 of the Public Order Act 1936 penalises "Any person who in any public place or at any public meeting (*a*) uses threatening, abusive or insulting words or behaviour ... with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned."

[186] See Working Paper No. 57, para. 79.

[187] [1973] A.C. 854.

[188] See *e.g.*, the case reported in *The Times* 6 August 1975 in which D pleaded guilty to, and was fined the maximum £20 for, "insulting behaviour", which involved "streaking" at Lords cricket ground.

entail. Furthermore, we were given no indication of why such an offence was thought to be necessary, and no evidence was brought to light which demonstrates that female exposure at present constitutes any kind of social problem. Accordingly, notwithstanding the comments we have received on this problem, we adhere to the provisional view in our working paper that no offence should be created specifically to penalise female exposure. We have pointed out (and having regard to our consultation, it is a factor requiring emphasis) that, so far as exhibitionism is concerned, the male behaviour has no counterpart in the female, and corresponding criminal sanctions are therefore not required. The legislation already referred to will, in our view, continue for the time being to be adequate to deal with the minor nuisance—if it be a nuisance—of female "streaking". Any more serious cases which may arise will, we think, be met either by the offence which we discuss in the following paragraphs or by the offence penalising obscene performances and displays recommended above[189].

(iii) *Other indecent behaviour in public view*

3.107 There was widespread support upon consultation for our provisional proposal for an offence in the terms set out in the working paper. The only criticism of it came from those who took it to be aimed at the "courting couple", which it was not. In view, however, of the possibility that the offence might be construed in too wide a manner, we have given some consideration as to whether it might be given a more restricted ambit than it had in our provisional proposal.

3.108 There are difficulties of definition in regard to both the proscribed conduct and the mental element (or absence of it). In colloquial terms, the proposed offence is concerned with indecent acts which cause disgust or offence. We do not, however, think it is possible to define the conduct to be penalised in terms of acts of "indecency", whether or not qualified by the adjective "gross". Some of the acts concerned, such as sexual intercourse itself, only become offensive by reason of the circumstances in which they take place. At the same time we doubt whether an offence which simply penalised sexual intercourse in public would be satisfactory, since it is not difficult to detail other sexual behaviour indulged in either by individuals or by more than one person, not necessarily involving actual exposure, which would be considered offensive if taking place in the public view. Nor would we consider it satisfactory to specify an offence in terms simply of any act which, by reason of the circumstances in which it takes place, becomes indecent; this in our view would be unacceptably wide.

3.109 The crucial element in the conduct to be penalised is, in our view, the disgust with which most people would react if confronted by a person or persons publicly indulging in these activities. The activities themselves may well, as we have said, become disgusting or indecent only by reason of the circumstances in which they take place. Thus we conclude that the conduct itself must be described objectively, and in practical terms the most appropriate manner of so doing is, we think, the phrase used in our working paper, sexual intercourse or other overt sexual behaviour. The word "overt" has, however, seemed to us unnecessary in giving legislative form to our recommendation, since, to attract prosecution, the

[189] See para. 3.96, above.

conduct must always be such as is likely to be seen by others and likely to give offence. In order more closely to restrict the ambit of the offence we further recommend that the conduct in question must be likely to cause "serious offence".

3.110 As to the mental element, it has been urged[190] that an offence of this nature is of so serious a character as to require a mental element at least of an intent to be seen. In our view, however, the offence we are recommending is essentially one intended to penalise behaviour in the nature of a public nuisance, where the person concerned knows or ought to know that it is likely to be seen by others and is likely to be offensive to them. We therefore do not consider it appropriate to limit the offence to cases in which the person concerned intends to be seen or knows he is likely to be seen[191]. Some of our commentators thought the maximum penalty proposed in our working paper, a fine of £100, was too low. But, again, having regard to the nature of the offence to which we have already referred, we do not think that the imposition of a higher maximum penalty could be justified.

3.111 Accordingly we recommend that a new offence be created penalising any person who has sexual intercourse or engages in sexual behaviour in such circumstances that he knows or ought to know that his conduct is likely to be seen by other persons and is likely to cause them serious offence. The maximum penalty for this offence should be a fine of £100.

5. Conduct for which new criminal sanctions are not required

3.112 In the foregoing paragraphs in section C of this part of the report we have examined the uses to which conspiracy charges and interlinked common law offences have been (or are capable of being) put in the area of public morals and decency. In relation to each area of conduct examined we have made recommendations for the creation of new offences or amendments to existing legislation.

3.113 In the following paragraphs of section C we shall consider the remaining areas of conduct subject to conspiracy or common law charges. Unlike those already examined, however, the areas of conduct concerned do not require the creation of new offences. We shall explain in relation to each of them that, in our view, despite the recommended abolition of the conspiracy and common law offences, they are either satisfactorily dealt with by existing legislation (which in some instances is currently under review by bodies other than the Law Commission) or are in no need of further criminal sanctions in addition to those we have already recommended.

(a) Indecent exhibitions at common law

3.114 Cases reported in the nineteenth century[192] indicate that the common law offence of public exhibition of indecent acts and things has in the past been

[190] See Leigh, "Indecency and Obscenity" [1975] Crim. L.R. 413, 414–5.

[191] The objective character of the offence, and also the fact that it may occur in circumstances unlikely to cause an actual breach of the peace, are the reasons why we do not consider it possible to leave these matters to be dealt with by charges of "insulting behaviour": these offences require an intent to cause a breach of the peace or at least the likelihood of it. See n. 185, above.

[192] See para. 3.27, above.

used in a variety of situations. In so far as the offence has recently been used in connection with cinematograph exhibitions on licensed premises and with live performances and displays, we have put forward recommendations for its replacement by legislation.

3.115 There is, however, already in existence legislation which covers much of the common law field, albeit with provision for summary prosecution only. Thus prosecutions for indecent exhibitions may be brought under section 4 of the Vagrancy Act 1824[193] and section 3 of the Indecent Advertisements Act 1889[194]. It may be that the latter was originally directed against advertisements for quack remedies for venereal diseases, but the wording is general, and is not even confined to advertisements. Indeed, the wording of all this legislation is so wide that, apart from the particular situations referred to in the last paragraph, there appears to be nothing which may be prosecuted at common law which may not be the subject of a statutory charge.

3.116 This legislation has been subject to review by the Home Office Working Party on Vagrancy and Street Offences, who have made provisional proposals for its replacement. Pending the enactment in legislation of recommendations on this subject, we are of the view that existing legislation, taken with the recommendations we have made in regard to cinematograph exhibitions and live performances, will enable the common law offence to be abolished without replacement by further legislation.

(*b*) *Indecency with children*

3.117 One of the groups of cases we have examined involving charges of conspiracy to corrupt concerned the taking of obscene photographs in which children were participants. In fact, in all of these cases the conspiracy charges were unnecessary since all the defendants were found guilty of alternative statutory offences. For example, in one case[195] the defendants were a man and woman cohabitating, the other participants being the woman's daughter (aged eleven) and son (slightly younger) by a previous marriage. Photographs were taken by the man of himself having intercourse with the girl and committing buggery with the boy, of the two children in indecent poses and of the mother in indecent poses with the boy. The defendants' pleas of not guilty on charges of conspiracy to corrupt and procuring were accepted, but they were convicted on several counts under the Sexual Offences Act 1956[196] and section 1(1) of the

[193] "Every person wilfully exposing to view, in any street, road, highway, or public place any obscene print, picture or other indecent exhibition." The Vagrancy Act 1838, s. 2 extends this to any "window or other part of any shop or other building situate in any street . . . ".

[194] "Whoever affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree or any other thing whatsoever so as to be visible to a person being in or passing along any street, public highway, or footpath, and whoever affixes to or inscribes on any public urinal, or delivers or attempts to deliver or exhibits to any inhabitant or to any person being in or passing along any street, public highway, or footpath, or throws down the area of any house, or exhibits to public view in the window of any house or shop, any picture or written matter which is of an indecent or obscene nature . . . ". Prosecutions may also be brought under the Town Police Clauses Act 1847, s. 28 and the Metropolitan Police Act 1839, s. 54 for selling or exhibiting to public view indecent or obscene books, prints, etc.: penalty, £20. The former requires this to take place in the street to the annoyance or danger of residents or passengers, the latter in any public thoroughfare in the Metropolitan Police district (see London Government Act 1963, s. 76).

[195] *R.* v. *Thomas and Another*: Hereford Assizes, 27 February 1968.

[196] Sects. 5, 12, 14(1) and 25.

Indecency with Children Act 1960. In another case[197] the defendants, a photographer and three male "models", were all found guilty of conspiracy to corrupt after they had induced three girls all aged fourteen or fifteen to pose with the models for indecent photographs; but all in any event had committed offences to which they pleaded guilty under section 6(1) of the Sexual Offences Act 1956[198].

3.118 We pointed out in our working paper[199] that the Indecency with Children Act[200] provides protection only for children under the age of fourteen. In theory, therefore, were a case similar to the second of those described above to occur, involving persons over fourteen and where no other statutory charges were appropriate, the charge of conspiracy to corrupt might well be the only available. Doubts have also been expressed as to whether the term "with or towards" in the Act satisfactorily covers the situation where there has been no physical contact with a child but where, nevertheless, the child has been persuaded to pose in indecent postures for the purpose of being photographed. It was for these reasons that we made provisional proposals to clarify the latter question and to raise the age of protection provided by the Act to sixteen. The latter proposal received wide support upon consultation.

3.119 On reconsideration, and notwithstanding the favourable reception given to our provisional proposals, we do not propose to recommend any changes in the Act. We have changed our view because sexual offences as a whole have now been remitted by the Home Secretary for comprehensive review by the Criminal Law Revision Committee. If there are any shortcomings in the Indecency with Children Act, we feel sure that this would be the most appropriate context for their consideration. We are reinforced in our view by the fact that this Act came into being in consequence of the Criminal Law Revision Committee's own First Report[201], in which the Committee expressed very firmly their opinion that protection should be provided only for those under fourteen years of age[202]. Our decision in no way affects the recommendation to abolish conspiracy to corrupt public morals since, as we have noted, there appears to have been no actual case in which this charge was considered necessary because of possible defects in the Indecency with Children Act.

(c) *Advertisements by prostitutes.*

(i) *The present law*

3.120 The Home Office Working Party on Vagrancy and Street Offences have considered the subject of street offences as a whole in the course of their review of the law. It was agreed, however, that one small part of this topic should be examined by the Law Commission, namely, solicitation by prostitutes by means of shop window advertisements. The reason for this exception was that these small-card advertisements might, as we shall explain, be dealt with, following

[197] *R.* v. *Hart and Others:* Bristol Assizes, 22 June 1966.
[198] Penalising sexual intercourse with a girl under 16.
[199] Working Paper No. 57, para. 69.
[200] Sect. 1(1) provides that "any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment . . . ".
[201] *Indecency with Children* (1959) Cmnd. 835.
[202] *ibid.*, para. 9.

Shaw's case[203], by a charge of conspiracy to corrupt against the shopkeeper concerned.

3.121 The Wolfenden Committee, in its *Report on Homosexual Offences and Prostitution*[204], remarked—

> "It must be accepted that for so long as prostitution exists the prostitute will seek customers and the potential customer will seek prostitutes. If the prostitute is not allowed to find her customers in the streets then presumably she and her customers will find other means of meeting each other."

The Committee foresaw, as a possible consequence of their proposals, "an increase in small advertisements in shops or local newspapers, offering the services of masseuses, models or companions", adding that they thought that "this would be less injurious than the presence of prostitutes in the streets". This forecast has proved correct. The use of advertisements in shop windows or display cabinets outside shops has become a popular way for prostitutes to publicise their services. The advertisements usually comprise some such formula as "French lessons" or "doll for sale", together with a telephone number. Overtly they are not usually indecent. In some cases the euphemistic metaphor used by the prostitute may be capable of being interpreted as an innocent advertisement, but their true meaning will generally be apparent, particularly where, as often happens, they are grouped on display boards notorious for providing this service

3.122 We have been told by the senior police officers who are members of the Home Office Working Party that the rewards to shopkeepers for displaying these advertisements are sometimes very high. Prostitutes are apparently prepared to pay up to £40 per week for the display of a small card and, as one display cabinet can accommodate many such cards, it is obvious that shopkeepers such as these can make large profits out of prostitution.

3.123 Under the present law, the placing or display of these advertisements does not in itself constitute any offence[205]. A male shopkeeper who displays them may commit the offence under section 30 of the Sexual Offences Act 1956 of knowingly living wholly or in part on the earnings of prostitution, and there have been successful prosecutions for this offence of shopkeepers who have made the advertisements a substantial source of income. We understand that the police do not prosecute without giving a caution first. This offence, however, applies only to men so that no such action can be taken against a woman shopkeeper. It is also possible that a jury might decide that the agreement between a shopkeeper (of either sex) and a prostitute or her pimp for the shopkeeper to advertise the prostitute's services in this way constitutes the offence of conspiracy to corrupt public morals, though we have not heard that this conduct has been so prosecuted.

3.124 We have noted that the Wolfenden Committee was prepared to accept an increase in this type of advertising as part of the price to be paid for "driving the prostitute from the streets"[206]. Nevertheless, the Committee thought that, where exploitation of the prostitute was involved, the laws covering such

[203] [1962] A.C. 220; see para. 3.9, above.
[204] (1957) Cmnd. 247, para. 286.
[205] See *Weisz* v. *Monahan* [1962] 1 W.L.R. 262 and *Burge* v. *D.P.P.* [1962] 1 W.L.R. 265.
[206] See para. 3.121, above.

exploitation should be rigorously enforced or even extended[207]. Thus, in respect of landlords' letting of premises to prostitutes at exorbitant rents, they recommended what they thought, on the authorities as they then stood, would be an extension of the law, to deem such landlords to be living on the earnings of prostitution[208].

(ii) *Response to Working Paper No. 57*

3.125 In our working paper [209] we posed the question whether these advertisements should be penalised by means of a new offence. There were, we pointed out, arguments for both points of view—

> "On the one hand it may be argued that very few people nowadays are likely to be offended by advertisements of the kind we have described; that many of the advertisements are displayed by shopkeepers who are known to specialise in them and will probably be read only by those who seek them out; and that society should tolerate this method of plying a trade which is not itself illegal. On the other hand, it may be said that it is wrong that shopkeepers should be able to make large profits from prostitution and that the ready accessibility of such advertisements may encourage resort to prostitutes and place young people in moral danger."

Our provisional view was that, so long as such advertisements are not overtly indecent, their display should not, of itself, constitute any offence. But we continued—

> "Where, however, a shopkeeper is plainly exploiting prostitutes by charging exorbitant fees for the display of these cards, then we agree with the view of the Wolfenden Committee that the laws covering exploitation should be rigorously enforced; and, consequently, that it is not inappropriate to prosecute the male shopkeeper under section 30 of the Sexual Offences Act 1956. There is no simple solution to the anomaly which arises in the case of a female shopkeeper. It arises equally in the case of the female owner of a flat let at an exorbitant rent to a prostitute or, indeed, to any other female who exploits prostitutes without going so far as to commit one of the offences under the Sexual Offences Act 1956[210]. The extension of the section 30 offence to women would bring within its ambit not only the woman shopkeeper but also, for example, the prostitute's "maid", and would raise difficult questions about the proper scope of the offence which would go beyond the limits we have set ourselves in this paper. A re-examination of the ambit of section 30 is something which must await a full consideration of sexual offences generally."

3.126 In response to our arguments a majority agreed with our provisional view that, provided that they are not themselves indecent, the advertisements should not be the subject of a new offence. A minority would, however, have favoured the creation of such an offence. It was also pointed out that, because

[207] (1957) Cmnd. 247, para. 286.

[208] *ibid.*, para. 331. The Court of Criminal Appeal in *R.* v. *Thomas* [1957] 1 W.L.R. 747 overruled *R.* v. *Silver* [1956] 1 W.L.R. 281, the case upon the authority of which the Committee based its recommendation. The decision in *R.* v. *Thomas* that a person who, at a cost of £3 a night, allowed a prostitute to use his bedroom, was living in part on the earnings of prostitution, rendered implementation of this recommendation unnecessary.

[209] See Working Paper No. 57, para. 108 *et seq.*

[210] *e.g.*, exercising control over a prostitute under s. 31, keeping a brothel under s. 33, letting premises for use as a brothel under s. 34 or permitting premises to be used as a brothel under s. 35.

of the loophole in section 30 of the Sexual Offences Act 1956, prosecutions for these advertisements are few, this lucrative business now being largely in the hands of women.

(iii) *Conclusion*

3.127 Examination of the ambit of section 30 of the 1956 Act, as of all of the Act's provisions, now falls to the Criminal Law Revision Committee, following the Home Secretary's remission of sexual offences as a whole for consideration by that Committee. In the circumstances, we think it inappropriate now to recommend any new offence relating to these advertisements. Where they are overtly indecent they are already subject to prosecution under existing legislation[211]. They would continue to be subject to penalties, if indecent, under the terms of the legislation relating to indecent displays provisionally proposed by the Home Office Working Party. We therefore recommend no change in the law to deal with them; and, since charges of conspiracy to corrupt have never, to our knowledge, been brought in respect of them, the abolition of that type of conspiracy will leave no unacceptable gap in the law in this area.

(d) Sale of accoutrements for use in deviant sexual practices

3.128 We pointed out in Working Paper No. 57[212] that one case of conspiracy to corrupt among those we had examined penalised the sale of certain instruments or accoutrements for use in various sexual practices. In that case[213] the directors and employees of a company (but not the company itself) were found guilty of conspiracy to corrupt where they were involved in a flourishing business in sado-masochistic accoutrements, catalogues and books. The count charged them with "procuring, producing and offering for sale certain whips, leg irons, wrist irons, arm restrictors, belts, straps, chains, gags, hoods, masks, head harnesses, chastity belts, restrictive equipment and other articles, rubber and leather garments" etc. The printed matter, it seems clear, might have been dealt with by a charge under the Obscene Publications Act 1959, but an "article" under that Act is limited at present to matter to be read or looked at, sound records and films. The conspiracy charge was the only one available to deal with the other objects.

3.129 We expressed doubt in our working paper[214] as to the need for a new offence to deal with the sale of such articles, pointing out the difficulties of definition having regard to the fact that some of the objects concerned were the subject of everyday commercial transactions. By a small majority, those commenting upon our working paper favoured the provision of a new offence, in some instances with the suggestion that it be limited to the sale of the objects in question to persons under the age of sixteen or eighteen. Very few suggestions, however, were put forward as to the terms of any such offence. The only suggestion of substance, in fact, was that the definition of "article" in the Obscene Publications Act 1959 should be amended to include them, with a provision placing on the defendant the onus of proof as to their possession for a lawful purpose. We do not think that a provision which singled out in this way possessors of this type of article alone would be acceptable.

[211] Under the Indecent Advertisements Act 1889 and the Vagrancy Act 1824; see para. 3.115, above.
[212] Para. 56.
[213] *R.* v. *Traill-Hill and Others:* Central Criminal Court, 19 June 1967.
[214] See Working Paper No. 57, para. 101.

3.130 In fact, it is evident from a number of comments that the main objection to the sale of these articles was the undesirable character of their display in shop windows. We think that the provisional proposals made by the Home Office Working Party for changes in the law relating to indecent display would, if implemented, be sufficient to meet any future objection to their open display for sale. It must also be borne in mind, first, that the terms of section 11 of the Post Office Act 1953[215] have the effect of inhibiting mail order sales, and this prevents wide advertisement of many of these articles and, secondly, that existing legislation [216] already penalises any exhibition of these articles which is indecent. It seems to us, therefore, that existing legislation has the effect of confining the sale of these articles to a limited number of shops with discreet displays in the larger centres, frequented by relatively few people. This situation is, in our view, unlikely to be altered by proposed changes in this legislation. We think that the present situation is preferable to a total ban brought about by means of a new offence which inevitably, it seems to us, would, through difficulties of definition, be of uncertain ambit. Accordingly, we make no recommendation for the creation of an offence dealing specifically with these articles.

(*e*) *Soliciting custom for films and live performances*

3.131 We have seen[217] that the majority of charges of conspiracy to corrupt or outrage brought in recent years have concerned the showing of pornographic films on unlicensed premises, while a smaller number concerned live sex shows. Among the defendants on these charges, a considerable number were touts soliciting customers for these exhibitions, either in the street or from the doors of the premises concerned. We took the view in our Working Paper No. 57[218] that their activities might be regarded as less serious than those actually projecting the films or presenting the exhibitions and we therefore proposed the creation of a specific offence with relatively low penalties[219] analogous to that in section 1 of the Street Offences Act 1959, which would have penalised anyone who solicits others in a public place to induce them to attend film shows and live exhibitions subject to criminal sanctions.

3.132 Upon reconsideration, we have decided not to make this recommendation. It seems clear to us that the conduct which it would cover would in any event always be criminal in that it would necessarily involve complicity as a secondary party in the offences we have recommended in regard to obscene films and live performances[220]. We do not think that there is any real need to burden the statute book with a specific offence applicable only to secondary parties in the commission of some other offence. We are fortified in our view by the fact that, while the touting offence was generally welcomed upon consultation, it was felt by some that the maximum penalties proposed were too low. Where touts are prosecuted for counselling or procuring the offences we now

[215] Sect. 11 prohibits, *inter alia*, the sending of a postal packet (i) enclosing any indecent or obscene print etc., or article, or (ii) which has on it or on its cover any words etc., grossly offensive or of an indecent or obscene character. "Obscene" here bears its "ordinary" meaning which includes "shocking, lewd and indecent matter": *R.* v. *Anderson* [1972] 1 Q.B. 304. See also Customs Consolidation Act 1876, s. 42: prohibition on importation of "indecent and obscene" prints, books etc., and articles.

[216] The Vagrancy Act 1824, s. 4; see para. 3.115, above.

[217] See para. 3.35, above.

[218] Para. 95.

[219] A maximum of three months' imprisonment and a £400 fine.

[220] See paras. 3.86 and 3.96, above.

recommend, they will, of course, be subject to the maximum penalties applying to those offences[221]. We therefore do not recommend the creation of a special offence penalising those soliciting custom for obscene films or live performances.

(f) Other conduct subject to conspiracy charges

3.133 Upon consultation, the one gap in the armoury of the law which would result from the disappearance of conspiracy to corrupt, and which we did not consider in our working paper, was shown to be a minor lacuna in the Theatres Act 1968. We have made recommendations to deal with this[222]. But it seems that the matters hitherto surveyed do not exhaust the uses to which the conspiracy charge has been put. One instance we have noted[223] is a charge of conspiracy to corrupt the morals "of such persons as might consume heroin by procuring quantities of heroin and supplying the same to members of the public" in Soho. This was the forty-fourth count upon an indictment charging twenty-one people with forty-three offences under the Dangerous Drugs Act. While we are not aware of the outcome of this particular case, the charge in this instance would appear to have been superfluous.

3.134 In the absence of any reports of other cases or of fresh situations brought to our attention we are convinced that the matters surveyed in section C of this part of the report have dealt with every situation in which the need for legislation has been demonstrated. We now explain in more detail how our recommendations will enable common law offences in the field of public morals and decency to be abolished.

D. ABOLITIONS, REPEALS AND AMENDMENTS

1. Abolitions

3.135 The objective of this part of the present report is, as we stated at the outset[224], to examine in the context of our review of the law of conspiracy the scope of conspiracy to corrupt public morals and to outrage public decency together with connected, specific offences at common law, and to make recommendations for legislative changes which would enable the conspiracy and common law offences to be abolished. This has been done in sections B and C above. However, in order to indicate more precisely how the recommendations we have made link with the conspiracy and specific common law offences, we set out briefly in this section the recommendations for legislative changes in relation to each of them which, in our view, will suffice to enable the common law in this area to be dispensed with.

(a) Conspiracy to corrupt public morals

3.136 It is unnecessary to recapitulate at length the recommendations we have made for legislative changes to supersede this type of conspiracy charge. Details have been given of the uses to which the charge has been put in recent years and also of its other potential applications[225]. All of the recommendations for legislative changes made in section C, save only those relating to sexual

[221] Six months and £400 (summary), three years and a fine (indictment): see paras. 3.38, n. 93 and 3.96, above.
[222] See para. 3.99, above.
[223] *R.* v. *Brooks and Others*, referred to in Hazell, *Conspiracy and Civil Liberties* (1974), p. 33.
[224] See Introduction, para. 7, above.
[225] See paras. 3.36, 3.87, 3.98, 3.117, 3.123 and 3.128, above.

behaviour in public view, are designed to fill those actual or potential gaps in the law requiring criminal sanctions which would be left if our recommendation to abolish the charge of conspiracy to corrupt public morals is implemented.

(b) Conspiracy to outrage public decency

3.137 In so far as conduct penalised by the offence of indecent exposure at common law may now alternatively be charged as an outrage to public decency[226], our recommendation for an offence penalising offensive sexual behaviour in public view will, we believe, cover all conduct requiring the sanctions of the criminal law which is not already dealt with by the Vagrancy Act and other legislation currently in force. We have seen also[227] that the conspiracy charge has been used as an alternative to conspiracy to corrupt. In so far as it has been so used, no further legislative changes beyond those recommended to replace conspiracy to corrupt are needed.

(c) Public exhibition of indecent acts and things

3.138 In so far as the common law offence of public exhibition of indecent acts and things has been used in recent years to penalise live performances and the exhibition of films[228], our recommendations for legislation are designed to replace it. We are unaware of any other situations of importance for which the offence has been required in recent years.

(d) Keeping a disorderly house

3.139 The charge of keeping a disorderly house has, as we have seen[229], been successfully brought as an alternative to conspiracy to corrupt in cases dealing with pornographic films and live performances. Our recommendations in relation to these matters will, in our view, deal with all such conduct in this area as requires to be penalised by the criminal law. The other situations in which a charge of keeping a disorderly house is or has been used are, in our view, already effectively dealt with by existing legislation[230].

(e) Indecent exposure at common law

3.140 Most cases of male exposure are dealt with under the Vagrancy Act 1824, which is currently the subject of review by the Home Office Working Party on Vagrancy and Street Offences. The only type of male exposure which is not dealt with by legislation is that prosecuted at common law in *R.* v. *Mayling*[231] and, as we have explained[232], we think these infrequent cases will be adequately met by the new offence we recommend dealing with offensive sexual behaviour in public view. That offence will also cover all other such conduct hitherto dealt with by the common law offence as in our view requires to be penalised by the criminal law.

(f) Obscene libel

3.141 As we have seen[233], the common law offence of obscene libel has been put in abeyance, as regards books and other "articles" which are "published" within the meaning given to those terms in the Obscene Publications Act 1959,

[226] See para. 3.25, above and *R.* v. *Mayling* [1963] 2 Q.B. 717.
[227] See para. 3.36, above.
[228] See para. 3.28, above.
[229] See para. 3.36, above.
[230] See para. 3.30, notes 75, 77 and 81, above.
[231] [1963] 2 Q.B. 717.
[232] See para. 3.105, above.
[233] See para. 3.38, above. For the possibility that the offence is capable of application at present to films, see n. 99, above.

by section 2(4) of that Act. Taken with our recommendations as to films, we think that the whole field to which the common law offence is capable of application is now satisfactorily covered either by legislation in force or by our legislative proposals. In our view, therefore, the offence now serves no useful purpose.

(g) Conspiracy to debauch an individual

3.142 The cases which appear to establish conspiracy to debauch an individual or conspiracy to seduce a young girl as a distinct type of conspiracy charge[234] would all, as we have seen[235], be dealt with by charges under statute today. These cases were those chiefly relied upon by the House of Lords in *Shaw's* case to establish the wider offence of conspiracy to corrupt public morals[236]. However, that wider offence has only been used in recent times in cases of this kind where alternative statutory charges were available[237]. We conclude that, whether as a separate head of conspiracy or as an instance of the more general charge of conspiracy to corrupt, this type of conspiracy charge is no longer a necessary weapon in the armoury of the criminal law.

(h) Conclusion

3.143 Having regard to the conclusions reached in the foregoing review of common law offences, we recommend the abolition of the common law offences of public exhibition of indecent acts and things, keeping a disorderly house, indecent exposure and obscene libel. We further recommend the abolition of the common law offences of corrupting public morals and outraging public decency. The implementation of our recommendation in Part I of this report, that conspiracies should be limited to those having as their object the commission of a criminal offence, will, taken with the aforementioned abolitions, secure the objective stated at the outset of this part of the report: that charges of conspiracy to corrupt public morals or to outrage public decency should no longer be brought[238].

2. Repeals and amendments

3.144 As a direct consequence of our recommendation to abolish all common law offences dealing with obscenity and indecency, it seems to us that the provisions in the Obscene Publications Act 1959[239] and the Theatres Act 1968[240], which prohibit the bringing of common law charges of obscenity etc. in respect of the subject matter regulated by those Acts, will be to some extent spent. Section 2(4) of the Theatres Act, however, also applies to Scotland, and it also prohibits the bringing of certain statutory charges; and to this extent it requires to be excepted from any repeal. We therefore recommend that section 2(4) of the 1959 Act should be repealed, but that section 2(4) of the 1968 Act should be repealed only to the extent that it deals with the common law in force in England and Wales.

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[234] See para. 3.32 n. 84, above.
[235] See para. 3.32 and n. 85, above.
[236] See [1962] A.C. 220, 285 *et seq*, *per* Lord Tucker.
[237] See *e.g.*, para. 3.117 n. 197, above; see also *R.* v. *Mackenzie and Higginson* (1910) 6 Cr. App. R. 64.
[238] Similarly the charge of conspiracy to debauch or seduce an individual will disappear.
[239] See para. 3.38, above.
[240] See para. 3.97, above.

3.145 There are two statutes which penalise certain individuals by deeming them to be keepers of disorderly houses in the event of the prohibited conduct taking place. In section 1 of the Sunday Observance Act 1780 "any house, room or other place which shall be opened or used for public entertainment or amusement" etc., on a Sunday, and "to which persons shall be admitted by the payment of money or by tickets sold for money" is deemed a disorderly house and the keeper is liable "as the law directs in the cases of disorderly houses": that is, to the penalty at common law. The operation of the Act is excluded in relation to certain licensed premises where entertainment is provided[241], in regard to Sunday opening of cinemas, museums etc.[242], and in regard to theatrical performances in theatres licensed under the Theatres Act 1968[243]. Section 1 of the Act of 1780 also imposes monetary penalties on the keeper of the premises and others (such as those conducting or managing the entertainments) to be forfeit to "such person as shall sue for the same". Section 1(3) of the Common Informers Act 1951, however, has the effect of abolishing these latter penalties, and of substituting a £100 maximum fine on persons other than a keeper, whose penalty at common law remains unaffected.

3.146 With the abolition of the offence of keeping a disorderly house, the keeper of a place of public entertainment will no longer be liable to punishment at common law for keeping such a place open on the Lord's Day, although, by virtue of section 1(3) of the Common Informers Act, he will be liable to a fine of £100. The deeming provision in section 1 of the 1780 Act and the reference to the keeper being punishable "as the law directs in cases of disorderly houses" will serve no purpose and can be repealed.

3.147 By paragraph 5 of section 51 of the Public Health Acts Amendment Act 1890 any "house, room, garden or place" kept for "public dancing, singing, music or other public entertainment of the like kind" without a licence obtained from the local licensing justices is deemed a disorderly house and the occupier is liable to a penalty of £200[244]. It would seem that the penalty here is limited to this fine of £200, and that the occupier is not liable to the penalty for keeping a disorderly house. The deeming provision, therefore, seems to serve no purpose, and, with the abolition of the offence of keeping a disorderly house, can be repealed.

3.148 Finally, the provisions of the Disorderly Houses Act 1751 must be noted. Of the two sections which are still in force, section 8 specifies who, for the purposes of the general law, shall be deemed to be the keeper of a disorderly house, while section 10 relates to certain procedural requirements as to proceedings for keeping a disorderly house. Having regard to our recommendation for the abolition of the offence of keeping a disorderly house, these provisions will be entirely without purpose[245], and we recommend the repeal of the Act.

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[241] Licensing Act 1964, s. 88.

[242] Sunday Entertainment Act 1932, s. 4.

[243] Sunday Theatres Act 1972, s. 1.

[244] Criminal Justice Act 1967, s. 92, Sch. 3. Sect. 51(5) does not apply in certain parts of the country where the situation is covered by other specific legislation.

[245] The Sunday Observance Act 1780 contains in s. 2 its own definition of a keeper of a house for the purposes of that Act.

E. SUMMARY OF RECOMMENDATIONS

3.149 We recommend the abolition of the generic offences at common law of corruption of public morals and outrage to public decency and the common law offences of public exhibition of indecent acts and things, keeping a disorderly house, indecent exposure and obscene libel. Taken with our recommendations in Part I of this report, these abolitions will mean that charges of conspiracy to corrupt public morals, conspiracy to outrage public decency and conspiracy to debauch will, in accordance with the major recommendation of Part III of this report, cease to be available.

3.150 In regard to the exhibition of films we recommend as follows—

(*a*) The Obscene Publications Act 1959 should be amended so that the offence of publishing an obscene article in section 2(1) of the Act applies to the showing, playing or projecting of all films. This may be effected by amending the proviso to section 1(3)(*b*) of the Act (paragraph 3.86 and clause 16(1)).

(*b*) There should be a special defence of public good available in respect of films which are the subject of proceedings under the Obscene Publications Acts. This should provide that publication of a film may be justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning (paragraph 3.86 and clause 16(3)).

(*c*) There should be no offence committed under the Obscene Publications Act 1959 if a cinematograph exhibition involving the showing, playing or projecting of obscene films is given upon a domestic occasion in a private dwelling, provided that no person under the age of sixteen is present and no charge is made for the exhibition or for anything else provided on that occasion (paragraph 3.86 and clause 16(2)).

(*d*) There should be a limited restriction upon institution of proceedings; this should provide that where it is alleged that an offence has been committed under section 2(1) of the Obscene Publications Act 1959 in respect of a film exhibited or to be exhibited—

(i) on premises licensed for a cinematograph exhibition under the Cinematograph Act 1909; or

(ii) at an exempted exhibition by an exempted organisation under section 5(3) of the Cinematograph Act 1952,

no proceedings under section 2(1) of the 1959 Act shall be instituted except by or with the consent of the Director of Public Prosecutions. This restriction should apply whether the proceedings in question are to be instituted against a distributor or an exhibitor. Corresponding provision should be made in cases of the issue of warrants for seizure leading to forfeiture proceedings under section 3(3) of the Obscene Publications Act 1959 (paragraph 3.86 and clause 17).

3.151 In regard to live performances not subject to the provisions of the Theatres Act 1968, we recommend that—

(*a*) It should be an offence for a person, whether in public or private and whether for gain or not, to present, organise or participate in any live performance or display which is obscene. A "live performance or dis-

play" should include any live activity which does not fall within the definition of a "play" in section 18 of the Theatres Act; and such a performance or display should be deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to see it.

(*b*) There should be a defence of public good to this offence whereby a person shall not be convicted if it is proved that the giving of the performance or display was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning.

(*c*) The offence should not apply to any activity taking place on a domestic occasion in a private dwelling, provided that no person under sixteen is present and no charge is made for the performance or display or for anything else provided on that occasion.

(*d*) The penalties for the offence should be the same as those provided in section 2 of the Theatres Act 1968, that is—

(i) on summary conviction, a fine not exceeding £400 and a term of imprisonment not exceeding six months; or

(ii) on conviction on indictment, a fine, or imprisonment for a term not exceeding three years, or both (paragraph 3.96 and clauses 18 and 19).

3.152 In regard to indecent behaviour in public view which at present falls within the ambit of indecent exposure at common law, we recommend that a new offence be created penalising any person who has sexual intercourse or engages in sexual behaviour in such circumstances that he knows or ought to know that his conduct is likely to be seen by other persons and is likely to cause them serious offence. The maximum penalty for this offence should be a fine of £100 (paragraphs 3.107—3.111 and clause 21).

3.153 We recommend that section 7(1) of the Theatres Act 1968 (which exempts from the Act's provisions performances of plays on domestic occasions in private dwellings) should be amended so that the exemption it provides shall apply only if persons under the age of sixteen are not present and no charge is made for the performance or for anything else provided on that occasion (paragraphs 3.97—3.99 and clause 20).

3.154 We recommend the following repeals—

(*a*) Section 2(4) of the Obscene Publications Act 1959 and (in so far as it refers to offences at common law in England and Wales) section 2(4) of the Theatres Act 1968 (forbidding certain prosecutions at common law on the subject matter of the Acts). By virtue of the recommended abolition of the common law in this field, these provisions to the stated extent will serve no purpose (paragraph 3.144).

(*b*) The Disorderly Houses Act 1751 (paragraph 3.148).

(*c*) Deletion of the references in the Sunday Observance Act 1780 and the Public Health Acts Amendment Act 1890 to disorderly houses and their keepers (paragraphs 3.146—3.147, clauses 22 and 24, and the Schedule).

PART IV

CONSPIRACIES TO EFFECT A PUBLIC MISCHIEF

A. INTRODUCTION

4.1 In this part of the report we examine the present position regarding conspiracy to effect a public mischief. Our examination of this aspect of the law of conspiracy has, for reasons given below[1], not involved any recommendations for legislative changes.

4.2 The scope of our examination of conspiracies to effect a public mischief is limited by two considerations. In the first place, "public mischief" is a label which has been used frequently to apply to certain other kinds of conspiracy with which we have already dealt. For example, Lord Simon of Glaisdale in *Knuller* v. *D.P.P.* considered that conspiracies to corrupt public morals were no more than one form of conspiracy to effect a public mischief[2], while Lord Hailsham of St. Marylebone L.C. in *Kamara* v. *D.P.P.*[3] referred to several species of conspiracy, for example, conspiracies involving fraud and conspiracies to corrupt public morals, as falling within the ambit of conspiracy to effect a public mischief. However, it is fundamental to the decision of the House of Lords in *Withers* v. *D.P.P.*[4] that conspiracy to effect a public mischief is not a separate head of conspiracy at all; it follows that all cases so labelled in the past were either examples of conspiracies falling within other long-recognised categories or were wrongly decided. In this part of the paper, we are, therefore, concerned, not with those "conspiracies to effect a public mischief" which either overlap or are coincidental with other categories of conspiracy previously examined, but solely with those which do not fall within those categories.

4.3 The second factor limiting the scope of our examination of conspiracies to effect a public mischief is the decision of the House of Lords, already mentioned, in *Withers* v. *D.P.P.* As we explain in more detail hereafter, this decision has had the effect of eliminating conspiracy to effect a public mischief as a separate head of liability. This has removed much of the uncertainty which previously surrounded the use of the term "public mischief". Having regard to the consultation upon our working paper dealing with conspiracies to effect a public mischief[5], the effect of this decision cannot be overemphasised. Some comments received upon our paper indicated that some of its recipients were under the impression that we ourselves were proposing the abolition of conspiracy to effect a public mischief. That was not, and is not now the case: it is by

[1] See paras. 4.7, 4.12 and 4.18, below.
[2] [1973] A.C. 435, 489.
[3] [1974] A.C. 104, 122–3.
[4] [1974] 3 W.L.R. 751, referred to hereafter as *Withers'* case.
[5] Working Paper No. 63, "Conspiracies to effect a public mischief and to commit a civil wrong."

virtue of the decision of the House of Lords, which, of course, we welcome, that conspiracy to effect a public mischief cannot now be preferred as a distinct type of conspiracy charge. Nevertheless, we think it desirable to elucidate the implications of *Withers*' case, and this we do after outlining the present position.

B. THE CONSEQUENCES OF *WITHERS* v. *D.P.P.*

4.4 In *Withers*' case[6], the appellants ran an investigation agency which obtained information about customers' accounts from banks and building societies, and information from government departments which they were not entitled to have, or to have only on payment of a fee. They sold the information to those employing them. They were convicted at the Central Criminal Court (the convictions being affirmed by the Court of Appeal[7]) on two counts of conspiracy to effect a public mischief: first, by unlawfully obtaining confidential information from banks and building societies by false representations that they were persons authorised to receive such information; secondly, by obtaining such information from central and local government departments by such representations.

4.5 On appeal by the defendants, the House of Lords held unanimously that there was no separate and distinct class of criminal conspiracy to effect a public mischief. They indicated, however, that where a charge of conspiracy to effect a public mischief had been preferred, it was necessary to consider whether the object or means of the conspiracy alleged in the charge was in substance of such a quality or kind as had already been recognised by the law as criminal. On the facts as charged here, the House considered that it might have been possible for the accused to have been convicted of a conspiracy to defraud on the basis of the test referred to by Lord Radcliffe in *Welham* v. *D.P.P.*[8] that the persons deceived were those holding public office or were a public authority[9]. But because the issues that the jury would then have had to decide had not been put to them in this case, there was no room for upholding the conviction by the application of the proviso to section 2(1) of the Criminal Appeal Act 1968[10]. The appeals were therefore allowed and the convictions quashed.

4.6 It will be clear from this outline of the case that charges of conspiracy to effect a public mischief are not now available in situations falling outside any well-established forms of conspiracy, such as conspiracy to defraud. And it is also clear from the speeches in *Withers*' case that the bringing of such a charge even in cases which on the facts might fall within the well-established forms of conspiracy entails considerable risks; in such cases "one has to go on to consider on an appeal, whether the course the trial took in consequence of the reference to public mischief was such as to vitiate the conviction"[11].

4.7 For reasons given earlier in this report[12], charges of conspiracy to defraud will continue for the time being to be available even after the other recom-

[6] [1974] 3 W.L.R. 751.
[7] [1974] Q.B. 414.
[8] [1961] A.C. 103, 124.
[9] See [1974] 3 W.L.R. 751, 759 *per* Lord Dilhorne.
[10] The section sets out the grounds upon which the Court of Appeal shall allow an appeal, "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred".
[11] *Withers*' case, [1974] 3 W.L.R. 751, 759 *per* Lord Dilhorne.
[12] See para. 1.16, above.

mendations contained in it are implemented by legislation. It may well be, therefore, that, if the facts of *Withers'* case were to recur, a conviction could be secured on a charge of conspiracy to defraud[13]. There are, however, some other situations with which, in consequence of the decision in *Withers'* case, the law as it stands at present would find more difficulty in coping satisfactorily. We think it right to give a clear indication of what those situations are, as we did in our working paper[14]. But, while we shall give some indication of how, in our view, the difficulties arising in these situations may best be resolved, we are not putting forward any legislative proposals in relation to them. The reasons for this will be indicated in each case, but one factor is common to all. The potential difficulties in this area of the law in all cases arise, not from the implementation of our recommendations upon the law of conspiracy, but from the consequences of the decision in *Withers'* case. In our view, the implications of that decision ought properly to await a review of those areas of the law most closely affected, which, as will be seen, include the areas of public order and conspiracy to defraud. The detailed consultation necessary before recommendations could be made for amendments to the law in these sensitive and—in the case of fraud—complex areas would, furthermore, delay the publication of the present report to an unacceptable extent.

C. POSSIBLE DEFECTS IN THE PRESENT LAW

4.8 Quite apart from those types of conspiracy already dealt with in this report which have on occasion been categorised as conspiracies to effect a public mischief[15], there is a small residue of cases so charged in the past which do not fit readily into any other well-settled type of conspiracy. In the main these have concerned the obtaining of information by deception (in circumstances where it is doubtful if a charge of conspiracy to defraud could have been preferred) and the causing of alarm by false reports. We examine these in turn.

1. Obtaining information by deception

4.9 In addition to *Withers'* case, a number of unreported cases in which charges of conspiracy to effect a public mischief were preferred concerned the obtaining of information by means of deception. Of these, the facts of some differed in no material respect from those of *Withers'* case, or differed only in so far as the conduct was such as to enable successful charges to be brought as alternatives in addition to the public mischief charges. For example, in *R.* v. *Quartermain*[16], a private investigator was charged with effecting a public mischief by conspiring to obtain confidential information from government departments, local authorities and the police through telephoning and impersonating police officers or public officials. According to the particulars of the offence, which were amended by the Crown before arraignment, the essence

[13] In *Withers'* case Viscount Dilhorne (Lord Reid agreeing), Lord Diplock and Lord Kilbrandon recognised that conspiracy to defraud included conspiracy to deceive public officers into committing a breach of duty: [1974] 3 W.L.R. 751, 759, 761, 776. But Lord Kilbrandon was not prepared to accept that the "officials of banks and building societies" referred to in the first count (see para. 4.4 above) were public officers within the meaning of *Welham* v. *D.P.P.* Lord Simon, while recognising that there exists a class of conspiracy dishonestly to procure a person charged with a duty to the public to act in derogation of that duty, did not favour classifying this as a type of conspiracy to defraud: *ibid.*, 772.

[14] See Working Paper No. 63, para. 12 *et seq.*

[15] See para. 4.2, above.

[16] Unrep. See *The Times* 23 and 24 October 1974.

of the public mischief charged was that he had deceived a public official into acting contrary to his duty, that is, a conspiracy to defraud on the *Welham* principle[17]. The defendant pleaded guilty and appealed to the Court of Appeal after the decision in *Withers'* case was announced. His appeal was dismissed on the grounds that the particulars of offence disclosed a conspiracy to defraud of the *Welham* type; the conviction could, therefore, be upheld by the application of the proviso to section 2(1) of the Criminal Appeal Act 1968[18].

4.10 Other cases in this group, however, have nothing in common with the facts of *Withers'* case. This is particularly the case with the rare instances in which the unauthorised tapping of telephone calls has been prosecuted. In *R.* v. *Blackburn*[19], the only instance of this which has come to our notice, the defendant pleaded guilty to effecting a public mischief by tampering with Post Office equipment and intercepting, tape-recording and listening to telephone calls made by or to an occupant of a private house. Here, it will be noted, the offence charged did not involve conspiracy. Such charges can, in the light of *Withers'* case, no longer be brought, as it is an inevitable inference from that case that, if there is no separate category of conspiracy to effect a public mischief, there can be no substantive offence of public mischief independent of conspiracy. Had that substantive offence existed, the enquiry by the House of Lords as to whether conspiracy to effect a public mischief was a separate category of conspiracy would have been unnecessary.

4.11 In fact situations resembling those in *Withers'* case, there will in most cases be the possibility of bringing charges of conspiracy to defraud; and the implementation of our recommendations in this report will bring no change in this. In due course we shall be examining again the subject matter of our Working Paper No. 56, "Conspiracy to Defraud", in which we put forward provisional proposals for new substantive offences to cover those situations where the only charge available at present is that of conspiracy to defraud. One of the proposed offences was that of obtaining information by deception. The proposal was cast in alternative forms, one more widely drafted than the other. In its more extended form it involved simply "inducing another by deception to give information, which but for the deception he would not have given". Apropos the offence in this form, we commented[20]—

> "It would not be necessary to show either that there was any element of injury to the community, or even that there was any duty upon the person deceived not to disclose the information. It may be thought that this would penalise too wide a range of conduct. If the offence were cast in the terms of inducing another by deception to give information which it was his duty not to disclose except to those properly entitled to it [this is the narrower form proposed] there would be some limitation upon the extent of the offence; but it could be contended that there is little justification for distinguishing between deceiving a bank manager into disclosing the bank balance of his client and deceiving a person into disclosing his own bank balance."

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[17] See [1961] A.C. 103, 124.

[18] See para. 4.5, above. The defendant also pleaded guilty to charges of conspiring to contravene the Wireless Telegraphy Act, perverting justice by constructing false and misleading evidence in divorce cases, and obtaining passports by giving false names.

[19] Unrep. See *The Times* 6 June 1974.

[20] Working Paper No. 56, para. 76.

The comments which we have received upon this proposal, in response to Working Paper No. 56 and again in the context of our working paper upon conspiracies to effect a public mischief[21], will assist us in settling what recommendations to make upon this subject. Whatever form those recommendations take, the offence will, we think, have to be in terms wide enough to bring within its scope the type of conduct with which the defendants in *Withers'* case were charged.

4.12 As regards the conduct penalised in the case of *R.* v. *Blackburn* referred to in paragraph 4.10 above, telephone tapping was the subject of comment by the Report of the Committee on Privacy, which made a detailed survey of technical surveillance devices[22]. The Committee recommended the creation of a new offence which would cover the unauthorised use of surveillance devices without the consent of the "victim"[23]. Implementation of this recommendation is a matter for the Home Office, and we do no more than draw attention to the existence of this recommended offence designed to combat unauthorised use of surveillance devices, which would effectively cover the practice of unauthorised telephone tapping.

2. Causing alarm and false reports

4.13 Another small group of unreported cases of conspiracy to effect a public mischief concern the placing of hoax bombs in circumstances likely to arouse public alarm. So far as we are aware, there have only been two such cases. In the case of *R.* v. *Chandler*[24], the defendants placed a false but realistic "time bomb" on the pavement on a London street. A passer-by telephoned the police who sealed off the street for three-quarters of an hour while the parcel was examined by a bomb expert. All seven defendants pleaded guilty to conspiracy to effect a public mischief and were given a two year conditional discharge. In *R.* v. *Longhurst*[25], a charge of conspiracy to effect a public mischief was brought where three Post Office engineers manufactured an imitation bomb incapable of exploding and placed it in a post office. The police were called and the building cleared. The defendants pleaded guilty and were fined.

4.14 Where there is a false report which thereby wastes the time of the police, it is possible to charge an offender under section 5(2) of the Criminal Law Act 1967[26], although this is only a summary offence with a maximum penalty of six months' imprisonment and a fine of £200. But this does require a false report

[21] See Working Paper No. 63, para. 15.

[22] (1972) Cmnd. 5012, para. 501 *et seq.*

[23] Para. 563 of the Report states that "The criminal offence of surreptitious surveillance by means of a technical device would comprise the following elements:

(*a*) a technical device;
(*b*) surreptitious use of the device;
(*c*) a person who is, or his possessions which are, the object of surveillance;
(*d*) a set of circumstances in which, were it not for the use of the device, that person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation;
(*e*) an intention by the user to render those circumstances ineffective as protection against overhearing or observation; and
(*f*) absence of consent by the victim."

[24] Unrep., Central Criminal Court, 25 November 1970.

[25] Unrep., Central Criminal Court, 3 September 1971.

[26] "Where a person causes any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police enquiry, he shall be liable on summary conviction . . . ".

to have been made by the defendant, not necessarily directly to the police, although it must at least be passed to them with the result that their time is wasted. A possible alternative is a charge under section 78 of the Post Office Act 1969[27], but again this is only a summary offence with a £50 maximum fine. Where the report amounts to a threat to destroy or damage property, a charge under section 2(*a*) of the Criminal Damage Act 1971 of a threat to destroy or damage property may be possible[28]. The cases referred to in paragraph 4.13, however, did not fulfil the conditions for bringing any of the above charges, for the only act of the defendants was the placing of hoax bombs in the form of parcels and the like in situations giving rise to public apprehension. At the time when these cases occurred it therefore seemed that conspiracy to effect a public mischief was the only available charge to be used against the defendants. On infrequent occasions since then, it is true, a charge has been brought under the Public Order Act 1936. Thus in one unreported case[29] two defendants were sentenced at Manchester City Magistrates' Court to three months' imprisonment for planting a hoax bomb in a crowded wine bar. They were charged under section 5 of the 1936 Act[30] with having "displayed a visible representation, namely a brown paper plastic-taped parcel, which was threatening, whereby a breach of the peace was likely to be occasioned". But there is little doubt that this case involved a strained interpretation of the section, which was certainly not designed to combat this particular kind of incident.

4.15 It has recently been established[31] that it is an offence to commit a public nuisance by making a bogus telephone call falsely giving information concerning the presence of explosives. But it is necessary to show actual, as distinct from potential, danger or risk and that a considerable number of persons, or a section of the public as distinct from an individual, were affected. By way of comment on this decision, we would observe, in the first place, that public nuisance, as distinct from public mischief, is a long-established offence at common law[32], which has been used during the last two centuries in a wide variety of situations, most particularly in connection with obstructions on the highway. It requires a substantial and unreasonable interference with the public's rights, a nuisance "which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large"[33]. Secondly, it follows from the very nature of public nuisance that many cases involving a false report

[27] "A person who . . . (*b*) for the purpose of causing annoyance, inconvenience or needless anxiety to another, sends [by means of a public telecommunication service] a message that he knows to be false or persistently makes use for that purpose of public telecommunication services, shall be liable . . . ".

[28] See *e.g.*, news item in *The Times* 30 November 1974, where the defendant Dunn was sentenced to five years' imprisonment at Wakefield Crown Court for making a 999 call alleging that there was a bomb in Wakefield Magistrates' Court.

[29] See news item in the *Daily Telegraph* 27 November 1974. Details of the charge were made available to us by the Clerk to the Justices, Manchester City Magistrates' Court.

[30] See para. 3.104, n. 185, above.

[31] *R.* v. *Madden* [1975] 3 All E.R. 155.

[32] Stephen's *Digest* defines it as "an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects."

[33] *A.-G.* v. *P. Y. A. Quarries Ltd.* [1957] 2 Q.B. 169, 191 *per* Denning L. J. See generally Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 620 *et seq.*

of explosives or the placing of a hoax bomb will not satisfy all the elements of the offence[34].

4.16 To meet the apparent gap in the law in this area in consequence of the House of Lords' decision in *Withers*' case that conspiracy to effect a public mischief is not a distinct type of conspiracy charge, we put forward proposals in our Working Paper No. 63 (which was published before the decision upon public nuisance described above) for a new offence dealing with the placing of hoax bomb devices in circumstances giving rise to public alarm. We proposed an offence to penalise any person who places any thing which in the circumstances is likely to induce the public to fear that personal injury will thereby be caused, with a mental element in the defendant of an intent to induce the public to fear that personal injury will be caused. The suggested penalty was a maximum of five years' imprisonment and a fine on indictment, with, however, provision for summary trial with the consent of the accused[35].

4.17 When this proposal was made we thought that its possible width might stimulate adverse comment. We ourselves did not consider any narrower formulation would be satisfactory, but we invited comment upon any possible means of circumscribing the offence further. The comment received upon it, however, not only unanimously confirmed the need for some strengthening of the law in this area, but indicated that the proposed offence was too narrowly drawn. The comments were in the main directed towards two points. First, the offence we proposed should, in the view of our commentators, be broadened to penalise anyone who places any thing which in the circumstances is likely to induce "persons" (as distinct from the public at large) to fear that personal injury *or* damage to property will thereby be caused. More fundamentally, however, it was thought by nearly all our commentators that the offence should extend to the giving of false reports likely to induce public alarm. Existing offences dealing with this conduct[36] were thought to be lacking in two respects: save where the conduct amounted to a threat or a public nuisance, the only offences chargeable were punishable summarily with a low maximum penalty; in any event, section 5(2) of the Criminal Law Act 1967 was concerned essentially with the wasting of police time, rather than with the more serious consequences of the defendant's conduct in terms of causing alarm and inconvenience to the public at large.

4.18 It is clear from our consultation that a substantial need is felt for a clarification and extension of penal provisions in this area to make them adequate to meet present conditions. This need does not, however, arise from the changes in the law we are recommending in our review of the law of conspiracy. Rather, it arises from the events of recent years which have demonstrated that the criminal law may not in all respects be adequate to meet current needs; and, probably to a very minor extent, from the decision by the House of Lords in *Withers*' case[37] that conspiracy to effect a public

[34] Significantly, in *R.* v. *Madden* (n. 31 above) one reason given for quashing D's conviction on appeal was that there was no evidence that a considerable number of persons had been affected by his telephone call; only the telephonist, police and security men at the factory concerned were affected. It is noteworthy also that the defendant was acquitted on charges under the Criminal Damage Act 1971, s. 2 and the Public Order Act 1936, s. 5.

[35] Working Paper No. 63, para. 22 *et seq.*

[36] See para. 4.14, above.

[37] [1974] 3 W.L.R. 751.

mischief does not exist as a distinct type of offence. We say "to a very minor extent" since, as we have seen[38], the instances in which the charge was used to penalise hoax bombs were apparently few and isolated.

4.19 These considerations persuade us that fresh proposals in this context would be better made, either in a review of public order offences in general, or alternatively in legislation designed especially to deal with the problems which recent experience has shown to exist. The former course would also, we believe, be the appropriate time for review of the common law offence of public nuisance, which, as we have pointed out, differs considerably from public mischief, an offence which now finds no place in English law. In the present report, therefore, we make no final recommendations with regard to conduct causing public alarm.

3. Other cases

4.20 The foregoing paragraphs have reviewed the great majority of the infrequent cases in recent years where a charge of conspiracy to effect a public mischief has been brought. Our working paper drew attention to one isolated case[39] which we considered might be worthy of the attention of those concerned with the administration of prisons but which we did not consider to justify any legislative proposal. Consultation on the working paper has not brought to light any further case requiring consideration.

D. CONCLUSION

4.21 For reasons given above[40], we take the view that the recent decision by the House of Lords in *Withers'* case[41], that conspiracy to effect a public mischief does not exist as a distinct type of offence, does not make it either necessary or appropriate for us to make any legislative recommendations in the present report upon the issues raised by that case.

PART V

CONSPIRACIES TO COMMIT A CIVIL WRONG

A. INTRODUCTION

5.1 Two types of conspiracy to commit an unlawful, but not criminal, act remain to be dealt with: conspiracy to commit a tort and conspiracy to injure. Not only are they perhaps the most uncertain in ambit amongst all the branches of criminal conspiracy considered in this report, but they are closely linked and, indeed, overlap to a considerable extent. While, therefore, a separate description is required of their respective ambits (as we understand them to be), our conclusions[1] pertain to the whole of the law in this area.

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[38] See para. 4.13, above.

[39] In *R.* v. *Henman and Donovan*, Unrep., Central Criminal Court, 1 May 1969, D, serving a prison sentence, conspired with H for the latter to send him a false telegram telling him of his daughter's death, in order that D should be granted on false grounds compassionate leave for her funeral. Enquiries showed the telegram's contents to be false. D and H pleaded guilty to conspiracy to effect a public mischief and were each sentenced to six months' imprisonment. See Working Paper No. 63, para. 26 *et seq.*

[40] See paras., 4.7, 4.12, 4.18 and 4.19.

[41] [1974] 3 W.L.R. 751.

[1] See paras. 5.17 and 5.23, below.

B. CONSPIRACY TO COMMIT A TORT

5.2 Until recently it could not be asserted with any certainty what the boundaries of criminal liability were in this area. Authority seemed to indicate that not all conspiracies to commit a tort sufficed to found criminal liability[2], but the position was confused both by the attention paid to the so-called "Denman antithesis"[3] and by dicta which, when isolated from the context of the cases in which they were pronounced, appeared to provide authority for extremely broad principles of liability[4].

5.3 The law must, however, now be taken to be as stated by the House of Lords in *Kamara* v. *D.P.P.*[5] The facts of the case and the principles enunciated by Lord Hailsham L.C. and by Lord Cross have been set out already[6]. A more detailed examination of these principles, however, is required in the present context, and their content must, therefore, be repeated here. In Lord Hailsham's view[7], to establish criminal liability for conspiracy to commit a tort, the conspiracy must aim at the commission not merely of a tort or "other actionable wrong" but must also involve either "the invasion of the public domain or the intention to inflict on its victim injury and damage which goes beyond the field of the nominal". The tortious conduct which the execution of the conspiracy involves may consist of "trespass to land, goods or person", "the commission of a private nuisance", "some contrivance of fraud", "the imposition of force", "ruin of the victim's reputation through defamation of character", or, indeed, "any other means which is tortious". In the view of Lord Cross[8], an agreement by several to commit acts which, if done by one, would only amount to a tort, may constitute a criminal conspiracy "when the carrying into execution of the agreement would have consequences sufficiently harmful to call for penal sanction".

5.4 A conspiracy to commit a tort is, therefore, indictable in a variety of circumstances, depending upon the character of the act contemplated by the agreement. These circumstances require examination to ensure that they disclose no situations with which the criminal law must deal when our recommendations in the other parts of this report are implemented, since conspiracy to commit a tort will cease to exist as a criminal offence. For this purpose it will be convenient to consider in turn the various forms of tortious conduct specified by Lord Hailsham.

1. Conspiracies to commit trespass to land, goods or person

5.5 The circumstances in which a conspiracy to trespass upon land is indictable was, of course, the question at issue in *Kamara* v. *D.P.P.* We have

[2] *e.g.*, *R.* v. *Turner* (1811) 13 East 228, in which Lord Ellenborough C.J. held that an agreement to commit a civil trespass was not indictable.

[3] In *R.* v. *Jones* Lord Denman C.J. said that an indictment must "charge a conspiracy to do an unlawful act, or a lawful act by unlawful means" (1832) 4 B. & Ad. 345, 349. Later he said that he did not think this was "very correct" (*R.* v. *Peck*, (1839) 9 Ad. & El. 686, 690) and "the words 'at least' should accompany" it (*R.* v. *King* (1844) 7 Q.B. 782, 788).

[4] *e.g.*, *R.* v. *Warburton* (1870) L.R. 1 C.C.R. 274, 276 *per* Lord Cockburn C.J.; *R.* v. *Parnell* (1881) 14 Cox C.C. 508, 513 *per* Fitzgerald J.; *R.* v. *Whitaker* [1914] 3 K.B. 1283, 1299 *per* Lawrence J.

[5] [1974] A.C. 104.

[6] See paras. 2.19–2.21, above.

[7] [1974] A.C. 104, 129.

[8] *ibid.*, at p. 132.

examined the decision fully from this point of view and made recommendations covering this area of the law[9].

5.6 We find it difficult to envisage situations of any moment in which a conspiracy to commit trespass to goods would not already constitute a conspiracy to commit a crime, such as theft or criminal damage. In some circumstances conduct falls outside the definition of theft, for example, where there is a mere temporary deprivation of property. Some of these may amount to a conspiracy to defraud[10], and if so, will continue to be so prosecuted for the time being in accordance with our recommendations[11]. Other temporary deprivations may not amount to conspiracy to defraud, for example, where workmen temporarily deprive a colleague of his tools with malicious intent. This is not theft[12] but might conceivably amount, in a serious case, to a conspiracy to commit trespass to goods. In our working paper[13] we doubted the need for legislation to deal with this type of case, and the results of our consultation confirm our provisional view.

5.7 A conspiracy to commit trespass to the person must always, it seems to us, involve also a conspiracy to commit an offence to the person; and so, however trivial the intended result may be—such as a "technical" assault—there is always the possibility of a charge of conspiracy to commit a crime. In any event, in our view the law relating to offences against the person provides adequate protection in all circumstances likely to arise. Consequently, we see no useful purpose in retaining conspiracy to commit a tortious act in this area of the law, whether the tortious element be described as "trespass to the person" or "the imposition of force".

2. Conspiracies involving commission of a private nuisance

5.8 There is early but weak authority that conspiracy to inflict injury upon a person by means of a private nuisance is indictable: in the case of *R.* v. *Levy*[14] the defendants conspired to injure a woman in labour by banging loudly on the wall of her room. The jury found them guilty, but no report of the direction is given. Such conduct would now most probably be dealt with as an agreement to commit a criminal assault. We are not aware of any other cases of agreements to commit a private nuisance which have for that reason been dealt with as an offence, and therefore conclude that such liability, so far as it may exist, does not now have any utility.

3. Conspiracies to commit torts involving fraud

5.9 Statements are to be found in cases involving fraud[15] to the effect that the conduct in question was actionable as a civil wrong in order to justify the conclusion that it was indictable as a conspiracy to defraud. However, the element of fraud in criminal conspiracy is not restricted to cases where the conduct involves a civil wrong; thus there is no necessary connection between tortious and criminal liability[16]. Under our recommendations,

[9] See Part II, above.
[10] *Scott* v. *D.P.P.* [1974] 3 W.L.R. 741.
[11] See para. 1.16, above.
[12] See *R.* v. *Warner* (1970) 55 Cr. App. R. 93.
[13] Working Paper No. 63, para. 48.
[14] (1819) 2 Stark 458.
[15] See *e.g.*, *R.* v. *Warburton* (1870) L.R. 1 C.C.R. 274, 276.
[16] Although see Glanville Williams, *Criminal Law* (2nd ed., 1961), p. 693 *et seq.*

conspiracy to defraud is, for the time being, to be retained as a separate head of conspiracy liability[17].

4. Conspiracies involving defamation of character

5.10 It is an offence to conspire to charge a person with having committed a crime when he has not done so. The subject is treated in detail in *Russell on Crime* which sets out precisely the circumstances in which the conspiracy charge is available[18]. It is said that this form of conspiracy is not criminal if the charge was to be preferred honestly and with reasonable belief in its truth[19]. The conspirators may, however, be indicted whether or not they have reached the stage of indicting the injured party, since it is the agreement which, as in all cases of conspiracy, is the gist of the offence. It is also an offence to conspire to indict another for the purpose of extortion whether the charge is true or false[20], or to enforce by legal process the payment of money known by the conspirators not to be due[21].

5.11 So far as these types of conspiracy charges protect the property of the victims of such conspiracies and the proper functioning of the courts, they are, in our view, clearly obsolete. Where the object is extortion, all conduct which needs to be penalised appears to be covered in any case likely to arise by section 21 of the Theft Act 1968 (blackmail)[22]. Where there is abuse of the criminal process, the conduct would almost certainly involve, at one stage or another, a false report causing wasteful employment of the police[23], perversion of the course of justice or perjury.

5.12 So far as the conspiracy charges under consideration protect the reputation of victims, they are to a large degree covered by other offences. By section 4 of the Libel Act 1843 it is an offence punishable with up to two years' imprisonment to "maliciously publish any defamatory libel, knowing the same to be false". There is some authority for the view that this creates no new offence but does no more than regulate the punishment for the offence at common law[24]. The common law offence of criminal libel is in some respects wider than the tort of defamation[25], but is concerned mainly with "writings" and is in part regulated by the 1843 Act. Proceedings for criminal libel are discouraged if the libel is unlikely either to disturb the peace or seriously to affect the reputation of the person defamed[26], a limitation upon proceedings based upon the attitude of the courts and the prosecutor's discretion.

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[17] See para. 1.16, above.

[18] See *Russell on Crime* (12th ed., 1964) p. 1482.

[19] See *Russell on Crime* (12th ed., 1964) p. 1482, although it is not clear that the authority cited, *R.* v. *Jacobs* (1845) 1 Cox C.C. 173, establishes this proposition.

[20] *R.* v. *Hollingberry* (1825) 4 B. & C. 329.

[21] *R.* v. *Taylor* (1883) 15 Cox C.C. 265; here a false civil claim was held to be both a conspiracy to defraud and a conspiracy against the administration of justice.

[22] It is relevant to note that the Act abolishes, *inter alia*, common law offences of "obtaining property by threats": s. 32(1)(*a*).

[23] Criminal Law Act 1967, s. 5(2).

[24] Sect. 5 of the 1843 Act punishes with up to one year's imprisonment anyone who shall "maliciously publish any defamatory libel". In *R.* v. *Munslow* [1895] 1 Q.B. 758 this was held only to prescribe the punishment for the common law offence. *Archbold* (38th ed., 1973), para. 3622, cites the case as authority for this proposition in relation to s. 4.

[25] As to the differences between the crime and the tort, see Smith and Hogan, *Criminal Law* (3rd ed., 1973), p. 637. See also Report of the Committee on Defamation (1975) Cmnd. 5909 paras. 428–448, which recommends retention of the offence of criminal libel with only minor amendments.

[26] *R.* v. *Wicks* [1936] 1 All E.R. 384.

5.13 There are, in our view, no instances of any importance where conspiracy charges of the type under consideration would lie, but where a charge of criminal libel would not, certainly none which would justify the retention in the law of this type of conspiracy. We have considered two situations which seem to present some difficulties. In the first place, if a charge of criminal libel is in respect of an accusation contained in a document incidental to the proper initiation of judicial proceedings[27], such as the formal information that is laid, the absolute privilege attaching to it would seem to exclude the possibility of a successful prosecution. It might, therefore, be thought that this is an instance where the only charge available to deal with such conduct would be one of conspiracy. It has to be borne in mind, however, that, on the better view[28], privilege attaches to the occasion upon which the statement in a document is used rather than to the statement itself. This means that the statement in the information cannot be made the subject either of an action for libel or a prosecution for criminal libel. But it does not mean that it cannot be used as evidence of the commission of another criminal offence. To take a parallel case, it is well settled that an action for libel cannot lie for anything said by a witness in the course of judicial proceedings; but this does not prevent charges of perjury being brought against the witness in respect of his untrue statements[29]. Thus, where a false charge is made in an information, despite the absolute privilege attaching to it, there would appear to be nothing to prevent charges of perverting the course of justice being brought in respect of an abuse of the court process[30]; and where a charge, whether true or false, is laid in an information with intent to extort, there would again appear to be no bar to a prosecution for blackmail. We conclude, therefore, that in this respect the type of conspiracy charge under discussion does not extend the armoury of the criminal law.

5.14 The other situation we have considered concerns slander. Charges of criminal libel cannot be brought in respect of oral statements. A conspiracy charge can, however, be brought where there is a false oral allegation of crime without intent to extort[31]. We have traced no case occurring in this country in which any such charge was brought, and our consultation has confirmed the view expressed in our working paper[32] that conspiracy no longer plays a useful role in this context.

5. Conspiracies effected by other tortious means

5.15 The tortious conduct involved in the execution of a conspiracy attracting criminal liability may, quite apart from the means specified in the foregoing paragraphs, be "any other means which is tortious", according to the test propounded by Lord Hailsham L.C. in *Kamara* v. *D.P.P.*[33] There is no authority, other than *Kamara's* case itself, which would indicate precisely what may be comprehended in this residual liability. It has to be borne in mind,

[27] See *Gatley on Libel and Slander* (7th ed., 1974), para. 409 *et seq.*

[28] See *e.g.*, *Salmond on the Law of Torts* (16th ed., 1973), p. 162 and the cases there cited.

[29] See judgment of Lord Goddard C.J. in *Hargreaves* v. *Bretherton* [1959] 1 Q.B. 45, 51 and the cases cited therein; and *Roy* v. *Prior* [1971] A.C. 470, 477 *per* Lord Morris.

[30] In addition, a charge of perjury might be available in some cases: under the Magistrates' Courts Act 1952, s.1, if the justice intends to grant a warrant, the matter of the information must be both in writing and substantiated on oath.

[31] See *R.* v. *Conteh* [1956] A.C. 158 (P.C.).

[32] See Working Paper No. 63, paras. 57–58.

[33] [1974] A.C. 104, 129; see para. 5.3, above.

however, that both inducement to breach a contract and intimidation by threats may give rise to a cause of action. In our working paper[34] we pointed out that there was little or no authority for the proposition that conspiracy to commit or induce a breach of contract was in itself indictable. Where, however, there is a conspiracy to induce a breach of contract which falls within the tests propounded in *Kamara's* case—that is, one which involves invasion of the public domain or the intention to inflict more than nominal injury upon the victim[35] —it could well be that liability might be held to exist. It follows from this that there may well here be an area of potential liability in respect of certain activities by trade unions where these activities lie outside the bounds of a "trade dispute"[36]. What the limits of this liability may be is a matter of considerable uncertainty, but whether or not the liability exists in a given case would seem to depend upon technicalities bearing little or no relationship to the gravity or otherwise of the activities themselves[37]. We are firmly of the view that a liability for conspiracy to commit a non-criminal act which has never been invoked, and the ambit of which cannot be stated with any certainty, should find no place in the law today.

5.16 In the area of potential liability that may exist by virtue of the principles in *Kamara's* case discussed in the last paragraph, there would seem to be a considerable overlap with criminal conspiracy to injure, with which we deal separately[38]. How far this overlap extends cannot, in the entire absence of decided cases upon the matter, be stated with any confidence.

6. Conclusion

5.17 Conspiracy to commit a tort will, with the implementation of our other recommendations in this report, cease to be an offence, whatever the qualifying circumstances of the conduct[39]. But our survey of the possible activities dealt with by this form of conspiracy indicates that the conduct which requires the sanctions of the criminal law is either fully covered by existing legislation or will be covered for the future by recommendations made elsewhere in this report. We do not, therefore, recommend the creation of any further offences in this area.

C. CONSPIRACY TO INJURE

1. The extent of criminal liability

5.18 The limits of tortious, as distinct from criminal, liability for conspiracy to injure or molest must be taken to have been settled in *Crofter Handwoven Harris Tweed* v. *Veitch*[40]. From this case it emerges that a conspiracy to injure another, without the justification that the defendants are acting to protect what they believe to be their own legitimate interests, is actionable if loss is caused by the defendants' activities. In the words of Viscount Simon L.C.[41]—

> "... unless the real and predominant purpose is to advance the defendants'

[34] Working Paper No. 63, para. 67.
[35] See para. 5.3, above.
[36] "Trade dispute" is defined by the Trade Union and Labour Relations Act 1974, s. 29(1).
[37] See Wallington, "Criminal Conspiracy and Industrial Conflict" Industrial L.J. (1975) p. 69, 80 *et seq.*
[38] See para. 5.18, below.
[39] Except, of course, in the case of fraudulent conduct amounting to a conspiracy to defraud: see para. 1.16, above.
[40] [1942] A.C. 435.
[41] *ibid.*, at p. 446.

lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful."

Once the bona fides of the defendants is established, it is not for the courts to enquire as to the quantum of damage inflicted by their activities[42]. These principles extend beyond trade competition and labour disputes[43]. Some dicta also suggest that a combination to injure by "unlawful means"—such as "illegal threats or the exercise of unlawful coercion"[44]—would give rise to a cause of action.

5.19 The definition of the extent of tortious liability for conspiracy is of importance, for it is generally thought that criminal and civil liability in this sphere are co-extensive, the one difference in practice being that actual damage must have occurred to ground an action in tort. This was assumed to be the position in the authorities preceding the *Crofter* case, such as *Quinn* v. *Leathem*[45], and it underlies the *Crofter* case itself[46]. Further, Lord Reid in *Shaw* v. *D.P.P.*[47] included injury to a man in his trade without justification as one head of criminal conspiracy. It is to be noted, however, that Lord Porter in the *Crofter* case said[48]—

". . . in recent times I do not think it has been held criminal merely to combine to injure a third party provided no unlawful means are used or contemplated and it is doubtful whether such a combination ever was criminal".

In his view, therefore, conspiracy to injure in itself, although it may be actionable in tort, is not criminal, although it is criminal if done by "unlawful means". This isolated dictum has, however, to be set against the weight of opinion to the contrary.

5.20 The references in the *Crofter* case to "unlawful means" are, nevertheless, of importance as an indication of the overlap we have previously mentioned which may well exist between criminal liability for conspiracy to commit a tort and criminal liability for conspiracy to injure. In tortious conspiracy upon the principles of the *Crofter* case "the conspiracy [to injure] is the gist of the wrong" and not "the particular wrongful acts done in pursuance of it"[49]. But this tortious liability has its roots in criminal conspiracy as it developed during the nineteenth century, and in particular in a group of cases[50] which held, first, that agreements having as their object injury to an employer, as distinct from furtherance of workers' interests, entailed criminal liability; and, secondly, that agreements which had the effect of coercing, as distinct from persuading, an employer were criminal.

[42] *ibid.*, at p. 447 *per* Viscount Simon L.C.
[43] *ibid.*, at p. 447 *per* Viscount Simon L.C. and p. 478 *per* Lord Wright.
[44] [1942] A.C. 435, 467 *per* Lord Wright.
[45] [1901] A.C. 495.
[46] See *e.g.*, [1942] A.C. 435, 439–440 *per* Viscount Simon L.C.
[47] [1962] A.C. 220, 273; and see *Kamara* v. *D.P.P.* [1974] A.C. 104, 124–125 *per* Lord Hailsham of St. Marylebone L.C.
[48] [1942] A.C. 435, 488.
[49] *ibid.*, at p. 461 *per* Lord Wright.
[50] *R.* v. *Duffield* (1851) 5 Cox C.C. 404; *R.* v. *Rowlands* (1851) 5 Cox C.C. 466; *R.* v *Druitt* (1870) 10 Cox C.C. 592; *R.* v. *Bunn* (1872) 12 Cox C.C. 316.

5.21 In large part the cases mentioned in the last paragraph are, because of the effects of subsequent legislation[51], no longer authority for the propositions there set out. But this general statement must be qualified in two respects. In the first place, these cases, as we have mentioned, influenced the development of the tort of conspiracy to injure established in *Quinn* v. *Leathem*[52], where it seems that the House of Lords assumed that a conspiracy was civilly actionable because it would also entail criminal liability. Secondly, *R.* v. *Bunn*[53] is, it seems, still an authority on criminal liability, since the law relating to one of the charges in that case was based upon principles which were unaffected by any of the legislation referred to above[54]. That charge was described thus by Brett J.[55]—

> ". . . if there was an agreement among the defendants by improper molestation to control the will of the employers . . . and . . . the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve to deter them from carrying on their business . . . then I say that this is an illegal conspiracy. . . .".

And it was an "improper molestation" if—

> "anything was done with an improper intent which you think was an unjustifiable annoyance and interference with the masters in the conduct of their business, and which in any business would be such annoyance and interference as would be likely to have a deterring effect upon masters of ordinary nerve."[56]

This case was cited in argument in *Cory Lighterage Ltd.* v. *T.G.W.U.*[57] and, although not mentioned in the judgments, we understand that the Court of Appeal in the course of argument indicated its view that the case (in so far, it would seem, as it dealt with this particular conspiracy charge[58]) is still good law.

5.22 The position of conspiracy to coerce by unlawful means as established in *R.* v. *Bunn* has to be considered in the light both of the principles of *Kamara's* case and of the more modern development of criminal conspiracy to injure in parallel with tortious liability as defined in the *Crofter* case. As regards the first, since the conduct referred to by Brett J. as "improper molestation" probably also amounts to actionable intimidation and could have the effect of inducing a breach of contract, which is also an actionable wrong, a conspiracy of the type penalised in *R.* v. *Bunn* could well be charged today as a conspiracy to commit a tort, provided that the facts were such as to fall within the principles of *Kamara's* case[59]. The relationship of *R.* v. *Bunn* with criminal conspiracy to injure as deduced from the *Crofter* case is less clear, but it is to be observed

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[51] Molestation of Workmen Act 1859; Criminal Law Amendment Act 1871; Trade Union Act 1871; Conspiracy and Protection of Property Act 1875.

[52] [1901] A.C. 495.

[53] (1872) 12 Cox C.C. 316.

[54] See n. 51, above.

[55] (1872) 12 Cox C.C. 316, 340.

[56] *ibid.*, at pp. 348–9.

[57] [1973] 1 W.L.R. 792. This was a civil case which turned on the meaning of an "industrial dispute" under the Industrial Relations Act 1971.

[58] In *R.* v. *Bunn* one of the charges was a conspiracy to commit a breach of contract, but that was at a time when breach of contract between master and servant was both a criminal and a civil wrong under the Master and Servant Acts 1867, repealed by the Conspiracy and Protection of Property Act 1875: see (1872) 12 Cox C.C. 316, 340.

[59] See paras. 2.20 and 2.30, above.

that, while *R.* v. *Bunn* and other contemporaneous cases[60] were decisions relating solely to trade disputes, the principles of tortious liability enunciated in the *Crofter* case were specifically stated by the House of Lords not to be limited to that context[61]. In the absence of any reported cases in recent times, all that can be said with confidence is that there must be a considerable degree of overlap in the principles of liability deducible from these cases.

2. Conclusion

5.23 There have, as we have already indicated, been no reported cases of liability for criminal conspiracy to injure, nor any cases involving a conspiracy to coerce by unlawful means since the case of *R.* v. *Bunn* in 1872. We suggested in our working paper[62] that this was evidence that in recent years these forms of criminal conspiracy have served no useful social function. This conclusion has met with no disagreement upon consultation, and we, therefore, do not recommend that any new offences in this area be created when our other recommendations in this report are implemented. The consequent elimination of these forms of conspiracy will accordingly clarify this area of the law. It is relevant to note, however, that our recommendations will have no effect upon such civil liability as may at present exist in this field.

PART VI

CONTEMPT OF STATUTE

A. PRESENT LAW

6.1 In our *Seventh Annual Report*[1] we stated that "other common law 'misdemeanours' which constitute separate substantive offences will be considered in due course in relation to the broad divisions of criminal conduct under which they most appropriately fall". For this reason, as we have explained in the introduction to the present report, we have considered certain common law offences cognate to the different types of conspiracy charges dealt with in it. There is, however, one form of common law liability which we find has no link with any other broad division of criminal conduct, but shares with conspiracy not only an ancient lineage but the dual objection of extreme uncertainty as to its scope combined with the availability of an unlimited penalty. We refer to the doctrine of contempt of statute. We believe that it will be convenient to examine here this doctrine which, as will be seen, is obsolete but not dead, and make recommendations in regard to it.

6.2 The doctrine is set out at length in *Hawkins' Pleas of the Crown*[2], of which the relevant passage was approved by Charles J. in *R.* v. *Hall*[3]. It is as follows—

> "It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberty and security of a subject, or

[60] See n. 50, above.
[61] See para. 5.18, n. 43, above.
[62] Working Paper No. 63, para. 66.
[1] (1972) Law. Com. No. 50, (1972–73) H.C. 35, para. 29.
[2] (1788) Vol. II, c. 25, s. 4; and see *Archbold* (38th ed., 1973), para. 6.
[3] [1891] 1 Q.B. 747, 753.

commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such methods of proceeding do manifestly appear to be excluded by it. . . . Also where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information etc., without mentioning an indictment, it seems to be settled at this day that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment. Yet it hath been adjudged that, if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorises a proceeding by way of indictment. Also where a statute adds a farther penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. And if the indictment for such offence conclude *contra formam statuti*, and cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law."

The most important part of this citation is, perhaps, the principle set out in its final sentence. This aspect of the doctrine is put in more modern form in Article 152 of Stephen's *Digest*[4]—

> "Every one commits a misdemeanour who wilfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the legislature to provide other penalty for such disobedience."

Craies on Statute Law and *Maxwell on the Interpretation of Statutes* both devote short passages to the doctrine[5] and refer to the old cases[6].

6.3 The doctrine was recently invoked in the case of *R.* v. *Lennox-Wright*[7] where the defendant who posed as a doctor in a hospital was charged, *inter alia*, with "doing an act in disobedience of a statute by removing parts of a dead body contrary to section 1(4) of the Human Tissue Act 1961". Section 1(4) states that no removal of parts from a dead body "shall be effected" save by a registered medical practitioner. The Act nowhere states that it is an offence to violate its provisions, nor prescribes any penalties. However, it was held to be settled that if a statute prohibits a matter of public grievance to the liberties and securities of the subject or commands a matter of public convenience, all acts or omissions contrary to the prohibitions or command of the statute are misdemeanours at common law punishable by indictment unless such method manifestly appears to be excluded by statute. The punishment was governed by the common law and an unlimited term of imprisonment and an unlimited fine could be imposed. The defendant was convicted and given

[4] See (9th ed., 1950), at p. 120.

[5] (7th ed., 1971), at pp. 230–232 and (12th ed., 1969), at pp. 334-335 respectively.

[6] These include *R.* v. *Jones* (1735) 2 Stra. 1146; *R.* v. *Davis* (1754) Say. 163; *R.* v. *Wright* (1758) 1 Burr. 543; *R.* v. *Robinson* (1759) 2 Burr. 800; *R.* v. *Boyall* (1759) 2 Burr. 832; *R.* v. *Smith* (1780) 2 Douglas 441; *R.* v. *Harris* (1791) 4 T.R. 202; *R.* v. *Gregory* (1833) 5 B. & Ald. 555; *R.* v. *Price* (1840) 11 Ad. & E. 727; *R.* v. *Buchanan* (1846) 8 Q.B. 883.

[7] [1973] Crim. L.R. 529.

a suspended prison sentence. This is the first instance since 1846[8], so far as we know, in which the doctrine has been successfully invoked.

6.4 In our view, this doctrine in practice now leads to results which are undesirable. But for the existence of the doctrine, it might be assumed that whenever Parliament intends to impose penalties for contravening a prohibition contained in a statute, it invariably provides expressly for this purpose. The recent affirmation of the existence of the doctrine, however, some one hundred and thirty years after the last case in which it was successfully invoked, makes that assumption impossible; and the doctrine is the more objectionable in that, operating as it does at common law, it permits the imposition of an unlimited period of imprisonment and fine. In this respect also, it encounters the objection frequently raised to the law of conspiracy.

B. RECOMMENDATION

6.5 In essence, this is a matter of statutory construction; and the modern approach would, we think, be to ask whether, in the absence of an express provision making particular conduct an offence, there was any intent by Parliament to penalise that conduct. The answer today, we suggest, would always be in the negative. In our working paper[9] we proposed that the doctrine under discussion be abolished. This met with almost complete agreement upon consultation. Accordingly, we now recommend that it be provided that no person shall be guilty of an offence by reason of a failure to comply with the terms of a statute, whether by doing any act which it forbids or by omitting to do any act which it requires to be done, unless the statute provides expressly that such failure to comply shall be an offence.

PART VII

COMPREHENSIVE SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

7.1 The following paragraphs summarise the conclusions and recommendations of this report. Reference is made in each case to the relevant paragraphs where the matters summarised are discussed, and, where the recommendations involve the need for legislation, to the draft clauses in Appendix 1.

7.2 In relation to the principles of the law of conspiracy discussed in Part I—

(1) A separate inchoate offence of conspiracy should continue to have a place in the criminal law, but (subject to (19) below) as an offence defined by statute (paragraphs 1.5-1.6).

(2) The crime of conspiracy should be limited to agreements to commit criminal offences (paragraph 1.9 and clauses 1(1) and 6(1)).

(3) To be guilty of conspiracy a person must have agreed with at least one other person (paragraph 1.23 and clause 1(1)).

[8] See *R.* v. *Buchanan* (1846) 8 Q.B. 883.
[9] Working Paper No. 63, para. 74.

(4) A person should not be guilty of conspiracy if the only person with whom he has agreed is a corporation of which he is acting as the sole agent (paragraph 1.24).

(5) A person should be guilty of conspiracy if he agrees with another person that an offence shall be committed. Both must intend that any consequence specified in the definition of the offence will result and both must know of the existence of any state of affairs which it is necessary for them to know in order to be aware that the course of conduct agreed upon will amount to the offence (paragraph 1.39 and clauses 1(1), (2) and (3)).

(6) A person should not be guilty of conspiracy if the only person with whom he agrees is his spouse (paragraph 1.49 and clause 2(2) (*a*)).

(7) Where the only agreement is between a person and one or more other persons who are exempt for the reasons mentioned in paragraphs 1.51 to 1.55 of the report from criminal liability in respect of the act which it is agreed shall be done, no charge of conspiracy in respect of the agreement shall lie against anyone (paragraph 1.58 and clause 2).

(8) A person should not be entitled as a matter of law to an acquittal on a charge of conspiracy merely because another person or persons with whom he is found to have agreed are acquitted, whether they are tried at the same time as he or separately (paragraph 1.63 and clause 6(4)).

(9) It should be a rule of practice that, in the case where an indictment contains substantive counts and a conspiracy count based upon an agreement to commit the offences charged in the substantive counts, the prosecution should be required to justify the joinder to the judge. If, in the exercise of his discretion, the judge decides not to allow joinder, the prosecution should be required to elect whether to proceed on the substantive or conspiracy counts (paragraph 1.71).

(10) Where an offence has been committed and prosecution for the offence is statute barred no charge of conspiracy based upon an agreement to commit that offence should lie (paragraph 1.75 and clause 4(3)).

(11) Where prosecution of an offence requires the consent of any person the same consent should be required for prosecution of a conspiracy to commit that offence (paragraph 1.75 and clause 4(2)).

(12) The question whether a defence of withdrawal should be provided on a charge of conspiracy will be considered in the context of defences of general application and be the subject of a recommendation in a later report (paragraph 1.79).

(13) Conspiracy to commit any offence including a purely summary one should be an offence (paragraph 1.85 and clause 1(1)).

(14) The consent of the Director of Public Prosecutions should be required for the prosecution of an offence of conspiracy to commit an offence which is expressed in the enactment creating it only to be triable summarily (whether or not the defendant or prosecution is given the right to trial on indictment). The object of this is to ensure that

conspiracy to commit summary offences is prosecuted only in cases where there is deliberate planning of offences on a widespread scale (paragraphs 1.85 and 1.87 and clause 4(1)).

(15) The offence of conspiracy should only be triable on indictment (paragraph 1.87 and clause 3(1)).

(16) The rules as to maximum penalties should be—

(*a*) for conspiracy to commit murder or any other offence the sentence for which is fixed by law, imprisonment for life;

(*b*) for conspiracy to commit an offence for which imprisonment for life is provided or to commit an indictable offence punishable with imprisonment for which no maximum term of imprisonment is provided, imprisonment for life;

(*c*) for conspiracy to commit any other indictable offence, the period available as a maximum for that offence or one year's imprisonment, whichever is the greater;

(*d*) for conspiracy to commit summary offences, one year's imprisonment;

(*e*) the penalty for conspiracy to defraud should remain at large;

(*f*) there should be no limit to the amount of the fine which can be imposed for conspiracy

(paragraph 1.106 and clause 3).

(17) There should be no alteration in the special rule laid down by section 3 of the Conspiracy and Protection of Property Act 1875 (paragraph 1.110).

(18) The maximum penalty for conspiracy to commit an offence under sections 5 or 7 of the Conspiracy and Protection of Property Act 1875 should be three months' imprisonment (paragraph 1.111 and clause 3(5)(*b*)).

(19) The common law offence of conspiracy to defraud should continue as a common law offence until the Law Commission reports comprehensively on fraud and the recommendations in that report are implemented (paragraph 1.16 and clause 6(2)).

(20) Perverting the course of justice is a substantive offence; thus the offence of conspiracy to pervert the course of justice does not require to be dealt with specifically in the legislation recommended in this report (paragraphs 1.17–1.19).

7.3 In relation to offences of entering and remaining on property discussed in Part II—

(1) The common law offences of forcible entry and detainer should be abolished, and the Forcible Entry Acts 1381–1623 should be repealed (paragraph 2.50 and clause 15).

(2) As to entry upon property—

(*a*) it should be an offence without lawful authority to use or to threaten violence for the purpose of securing entry to premises on

which another is present, against the will of that person, knowing that another is present and that entry would be against his will (paragraphs 2.53 and 2.65 and clause 7(1));

(*b*) measures taken by a person to regain his own living accommodation which, until he was deprived of it, he was using as such, should not make him liable for this offence (paragraph 2.57 and clause 7(3));

(*c*) premises should include, as well as land and buildings, any movable structure, vehicle or vessel designed or adapted for human habitation (paragraph 2.64 and clause 14(5));

(*d*) violence should include violence against the person and against property (paragraph 2.62 and clause 7(4)(*a*));

(*e*) entry should include entry for any purpose (paragraph 2.63 and clause 7(4)(*b*));

(*f*) the offence should be triable on indictment with a maximum penalty of imprisonment for two years and a fine, and triable summarily with the consent of the defendant under section 19 of the Magistrates' Courts Act 1952 (paragraph 2.67 and clauses 7(5) and 12(1));

(*g*) there should be a power in a police constable to arrest on reasonable suspicion that a person has committed this offence (paragraph 2.68 and clause 7(6)).

(3) As to remaining upon residential property—

(*a*) it should be an offence for a person who has entered as a trespasser, and continues as a trespasser upon, premises which another was, until he was dispossessed, lawfully using as his living accommodation, to fail to leave when required to do so by or on behalf of a displaced residential occupier (paragraph 2.75 and clauses 8(1) and 14);

(*b*) it should be a defence for the defendant to prove that he believed and had reasonable cause to believe that the person requiring him to leave was not the displaced residential occupier or a person acting on his behalf (paragraph 2.79 and clause 8(2));

(*c*) the offence should be triable summarily and carry a maximum penalty of imprisonment for six months and a fine of £400, and there should be a power of arrest in a constable (paragraph 2.80 and clause 8(3) and (4)).

(4) It should be an offence for a trespasser who has entered premises as a trespasser to have upon the property, without lawful authority or excuse, an offensive weapon as defined in the Prevention of Crime Act 1953. The offence should be punishable on summary trial with a maximum of three months' imprisonment and a fine of £200, and on indictment with a maximum of two years' imprisonment and a fine. There should be a power of arrest in a police constable on reasonable suspicion that a person is committing this offence (paragraph 2.83 and clause 9).

(5) As to entering and remaining upon the premises of a diplomatic mission—

(*a*) it should be an offence to enter, or remain upon, as a trespasser the

premises of a diplomatic mission, of a consular post, or of an international organisation accorded diplomatic inviolability under the International Organisations Act 1968. Proof that the premises are of the nature specified should be by certificate by or under the authority of the Secretary of State (paragraph 2.88 and clause 10(1), (2) and (4));

(*b*) the offence should be indictable with a maximum sentence of imprisonment for one year and a fine, and triable summarily with the consent of the defendant under section 19 of the Magistrates' Courts Act. There should be power for a police constable to arrest a person whom he suspects on reasonable grounds to be committing the offence (paragraph 2.88 and clauses 10(5) and (6), and 12(1)).

(6) As to resisting the execution of writs and warrants of possession—

(*a*) it should be an offence to resist or obstruct any sheriff, bailiff or officer of a sheriff, or officer of a county court seeking to execute a writ of possession issued under Order 113 of the Rules of the Supreme Court or a warrant of possession issued under Order 26 of the County Court Rules. It should be a defence for the defendant to prove that he believed and had reasonable cause to believe that the person he resisted or obstructed was not such an official (paragraph 2.92 and clause 11(1), (2) and (3));

(*b*) this should be a summary offence punishable with a maximum of 6 months' imprisonment and a fine of £400. There should be power in a constable or officer of a court to arrest on reasonable suspicion that a person has committed this offence (paragraph 2.93 and clause 11(4) and (5)).

7.4 With regard to conspiracies relating to public morals and decency discussed in Part III—

(1) The generic offences at common law of corruption of public morals and outrage to public decency should be abolished, together with the specific common law offences of public exhibition of indecent acts and things, keeping a disorderly house, indecent exposure and obscene libel (paragraphs 3.136–3.143 and clause 22).

(2) As to the exhibition of films—

(*a*) all cinematograph exhibitions should be subject to the controls of the Obscene Publications Act 1959. The Act should therefore be amended so that the offence of publishing an obscene article in section 2(1) of the Act applies to the showing, playing or projecting of all films. This may be effected by amending the proviso to section 1(3)(*b*) of the Act (paragraph 3.86 and clause 16(1));

(*b*) there should be a special defence of public good available in respect of films which are the subject of proceedings under the Obscene Publications Acts. This should provide that publication of a film

may be justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning (paragraph 3.86 and clause 16(3));

(*c*) there should be no offence committed under the Obscene Publications Act 1959 if a cinematograph exhibition involving the showing, playing or projecting of obscene films is given upon a domestic occasion in a private dwelling, provided that no person under the age of sixteen is present and no charge is made for the exhibition or for anything else provided on that occasion (paragraph 3.86 and clause 16(2));

(*d*) there should be a limited restriction upon institution of proceedings; this should provide that where it is alleged that an offence has been committed under section 2(1) of the Obscene Publications Act 1959 in respect of a film exhibited or to be exhibited—

(i) on premises licensed for a cinematograph exhibition under the Cinematograph Act 1909; or

(ii) at an exempted exhibition by an exempted organisation under section 5(3) of the Cinematograph Act 1952,

no proceedings under section 2(1) of the 1959 Act shall be instituted except by or with the consent of the Director of Public Prosecutions. This restriction should apply whether the proceedings in question are to be instituted against a distributor or an exhibitor. Corresponding provision should be made in cases of the issue of warrants for seizure leading to forfeiture proceedings under section 3(3) of the Obscene Publications Act 1959 (paragraph 3.86 and clause 17).

(3) As to live performances not subject to the provisions of the Theatres Act 1968—

(*a*) it should be an offence for a person, whether in public or private and whether for gain or not, to present, organise or participate in any live performance or display which is obscene. A "live performance or display" should include any live activity which does not fall within the definition of a "play" in section 18 of the Theatres Act; and such a performance or display should be deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to see it;

(*b*) there should be a defence of public good to this offence whereby a person shall not be convicted if it is proved that the giving of the performance or display was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning;

(*c*) the offence should not apply to any activity taking place on a domestic occasion in a private dwelling, provided that no person under sixteen is present and no charge is made for the performance or display or for anything else provided on that occasion;

(*d*) the penalties for the offence should be the same as those provided in section 2 of the Theatres Act 1968, that is—

(i) on summary conviction, a fine not exceeding £400 and a term of imprisonment not exceeding six months; or

(ii) on conviction on indictment, a fine, or imprisonment for a term not exceeding three years, or both

(paragraph 3.96 and clauses 18 and 19).

(4) In relation to indecent behaviour in public view which at present falls within the ambit of indecent exposure at common law, a new offence should be created penalising any person who has sexual intercourse or engages in sexual behaviour in such circumstances that he knows or ought to know that his conduct is likely to be seen by other persons and is likely to cause them serious offence. The maximum penalty for this offence should be a fine of £100 (paragraphs 3.107–3.111 and clause 21).

(5) Section 7(1) of the Theatres Act 1968 (which exempts from the Act's provisions performances of plays on domestic occasions in private dwellings) should be amended so that the exemption it provides shall apply only if persons under the age of sixteen are not present and no charge is made for the performance or for anything else provided on that occasion (paragraphs 3.97–3.99 and clause 20).

(6) As to repeals and amendments of current legislation—

(*a*) section 2(4) of the Obscene Publications Act 1959 and (in so far as it refers to offences at common law in England and Wales) section 2(4) of the Theatres Act 1968 (forbidding certain prosecutions at common law of the subject matter of the Acts) should be repealed. By virtue of the recommended abolition of the common law in this field, these provisions to the stated extent will serve no purpose (paragraph 3.144);

(*b*) the Disorderly Houses Act 1751 should be repealed (paragraph 3.148);

(*c*) the references in the Sunday Observance Act 1780 and the Public Health Acts Amendment Act 1890 to disorderly houses and their keepers should be deleted (paragraphs 3.145–3.147, clauses 22 and 24 and the Schedule).

7.5 The case of *Withers* v. *D.P.P.*[1] (which decided that conspiracy to effect a public mischief does not exist as a separate type of conspiracy offence) is discussed in Part IV, where we conclude that it would be inopportune for us to make any legislative recommendations in this report in relation to the issues raised by that case (paragraph 4.21).

7.6 In relation to conspiracies to commit a civil wrong (including conspiracy to commit a tort or induce a breach of contract, and conspiracy to injure) which are discussed in Part V, we conclude that there is no need to recommend any new legislation. Accordingly, with the implementation of the recommendations for legislation in Part I, these forms of conspiracy will cease to be criminal offences (paragraphs 5.17 and 5.23).

[1] [1974] 3 W.L.R. 751.

7.7 The doctrine of contempt of statute discussed in Part VI should be abolished by a provision to the effect that no person shall be guilty of a criminal offence by reason of a failure to comply with or contravention of a statute unless it provides expressly that the failure or contravention shall be an offence (paragraph 6.5 and clause 23).

(*Signed*) SAMUEL COOKE, *Chairman.*
AUBREY L. DIAMOND.
STEPHEN EDELL.
DEREK HODGSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

27 *January* 1976.

APPENDIX 7

Draft Conspiracy and Criminal Law Reform Bill

ARRANGEMENT OF CLAUSES

PART I

CONSPIRACY

PART II

OFFENCES RELATING TO ENTERING AND REMAINING ON PROPERTY

PART III

OFFENCES AGAINST PUBLIC MORALS AND DECENCY

Application of Obscene Publications Acts to cinematograph exhibitions

Obscene performances and displays

Clause

Restriction on exception under Theatres Act 1968 *for private performances of obscene plays*

Offensive sexual behaviour in public view

Abolition of common law offences relating to public morals and decency

PART IV

MISCELLANEOUS AND SUPPLEMENTARY

DRAFT

OF A

BILL

TO

AMEND the law of England and Wales with respect to criminal conspiracy; to make new provision in that law, in place of the provisions of the common law and the Statutes of Forcible Entry, for restricting the use or threat of violence for securing entry into any premises and for penalising unauthorised entry or remaining on premises in certain circumstances; to make new provision in that law in place of the common law relating to offences against public morals and decency; to abolish the doctrine of contempt of statute; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

CONSPIRACY

The offence of conspiracy.

1.—(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy in relation to the offence or offences in question.

(2) Without prejudice to the generality of subsection (1) above, for a person to be guilty of conspiracy by virtue of that subsection in relation to a particular offence both he and the other person or persons with whom he agrees must intend to bring about any consequence which is an element of that offence, even where the offence in question may be committed without that consequence actually being intended by the person committing it.

Clause 1

1. This clause gives effect to the central recommendations of Part I of the Report that there should be a statutory offence of conspiracy which would be committed only when there was an agreement to commit a criminal offence.

2. *Subsection* (1) sets out the essential elements of the offence of conspiracy as—

(*a*) an agreement,

(*b*) with at least one other person,

(*c*) to pursue a course of conduct,

(*d*) which will necessarily amount to or involve the commission of an offence by one or more of the parties if the agreement is carried out in accordance with the intentions of the parties.

3. *Subsection* (1) requires that the parties must agree on a course of conduct which if carried out will *necessarily* amount to an offence; so, for example, an agreement to beat up a nightwatchman will be a conspiracy to cause grievous bodily harm and not a conspiracy to murder, notwithstanding that, if the agreement were carried out and the watchman died, there would be an offence of murder. *Subsection* (2) emphasises that in the circumstances discussed above, even where the watchman died there would be no liability for conspiracy to murder unless the parties to the agreement actually intended to kill him.

(3) A person shall not by virtue of subsection (1) above be guilty of conspiracy in relation to any particular offence unless he and at least one other person with whom he agrees not only intend that any acts, omissions or other behaviour which are elements of that offence shall take place, but also intend or know that any facts or circumstances which are elements of that offence shall or will exist at the material time under the agreement.

(4) Where in pursuance of any agreement the acts in question in relation to any offence are to be done in contemplation or furtherance of a trade dispute that offence shall be disregarded for the purposes of subsection (1) above provided that it is either—

(*a*) an offence triable only by a magistrates' court for which imprisonment may not be imposed otherwise than by way of committal in default of payment of a fine; or

(*b*) an offence consisting in procuring the commission of any such offence as is mentioned in paragraph (*a*) above.

(5) Subject to subsection (6) below, where in pursuance of any agreement the conduct constituting any offence is to take place outside England and Wales that offence shall be disregarded for the purposes of subsection (1) above unless it would be triable in England and Wales if committed in the circumstances intended by the parties to the agreement.

(6) A person may by virtue of subsection (1) above be guilty of conspiracy in relation to the offence of murder notwithstanding that the offence would not be triable in England and Wales if committed in the circumstances intended by the parties to the agreement.

Clause 1 (*continued*)

4. Even where knowledge of facts or circumstances which are elements of an offence is not required before that offence is committed, there is no liability for conspiracy to commit that offence unless the parties know that such facts or circumstances will exist when the course of conduct they have agreed upon is realised (*subsection* (3)). In substance this puts in statutory form the decision in *Churchill* v. *Walton* [1967] 2 A.C. 224.

5. Subject to the exception below, the offence which is the object of the conspiracy may be any indictable or summary offence.

6. *Subsection* (4) provides that a course of conduct to be followed in contemplation or furtherance of a trade dispute, which constitutes an offence triable only by a magistrates' court and not punishable with imprisonment otherwise than by way of committal in default of payment of a fine (or which constitutes procuring the commission of such an offence), cannot form the subject of a conspiracy charge. This re-enacts the provisions of section 3 of the Conspiracy and Protection of Property Act 1875 in this regard, which is now repealed by clause 6(8).

7. *Subsection* (5) states the general rule that, where there is an agreement to pursue a course of conduct outside England and Wales, this will be conspiracy only where that conduct would constitute an offence triable in England and Wales. This is in effect the present law as stated in *Board of Trade* v. *Owen* [1957] A.C. 602, 634.

8. *Subsection* (6) provides the only exception to the general rule. It relates to conspiracy to murder, which under section 4 of the Offences against the Person Act 1861 is an offence even where the murder is to be committed abroad by a person who is not a British subject. This section is repealed in so far as it relates to conspiracy to murder by clause 6(7), but its effect is preserved by the present subsection.

Exemptions from liability for conspiracy.

2.—(1) A person shall not by virtue of section 1 above be guilty of conspiracy in relation to any particular offence if he is a person who, by virtue of—

(*a*) any limitation on the description of persons who are capable, in law, of committing that offence; or

(*b*) any exemption from prosecution provided in relation to that offence;

would not be guilty of an offence or (as the case may be) liable to be prosecuted if he were to do the acts in question under the agreement in relation to that offence himself.

(2) A person shall not by virtue of section 1 above be guilty of conspiracy in relation to any offence or offences if the only other person or persons with whom he agrees are persons of any one or more of the following descriptions, that is to say—

(*a*) his spouse;

(*b*) a person under the age of criminal responsibility;

(*c*) a person exempt under subsection (1) above from liability for conspiracy in relation to that offence or each of those offences; and

(*d*) an intended victim of that offence or of each of those offences.

(3) A person is under the age of criminal responsibility for the purposes of subsection (2)(*b*) above so long as it is conclusively presumed, by virtue of section 50 of the Children and Young Persons Act 1933, that he cannot be guilty of any offence.

1933 c.12.

Clause 2

1. This clause provides exceptions to liability for conspiracy in certain specified cases.

2. A person who himself would not be guilty of the offence it was conspired to commit, by reason of his not being within the description of person capable of committing the offence or by virtue of exemption from prosecution, cannot be guilty of conspiracy to commit that offence (*subsection* (1)). This reverses the effect of the decision in *R.* v. *Whitchurch* (1890) 24 Q.B.D. 420 in which a woman, who was not pregnant, was found guilty of conspiracy with a man to procure her miscarriage contrary to section 58 of the Offences against the Person Act 1861, although that section requires her to be with child before she can contravene it.

3. *Subsection* (2) provides that a person is not guilty of conspiracy if the only person he conspires with is—

(*a*) his spouse,

(*b*) a person under the age of criminal responsibility (*i.e.*, under 10 years of age) (see *subsection* (3)),

(*c*) a person who cannot himself in law commit the offence it is conspired to commit,

(*d*) a person who would be the victim of the offence it is conspired to commit, *e.g.*, a girl under the age of 16 with whom it is an offence under section 6 of the Sexual Offences Act 1956 to have unlawful sexual intercourse.

Penalties for conspiracy.

3.—(1) A person guilty by virtue of section 1 above of conspiracy in relation to any offence or offences shall be liable on conviction on indictment to imprisonment for a term related in accordance with the following provisions of this section to the gravity of the offence or offences in question (hereafter in this section referred to as the relevant offence or offences).

(2) Where the relevant offence or any of the relevant offences is an offence of any of the following descriptions, that is to say—

(*a*) murder, or any other offence the sentence for which is fixed by law;

(*b*) an offence for which a sentence extending to imprisonment for life is provided; or

(*c*) an indictable offence punishable with imprisonment for which no maximum term of imprisonment is provided;

the person convicted shall be liable to imprisonment for life.

(3) Where in a case other than one to which subsection (2) above applies the relevant offence or any of the relevant offences is an indictable offence for which a maximum term of imprisonment on conviction on indictment of more than one year is provided the person convicted shall be liable to imprisonment for a term not exceeding—

(*a*) where only one such indictable offence is in question, the maximum term provided for that offence; and

(*b*) where more than one such indictable offence is in question, the maximum term provided for one of those offences where the maximum terms provided are the same and the longer or the longest of the maximum terms provided for those offences respectively where those terms are different.

(4) Subject to the following provisions of this section, in any case other than one to which subsection (2) or (3) above applies the person convicted shall be liable to imprisonment for a term not exceeding one year.

(5) Subject to subsection (6) below, where the acts in question in relation to the relevant offence or (as the case may be) in relation to each of the relevant offences were, in pursuance of the agreement on which the conviction was based, to be done in contemplation or furtherance of a trade dispute the person convicted shall be liable to imprisonment for a term not exceeding three months, provided that the relevant offence or each of the relevant offences is an offence of any of the following descriptions, that is to say—

(*a*) an offence triable only by a magistrates' court; or

(*b*) an offence under section 5 or 7 of the Conspiracy and Protection of Property Act 1875; or

1875 c.86.

(*c*) an offence consisting in procuring the commission of any such offence as is mentioned in paragraph (*a*) or (*b*) above.

Clause 3

1. This clause gives effect to the general recommendation that the maximum penalty for conspiracy to commit an offence should (with certain limited exceptions) be the same as the maximum penalty available for the offence itself.

2. *Subsection* (2) provides a maximum penalty of imprisonment for life for conspiracy to commit an offence for which—

(*a*) the sentence is fixed by law (as *e.g.*, in murder, treason and genocide),

(*b*) the maximum sentence provided is imprisonment for life, or

(*c*) there is no maximum term of imprisonment provided (as in certain common law offences, such as, *e.g.*, kidnapping).

3. *Subsection* (3) deals with conspiracy to commit indictable offences carrying a maximum penalty of imprisonment on conviction on indictment of more than one year. Paragraph (*b*) covers two situations: first, where there is one agreement to commit two or more offences of the same kind, *e.g.*, to burgle two banks, and secondly where there is one agreement to commit two or more offences of different kinds, *e.g.*, to rob a bank and to steal a car as part of the operation.

4. *Subsection* (4) deals with conspiracy to commit indictable offences carrying a penalty of imprisonment for one year or less, and with summary offences (other than those dealt with in *subsections* (5) and (6)).

(6) Where in a case falling within subsection (5) above the relevant offence or any of the relevant offences is one for which a maximum term of imprisonment of more than three months is provided, the person convicted shall be liable to imprisonment for a term not exceeding—

(*a*) where only one such offence is in question, the maximum term provided for that offence; and

(*b*) where more than one such offence is in question, the maximum term provided for one of those offences where the maximum terms provided are the same and the longer or the longest of the maximum terms provided for those offences respectively where those terms are different.

Clause 3 (*continued*)

5. *Subsections* (5) and (6) deal with conspiracy to commit offences in contemplation or furtherance of a trade dispute where the offence is—

(*a*) triable only by a magistrates' court, or

(*b*) an offence under sections 5 or 7 of the Conspiracy and Protection of Property Act 1875.

6. The effect of the two subsections is that the maximum penalty for conspiracy in the stated circumstances is three months' imprisonment or the penalty provided for the offence it is conspired to commit, whichever is the greater. This is presently the law by virtue of the last paragraph of section 3 of the Conspiracy and Protection of Property Act 1875 in respect of offences triable only by a magistrates' court (or procuring such offences). The subsection re-enacts this and applies the same limitation of penalty in regard to the offences under sections 5 and 7 of the 1875 Act, which, at the option of the defendant only, can be tried on indictment.

Restrictions on the institution of proceedings for conspiracy.

4.—(1) Proceedings under section 1 above for conspiracy in relation to any offence or offences shall not be instituted against any person except by or with the consent of the Director of Public Prosecutions if the offence or (as the case may be) each of the offences in question is a summary offence.

(2) Any prohibition by or under any enactment on the institution of proceedings for any offence otherwise than by, on behalf or with the consent of the Director of Public Prosecutions or any other person shall apply also in relation to proceedings under section 1 above for conspiracy in relation to that offence or in relation to any offences which include that offence.

(3) Where—

(*a*) an offence has been committed in pursuance of any agreement; and

(*b*) proceedings may not be instituted for that offence because any time limit applicable to the institution of any such proceedings has expired;

proceedings under section 1 above for conspiracy in relation to that offence shall not be instituted against any person on the basis of that agreement.

Clause 4

1. *Subsection* (1) requires the consent of the Director of Public Prosecutions to the institution of proceedings for conspiracy to commit a summary offence.

2. *Subsection* (2) provides that, where the consent of any person is required for the institution of proceedings for an offence, the same consent is required for the institution of proceedings for conspiracy to commit that offence.

3. *Subsection* (3) prohibits proceedings for conspiracy to commit an offence when that offence has been committed in pursuance of the conspiracy and any time limit applicable to the institution of proceedings for that offence has expired.

Interpretation of this Part of this Act.

5.—(1) In this Part of this Act "summary offence" means any offence which is triable only by a magistrates' court and any offence which—

1952 c.55.

(*a*) is required under section 25 of the Magistrates' Courts Act 1952 or under any other enactment to be tried on indictment at the instance of the defendant or the prosecutor; but

(*b*) is otherwise triable only by a magistrates' court.

(2) In this Part of this Act "indictable offence" means any offence which is triable on indictment (whether or not it is also triable by a magistrates' court) other than a summary offence.

1974 c.52.

(3) In this Part of this Act "trade dispute" has the same meaning as in the Trade Union and Labour Relations Act 1974.

Clause 5

1. This clause defines "summary offence", "indictable offence" and "trade dispute".

2. An instance of the prosecution being entitled to claim that the trial should be on indictment occurs in section 3 of the Witness (Public Inquiries) Protection Act 1892.

3. The definition of "trade dispute" is to be found in section 29 of the Trade Union and Labour Relations Act 1974.

Abolitions, savings, consequential amendment and repeals.

6.—(1) Subject to subsection (2) below, the offence of conspiracy at common law is hereby abolished.

(2) Subsection (1) above shall not affect the offence of conspiracy at common law so far as relates to conspiracy to cheat and defraud, and section 1 above shall not apply in any case where the agreement in question amounts to a conspiracy to cheat and defraud at common law.

(3) The rules laid down by sections 1 and 2 above shall apply for determining whether a person is guilty of an offence of conspiracy under any enactment other than section 1 above, but conduct which is an offence under any such other enactment shall not also be an offence under section 1 above.

(4) The fact that the person or persons who, so far as appears from the indictment on which any person has been convicted of conspiracy, were the only other parties to the agreement on which his conviction was based have been acquitted of conspiracy by reference to that agreement (whether after being tried with the person convicted or separately) shall not be a ground for quashing his conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons in question.

(5) Any rule of law or practice inconsistent with the provisions of subsection (5) above is hereby abolished.

1861 c.100.

(6) In section 4 of the Offences against the Person Act 1861—

(*a*) the words preceding "whosoever" shall cease to have effect; and

(*b*) for the words from "be kept" to "years" there shall be substituted the words "imprisonment for life".

1875 c.86.

(7) Section 3 of the Conspiracy and Protection of Property Act 1875 shall cease to have effect.

Clause 6

1. *Subsections* (1) and (2) abolish the offence of conspiracy at common law save for conspiracy to cheat and defraud.

2. *Subsection* (3) applies the rules in clauses 1 and 2 to any specific statutory offence of conspiracy (such as conspiracy to cause an explosion contrary to section 3 of the Explosive Substances Act 1883, or conspiracy to commit an offence contrary to paragraph 1 of Part II of Schedule 5 of the Exchange Control Act 1947) for determining whether a person is guilty of any such conspiracy, and ensures that such a conspiracy is not also an offence under section 1.

3. *Subsections* (4) and (5) provide that, for the future, the acquittal of one party to an agreement upon which a conviction for conspiracy is based shall not be a ground in itself for acquitting the other party to the agreement.

4. *Subsection* (6) removes from section 4 of the Offences against the Person Act 1861 the offence of conspiracy to murder, and increases, from imprisonment for 10 years to imprisonment for life, the penalty for soliciting, encouraging, persuading, or proposing to, another to commit murder.

5. The repeal of section 3 of the Conspiracy and Protection of Property Act 1875 does not change the general policy underlying that section. Clauses 1(1) and (4), and 3(5) and (6) re-enact the law as contained in that section, with the additional limitation of the penalty in regard to conspiracy to commit offences under sections 5 and 7 of that Act referred to in the note on clause 3(5) and (6).

PART II

OFFENCES RELATING TO ENTERING AND REMAINING ON PROPERTY

Violence for securing entry.

7.—(1) Subject to the following provisions of this section, any person who, without lawful authority, uses or threatens violence for the purpose of securing entry into any premises for himself or for any other person is guilty of an offence, provided that—

(*a*) there is someone present on those premises at the time who is opposed to the entry the violence is intended to secure; and

(*b*) the person using or threatening the violence knows that that is the case.

(2) The fact that a person has any interest in or right to possession or occupation of any premises shall not for the purposes of subsection (1) above constitute lawful authority for the use or threat of violence by him or anyone else for the purpose of securing his entry into those premises.

(3) A person shall not be guilty of an offence under this section by virtue of any action taken by him for the purpose of securing entry into any premises for himself or for any other person if he or that other person is a displaced residential occupier of the premises.

(4) It is immaterial for the purposes of this section—

(*a*) whether the violence in question is directed against the person or against property; and

(*b*) whether the entry the violence is intended to secure is for the purpose of acquiring possession of the premises in question or for any other purpose.

(5) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years.

(6) A constable may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of an offence under this section.

(7) Section 14 below contains provisions which apply for determining when any person is to be regarded for the purposes of this Part of this Act as a displaced residential occupier of any premises.

Clause 7

1. This clause creates an offence of using or threatening violence to secure entry into any premises on which there is another person who opposes the entry. It is punishable on indictment with a maximum penalty of imprisonment for two years and a fine (*subsection* (5) and Powers of Criminal Courts Act 1973, section 30(1)), but is also triable summarily with the consent of the defendant (clause 12).

2. The offence is committed only when the defendant knows that there is another person on the premises when he uses or threatens violence, and knows that he is opposed to the entry (*subsection* (1) (*a*) and (*b*)).

3. The use or threat of violence must be without lawful authority and *subsection* (2) makes it clear that the fact that a person has an interest in the property does not constitute lawful authority to use or threaten violence to secure entry.

4. The absence of lawful authority is an element of the offence and the burden of proving its absence is upon the prosecution if the question arises.

5. The offence is not committed if the use or threat of violence is to secure entry by a displaced residential occupier to residential premises from which he is excluded by a trespasser (*subsection* (3)). This will not affect liability for any other offence which a person may commit, such as assault, if he uses excessive force to eject a trespasser.

6. *Subsection* (4)(*b*) ensures that the entry sought need not be entry for the purpose of securing possession; this gives effect to the decision in *R.* v. *Brittain* [1972] 1 Q.B. 357.

7. The definition of a displaced residential occupier in clause 14 makes it clear that a person who was occupying premises as a trespasser immediately before being excluded from the occupation is not a displaced residential occupier (clause 14(2)). Thus a trespasser excluded from premises he is using as a residence is not entitled to the benefit of subsection (3).

Adverse occupation of residential premises.

8.—(1) Subject to subsection (2) below, any person who is on any premises as a trespasser is guilty of an offence if he fails to leave those premises on being required to do so by or on behalf of a displaced residential occupier of the premises.

(2) In any proceedings for an offence under this section it shall be a defence for the defendant to prove that he believed, and had reasonable cause to believe, that the person requiring him to leave the premises was not a displaced residential occupier of the premises or a person acting on behalf of a displaced residential occupier.

(3) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £400 or to both.

(4) A constable may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of an offence under this section.

Clause 8

1. This clause makes it an offence for a trespasser to fail to leave premises when required to do so by, or on behalf of, a displaced residential occupier (*subsection* (1)). The offence is a summary one punishable with a maximum penalty of imprisonment for six months and a fine of £400 (*subsection* (3)).

2. It is a defence for the defendant to prove on a balance of probabilities that he believed, and had reasonable cause to believe, that the person requiring him to leave was not a displaced residential occupier or a person acting on behalf of a displaced residential occupier (*subsection* (2)).

3. The failure by a trespasser to leave premises becomes an offence only if the requirement that he should leave has been made by a displaced residential occupier (as defined by clause 14). It follows that there can be an offence under clause 8 only where the premises which the trespasser fails to leave had been occupied as a residence immediately before the occupier was excluded by a person who entered there as a trespasser. A person holding over after the expiry of a tenancy or licence and failing to leave will not commit the offence.

4. Clause 14 also makes it clear that—

(*a*) a person who enters or is on premises by virtue of any right derived from a trespasser is himself a trespasser (clause 14(3)), and

(*b*) a trespasser continues to be a trespasser notwithstanding that he is given time to vacate the premises (clause 14(4)).

Trespassing with an offensive weapon.

9.—(1) A person who is on any premises as a trespasser, after having entered as such, is guilty of an offence if, without lawful authority or reasonable excuse, he has with him on the premises any offensive weapon.

(2) In subsection (1) above "offensive weapon" means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him.

(3) A person guilty of an offence under this section shall be liable—

(*a*) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding £200 or to both; and

(*b*) on conviction on indictment, to imprisonment for a term not exceeding two years.

(4) A constable may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an offence under this section.

Clause 9

1. This clause makes it an offence for a person who is a trespasser on any premises, having entered as a trespasser, to have on the premises, without lawful authority or excuse, an offensive weapon. The offence is punishable on summary conviction with a maximum penalty of imprisonment for three months and a fine of £200, and on indictment with a maximum period of imprisonment for two years and a fine.

2. "Offensive weapon" is defined in *subsection* (2) in the same terms as it is in the Prevention of Crime Act 1953.

3. As is the case under clause 7, the burden of proving the absence of lawful authority or reasonable excuse will be upon the prosecution if the question arises.

Trespassing on premises of foreign missions, etc.

10.—(1) A person who enters or is on any premises to which this section applies as a trespasser is guilty of an offence.

(2) This section applies to any premises which are or form part of—

(*a*) the premises of a diplomatic mission within the meaning of the definition in Article 1(i) of the Vienna Convention on Diplomatic Relations signed in 1961 as that Article has effect in the United Kingdom by virtue of section 2 of and Schedule 1 to the Diplomatic Privileges Act 1964;

1964 c.81.

(*b*) consular premises within the meaning of the definition in Article 1(*f*) of the Vienna Convention on Consular Relations signed in 1963 as that Article has effect in the United Kingdom by virtue of section 1 of and Schedule 1 to the Consular Relations Act 1968; and

1968 c.18.

(*c*) any premises of an organisation to which section 1 of the International Organisations Act 1968 applies, being premises in respect of which, by virtue of an Order in Council made under subsection (2) of that section, the organisation has diplomatic inviolability.

1968 c.48

(3) In paragraph (*c*) of subsection (2) above "diplomatic inviolability" means the like inviolability of premises as is accorded in respect of the premises of a diplomatic mission by virtue of Article 22 of the Convention mentioned in paragraph (*a*) of that subsection as that Article has effect in the United Kingdom by virtue of the provisions there mentioned.

(4) In any proceedings for an offence under this section a certificate issued by or under the authority of the Secretary of State stating that any premises are or form part of premises of any description mentioned in paragraphs (*a*) to (*c*) of subsection (2) above shall be conclusive evidence that the premises are or form part of premises of that description.

(5) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding one year.

(6) A constable may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an offence under this section.

Clause 10

1. This clause makes it an offence to enter or be upon, as a trespasser, diplomatic or consular premises or premises of an international organisation which has diplomatic inviolability under the International Organisations Act 1968. The offence is punishable on indictment with a maximum penalty of imprisonment for a year and a fine, but also triable summarily with the consent of the defendant.

2. Proof that the premises are premises covered by the clause is by certificate of the Secretary of State (*subsection* (4)).

Obstruction of court officers executing process for possession against unauthorised occupiers. 1887 c.55.

11.—(1) Without prejudice to section 8(2) of the Sheriffs Act 1887 but subject to the following provisions of this section, a person is guilty of an offence if he resists or in any way obstructs any officer of a court in the execution of any process issued by the High Court or by any county court for the purpose of enforcing any judgment or order for the recovery of any premises or for the delivery of possession of any premises.

(2) Subsection (1) above does not apply unless the judgment or order in question was given or made in proceedings brought under any provisions of rules of court applicable only in circumstances where the person claiming possession of any premises alleges that the premises in question are occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation of the premises without the licence or consent of the person claiming possession or any predecessor in title of his.

(3) In any proceedings for an offence under this section it shall be a defence for the defendant to prove that he believed, and had reasonable cause to believe, that the person he was resisting or obstructing was not an officer of a court.

(4) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £400 or to both.

(5) A constable or any officer of a court may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of an offence under this section.

(6) In this section "officer of a court" means—

(*a*) any sheriff, under sheriff, deputy sheriff, bailiff or officer of a sheriff; and

(*b*) any bailiff or other person who is an officer of a county court within the meaning of the County Courts Act 1959. 1959 c.22.

Clause 11

1. This clause creates an offence of resisting or obstructing any officer of the High Court or of a county court seeking to enforce an order for possession made under Order 113 of the Rules of the Supreme Court or under Order 26 of the County Court Rules. The offence is a summary one punishable with a maximum penalty of imprisonment for six months and a fine of £400.

2. It is a defence for the defendant to prove on a balance of probability that he believed, and had reasonable cause to believe, that the person he was resisting or obstructing was not an officer of the court (*subsection* (3)).

3. *Subsection* (2) does not refer in terms to judgments or orders made under the above-mentioned Orders. It defines the judgments or orders to which the offence is limited by reference to the description of the basis of the claim in respect of which they are made, following the precise terms of the Orders.

Jurisdiction of magistrates' courts. 1952 c.55.

12.—(1) The Magistrates' Courts Act 1952 shall have effect as if offences under sections 7 and 10 above were included among those specified in paragraphs 1 to 18 of Schedule 1 to that Act (indictable offences which are by virtue of section 19 of that Act triable summarily with the consent of the defendant).

(2) No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved shall preclude magistrates' courts from trying offences under this Part of this Act.

Clause 12

1. *Subsection* (1) makes the offences under clauses 7 and 10 triable summarily with the consent of the defendant under section 19 of the Magistrates' Courts Act 1952. Where the offences are so tried the maximum penalty will be imprisonment for six months and a fine of £400.

2. *Subsection* (2) abolishes in relation to offences under Part II the rule of law which prevents a magistrates' court from trying an offence when a dispute of title to real property arises. Without such a provision, the jurisdiction of a magistrates' court would probably be ousted if a defendant, prosecuted *e.g.*, under clause 8, alleged title to the premises.

Power of entry for the purposes of this Part of this Act.

13. For the purpose of arresting a person under any power conferred by any provision of this Part of this Act other than section 10(6) above a constable may enter (if need be, by force) and search any premises or other place where that person is or where the constable, with reasonable cause, suspects him to be.

Clause 13

1. This clause gives to a constable a power of entry and search for the purpose of arresting a person under a power conferred by this Part. This does not extend to entry and search of premises enjoying diplomatic immunity, where entry must be authorised by the lawful occupier.

2. A constable is given power to arrest without warrant a person—

(*a*) who is, or whom he suspects with reasonable cause to be, guilty of an offence under clause 7, 8 or 11, or

(*b*) who is, or whom he suspects with reasonable cause to be, in the act of committing an offence under clause 9 or 10.

Supplementary provisions.

14.—(1) Subject to subsection (2) below, any person who was occupying any premises as a residence immediately before being excluded from occupation by anyone who entered the premises as a trespasser is a displaced residential occupier of the premises for the purposes of this Part of this Act so long as he continues to be excluded from occupation of the premises by the original trespasser or by any subsequent trespasser.

(2) A person who was himself occupying the premises in question as a trespasser immediately before being excluded from occupation shall not by virtue of subsection (1) above be a displaced residential occupier of the premises for the purposes of this Part of this Act.

(3) Anyone who enters or is on or in occupation of any premises by virtue of—

(*a*) any title derived from a trespasser; or

(*b*) any licence or consent given by a trespasser or by a person deriving title from a trespasser;

shall himself be treated as a trespasser for the purposes of this Part of this Act (without prejudice to whether or not he would be a trespasser apart from this provision); and references in this Part of this Act to a person's entering or being on or occupying any premises as a trespasser shall be construed accordingly.

(4) Anyone who is on any premises as a trespasser shall not cease to be a trespasser for the purposes of this Part of this Act by virtue of being allowed time to vacate the premises, nor shall any such allowance of time to a trespasser be regarded as affecting the continuity of any person's exclusion from occupation of the premises by that trespasser.

(5) References in this Part of this Act to premises include references to any movable structure, vehicle or vessel designed or adapted for human habitation.

Clause 14

1. *Subsections* (1) and (2) state who is a displaced residential occupier for the purposes of clauses 7(3) and 8 where that term is used.

2. A displaced residential occupier is a person who is excluded by a trespasser from premises which he was occupying as a residence, whether the exclusion is by the trespasser who first excluded him or any subsequent trespasser (*subsection* (1)).

3. *Subsection* (2) makes it clear that a person who was occupying the premises as a trespasser immediately before being excluded is not a displaced residential occupier.

4. *Subsection* (3) ensures that, notwithstanding that the person who excludes the displaced residential occupier is acting under some title or authority derived from a trespasser, the exclusion is still exclusion by a trespasser. This situation is not likely to arise in any but the most exceptional cases, but such provision is needed to ensure that a displaced residential occupier is not in such circumstances deprived of the benefits conferred on him by clauses 7(3) and 8(1). It also has the effect that a trespasser, who by virtue of subsection (2) is not a displaced residential occupier, includes a person who is in occupation by virtue of any right or title derived from a trespasser.

5. *Subsection* (4) provides that a person continues to be a displaced residential occupier even where he gives time to vacate to a trespasser who has been excluding him from his premises.

6. *Subsection* (5) ensures that a movable habitation is within the meaning of premises.

Abolitions and repeals.

15.—(1) The offence of forcible entry and any offence of forcible detainer at common law are hereby abolished.

(2) The following enactments shall cease to have effect—

1381 c.7. (*a*) the Forcible Entry Act 1381;

(*b*) the Act 15 Ric.2.c.2; chapter 2 of 15 Ric.2 (1391);

1429 c.9. (*c*) the Forcible Entry Act 1429;

1588 c.11. (*d*) the Forcible Entry Act 1588; and

1623 c.15. (*e*) the Forcible Entry Act 1623.

Clause 15

This clause abolishes the common law offences of forcible entry and detainer, and repeals the following statutes, namely, the Forcible Entry Act 1381, the Act 15 Ric.2.c.2 (of 1391), the Forcible Entry Act 1429, the Forcible Entry Act 1588 and the Forcible Entry Act 1623.

PART III

OFFENCES AGAINST PUBLIC MORALS AND DECENCY

Application of Obscene Publications Acts to cinematograph exhibitions

Amendments of Obscene Publications Act 1959 with respect to cinematograph exhibitions.
1959 c.66.

16.—(1) In the proviso to section 1(3) of the Obscene Publications Act 1959 (which excludes from the scope of that Act anything done in the course of a cinematograph exhibition taking place otherwise than in a private house to which the public are not admitted and anything done in the course of television or sound broadcasting), the words from "a cinematograph exhibition" to "in the course of" shall cease to have effect.

(2) In section 2 of that Act (prohibition of publication of obscene matter), after subsection (3) there shall be inserted the following subsection—

"(3A) A person shall not be convicted of an offence against this section by virtue of showing, playing or projecting any article in the course of a cinematograph exhibition (within the meaning of the Cinematograph Act 1952) given on a domestic occasion in a private dwelling provided that—

1952 c.68.

(*a*) no person under the age of sixteen is present during the exhibition; and

(*b*) no charge is made for the giving of the exhibition or for anything else (including any other entertainment) provided on that occasion."

(3) After section 4 of that Act (defence of public good) there shall be inserted the following section—

"Defence of public good in relation to moving picture films and soundtracks.

4A.—(1) Section four of this Act shall not apply where the article in question is a moving picture film or soundtrack, but a person shall not be convicted of an offence against section two of this Act in relation to any such film or soundtrack, and an order for forfeiture of any such film or soundtrack shall not be made under section three of this Act, if it is proved that publication of the film or soundtrack is justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning.

(2) It is hereby declared that the opinion of experts as to the artistic, literary or other merits of any moving picture film or soundtrack may be admitted in any proceedings under this Act either to establish or to negative the said ground.

(3) In this section 'moving picture soundtrack' means any sound record designed for playing with a moving picture film, whether incorporated with the film or not."

Clause 16

1. This clause has three main objectives—

   (*a*) the extension of the Obscene Publications Act 1959 to cover the exhibition of films whether on or off premises licensed for cinematograph exhibitions;

   (*b*) the exclusion of the penal provisions of the 1959 Act from the exhibition of films in domestic circumstances; and

   (*c*) the provision of a special defence of public good applying solely to obscene films which would otherwise be subject to penalty under the 1959 Act.

2. *Subsection* (1) has the effect of bringing within section 1(3) of the 1959 Act (which defines for the purposes of the Act when an article is "published") the showing, playing or projecting of films, whether on or off licensed premises. This amendment will also have the effect of ensuring that the distribution, sale or letting on hire of a film constitutes publication of a film for the purposes of the Act under its section 1(3)(*a*).

3. *Subsection* (2) provides for a new subsection to be inserted in section 2 of the 1959 Act in order to exclude from penalty under the Act the showing, playing or projecting of an obscene film in the course of a cinematograph exhibition on a domestic occasion in a private dwelling. This exclusion does not apply if anyone under the age of sixteen is present or if a charge is made, whether for the exhibition or anything else on the occasion on which it takes place. By virtue of this subsection, the domestic screening of a film (or playing of its soundtrack) is placed in a position similar to the reading of an obscene book or the possession of an obscene book for the sole purpose of reading it; these activities are not penalised by the 1959 Act.

4. The defence of public good in *subsection* (3) is modelled upon the corresponding provision in section 3(1) of the Theatres Act 1968 in so far as it specifies that publication of an obscene film may be justified as "being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning." This formulation excludes in relation to films the words "or of other objects of general concern" in section 4(1) of the 1959 Act, which will continue to apply to all articles except films.

Restriction on institution of proceedings under Obscene Publications Act 1959 with respect to certain cinematograph exhibitions.

17.—(1) Proceedings for an offence under section 2 of the Obscene Publications Act 1959 shall not be instituted except by or with the consent of the Director of Public Prosecutions in any case where the relevant publication or the only other publication which followed or could reasonably have been expected to follow from the relevant publication took place or (as the case may be) was to take place in the course of a cinematograph exhibition to which this section applies.

1959 c.66.

(2) In subsection (1) above, "the relevant publication" means—

(*a*) in the case of any proceedings under section 2 for publishing an obscene article, the publication in respect of which the defendant would be charged if the proceedings were brought; and

(*b*) in the case of any proceedings under section 2 for having an obscene article for publication for gain, the publication the defendant would be alleged if the proceedings were brought to have had in contemplation.

(3) This section applies to any cinematograph exhibition—

(*a*) which is given on premises in respect of which a licence under the Cinematograph Act 1909 is in force; or

1909 c.30.

(*b*) which is an exempted exhibition for the purposes of section 5 of the Cinematograph Act 1952 by virtue of subsection (3) of that section (exemption for exhibitions given by non-profit making organisations).

1952 c.68.

(4) An order for the forfeiture of any article shall not be made under section 3 of the Obscene Publications Act 1959 where by virtue of subsection (1) above proceedings under section 2 of that Act for having the article for publication for gain could not be instituted except by or with the consent of the Director of Public Prosecutions, unless the warrant under which the article was seized was issued on an information laid by or on behalf of the Director of Public Prosecutions.

(5) Nothing in subsection (4) above shall affect the duty of a court under section 1(4) of the Obscene Publications Act 1964 to make an order for the forfeiture of any article seized under section 3 of the Obscene Publications Act 1959 on the conviction of a person under section 2 of that Act of having that article for publication for gain.

1964 c.74.

(6) In this section "cinematograph exhibition" means an exhibition of moving pictures produced on a screen by means which include the projection of light.

Clause 17

1. This clause requires the consent of the Director of Public Prosecutions to be obtained in certain instances before proceedings under section 2 of the Obscene Publications Act 1959 are instituted in respect of the exhibition of a film alleged to be obscene (*subsection* (1)).

2. Consent under the clause is required where the exhibition of the film in respect of which proceedings are contemplated takes place (or is to take place) in premises licensed under the Cinematograph Act 1909, or in the course of an exhibition exempted from the licensing requirements of that Act by section 5 of the Cinematograph Act 1952 on the grounds that the exhibition is given by a non-profit making organisation (*subsection* (3)).

3. The clause is so drafted that consent is required whether the proceedings are to be instituted against—

(*a*) a cinema licensee, whose exhibition of the film on the premises amounts to publication under section 1(3)(*b*) of the 1959 Act; or

(*b*) a distributor, whose distribution, sale or letting on hire of the film to the licensee would amount to publication under section 1(3)(*a*) of the 1959 Act (*subsections* (1) and (2)).

4. The clause makes parallel provision for the case of seizure of obscene articles under section 3 of the 1959 Act. In cases where the Director's consent is needed for institution of proceedings, no order for forfeiture under section 3 can be made unless the warrant for seizure was issued on information laid by or on his behalf. This requirement does not apply where conviction under section 2 of the 1959 Act for having the articles for publication for gain results in their forfeiture in accordance with section 1(4) of the Obscene Publications Act 1964; but in this case the consent required by this clause for prosecution under section 2 must have been obtained (*subsections* (4) and (5)).

5. For the purposes of the clause, a "cinematograph exhibition" is assigned the meaning it has in the Cinematograph Acts, 1909 and 1952 (*subsection* (6)).

Obscene performances and displays

Prohibition of obscene performances and displays.

18.—(1) Subject to section 19 and subsection (4) below, any person who (whether for gain or not) presents, organises or takes part in an obscene performance or display is guilty of an offence, whether the performance or display is given in public or in private.

(2) For the purposes of this section a performance or display shall be deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to see it.

(3) For the purposes of this section and section 19 below "performance" includes any activities which take place in circumstances in which anyone is likely to see the activities in question; but—

(*a*) nothing in this section shall apply to any performance or display unless one or more persons actually present at the time when it is given take part in it; and

(*b*) nothing in this section shall apply to any performance or display which is or forms part of a performance of a play within the meaning of the Theatres Act 1968.

1968 c.54.

(4) A person shall not be guilty of an offence under this section by virtue of presenting, organising or taking part in any performance or display given on a domestic occasion in a private dwelling provided that—

(*a*) no person under the age of sixteen is present while the performance or display is being given; and

(*b*) no charge is made for the giving of the performance or display or for anything else (including any other entertainment) provided on that occasion.

(5) A person guilty of an offence under this section shall be liable—

(*a*) on summary conviction, to a fine not exceeding £400 or to imprisonment for a term not exceeding six months;

(*b*) on conviction on indictment, to imprisonment for a term not exceeding three years.

Clause 18

1. This clause provides for a new offence penalising obscene performances and displays which do not constitute or form part of a performance of a play under the Theatres Act 1968 (*subsections* (1) and (3)(*b*).)

2. The offence penalises the presentation, organisation or participation in any obscene "live" performance or display, whether for gain or not and whether it is given in public or private (*subsections* (1) and (3)(*a*)).

3. A performance or display is deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to see it. This provision is similar to that in section 2(1) of the Theatres Act applying to obscene performances of plays (*subsection* (2)).

4. No offence is committed if the performance or display takes place on a domestic occasion in a private dwelling, unless anyone under sixteen is present or a charge is made. This parallels the provision in clause 16 as to the domestic screening of obscene films (*subsection* (4)).

5. The maximum penalty on summary conviction is a fine of £400 and six months' imprisonment, and on indictment three years' imprisonment and a fine (*subsection* (5)).

Defence of public good in relation to obscene performances and displays.

19.—(1) A person shall not be convicted of an offence under section 18 above if it is proved that the giving of the performance or display in question was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning.

(2) It is hereby declared that the opinion of experts as to the artistic, literary or other merits of any performance or display may be admitted in any proceedings for an offence under section 18 above either to establish or to negative the ground mentioned in subsection (1) above.

Clause 19

1. This Clause makes available a defence of public good in respect of obscene performances and displays penalised under clause 18.

2. It provides that a person is not to be convicted of the offence if it is proved that the giving of the performance or display in question was justified as being for the public good on the ground that it was in the interests of drama, opera, ballet or any other art, or of literature or learning. These grounds are similar to those set out in the defence of public good in section 3 of the Theatres Act, which is available upon the prosecution of an obscene performance of a play under section 2 of that Act (*subsection* (1)).

3. Expert evidence may be admitted on the artistic, literary or other merit of a performance or display to establish or negative the specified grounds of public interest (*subsection* (2)).

Restriction on exception under Theatres Act 1968 *for private performances of obscene plays*

Restriction on exception under Theatres Act 1968 for private performances of obscene plays. 1968 c. 54.

20. At the end of section 7(1) of the Theatres Act 1968 (nothing in sections 2 to 4 of that Act to apply in relation to a performance of a play given on a domestic occasion in a private dwelling) there shall be added the words "provided that, where the performance in question is given in England and Wales—

(*a*) no person under the age of sixteen is present during the performance; and

(*b*) no charge is made for the giving of the performance or for anything else (including any other entertainment) provided on that occasion".

Clause 20

By virtue of section 7 of the Theatres Act 1968, the performance of a play on a domestic occasion in a private dwelling may not be prosecuted for obscenity under the Act, although it remains subject to the common law offences abolished in clause 22. Clause 20 qualifies the exclusion under this section in line with clauses 16(2) (applying to films) and 18(4) (applying to live performances and displays). It provides that the exclusion specified by section 7 of the Theatres Act shall not apply if persons under sixteen are present at the performance or if a charge is made for it or for anything else on the occasion upon which it is given.

Offensive sexual behaviour in public view

Offensive sexual behaviour in public view.

21.—(1) A person who—

(*a*) has sexual intercourse; or

(*b*) whether alone or with anyone else, engages in any other sexual behaviour;

is guilty of an offence if he does so in such circumstances that he knows or ought to know that his conduct is likely to be seen by other persons to whom it is likely to cause serious offence.

(2) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £100.

Clause 21

1. This clause creates a new summary offence penalising anyone who engages in sexual intercourse or (whether or not with another) in other sexual behaviour in circumstances when he knows or ought to know that he is likely to be seen by others to whom his conduct is likely to cause serious offence (*subsection* (1)).

2. The maximum penalty provided is a fine of £100 (*subsection* (2)).

Abolition of common law offences relating to public morals and decency

Abolition of common law offences relating to public morals and decency.

22.—(1) Any distinct offence under the common law whose substance consists in the fact that the conduct constituting the offence tends to corrupt, undermine or otherwise injure public morals or affronts or outrages public decency is hereby abolished.

(2) Without prejudice to subsection (1) above, the following offences at common law are hereby abolished—

(*a*) indecent exposure;

(*b*) public exhibition of indecent, disgusting or offensive activities, pictures (including moving pictures reproduced from film or from any other record) or other articles or things;

(*c*) obscene libel; and

(*d*) keeping a disorderly house.

1780 c. 49 (21 Geo. 3).

(3) In section 1 of the Sunday Observance Act 1780—

(*a*) after the words "this present Act" there shall be inserted the words "the keeper of"; and

(*b*) the words from "shall be deemed" to "room or place" where next occurring and the words from "and be otherwise" to "disorderly houses" shall be omitted.

1890 c. 59.

(4) In paragraph 5 of section 51 of the Public Health Acts Amendment Act 1890—

(*a*) at the beginning there shall be inserted the words "the person occupying or rated as occupier of"; and

(*b*) the words from "shall be deemed" to "the same" shall be omitted.

Clause 22

1. This clause abolishes common law offences in the sphere of public morals and decency, and makes legislative amendments consequential upon these abolitions.

2. *Subsection* (1) abolishes the generic offences of corrupting public morals and outraging public decency, the existence of which at common law is supported by recent authority.

3. *Subsection* (2) abolishes the narrower, specific offences at common law of indecent exposure, public exhibition of indecent acts and things, obscene libel and keeping a disorderly house.

4. *Subsections* (3) and (4) make consequential amendments to the Sunday Observance Act 1780 and the Public Health Acts Amendment Act 1890 to delete references in those Acts to disorderly houses and to penalties at common law.

PART IV

MISCELLANEOUS AND SUPPLEMENTARY

Abolition of the doctrine of contempt of statute.

23. A person shall not be guilty of an offence by virtue of any failure to comply with or contravention of any enactment (whether contained in an Act passed before or in an Act passed after the passing of this Act) unless the enactment expressly provides that any such failure or contravention shall be an offence.

Clause 23

This clause abolishes the doctrine of contempt of statute, under which a contravention of a statute may be prosecuted at common law, notwithstanding that the statute does not specify that such contravention constitutes a criminal offence.

Short title, repeals and extent.

24.—(1) This Act may be cited as the Conspiracy and Criminal Law Reform Act 1976.

(2) The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

(3) This Act does not extend to Scotland or to Northern Ireland.

Clause 24

This clause deals with the short title and extent of application of the Bill. With the Schedule, it also gives effect to the recommendations for repeal of legislation made in the Report.

SCHEDULE

ENACTMENTS REPEALED

Session and Chapter	Title or Short Title	Extent of Repeal
5 Ric. 2. Stat. 1. c. 7.	The Forcible Entry Act 1381.	The whole Chapter.
15 Ric. 2. c. 2. (1391)	Statutes concerning forcible entries and riots confirmed.	The whole Chapter.
8 Hen. 6. c. 9.	The Forcible Entry Act 1429.	The whole Chapter.
31 Eliz. 1. c. 11.	The Forcible Entry Act 1588.	The whole Act.
21 Jac. 1. c. 15.	The Forcible Entry Act 1623.	The whole Act.
25 Geo. 2. c. 36.	The Disorderly Houses Act 1751.	The whole Act.
21 Geo. 3. c. 49.	The Sunday Observance Act 1780.	In section 1, the words from "shall be deemed" to "room or place" where next occurring and the words from "and be otherwise" to "disorderly houses".
24 & 25 Vict. c. 100.	The Offences Against the Person Act 1861.	In section 4, the words preceding "whosoever".
38 & 39 Vict. c. 86.	The Conspiracy and Protection of Property Act 1875.	Section 3.
53 & 54 Vict. c. 59.	The Public Health Acts Amendment Act 1890.	In paragraph 5 of section 51, the words from "shall be deemed" to "the same".
6 & 7 Eliz. 2. c. 45.	The Prevention of Fraud (Investments) Act 1958.	Section 13(2).
7 & 8 Eliz. 2. c. 66.	The Obscene Publications Act 1959.	In the proviso to section 1(3), the words from "a cinematograph exhibition" to "in the course of". Section 2(4).
1968 c. 54.	The Theatres Act 1968.	In section 2(4), paragraph (*a*) and the words from "and no person" to the end of the subsection.
1974 c. 52.	The Trade Union and Labour Relations Act 1974.	Section 29(7).

APPENDIX 2

Membership of the Law Commission's Working Party upon the General Principles of the Criminal Law

Joint Chairmen:	Mr. Derek Hodgson, Q.C.
	Mr. Norman S. Marsh, Q.C.
Law Commission member:	The Honourable Mr. Justice Cooke
Members, other than representatives of the Law Commission:	*The Right Honourable Lord Edmund-Davies
	His Honour Judge Buzzard
	Mr. T. R. Fitzwalter Butler
	Mr. A. E. Cox
	Mr. R. Du Cann, Q.C.
	Mr. J. N. Martin, O.B.E.
	*Professor Glanville L. Williams, Q.C., LL.D., F.B.A.
	Mr. F. L. T. Graham-Harrison, C.B. (Home Office)
alternate	*Sir Kenneth Jones, C.B.E. (Home Office)
	†Mr. J. Nursaw (Home Office)
Secretary:	Mr. J. C. R. Fieldsend (Law Commission)
Assistant Secretary:	Mr. C. W. Dyment (Law Commission)

* Also members of the Criminal Law Revision Committee.

† Secretary of the Criminal Law Revision Committee.

APPENDIX 3

Participants in a seminar held at All Souls' College, Oxford on 5-6 April 1974, to discuss the Law Commission's Working Paper No. 50, "Inchoate offences"

The Honourable Mr. Justice Cooke (Law Commission) (in the chair)
The Lord Chancellor, The Right Honourable Lord Elwyn-Jones
The Right Honourable Lord Edmund-Davies
The Right Honourable Lord Justice Shaw
Mr. Peter Archer, Q.C. (The Solicitor General)
Mr. Claud Bicknell, O.B.E.
Mr. R. J. Buxton
Professor Sir Rupert Cross
Mr. Aubrey L. Diamond
Mr. R. Du Cann, Q.C.
Mr. C. W. Dyment
Mr. J. C. R. Fieldsend
Mr. F. L. T. Graham-Harrison, C.B.
Mr. Derek Hodgson, Q.C.
Mr. Roger Hood
Sir Kenneth Jones, C.B.E.
Sir Stanley Krusin, C.B.
Mr. Philip Lewis
Mr. Richard Lowry, Q.C.
Mr. Alexander Lyon, M.P. (Minister of State, The Home Office)
Mr. Norman S. Marsh, Q.C.
Mr. Patrick Neill, Q.C.
Mr. J. M. Cartwright Sharp
M. Manfred Simon
Sir Norman Skelhorn, K.B.E., Q.C. (Director of Public Prosecutions)
Professor J. C. Smith
Mr. Ewan Stewart, M.C., Q.C. (Scottish Law Commission)*
Professor K. W. Wedderburn

* Appointed in January 1975 as a Senator of the College of Justice with the judicial title of Lord Stewart.

APPENDIX 4

Organisations and individuals who commented on the Law Commission's Working Paper No. 50, "Inchoate offences"

Mr. M. Butcher
Mr. R. J. Buxton
Mr. R. Card
The Cobden Trust
Freedom under Law International
General Council of the Bar
Mr. M. House
Inland Revenue
Justices' Clerks' Society
The Law Society
Mr. W. A. Leitch, C.B.
The Magistrates' Association
Mr. G. Orchard
Prosecuting Solicitors' Society of England and Wales
The Right Honourable Lord Reid
Mr. C. H. Rolph
Mr. A. H. Sherr
Society of Conservative Lawyers
Society of Public Teachers of Law
Society of Registration Officers
Mr. J. A. Clarence Smith
Mr. K. J. M. Smith
Mr. P. Smith
W. H. Thompson, Solicitors
Trades Union Congress
Professor K. W. Wedderburn

APPENDIX 5

Organisations and individuals who commented on the Law Commission's Working Paper No. 54, "Offences of entering and remaining on property"

Association of Chief Police Officers
Association of Teachers in Technical Institutions (Outer London Division)
Barnet Borough Trades Council
Bath Federation of Townswomen's Guild
Benwell Community Project
Mr. R. Brazier
Bristol University Students' Union
British Property Federation
British Railways Board
Burchell & Ruston, Solicitors
Cambridge Constituency Labour Party
Cambridge & District Trades Council
Camden Borough Housing Committee
Camden Housing Aid Centre
Campaign against a Criminal Trespass Law
Child Poverty Action Group
Community Development Project Workers' Organisation
Mr. L. N. Coppendale
Country Landowners' Association
Crown Estate Office
Professor D. W. Elliott
Freedom under Law International
Mr. T. Gould
Haldane Society
Haringey Borough Housing Department
Hertsmere District Council
The Home Office
Incorporated Society of Valuers and Auctioneers
Justices' Clerks' Society
Mr. G. A. King
Lambeth Borough Housing Committee
Latimer Housing Association Ltd.
Law Centres Working Group
The Law Society

Mr. B. E. Lawson
Leicester Polytechnic Law Staff
Mr. W. A. Leitch, C.B.
Mr. I. Litterick
The Magistrates' Association
Manchester Group of Campaign against a Criminal Trespass Law
Metropolitan Police, Solicitors' Department
Mr. A. J. Moore
Mr. D. Morris
National Council for Civil Liberties
National Union of Public Employees
National Union of Students
North East London Polytechnic Students' Union
North Kensington Women's Group
Paisley Community Development Project Team
Mr. C. V. H. Pitt
Police Federation
Police Superintendents' Association
Pollard, Thomas & Co., Solicitors
The Post Office
The Proctors, University of Oxford
Prosecuting Solicitors' Society of England and Wales
Release
Romano Institute
Romany Guild
St. David's University College, Students' Union
Salford District Trades Council
Mr. A. Samuels
Second Actel Housing Association Ltd.
Mr. M. A. Selwyn
Senate of the Inns of Court and the Bar
Society of Public Teachers of Law
Mr. H. Spence
Stock Conversion and Investment Trust Ltd.
Thornhill Association
Mr. J. J. Tobin
Trades Union Congress
Wessex Branch, Amalgamated Union of Engineering Workers
Mr. B. J. Whitney
Young Liberal Law Commission

APPENDIX 6

Participants in a seminar held at Jesus College, Cambridge on 4-5 April 1975, to discuss the Law Commission's Working Paper No. 57, "Conspiracies relating to morals and decency"*

The Honourable Mr. Justice Cooke (Law Commission) (in the chair)
Mr. Claud Bicknell, O.B.E.
Mr. A. J. E. Brennan
Miss M. E. Chadwell
Mr. E. J. Crowther
Mr. A. Davidson, M.P.
(Parliamentary Secretary, Law Officers' Department)
Mr. Aubrey L. Diamond
Mr. C. W. Dyment
Mr. M. Evelyn
Mr. J. C. R. Fieldsend
Mr. P. Glazebrook
Mr. Derek Hodgson, Q.C.
Sir Kenneth Jones, C.B.E.
Mr. E. Kent
Professor D. Levine
Mrs. Nina Lowry
Mr. Norman S. Marsh, Q.C.
Mr. Stephen Murphy
Mr. D. Napley
Mr. J. Nursaw
Miss K. A. O'Neill
Miss O. Parry
Mr. B. Passingham
Mr. D. Tudor Price
Mr. T. P. Russell, Q.C.
Professor Glanville L. Williams, Q.C., LL.D., F.B.A.

* The seminar also discussed the Working Paper of the Home Office Working Party on Vagrancy and Street Offences.

APPENDIX 7

Organisations and individuals who commented on the Law Commission's Working Paper No. 57, "Conspiracies relating to morals and decency"

Action Group on Abuse of Law (Mr. Hugh S. Watts)
Association of Chief Police Officers of England, Wales and Northern Ireland
Mr. Raymond Blackburn
British Board of Film Censors (Secretary)
Josephine Butler Society
Calder and Boyars Ltd.
Cinematograph Exhibitors' Association of Great Britain and Ireland
Mr. David Holbrook
The Home Office
Mr. Edward Johnson
Mr. H. P. Kaufmann
Mr. R. C. Keen
The Law Society
Dr. L. H. Leigh
Mr. W. A. Leitch, C.B.
Mr. Robert M. Lynn
Magistrates' Association
Methodist Church (Division of Social Responsibility)
National Council of Women of Great Britain
Nationwide Festival of Light
North Kent Sun Club (The Naturist Foundation)
Police Superintendents' Association of England and Wales
Prosecuting Solicitors' Society of England and Wales
Mr. Michael Rubinstein
Mr. Brian E. Seager
Senate of the Inns of Court and the Bar
The Right Honourable Lord Simon of Glaisdale
Sexual Law Reform Society
Society of Conservative Lawyers
Society of Public Teachers of Law
Mr. John Trevelyan
Mr. Graham Zellick

APPENDIX 8

Organisations and individuals who commented on the Law Commission's Working Paper No. 63, "Conspiracies to effect a public mischief and to commit a civil wrong"

Association of Chief Police Officers
Director of Public Prosecutions
The Home Office
The Law Society
Mr. W. A. Leitch, C.B.
Police Superintendents' Association
Prosecuting Solicitors' Society of England and Wales
Senate of the Inns of Court and the Bar
University College, London,
Law Reform sub-committee of the Faculty of Laws

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