

The Law Commission

(LAW COM No 318)

CONSPIRACY AND ATTEMPTS

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THE LAW COMMISSION

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

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THE LAW COMMISSION

CONSPIRACY AND ATTEMPTS

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THE LAW COMMISSION

CONSPIRACY AND ATTEMPTS

To the Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice

PART 1 INTRODUCTION

CONSPIRACY, ATTEMPTS AND THE 'GENERAL PART' OF THE LAW

- 1.1 This report on the law of conspiracy and attempts follows our Consultation Paper, *Conspiracy and Attempts*¹ ("CP"), published in October 2007. That paper was issued in response to a Government request to review the offence of statutory conspiracy² under the Criminal Law Act 1977 ("the 1977 Act").
- 1.2 In a broader context, our report completes our review of the elements of criminal wrongdoing in the 'general part' of the criminal law.³ This is the part of the criminal law that buttresses and supports more specific criminal prohibitions, such as the prohibitions on murder or rape.
- 1.3 'General part' forms of wrongdoing include some discrete offences in themselves. The most important examples, other than conspiracy and attempt, are the recently created offences of encouraging or assisting crime.⁴ The justification for having such offences is clear enough.⁵ If there are reasons to prohibit murder, rape, fraud, assault, and so on, then there are also reasons to prohibit acts that encourage or assist the commission of these offences, and reasons to prohibit conspiracies or attempts to commit these offences. The latter kinds of offences are 'discrete', in that they can be committed even if the substantive offence never takes place:

Example 1A

D1 and D2 agree to kill V. Hearing of their plan, D3 writes letters to D1 and D2 encouraging them to go ahead with the murder. V dies of natural causes before D1 and D2 embark on the planned crime.

¹ *Conspiracy and Attempts* (2007) Law Commission Consultation Paper No 183.

² The Commission was not asked to consider common law conspiracy.

³ See *Participating in Crime* (2007) Law Com No 305; *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300. This has been referred to, perhaps more accurately, as the "auxiliary" part of the criminal law: John Gardner, "On the General Part of the Criminal Law" in RA Duff (ed) *Philosophy and the Criminal Law* (1998).

⁴ See Part 2 of the Serious Crime Act 2007.

⁵ A full defence of the crime of conspiracy can be found in *Conspiracy and Attempts* (2007) Law Commission Consultation Paper No 183, Part 2.

- 1.4 In example 1A, under the existing law, D1 and D2⁶ are guilty of a conspiracy to commit murder,⁷ and D3 is guilty of encouraging murder,⁸ even though murder never takes place.
- 1.5 A similar point can be made about a criminal attempt:

Example 1B

D1 and D2, unaware that V had already died, set fire to V's house at night (assuming that V was inside) in order to carry out their plan to murder V.

- 1.6 In example 1B, D1 and D2 would be guilty of attempted murder. Attempted murder can be committed quite independently of whether murder itself could or does take place.
- 1.7 The forms of wrongdoing in the 'general part' also include the species of wrongdoing known as 'complicity' – participation in another's crime.⁹ In broad terms, if two or more people conspire to commit a crime, or knowingly do acts capable of encouraging or assisting crime, and that crime is consequently committed, then the individuals in question will be guilty of the offence itself.¹⁰ They will no longer merely be guilty of conspiracy or of encouraging or assisting crime:

Example 1C

D1 and D2 agree to kill V. Hearing of their plan, D3 writes letters to D1 and D2 encouraging them to go ahead with the murder. D1 goes on to commit the murder himself when D2 says that he does not want to be seen on the day in question in the part of town in which V lives.

- 1.8 In example 1C, D2 and D3 are both guilty of murder, along with D1. In law, D2 and D3 are regarded as having participated in – become complicit in – the murder committed by D1. Upon conviction, they will accordingly receive the mandatory sentence for murder, along with D1.

⁶ As we have done in other recent work, in this report we will use the term 'D' (or 'D1', 'D2', 'D3' and so on) to refer to a defendant, and 'V' to a victim. This has become common practice in writing about criminal law, and the use of single letters to signify defendants is also now used in the drafting of criminal offences.

⁷ Contrary to s 1(1) of the Criminal Law Act 1977.

⁸ Contrary to s 44 of the Serious Crime Act 2007.

⁹ We have recently published a set of recommendations for reform of the law governing complicity: see *Participating in Crime* (2007) Law Com No 305.

¹⁰ We put on one side here a discussion of 'joint enterprise' liability: see further *Participating in Crime* (2007) Law Com No 305, paras 3.46 to 3.58.

- 1.9 It should be obvious that there is a particularly close relationship between conspiracy, encouraging or assisting crime, and complicity in crime. For example, entering into a conspiracy will usually involve some express or implied act of encouragement to the other participants to commit the crime, meaning that both discrete offences are committed at one and the same time. To give another example, if D1 shouts encouragement to D2 to continue repeated punching of V, and D2 consequently does continue to punch V, D1 becomes guilty of encouraging assault and (the moment the next blow lands on V) of assault itself, at almost the same time.
- 1.10 The closeness of the relationship between the different forms of wrongdoing in the 'general part' of the criminal law means that it is important that, in so far as is possible, there is a consistent approach to key elements of their ingredients. There will be isolated instances in which consistency is neither achievable nor desirable. However, one of the major aims of this report, when set alongside the reforms instituted by the Serious Crime Act 2007 ("the 2007 Act") (based on our report on assisting and encouraging crime)¹¹ and alongside our report on participation in crime,¹² is to move towards such consistency.
- 1.11 It has proved impossible for the courts to achieve any degree of consistency, in this respect, through their power to interpret and develop the law.¹³ Amongst other explanations for this is the simple fact that an individual case about, say, a point of law on conspiracy, cannot authoritatively address the analogous point of law, if it arises, in the law of attempt, in the law of encouraging or assisting crime, and in the law of complicity. It has remained open to other courts, on other occasions, to take a different view of the same point of law, as it arises in those other areas of law.
- 1.12 In that regard, the most important issues addressed in this report are those bearing on the fault requirements for conspiracy and attempt. In this introductory part, we will concentrate on the requirements for the law of conspiracy, but much of what is said will be relevant, by virtue of the need for consistency, with the law of attempt.

THE FAULT ELEMENT IN STATUTORY CONSPIRACY

Agreement, intention and knowledge in the existing law

- 1.13 Statutory conspiracy is defined by section 1 of the 1977 Act which provides:
- (1) ... if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either-
- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

¹¹ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

¹² Participating in Crime (2007) Law Com No 305.

¹³ See, for example, the discussion of the current law of complicity in Participating in Crime (2007) Law Com No 305, Appendix B.

- (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

1.14 Subsection (2) adds:

Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

- 1.15 It is noticeable that three mental elements, or fault requirements (our preferred term), are employed in this definition: 'agreement', 'intention', and (in subsection (2)), 'knowledge'.

Agreement and intention regarding conduct and consequence elements: our recommendations

- 1.16 Clearly, a conspiracy must involve an agreement on a course of criminal conduct, even if the agreement is tacit, or inferred from collaborative action of certain kinds, rather than express. This is a matter of common sense.
- 1.17 We believe that a conspiracy that is to be the subject of criminal sanctions should also require an intention on the part of the participants that the conduct amounting to the offence should take place. That might also seem to be a matter of common sense, but the issue is not straightforward. Someone may agree with others to commit an offence without intending the agreement to be carried out:

Example 1D

D1, D2 and D3 agree to commit robbery. D1 is in fact an undercover officer who intends D2 and D3 to be arrested before the robbery takes place. D2 always intended simply to abscond with money pooled by the other conspirators to buy equipment essential to the commission of the offence. D3 always intended to 'shop' D1 and D2 to the police, and claim a reward for preventing a robbery.

- 1.18 In example 1D, by virtue of agreeing to commit the offence, one or more of D1, D2 and D3 may possibly be guilty, under Part 2 of the 2007 Act, of encouraging or assisting the forming of a conspiracy. However, in the absence of an intention that the offence be committed, we do not believe that they should be regarded as guilty of conspiracy to commit robbery.¹⁴

¹⁴ See paras 2.46 to 2.56 below.

- 1.19 Accordingly, our first two recommendations for reform of the law of conspiracy are designed to clarify the law on these issues. These recommendations make agreement and intention explicit legal requirements of any criminal conspiracy, in a way that the current law does not do with sufficient clarity.
- 1.20 **Recommendation 1** consists of a requirement for proof against any alleged conspirator that he or she agreed to engage in the conduct element of the offence and, where relevant, to bring about any consequence element.¹⁵
- 1.21 In example 1D, following this recommendation would involve proof, as against (two or more of) D1, D2 and D3, that they agreed that a potential victim (V) should be subject to theft, and that immediately before or at the time of the theft, (one or more of) D1, D2 and D3 should put or seek to put V in fear of being then and there subjected to force.¹⁶ In example 1D, the theft and the contemporaneous use or (speaking broadly) 'threat' of force are conduct elements of the offence of robbery that D1, D2 and D3 must agree will take place.
- 1.22 **Recommendation 2** involves a requirement for proof of an intention that any conduct element and, where relevant, consequence element of the offence should take place.
- 1.23 In example 1D, following this recommendation would involve proof that the relevant conspirator intended the conduct elements of robbery (described above) to take place.

Fault requirements regarding circumstance elements

- 1.24 Far more controversial has proved to be the provision in subsection (2) of the 1977 Act.¹⁷ This requires proof of conspirators' knowledge of the circumstance elements of an offence, even when the conspiracy in question relates to a substantive offence that does not itself require proof of knowledge of the circumstance elements.¹⁸ As we will see, the provision is controversial because it draws the boundaries of conspiracy so narrowly, where circumstance elements are involved.

¹⁵ On the distinction between conduct, consequence, and circumstance elements, see para 2.14 below.

¹⁶ Theft Act 1968, s 8.

¹⁷ See para 1.14 above.

¹⁸ Where a substantive offence *does* require proof of knowledge of a fact or circumstance, there will in fact still be a requirement for proof of the same knowledge on a charge of conspiracy to commit that offence, in spite of the fact that subsection (2) might be taken to imply the contrary. In such a case, the requirement for proof of knowledge is in effect treated as a requirement bearing on the intentions in accordance with which the agreement to commit the offence is carried out, for the purposes of subsection (1).

- 1.25 In Part 2 we explain the distinction between the different possible elements of an offence: conduct, consequence, and circumstance elements.¹⁹ In broad terms, the most common kind of circumstance element in an offence is a factual or legal quality that a conduct or consequence element must have, if engaging in that conduct or bringing about the consequence is to amount to an offence. For example, goods must be ‘stolen’ before handling them amounts to an offence, and sexual intercourse must be ‘non-consensual’ before it can amount to the core element of rape. The ‘stolen’ quality of the goods, and the ‘non-consensual’ nature of the intercourse, are the circumstance elements of the offence.
- 1.26 In that regard, what does subsection (2) require? Subsection (2) appears to apply only when there is no requirement in the substantive offence for proof of knowledge of the circumstances. Rape is a crime that does not require proof of knowledge, on D’s part, that the circumstance element (lack of consent to sexual intercourse) was present at the relevant time.²⁰ Accordingly, on a charge of conspiracy to rape against D1 and D2, subsection (2) requires proof that D1 and D2 *knew* that V would not be consenting at the time of the intercourse that one or both of them intended to engage in with V.
- 1.27 Subsection (2) also applies to an offence, for example, such as handling stolen goods,²¹ which requires proof of knowledge *or of belief* that the goods in question are stolen. It applies because this offence, being satisfied by proof of belief that the goods handled are stolen, is an example where (in the words of subsection (2)) “liability may be incurred without knowledge” that the circumstance element will be present at the relevant time.
- 1.28 As we have indicated, on a charge of conspiracy to handle stolen goods it would not be enough to show that the conspirators believed that the goods they intended to handle would be stolen goods. It must be shown by the prosecution that the alleged conspirators *knew* that the goods would be stolen goods at the relevant time.
- 1.29 It would be helpful to put these two offences – rape and handling stolen goods – together for the purposes of analysis:

Example 1E

D1 and D2 agree to pressure V, D1’s older cousin, into having sexual intercourse with them.

¹⁹ See para 2.14 below. Briefly, however, the distinction between the conduct consequence and circumstance elements is as follows: the conduct is the action of D; the consequence amounts to the state of affairs which results from the conduct; and the circumstance is the factual matrix in which the conduct or consequence must occur.

²⁰ Very roughly, all that is required, under the Sexual Offences Act 2003, is proof that D lacked a reasonable belief that V was consenting to sexual intercourse.

²¹ Contrary to s 22 of the Theft Act 1968.

Example 1F

D1 and D2 agree to store goods in a secure place for X. At the time of the agreement, D1 knows that the goods will be stolen goods. At that point, D2 believes that the goods will be stolen because that is what D1 has unequivocally said.

- 1.30 In both these examples, were the substantive offences in issue (rape or handling stolen goods) there would be no need to show knowledge on the part of D1 and D2 respectively that V did not consent and that the goods were stolen. It would be sufficient to show (and in the case of rape, rather more than sufficient) that D1 and D2 believed that the circumstance element in question attended the relevant conduct element.
- 1.31 However, on a charge of conspiracy to commit these offences, it must be shown that D1 and D2 *knew* respectively that V would not consent to the intercourse and that the goods were stolen. Our provisional view in the CP was that this requirement was too generous to the accused, and too onerous for the prosecution to prove.²² Our recommendations reflect that provisional view.²³
- 1.32 The current law is made harder to understand by the fact that, in each case, had D1 and D2 gone far enough forward with their agreement to be engaging in an attempt to commit these crimes, there would no longer be a requirement for proof of knowledge that the circumstance elements obtained or would obtain at the relevant time.²⁴ This is so even though, when an attempt is in issue, it ought in theory to be easier to prove that D had such knowledge.

The decision of the House of Lords in Saik²⁵

- 1.33 The decision of the House of Lords in *Saik* has confirmed that section 1(2) of the 1977 Act requires proof of knowledge on the part of the conspirators that a circumstance element will be present, where the substantive offence does not require proof of such a fault requirement.

²² Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 1.28 to 1.29.

²³ See paras 2.65 to 2.67 below.

²⁴ *Khan* [1990] 1 WLR 813; *Attorney General's Reference (No 3 of 1992)* [1994] 1 WLR 409. For a discussion of the fault element in attempt, see Conspiracy and Attempts (2007) Law Commission Consultation Paper 183, paras 14.26 to 14.55.

²⁵ [2006] UKHL 18, [2007] 1 AC 18.

- 1.34 In *Saik*, D was charged with conspiracy to convert (in more familiar speech, 'to launder') the proceeds of another person's crime.²⁶ D had been the sole proprietor of a bureau de change. It had a turnover of £1000 per week, and up to late 2001 had made a small annual profit of £8000. However, from that time onwards, D started purchasing large quantities of \$100 bills. Between May 2001 and February 2002, D exchanged some \$8 million. Surveillance officers observed D meeting another of the alleged conspirators many times in D's car in a nearby street rather than in D's office. On these occasions, sacks containing sterling were seen.
- 1.35 D pleaded guilty to the conspiracy charge, on the basis that he had 'suspected' at the time that the money with which he had been dealing was the proceeds of another's crime. The substantive offence of converting (laundering) the proceeds of crime is committed where D knows *or suspects* that the money in question is the proceeds of crime.
- 1.36 Nonetheless, D's conviction for conspiracy to commit this offence was quashed. The House of Lords held by a majority²⁷ that subsection (2) applied respecting the circumstance element of the crime: the fact that the money was the proceeds of crime. By confessing that he merely suspected that the money was the proceeds of crime, D was not thereby admitting that he *knew* that the money was the proceeds of crime; and it is knowledge that the circumstance element obtains or will obtain at the relevant time that is required by subsection (2).
- 1.37 In the CP, we discussed the decision in *Saik* at length.²⁸ We stated that, although the decision of the House of Lords was in broad terms legally correct, it exposed several unsatisfactory aspects about the law as it stands.
- 1.38 First, the basis for the decision in *Saik* is to some extent unclear. There is a consensus amongst their Lordships that several states of mind (recklessness, or suspicion, for example) fall short of knowledge. However, there is no single view of what amounts to knowledge of a particular fact or circumstance for the purposes of section 1(2) of the 1977 Act.²⁹
- 1.39 In relation to the facts of the case, Lord Nicholls³⁰ held that there is a distinction between cases where the agreement forming the basis of the conspiracy related to unidentified property, and those where it related to identified property. In the former, proof of an intention to launder the proceeds of crime would be required, whereas in the latter proof of knowledge that the money was the proceeds of crime would be required.

²⁶ An offence under s 93C(2) of the Criminal Justice Act 1988, now replaced by s 327 of the Proceeds of Crime Act 2002.

²⁷ Baroness Hale dissenting.

²⁸ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.70 to 4.93.

²⁹ See paras 1.40 to 1.41 and para 2.64 below.

³⁰ With whom Lord Steyn agreed.

- 1.40 For Lord Nicholls, knowledge on the part of a conspirator could only result from him or her having first-hand knowledge of the circumstance. If he or she were to be told of the existence of a circumstance by a co-conspirator then, at most, he or she would have a belief in its existence. As such, in his opinion, this would be something less than knowledge.
- 1.41 By way of contrast, Lord Brown held that a belief in the existence of a circumstance element could in some circumstances satisfy the requirement in section 1(2) for knowledge.³¹ In a similar vein, Lord Hope held that “wilful blindness” was a state of mind tantamount to knowledge.³²
- 1.42 Secondly, the decision in *Saik* leaves many agreements that the participants know may end in serious criminal activity outside the scope of the law of conspiracy. A much-discussed example is one in which D1 and D2 agree to have sexual intercourse with V, believing that V may not consent. Under the present law as governed by *Saik*, this would not be a conspiracy to rape. This is because D1 and D2 did not know that V would not consent, even though D1 and D2 both more than satisfy the fault requirements for rape itself.³³ In such cases, to require proof of knowledge or intention as to circumstance elements on the conspiracy charge, even though that would be unnecessary had the full offence been charged, is too generous to the accused.
- 1.43 It must be kept in mind that in some cases it may never be known, either to the prosecution or to D, whether the substantive offence was ever committed (by persons unknown who were parties to the conspiracy). So it is not obvious why the accused should benefit from a requirement for conspiracy that the prosecution prove a more stringent fault element than would have to be proved if he or she were charged with the substantive offence.³⁴ In *Saik* itself Lord Nicholls stated that the conclusion of the majority was, “not altogether satisfactory in terms of blameworthiness”.³⁵
- 1.44 The following example illustrates the problem in a different context:

Example 1G

D1 and D2 agree to try to persuade V to have sexual intercourse with them, realising that V may be as young as 12 years old. They believe that V is over 16 years old, but will nevertheless carry out their plan whatever her age.

³¹ [2006] UKHL 18, [2007] 1 AC 18 at [119].

³² Above at [26]. For a full discussion of what is meant by the concept of wilful blindness together with the reasons as to why we do not believe that amounts to ‘knowledge’, see Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.94 to 4.106.

³³ They realise that V may not consent, whereas s 1 of the Sexual Offences Act 2003 only requires an absence of reasonable belief that V will consent.

³⁴ So long, obviously, as the fault requirements for conspiracy in general meet an acceptable standard of fairness: see para 2.54 below.

³⁵ [2006] UKHL 18, [2007] 1 AC 18 at [33].

- 1.45 In this example, D1 and D2 are not guilty of conspiracy to incite someone under the age of 13 to engage in sexual activity. They do not have knowledge as to the circumstance element of the offence (V's age), and do not therefore fulfil the requirements of section 1(2) of the 1977 Act. In our view, such a reckless disregard for V's age ought to result in liability for the offence of conspiracy to incite someone under 13 years of age to engage in sexual activity.³⁶
- 1.46 As we suggested earlier,³⁷ the law is now operating in a way too generous to those who agree on conduct that they know may end in the commission of criminal offences. Further, it is out of line with the approach taken in cases of attempt, where knowledge that the circumstance element obtains or will obtain is not required.³⁸

Fault bearing on circumstance elements: our recommendations

- 1.47 Our third and fourth recommendations, those that involve a significant change in the law, concern the circumstance elements of the crime someone is alleged to have conspired to commit. The prosecution should no longer be required to show knowledge on the part of an alleged conspirator that a circumstance element would be present at the relevant time, unless proof of such knowledge is required by the substantive offence. In that regard, our third and fourth recommendations involve taking a different approach to what must be proved by way of fault, in relation to a circumstance element, depending on what the substantive offence itself says (or fails to say) about the issue.
- 1.48 **Recommendation 3** provides that where the substantive offence requires no proof of fault in relation to a circumstance element, or proof only of negligence (or an equivalent, objectively determined, state of mind, such as an unreasonable belief), the prosecution should be required to show that an alleged conspirator was reckless concerning the possible presence or absence of the circumstance element at the relevant time.
- 1.49 This recommendation broadly follows our provisional proposal.³⁹ Our reasoning is set out in detail in Part 2. In example 1G given in paragraph 1.44 above, it would mean that D1 and D2 could be convicted of conspiracy only if they realised that V might be under 13 when the time came to incite her to engage in sexual activity.

³⁶ Baroness Hale held that, in this kind of example, D1 and D2 could be said to conditionally intend the circumstance element of the offence (V's age) and so would be guilty of conspiracy to rape: see [2006] UKHL 18, [2007] 1 AC 18 at [99]. Some of our consultees also adopted this view: see para 2.115 below. At paras 2.119 to 2.128 we analyse the possibility of basing the offence of conspiracy on conditional intent but we conclude that it would leave unacceptable gaps in the law.

³⁷ See para 1.31 above.

³⁸ *Khan* [1990] 1 WLR 813; *Attorney-General's Reference (No 3 of 1992)* [1994] 1 WLR 409.

³⁹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.4 and 4.113.

- 1.50 **Recommendation 4** concerns cases in which proof of fault other than negligence (or its equivalent) – fault sometimes referred to as ‘subjective’ fault – is required by the substantive offence in relation to a circumstance element. In such cases, we recommend that the prosecution must show that the alleged conspirator had any subjective fault element bearing on a circumstance element provided for in the substantive offence, whether it be suspicion, belief, awareness, knowledge, or another fault element of that kind.
- 1.51 This recommendation builds on, but in important ways differs from, our provisional proposals.⁴⁰ The latter spoke of the need to prove the same fault element, on a conspiracy charge, as is required for the substantive offence if that fault element was ‘higher’ or ‘more stringent’ than recklessness. On reflection, we have decided that, whilst on the right lines, this approach does not suit English law, which does not formally divide fault elements into ‘higher’ and ‘more stringent’ forms, as distinct from ‘lower’ or ‘more lax’ forms. Whilst the law does not formally distinguish between subjective and other forms of fault either, the way in which our fourth recommendation – and the draft Bill – is worded will not force the courts to adopt such terminology if they do not wish to do so.⁴¹
- 1.52 An illustration of the way that recommendation 4 is to work involves the offence of handling stolen goods, an example on which we relied in the CP, as well as in the earlier discussion.⁴² This offence requires proof that D *knew or believed* that the goods in question were stolen at the relevant time. Accordingly, proof of that state of mind will be required on a charge of conspiracy to commit this offence. Under recommendation 4, this is because proof of such knowledge or belief involves proof of fault other than negligence or its equivalent (where, under recommendation 3, proof only of recklessness would be both necessary and sufficient).

⁴⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.113.

⁴¹ Using the terms ‘objective’ and ‘subjective’ to define the distinction between the approach taken under the third recommendation, and the approach taken under the fourth recommendation, is a convenient way of theorising the distinction. However, we do not see that distinction as having practical normative significance. Its use to that end has been judicially disapproved at the highest level: see *MPC v Caldwell* [1982] AC 341.

⁴² Theft Act 1968, s 22; see Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.133 to 4.134; see paras 1.27 to 1.32 above.

- 1.53 This approach is different to that of the current law in relation to a conspiracy to handle stolen goods. As we have seen,⁴³ by virtue of section 1(2) of the 1977 Act the current law requires proof of knowledge that goods will be stolen goods at the relevant time. We see no real merit in such a further restriction when conspiracy is being charged. Consider the example of a multi-handed conspiracy in relation to existing goods that are to be handled in the future. There is no adequate justification for differentiating between alleged conspirators who knew that the goods would be stolen goods at the relevant time (who may be convicted) and alleged conspirators who believed that the goods would be stolen goods at the relevant time (who may not be convicted). Under our recommendations, both sets of alleged conspirators would stand to be convicted, in just the same way that, with their respective fault elements, they could all be convicted of the substantive offence if the plan proceeded to a successful conclusion.
- 1.54 As we explain in Part 2,⁴⁴ an important function of recommendation 4 is to ensure that it is not easier to prove the fault elements of conspiracy than it is to prove the fault elements of the substantive offence that is the focus of the conspiracy. In that regard, our recommendations will not affect the need to prove fault elements, where relevant, that are not specifically related to particular conduct, consequence, or circumstance elements: an example is the requirement for 'dishonesty' in theft.
- 1.55 **Recommendation 5** provides that in relation to recommendations 3 and 4 (in the light of separate recommendations we have made relating to the relevance of intoxication to criminal liability),⁴⁵ it should be possible for D to deny that he or she possessed the fault element for conspiracy because of intoxication, whether voluntary or involuntary, even when the fault element in question is recklessness, or its equivalent. This accords with our approach to the relevance of intoxication to recklessness as to elements of the offence where the offences of encouraging and assisting under Part 2 of the 2007 Act are in issue.

The relationship between conspiracy, complicity and Part 2 of the Serious Crime Act 2007

- 1.56 It may be helpful at this stage to give a very broad indication of how conspiracy fits in with two other closely related areas of the criminal law.
- 1.57 One of these areas of law is the doctrine of complicity, whereby one person (D1) can be convicted of an offence committed by another person (D2), if D1 is party to a joint enterprise with D2 to commit the offence.⁴⁶ Another such area involves the inchoate offences of 'encouraging or assisting' someone to commit an offence (whether or not that offence takes place), contrary to the offences set out in Part 2 of the 2007 Act.

⁴³ See para 1.27 above.

⁴⁴ See para 2.139 below.

⁴⁵ Intoxication and Criminal Liability (2009) Law Com No 314.

⁴⁶ This is called the "plain vanilla" kind of joint enterprise by Lord Hoffmann as cited in *R v Rahman* [2008] UKHL 45, [2009] 1 AC 129 at [9]; see AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) pp 221 to 222.

Conspiracy and complicity

- 1.58 If D1 and D2 agree to commit a crime (say, murder), and the murder is consequently carried out either by D1 alone, by D2 alone, or by D1 and D2 acting together, D1 and D2 are guilty of murder, and of conspiracy to murder.⁴⁷ In such a case, it is highly likely that murder will be charged, in preference to conspiracy to murder, although the latter can be an alternative charge on the indictment.
- 1.59 In the case where it is D1 (or D2) alone who executes the plan, the other conspirator is still regarded as guilty of the substantive offence, not just of the conspiracy. As Baron Alderson put it in *Macklin*:
- If several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all.⁴⁸
- 1.60 At first glance, this might be considered counter-intuitive and controversial. However, it is in fact a perfectly normal practice to allocate responsibility, and hence give credit and blame, on a group rather than purely on an individual basis. So, one says of one's team, "we played poorly", or "we won", even if the poor play, or the winning, might be in some sense attributable to one or two individual performances. In much the same way, in the example given above,⁴⁹ the law regards the murder as committed through a 'team effort' – a joint enterprise – involving D1 and D2 together.
- 1.61 Where one conspirator alone goes on to commit the substantive offence, it will always be a temptation for the other conspirator to seek to avoid liability for that offence by saying one of two things. He or she may say that, although he or she agreed that it should be committed, either (i) he or she never intended it actually to be committed, or (ii) he or she had second thoughts afterwards and withdrew from the plan before the crime was committed.
- 1.62 So far as the first claim is concerned, as we will explain, without an intention that the plan is executed, there should be no conspiracy in law.⁵⁰ The jury is to be trusted to distinguish possibly genuine from wholly implausible claims that there was no such intention. Further, an agreement to do X normally carries with it an implication that there was an intention that X be done in pursuance of the agreement.⁵¹ However, there may be instances in which D1 agrees with D2 that a crime shall be committed, but with no intention that it should be committed. An example would be where D1 is an undercover agent who enters into an agreement only to maintain his or her cover, and intends to frustrate the enterprise before it comes to fruition.⁵²

⁴⁷ Special evidential rules apply in this situation. They were discussed in *Conspiracy and Attempts* (2007) Law Commission Consultation Paper No 183, para 2.20.

⁴⁸ (1838) 2 Lew CC 225, 226.

⁴⁹ See para 1.58 above.

⁵⁰ See paras 2.46 to 2.56 below.

⁵¹ See *Participating in Crime* (2006) Law Com No 305, para 3.45.

⁵² See the discussion of such examples in para 6.17 below.

1.63 Under the Commission's recommendations for reform, the second claim would be permitted to prevent liability for the substantive offence only where the conspirator in question has negated the effect of his or her participation.⁵³ However, we will argue in this report that the second claim should not be allowed to prevent liability in relation to the conspiracy itself.⁵⁴ Once the agreement has been made, one conspirator may subsequently repudiate it (and that may be some mitigation in sentencing), but that cannot change the fact that the conspirator took part in the making of the conspiracy. Even if every party abandons the conspiracy at some later point, the conspiracy was complete at one stage, and that is enough to establish liability.

1.64 Finally, it is worth noting that sometimes, even when a substantive offence has been committed, prosecutors will prefer to charge conspiracy to commit that offence rather than the offence itself. They may do this for a number of reasons. One reason might be the difficulty of proving beyond reasonable doubt that there is a link between the conspiracy and the commission of the offence (which might take place months or years after the conspiracy). Another reason might be that proceeding with a conspiracy charge puts the prosecution in a better position to show, for example, the roles that a large number of persons played in the plot to perpetrate the offence over a long period leading up to its commission.

Conspiracy and encouraging and assisting crime

1.65 At various points in this report, we will be comparing the law governing encouraging and assisting crime and our recommendations for reform of the law of conspiracy. Understanding the comparisons we will make may be easier if some background is provided here.

1.66 Part 2 of the 2007 Act abolishes the common law offence of incitement, and creates three new offences to replace and buttress that offence.⁵⁵ In the present context, the most important of these are the offences of encouraging or assisting an offence, contrary to sections 44 and 45 of the 2007 Act. These offences can be committed when D does an act capable of encouraging or assisting an offence. Such an act will amount to an offence under the 2007 Act either if D intends the act to encourage or assist the commission of the offence (section 44), or if D believes that the offence will be committed, and that his or her act will encourage or assist it (section 45). Here is a simple example:

⁵³ Participating in Crime (2006) Law Com No 305, paras 3.60 to 3.66. For discussion of the complex current law, see AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) pp 240 to 241.

⁵⁴ See paras 2.35 to 2.44 below.

⁵⁵ Serious Crime Act 2007, ss 44 to 46.

Example 1H

D1 is assaulting V in the street. D2 comes on the scene and, seeing that it is V who is being struck, shouts encouragement to D1 to hit V harder. D3 arrives at the same time and, seeing that it is V who is being struck, hurls D1 an iron bar with which to strike V. However, at that moment D1 stops the assault and runs off. D1, D2 and D3 are unknown to one another, although it so happens that they all hate V.

- 1.67 In example 1H, D2 and D3 can be convicted of encouraging and assisting crime, contrary to section 44, even though D1 was in the end neither encouraged nor assisted by their actions.⁵⁶ The actions of D2 and D3 were both “capable of encouraging or assisting” D1 and that is enough to satisfy section 44, given the intention of D2 and D3 to encourage or assist.
- 1.68 In most instances, when D1 and D2 conspire together they will also be committing an offence contrary to section 44 or 45. This is because each will intend their agreement to encourage the other, or each will believe that his or her agreement will have that effect. However, it is possible that a criminal conspiracy could be formed without any such express or implied encouragement.
- 1.69 An example might be where D1 threatens D2 with adverse consequences if D2 does not agree to join a conspiracy, but the nature of the threat is not such as to undermine the existence of the agreement that constitutes the conspiracy itself. In such a case, it may be that D2 will neither intend his or her agreement to encourage D1 to commit the offence, nor believe that his or her agreement will have this effect (perhaps because D1 is set on committing the offence in any event). The offence of conspiracy is thus not made redundant by the creation of the offences in sections 44 and 45 of the 2007 Act. So there is still a need for the offence of conspiracy notwithstanding the overlap between conspiracy and encouraging and assisting crime.
- 1.70 In any event, in terms of the accurate labelling of offenders who decide to act in concert, a conviction for conspiracy may be a more representative label than a series of individual convictions under the 2007 Act for encouraging or assisting crime. Contrast these two examples:

⁵⁶ The action of D3 in throwing D1 the iron bar is obviously most naturally thought of as an act of assistance; but equally, such an act may encourage the commission or continuation of the offence as well. On assisting and encouraging ‘continuing acts’, see s 47(8)(b) of the Serious Crime Act 2007.

Example 1I

D is walking down his street with a can of petrol and matches to set fire to the house of a man thought both by him and by his neighbours to be a paedophile. As he proceeds down the street, a series of neighbours, seeing what he is about to do, emerge from their houses to shout encouragement to him to commit arson.

Example 1J

D and his neighbours have agreed that, if and when D has summoned the courage to set fire to the house of a man they all allege to be a paedophile, the neighbours will encourage D not to weaken in his resolve.

- 1.71 In relation to example 1J, it is possible to think of the act of entering into the agreement as itself an act capable of encouraging D to commit arson, just as, in example 1I, the shouting is such an act. So, in both examples, the individual defendants could be charged under the 2007 Act. However, there is a clear moral distinction between the criminality involved in example 1I, and that involved in example 1J.
- 1.72 In example 1I, there are a series of individual wrongs by the neighbours, in the form of a series of incitements to commit arson. The seriousness of these wrongs may fall to be judged quite separately from the fact that identical wrongs have been committed by the other neighbours.⁵⁷ By way of contrast, in example 1J there are not so much individual wrongs (in the form of separate acts of encouragement) as a jointly planned pattern of criminal activity, a conspiracy to encourage D to commit arson.
- 1.73 It might well be artificial, both morally and legally, to have to overlook this shared element to the wrong involved, when considering the appropriateness of a criminal charge. The crime of conspiracy serves the function of providing the right label for wrongdoing that has such a shared element.⁵⁸

OTHER ELEMENTS OF THE LAW OF CONSPIRACY

- 1.74 We took the opportunity in the CP to review other aspects of the law of conspiracy.

⁵⁷ For example, the first neighbour to shout encouragement to D may well have no idea that others will engage in similar acts thereafter.

⁵⁸ See further, Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, Part 2.

- 1.75 Where statutory conspiracy is concerned, we considered whether there should continue to be an exemption from the law of conspiracy for an agreement to commit an offence reached between a husband and wife or between civil partners.⁵⁹
- 1.76 We also considered whether there should be a crime of attempting to conspire,⁶⁰ what defences to conspiracy there should be,⁶¹ exemptions for victims,⁶² and whether there should be an exemption for both parties when someone enters into a conspiracy with one other person exclusively who is the intended victim or who is under the age of criminal responsibility.⁶³
- 1.77 We also considered the way in which conspiracies should be charged.⁶⁴ In addition, we considered other issues in relation to conspiracy to commit a summary offence or offences.⁶⁵
- 1.78 We also considered the extra-territorial application of the law,⁶⁶ and the way in which a conspiracy to commit different or alternative offences should be charged.⁶⁷
- 1.79 Our provisional proposals, and additional questions asked, about these issues are discussed in the course of the arguments we develop in this report in support of our recommendations.
- 1.80 **Recommendation 6** sets out our recommendation that agreements comprising a course of conduct which, if carried out, will comprise more than one offence with different fault as to circumstance elements or to which different penalties apply, should be charged as more than one conspiracy in separate counts on an indictment.⁶⁸ This will be a procedural change rather than a reform of the law. It is intended to simplify conspiracy cases and to ensure that a charge of conspiracy is used in an appropriate manner by prosecutors.
- 1.81 **Recommendation 7** abolishes the present requirement for the Director of Public Prosecutions⁶⁹ to give his or her consent to proceedings to prosecute a conspiracy to commit a summary offence.

⁵⁹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, Part 9.

⁶⁰ Above, Part 7.

⁶¹ Above, Part 8.

⁶² Above, Part 10.

⁶³ Above.

⁶⁴ Above, Part 6.

⁶⁵ Above.

⁶⁶ Above, Part 11.

⁶⁷ Above, Part 6.

⁶⁸ With the exception of the pre-Proceeds of Crime Act 2002 conspiracies to launder unidentified criminal proceeds.

⁶⁹ As provided for by s 4(1) of the Criminal Law Act 1977.

- 1.82 **Recommendation 8** provides that the immunity for spouses and civil partners provided for by section 2(2)(a) of the 1977 Act should be abolished. In our view the rule is anachronistic and can no longer be justified.
- 1.83 **Recommendation 9** provides that the present exemption from liability for a person who conspires with the intended victim of the offence should be abolished. However, we recommend that the present exemption for the victim (D) should be retained if the following conditions are met:
- (a) the conspiracy is to commit an offence that exists wholly or in part to protect a particular category of persons;
 - (b) D falls within the protected category; and
 - (c) D is the person in respect of whom the offence agreed upon would have been committed.
- 1.84 The reformed rule concerning the victim of the proposed conspiracy is consistent with the limitation on liability in respect of victims in the 2007 Act.⁷⁰ It also has the advantage of clarifying the circumstances in which a person is to be regarded as a victim for these purposes.
- 1.85 **Recommendation 10** retains the current exemption from liability for a person who is of an age of criminal responsibility who conspires with a child who is under the age of criminal responsibility.
- 1.86 **Recommendation 11** concerns the defence of acting reasonably provided for by section 50 of the 2007 Act, which we recommend should be applied in its entirety to conspiracy.
- 1.87 **Recommendations 12 to 16** are our recommendations that the rules governing extra-territorial jurisdiction for conspiracy should be consistent, in broad terms at least, with the provisions governing jurisdiction for the offences in Part 2 of the 2007 Act.

CRIMINAL ATTEMPTS

- 1.88 Section 1(1) of the Criminal Attempts Act 1981 (“the 1981 Act”) currently provides the basis for prosecuting attempts to commit crimes:

If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

⁷⁰ Serious Crime Act 2007, s 51.

- 1.89 Our main concern in the CP was an element of inconsistency in the way that some courts had approached the question of what conduct can be regarded as “more than merely preparatory” for the purposes of section 1(1).⁷¹ The ordinary meaning of the words “more than merely preparatory” suggests that some acts of very advanced preparation were intended by the legislature to be regarded as capable of amounting to a criminal attempt. However, some decisions of the Court of Appeal suggest that only conduct that has gone past the stage of preparation can be regarded as a criminal attempt.⁷²
- 1.90 In our CP, we provisionally proposed that the current basis of liability occupied by criminal attempt, contrary to section 1(1), should be replaced by two discrete inchoate offences carrying the same maximum penalty. There was to be a newly defined offence of ‘attempt’, complemented by a new offence of ‘criminal preparation’.⁷³
- 1.91 Our intention was that these new offences should neither increase nor reduce the scope of inchoate liability associated with endeavouring to commit a criminal offence. Instead, they would more accurately reflect, and more clearly explain, the basis of liability currently described by the 1981 Act. In other words, the new offence of ‘criminal preparation’ was to cover only very advanced acts of preparation, in line with what we believed the legislature’s intention to have been, as expressed in the 1981 Act. The new offence of ‘attempt’ would cover acts going beyond preparation, albeit not ending in the commission of the intended substantive offence.
- 1.92 This proposal did not, however, find sufficient support amongst our consultees to justify its being taken forward into a recommendation in this report. Accordingly, we are not recommending any change to the definition of attempt in section 1(1) of the 1981 Act. We explain our provisional proposal, the responses following consultation, and our reason for abandoning this proposal in Part 8 of this report.
- 1.93 In our CP, we also identified a number of other weaknesses in the 1981 Act and made proposals that we believed would address them. We proposed that the fault element for attempt should be brought into line with the fault element that we were proposing for conspiracy, which is now a recommendation. We also proposed that it should be possible to attempt to commit a crime by omission, if the substantive offence could be committed by omission. On reflection, we have turned this into a recommendation only for the crime of attempted murder. It is in relation to this crime that the issue is most likely to arise, and where the public interest in avoiding undesirable gaps in the law is at its highest. In relation to other offences, we have no wish substantially to extend the scope of the criminal law where there is no significant case for doing so.
- 1.94 The response to these proposals following consultation was considerably more favourable. Accordingly, having repeated our reasons for making these proposals in the CP, we restate them in Part 8 as recommendations for reform.

⁷¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 12.17 to 12.18.

⁷² Above.

⁷³ Above, proposals 15 and 15A, paras 16.1 to 16.25.

- 1.95 **Recommendation 17** would mean that “intent to commit an offence” in section 1(1) of the 1981 Act would be interpreted to include a conditional intent to commit the offence.
- 1.96 **Recommendation 18** requires that someone alleged to have attempted to commit a substantive offence must be shown at the relevant time to have been reckless whether a circumstance element of that offence would be present at the relevant time, when the substantive offence has no requirement for proof of fault, or a requirement only for proof of negligence (or its equivalent), in relation to that circumstance element.
- 1.97 **Recommendation 19** provides that where a substantive offence has fault requirements not involving mere negligence (or its equivalent), in relation to a fact or circumstance, someone alleged to have attempted that offence may be found guilty if shown to have possessed those fault requirements at the relevant time.
- 1.98 **Recommendation 20** provides that it should be possible to convict D of attempted murder by omission.

THE STRUCTURE OF THIS REPORT

- 1.99 In Part 2 we analyse the fault element of conspiracy, and set out our recommendations.
- 1.100 In Part 3 we discuss the issue of double inchoate liability and consider the implications of the 2007 Act for conspiracy.
- 1.101 In Part 4 we explain our recommendation for the way in which conspiracy should be charged. We also explain our recommendation that the consent of the Director of Public Prosecutions to a prosecution for a conspiracy to commit a summary offence need not be retained.
- 1.102 In Part 5 we address the current exemptions from liability for conspiracy and give our reasons for recommending that they are either abolished or retained. We set out a reformed definition of what is meant by the ‘victim’ of the offence and the basis of a limitation on liability for the victim of a conspiracy.
- 1.103 In Part 6 we set out our recommendation for a defence to conspiracy.
- 1.104 In Part 7 we consider extra-territorial jurisdiction in relation to the reformed offence of conspiracy.
- 1.105 In Part 8 we explain why we are no longer pursuing our provisional proposal which would have seen the current offence of attempt replaced by two new offences; and we explain our recommendations, outlined above, for reforming certain other aspects of the 1981 Act.
- 1.106 Part 9 contains a list of recommendations for conspiracy and attempt.

PART 2

THE FAULT ELEMENT FOR CONSPIRACY

INTRODUCTION

- 2.1 In this Part we make recommendations for reform of the fault element in conspiracy.
- 2.2 We will be principally concerned with the first four provisional proposals put forward in the CP.¹ Following consultation, these are now our recommendations:

Recommendation 1: A conspiracy must involve an agreement by two or more persons to engage in the conduct element of an offence,² and (where relevant) to bring about any consequence element.

Recommendation 2: Each conspirator must be shown to have intended that the conduct element of the offence, and (where relevant) the consequence element (or other consequences),³ should respectively be engaged in or brought about.

Recommendation 3: An alleged conspirator must be shown at the time of the agreement to have been reckless whether a circumstance element of a substantive offence (or other relevant circumstance) would be present at the relevant time, when the substantive offence requires no proof of fault, or has a requirement only for proof of negligence (or its equivalent), in relation to that circumstance.

Recommendation 4: Where a substantive offence has fault requirements not involving mere negligence (or its equivalent), in relation to a fact or circumstance element,⁴ an alleged conspirator may be found guilty if shown to have possessed those fault requirements at the time of his or her agreement to commit the offence.

¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 17.2 to 17.5.

² Which we define in the draft Bill in terms of “acts, omissions, or other behaviour”. This language is meant to be broader than conduct, in that it is meant to cover not just bodily movement but other analogous elements of offences, such as ‘possession’, being in a particular place, and so on: see para 2.14 below.

³ Sometimes, a crime may require proof of an intention that a consequence come about, even though that consequence is not, as such, an element of the offence. An example is the intention of ‘permanent deprivation’ that must be proved under s1 of the Theft Act 1968. That intention must be shown to have been present at the relevant time, even though ‘permanent deprivation’ is not itself an element of the offence: see paras 2.34 and 2.147 to 2.148 below.

⁴ Such as knowledge that the circumstance obtains, or a belief that it obtains (as opposed to a belief that it may obtain).

- 2.3 Following the publication of our Report, Intoxication and Criminal Liability,⁵ we will also address in this Part the relevance of intoxication to a denial of the fault element for conspiracy. In broad terms, we recommend that, in the current language of the common law, conspiracy should be treated as a crime of “specific intent”.⁶ This means that D may deny that he or she had the fault element for conspiracy because of (voluntary or involuntary) intoxication, even when the fault element in question is recklessness as to a circumstance element rather than intention as to a conduct or consequence element.⁷

Recommendation 5: It should be possible for a defendant to deny that he or she possessed the fault element for conspiracy because of intoxication, whether voluntary or involuntary, even when the fault element in question is recklessness (or its equivalent).

OUR MAIN RECOMMENDATIONS AND CONSULTEES’ RESPONSES

Consultees’ responses: an overview

- 2.4 Our provisional proposals – now our recommendations – concerning (1) an agreement to engage in the conduct and bring about the consequence (where relevant) and (2) a requirement of intention to bring about the conduct and consequence element, were uncontroversial. They are further considered below.⁸
- 2.5 More controversial was our proposal that there should be a minimum fault requirement of recklessness⁹ as to the circumstance elements (if any) of the offence.¹⁰ Consultees were relatively evenly divided on the merits of this proposal. Six out of thirteen who addressed the issue directly agreed with the proposal. These were the Senior Judiciary, the Crown Prosecution Service, Mr Justice Calvert-Smith, the Association of Chief Police Officers, the Police Federation, and Mr Child.¹¹ However, of the seven who disagreed with it, there was no clear view about the best alternative.

⁵ (2009) Law Com No 314.

⁶ Under cl 3 of the draft Criminal Law (Intoxication) Bill, the language of “specific” and “basic” intent is to be abandoned in determining when a denial of fault may be supported by evidence of voluntary intoxication.

⁷ This mirrors the recommendation we make in Intoxication and Criminal Liability (2009) Law Com No 314, concerning the relevance of intoxication to a denial of recklessness in Part 2 of the Serious Crime Act 2007.

⁸ Paras 2.30 to 2.50 below.

⁹ This can be defined in short as the taking of an unjustified risk of harm, in the awareness that there is a risk (whether or not there is awareness of its unjustifiability): see *G* [2003] UKHL 50, [2004] 1 AC 1034.

¹⁰ This proposal is effectively embodied in recommendations 3 and 4, para 2.2 above, albeit not in exactly those terms.

¹¹ University of Birmingham.

- 2.6 The Criminal Bar Association, Professor Spencer QC,¹² Mr Krolick QC, and Mrs Padfield¹³ all considered that there is no need to change the present (more stringent) requirement of knowledge as to circumstances. Their argument centred on the potential remoteness of a conspiracy from the commission of the actual offence. Indeed, both Professor Spencer QC and Mr Krolick QC thought that the offence of conspiracy (as presently constituted) was in itself unjustified because it spread the net of criminal liability too widely.
- 2.7 By way of contrast, the Council of Her Majesty's Circuit Judges and Professor Duff agreed with our provisional proposal requiring proof of a more stringent fault requirement than recklessness, when this was required for any circumstance element of the completed offence. However, they went on to argue that we failed to follow through the logic of the argument when less stringent, or no, fault elements were required for such an element of the completed offence. They argued that, in the interests of justice and simplicity, if no fault element was required as to circumstances for the completed offence (or a fault element less stringent than recklessness), then logically no fault element (or the lesser fault element) should be required to be proved on a charge of conspiracy to commit that offence.
- 2.8 For example, under our recommendations, a conspiracy to handle stolen goods would require proof of knowledge or belief that the goods were or would be stolen at the relevant time. This is because the substantive offence of handling stolen goods¹⁴ requires proof of this fault element, a requirement more stringent than a requirement for proof of recklessness. With this, the Council of Her Majesty's Circuit Judges and Professor Duff agreed.
- 2.9 By way of contrast, the substantive offence of rape¹⁵ requires proof of an absence of reasonable belief that V is consenting, a requirement for proof of a form of negligence. This is a requirement less stringent than a requirement for proof of recklessness. Nevertheless, on the view of the Council of Her Majesty's Circuit Judges and Professor Duff, a charge of conspiracy to rape should require proof of the same fault element (if any) as is required for the full offence. So, on such a charge, it would be sufficient to show that D1 and D2 agreed to have sexual intercourse with V, and at the time of that agreement D1 and D2 had no reasonable belief that V would consent to the intercourse. Under our recommendations, on a charge of conspiracy to rape, proof of recklessness with regard to the absence of consent would be required.
- 2.10 We considered this argument in the CP,¹⁶ and do so again below.¹⁷

¹² Selwyn College, Cambridge University.

¹³ Fitzwilliam College, Cambridge University.

¹⁴ Contrary to s 22 of the Theft Act 1968.

¹⁵ Contrary to s 1 of the Sexual Offences Act 2003.

¹⁶ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.145 to 4.160.

¹⁷ Paras 2.87 to 2.98 below.

- 2.11 Between these two ends of the spectrum was the argument of Dr Williams¹⁸ and Mr Glazebrook.¹⁹ Dr Williams provided an extended argument in favour of some broadening of the fault requirement as it applies to circumstance elements. She argued that, in place of a recklessness requirement, a requirement of ‘conditional intention’ to bring about the conduct and consequences (where relevant) in the prohibited circumstances should replace the current law (which requires knowledge that the circumstances will obtain). On this view, whilst the fault requirement respecting circumstances would become more relaxed than it is under the current law, it would not be as broad as under our recommendation. It would also have the virtue of employing the same fault term – ‘intention’ – as we recommend should be employed respecting conduct and consequence elements. We consider this argument below.²⁰
- 2.12 We continue to believe that, as we argued in the CP, there is not enough to be said in favour the views of the Criminal Bar Association, Professor Spencer QC, Mr Krolick QC and Mrs Padfield. So far as the views of the Council of Her Majesty’s Circuit Judges and Professor Duff are concerned, we accept them in so far as they relate to crimes where a ‘subjective’ fault element is required in relation to a circumstance element.²¹ However, we do not accept these views should be carried through to their logical conclusion where no fault offences, or offences based on negligence (or its equivalent), are concerned. In such cases, proof of recklessness as to the existence of the circumstance element should be required. We will also give reasons for preferring our recommendations 3 and 4 above to the novel suggestion of Dr Williams and Mr Glazebrook.²²
- 2.13 Before turning to consideration of each of our recommendations, and to the arguments of our consultees, we need to address a preliminary issue. This is the use of the distinction between the conduct, consequence and circumstance elements of an offence.²³

¹⁸ Pembroke College, Oxford University.

¹⁹ Jesus College, Cambridge University.

²⁰ See paras 2.99 to 2.128 below.

²¹ See paras 2.71 to 2.72 and 2.87 to 2.98 below, where each of these sets of views is discussed.

²² See paras 2.99 to 2.128 below.

²³ In the CP, we placed substantial reliance on these terms: see Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.6 to 4.15.

A preliminary issue: the language of ‘conduct, circumstance and consequence’

- 2.14 The conduct element of an offence is almost always the action or behaviour of D. However, this notion extends as far as a state of affairs, such as being ‘in possession’ of, for example, a controlled drug. The consequence element refers to an event or state of affairs resulting from the conduct element. The circumstance element is the set of conditions or the factual matrix in which a conduct or consequence element must occur, if the conduct (and consequence, if any) is to fall within the scope of the offence. For example:

Example 2A

D knocks down and kills V when D is unable to stop in time to avoid V because D’s tyres are bald and the car brakes are faulty. D is convicted of causing death by driving a mechanically propelled vehicle dangerously on a public road, contrary to section 1 of the Road Traffic Act 1988. In this offence, the *conduct* element is driving, the *circumstance* elements are that the vehicle is mechanically propelled, that it is on a public road, and that the driving is dangerous, and the *consequence* element is that death is caused by engaging in the relevant conduct in those circumstances.

- 2.15 The distinction between these aspects of the external elements of an offence has an important role to play in the offences of encouraging and assisting crime²⁴ in Part 2 of the 2007 Act. For example, whilst someone accused of assisting a crime must be shown to have intended that the conduct element of that crime occur, or to have known that the conduct element would occur, there is a less stringent fault requirement in relation to circumstance and consequence elements. So far as the latter are concerned, only proof of recklessness as to whether they might occur is required.
- 2.16 As we indicated in the CP,²⁵ with offences so closely related in nature as encouraging or assisting crime and conspiracy, it is highly desirable that they should have a similar conceptual and linguistic structure. In that regard, the importance of the distinction between aspects of the external elements of an offence, in the present context, comes from our view that in conspiracy there should be a different fault requirement for the conduct and consequence elements, on the one hand, and the circumstance element, on the other hand.

²⁴ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.6 to 4.15.

²⁵ Above, para 4.124.

Consultees' objections to the distinction

- 2.17 A minority of consultees did not believe that we should reform the law of conspiracy by distinguishing between the conduct, consequence and circumstance elements of offences to which a conspiracy relates.²⁶
- 2.18 Mr Justice Calvert-Smith was concerned that the distinction would be difficult for juries and lay magistrates to understand and further that, as we have always acknowledged,²⁷ the boundaries between the divisions are not always clear. He was supported in this view by Professor Duff who stated:

It would still be preferable to avoid explicit reliance on such theoretically problematic distinctions, especially given the danger that courts, in trying to explain them, might be led back down the dead end of portraying 'conduct' as a matter of (willed) bodily movements.

Our response to these objections

- 2.19 In our report on assisting and encouraging crime, we suggested that in the vast majority of cases the distinction between these elements will be sufficiently clear and explicable.²⁸ Moreover, '(willed) bodily movement' is already well understood to be, at best, just one manifestation of conduct in law. The latter notion has always in practice been treated as broad enough to cover phenomena such as being 'in possession', being 'found', or being 'in charge', which do not depend on bodily movement.²⁹
- 2.20 Usually, it will be a matter of common sense that an element of a given offence has a particular character: so, 'occasioning actual bodily harm' is a consequence element in the offence of assault occasioning actual bodily harm.³⁰ Sometimes, it will be possible to formulate a general proposition that an element of an offence will always have a particular character. For example, the element of 'unlawfulness' will always be, expressly or by implication, a circumstance element of any offence.

²⁶ Mr Glazebrook proposed an alternative definition of conspiracy in terms simply of an agreement to commit what, if done, would be 'a crime'. This is an admirably simple definition. However, we do not believe that this definition can escape the need to break down for the jury the elements of 'a crime', if (as we recommend) a different approach is to be taken to the fault element of an offence depending on the facet of the external element of that offence to which it relates. Mr Glazebrook's definition of conspiracy also has implications for the fault element in that it uses the notion of 'agreement' without reference to 'intention'. This issue is addressed at paras 2.48 to 2.50 below.

²⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.11.

²⁸ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 5.108 to 5.109.

²⁹ The conduct element is almost always the action or behaviour of D but sometimes it refers to a state of affairs such as being in possession of something, or being found drunk (in charge of a motor vehicle). For example, under s 5(2)(b) of the Road Traffic Act 1988 it is an offence if a person is in charge of a motor vehicle on a road or other public place after consuming so much alcohol that it exceeds the prescribed limit.

³⁰ Contrary to s 47 of the Offences Against the Person Act 1861.

- 2.21 It is important to note that Parliament may itself have framed an offence so as to distinguish between conduct, consequence and circumstance elements of an offence. In some instances, this may mean that Parliament anticipates that an element can be viewed as (say) either a conduct element, or a circumstance element, depending on the nature of the case.
- 2.22 An example of the latter phenomenon is to be found in the crime of sexual assault, contrary to section 3 of the Sexual Offences Act 2003.³¹ This offence requires that a touching be 'sexual'. The Act stipulates that a touching is sexual if either it is 'because of its nature' sexual, or it is 'because of its circumstances' sexual.³² Stroking someone's private parts without their consent would in the ordinary way be an assault that is 'because of its nature' sexual. By way of contrast, touching someone without their consent on some other part of their body would in the ordinary way be a 'sexual' assault only if the circumstances were such as to make it sexual (such as, perhaps, when D engages in the touching with his private parts exposed).³³
- 2.23 When an assault is 'because of its nature' sexual, the sexual dimension is almost certainly part of the conduct element. Under our recommendations,³⁴ the conduct element must be intended. Accordingly, if D1 and D2 are charged with a conspiracy to engage in an assault that is because of its nature sexual, it would have to be shown that, at the time of the agreement, they intended the assault to take a sexual form (that is, a form that a reasonable person would regard as 'sexual'). An example would be where D1 and D2 agree to strip V naked against V's will.
- 2.24 By way of contrast, when an assault is only sexual 'because of its circumstances', the sexual dimension is clearly a circumstance element. Accordingly, if D1 and D2 were charged with conspiracy to commit an assault that was 'because of its circumstances' sexual, under our recommendations,³⁵ the prosecution would have to show that D1 and D2 were reckless as to the presence or absence of the circumstance element. The prosecution would have to show that, at the time of the agreement, D1 and D2 realised that there might be a dimension to the assault that a reasonable person would regard as 'sexual'. An example would be where D1 and D2 agree that they will seek forcibly to take gold finger and ear rings from women by gaining entry to the female changing room at a swimming pool, even though they realise that the women targeted may be partially clad or naked at the time.³⁶

³¹ For general discussion see D Ormerod, *Smith and Hogan, Criminal Law* (12th ed 2008) ch 18.

³² Sexual Offences Act 2003, s 78.

³³ See, for example, *Deal* [2006] EWCA Crim 684.

³⁴ See recommendation 2, para 2.2 above.

³⁵ See recommendation 3, para 2.2 above.

³⁶ See *H* [2005] EWCA Crim 732, [2005] 1 WLR 2005.

- 2.25 There may be other instances in which an element of the offence varies in its nature (conduct or circumstance element), depending on how the offence is committed. In considering a conspiracy to engage in dangerous driving³⁷ the element of dangerousness may lie in the very nature of the driving (the conduct) agreed on, as where D1 and D2 agree to race each other along a motorway. Alternatively, the danger may lie in an inherent risk, such as an agreement to drive even though D1 and D2 know that their car tyres are bald. In such a case, we would expect the court to say that whether the element of dangerousness is a conduct element (as in the first example), or a circumstance element (as in the second example), depends on the factual foundation on which the prosecution seeks to rely.
- 2.26 In the CP,³⁸ we said that the courts could be relied on to interpret offences in a just and satisfactory way in the rare cases where the distinction between the elements is not evident from the definition of the offence itself. We remain of that view, although some clarification of what it entails, respecting the role of judge and jury, is now explained below.³⁹
- 2.27 Consequently, we will continue to refer to the terms ‘conduct, consequence and circumstance’. In our view, the distinction between them is the best way to understand the different dimensions that there may be to the external element of a crime.⁴⁰ The distinction is also now embedded in the way that the closely allied offence of encouraging or assisting crime is defined by the 2007 Act. Accordingly, the draft Bill reflects this policy.

Judge and jury

- 2.28 The distinction between conduct, consequence and circumstance must be a help and not a hindrance. To that end, it will not assist to make the distinction between them too rigid. As the analysis just given demonstrates, the distinction between them may in some cases be a matter of substantive law – if Parliament has made it one⁴¹ – but in other cases it may turn on the way in which the prosecution puts its case. In the vast majority of cases, it will be a matter of common sense analysis.

³⁷ Road Traffic Act 1988, s 2.

³⁸ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.6 to 4.15; see also Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 5.23.

³⁹ See paras 2.28 to 2.29 below.

⁴⁰ They are also integral to an understanding of the Serious Crime Act 2007 with which we are anxious to achieve an adequate degree of consistency.

⁴¹ See para 2.21 above.

2.29 The question whether an element of an offence involves, say, a circumstance as well as a consequence element, is not one that will necessarily require, in each and every case, a binding ruling on the issue from the higher courts. However, neither is it a simple matter of fact for the jury. In any case where the issue arises, it should be the task of the trial judge to direct the jury that, in the context of the way in which the prosecution is conducting its case, a particular element should be regarded as, say, a conduct element or as a circumstance element. The jury should not be left to decide for itself in any given case whether something is a conduct, consequence or circumstance element. In most cases, we doubt if this issue will even arise, because it will be common ground, as between prosecution and defence, that an element is a conduct, consequence, or circumstance element.

Recommendation 1: conspiracy must involve an agreement to engage in the conduct and (where relevant) the consequence elements of the offence

2.30 In our CP we made the following proposal:

Proposal 1: A conspiracy must involve an agreement by two or more persons to engage in the conduct element of an offence and (where relevant) to bring about any consequence element.

2.31 Proposal 1 is already generally understood to be the law.⁴² Ten out of eleven of our consultees who addressed the matter agreed with this proposal. Nothing needs to be done to the existing legislation to make the law clearer.

Is agreement enough?

2.32 Professor Spencer QC answered this question in the negative, but he did so on the broader ground that the offence of conspiracy is too wide. He was of the view that this is so because conspiracy:

Criminalises all agreements to commit offences, regardless of how trivial;

It is committed by the pure fact of agreement, and no action needs to be taken;

There is no defence for a conspirator who withdraws.

In particular, he would prefer to see a narrower offence, which (a) would require some action on the part of the conspirators before the conspiracy can be said to be complete, and (b) provides a defence to a conspirator who withdraws. It would be convenient to address his argument in the present context.

⁴² D Ormerod, *Smith and Hogan, Criminal Law* (11th ed 2005) p 367.

- 2.33 In the CP, we considered at some length the case for an offence of conspiracy, focused broadly on proof of an agreement to commit an offence, and we concluded that the offence is justified.⁴³ The reaching of an agreement is, of course, in itself conduct. There should be no need to show some conduct in furtherance of that agreement before one can say that a criminal conspiracy exists or can be prosecuted. Proof of such further conduct may add nothing in terms of what can be inferred either about culpability or about someone's commitment to a criminal enterprise. Such further conduct, in furtherance of the conspiracy, may be as simple as getting out of a chair or into a car following the reaching of agreement.⁴⁴
- 2.34 The requirement of agreement in conspiracy means that more is actually required on the part of a participant in a conspiracy than is required for some other offences. Examples where less is required are offences involving 'situational' liability (such as 'being found' in some condition, or 'in possession' of something), or some instances of assisting a crime, as by intentionally remaining where one is standing, in order to block V's flight from an aggressor.⁴⁵

Should there be a defence of withdrawal?

- 2.35 If it is justified to focus on the element of agreement alone in conspiracy cases, we believe it would be wrong to provide a defence of 'withdrawal' once the agreement has been made.
- 2.36 It is natural enough that someone may decide that they want no further part in an ongoing conspiracy. It seems right that police and prosecutors should do something to encourage such withdrawals at any point during the life of the conspiracy.⁴⁶ However, to give D a voluntary power completely to undo what he or she has done will not in itself provide much of an incentive to law enforcement officials in that regard; quite possibly the reverse.
- 2.37 If D can escape conviction completely by withdrawing, D has (other things being equal) a greater incentive to withdraw than to cooperate with the authorities. By the same token, in that situation the authorities would have a greater incentive to catch D while he or she is still part of the conspiracy than to give D a chance to withdraw. Although we make no recommendations on the matter, deals involving information traded for non-prosecution, or for prosecution requests for reduced penalties, may be more effective in securing the right kind of link between the incentive to withdraw and the actions of police and prosecution authorities in encouraging withdrawal.

⁴³ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 2.33.

⁴⁴ In practice, of course, it may well be that it is the fact that such acts took place that is used by the prosecution to show that there was a prior agreement. So, even as things stand (as under our recommendations), proof of acts done in furtherance of an agreement to commit an offence will in practice be desirable.

⁴⁵ For a general discussion see A Ashworth, *Principles of Criminal Law* (5th ed 2006) pp 106 to 107.

⁴⁶ See further, the helpful discussion in NK Katyal, "Conspiracy Theory" (2003) 112 *Yale Law Journal* 1307.

2.38 Further, in a conspiracy, if D1 is emboldened by D2's agreement to a course of action, this may not be changed by D2's withdrawal. Far from weakening a conspiracy, D2's withdrawal may stiffen the resolve of the others to carry it through more quickly without D2, in case (for example) D2 decides to go to the police. As we explained in the CP,⁴⁷ conspiracies facilitate the commission of offences on a bigger scale because they enable a division of labour and the pooling of resources, as well as cementing loyalties between group members. The withdrawal of one conspirator may not have an impact on these factors, and his or her part in the formation or furtherance of the collective enterprise should not be overlooked by an individualist focus on 'repentance'.

2.39 We considered this issue some years ago, and arrived at the same conclusion. We said:

If it is accepted that the main rationale for the existence of inchoate offences lies in the danger to society in the planning and preparation of crime and the opportunity they give to the police to intervene at a relatively early stage in criminal activity, it seems hard to avoid the conclusion that the provision of a withdrawal defence ... is unjustifiable in principle.⁴⁸

2.40 Then there is the question of compatibility with the 2007 Act. There is no withdrawal defence to an act of encouragement or assistance.⁴⁹ Suppose D1 leaves a gun in D2's bag so that D2 can commit murder, but then thinks better of it and removes it before D2 is aware of anything having been put in or taken out of his or her bag. D1 can still be found guilty of assisting murder (suppose he was caught on CCTV initially placing the gun in the bag). It would be anomalous if D1 can be convicted of assisting murder in this situation but, had D1 and D2 *agreed* to commit a murder, for which D1 would provide a gun, D1 could plead withdrawal in the same situation. It goes almost without saying that where conspiracy and encouraging and assisting are charged together, as they may well be in cases where defendants' roles cannot otherwise be precisely identified, the existence of the defence in the one case but not in the other would be a needless complication.

2.41 Finally, we do not believe that a defence that D had withdrawn after the agreement would be worth introducing, even with the burden of proof placed on D to show that there had been a withdrawal. Questions would arise, for example, about whether both D1 and D2 could claim to have withdrawn if they both independently purported to do so, either without the knowledge of the other, or by mutual (further) agreement.

⁴⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, Part 2.

⁴⁸ Inchoate Offences: Conspiracy, Attempt and Incitement (1973) Law Com Working Paper No 50, para 142, p 102. Our Report, Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, backed this view, concluding that this interpretation was correct, stating that "there would be an inherent contradiction in providing a defence when [the] activity had already reached a stage sufficiently advanced to warrant [police] intervention": see para 2.132 below.

⁴⁹ We rejected a defence of withdrawal in our own report on assisting and encouraging: see Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 6.57 to 6.58.

- 2.42 If notice of withdrawal given to co-conspirators is required, then the complexities multiply. Someone seeking to withdraw may not know how many others are involved in the conspiracy, or who they are: an indictment may refer to “persons unknown” as being parties to the conspiracy. Yet, without some quasi-formal notification of it to someone, it is hard to see what could count as a ‘withdrawal’.
- 2.43 It is true that, under the current law, in very limited circumstances D may be found to have withdrawn from a joint enterprise in which the other participants go on to commit the offence.⁵⁰ However, in our recommendations on joint enterprise we recommended that there should be a ‘withdrawal’ defence only when D managed to negate the effect that his or her conduct may have had, in terms of encouragement or assistance, before the substantive offence itself was committed.⁵¹ In a conspiracy case, there need have been no substantive offence committed, and so there is no real analogy to the case of a successful joint enterprise.
- 2.44 In our view, the real choice is between either an offence of conspiracy based on agreement, as we recommend, or no offence of conspiracy at all (an option rejected in the CP).⁵²

2.45 We therefore recommend that

a conspiracy must involve an agreement by two or more persons to engage in the conduct element of an offence and (where relevant) to bring about any consequence element of the substantive offence.⁵³

(Recommendation 1)

Recommendation 2: intention as to conduct and consequence elements of the offence

- 2.46 In our CP, we said:

Proposal 2: A conspirator must be shown to have intended that the conduct element of the offence, and (where relevant) the consequence element, should respectively be engaged in or brought about.

⁵⁰ See the discussion in KJM Smith, “Withdrawal in Complicity” [2001] *Criminal Law Review* 769.

⁵¹ See Participating in Crime (2007) Law Com No 305, paras 3.60 to 3.67.

⁵² See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 2.4 to 2.19.

⁵³ This is, of course, already a legal requirement by virtue of s 1 of the Criminal Law Act 1977.

- 2.47 The overwhelming majority of consultees agreed with this proposal. As we stated in the CP,⁵⁴ it had previously been the Law Commission's policy (in making the recommendations underpinning the 1977 Act) to make it clear that there should be a requirement of intention as to conduct and consequences. It was only during the Parliamentary process that the clause that had previously made this clear was dropped.⁵⁵ The dropping of the clause may have set the scene for the decision in *Anderson*,⁵⁶ criticised in the CP,⁵⁷ where it was held that D could be guilty of conspiracy even if he or she did *not* intend the conspiracy to be carried out.⁵⁸

The need to show intention respecting conduct and consequence elements

MR GLAZEBROOK'S OBJECTION

- 2.48 Mr Glazebrook suggested that it would be unnecessary to stipulate that D1 and D2 must 'intend' that the crime take place, if it has already been specified that there must have been an agreement that the crime will take place. We disagree.
- 2.49 The importance of proving such an intention, as part of an agreement, was established many years ago. As we pointed out in the CP,⁵⁹ Mr Justice Lawton ruled in *Thomson* that the prosecution "had to prove in each of the alleged conspirators an intention at the time when the agreement was made to carry out the unlawful purpose".⁶⁰ This ruling was made in a context where the issue was whether D could still be liable when, contrary to what he had indicated to the other parties, he never had any intention of carrying out the agreement. Mr Justice Lawton's approach has been endorsed both by the House of Lords,⁶¹ and by the Privy Council.⁶²

⁵⁴ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.22 to 4.24.

⁵⁵ Clause 1(2) of the Commission's draft Bill attached to Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76.

⁵⁶ [1986] AC 27.

⁵⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.30.

⁵⁸ Some variations on the facts of *Anderson* [1986] AC 27 might now be covered by the offence under s 45 of the Serious Crime Act 2007 of assisting an attempt to escape from prison. In *Anderson* D agreed to provide wire cutters to assist an escape from prison. Such a D could therefore be said to believe (i) that the offence (of escape) will be committed and (ii) that his act (agreeing to provide wire cutters) will encourage or assist its commission.

⁵⁹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 3.5 to 3.8.

⁶⁰ (1966) 50 Cr App R 1, 2.

⁶¹ *DPP v Kamara* [1974] AC 104.

⁶² *Yip Chiu-Cheung* [1995] 1 AC 111.

2.50 D may agree that an offence is to take place, but have no intention that it will take place. An example would be where D intends to abscond with his or her payment before his or her crucial role has been performed, but agrees to commit the offence in order to receive that payment.⁶³ In such cases, D should not be regarded as conspiring to commit the offence. Were it otherwise, if D1 and D2 agreed to commit theft but each secretly intended to abscond without caring whether or not the other went ahead, they could both be convicted of conspiracy to steal even though neither of them intended theft to be committed. It would not be appropriate, in the case of an inchoate offence such as conspiracy, to impose liability in the absence of an intention to commit the offence.

A comparison with the position under the Serious Crime Act 2007

2.51 In requiring intention as to consequence elements (if any) as well as to conduct elements, our recommendations for conspiracy (whilst reflecting the existing law) will be narrower in scope than the law which now governs encouraging or assisting crimes with a consequence element, contrary to the 2007 Act. Section 47(5)(b)(ii) of the 2007 Act provides that D may be liable for encouraging or assisting a crime with a consequence element even if he or she was only reckless as to the occurrence of that consequence element.⁶⁴

2.52 There is not necessarily any theoretical inconsistency here. For example, it is possible to assist someone to commit a crime knowingly, intentionally, through recklessness, or through carelessness. Depending on what weight is to be attributed to a variety of policy considerations, criminal liability for assisting may latch on to any one or more of these fault elements, in relation to the consequences of the conduct assisted. By way of contrast, it makes little sense to speak of a conspiracy being entered into anything other than intentionally. This has implications for the nature and scope of the fault element.

2.53 It would in theory be possible to limit the undoubted relevance of intention in conspiracy to a requirement that D1 and D2 be shown to have intended to perpetrate the conduct element, requiring proof only of recklessness as to the occurrence of the consequences (if any):

Example 2B

D1 and D2 agree to rob an elderly V, using a high degree of violence if V resists. They both realise that V might die of shock at the experience.

⁶³ See *Anderson* [1986] AC 27. For an analogy, see *Rook* (1993) 1 WLR 1005.

⁶⁴ The section needs to be read together with ss 44, 45 and 46 for the purpose of proving whether or not P's conduct, "if done, would amount to the commission of an offence". In our Report, *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300, we had recommended that it should be proved that D should have foreseen that the consequence element *would* occur.

2.54 In example 2B, the robbery planned by D1 and D2 involves a conditional intention to engage in a species of the conduct element of murder, namely inflicting serious harm.⁶⁵ So, D1 and D2 can be found guilty of conspiracy to inflict grievous bodily harm, as well as of conspiracy to commit robbery. However, they also possessed the fault element of recklessness as to the consequence element of murder (V's death), for the purposes of the 2007 Act. This means that D1 or D2 could be found guilty of encouraging the commission of murder, because each not only conditionally intended the relevant conduct element (serious harm) to take place, but also realised that V may die as a result of the robbery. However, it should not be possible on these facts to find them guilty of conspiracy to murder, simply because they realised that V might die. We are sure that this example would not generally be regarded as one of conspiracy to murder, in spite of the callous attitude towards V that can be inferred. We believe that the integral link between conspiracy and intention is what explains this strong intuition.

2.55 When referring to 'intention', we refer to the common law understanding of that concept that is now widely used in many criminal law contexts. This means that the tribunal of fact may infer the existence of an intent to commit the offence from a finding that D foresaw the conduct or (if any) consequence element as virtually certain to occur.⁶⁶

2.56 We therefore recommend that

a conspirator must be shown to have intended that the conduct element of the offence, and (where relevant) the consequence element (or other consequences), should respectively be engaged in or brought about.⁶⁷

(Recommendation 2)

Elements that must be intended but which need not come about

2.57 We have been speaking of the need to prove intention with regard to a conduct or consequence element. That includes, by implication, cases in which, even for the substantive offence, there is a need to prove only an intention that something (referred to in the draft Bill as a 'consequence') will occur, whether or not it does occur. This point is best explained by use of an example.

⁶⁵ For conditional intention, see s 1ZA(6) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

⁶⁶ *Woollin* [1999] 1 AC 82.

⁶⁷ See s 1ZA(2) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill. Naturally, where there is some further element of fault that must be proved beyond intention (or foresight), the most important example being 'dishonesty', proof of that element will still be required by virtue of the existing law. That is because it is only where the agreement, if carried out in accordance with the conspirators' intentions, amounts to or involves a *criminal offence* that they can be found guilty.

2.58 An example, under the Sexual Offences Act 2003, would be the need to show that D1 and D2 agreed to engage in conduct 'for the purposes of obtaining sexual gratification'.⁶⁸ Although it is sometimes required that D be shown to have acted for this purpose, it is not a requirement of any completed offence under the Sexual Offences Act 2003 that D actually obtain sexual gratification from any of his or her acts. However, as some of the offences under the Act stipulate that such a purpose must be shown when D was engaging in the conduct element, it must similarly be proved when the charge is a conspiracy to engage in the conduct element. The draft Bill reflects this policy.⁶⁹

Recommendations 3 and 4: fault requirements and circumstance elements

2.59 In our CP we proposed:

Proposal 3: Where a substantive offence requires proof of a circumstance element, a conspirator must be shown to have been reckless as to the possible existence of a circumstance element at the time when the substantive offence was to be committed (provided no higher degree of fault regarding a circumstance element is required by the substantive offence).

2.60 For reasons we will explain in due course,⁷⁰ our recommendation 3 is not now quite in these terms, although when put together with recommendation 4 the thrust of it is very similar.⁷¹ In essence, so far as circumstance elements are concerned, our recommendations distinguish between, on the one hand, crimes imposing strict liability or liability on the basis of proof of an 'objective' fault element, like negligence, and, on the other hand, crimes with a 'subjective' fault element. A conspiracy to commit a crime falling into the former category will require proof of recklessness in relation to the circumstance element. A conspiracy to commit a crime falling into the latter category will require proof of the same fault element or elements as is required, in that regard, for the substantive offence. However, given judicial disapproval at the highest level for the use of the terms 'subjective' and 'objective' in this kind of context,⁷² we have not employed those exact terms to distinguish between the categories.

2.61 For the present, we will concentrate on our provisional proposal, to which consultees were asked to respond.

⁶⁸ See, for example, Sexual Offences Act 2003, s 18 and s 67.

⁶⁹ See s 1ZA(2)(b) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

⁷⁰ See paras 2.142 to 2.146 below.

⁷¹ For recommendations 3 and 4, see para 2.2 above.

⁷² See, in particular, the speech of Lord Diplock in *MPC v Caldwell* [1982] AC 341.

Background and explanation for our provisional proposal

- 2.62 Our provisional proposal was made in the wake of the decision of the House of Lords in *Saik*,⁷³ which we analysed in detail in the CP.⁷⁴ In brief and as we stated in Part 1, D was charged with a conspiracy to launder money (the proceeds of crime).⁷⁵ The business turnover relating to his bureau de change had gone from £1000 per week, in 2001, to a situation in which, between May 2001 and February 2002, he exchanged some \$8 million. He was observed by surveillance officers meeting another of the alleged conspirators in D's car in a street near his bureau de change, at which time sacks containing sterling were seen.
- 2.63 D pleaded guilty to conspiracy, on the basis that he 'suspected' at the relevant time that the money was the proceeds of crime. His conviction was quashed on appeal to the House of Lords. The House of Lords held by a majority that it had to be shown that, at the relevant time, D *knew* that the money was the proceeds of crime. It was not enough to show, or for D to admit, that he or she merely suspected that the money was the proceeds of crime. The majority decision in that case was that section 1(2) of the 1977 Act⁷⁶ requires knowledge, at the time of the agreement, on the part of D1 (and at least one other party to the agreement) that a circumstance element of the substantive offence will be present. This requirement exists notwithstanding the fact that liability for the substantive offence may (as in *Saik* itself)⁷⁷ be incurred without knowledge of the existence of that circumstance. In the CP, we acknowledged that, in broad terms, this was the right understanding in law of section 1(2) of the 1977 Act.
- 2.64 However, we pointed out that different judges in the majority gave different explanations of what they understood by 'knowledge' that a circumstance element will be present at the time that the substantive offence is committed.⁷⁸ Further, the House of Lords' decision was complicated by their Lordships' view that the fault element could vary, depending on whether, at the relevant time, the conspiracy concerned unidentified or identified property.⁷⁹

⁷³ [2006] UKHL 18, [2007] 1 AC 18.

⁷⁴ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.70 to 4.106.

⁷⁵ See para 1.34 above.

⁷⁶ Section 1(2) of the Criminal Law Act 1977 is set out in para 1.14 above.

⁷⁷ In *Saik* [2006] UKHL 18, [2007] 1 AC 18 the substantive offence that was the subject of the alleged conspiracy was converting property knowing or having reasonable grounds to suspect that the property is the proceeds of another person's criminal conduct, an offence contrary to s 93C of the Criminal Justice Act 1988.

⁷⁸ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.80 to 4.90.

⁷⁹ Above, paras 4.77 to 4.80.

- 2.65 More generally, we concluded that the test of whether D intended or ‘knew’ (howsoever interpreted) at the time of the agreement that a circumstance would be present when the substantive offence was to be committed was a test too generous to the accused. The meaning now given to section 1(2) of the 1977 Act means that, for example, even if it is proved that D1 and D2 agreed to persuade V to have sexual intercourse with them whether or not V freely consented, it may not be possible to convict them of a conspiracy to rape.⁸⁰ This is because they may not at the time of the agreement have intended or ‘known’ that V would not freely consent (lack of free consent being the circumstance element in rape).
- 2.66 The *Saik* test is also inconsistent with the fault requirements respecting circumstance elements in the offences of encouraging or assisting crime.⁸¹ If D is charged with encouraging or assisting crime, he or she need only be proved to have been reckless with regard to whether or not the circumstance element would exist at the time that the substantive offence was to be committed. By way of contrast with our approach to conduct and consequence elements of offences,⁸² we see no reason why the fault element with regard to circumstance elements should necessarily be much more stringent for conspiracy than it is for encouraging or assisting crime. However, under our scheme, recklessness will suffice for conspiracy only if it is sufficient for the substantive offence, or if the substantive offence is one that is addressed by the new section 1ZA(5) of the 1977 Act.⁸³
- 2.67 The alternative – leaving the approach of the majority in *Saik* to govern the law – would have anomalous results in many cases. Suppose D1 and D2 agree to have sexual intercourse with V realising that she may not consent. As we have pointed out, they cannot be guilty of conspiracy to rape under the approach in *Saik*.⁸⁴ However, if, knowing of the exact nature of their enterprise, but without himself entering into the agreement, D3 said that he would supply D1 and D2 with condoms, he could be convicted of assisting rape at that point.⁸⁵ The acquittal of D1 and D2 on the conspiracy charge, but the conviction of D3 on the assisting charge, would be something many might find hard to understand and justify.

⁸⁰ As is pointed out in Baroness Hale’s dissenting speech in *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [99].

⁸¹ Serious Crime Act 2007, ss 44 to 46.

⁸² See para 2.45 above.

⁸³ As inserted by cl 1(3) of the draft Bill.

⁸⁴ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.107 to 4.110.

⁸⁵ Under the Serious Crime Act 2007, assisting a crime requires (amongst other things) proof only of recklessness as to a circumstance element.

The views of consultees about our provisional proposal

- 2.68 Thirteen consultees responded to our provisional proposal 3. They were divided in their response.⁸⁶
- 2.69 Amongst those consultees who expressed themselves as being in favour of our proposal were Mr Justice Calvert-Smith, the Council of Her Majesty's Circuit Judges, the Crown Prosecution Service, the Association of Chief Police Officers, the Police Federation and the Senior Judiciary. They supported the proposal because, as the Crown Prosecution Service stated:

We share the concerns of the Law Commission that section 1(2) of the Criminal Law Act 1977 sets the standard of proof too high as far as the circumstance element in conspiracy is concerned.

The Senior Judiciary also shared our view:

There is also significant force in the argument that whilst the conduct/consequence elements for an offence of conspiracy must be intended, the circumstance element need not be. For the reasons [set out in the CP], recklessness as to the possible existence of a circumstance element should suffice, unless the substantive offence requires a higher degree of fault than recklessness in relation to a circumstance element.

- 2.70 Of the consultees who disagreed, no ground of opposition was shared between them.

The view that the law should be left as it is, requiring proof of knowledge

- 2.71 The Criminal Bar Association, Mr Ivan Krolick QC, Professor Spencer QC, and Mrs Padfield considered that the outcome of *Saik*⁸⁷ did not justify any change in the law. In broad terms, their view is that there is a need for the most stringent fault requirements in a crime such as conspiracy, which may be committed at a point in time remote from the commission of the offence itself. For them, that entails a requirement of intention or knowledge in relation to the circumstance elements (if any) of a crime.
- 2.72 We share the view that it is important to have stringent fault requirements where ancillary offences are concerned because they may occur at a time remote from the commission of the offence itself. However, we take a different view concerning how stringent those fault requirements need to be to account for the 'remoteness' feature of ancillary offences in general, and of conspiracy in particular, where the requirements in question involve circumstance elements. Further, we do not believe that the current law's reliance on 'knowledge' as a key fault element in this respect has produced either certainty or justice.

⁸⁶ See para 2.29 above for the proposal. In that regard, in spite of the low number of consultees commenting on this proposal, it is worth making the point that 'individual' consultees – like the Police Federation – sometimes speak on behalf of very large numbers of people. Most such consultees (ie representative consultees) favoured our provisional proposal 3.

⁸⁷ [2006] UKHL 18, [2007] 1 AC 18.

THE HISTORICAL BASIS OF THE 'KNOWLEDGE' REQUIREMENT

- 2.73 The foundation of the present law is commonly acknowledged to be the decision of the House of Lords in *Churchill v Walton*,⁸⁸ which formed the basis for what is now section 1(2) of the 1977 Act. In that case, the House of Lords considered whether someone could be convicted of conspiracy to commit a strict liability offence, even if he was unaware of the facts making what he had agreed to do criminal.⁸⁹ In delivering the only speech, Viscount Dilhorne said there was a requirement that D be shown to have known of the relevant facts, and in so finding drew on an analogy with the law (as he understood it) governing aiding and abetting crime. Citing from the judgment of Lord Chief Justice Goddard in *Johnson v Youden*,⁹⁰ Viscount Dilhorne said that the law was the same for conspiracy as for aiding and abetting in so far as, “[D] must at least know the essential matters which constitute [the] offence”.⁹¹
- 2.74 The problem with this analysis is that the analogy between conspiracy and aiding and abetting is weak, so far as the fault element is concerned. There is a strong analogy between conspiracy and the inchoate offences of encouraging or assisting crime, and we draw on that analogy frequently in this report; but aiding and abetting (complicity) are ways of committing the substantive offence itself. It is perfectly natural (as we have recommended) that in general terms the fault requirements for complicity should be stringent, involving no less than an intention that a crime should be committed.⁹² This is because D stands to be convicted of the *same* crime as the actual perpetrator. Where D is to be found guilty of an inchoate offence, a different view may legitimately be taken.
- 2.75 A further question mark over the force of the decision in *Churchill v Walton* is raised by reflection on what their Lordships might have regarded as sufficient by way of proof of ‘knowledge’. Quite possibly, at that time, they would have considered that someone could be regarded in law as ‘knowing’ something if an ordinary person in those circumstances would have known it.⁹³ If so, that casts doubt on how much of a restriction on the scope of the law of conspiracy the requirement for proof of ‘knowledge’ of the facts really was.
- 2.76 In that regard, it is noticeable that when the Draft Criminal Code was published in 1989, it did not follow the approach in the 1977 Act, based on *Churchill v Walton*. The Code provided, as we recommend (in broad terms) here, that recklessness should suffice for a circumstance element, if it suffices for the substantive offence.⁹⁴

⁸⁸ [1967] AC 224.

⁸⁹ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 3.9 to 3.13.

⁹⁰ [1950] 1 KB 544.

⁹¹ [1967] AC 224, 226, citing Lord Goddard CJ in *Johnson v Youden*, [1950] 1 KB 544, 546 to 547.

⁹² Participating in Crime (2007) Law Com No 305.

⁹³ For an analogous analysis of intention at that time see *DPP v Smith* [1961] AC 290.

⁹⁴ Draft Criminal Code, cl 48.

PROBLEMS WITH A 'KNOWLEDGE' REQUIREMENT

- 2.77 The meaning of 'knowledge' is one that has always been contested in law.⁹⁵ One of the reasons for this is as follows.⁹⁶ When knowledge is used as the sole element of fault, the law may (quite rightly, in point of justice) not mean exactly what it says in requiring proof of it. Taken literally, a requirement of knowledge – say, that a circumstance existed – would allow D to deny guilt by showing that the most that could be proved was that his or her belief that the circumstance existed was true, but only fortuitously so.⁹⁷ Even the most ardent advocate of pro-defendant 'subjectivism' in the definition of criminal offences, Professor Glanville Williams, ruled out such a possibility, saying, "it cannot be said that the accused had no knowledge ... merely because he was essentially right [in his belief] only by accident".⁹⁸ As Professor Shute has concluded, "the criminal law seems to require nothing more of a belief for it to count as knowledge than that it be correct".⁹⁹ This point is taken up further below.¹⁰⁰
- 2.78 An additional point should be noted about the use of knowledge as a fault element in the criminal law.¹⁰¹ Commonly, knowledge is not – or has not historically been – regarded as an adequate fault element on its own, even when inchoate or ancillary offences are in issue. It is often buttressed in the same offence definition by a less stringent alternative fault element, such as belief¹⁰² (or its absence),¹⁰³ recklessness,¹⁰⁴ mere suspicion,¹⁰⁵ or even an objective fault element such as having 'reasonable cause for believing'.¹⁰⁶ So, it cannot be taken for granted that, just because an inchoate or ancillary offence is remote from the commission of the offence or harm itself, this means that nothing less than knowledge will (or indeed should) suffice as a fault element.

⁹⁵ On the uncertainty in the law of conspiracy, see *Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183*, paras 4.94 to 4.106. For an excellent discussion of the broader issues, in law and morality, see S Shute, "Knowledge and Belief in Criminal Law", in S Shute and AP Simester (eds), *Criminal Law Theory* (2002) pp 171 to 206.

⁹⁶ The following analysis is taken directly from Professor Shute's article, "Knowledge and Belief in Criminal Law", in S Shute and AP Simester (eds), *Criminal Law Theory* (2002) p 191.

⁹⁷ In other words, even when D for good reason believes (correctly, as it turns out) that a circumstance exists, for all D 'knew' at the time, he might conceivably be wrong about it: see the example in para 2.84 below.

⁹⁸ Glanville Williams, *Criminal Law: The General Part* (2nd ed 1983) p 169.

⁹⁹ S Shute, "Knowledge and Belief in Criminal Law", in S Shute and AP Simester (eds), *Criminal Law Theory* (2001) p 191.

¹⁰⁰ See paras 2.80 to 2.86 below.

¹⁰¹ See the various offences discussed by S Shute, "Knowledge and Belief in Criminal Law", in S Shute and AP Simester (eds), *Criminal Law Theory* (2002) p 178.

¹⁰² As in the case of handling stolen goods contrary to s 22(1) of the Theft Act 1968.

¹⁰³ Perjury Act 1911, s 1(1).

¹⁰⁴ Financial Services Act 1986, s 133(1).

¹⁰⁵ Criminal Justice Act 1988, s 93(A); Drug Trafficking Act 1994, s 50(1).

¹⁰⁶ Firearms Act 1968, s 25.

2.79 We can take an example from the Firearms Act 1968 to illustrate this point. Proving a substantive offence under section 25 of the Act (which prohibits the sale of firearms to persons who are drunk or insane) involves the need to prove, ‘reasonable cause for believing’, alongside knowledge as the fault element.¹⁰⁷ It is a case in point, in the present context. Like conspiracy, it involves an offence (involving two or more persons) remote from the commission of any actual harm, namely selling or transferring a firearm or ammunition to someone who D knows or has reasonable cause to believe is drunk or of unsound mind.¹⁰⁸ Yet, that element of remoteness was not thought to be a factor justifying reliance on knowledge alone as the fault element relating to the circumstance element of drunkenness or unsoundness of mind. There are other similar, more recent examples.¹⁰⁹

REQUIRING PROOF OF A ‘BELIEF THAT X DOES OR WILL EXIST’ AS A SUBSTITUTE FOR A REQUIREMENT OF KNOWLEDGE

2.80 An obvious response to difficulties with reliance on knowledge alone as the fault element respecting circumstances would be to propose that such a fault element (at least in inchoate offences) should be extended beyond knowledge, but only as far as a belief that the circumstances *will be* present when the offence is committed. This was the approach we adopted to fault bearing on circumstance elements in our recommendations for reform of the law governing assisting and encouraging crime.¹¹⁰

2.81 In the CP, we asked consultees about our choice of recklessness as the circumstance fault element, and gave two additional choices as possibilities, although we did not provisionally propose them. Question 1 was:

If recklessness as to whether the conduct (or consequence) element will take place in specified circumstances is thought to be too low a level of fault for conspiracy to commit an offence (proposal 3), should it be replaced by a requirement that, at the time of the agreement, the alleged conspirator believed that the offence would take place in the specified circumstances?

¹⁰⁷ See para 2.78 and n 105 above.

¹⁰⁸ In the taxonomy helpfully provided by Professor Duff, the offence is general as to the interest that is threatened (no specific harm is mentioned), although implicitly specific as to the way in which interests may be threatened (by the use of the firearm or ammunition). It is also ‘indirect’ in character, with respect to harm that may be done, because the doing of the harm is almost certain to depend on a further wrongful human action (discharge of a firearm): see RA Duff, “Criminalising Endangerment”, in RA Duff and S Green (eds), *Defining Crimes* (2005) p 43. See also D Husak, *Overcriminalization* (2008) pp 39 to 40.

¹⁰⁹ See, for example, s 19(2) of the Criminal Justice (International Co-operation) Act 1990, which makes it an offence for someone to possess a controlled drug on a ship to which the section applies, knowing or *having reasonable grounds to suspect* that the drug is intended to be imported or had been exported, contrary to s 3(1) of the Misuse of Drugs Act 1971 (or contrary to an analogous provision in foreign law).

¹¹⁰ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

- 2.82 Clearly, this alternative requirement involves a stricter fault element than recklessness. It involves a belief that the circumstances making conduct criminal *will* be present when the conduct is engaged in (or the consequences brought about).¹¹¹ Some legal practitioners, such as the Criminal Bar Association, believed that we should take this approach. However, the majority of consultees who addressed the issue answered the question in the negative.
- 2.83 There are two main difficulties with going back to this alternative.¹¹²
- 2.84 First, it may not provide adequate coverage in some cases where, we believe, most people would agree that D should be found liable. An example would be where D believes, has reason to believe, and is correct in believing that (say) containers he or she has agreed to bring into England contain illegal firearms. It is perfectly possible that such a person does not in fact believe that the containers ‘will’ contain illegal firearms; he or she merely (for good reason) believes – and, as it happens, is right to believe – that illegal firearms may be what the containers contain. Yet, it seems to us wrong to countenance the possibility that a denial of fault could – even in theory – successfully be mounted on this basis.
- 2.85 Secondly, making the circumstance fault element turn on whether there was a belief that the circumstance would be present, is an approach that has been rejected by the Government, in creating the offences of encouraging and assisting crime under the 2007 Act. For these offences, only recklessness as to the existence of a circumstance element need be shown.¹¹³
- 2.86 The offences of conspiracy and encouraging and assisting crime are closely related. It is therefore our view that, in these circumstances, no good purpose is served by attempting to revive our previously recommended approach in relation to reform of conspiracy.¹¹⁴ Consequently, under our recommended scheme, proof of recklessness in relation to a circumstance element of an offence will suffice on a charge of conspiracy to commit that offence if it would suffice when the substantive offence itself is charged. Proof of recklessness will also be required respecting circumstance elements of any offence governed by the new section 1ZA(5),¹¹⁵ these being no-fault offences and offences with a negligence-type fault requirement respecting a circumstance element of the offence.

¹¹¹ See *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300, para 9.11.

¹¹² In other words, an alternative based on the recommendations in *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300, para 9.11.

¹¹³ See paras 2.129 to 2.130 below.

¹¹⁴ See *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300, para 9.11

¹¹⁵ The new s 1ZA(5) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

The view that the fault element respecting circumstances should be the same for conspiracy as it is for the completed offence

- 2.87 At the other end of the spectrum (the view amongst consultees that was least favourable to the accused) were the views of Professor Duff and of the Council of Her Majesty's Circuit Judges. Their view was that the fault element with respect to circumstances should be the same for conspiracy to commit an offence as it is for the completed offence in question. We will call this the 'same test' approach. To give an example of how the 'same test' approach works, consider the offence of supplying an intoxicating substance, contrary to section 1(1) of the Intoxicating Substances (Supply) Act 1985. This offence is committed if, amongst other things, D offers to supply an intoxicating substance to a person under the age of 18, *knowing or having reasonable cause to believe* that the person is under that age. The 'same test' approach would convict D1 and D2 of a conspiracy to commit that offence in the following circumstances:

Example 2C

D1 and D2, who import and deliver alcohol from France, are telephoned by V, who asks them to supply him with a quantity of wine for a party at an address known to D1 and D2. D1 and D2 agree to supply the wine. At the time of the agreement, D1 and D2 should have realised that V is the 17-year-old son of their friend Z, because Z never drinks wine, but they were misled by the similarity between the sound of V's voice and of Z's.

- 2.88 If D1 and D2 had agreed to supply V with the wine 'knowing' that V was under 18 years of age, then there are sound moral grounds for regarding that agreement as a criminal conspiracy. However, if D1 and D2 had agreed to supply the wine to someone they thought was over 18 years of age, we do not believe that such an agreement should fall within the scope of criminal conspiracy even if D1 and D2 ought to have realised that the person to whom the wine was to be supplied was in fact under 18 years of age. Nevertheless, the views of Professor Duff and of the Council of Her Majesty's Circuit Judges touch directly on a question that we specifically asked, as a possible qualification to proposal 3 above. We asked:

If, in proposal 3, recklessness as to whether the conduct or (consequence) element will take place in specified circumstances is thought to be too high (too generous) a level of fault for conspiracy to commit an offence, should it be replaced by a requirement that, at the time of the agreement, the alleged conspirator had the circumstance fault element (if any) required by the substantive offence itself?¹¹⁶

- 2.89 In that regard, Professor Duff argued that,

if a complete offence does not require intention, knowledge or belief as to a circumstantial aspect, an attempt or a conspiracy to commit that offence should not require intention [knowledge or belief].

¹¹⁶ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.145.

He suggested that, if this appears to produce harsh results, it is the fault element in the definition of the substantive offence that is in fact unacceptable.

- 2.90 Having said that, Professor Duff does anticipate that problems would occur in the event of a 'same test' approach to the circumstance fault element. First, he thought that there would be difficulties if the courts were to fail to draw clear distinctions between 'conduct, circumstances and consequences'. Secondly, he believed that there are potential problems in the absence of any consideration of impossibility and its application to inchoate offences.
- 2.91 The principal advantage of adopting the same approach to the circumstance fault element as appears in the substantive offence, when defining that element for the purposes of a conspiracy to commit that offence, is one of simplicity.¹¹⁷ On the 'same test' approach, the jury would not have to consider two different tests in relation to circumstance fault elements in cases (we suspect, a minority) where both the substantive offence and a conspiracy to commit that offence have been charged.¹¹⁸
- 2.92 Recommendation 4 is designed to accommodate this 'same test' approach, in so far as it relates to what might broadly be referred to as 'subjective' fault requirements relating to circumstance elements, such as awareness, suspicion or recklessness.¹¹⁹ To that extent, we go along with the views of the Council of Her Majesty's Circuit Judges and Professor Duff. However, in the CP we said that the advantage of the 'same test' approach, in terms of simplicity, may be outweighed by the great unfairness to defendants, and the potentially very considerable expansion of the criminal law, that would result if it were employed in some kinds of case.¹²⁰ These are the substantive offences where there is no fault requirement, or only a negligence-based fault requirement, in relation to a circumstance element. In our view, D1 and D2 should not stand to be convicted of conspiracy to commit such an offence if they did not at least realise that circumstances might attend the conduct they intend to engage in that would make that conduct (or its consequences) criminal.
- 2.93 In defence of this view, we will focus on cases where defendants are charged with conspiracy to commit very serious offences that can be committed where there was negligence (or its equivalent) as to the circumstance elements.

¹¹⁷ See paras 2.7 to 2.9 above.

¹¹⁸ This is assuming of course that the substantive offence has a fault requirement as to a circumstance element that does *not* require proof of subjective fault. It is only in such cases that our scheme would require a different test, the requirement being proof of recklessness in relation to the circumstance element of the substantive offence.

¹¹⁹ See para 2.2 above.

¹²⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.146.

- 2.94 In our CP, rape and sexual offences with children aged under 16 were examples on which we focused.¹²¹ The former effectively requires proof of no more than negligence (an absence of reasonable belief) with regard to the absence of consent. The latter effectively requires proof of no more than negligence (an absence of reasonable belief) with regard to the fact that a child was under 16. In our view, it would not be right that D1 and D2 could be convicted of conspiracy to engage in under-age sex with V if all they had agreed to do was to persuade V (aged 15) to have consensual sexual intercourse with them, stupidly believing – ie through negligence – that V was aged 17.
- 2.95 Crimes such as conspiracy attract stigma upon conviction, whatever the sentence imposed. When such crimes are by their nature remote from the causing of harm, requirements of justice and of fair warning point towards the adoption of subjective fault elements that may not be required, in point of justice, for the substantive offences (involving harm) to which the more remote crimes relate.¹²² The draft Bill reflects that view. It treats substantive offences requiring proof of negligence or a similar fault element (and those requiring no fault to be proved) in relation to a circumstance element as if they required proof of recklessness as to that circumstance element for the purposes of a conspiracy charge.¹²³
- 2.96 We also believe that these kinds of offences – sexual offences – provide examples that answer Professor Duff’s suggestion that one should look to reform of the substantive offence (requiring stricter or subjective fault elements) if one is unhappy with the application of its fault elements to a conspiracy to commit that offence. The difficulty with this argument is that it may be perfectly justifiable to take a different approach to fault elements, depending on whether or not the harm has been done, or is merely contemplated.
- 2.97 So far as the commission of the substantive offences of rape and under-age sex is concerned, a negligence-focused approach to fault relating to consent or age is entirely justified, because these offences involve intimate contact between offender and victim. However, a conspiracy to commit rape or a conspiracy to engage in under-age sex does not itself involve such contact. So, one of the main justifications for negligence-based liability falls away.

¹²¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 4.157 to 4.160.

¹²² See the discussion of the ‘remoteness principle’ in Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 1.6 to 1.7.

¹²³ Section 1ZA(5) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

2.98 The view defended by the Council of Her Majesty's Circuit Judges and Professor Duff was the very view rejected by the House of Lords in *Churchill v Walton*.¹²⁴ In that case, D was charged with conspiracy to commit an offence involving the evasion of excise duty.¹²⁵ The element of evasion involved the improper use of heavy oil as road fuel. The plan was to pay a lower level of duty, on the grounds that the fuel was supposedly only for home use. D was a book-keeper unaware of the use to which the fuel was (improperly) to be put by his company, collaborating with another company. D had been acquitted on graver charges of conspiracy to cheat and to defraud. He was only found guilty at first instance of a lesser charge of conspiracy to evade duty, because the judge had directed the jury that, for this offence, there was no burden on the prosecution to show knowledge or awareness of the crucial facts making what was to be done criminal. We do not believe that it would now be right to introduce such an easy path to conviction for conspiracy.

A new approach, in terms of 'conditional' intention

2.99 Mr Glazebrook and Dr Williams separately put forward an alternative proposal. This alternative proposal involves reliance upon the concept of 'conditional' intention. In brief, the proposal is that, just as (on our recommendations) the conduct and (if any) consequence elements must be intended, so should the circumstance element (if any). The intention in relation to the latter will be the intention to engage in the conduct (or bring about the consequence) element *even if* it is attended by the circumstance element. This is a 'conditional' intention that the conduct or consequences come about in the prohibited circumstances.

2.100 Like our recommendation, this proposal involves broadening the fault element in relation to circumstances, and thus involves casting the net of liability for conspiracy wider than the current requirement that D intends or 'knows' that the circumstances will be present. However, it may be slightly more restrictive, in terms of its 'net-widening' effect, than our recommendation that reliance be placed on proof of recklessness with regard to the presence of the circumstance element.¹²⁶ In this context, proof of recklessness involves proof of awareness of the possible existence of the relevant circumstances at the time of the offence, whereas proof of a conditional intention requires proof of a willingness to go through with the conduct, or bring about the consequences, even if the relevant circumstances are present at the time.

2.101 The main attraction of the proposal is that it simplifies the fault requirement for conspiracy. What the prosecution will have to prove is simply that D (conditionally) intended to bring about all the elements of the offence.

¹²⁴ [1967] AC 224.

¹²⁵ Contrary to s 200(2) of the Customs and Excise Act 1952.

¹²⁶ This point is discussed in more detail at paras 2.115 to 2.128 below.

- 2.102 Before explaining why we have decided not to adopt this proposal, some preliminary points must be made about ‘conditional’ intention. This notion may be encountered in conspiracy cases not only under our recommendations, but also under the present law.¹²⁷

Conditional intention: a preliminary analysis

OUR APPROACH IN THE CP

- 2.103 D may intend to engage in the conduct or consequence elements of an offence, along with others, only if certain conditions obtain. Such conditions may vary widely. So, for example, D may agree to take part in a conspiracy to steal: (a) only if Z plays no part in the plan; (b) only if no violence is used; (c) only if there are no police officers in the vicinity; (d) only if D has finished another job in time to take part; and so forth. Should the setting of conditions upon which D is prepared to agree that an offence be committed allow D to deny, in any circumstances, that he or she in fact had the intention to commit the offence?
- 2.104 In the CP, we argued that a ‘conditional’ intent to commit a crime should be regarded straightforwardly as an intention to commit the crime, as it is at common law¹²⁸ and under the existing law of conspiracy.¹²⁹ The conditions under which an ‘intention’ will be acted on *can* be regarded as negating the fault element respecting the conduct or consequence elements of an offence. However, that will only be so if those conditions are in fact inconsistent with an intention to engage in the relevant conduct or bring about the consequence elements.
- 2.105 An example of the latter would be where D agrees to take part in a ‘robbery’, but only, ‘if no violence is used or threatened’. As robbery by definition involves the use or threat of violence before or at the time of theft from the victim, this condition negates the fault element with regard to a conduct element of robbery. So, D could not be convicted of robbery, although he or she could still be convicted on the same indictment of a conspiracy to steal, theft being an intrinsic element of robbery.
- 2.106 By way of contrast, if D1 agrees with D2 to import prohibited drugs, ‘so long as no violence is used or threatened’, D1 can be convicted of a conspiracy to import prohibited drugs. This is because whether or not violence has been used or threatened is irrelevant to the question of whether or not the offence of drug importation has been committed. In this example, D1 still intends to import prohibited drugs, and so his or her agreement to do this fulfils the elements of the conspiracy offence. D1’s unwillingness to use violence might be some mitigation at the sentencing stage; but that is as far as its legal relevance will go.

¹²⁷ For discussion of it as it has been analysed under the existing law, see Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 5.1 to 5.7.

¹²⁸ See the discussion in Archbold (2009 ed) at para 17-39.

¹²⁹ *Saik* [2006] UKHL 18, [2007]1 AC 18 at [5], by Lord Nicholls.

2.107 In the CP, we sought examples illustrating the above points by asking the following question:¹³⁰

Are there circumstances where the conditions under which D1 and D2 believe they will carry out an agreed course of criminal conduct are of such a nature as to undermine the existence of any true intention to commit the offence?

2.108 Responses were mixed. In summary, the general view was that, other than those cases where an element of the offence is necessarily negated by the condition itself, it will be a question of fact as to whether the conditions are so onerous, extreme or absurd as to undermine a true intention to commit the offence. In that regard, it is worth citing once more¹³¹ the opinion of Lord Nicholls given in *Saik* concerning conditional intent:

An intention to do a prohibited act is within the scope of section 1(1) even if the intention is expressed to be conditional on the happening, or non-happening of some particular event ... A conspiracy to rob a bank tomorrow if the coast is clear when the conspirators reach the bank is not, by reason of this qualification, any less of a conspiracy to rob ... Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside section 1(1).¹³²

2.109 This opinion is now provided for in the draft Bill.¹³³

IS IT NECESSARY TO GO BEYOND WHAT WAS SAID IN *SAIK* ABOUT CONDITIONAL INTENT?

2.110 In our view, the answer to this question is 'no'. The draft Bill makes this explicit.

2.111 In the passage from the speech of Lord Nicholls just cited,¹³⁴ Lord Nicholls says that only in "fanciful" cases will the conditional nature of an intent have a bearing on whether or not proof of that intent will suffice as proof of fault for the purposes of liability for conspiracy. However, the current edition of *Smith and Hogan* casts some doubt on how "fanciful" a case may have to be to take it outside section 1(1).¹³⁵ In *O'Hadhmaill*,¹³⁶ some IRA members agreed to make bombs during a ceasefire period, with the intention of causing explosions if the ceasefire period came to an end. The Court of Appeal found that proof of this 'conditional' intention to cause explosions was enough to satisfy the requirements of a criminal conspiracy. Of this result, *Smith and Hogan* says:

¹³⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 5.17.

¹³¹ Above, para 5.6.

¹³² [2006] UKHL 18, [2007] 1 AC 18 at [5].

¹³³ Section 1ZA(6) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

¹³⁴ *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [5].

¹³⁵ D Ormerod, *Smith and Hogan, Criminal Law* (12th ed 2008) p 412.

¹³⁶ [1996] Criminal Law Review 509.

The [decision] may be criticised on the basis that the satisfaction of the condition may be too dependent on DD's own subsequent evaluation of the circumstances to be said to represent a true intention ... In *O'Hadhmaill*, the question arises whether the ceasefire could be regarded as a fact or circumstance that was clearly determinable without reverting to D's opinion.¹³⁷

- 2.112 In our view, *O'Hadhmaill* was correctly decided. The triggering of the condition, in D's conditional intention, may often depend on some element of evaluation. To elaborate on Lord Nicholls example,¹³⁸ if D1 and D2 decide to go ahead with a robbery only if the coast is clear, whether the coast is 'clear' may depend on an element of evaluation or opinion. For D1, the coast being clear may mean that there must be no security personnel in sight at all, whereas for D2 it may mean only that there is no reason to think that the police are there waiting for them. For D1, the coast may still be clear even if there is someone who has spent the night under cover of the bank entrance way and is causing a slight obstruction, whereas perhaps for D2 the coast would not be 'clear' in such circumstances. Unless such differences of opinion or evaluation prevent D1 and D2 reaching an agreement to rob in the first place (which they clearly do not), then they are, and should be, irrelevant to their liability.
- 2.113 Deep conceptual waters can be avoided in this context if it is kept in mind that an 'intention' to do something need not involve a high-level commitment, unlike a pledge, vow or oath. In this context, an 'intention' is nothing more than a (possibly, quite weak) provisional conclusion reached in reasoning about action. It is a decision to do something, unless reconsideration (whether or not involving new factors) at some point leads the person who has the intention to abandon or modify it.
- 2.114 Such considerations or factors may be factually determinable ('will there or will there not be a police officer outside the bank?'), or wholly evaluative ('will I still feel like going through with it when I get to the bank?'). In itself, uncertainty bearing on the fulfilment of conditions need not negate the existence of a conditional intention to do something. This will only happen if the uncertainty prevents the formation of the intention at the relevant time *at all* ('whether I agree to rob the bank depends on how I feel about it when I wake up on the morning in question').

¹³⁷ D Ormerod, *Smith and Hogan, Criminal Law* (12th ed 2008) p 412.

¹³⁸ See para 2.108 above.

Is conditional intention a better alternative to recklessness as a basis for reform?

BARONESS HALE'S DISSENTING OPINION IN *SAIK*¹³⁹

- 2.115 As we indicated above,¹⁴⁰ Dr Williams and Mr Glazebrook had an alternative suggestion for the fault element. They suggested that conditional intention would be a better way to express the fault element for conspiracy, in particular as it relates to any circumstance elements of the offence, than our provisional proposal that proof of recklessness as to circumstances should suffice. We will analyse their suggestion shortly. Their approach also found support in the dissenting speech of Baroness Hale in *Saik*.
- 2.116 Baroness Hale argued that if D1 and D2 agree to engage in conduct whether it will involve wrongdoing or not, they can be described as 'conditionally' intending to commit the wrongdoing. Suppose that they intend to engage in the conduct (for example, importing goods in sealed containers) even if it turns out to involve illegality of a certain kind (say, there are illegal drugs in the containers). In Baroness Hale's view, in such a case D1 and D2 can be said 'conditionally' to intend to import illegal drugs.
- 2.117 In discussing an example in which D1 and D2 agree to have sexual intercourse with V 'even if V does not consent', Baroness Hale said, of the distinction between recklessness and conditional intention:

The dividing line between them may be narrow, but it is discernible ... When [D1 and D2] agree [to have sexual intercourse with V] they have thought about the possibility that she may not consent. They have agreed that they will go ahead *even if at the time when they go ahead they know that she is not consenting*. If so, that will not be recklessness; that will be intent to rape.¹⁴¹

- 2.118 Baroness Hale then goes on to apply this analysis to money laundering cases:

So if, in our example, the conspirator agrees to launder the money even if at the time he does so he is told that it is in fact the proceeds of crime, then he does indeed intend that fact to be the case when he does the deed. The fact that he is equally happy to convert the money even if it is not the proceeds of crime makes no difference. So perhaps the real question for the jury is, "what would he have done if, when the money came in, someone had let him know the truth?" Would he have said, "take it away"? Or would he have said "hand it over"?¹⁴²

¹³⁹ [2006] UKHL 18, [2007] 1 AC 18.

¹⁴⁰ See para 2.99 to 2.102.

¹⁴¹ [2006] UKHL 18, [2007] 1 AC 18 at [99] (emphasis in the original).

¹⁴² Above, at [100].

AN EVALUATION OF BARONESS HALE'S APPROACH

- 2.119 There are two closely related points we would make about Baroness Hale's analysis.
- 2.120 First, as she says, the dividing line between recklessness and 'conditional' intention is narrow. Indeed, so close are they that Professor Sir John Smith and Professor Glanville Williams have both said that conditional intention might be seen as "a recklessness formula in disguise".¹⁴³ One might ask, therefore, how much really hangs on maintaining a distinction between them, once there is no longer pressure to do so in order to meet the fault requirements of the 1977 Act.
- 2.121 Secondly, we have serious doubts about whether what Baroness Hale describes as perhaps the "real question for the jury" is indeed a question it would be right to put to a jury, in this context.
- 2.122 Baroness Hale's question involves the jury speculating in a hypothetical way about what D would or would not have agreed to if he or she had known the truth at the time of the agreement. Answers to hypothetical questions may be particularly hard for the prosecution to persuade the jury to accept beyond reasonable doubt. It will be very easy for D to claim in almost any case of the sort under discussion that, 'if I had known illegality of this kind was to be involved, I would not have gone ahead'. Under Baroness Hale's approach, if the jury thinks this claim might be true, then they must acquit even if it is accepted that D agreed on the course of conduct realising illegality of the relevant kind might be involved.¹⁴⁴
- 2.123 In our view, this would be a particularly unfortunate result in cases involving, for example, haulage companies who realise that the sealed containers they have agreed, in exchange for a handsome sum, to bring into the UK may contain either flour or cocaine. The same can be said of cases involving dealers prepared to engage in the onward sale of antiquities when some of them may have been stolen.¹⁴⁵ One of the main sources of illicit art objects is theft from institutions and private collections, and in terms of profitability art theft is ranked second in the world to the drugs trade.¹⁴⁶ Escaping conviction for conspiracy in such cases should not be as easy as suggesting, albeit plausibly, that had one known that the objects sold were stolen antiquities, one would not have gone ahead.
- 2.124 In that regard, here is an example illustrating the kind of (in our view) unacceptable result that could be produced by the 'conditional intent' approach:

¹⁴³ See the discussion in D Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" [2006] *Current Legal Problems* 185, 225.

¹⁴⁴ The need to persuade the jury that D would have gone ahead with the agreed conduct 'even if' he or she had known that illegality would be involved, is likely to put pressure on the prosecution to introduce, and to make central to their case about D's fault, evidence of D's bad character. We do not believe that this would be a desirable development.

¹⁴⁵ See J Greenfield, *The Return of Cultural Treasures* (3rd ed 2007), ch 9.

¹⁴⁶ Above, p 24.

Example 2D

With V's assent, D1, a school teacher, invites D2 and D3 to engage in sexual activities 'at the house of a young friend of mine (V), with her watching'. D2 agrees, so long as the friend is aged over 18. D3 agrees, so long as the friend is not one of D1's students. The 'friend' is in fact one of D1's students, aged 15. Both D2 and D3 admit that they realised V might be one of D1's students, and be aged under 18. D1, D2 and D3 are charged with a conspiracy, in breach of a position of trust, to engage in sexual activity in V's presence for the purposes of sexual gratification, contrary to section 18 of the Sexual Offences Act 2003.

- 2.125 In example 2D, under our recommendations, the prosecution will first have to show that D1, D2 and D3 agreed that they would (and intended to) engage in the conduct element of the offence. In this example, that involves showing that D1, D2 and D3 agreed to engage in sexual activity.¹⁴⁷ The prosecution would then have to go on to show that each alleged conspirator was aware that all of the circumstance elements of the offence might be present at the time when the conduct element took place. These circumstance elements are the breach of trust, V's presence during the sexual activity, and V being under 18 years old.
- 2.126 By way of contrast, in example 2D, the conditional-intent-as-to-circumstances view would require one or more of D2, D3 or even D1 himself (in consequence) to be acquitted, if D2 and D3 might have agreed to D1's plan only on the conditions set. They would have to be acquitted even if they were aware that the relevant circumstance elements might be present at the time the conduct element was to be engaged in.¹⁴⁸

A contrast with the fault element respecting conduct and consequences

- 2.127 For the sake of completeness, so far as conditional intent is concerned, the position in relation to circumstance elements under our recommendations should be contrasted with the position in relation to the conduct elements. If D1 agrees with D2 and D3 to import class A drugs only if no violence is used, D1 can be convicted of conspiracy to import class A drugs, in spite of the fact that he or she is only prepared to do that on condition that no violence is used. This is because the use of violence is not part of the elements of the offence of drug importation.

¹⁴⁷ The conduct element of an offence may often in itself be quite innocent, as in the case of sexual activity, under the Sexual Offences Act 2003, or the appropriation of property under the Theft Act 1968.

¹⁴⁸ In Appendix B, we address the more detailed arguments in favour of the conditional intent view put forward by Mr Glazebrook and Dr Williams.

2.128 However D1 cannot be convicted of a conspiracy to assault, even if D1 was aware that D2 and D3 might have been prepared to use some violence if necessary (and in fact, they were so prepared). Under our recommendations, the conduct element (and consequence elements, if any) of the offence must be proved to have been intended by any alleged conspirator. So, in our example, only D2 and D3 can be convicted of a conspiracy to assault if they had in fact agreed that some violence could be used if need be. D1 cannot be convicted of that offence if what can be proved is no more than that D1 was aware that D2 and D3 *might* be prepared if need be to use violence to secure the importation. D1 could only be convicted of a conspiracy to assault if the relevant (conditional) intention to assault can be proved.

Conspiracy and encouraging or assisting crime under Part 2 of the Serious Crime Act 2007

Section 47 of the Serious Crime Act 2007

2.129 Part 2 of the 2007 Act abolishes the common law offence of incitement¹⁴⁹ and creates three new offences of encouraging and assisting crime.¹⁵⁰ Of particular significance, in this context, is what these offences demand by way of proof of fault in relation to the circumstance elements (if any) of the substantive offence D is alleged to have encouraged or assisted. Subsection (5) of section 47 says:

(b) if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that-

(i) D believed that, were the act to be done, it would be done in those circumstances or with those consequences; or

(ii) D was reckless as to whether or not it would be done in those circumstances or with those consequences.

2.130 So, in relation to the circumstance element of an offence D is charged with having encouraged or assisted, it will suffice that D was reckless as to whether the person to be encouraged or assisted would do the act in question in the relevant circumstances.¹⁵¹ Should this approach be followed in any reform of conspiracy?

¹⁴⁹ Serious Crime Act 2007, s 59.

¹⁵⁰ Serious Crime Act 2007, ss 44 to 46.

¹⁵¹ Section 47(5) of the Serious Crime Act 2007 also requires proof of no more than recklessness with regard to whether the consequence element of an offence will occur. We will not be recommending that the law of conspiracy, which currently requires proof of an intention to bring about consequence elements, is changed to reflect this (lesser) requirement under the 2007 Act. In our recommendations, on which Part 2 of the 2007 Act is based, we had in fact recommended that there be more stringent fault requirements in relation to circumstance and consequence elements of the offences of encouraging and assisting: see Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

The implications of the Serious Crime Act 2007 for reform of conspiracy: conduct and consequences

- 2.131 In our recommendations for conspiracy, we do not see a case for following in all respects the approach to fault embodied in the 2007 Act.¹⁵² In particular, as indicated above, we are recommending that there should be a requirement of proof of an intention to commit the offence, so far as both the conduct and consequence elements of it are concerned.¹⁵³ Although there will be many situations in which there is an overlap between the offences of encouraging and assisting crime, and of conspiracy, there is an important difference in the nature of the offences.
- 2.132 A conspiracy is an *agreed* joint venture. The ‘joint venture’ foundation of conspiracy entails that the conduct and consequence elements of the offence to be committed must be agreed on and intended.
- 2.133 By way of contrast, there need be no ‘joint venture’ in cases of encouraging and assisting crime. Agreement on a joint venture is not an essential part of the wrongdoing in such cases. In such cases, the decision to commit the substantive offence may be taken by D1 quite independently of D2’s encouragement or assistance. So, there is (by way of contrast with conspiracy cases) no conceptual requirement that D1 and D2 be proved to have agreed either on what conduct or what consequences (if any) should occur. Accordingly, there may be a justification for making D2’s liability turn on what consequences he or she realised that D1 might bring about, as a result of his or her encouragement or assistance, even if D2 did not agree or intend that the consequences should occur.¹⁵⁴
- 2.134 Having said that, from a prosecution perspective, there will often be little to choose between the merits of charging encouraging or assisting crime, and the merits of a conspiracy charge. Whatever subtle variations there may be in the way that they are each defined, in committing one of these offences, someone will often commit the other offence as well or in consequence.

The implications of the Serious Crime Act 2007 for reform of conspiracy: circumstance elements

- 2.135 Dr Williams argues that the approach taken to the circumstance fault elements in encouraging or assisting crime (involving a requirement to prove only recklessness as the form of fault) is defensible in a way that it is not in conspiracy cases. She suggests that, in encouraging or assisting cases, D, “relinquishes control of the situation once he has given his encouragement or his assistance to P”, and so the one-dimensional form of circumstance fault element, recklessness, may be appropriate. By way of contrast, she argues:

¹⁵² For detailed analysis of the provisions, see D Ormerod and R Fortson, “The Serious Crime Act 2007: the Part 2 Offences” (2009) 6 *Criminal Law Review* 389.

¹⁵³ See para 2.2 above; s 1ZA(2) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

¹⁵⁴ Under the offences created in Part 2 of the Serious Crime Act 2007, there need only be recklessness as to consequence elements.

Of course in conspiracy D1 may well also lose physical control of the situation if the agreement is that he will provide equipment for D2 to use later on, but the whole point is that by reaching agreement with D2, rather than simply encouraging him/her, D1 seeks to exert some influence over D2's actions even when D1 is not there.

2.136 We have ourselves distinguished the theory underlying assisting and encouraging from conspiracy theory.¹⁵⁵ However, it was the joint venture element of conspiracy rather than the retention by D1 of 'control' of the situation that was central to our distinction. In that regard, we would add that it is perfectly possible for D1's prior encouragement and assistance to influence D2 later when D1 'is not there', in just the same way as D1's initial agreement may influence D2 in such circumstances.¹⁵⁶ So, whilst we agree that there is an important theoretical distinction between the crimes of encouraging and assisting, and of conspiracy, we do not see that this distinction compels us to take a substantially different approach to the circumstance fault element.

2.137 We therefore recommend that

an alleged conspirator must be shown at the time of the agreement to have been reckless whether a circumstance element of a substantive offence (or other relevant circumstance) would be present at the relevant time, when the substantive offence requires no proof of fault, or has a requirement for proof only of negligence (or its equivalent), in relation to that circumstance.¹⁵⁷

(Recommendation 3)

Circumstance fault requirements other than negligence (or no fault)

2.138 In our CP, we proposed:

Proposal 4: As a qualification to proposal 3, where a substantive offence has a fault requirement more stringent than recklessness in relation to a circumstance element, a conspirator must be shown to have possessed that higher degree of fault at the time of his or her agreement to commit the offence.

¹⁵⁵ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 5.116; paras 2.132 to 2.133 above.

¹⁵⁶ The importance of our simple 'joint venture' basis for understanding conspiracy is demonstrated when one considers cases in which D1 is very much the junior partner in a conspiracy and hence not in fact influencing D2, or trying to influence D2, when D2 is "not there", to use Dr Williams' language.

¹⁵⁷ See s 1ZA(5) of the Criminal Law Act 1977, as inserted by cl 1(3) draft Bill.

- 2.139 There was complete agreement from consultees on proposal 4. Proposal 4 was designed to avoid prosecutors being able to derive an unfair advantage by charging conspiracy instead of the substantive offence in question, even when there are perfectly adequate grounds for charging the substantive offence.¹⁵⁸ In our view it should not be easier to prove conspiracy because of the availability of a more relaxed fault threshold than it is to prove the substantive offence.
- 2.140 For example, where the substantive offence requires proof of knowledge or belief that the fact or circumstance *will be* present at the relevant time, then that state of mind must be proved on a charge of conspiring to commit that offence.¹⁵⁹ An example we used in the CP was the offence of handling stolen goods, where it must be shown that at the relevant time D knew or believed them to be stolen.¹⁶⁰ Clearly, it should not be enough to show, on a charge of conspiracy to commit this offence, that D merely thought that the goods *might be* stolen.
- 2.141 Proposal 4 was meant to be a more subtle version of clause 48(2) of the Draft Criminal Code, which said that, ‘recklessness with respect to a circumstance suffices where it suffices for the offence itself’.¹⁶¹ Clear and simple though it is, that clause failed to address instances in which a fault term other than, but equivalent to, recklessness was employed in defining a circumstance element in the substantive offence. It also failed to say specifically what should happen in instances where the fault element relating to circumstances was something less than knowledge, but something more than mere recklessness.
- 2.142 On further consideration, we have concluded that proposal 4 is not quite the right way to achieve the aim we set for ourselves.¹⁶² To begin with, English law has no formal hierarchy of fault requirements. So, to speak of ‘more stringent’ fault elements than recklessness begs an important question. Further, like clause 48(2) of the Draft Criminal Code, proposal 4 did not make clear what should happen when a fault requirement was broadly equivalent to but not the same as recklessness. Four possible examples of such fault requirements are ‘malice’,¹⁶³ ‘awareness’, knowledge that something *might be* the case,¹⁶⁴ and ‘suspicion’.
- 2.143 If the substantive offence involves proof of one of these fault requirements in relation to a circumstance element, there is little or nothing to be gained by requiring proof of recklessness instead on a charge of conspiracy to commit that offence. The risk is that the directions to the jury will become more complicated, with no greater good being achieved thereby.

¹⁵⁸ We referred to this issue in Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.134.

¹⁵⁹ See s 1ZA(4) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

¹⁶⁰ Theft Act 1968, s 22(1).

¹⁶¹ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 3.28.

¹⁶² See para 2.65 above.

¹⁶³ In so far as, in some contexts, that goes beyond an intention to bring about a consequence: *R v Cunningham* [1957] 2 QB 396.

¹⁶⁴ An example would be the provision in the Fraud Act 2006 referring to knowledge that a representation ‘might be’ untrue or misleading: Fraud Act 2006, s 2(2)(b).

2.144 In such instances, the ‘same test’ approach¹⁶⁵ has clear advantages over a test that requires proof of recklessness. Recommendation 4 is designed to adopt that approach, in relation to crimes involving a ‘subjective’ fault requirement in relation to a circumstance element, and the draft Bill reflects that approach.¹⁶⁶

2.145 Like proposal 4, it is also therefore apt to cover instances in which the fault element falls somewhere in between recklessness, on the one hand, and knowledge or intention, on the other. An example would be the offence under section 2 of the Criminal Damage Act 1971 of making a threat (intending that another would fear that it would be carried out) to destroy or damage property in a way that D *knows is likely to* endanger life. Under recommendation 4, on a charge of conspiracy to commit this offence, the circumstance fault element – the knowledge that the destruction or damage is likely to endanger life – would have to be proved.

2.146 We therefore recommend that

where a substantive offence has fault requirements not involving mere negligence (or its equivalent), in relation to a fact or circumstance element,¹⁶⁷ an alleged conspirator may be found guilty if shown to have possessed those fault requirements at the time of his or her agreement to commit the offence.¹⁶⁸

(Recommendation 4)

Fault in relation to circumstances that are not elements of the offence

2.147 As is the case with consequence elements (although perhaps more rarely), an offence of conspiracy may require proof of fault in relation to a fact or circumstance that is not an element of the offence. An example may be found in section 2 of the Criminal Damage Act 1971:

A person who, without lawful excuse, makes to another a threat, intending that that other would fear it would be carried out ...

(b) to destroy or damage his own property in a way which he knows is likely to endanger the life of [another];

shall be guilty of an offence.

¹⁶⁵ See para 2.87 above.

¹⁶⁶ Section 1ZA(4) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

¹⁶⁷ Such as knowledge that the circumstance obtains, or a belief that it obtains (as opposed to a belief that it may obtain).

¹⁶⁸ Section 1ZA(4) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

2.148 This offence requires D to know that damaging or destroying his own property is likely to endanger life. However, it does not require life *necessarily* to be endangered by what is threatened, in such a way that it would be accurate to say that life-endangerment is an ‘element of the offence’. Even so, such a fault element must clearly be proved by the prosecution, on a charge of conspiracy to commit this offence. The draft Bill makes this possible.¹⁶⁹

CONSPIRACY AND INTOXICATION

2.149 In our recent report on intoxication,¹⁷⁰ we explained the relevance (or irrelevance) of voluntary intoxication to the determination of criminal liability, both under the present common law rules and under the equivalent rules set out in the appended draft Criminal Law (Intoxication) Bill.¹⁷¹ We explained, in particular, that where a subjective fault element has *not* been held to be a “specific intent” at common law,¹⁷² D’s state of voluntary intoxication is irrelevant to the determination of his or her liability.

2.150 Thus, where D is charged with an offence requiring proof of subjective recklessness,¹⁷³ and D claims that, on account of his or her state of voluntary intoxication, he or she did not have the state of mind required for liability, D will be judged according to what he or she *would* have perceived if he or she had been sober. We referred to this rule as the “*Majewski* rule”,¹⁷⁴ following the decision of the House of Lords in *DPP v Majewski*.¹⁷⁵

2.151 For example, suppose that it can be proved that D, in a drunken condition, spun around in a public house with his arms flailing, and struck another individual. It would not be open to D to argue in court that his state of intoxication meant that he did not appreciate the risk that he would strike another person and that, for that reason, he cannot be convicted. In the absence of some other explanation, D would be guilty of battery by the application of the *Majewski* rule, or by the application of our equivalent rule,¹⁷⁶ because:

- (1) where battery is charged, it is sufficient for liability that D foresaw the possibility that he might apply unlawful force; and

¹⁶⁹ Section 1ZA(2)(b) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill.

¹⁷⁰ Intoxication and Criminal Liability (2009) Law Com No 314.

¹⁷¹ Above, Appendix A.

¹⁷² Or, under our draft Criminal Law (Intoxication) Bill, where a subjective fault element is *not* listed in cl 3(5).

¹⁷³ In this respect we have recommended one exception: see cl 3(5)(e) of our draft Criminal Law (Intoxication) Bill.

¹⁷⁴ Intoxication and Criminal Liability (2009) Law Com No 314, para 2.37.

¹⁷⁵ [1977] AC 443. See generally Intoxication and Criminal Liability (2009) Law Com No 314, paras 2.35 to 2.46.

¹⁷⁶ Clause 3(3) of our draft Criminal Law (Intoxication) Bill provides that “D is to be treated as having been aware at the material time of anything which D would then have been aware of but for the intoxication”.

- (2) this form of subjective recklessness is not a “specific intent”.¹⁷⁷
- 2.152 It follows that if it can be proved that D would have foreseen the possibility of striking another person with his flailing arms, if he had been sober, he is to be held liable for battery even though it is not a risk he actually perceived.
- 2.153 In our report, we also explained that there is currently no scope for the application of the *Majewski* rule to the offence of statutory conspiracy because recklessness as to a circumstance does not at present suffice for liability where conspiracy is alleged.¹⁷⁸ However, we added that if the law were to be altered so that proof of recklessness as to a circumstance would be sufficient for conspiracy where it is sufficient for the intended substantive offence,¹⁷⁹ then it would be necessary to consider whether the *Majewski* rule should apply to this fault element.¹⁸⁰
- 2.154 We are now recommending that, for conspiracy, the prosecution should have to prove subjective recklessness (or its equivalent) as to the circumstance element in the intended offence where:
- (1) recklessness (or its equivalent) suffices for that circumstance element in the substantive offence itself;
 - (2) the fault element as to a circumstance involves proof of negligence (or an equivalent state of mind); or
 - (3) no fault element is required as to the circumstance element.¹⁸¹
- 2.155 Accordingly, it is now necessary to consider, for cases where D is voluntarily intoxicated, whether this form of recklessness (or its equivalent) should be treated as a fault element to which the *Majewski* rule applies, the usual position for subjective recklessness. Alternatively, the question is whether this state of mind should instead be incorporated into clause 3(5) of our draft Criminal Law (Intoxication) Bill as a state of mind which must always be proved.
- 2.156 The effect of clause 3(5), in its present form,¹⁸² is that five subjective fault elements must always be proved. So, if D was intoxicated (voluntarily or involuntarily) at the relevant time, and it is alleged that D acted with a state of mind listed in clause 3(5), D’s state of intoxication is relevant to the question whether D did or did not act with the state of mind required for liability.
- 2.157 These five subjective fault elements are:
- (1) intention as to a particular result;

¹⁷⁷ Or, under our draft Criminal Law (Intoxication) Bill, it is not a subjective fault element listed in cl 3(5).

¹⁷⁸ Intoxication and Criminal Liability (2009) Law Com No 314, para 3.120.

¹⁷⁹ Above, para 4.113.

¹⁸⁰ In line with the proposal in Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183.

¹⁸¹ Section 1ZA(4) and (5) of the Criminal Law Act 1977, as inserted by cl 1(3) draft Bill.

¹⁸² When read with cl 3(3) (see n 175 above) and cl 3(4).

- (2) knowledge as to something;¹⁸³
- (3) a belief, amounting to certainty or near certainty, that something was, had been, or would be the case;
- (4) fraud or dishonesty; and
- (5) recklessness for the purposes of section 47(5)(a)(ii) or (b)(ii) of the Serious Crime Act 2007.

2.158 In our report,¹⁸⁴ we referred to each of these states of mind as an “integral fault element”, favouring this label over the common law term “specific intent”.

2.159 We explained in our report that the *Majewski* rule should not be applied to such states of mind.¹⁸⁵ This is because, if the *Majewski* rule (or the general rule in clause 3(3) of our draft Bill) were to be applied to these fault elements, there would be a significant mismatch between the culpability justifying liability on the basis of voluntary intoxication and the culpability ordinarily required for liability (in accordance with the definitional requirements of the offence).

2.160 We believe that the same must be true if D is charged with conspiracy on the basis of recklessness as to a circumstance in the substantive offence that D and his or her fellow conspirators agreed to commit. In other words, if the general (*Majewski*) rule in clause 3(3) of our draft Bill were to apply to conspiracy, where the intended offence requires mere recklessness (or its equivalent) as to a circumstance element, there would be a significant mismatch between the culpability underpinning this basis of liability and the culpability ordinarily required for conspiracy.¹⁸⁶

2.161 Consider the following example:

Example 2E

D1 and D2 agree to damage V’s front door in a few days time. D1 plans to set fire to the door and intimates that this is his intention. However, D2, being drunk, is under the mistaken impression that they will merely give the door a “good kicking” and that there is no possibility of anyone’s life being put at risk. If D2 had been sober he would have appreciated the risk that D1 might have set fire to V’s door.

¹⁸³ Other than knowledge as to a risk.

¹⁸⁴ Intoxication and Criminal Liability (2009) Law Com No 314, para 3.34.

¹⁸⁵ Above, para 1.59.

¹⁸⁶ In accordance with the definitional requirements of the offence we recommend.

2.162 If the *Majewski* rule could be applied to example 2E, a situation which is still far-removed from the intended offence actually being committed, D2 could be liable for conspiring to commit an extremely serious offence, that is, the offence of aggravated (life-endangering) criminal damage by arson.¹⁸⁷ D2's true level of culpability in this example falls far short of the level of culpability usually associated with conspiring to commit such a serious offence.

2.163 We should add that displacing the *Majewski* rule in this way accords with the position we have recommended for the use of recklessness in Part 2 of the 2007 Act.¹⁸⁸ It also accords with the position at common law, to the extent that the fault elements required for conspiracy have traditionally been regarded as integral fault elements ("specific intents").

2.164 We therefore recommend that

it should be possible for a defendant to deny that he or she possessed the fault element for conspiracy because of intoxication, whether voluntary or involuntary, even when the fault element in question is recklessness (or its equivalent).

(Recommendation 5)

2.165 As a result, when the fault element of recklessness (or its equivalent) as to a circumstance element is required for liability for conspiracy, it should be a state of mind which must always be proved. Accordingly, it should be added to the list of integral fault elements in clause 3(5) of our draft Criminal Law (Intoxication) Bill.

CONSPIRACY AND 'GENERAL' FAULT ELEMENTS

2.166 Some offences include 'general' fault elements, namely fault elements that do not relate specifically to a conduct, consequence or circumstance element. Instead, general fault elements describe a state of mind that D must be proved to have possessed upon the occurrence of the other elements of the offence, including the specific fault elements that relate to conduct, consequences and circumstances (such as intention). Examples of general fault elements are to be found in those offences requiring D to have acted 'dishonestly' or 'corruptly', if the offence in question is to be committed. Our recommendations do not affect the need to prove that D possessed a general fault element, when that is part of the offence. This is because, under the existing law, it is only when the agreement, if carried out in accordance with the conspirators' intentions, amounts to or involves a criminal offence that the conspirators can be found guilty. It will only amount to such an offence, when it includes a general fault element, if it is proved that the conspirators possessed that element.

¹⁸⁷ Contrary to Criminal Damage Act 1971, s 1(2) and (3), and carrying a maximum penalty of life imprisonment: see Criminal Damage Act 1971, s 3(2), and Criminal Law Act 1977, s 3(2).

¹⁸⁸ Intoxication and Criminal Liability (2009) Law Com No 314, paras 3.104 to 3.117; draft Criminal Law (Intoxication) Bill, cl 3(5)(e).

PART 3

THE ISSUE OF DOUBLE INCHOATE LIABILITY

INTRODUCTION

- 3.1 In the CP, we said that we wanted to rationalise the arbitrary and unprincipled rules governing double inchoate liability (liability incurred through commission of an inchoate offence that relates to another inchoate offence).¹ In this Part, we determine to what extent that is possible, in the light of consultees' responses.
- 3.2 The 2007 Act made significant changes to this area of the law. Schedule 14 of the 2007 Act repealed section 5(7) of the 1977 Act, which had provided that an incitement to commit the offence of conspiracy was not an offence. In this Part, we consider the implications of that repeal.
- 3.3 We then go on to address the issue of attempting to conspire.² We explain our reasons for thinking that extending the law so that it would be possible to attempt a conspiracy would be in the interests of coherence and consistency. However, the responses from consultees regarding this issue were starkly divided. We conclude that it is not necessary to extend the law in this way. This is because the mischief that such an extension would address is likely to be caught by other legislation, namely the 2007 Act.

INCITEMENT TO CONSPIRE, AND ENCOURAGING AND ASSISTING A CONSPIRACY

Consistency

- 3.4 We have long held the view that it should be an offence for D1 to incite D2 to conspire and that accordingly, section 5(7) of the 1977 Act should be repealed.³ This is because we think that it is anomalous that there should be no offence of incitement to conspire when there was a common law offence of incitement to incite and there is now an offence of encouraging and assisting an act of encouragement or of assistance in relation to an offence.⁴

¹ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 7.4, where we referred to the Draft Criminal Code and the fact that we did not feel able to restate in a code the fact that s 5(7) of the Criminal Law Act 1977 prevents a charge of incitement to conspiracy, but if D incited P to incite X to wound G, D can be charged with incitement to incite.

² The question we asked consultees was whether s 1(4)(a) of the Criminal Attempts Act 1981, which prevents a charge of attempting to conspire being laid, should be repealed.

³ Criminal Law: A Criminal Code for England and Wales: Vol 2 Commentary on Draft Criminal Code Bill (1989) Law Com No 177, para 13.13.

⁴ Serious Crime Act 2007, s 49(4).

- 3.5 However, there should be limits set to the scope for such double inchoate liability. Under the 2007 Act, these limits are set by the requirement that, in relation to another inchoate offence, D must *intend* the act of encouragement or assistance of the offence to take place.⁵ Accordingly, in ‘double inchoate’ cases, D must be charged under section 44 of the 2007 Act, which creates an offence confined to instances in which D had such an intention.⁶
- 3.6 In our Report, Inchoate Liability for Assisting and Encouraging Crime,⁷ we gave the following examples of situations to which an offence under what is now section 44 of the 2007 Act could apply to another offence of encouraging and assisting:⁸

Example 3A

D, knowing that P is planning to act as X’s getaway driver in a robbery, lends a car to P so that P can provide assistance to X.

Example 3B

D, knowing that P intends to distribute a leaflet encouraging X to commit a racially motivated assault, provides P with the means of producing the leaflet.

- 3.7 The potential to apply the offence under section 44 of the 2007 Act to another offence under Part 2 of the 2007 Act has the practical advantage of identifying the role which D has played in the overall criminal enterprise.⁹ This will be important for the purpose of sentence in the event that D is convicted. Even though D has the relevant intention by virtue of the nature of the charge (section 44) he remains considerably removed from the harm which will follow from the anticipated offence.

Application of section 44 to conspiracy

- 3.8 These principles can be applied to an offence under section 44 of the 2007 Act to commit an offence of conspiracy. We gave the following example where D would incur liability if he were to encourage and assist a conspiracy:

⁵ Serious Crime Act 2007, s 49(4).

⁶ This is consistent with our recommendations in Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 7.20, and with our draft Bill, cls 1 and 2.

⁷ (2006) Law Com No 300.

⁸ Above, para 7.1.

⁹ There is therefore no need for the defence to request further and better particulars of the indictment as is often the case in conspiracy.

Example 3C

D knows that X and P, normally rival drug dealers, are concerned about the activities of V, another drug dealer. D, who hates V, makes a room available to X and P to hatch a plot to murder V. The meeting breaks up in acrimony without any agreement having been reached.

In this situation D is guilty of the section 44 offence in relation to a potential conspiracy between X and P because he intends to assist it.

An expansion of the criminal law

- 3.9 The changes effected by the 2007 Act involve an expansion of the ambit of the criminal law, because it was not previously an offence to incite a conspiracy. This expansion of the criminal law, is in our view, justifiable, given that modern technology has made so much easier the encouragement or assistance of (and in particular, the meeting of minds disposed to commit) crime on a global scale. In the CP we gave the following example:¹⁰

Example 3D

D1 sets up a website inviting people to join together to abduct children for abuse by people travelling on business or on holiday in a number of parts of the world.

- 3.10 In that regard, it is worth noting that, in identifying six major categories of international and internet child sexual abuse, recent research¹¹ classifies one such category as, “internet-initiated incitement or conspiracy to commit child sexual abuse”.¹² The same research concluded that “there was, among policy makers and practitioners, very little awareness of, or response to cases of internet-initiated incitement or conspiracy to commit child sexual abuse”.

ATTEMPTING TO CONSPIRE

- 3.11 Knowing that, on the basis of our proposals in our report on assisting and encouraging crime¹³ and the 2007 Act, this expansion of the criminal law would occur, we also asked the following question in the CP:

¹⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 7.31.

¹¹ B Gallagher, C Fraser, K Christmann, B Hodgson, “International and Internet Child Sexual Abuse and Exploitation: Research Report” (2006), http://webserver.hud.ac.uk/schools/hhs/research/acs/staff/Inter_net_CSA.pdf.

¹² As above. The other categories were international child sex abuse victim, international child sex abuser, international movement of child abuse images, internet-initiated grooming for the purposes of sexually abusing a child and internet-based child abuse images.

¹³ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

Should section 1(4)(a) of the Criminal Attempts Act 1981 be repealed, so that it is possible to convict someone of attempting (or criminally preparing) to conspire?

3.12 We listed the advantages of making it legally possible to attempt to conspire, as follows:

- (1) It would ensure consistency of principle with section 49(4) of the 2007 Act because an attempt is not as remote from the commission of the substantive offence as an act that encourages or assists the formation of a conspiracy. An attempt requires an act that is more than merely preparatory to the commission of the offence, whereas an act of assisting and encouraging need not have such a degree of proximity.
- (2) It has long been recognised that attempts to commit crimes are a distinct wrong and may be criminalised as such.¹⁴
- (3) The offence would serve to ensure that those who seek to conspire exclusively with individuals who cannot be liable for conspiracy would be liable for attempted conspiracy.¹⁵
- (4) It would cover a situation where D1, D2 and D3 attempted to meet to conspire but were frustrated by extraneous circumstances.¹⁶

¹⁴ A good hypothetical example of a situation where there may be evidence of an attempt but not the full offence was provided by the Senior Judiciary and is cited at para 3.15 below.

¹⁵ We refer to those parties who are not liable because although they agree to commit an offence, they actually intend to frustrate the agreement for example undercover police officers. Alternatively there are those who are exempt from the law of conspiracy because he or she is a victim or because of his or her age: see Part 5 below.

¹⁶ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, see example at para 7.54.

- 3.13 We now add the following points. First, by virtue of sections 44 and 49(4), and Schedule 3 Part 2 of the 2007 Act, it is a crime to do an act capable of, and intended to, encourage and assist an offence of attempt. In addition, it is also possible to attempt an indictable offence of encouraging and assisting.¹⁷ This is consistent with the common law offence of attempted incitement,¹⁸ which (as we pointed out in the CP) has been recognised since *Banks* was decided in 1873.¹⁹ Accordingly it would produce consistency across the spectrum of inchoate offences if it were also to be possible to attempt a conspiracy.

Support for the repeal of section 1(4)(a) of the Criminal Attempts Act 1981

- 3.14 However, only three out of eight of our consultees who addressed this issue were in favour of repealing section 1(4)(a) the 1981 Act. They included the Crown Prosecution Service, who commented that double inchoate offences are likely to be of increasing value to prosecutors given the emphasis in both policing methods and the criminal law on targeting the organisation and management of criminal activity prior to substantive offences actually taking place.
- 3.15 The Senior Judiciary were also in favour of the repeal of section 1(4)(a). They responded as follows:

Although we are concerned at the proliferation of legislation concerning the criminal law, there are valid arguments in favour of making this proposed change. Particularly with the efforts that have been seen in the recent past to recruit groups of young people into terrorism, in certain circumstances this may provide the most apposite charge. Bearing in mind the investigative techniques often utilised for contemporary policing, it may be unclear whether an agreement has been finalised (eg if the police only gathered evidence of some of the conversations that have taken place). In those circumstances the (serious) charge of attempting to conspire may most appropriately reflect the available evidence.

¹⁷ Section 1(4) of the Criminal Attempts Act 1981 provides:

This section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than-

- a) conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment);
- b) aiding, abetting, counselling, procuring or suborning the commission of an offence;
- c) offences under section 4(1) (assisting offenders) or 5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the CLA 1967.

Under s 55(1) of the Serious Crime Act 2007, an offence under s 44 or 45 is triable in the same way as the 'anticipated offence' and under s 55(2), an offence under s 46 is triable on indictment.

¹⁸ *Banks* (1873) 12 Cox CC 393; see also *Goldman* [2001] EWCA Crim 1684, [2001] Criminal Law Review 822.

¹⁹ Although in reality the breadth of the terms "capable of encouraging or assisting" in ss 44 and 45 mean that it is unlikely that it will be necessary to try anyone of an attempt to commit one of the three offences under the Serious Crime Act 2007.

Consultees who did not agree with the repeal of section 1(4)(a) of the Criminal Attempts Act 1981

- 3.16 The majority²⁰ of consultees answered our question in the negative. The basis for the dissent was that the ultimate harm would be too remote and that such a repeal would therefore result in an unjustified extension of the criminal law. The general view was therefore that consistency should not be achieved at the expense of fairness and proportionality.
- 3.17 Some consultees believe that if a situation calls for remote harm to be criminalised then it is better that it is legislated for specifically rather than through the inchoate offences.²¹
- 3.18 Other consultees believe that it is unnecessary for *any* such activity to incur criminal liability. The Criminal Bar Association, for example, had the following comments to make:

In our view [the Commission] has given insufficient regard to [the remoteness principle] in recommending reforms that will criminalise conduct that is too remote from the infliction of harm.

- 3.19 Further the Criminal Bar Association warns:

The enactment of new offences of doing acts that are capable of assisting and encouraging a criminal offence, intending that the offence should be committed, that are based upon the Commission's proposals concerning secondary liability will produce, we predict, unforeseen consequences that may cause harm to the administration of justice and alienate sections of society. The intentions behind the proposals may be based upon logical reasoning that the current law is defective and inconsistent. However there are already fears that similar offences in the anti-terrorist legislation have created what some people refer to as 'thought crimes' which are so remote from the potential infliction of harm that significant sections of the population most notably at present Muslims fear they are being discriminated against for religious or political views. Their views may be unfounded on a strictly jurisprudential analysis of the law, but are nonetheless genuinely held.

This is a very important objection, although under our proposals we believe that the broad defence of 'reasonableness' which we proposed would have done something to meet it. It would have been possible to plead this defence on the basis that the conduct in question, objectionable though it might be, was so remote from the infliction of harm as to be not rightly regarded as a criminal conspiracy. Further the objection is as much to do with sensitive law enforcement policy as it is to do with the reach of the substantive law.

²⁰ The Council of Her Majesty's Circuit Judges had no comment to make but made it clear that they did not favour having to include a definition of an attempt to a jury in a summing up. (This was stated in response to proposal 8 concerning a specific defence for victims). See para 5.35 below.

²¹ Mr Justice Calvert-Smith.

Conclusion

- 3.20 In the absence of clear and substantial support from consultees for the repeal of section 1(4)(a) of the 1981 Act we do not propose to make any recommendations.
- 3.21 In addition to the views of those consultees who have expressed their concerns about undue extension of the law, we have been influenced by the following factor. We are increasingly mindful of the danger of legislative duplication. We see it as undesirable and potentially confusing for offences to overlap to too great an extent.
- 3.22 As we explained earlier,²² the 2007 Act now makes it possible for D to encourage and assist a conspiracy as long as it is his or her intention to do so.²³ There will be very few situations in which D would be liable for attempting to conspire where he or she could not also be said to be encouraging or assisting a conspiracy. This is particularly so, in virtue of the fact that under the provisions of the 2007 Act it is not necessary for there to be a fully formed conspiracy.²⁴
- 3.23 The benefits that we listed above in relation to the possibility of attempted conspiracy²⁵ are also achieved by the 2007 Act. For example, in Part 5 we explain how an adult who seeks to conspire exclusively with a child below the age of criminal liability will be caught by the 2007 Act.²⁶

²² See para 3.2 above.

²³ Serious Crime Act 2007, ss 44 and 49(4).

²⁴ Section 49(1) of the Serious Crime Act 2007 provides that:

A person may commit an offence under this Part whether or not any offence capable of being encouraged or assisted by his act is committed.

²⁵ See para 3.12 above.

²⁶ See para 5.42 below.

PART 4

CHARGING CONSPIRACY

INTRODUCTION

- 4.1 In this Part, we make recommendations concerning the way in which conspiracy is charged. There are questions to be answered about the way in which conspiracy is, and should be, charged when more than one offence (the offences having different penalties attached) may be the outcome of the course of conduct which has been agreed on by the participants.
- 4.2 In short, we are recommending that, in such instances, separate charges of conspiracy comprising separate counts on the indictment should be used for each offence.¹ This recommendation is based on the proposal we made in the CP.²
- 4.3 We are not however recommending any legislative changes. This is because there is already provision for charging an agreement to commit a course of conduct which would amount to more than one offence as separate conspiracies, and so we do not think that a change in the law is necessary to put our recommendation into effect.

BACKGROUND TO OUR RECOMMENDATION

- 4.4 Our recommendation is meant to ensure specificity, especially in light of the new indictment rules.³ Rule 14.2.2 of the new rules provides that

more than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of the commission.

The new rules do not dispense with a discretion to charge offences separately, if fairness dictates that this is the most appropriate course. The new rules dispense with the rule against duplicity, which was stated in rule 4(2) of the Indictment Rules 1971. This provided that:

Where more than one offence is charged in an indictment, the statement and particulars of each offence shall be set out in a separate paragraph called a count.

¹ Our recommendation does not extend to any conspiracy to launder unidentified criminal proceeds which pre-date the Proceeds of Crime Act 2002: see paras 4.11 to 4.12 below.

² Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 5, para 6.56.

³ Criminal Procedure (Amendment) Rules 2007. Rule 3 revokes the Indictment Rules 1971.

- 4.5 We discussed the purpose of the rule against duplicity in detail in the CP.⁴ Briefly, the rule, as expressed in the Indictment Rules 1971, served to prevent a situation arising in which there might be confusion over the exact offence of which D had been convicted, caused by the presence of more than one offence charged in a single count on an indictment. The absence of such confusion would obviously make it easier for the trial judge to sentence D.
- 4.6 Precluding more than one offence in a count also prevents an unsatisfactory situation arising whereby a proportion of the jury (which is less than would be required for a majority verdict) find one offence proved but not the other. If a similar proportion of the jury find the other offence proved, but not the first, then the outcome could be an unsafe verdict.⁵ Sometimes, there is a similar danger regarding the ingredients of the offence. In this situation a special direction known as a '*Brown* direction' is required.⁶
- 4.7 The rule against duplicity made for fairness in the trial. It enabled D to know the case he or she had to meet in relation to matters affecting the conduct of the trial: for example, in making a submission of no case to answer.⁷ The rule also ensured fairness in a case where particular evidence may be admissible in relation to one offence alleged, but not in relation to another. For example, the prosecution may be permitted to adduce character evidence as to D's propensity to commit one kind of offence, in circumstances where it would not be right to admit such evidence in so far as it bears on D's propensity to commit another offence charged in the same indictment.⁸

⁴ For a discussion of the reasons for the former rule against duplicity see Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 6.12 to 6.20.

⁵ *Turner* [2000] Criminal Law Review 325.

⁶ *Brown (K)* (1983) 79 Cr App R 115. We refer to the *Brown* direction in detail at para 4.29 below.

⁷ A submission which can be made at any time after the close of the prosecution case.

⁸ Criminal Justice Act 2003, ss 101(1)(d) and 103(1)(a).

- 4.8 We explained in the CP that a single count of conspiracy to commit more than one offence did not breach the former rule against duplicity. Conspiracy is a free standing offence. The 1977 Act contemplates not only that there can be a conspiracy to commit more than one offence, but also that the offences that are the subject of one conspiracy may be offences to which different maximum penalties apply.⁹ However, ‘compendious’ counts – those that comprise more than one offence to which different penalties apply – have in the past caused confusion.
- 4.9 This has been most apparent in the context of the ‘either-or’ conspiracy. This is a conspiracy where one of the agreed courses of (criminal) action may only come about in certain circumstances.¹⁰

Example 4A

D1 and D2 agree to launder money: either the proceeds of drugs offences or the proceeds of robberies.

- 4.10 In this kind of case, a compendious count has been employed, because the precise provenance of the monies in question is not clear to the prosecution. The courts have held that this is a perfectly appropriate course of action.¹¹

⁹ See s 1(1)(a) of the Criminal Law Act 1977 which provides:

...If a person agrees with any other person or persons that a course of conduct will be pursued which, if the agreement is carried out in accordance with their intentions, either-

- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement ...

And s 3(3) which provides:

Where in a case other than one to which subsection (2) above applies the relevant offence or any of the relevant offences is punishable with imprisonment, the person convicted shall be liable to imprisonment for a term not exceeding the maximum term provided for that offence or (where more than one such offence is in question) for any one of those offences (taking the longer or the longest term as the limit for the purposes of this section where the terms provided differ).

See *Roberts, Taylor, Chapman and Daly* [1998] 1 Cr App R 441, 449; Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 6.24.

¹⁰ For example, see *Attorney General’s Reference (No 4 of 2003)* [2004] EWCA Crim 1944, [2005] WLR 1574; *Suchedina* [2006] EWCA Crim 2543, [2007] 1 Cr App R 23.

¹¹ See *Attorney General’s Reference (No 4 of 2003)* [2004] EWCA Crim 1944, [2005] WLR 1574, where the Court of Appeal held that the single offence of conspiracy can consist of one agreement to commit one or more offences; see also *Suchedina* [2006] EWCA Crim 2543, [2007] 1 Cr App R 23.

- 4.11 We said in the CP that we agree that this course of action is appropriate where the agreement relates to money which is unidentified. Example 4A illustrates this kind of situation (as it arose prior to the enactment of the Proceeds of Crime Act 2002).¹² D1 and D2 intend to convert the proceeds of crime whether the proceeds are the proceeds of drug trafficking,¹³ or of other non drug-related criminal conduct.¹⁴ One or both offences will be committed if D1 and D2 fulfil the agreement in accordance with their intentions. However, the existence of a compendious count will have little practical impact, given that the penalties in respect of each of the alternatives are the same.
- 4.12 In future the need to rely on a compendious count in situations such as that in example 4A will be less common. This is because a single offence, under the Proceeds of Crime Act 2002,¹⁵ has now replaced the separate offences of converting the proceeds of drugs under the Drugs Trafficking Act 1994 and converting the proceeds of criminal conduct under the Criminal Justice Act 1988. There will therefore only be a limited number of cases to which the compendious count will apply. Eventually, the need for them will disappear.¹⁶ However, in the mean time, the exception is necessary.

Reasons for the recommendation

- 4.13 In *Attorney General's Reference No 4 of 2003*,¹⁷ it was said that in a case where D1 and D2 agree to pursue a course of conduct A (which will necessarily involve a crime) and also, if the circumstances necessitate, a course of conduct involving crime B, then it can be argued that they are guilty of *two* conspiracies. We believe that is the right approach, and our recommendation is to that effect,¹⁸ as the best way of affording certainty and fairness to both the prosecution and the defence.
- 4.14 An alternative way of charging conspiracies to commit more than one offence would be to regard each offence incorporated in the agreement as an essential element of the conspiracy.¹⁹ However, the difficulty with this is that if one offence was not proved to the satisfaction of the jury, or there was a failure to adduce sufficient evidence to amount to a case to answer, then the count would fail.²⁰ This may unfairly disadvantage the prosecution.

¹² See the discussion at para 4.12 below.

¹³ See Drug Trafficking Act 1994, s 49(2).

¹⁴ See Criminal Justice Act 1988, s 93C(2)(b).

¹⁵ Proceeds of Crime Act 2002, s 327.

¹⁶ This is because they will only apply to offences committed before the coming into force of the Proceeds of Crime Act 2002.

¹⁷ [2004] EWCA Crim 1944, [2005] 1 WLR 1574. See also Professor Ormerod, "Making Sense of Mens Rea in Statutory Conspiracies" [2006] 59 *Current Legal Problems* 185, 225 where he states "this is surely right". He refers to Professor JC Smith in the *New Law Journal* (1977) 1164, 1165.

¹⁸ See para 4.25 below.

¹⁹ *Roberts, Taylor, Chapman and Daly* [1998] 1 Cr App R 441, 449.

²⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 6.51 to 6.55.

- 4.15 There would be an additional difficulty if the conspiracies were not charged separately. This would be where (following enactment of our recommendations on the fault element) the charge involves a conspiracy to commit two substantive offences, one of which requires recklessness or negligence or its equivalent respecting a circumstance element, whereas the other has a more stringent fault requirement such as knowledge respecting a circumstance element.
- 4.16 Where a substantive offence has a fault requirement as to a circumstance element other than negligence or its equivalent, our recommendations require the prosecution to show that D had that fault element on a charge of conspiracy to commit the substantive offence in question.²¹ Where the substantive offence has a fault requirement as to a circumstance element involving negligence or its equivalent (or has no circumstance fault requirement), then on a conspiracy to commit that offence, the prosecution must show recklessness as to the existence of that element. It follows that, where the alleged conspiracy involves two offences with different fault requirements as to circumstance elements falling into each of these categories, the allegations should be expressed in terms of two conspiracies, one respecting each offence. This would provide clarity as to the way in which the prosecution put the case against D, enabling the defence to meet that case properly.

Response to our proposal

- 4.17 Our recommendation is based on the proposal made in the CP.²² This proposal proved relatively uncontroversial. Only one consultee disagreed with it in its entirety.²³ Additionally, the Senior Judiciary did not think it appropriate to comment, given that it is a procedural proposal based on the current state of the law (as opposed to suggesting a change in the law).
- 4.18 The Crown Prosecution Service said that they did not necessarily agree that the proposed change was necessary

given the general acceptance of the proposition that a single conspiracy may involve an agreement to commit more than one offence or a course of offences some of which are conditional upon the existence of certain conditions.

²¹ See recommendation 4, para 2.2 above.

²² Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, Part 6.

²³ Mr Justice Calvert-Smith thought that there should be a discretion available to the prosecution and thereafter the trial judge as to how conspiracies should be charged. Although he conceded that in some situations there would be a need for separate counts, his view was that it would in general simply be artificial to split a conspiracy into more than one count.

- 4.19 However, they added that, if there was to be a general prohibition against using a compendious count, then “we would certainly prefer the prescribed practice to be that the indictment be broken down into several counts each of which alleges a conspiracy”.²⁴
- 4.20 Most consultees agreed that in cases of one conspiracy to commit several different offences, the process of breaking down the conspiracy into separate counts would be a helpful one.
- 4.21 The Council of Her Majesty’s Circuit Judges observed:

Although Rule 14.2 Criminal Procedure Rules 2005 permits the inclusion of more than one incident in the commission of the offence, even in relation to substantive offences, the practice continues of charging such incidents in separate counts. The reasoning is set out in paragraphs 6.13 to 6.15 of the CP. We consider the same practice should be adopted in relation to the offence of conspiracy. We would add that if a composite charge is preferred in an indictment where separate counts of conspiracy could or should be preferred, we would suggest that it should be necessary for the prosecution to prove each of the offences said to be the subject of the conspiracy. It should not be sufficient for the prosecution to establish the offence which carries the longest term of imprisonment. We would support the doubts expressed in the passage cited at 6.28 from *Roberts, Taylor, Chapman and Daly* [1998] 1 Cr App R 441 at 449. Given the prosecution has the choice of preferring separate charges of conspiracy, to require proof of all offences specified would not be unfair to the prosecution and would provide necessary clarity for sentencing purposes.

- 4.22 We have considered whether it is necessary for us to recommend any changes as to the way in which offences are charged and indictments are drafted so as to put our recommendations into effect. As previously stated, we do not think that any change is necessary. First, it is clear from the existing case law that it is possible to charge one agreement to commit a course of conduct which if carried out in accordance with the intentions of D1 and D2 would amount to more than one offence.²⁵

²⁴ This is in preference to the alternative option cited at para 4.14 that we considered and dismissed in the CP that the ulterior offences be specifically pleaded in a single conspiracy count. This would have had the consequence that a failure on the part of the prosecution to prove any one of the offences incorporated in the count would amount to a failure to prove the count.

²⁵ See *Roberts, Taylor, Chapman and Daly* [1998] 1 Cr App R 441, 449, where Phillips LJ cited in passing the following passage from *Cooke* [1986] AC 909:

A single agreement to pursue a course of conduct which involves the commission of two different specific offences could perfectly properly be charged in two counts alleging two different conspiracies, eg a conspiracy to steal a car and a conspiracy to obtain money by deception by selling the car with false registration plates and documents.

See also, *Attorney General’s Reference (No 4 of 2003)* [2004] EWCA Crim 1944, [2005] 1 WLR 1574.

- 4.23 Secondly, the new Criminal Procedure Rules to which we have referred at paragraph 4.4 above do not prohibit the use of separate counts in the circumstances that we recommend. The new rule 14.2.2 merely makes it possible to include more than one offence in one count where the circumstances of the case lend themselves to multiple counts. There is still a discretion to charge offences in separate counts. The Practice Direction (Criminal Proceedings: Consolidation)²⁶ makes it clear that in cases, other than conspiracy cases, “where what is in issue differs between different incidents a single ‘multiple incidents’ count will not be appropriate”. Further, where multiple incidents counts are appropriate, the penalty for the offence may have changed during the period over which the alleged incidents took place. The Practice Direction states that “in such a case additional multiple incidents counts should be used so that each count only alleges incidents to which the same maximum penalty applies”. By analogy, therefore, separate counts are possible and appropriate in the circumstances with which we are concerned namely, conspiracy to commit more than one offence.²⁷
- 4.24 Finally, if it is thought that in future the Criminal Procedure Rules should specifically provide for separate counts of conspiracy to embark upon a course of conduct which, if carried out, will amount to more than one offence, then the enabling legislation is sufficiently wide to permit further secondary legislation on the point.
- 4.25 **We therefore recommend that**

agreements comprising a course of conduct which, if carried out, will amount to more than one offence with different fault as to circumstance elements or to which different penalties apply,²⁸ should be charged as more than one conspiracy in separate counts on an indictment.

(Recommendation 6)

ALTERNATIVE OFFENCES UNDER THE SERIOUS CRIME ACT 2007

- 4.26 In some cases involving encouraging and assisting the commission of offences, D may have an intention to encourage or assist either one offence or another, depending on the circumstances. This situation is dealt with by section 46 of the 2007 Act, by virtue of which it is an offence to do an act capable of encouraging or assisting the commission of an offence, believing one or more offences will be committed.²⁹ Section 46 of the 2007 Act provides:

(1) A person commits an offence if-

²⁶ [2007] 1 WLR 1790: see paras iv.34.8 to iv.34.12.

²⁷ Having separate counts in such a situation is in any event consistent with Part 1 of the Criminal Procedure Rules (the overriding objective) because it simplifies matters and fairly outlines the case for the prosecution.

²⁸ With the exception of pre-Proceeds of Crime Act 2002 conspiracies to launder unidentified criminal proceeds.

²⁹ It is sufficient for D to believe that the offence/s will be committed, if certain conditions will be met: Serious Crime Act 2007, s 49(7).

- (a) he does an act capable of encouraging or assisting the commission of one or more of a number of offences; and
 - (b) he believes-
 - (i) that one or more of those offences will be committed (but has no belief as to which); and
 - (ii) that his act will encourage or assist the commission of one or more of them.
- (2) It is immaterial for the purposes of subsection 1(b)(ii) whether the person has any belief as to which offence will be encouraged or assisted.
- (3) If a person is charged with an offence under subsection (1)-
- (a) the indictment must specify the offences alleged to be the “number of offences” mentioned in paragraph (a) of that subsection; but
 - (b) nothing in paragraph (a) requires all the offences potentially comprised in that number to be specified.

4.27 Consider this example:

Example 4B

D volunteers to drive a gang to a public house knowing that they will commit either robbery or murder but he does not know which of the two offences the gang will commit.

How should D be charged?

4.28 The 2007 Act provides that the indictment must specify the offences alleged to be the number of offences encouraged or assisted.³⁰ However, it does not say whether the offences should be specified in the same count, or in separate counts. Further, section 48(2) provides that, in proving an offence under section 46, it is “sufficient to prove the matters mentioned in section 47(5) [the fault elements] by reference to one offence only”.

³⁰ Serious Crime Act 2007, 46(3)(a).

- 4.29 Suppose that D was charged in one count on the indictment with encouraging or assisting robbery or murder. It is difficult to see how the need for a *Brown* direction³¹ will be avoided, in the light of section 48(2). In *Brown (K)*³² it was held that (subject to the majority direction) each ingredient of the offence must be proved to the satisfaction of each member of the jury. Where there are a number of matters specified in the charge as together constituting one ingredient in the offence, and any one of them is capable of doing so, then it is enough to establish the ingredient that any one of them is proved. However, any such matter must be proved to the satisfaction of the whole jury. The jury should be directed accordingly, it being made clear to them that they should all be satisfied of the ingredient.
- 4.30 For the sake of clarity, we think that it would be preferable for each of the anticipated offences to be listed in different counts notwithstanding that they are both part of the section 46 offence. This will avoid uncertainty concerning exactly what D has been convicted of where D is charged with encouraging one or more different kinds of offences.

FURTHER QUESTIONS ON PROCEDURAL ISSUES

- 4.31 In the CP we asked two questions about summary jurisdiction in relation to conspiracy.³³ In asking these questions, we were mindful of the fact that, in agreeing to commit summary offences, D is likely to be twice removed from the causing of harm (if any is involved at all), as many summary offences are concerned with activities that cause public nuisance, or only risk harm as opposed to causing it.
- 4.32 The first question concerned section 4(1) of the 1977 Act, under which the consent of the Director of Public Prosecutions must be obtained before a charge of conspiracy to commit a summary offence can be brought.³⁴
- 4.33 The Crown Prosecution Service said that they regarded the consent of the Director of Public Prosecutions to be unnecessary, given the advent of the statutory charging regime in the Criminal Justice Act 2003. Mr Justice Calvert-Smith was also of this view.
- 4.34 We consider that conspiracy to commit a summary offence should be subject to the same charging regime as all other offences. Any offence which requires the consent of the Director of Public Prosecutions should be provided for by statute defining the substantive offence.

³¹ *Brown (K)* (1983) 79 Cr App R 115.

³² Above.

³³ Conspiracy is triable on indictment only.

³⁴ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 6.67. Question 4 was:

Should the law retain the requirement of the consent of the DPP to a prosecution for conspiracy to commit a summary offence?

4.35 **We therefore recommend that**

the present requirement for the Director of Public Prosecutions to give consent if proceedings to prosecute a conspiracy to commit a summary offence are to be initiated need not be retained.

(Recommendation 7)

4.36 We asked a further question which was:

Should conspiracy to commit a summary offence itself be a summary offence?³⁵

4.37 The responses to this question were divided.

4.38 The Crown Prosecution Service was of the view that conspiracy to commit a summary offence should be triable either way. This would enable it to be tried summarily, on it being considered suitable and provided the defendant consents. This view could prove to be problematic. On charges of conspiracy, there is usually more than one defendant. In a case where the magistrates' court accepts jurisdiction and one of two defendants wishes to elect a Crown Court trial, then the court will have to sever the defendants.³⁶ This may be difficult, given the nature of the charge.

4.39 The Criminal Bar Association made an additional point. They thought that the present requirement, that the offence of conspiracy to commit a summary offence is indictable only, means that there is an effective deterrent to the possibility of matters being overcharged as conspiracy when in fact there is insufficient evidence to make out the substantive offence.

Conclusion

4.40 We have decided that conspiracy to commit a summary offence should remain as an indictable only offence. In our view this is justifiable for the following reasons. First, such conspiracies are only charged when there is a sufficiently high degree of criminality to warrant such a charge. Secondly, as some consultees pointed out, the issues are likely to be too complex to be resolved summarily.

4.41 It is in this context that we have also considered the question of consistency with the 2007 Act. Section 55(1) of the 2007 Act provides that an offence under section 44 or 45 is triable in the same way as the anticipated offence. There is therefore an obvious difference between the present position with conspiracy and the position with encouraging or assisting crime.

³⁵ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, question 5, para 6.69.

³⁶ See Magistrates Courts Act 1980, s 20(3); *R v Brentwood Justices ex parte Nicholls* [1992] 1 AC 1.

4.42 However, offences alleged to have been committed under section 46 of the 2007 Act are indictable only. This is the case notwithstanding that the “one or more” offences contemplated in the charge may all be summary only. The distinction for offences committed under section 46 is justifiable on the basis that the issues of multiple intent are likely to be complex. There may be issues of similar complexity in conspiracy cases. Examples would be cases involving many defendants, and the evocation of the special evidential rules that apply to conspiracy cases.³⁷ The possibility that such complexities may arise points towards the need for conspiracy to remain triable only on indictment.

³⁷ We refer to the following rules: (1) that acts and declarations made by D1 in furtherance of the conspiracy may be admitted as evidence against D2 (and vice versa) provided that at the time when the act or declaration was made, D2 was a party to the conspiracy; (2) the act or declaration of D1 can be admitted against D3 regardless of whether D1 is present at the trial of D2 and D3; and (3) acts or declarations made by agents, including innocent third parties of a conspirator, are admissible against all other conspirators: *Devonport and Pirano* [1996] 1 Cr App R 221.

PART 5

EXEMPTIONS

INTRODUCTION

- 5.1 In this Part we make recommendations concerning the exemptions for certain categories of ‘conspirator’ provided for by section 2 of the 1977 Act.
- 5.2 First, we consider whether the current immunity for conspiracies made between spouses and between civil partners should be retained. In the CP, we took the view that this exemption is anachronistic. In light of the responses to the CP, we remain of this view and therefore recommend its abolition.
- 5.3 Secondly, we consider how best to deal with a conspirator who enters into an agreement with the intended victim of the offence. In the CP we proposed that the present exemption for victims and the non-victim co-conspirator be abolished. We discussed two possibilities: either providing the victim with a defence, or making it possible to convict the non-victim co-conspirator of an attempt to conspire. We now take the view that the latter possibility is not a viable option.¹ Accordingly we recommend that the exemption for the non-victim co-conspirator should be abolished, but that the limitation on liability in relation to the victim should be retained.
- 5.4 We further recommend that the terms on which liability should be limited should be consistent with those in relation to victims in the 2007 Act.
- 5.5 These recommendations differ slightly from our proposal in the CP. This was that the present exemption for victim and non-victim co-conspirator should be abolished, and that the victim should be given a defence. However, in the 2007 Act the position of the victim of an offence of encouraging and assisting is dealt with by way of an exemption from liability,² and we now wish to achieve consistency in this area between our recommendations for conspiracy and the provisions of the 2007 Act.
- 5.6 Finally we consider the position of a conspirator who makes an agreement with a child under the age of criminal responsibility. We recommend that the current rule that this kind of agreement should give rise to no criminal liability should be retained. In that regard, we further consider the issue of double inchoate liability and the implications of the 2007 Act.

SPOUSAL IMMUNITY

The current exemption

- 5.7 Section 2(2)(a) of the 1977 Act provides that a person is not guilty of a statutory conspiracy:

¹ See paras 3.11 to 3.23 above for the reasons as to why we have decided against a repeal of s 1(4)(a) of the Criminal Attempts Act 1981.

² Serious Crime Act 2007, s 51.

... if the only other person ... with whom he agrees [is] (both initially and at all times during the currency of the agreement) ... his spouse or civil partner

- 5.8 The rule does not apply if the marriage takes place after the agreement is formed.³ Further, if there is a third party to the agreement, the married couple can be held liable for the offence of conspiracy.⁴ It is irrelevant that one spouse did not come to any positive agreement with that third party, provided that he or she knew that there was another conspirator.⁵

Proposals in the CP

- 5.9 In the CP, we proposed that the immunity provided for by section 2(2)(a) should be abolished, on the basis that the underlying rationale is outdated and the rule results in unacceptable anomalies within our criminal law.

Rationale for the current law

- 5.10 The rule is based on the legal fiction that a husband and wife are one legal entity.⁶ As a conspiracy requires an agreement between two minds, a single entity will not suffice for the commission of the offence. However, the fiction that a husband and wife represent one will, or that one should subsume their identity in that of the other, has no place in the modern law.
- 5.11 The rule was also informed by public policy considerations; primarily, that the stability of marriage would be undermined if a husband and wife could be liable for conspiracy. The rule is meant to ensure that marital confidences remain private, that the law enforcement authorities cannot apply improper pressure and that the peace of families is preserved. Further, the law wishes to avoid a conflict between the duty owed by a wife to her husband and the duty she owes to the state not to break the law.

³ *Robinson's Case* [1746] 1 Leach 37.

⁴ *Lovick* [1993] Criminal Law Review 890.

⁵ *Chrastrny* [1991] 1 WLR 1381, 1384. The Court observed:

It seems to us plain, therefore, that if, for example, a wife, knowing that her husband is involved with others in a particular conspiracy, agrees with her husband that she will join the conspiracy and play her part she is thereby agreeing with all those whom she knows are the other parties to the conspiracy.

⁶ In *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496, 520 to 521, Oliver J stated that it was "beyond doubt" that the rule stemmed from biblical theory and that, "the subsequent search for a more logical analysis resulted in the premise that ... the wife had no independent will or her own". Genesis ch 3, v 16 states that the husband shall "rule over" the wife, and Genesis ch 2, vs 21 to 24 state that woman was created from man and that in union they become "one flesh".

5.12 In the CP, we did not regard these considerations as being persuasive any longer.⁷ There is a distinction between ordinary confidences between husband and wife and conspiring to commit a crime. The concern to avoid improper pressure being brought to bear on another could equally apply to other people in close relationships and so its limited application to spouses and civil partners appears arbitrary. It is also arguable that the law should extend to couples married after the formation of the conspiracy, if it is intended to preserve the peace of families. Further, the duty not to breach the law outweighs any special duty owed by one spouse to another or one civil partner to another. For many, the rule will also draw what appears to them to be an arbitrary line between those who are married and those in long-standing and stable extra-marital relationships.

Anomalies within the law

5.13 The exemption also creates anomalies within the law. A spouse or civil partner may now be convicted of encouraging or assisting his or her spouse or civil partner to commit an offence, but not of conspiring with his or her spouse or civil partner. In addition, if one spouse or civil partner goes on to commit the substantive offence that they have conspired to commit they can both be convicted of the substantive offence, one as principal offender and the other as the secondary party. Finally, once a third party joins the conspiracy, each spouse or civil partner can be prosecuted.

5.14 We believe that the danger that conspirators pose to the public and the moral culpability of those who have formed an agreement to commit a substantive crime does not, and should not, depend on their legal relationship to each other. Further, under our recommendations, it will always be open to a spouse or civil partner (or to any other person with a prior relationship to a fellow conspirator) to claim that, by virtue of the nature of that relationship, they should be acquitted on the grounds that it was reasonable to take part in the conspiracy in the circumstances.⁸

Responses to the CP

5.15 Support for the proposal to abolish this exemption in the CP was unanimous amongst those consultees who addressed the issue. Of those who gave reasoned responses to the proposal, all concurred with the reasoning set out in the CP.

5.16 **We therefore recommend that**

the immunity for spouses and civil partners provided for by section 2(2)(a) of the Criminal Law Act 1977 should be abolished.

(Recommendation 8)⁹

⁷ See Conspiracy and Attempts (2007), Law Commission Consultation Paper No 183, paras 9.17 to 9.21.

⁸ See the discussion of the 'reasonableness' defence in Part 6 below.

⁹ See s 2(2) of the Criminal Law Act 1977 as amended by cl 3(4) and (6) of the draft Bill.

LEGALLY PROTECTED PERSONS

The current exemption

5.17 Section 2(1) of the 1977 Act provides that:

A person shall not ... be guilty of an offence if he is an intended victim of that offence.

5.18 Section 2(2)(c) states that a person is exempt from liability for statutory conspiracy if:

the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) ... an intended victim of that offence or each of those offences.

5.19 The term "victim" is not defined in the Act. In our view, a person is a "victim" if two criteria are fulfilled. First, the substantive offence agreed upon must be one designed for his or her protection, and in respect of which he or she cannot be convicted of committing, or inciting. Secondly, he or she must be the person against whom the substantive offence would be committed if the agreement were carried out.

The rationale for the exemption of the victim

5.20 The rationale for exempting the victim is that it will be contrary to the policy underlying the substantive offence, to hold a person criminally liable for agreeing to commit that offence, when it exists for that person's own protection. The exemption is based on the decision in *Tyrrell*,¹⁰ in which an adult (P) had unlawful intercourse with a child aged between 13 and 16 (D).¹¹ It was held that D could not be convicted of committing the offence as a secondary party (or of inciting the offence) because the offence had been enacted for the purpose of protecting a category of persons and D fell within the category. The same rationale applies to a conspiracy to commit the substantive offence in such circumstances.

Encouraging or assisting crime

5.21 In our report on assisting and encouraging crime,¹² we recommended that D should be exempt from liability only if, in enacting the principal offence, it was Parliament's intention to afford protection to a particular category of persons and D falls within that category. However, we also concluded that D must be an intended victim.

5.22 We recommended¹³ that it should be a defence to a charge of encouraging or assisting crime if:

- (1) The offence encouraged or assisted is one that exists wholly or in part for the protection of a particular category of persons;

¹⁰ [1894] 1 QB 710.

¹¹ Contrary to s 5 of the Criminal Law Amendment Act 1885.

¹² Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

¹³ Above, para 6.44.

- (2) D falls within the protected category;
- (3) D is the person in respect of whom the offence encouraged or assisted was committed or would have been committed.

5.23 The 2007 Act took forward the Law Commission's recommendations, in the sense that it provided an exemption from liability for encouraging or assisting in respect of the victim.¹⁴ Section 51 provides that the exemption applies in relation to the victim (who provides the encouragement or assistance) as follows:

- (1) In the case of protective offences, a person does not commit an offence under this Part by reference to such an offence if-
 - (a) he falls within the protected category; and
 - (b) he is the person in respect of whom the protective offence was committed or would have been if it had been committed.
- (2) "Protective offence" means an offence that exists (wholly or in part) for the protection of a particular category of persons ("the protected category").

Application of the exemption to conspiracy

5.24 The application of this exemption to conspiracy would achieve a result which differs from the current provisions in the 1977 Act in two ways. First, the 2007 Act states explicitly in what circumstances a person would be deemed to be a victim of an offence and worthy of protection. This would make the exemption clearer, and would promote consistency among the inchoate offences.

5.25 Secondly, the recommendation only exempts the person who is the victim of the offence, by contrast with the current law, which exempts both the victim and the non-victim co-conspirator. For example:

Example 5A

D1 (a 12-year-old girl) and D2 (her 15-year-old friend) agree that D1 should have sexual intercourse with P (an adult).

5.26 Such conduct would amount to conspiracy to commit child rape under section 5 of the Sexual Offences Act 2003, because D1 cannot validly consent to sexual intercourse. D1 is exempt from liability for conspiracy because section 5 was enacted to protect children under the age of 13. However, under our scheme, D2 would not be exempt from liability. This is in line with the provisions of the 2007 Act, section 51(1)(b) of which requires that, in order to be exempted, D "is the person in respect of whom the protective offence was committed or would have been if it had been committed". For that same reason, D2 would be guilty under the 2007 Act of encouraging or assisting an offence under section 5 of the Sexual Offences Act 2003.

¹⁴ As opposed to providing a defence.

- 5.27 The issue is now whether, in such circumstances, it should be possible to convict D2 of conspiracy.

Proposals in the CP

- 5.28 In the CP, we accepted that the rationale for the exemption for the victim was sound. However, we concluded that it should be made clear that the exemption does not extend to the conspirator who is not in fact the victim, even though he or she falls (for example, on the grounds of youth) within the protected category. A conspirator over 10 years of age is deemed capable of forming a criminal intent. Therefore, when such a person conspires with another (who is also over 10 years of age) there can be a meeting of two minds capable of forming a criminal intent, even when the crime they agree to commit is one meant to protect young people.
- 5.29 We therefore proposed that the current exemption be abolished, but that this abolition should be subject to the victim co-conspirator being provided with a defence. We also asked consultees whether it should be possible to convict someone of attempting to conspire, as an alternative way of dealing with the non-victim co-conspirator.

ATTEMPTING TO CONSPIRE

- 5.30 As we pointed out in Part 3,¹⁵ an alternative option to abolishing the current exemption and providing an exemption for the victim co-conspirator would be to make it possible to charge D with attempting to conspire by repealing section 1(4)(a) of the 1981 Act. This would remove the need for a meeting of criminal minds and would also reflect the culpability of the non-victim conspirator.
- 5.31 However, we have decided against this. As we explained in Part 3, there was significant opposition to it from consultees. Further, there would be an unacceptable overlap with the offence of encouraging and assisting a conspiracy¹⁶ and with attempting to commit an indictable offence of encouraging and assisting.

Responses to the CP

AN EXEMPTION FOR THE VICTIM CO-CONSPIRATOR

- 5.32 Agreement with this proposal was unanimous amongst consultees. In particular, several consultees commented that it would be desirable to promote consistency among the inchoate offences by taking the same approach as section 51 of the 2007 Act.
- 5.33 In the light of the responses to the CP, and in order to achieve consistency with the 2007 Act, we are now recommending that the victim co-conspirator should be exempt from liability. This is slightly different from our original proposal. That was (a) to abolish the exemptions under section 2(1) and section 2(1)(c) in respect of both victim and non-victim co-conspirator, and (b) to give the victim a defence.

¹⁵ See paras 3.11 to 3.12 above.

¹⁶ Contrary to s 44 of the Serious Crime Act 2007.

5.34 However, we do recommend that the present exemption in relation to the non-victim co-conspirator should be abolished. This is for the reasons outlined at paragraph 5.28 above.

5.35 **We therefore recommend that**

the present exemption for a non-victim co-conspirator should be abolished but that the present exemption for a victim (D) should be retained if:

- (a) **The conspiracy is to commit an offence that exists wholly or in part for the protection of a particular category of persons;**
- (b) **D falls within the protected category; and**
- (c) **D is the person in respect of whom the offence agreed upon would have been committed.**

(Recommendation 9)¹⁷

CHILD CONSPIRATORS

The current exemption

5.36 Under section 2(2)(b) of the 1977 Act, a person is exempt from liability for conspiracy if:

The only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) ... a person under the age of criminal responsibility.

5.37 There is a conclusive presumption that a child under 10 cannot be guilty of a criminal offence.¹⁸ Therefore, there is no conspiracy if there is an agreement only between an adult and child under 10.

5.38 The rationale for this exemption is that a person under the age of criminal responsibility is not in law considered capable of forming a criminal intent. If one of two people involved in a conspiracy is legally incapable of forming the mental element required, the basis of the offence collapses.

¹⁷ See s 2(1) of the Criminal Law Act 1977 as amended by cl 3(2) and (3) of the draft Bill.

¹⁸ Section 2(3) of the Criminal Law Act 1977 states that a person is under the age of criminal responsibility "so long as it is conclusively presumed, by virtue of s 50 of the Children and Young Persons Act 1933, that he cannot be guilty of any offence". Section 50 of the Children and Young Persons Act 1933 states that "it shall be conclusively presumed that no child under the age of ten years can be guilty of an offence".

Proposals in the CP

- 5.39 In the CP, we proposed that this rule be retained, despite the fact that it may appear unsatisfactory that the adult's criminal responsibility rests in part on the age of his or her co-conspirator. Our proposal reflected our view that, when one of the two conspirators is a child under ten, there is not the requisite meeting of guilty minds that is of the essence in conspiracy cases. Further, as we will see below,¹⁹ following the enactment of the 2007 Act, it will now be possible to convict the adult co-conspirator of the inchoate offence of encouraging and assisting a conspiracy.

Double inchoate liability and the Serious Crime Act 2007

- 5.40 As discussed above,²⁰ we also consulted on whether section 1(4)(a) of the 1981 Act should be repealed. This would allow the adult co-conspirator to be convicted in this situation of attempting to conspire. However, the majority of consultees disagreed with repealing section 1(4)(a).²¹ In the light of the bringing into force of the provisions of the 2007 Act, it will not in fact be necessary to repeal section 1(4)(a) in order to convict the adult co-conspirator.²²
- 5.41 Section 44 of the 2007 Act makes it an offence to do an act capable of encouraging or assisting an offence, intending to encourage or assist its commission. In an offence requiring proof of fault, section 47(5)(a)(iii) requires that "D's state of mind was such that, were he to do it, it would be done with that fault". Therefore, under these provisions, it would be possible to convict an adult, who reaches an agreement with a child, of encouraging the formation of a conspiracy.

Example 5B

D1, a 20-year-old man, agrees with D2, an 8-year-old child, that they will steal a bicycle.

- 5.42 In this example D1, by making the agreement with D2, intentionally does an act capable of encouraging the offence of conspiracy (to commit theft). Therefore, the offence under section 44(1) of the 2007 Act is made out. D1 commits the offence, even though the facts are such that the commission of the crime is impossible in these circumstances, because D is under 10.²³ As we stated in our report on assisting and encouraging crime:

¹⁹ See paras 5.41 to 5.42 below.

²⁰ See para 5.31 above.

²¹ See para 5.31 and Part 3 above for reasons.

²² An alternative would be to convict the adult co-conspirator under the Serious Crime Act 2007 of encouraging a conspiracy: see paras 3.8 to 3.10 above.

²³ There is no defence of impossibility under the Serious Crime Act 2007.

If D can be liable notwithstanding that, contrary to D's belief, P never intends to commit the principal offence, it would be illogical if D was able to plead that it would have been impossible to commit the principal offence.²⁴

Responses to the CP

5.43 The majority of respondents on this point agreed that the rule that an agreement between an adult and a child under the age of criminal responsibility should not give rise to liability should be retained.

5.44 However, the majority of respondents answered question 6 in the CP in the negative. Question 6 had asked whether section 1(4)(a) of the 1981 Act should be repealed to allow the possibility of attempting to conspire.

5.45 **We therefore recommend that**

the rule that an agreement involving a person of or over the age of criminal responsibility and a child under the age of criminal responsibility gives rise to no criminal liability for conspiracy should be retained.

(Recommendation 10)

²⁴ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 6.61.

PART 6

DEFENCE OF ACTING REASONABLY

INTRODUCTION

- 6.1 In this Part, we explain why we are recommending that the defence of “acting reasonably”, provided for by section 50 of the 2007 Act in relation to offences of encouraging or assisting crime, should be applied to conspiracy. This recommendation is based on our provisional proposal for such a defence in the CP,¹ and is reflected in the draft Bill.²
- 6.2 In the CP, we came to the conclusion that there would be difficulties with only having a narrow defence to conspiracy focused solely on the prevention of crime or harm (which is what we were initially minded to propose).
- 6.3 In our report on assisting and encouraging crime,³ we recommended that there should be a defence of acting in order to prevent the commission of an offence or in order to prevent or limit harm. This recommendation provided that D should have a defence if:
- (1) he or she acted for the purpose of:
 - (a) preventing the commission of either the offence that he or she was encouraging or assisting or another offence; or
 - (b) prevent or limit the occurrence of harm; and
 - (2) it was reasonable to act as D did in the circumstances.⁴
- 6.4 We made this recommendation principally because it is in the public interest that, within reasonable bounds, acts be done in order to prevent crime or to prevent or limit the occurrence of harm.⁵ In any event, an ordinary citizen who does only what is reasonable to that end should have a complete defence available to them to reflect his or her lack of culpability.

¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 6, para 8.49.

² See s 2A of the Criminal Law Act 1977, as inserted by cl 4(1) of the the draft Bill.

³ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

⁴ Above, para 6.16.

⁵ Above, para 6.8.

- 6.5 We did not recommend that the defence should be limited to particular individuals or categories. Further, we did not recommend that incidental offences should be excluded from the scope of the defence.⁶ So if the offence (X) is committed in the course of preventing another offence (Y), X will still come within the scope of the defence. The focus should simply be on whether D acted reasonably in all the circumstances. If it was unreasonable to commit offence X in order to prevent offence Y, then the defence should not succeed.⁷
- 6.6 Acknowledging that the defence could be open to abuse, we recommended that there should be two restraining features.
- 6.7 First, we imposed an objective requirement that D must have acted reasonably in all the circumstances. Therefore, D can only plead the defence if what he or she did was proportionate to the seriousness of the offence or harm that he or she was trying to prevent. This requirement was intended to filter out unjustified claims.
- 6.8 Secondly, we recommended that D should bear the legal burden of proving the defence on a balance of probabilities. We explain in our report why we do not believe that placing the legal burden on D is incompatible with the presumption of innocence in article 6(2) of the European Convention on Human Rights and Fundamental Freedoms.⁸
- 6.9 The prevention of crime or harm defence was to be available both when D intended to encourage or assist crime (now section 44 of the 2007 Act) and when D believed that his or her act would encourage or assist crime (now section 45). In addition to a defence of preventing crime or harm, we also recommended a general defence of acting reasonably.⁹ The wider defence of acting reasonably was only to apply to the lesser (now the section 45) offence of doing an act believing that the act will encourage and assist crime.¹⁰ By way of contrast with the prevention of crime or harm defence, the defence of acting reasonably was excluded from having an application to cases in which D had intended to encourage or assist crime.

⁶ Inchoate Liability of Assisting and Encouraging Crime (2006) Law Com No 300, para 6.12.

⁷ For example, P is a member of a gang planning an armed robbery. D, who is a police officer who has infiltrated the gang, tells P where to steal a lorry which can be used in the robbery. D does so in order to maintain credibility with members of the gang. D's aim is to prevent the commission of the robbery. In these circumstances, although D's assistance was not for the purpose of preventing P committing theft, he should be able to plead the proposed defence to a charge of encouraging or assisting theft.

⁸ Inchoate Liability of Assisting and Encouraging Crime (2006) Law Com No 300, para 6.15.

⁹ Above, para 6.26.

¹⁰ We gave the following example of where the defence of acting reasonably might apply to what is now the s 45 offence: D moves from the outside lane of a motorway to the middle lane to let a faster driver through, knowing that the faster driver will be exceeding the speed limit (but not intending to assist the faster driver to do so). In this case D in effect knows that he will assist the faster driver to continue speeding, but in this context D's conduct can be regarded as reasonable. This takes account of the fact that, without the reasonableness defence, D would be liable even if the faster driver suddenly decided to slow down rather than overtake.

- 6.10 The reason for applying the defence of acting reasonably only to the section 45 offence was that it seemed to us wrong to characterise actions which were *intended* to encourage or assist a criminal offence as reasonable. We took the view that matters were different when D did not intend to encourage or assist crime, but merely believed that his or her act would encourage or assist crime. In such cases, we thought that the reasonableness defence was justified to prevent the net of liability being cast too widely.
- 6.11 The Government did not adopt our recommendation for a discrete crime prevention defence in the 2007 Act. Instead the 2007 Act provides for a broad defence of acting reasonably, applicable both to cases in which D intended to encourage or assist, and when he or she believed that his or her acts would encourage or assist.

THE SERIOUS CRIME ACT 2007

- 6.12 Section 50 of the 2007 Act provides:
- (1) A person is not guilty of an offence under this Part if he proves-
 - (a) that he knew certain circumstances existed; and
 - (b) that it was reasonable for him to act as he did in those circumstances.
 - (2) A person is not guilty of an offence under this Part if he proves-
 - (a) that he believed certain circumstances to exist;
 - (b) that his belief was reasonable; and
 - (c) that it was reasonable for him to act as he did in the circumstances as he believed them to be.
 - (3) Factors to be considered in determining whether it was reasonable for a person to act as he did include-
 - (a) the seriousness of the anticipated offence (or, in the case of an offence under section 46, the offences specified in the indictment);
 - (b) any purpose for which he claims to have been acting;
 - (c) any authority by which he claims to have been acting.
- 6.13 There is only one defence and it is applicable to all three offences under the 2007 Act.¹¹ It encompasses both of the defences which we proposed.

¹¹ Serious Crime Act, ss 44, 45 and 46.

- 6.14 Section 50(3) makes provision for those who act in order to prevent crime, or more broadly, those who act under the authority of law enforcement agencies.¹² However, section 50(3)(b) also reflects the wider ambit of the defence, of acting reasonably in the light of some other purpose.

APPLICATION OF OUR ORIGINAL PROPOSALS TO CONSPIRACY

- 6.15 If the defences that we had originally proposed in our report on assisting and encouraging crime had been enacted in the 2007 Act as we recommended they should be, then we would have had little difficulty in proposing that the defence of prevention of crime (which was intended to apply to the offence of intentionally encouraging and assisting – now the section 44 offence) should apply equally to conspiracy. This is because conspiracy itself is always an offence involving intention. It is never committed purely inadvertently or recklessly. It is therefore analogous to the inchoate offence of intentionally encouraging or assisting an offence.
- 6.16 There have always been sound policy reasons for a defence of prevention of crime, even for inchoate offences committed intentionally.

Policy reasons for a defence of crime prevention

General considerations

- 6.17 A participant in a conspiracy (D) may have an ulterior motive of crime prevention, for example by preventing the commission of further offences by exposing the substantive offence that is the object of the conspiracy. Alternatively, D may be acting in order to prevent or limit the harm caused by the planned criminal activity, for example by persuading other participants to steal rather than rob. However, under the current law,¹³ neither of these motivations would provide D with a defence. So long as D intends to play some part in the plan, D can be convicted of conspiracy even though he or she does not intend the conspiracy to succeed.¹⁴
- 6.18 There are good reasons to provide a defence to a charge of conspiracy for someone who only enters a criminal conspiracy in order to prevent crime or to limit the occurrence of harm. First, it is in the public interest that such conduct is tolerated, to facilitate the disruption of the activity of criminal gangs and the exposure of criminal activity. Secondly, in accordance with the principle of fair labelling, such individuals should not share the same criminal label as the very individuals whom they are seeking to expose. Thirdly, it is unsatisfactory that the current position effectively means that law enforcement officers and others seeking to prevent crime are reliant on the discretion of the prosecuting authorities.

¹² The wording makes specific reference to the seriousness of the ulterior offence and therefore suggests that it should be weighed up against any authority which may have been given. This is presumably a reference to authority which may have been granted to law enforcement officers.

¹³ *Yip Chiu-Cheung v R* [1995] 1 AC 111.

¹⁴ *Anderson* [1986] AC 27. Although it should be noted that s 1ZA(2)(a) of the Criminal Law Act 1977, as inserted by cl 1(3) of the draft Bill, ensures that *Anderson* will no longer be followed.

- 6.19 As far as this last point is concerned, section 29 of the Regulation of Investigatory Powers Act 2000 (“the 2000 Act”) provides for the regime under which the activity of covert human intelligence sources, or “CHIS”, (essentially undercover agents, investigators and informants) may be authorised by public bodies including the intelligence agencies and police forces. One of the grounds on which this undercover activity may be authorised is the prevention of crime. Activity which is authorised under Part II is lawful for all purposes¹⁵ and the CHIS Code of Practice states that such an authorisation may in a very limited range of circumstances “render lawful conduct which would otherwise be criminal”.¹⁶
- 6.20 In practice, undercover work is frequently unpredictable and there are circumstances in which it may be impracticable or dangerous for an undercover investigator or informant to refuse to participate in a criminal conspiracy or to refer back to his or her handler¹⁷ before doing so. As a consequence, he or she might have no choice but to operate outside the precise scope of the authorisation in pursuance of an unanticipated criminal conspiracy. The Code of Practice provides that “a source that acts beyond the limits recognised by the law will be at risk from prosecution”.¹⁸ At present he or she would have no defence to a charge of conspiracy in these circumstances, and would be reliant upon the prosecution exercising its discretion not to prosecute.
- 6.21 Finally, the current law also draws arbitrary distinctions. The law draws a distinction between an undercover officer (say) who intends to play some part in the fulfilment of the conspiracy, and one who simply agrees to take part but intends to do nothing further.¹⁹ The former can be convicted of conspiracy, whereas the latter cannot be convicted, even though both may share the same ulterior intention to expose the conspiracy. The distinction is arbitrary, because it may be a mere matter of chance whether an undercover officer is, or is not, required (in order to maintain cover) to do some act, however trivial, in furtherance of the conspiracy. In our view, the question of the officer’s liability for conspiracy should not turn on this issue. It should turn on whether, all things considered, it was reasonable for the officer to do as he or she did in order to expose the other participants.
- 6.22 We believe that these are all sound policy reasons in favour of a limited defence of crime prevention. Moreover, they do not point in favour of confining the benefit of the defence to formal or informal agents of the state.

¹⁵ Section 27(1) of the Regulation of Investigatory Powers Act 2000 provides:

Conduct to which this Part applies shall be lawful for all purposes if-

(a) an authorisation under this Part confirms an entitlement to engage in that conduct on the person whose conduct it is; and

(b) his conduct is in accordance with the authorisation.

¹⁶ Regulation of Investigatory Powers Covert Human Intelligence Sources: Code of Practice pursuant to Regulation Investigatory Powers Act 2000, s 71, para 2.10.

¹⁷ The term “handler” applies to both law enforcement agents and other informants.

¹⁸ Regulation of Investigatory Powers Covert Human Intelligence Sources: Code of Practice pursuant to Regulation Investigatory Powers Act 2000, s 71, para 2.10

¹⁹ *Anderson* [1986] AC 27.

The need for ordinary citizens to be able to avail themselves of the defence

- 6.23 A potential problem with any restriction of the defence to agents of the state is that it may be difficult to define exhaustively a test of eligibility to plead the defence. This may lead to cases turning on the technicality of whether or not D could be considered a formal or an informal agent of the state.²⁰ This might not be a particularly strong objection, were it not for the fact that once any potential defence is extended beyond prevention of crime to prevention of harm, the case for permitting it to be used by ordinary citizens becomes as strong if not stronger.
- 6.24 In the CP, we gave the following examples to illustrate this point:

Example 6A

D1, D2 and D3 are at a football match and meet a rival gang of supporters. D2 and D3 plan to stab a member (V) of the rival gang. D1, who does not want V to be harmed, manages to persuade D2 and D3 to damage V's car instead. D1 is charged with conspiracy to cause criminal damage.

Example 6B

D1 meets D2 who is a drug addict and who is convinced that V has stolen his stash of drugs. D2 states he is going to go to V's flat to "do him over". D1, unable to talk D2 out of this plan entirely, manages to persuade D2 to wait until V has exited the flat so that they can go to the flat and search for the drugs without harming him. On route to the flat, D1 and D2 are apprehended by the police. D1 is charged with conspiracy to burgle.

- 6.25 In these examples, we believe that it should be open to D1 to claim that, although he or she conspired to commit a crime, he or she was justified in doing so by the fact that a greater harm than the harm that would otherwise ensue was thereby prevented.

Moving beyond the prevention of crime or harm

General considerations

- 6.26 Given that the 2007 Act now provides for the wider defence of reasonableness, extending to acts intended to encourage or assist, a limited defence of crime or harm prevention for conspiracy runs the risk of creating inconsistency between the two inchoate offences of encouraging and assisting and conspiracy. Consistency between these offences is particularly important because acts of assisting and encouraging can overlap with conspiratorial acts.

²⁰ Inchoate Liability of Assisting and Encouraging Crime (2006) Law Com No 300, para 6.11. For example, if D is a paid informant in relation to some proceedings and not others but wants to rely on his informant status in relation to those other proceedings.

- 6.27 Additionally, if there were to be a distinction made regarding the availability of a defence, a side-effect may be that prosecutors would be encouraged to charge conspiracy when it would be more appropriate to charge the new inchoate offences of encouraging and assisting crime.²¹ There could be further complications in multi-handed trials in which defendants were charged with both intentionally encouraging or assisting crime and with conspiracy. Respecting what might be virtually identical kinds of conduct engaged in as part of the same sequence of acts, some defendants would be able to rely on the broader defence, whereas others would have to rely on the narrower prevention of crime or harm defence.

The significance of the Regulation of Investigatory Powers Act 2000

- 6.28 The wider defence of reasonableness is also more consistent with the regime under the 2000 Act for the authorisation of undercover agents, investigators and informants. This is because the grounds on which they may be authorised are far wider than the prevention of crime. They include crime detection, national security, public safety and the economic well-being of the UK.²² It makes sense that the defence should be available to undercover operatives acting on any of these grounds, and not just those acting with the purpose of preventing crime or harm.

Some countervailing considerations

- 6.29 The way that the laws of evidence operate in conspiracy cases may provide a reason against having a defence to conspiracy of either the prevention of crime or harm, or of reasonableness. The most important of these rules is the rule which states that acts and declarations in furtherance of the conspiracy by one conspirator can be admitted as evidence against another conspirator once he or she is shown to be a party to the conspiracy.²³

²¹ In much the same way as they presently opt for conspiracy instead of the substantive offence because of the advantages that it offers for them. See *Ali* [2005] EWCA Crim 87, [2006] QB 322 for a discussion of the convenience of the conspiracy 'umbrella'.

²² Regulation of Investigatory Powers Act 2000, s 29.

²³ See Professor JC Smith "Proving Conspiracy" [1996] *Criminal Law Review* 386 for an examination of the arguments as to what will suffice to demonstrate the existence of the conspiracy and that D is a party to it.

- 6.30 If a defence like one of the ones under discussion is available, D1 may be able to build evidence against D2 simply by adducing evidence of his own acts and declarations, knowing that he or she (D1) is likely to succeed with a defence.²⁴ This may lead to a stay of proceedings or applications to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984.²⁵ It is possible to see how, if the reasonableness defence was to be generally available, this would increase the risk that it would be misused. For example, in a joint trial, D1 could seek to rely on the defence, which would enable D2 to claim that it would be unfair to admit acts and declarations provided by D1 as evidence against him.²⁶ D2 could then seek exclusion of the evidence or severance of the indictment as between co-defendants. It is not easy to see how placing the legal burden of proving the defence on D will necessarily prevent this sort of abuse, particularly if defendants collude with each other in order to achieve long term gains such as severance.
- 6.31 However, this problem would exist whether or not the defence under consideration was limited to the prevention of crime or harm, or extended to any 'reasonable' action. The majority of our consultees said that the relevant defence should not be limited to the prevention of crime or harm but thought that the reasonableness defence should also apply in conspiracy cases. We specifically asked:²⁷

Are the interests of simplicity and consistency overridden, so far as the offence of conspiracy is concerned, by the need to confine the defence of acting reasonably to the prevention of crime or to acts engaged in under authority, as set out in clause 48(3)(a) and 48(3)(c) of the Serious Crime Bill?²⁸

²⁴ The position may be slightly different as far as agents of the state are concerned. They are more likely to be well aware of the dangers of building cases on this basis alone. They already have to operate whilst being aware of such rules, for example in cases involving 'agents provocateurs'. Boundaries governing what is permissible can be set by law and this may have an effect on what is admissible. However, we have already given reasons for not restricting the scope of any defence to formal and informal agents of the state.

²⁵ Section 78 of the Police and Criminal Evidence Act 1984 provides:

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

²⁶ Such a situation is contemplated in the Judicial Studies Board Specimen Direction ("Conspiracy") in relation to things said and done by A being relied upon as evidence against B:

then ask three questions ... [3]. Are you sure: ... That A in saying/doing what he did was not maliciously and falsely involving B in a conspiracy to which in truth he was not a party.

²⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 8.50.

²⁸ Now the Serious Crime Act 2007, s 50(3)(a) and (c).

- 6.32 Only three out of eight consultees who addressed the question agreed that there was a need to confine the defence in this way.²⁹ The other five consultees³⁰ agreed that simplicity and consistency with the 2007 Act are overriding considerations. A number of consultees commented that it is likely to be rare in practice that a defence relying on section 50(3)(b)³¹ will be allowed.³²

Conclusion

- 6.33 The Government's decision to reject our earlier recommendation for a narrower prevention of crime or harm defence to the offences of encouraging or assisting crime, and to extend that defence to one of reasonableness in the circumstances, must inevitably be a weighty factor affecting our recommendations for conspiracy. We consider that, in the interests of consistency, the defence to conspiracy should be similarly structured. This is particularly so when one considers the potential overlap between the acts that could be characterised as encouraging and assisting and acts that could be characterised as a conspiracy. Below, we examine the way in which we envisage that such a defence of acting reasonably could apply to conspiracy. We explain how it is reconcilable with the policy in relation to crime prevention cited at paragraphs 6.17 to 6.22 above.

DEFENCE OF ACTING REASONABLY

The function of section 50(3)(b) and its application to conspiracy

- 6.34 Section 50(3)(b)³³ is widely drawn and specifically refers to the purpose for which the defendant claims he or she was acting. This would allow a formal or informal agent of the state to claim the defence when he or she had unavoidably acted outside his or her authorisation,³⁴ for example to maintain credibility in circumstances similar to those set out in paragraph 6.20 above.

²⁹ They were Mr Justice Calvert-Smith, the Police Federation and the Senior Judiciary. In their response, the Senior Judiciary gave detailed reasons for this view. We address their reasoning in detail below at paras 6.48 to 6.55.

³⁰ Including the Crown Prosecution Service, the Criminal Bar Association and Her Majesty's Council of Circuit Judges, who all thought that simplicity and consistency were very important considerations in this context.

³¹ See para 6.12 above.

³² The Crown Prosecution Service and the Council of Her Majesty's Circuit Judges. The reason given by the Crown Prosecution Service was:

The requirement that the conduct element be reasonable and proportionate in the circumstances and that the defendant had reasonable grounds for believing that he should act in the way he did seems to us to provide ample safe guards against misuse of the defence.

The Council of Circuit Judges did not give a reason other than to say, "We agree that the fact of having entered into an agreement which the defendant intends shall be carried out is likely to preclude such a defence".

³³ See para 6.12 above.

³⁴ Under the Regulation of Investigatory Powers Act 2000.

- 6.35 We believe that, so understood, section 50(3)(b) provides exactly the kind of defence that ought also to be available to someone who has entered into a conspiracy in order ultimately to expose and capture criminals. Accordingly, it would simply be arbitrary to permit the defence for acts of encouragement or assistance, but not for acts amounting to conspiracy.

The wider ambit of section 50(3)(b) and its application to conspiracy

- 6.36 In our report on assisting and encouraging crime, we recommended that the ‘acting reasonably’ defence should extend more widely than the kinds of circumstances envisaged by the 2000 Act. However, that wider application was confined to cases in which D did not have as his or her purpose the encouragement or assistance of crime, but merely foresaw that his or her acts would encourage or assist the commission of a crime.³⁵ Nonetheless, in such cases, there would not be any theoretical or practical limits on the kinds of purpose on which D could rely as showing that he or she was ‘acting reasonably’ in encouraging or assisting crime. We noted that, in other contexts, the law has recognised broad defences based on the acceptability of conduct.³⁶ We gave the example of section 1(3)(c) of the Protection from Harassment Act 1997, which states that a person is not guilty of harassment if “in the particular circumstances the pursuit of the course of conduct was reasonable”.
- 6.37 An example where our (as originally envisaged, narrower) ‘acting reasonably’ defence might have an application would be where D, a personal assistant, types a letter for his or her employer that clearly involves an artificially inflated insurance claim for goods lost or damaged. Another example might be where a garage worker returns a car that he or she has just serviced to its owner, in spite of the fact that the garage worker can see that the car’s owner intends to let his under-age son drive the car. In these examples, the letter in question may never be sent, or the car may not actually be driven by the under-age boy. The question is whether the personal assistant and the garage worker should have a defence available to a charge of assisting crime of having acted reasonably. We recommended that they should have such a defence. That recommendation is in effect embodied in section 50(3)(b). Whether or not D has acted reasonably will always be a question of fact for the jury. Whereas no jury is likely to say that assisting a war crime is reasonable, a jury may well conclude that it is reasonable for a 12-year-old boy to assist his dictatorial father. It should of course be remembered that the 2007 Act deals with defences to inchoate offences as opposed to substantive offences.
- 6.38 The crucial difference made by the way in which section 50(3)(b) is drafted is that it would still have an application even if, in the examples just given, D wrote the letter, or returned the car, *in order that* the crime could be committed. No doubt, the fact that D had such an intention would weigh heavily against D, in the minds of the tribunal of fact, when deciding if D’s conduct was reasonable in the circumstances.

³⁵ Serious Crime Act 2007, s 45.

³⁶ Inchoate Liability of Assisting and Encouraging Crime (2006) Law Com No 300, paras 6.20 to 6.21.

- 6.39 Should section 50(3)(b) be applied to conspiracy cases, we anticipate that it will be (and should only be) in a most exceptional and unusual case that D will succeed with the defence. This is because in a conspiracy case not only has D agreed with another person to commit a crime, but (under our recommendations) D also intends the crime to be carried out. We fully expect the courts to rule, for example, that if the conspiracy is to commit criminal acts of terrorism or civil disobedience, D's 'high-minded' motivation should be rejected as a basis for the defence. The fact that in such a case D will usually have neither the prevention of a crime under English law as a motive, nor legitimate authority for his or her actions, ought to ensure that the defence is unsuccessful. In any event, we are not over-concerned that the reasonableness defence will cause a disproportionate amount of difficulty in terms of the time expended on it in court.³⁷ We have already mentioned the Protection from Harassment Act 1997,³⁸ but it must be kept in mind that there are a number of long-standing offences which have provided for a reasonableness defence, or for a defence of reasonable excuse,³⁹ which have not caused insuperable problems.
- 6.40 It is worth noting that in any case where a defence of reasonableness, or reasonable excuse, is relied on, the trial judge has an important gatekeeper duty. He or she should ensure that in a case tried on indictment the defence is left to the jury except when no reasonable jury could regard the facts as amounting to a reasonable excuse, or the like.⁴⁰
- 6.41 We believe that there is a further justification for the straightforward application of section 50 to the revised crime of conspiracy. Under the 2007 Act, D is able to plead a reasonableness defence as a way of giving motives excusatory force in respect of acts that are very remote from criminal wrongdoing. This is of some significance in the light of the recent trend towards defining 'substantive' offences, such as fraud, terrorist or sexual offences, in the inchoate mode.⁴¹ Although this point is rarely, if ever, raised when these 'substantive' offences are created, this trend means that a conspiracy (or an act of encouragement or assistance) to commit such a 'substantive' offence extends the reach of the criminal law very far back into the chain of events that may lead to causing of actual harm. We think it is appropriate to provide that D can plead that it was reasonable to engage in conspiratorial acts, precisely because they were so far removed from the causing of any harm.

³⁷ There may of course be an initial surge of litigation but there is no reason to assume that this will not die down once the defence has been tested.

³⁸ See para 6.36 above.

³⁹ For example, the offence of having an article with a blade or point in a public place contrary to s 139 Criminal Justice Act 1988. Section 139 (4) provides that it is a defence for a person charged with an offence (under s 139) to prove that he had good reason or lawful authority for having the article with him in a public place.

⁴⁰ See *G* [2009] UKHL 13, [2009] 2 WLR 724 at [81]:

Unless the judge is satisfied that no reasonable jury could regard the defendant's excuse as reasonable, the judge must leave the matter for the jury to decide.

⁴¹ So, for example, under the Fraud Act 2006, an offence of fraud can be committed even when no financial loss is in fact incurred by the defrauded party, and no financial gain actually made by the fraudster, and when no act that would, in law, be sufficiently proximate as to amount to an attempt to impose such a loss or make such gain has been performed.

- 6.42 An example of a 'substantive' offence defined in the inchoate mode is the offence of engaging in any conduct in preparation for giving effect to an intention to commit acts of terrorism, contrary to section 5 of the Terrorism Act 2006.⁴² The substantive offence can be committed as an attempt⁴³ or as an act of assisting⁴⁴ another to commit such acts. Further, section 1 of the Terrorism Act 2006 makes it an offence to publish a statement or to cause another to publish a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences. If someone is charged with encouraging or assisting the commission of, or with conspiracy to commit, one of these offences, then they are potentially liable for acts that may be very remote indeed from any tangible harm of the kind the law wishes to deter by creating inchoate offences.
- 6.43 The 2007 Act extended the criminal law to a limited extent by creating the offence of assisting crime, alongside the offence of encouraging crime (that replaces the common law offence of incitement). However as we have seen in Part 3, the 2007 Act also opens up more broadly the scope for so-called 'double inchoate' liability, where D commits one inchoate offence that is related to another inchoate offence: encouraging someone to form a conspiracy is one example. Suppose that someone is charged with encouraging someone to conspire to commit one of the 'substantive' offences just mentioned, defined in the inchoate mode. So remote may that act of encouragement be from the commission of actual harm that this fact in itself seems to be an adequate basis for pleading that engaging in the act was reasonable.⁴⁵
- 6.44 If that is true for encouraging someone to conspire to engage in a wrong defined in the inchoate mode, then it should also be true for conspiring to encourage someone to engage in a wrong defined in the inchoate mode. The more remote D's conduct from the commission of the harm the inchoate offences are there to deter, the stronger the case for permitting D to excuse him or herself by reference to his or her motives, even though the motives would rightly be thought irrelevant in the case where a substantive offence had been committed:

⁴² Section 5 of the Terrorism Act 2006 provides:

- (1) A person commits an offence if, with the intention of-
 - (a) committing acts of terrorism, or
 - (b) assisting another to commit such acts,

he engages in any conduct in preparation for giving effect to his intention.

- (2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.

- (3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for life.

⁴³ Terrorism Act 2006, s 5(1)(a).

⁴⁴ Terrorism Act 2006, s 5(1)(b).

⁴⁵ Although it is of course not always the case that remoteness equates to reasonableness. It should be fact specific. See, for example, para 6.45 below.

Example 6C

D encourages X and Y to use D's own hotel for a meeting to hatch a plot to commit fraud, because that means that he will be able to ensure that his son does not attend the meeting. The meeting never takes place.

- 6.45 In example 6C, suppose that D is charged with encouraging X and Y to conspire to commit fraud. D should be able to say, "what I did was so far removed from the commission of fraud itself, that my reasons for doing it excuse me, even though I accept that, had I myself taken part in the conspiracy or the actual fraud, to save my son from doing so, that would have been no excuse".
- 6.46 Some may say that the problem here is not so much whether the defence should apply, but the breadth of the combined effect of the offences (encouraging a conspiracy, or conspiring to encourage, to commit an offence that is substantively inchoate). We addressed this issue in our report on assisting and encouraging crime,⁴⁶ where we pointed out that clear lines cannot be drawn to confine the scope of 'double inchoate' liability without unacceptable arbitrariness. Similarly, it would be a hopeless task to scour the length and breadth of the criminal law in search of those 'substantive' offences that are defined in the inchoate mode, for the purpose of excluding them from the application of 'double inchoate' liability. Quite simply, it is often a difficult matter of judgment to determine whether a supposedly substantive offence is really an inchoate one. English criminal law does not lend itself well to that kind of analysis.⁴⁷
- 6.47 In any event, we do not believe that the remoteness of conduct from the commission of actual harm, being in itself a vague notion, can or should require the imposition of arbitrary boundaries limiting the scope of liability. Conduct intended to bring about or to risk harm at some future point is permissibly subject to legal prohibition, under the 'harm principle'.⁴⁸ We explained in the CP why there are good reasons for the law to act on that moral permission in conspiracy cases.⁴⁹

Response of the senior judiciary to the CP

Objections based on the distinction between conspiracy and encouraging and assisting

- 6.48 Notwithstanding the majority agreement with the proposal that section 50 of the 2007 Act should also apply to conspiracy, the Senior Judiciary made the following two objections:

⁴⁶ Inchoate Liability of Assisting and Encouraging Crime (2006) Law Com No 300, paras 7.6 and 7.19.

⁴⁷ For that reason, the defence of acting reasonably cannot in practice be confined to instances of double inchoate liability, because there will be too much scope for argument over whether such liability would in fact be involved in particular cases.

⁴⁸ See J Gardner and S Shute, "The Wrongness of Rape", in J Horder (ed) *Oxford Essays in Jurisprudence* (4th Series 2000).

⁴⁹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, Part 2.

The central objection is founded on the true nature and use of the charge of conspiracy: it is utilised, in reality, to charge both inchoate and substantive offences. In multi-handed trials when crimes have been fully carried out, and particularly when the precise role of each participant is not known with certainty, all those involved are frequently charged on the basis of participation in a conspiracy. When individuals are implicated at different stages (ie the instigators, the planners, the perpetrators and those involved *ex post facto*) conspiracy has a significant utility.

The application of this defence to conspiracy could produce wholly unfair results: if defendants are charged with the 'true' substantive offence (eg breach of the peace, assault, criminal damage) they would be unable to mount the defence of 'acting reasonably' whereas if the prosecution chose to charge them with conspiracy, the defence would be available. Judges will be met serially with the argument that the court should order the prosecution to charge the offence as conspiracy or that the proceedings are an abuse of process because the Crown is deliberately and unfairly trying to deny an avenue of defence to the accused.

- 6.49 The Senior Judiciary were also critical of the breadth of the defence of acting reasonably. In response to the view that it would only be likely to succeed in exceptional cases they made the following comments:

The flaw in this approach is revealed in the breadth of circumstances covered by conspiracy cases, and the consequent impossibility of predicting whether the defence will only succeed in the 'most exceptional and unusual circumstances', still less the extent to which alleged 'reasonable circumstances' will be canvassed before juries. What is reasonable in a given case is often a fact-dependent issue to be evaluated by the jury, and it cannot be assumed that the 'courts' (by which we assume is meant the trial judge) will 'rule' that a defendant's 'high-minded' motivation is to be rejected as providing a foundation for this defence. We have real concerns over whether the jurisprudence, as it evolves, will sufficiently restrict the use of the defence at trial to genuinely credible circumstances, or whether conspiracy trials overall will become longer because of routine but ultimately unmeritorious reliance on the reasonable circumstances defence.

- 6.50 We will now address these objections in turn. The first argument seeks to distinguish conspiracy from encouraging and assisting crime on the basis that conspiracy is used to charge both substantive and inchoate offences. Conspiracy is often charged when the prosecution does not know the precise nature of the role of each D. However, this is also likely to be the case with the offence of encouraging or assisting crime. The 2007 Act makes provision for charging D with one or other of the new inchoate offences when his or her precise role is not known by the prosecution.⁵⁰ Such a person will have a defence of reasonableness unlike a D who is known to be a perpetrator.
- 6.51 There will be no question of an abuse of process argument if D has been properly charged. D would have to show that the prosecution had manipulated or misused the process of the court so as to deprive him of the defence. We suggest that D would not be able to discharge the burden of proof.⁵¹ It is our intention to encourage the appropriate charging of the inchoate and the substantive versions of offences. For example, if it can be shown by the prosecution that D has committed the substantive offence, then subject to the need, through a conspiracy charge, to demonstrate an overall criminality going beyond the completion of a single substantive offence D is properly charged with that substantive offence.⁵²
- 6.52 We believe that the fact that Parliament has provided a defence to the inchoate version of the offence, but not to the substantive offence, is not an adequate basis on which to claim abuse of process. In some cases, charging D with the substantive rather than the inchoate version of an offence may bring additional difficulties for the prosecution. This may make it hard to answer the question whether D has been unfairly treated by being charged with the substantive offence.

⁵⁰ Section 56 of the Serious Crime Act 2007 provides:

(1) In proceedings for an offence under this Part ("the inchoate offence") the defendant may be convicted if-

- (a) it is proved that he must have committed the inchoate offence or the anticipated offence; but
- (b) it is not proved which of those offences he committed.

(2) For the purposes of this section, a person is not to be treated as having committed the anticipated offence merely because he aided, abetted, counselled or procured its commission.

⁵¹ Which is on him or her on the balance of probabilities.

⁵² See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.68, where we expressed our concern to ensure that the charge of conspiracy is not abused by prosecutors who regard the charge as an umbrella for a mass of evidence which should properly be charged as one or more substantive offence.

- 6.53 In the case of conspiracy there are procedural rules of evidence helpful to the prosecution, such as the rule that once D1 is shown to be a party to the conspiracy, then the evidence against D2 can also be used as evidence against D1. Contrariwise, D may see it as an advantage to be charged with the inchoate offence rather than the substantive offence. This may happen when, as the law stands, the fault element respecting knowledge of circumstances is more difficult to prove where a conspiracy charge has been brought than when the substantive offence has been charged. This is, of course, still the case under our recommendations. For example, a substantive offence which is one of strict liability will require a fault element of recklessness as to circumstances, if the prosecution prefers a charge of conspiracy to commit that offence.
- 6.54 Our second response to the Senior Judiciary does not involve denying the truth of what they say about the possibility of time-wasting defences run on the basis of 'high-minded' motivations. It is just that this argument does not in itself put in doubt the principle that the more remote from actual harm an act alleged to be criminal, the stronger the case for permitting D to excuse him or herself by reference to his or her motives.
- 6.55 One final point that should be noted is that if D relies on the defence of acting reasonably then the legal burden is on him or her to prove on the balance of probabilities⁵³ that he or she knew or believed that certain circumstances existed (and that his or her belief in the existence of those circumstances was reasonable), and that it was reasonable to act as he or she did. This may limit the desire to run an unmeritorious defence.
- 6.56 We therefore recommend that**
- the defence of acting reasonably provided for by section 50 of the Serious Crime Act 2007 should be applied in its entirety to the offence of conspiracy.**

(Recommendation 11)⁵⁴

⁵³ We do not believe that placing the legal burden on D is incompatible with the presumption of innocence contained in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms because the prosecution will have had to prove the elements of the offence. There is a legitimate aim in limiting fraudulent claims by the defence. Also, the matters are likely to be within the scope of D's knowledge. See *Johnstone* [2003] UKHL 28, [2003]1 WLR 1736; *Sheldrake v DPP, Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264.

⁵⁴ See s 2A of the Criminal Law Act 1977, as inserted by cl 4 of the draft Bill.

PART 7

JURISDICTION TO CONVICT AN ALLEGED CONSPIRATOR

INTRODUCTION

- 7.1 In this Part we explain our decision to take forward the proposals concerning jurisdiction which we set out in our CP.¹

The need for extra-territorial jurisdiction

- 7.2 The principal basis of our criminal jurisdiction is territorial. That is to say, a criminal court in this jurisdiction (England and Wales) may try a person for an offence allegedly committed in England or Wales regardless of his or her nationality; but as a general rule it is not permissible to try an individual in this jurisdiction for an offence committed in some other place: “English criminal law is local in its effect and ... the common law does not concern itself with crimes committed abroad”.²
- 7.3 The underlying principle, predicated on the “comity of nations”,³ is that it is for each nation state to address the criminal liability of individuals who allegedly perpetrate offences on their territory; and it is not for other (unaffected) states to impose criminal liability on such individuals.
- 7.4 There is therefore a strong presumption that, when creating or codifying a criminal offence, Parliament did not intend that conduct occurring outside the jurisdiction should give rise to liability within the jurisdiction.⁴ If D’s alleged conduct occurred in a place outside the jurisdiction, the strong presumption, if applied, in effect provides D with a defence to criminal liability. The question of the courts’ capacity (‘jurisdiction’) to try an alleged offender therefore has a bearing on the reach of the substantive criminal law.

¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183.

² *Somchai Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, 244.

³ The principles which nation states recognise from convenience or courtesy.

⁴ *Treacy v DPP* [1971] AC 537, 551.

- 7.5 However, a number of statutory provisions currently allow the criminal courts in England and Wales to try an individual for an offence allegedly committed outside the jurisdiction. These extra-territorial provisions rebut the presumption referred to in the previous paragraph. For example: section 9 of the Offences Against the Person Act 1861 provides that the courts in England and Wales may try a British subject for murder or manslaughter committed against an individual in a foreign country;⁵ and section 72 of the Sexual Offences Act 2003 empowers the courts in England and Wales to try a British citizen or United Kingdom resident for certain sexual offences committed in a country or territory outside the United Kingdom.⁶
- 7.6 More to the point, some statutory provisions, and the common law itself, currently provide a broader approach to the question of jurisdiction if the offence charged is conspiracy.
- 7.7 This is unsurprising because conspiracy is a very special type of offence. It is an inchoate offence to commit some other substantive offence at some later time, and its conduct element is simply an agreement. An agreement can of course be formulated by post, telephone or e-mail without any regard to national frontiers. Moreover, agreements can be formulated within England or Wales to commit offences outside the jurisdiction; and, perhaps more importantly, agreements can be formulated overseas to commit offences, and cause harm, within England or Wales.
- 7.8 The statutory provisions and common law rules governing jurisdiction to try alleged conspirators are complex, but there can be little doubt as to their importance. Greater political and economic freedom for people to cross national boundaries, and cheap and unrestricted access to global communication networks, mean that some types of crime are far more likely than previously to be organised and perpetrated on an international scale.⁷
- 7.9 Extra-territorial provisions are particularly important for conspiracy⁸ and the new offences of encouraging or assisting crime.⁹ These offences are far more likely than most other offences to involve several persons working together in two or more different countries. It is not uncommon, for example, to encounter conspiracies formed in whole or in part in one country, where the parties intend to import drugs, firearms or people into another country.¹⁰

⁵ Under s 9 of the Offences Against the Person Act 1861, there is jurisdiction to try D, a British subject, for "... murder or manslaughter ... committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not ...".

⁶ The offences are set out in Sch 2 to the Sexual Offences Act 2003. However, a person may be tried in England and Wales only if the sexual offence in question is also an offence in the overseas country or territory where it was allegedly committed (see s 72(1)(a)).

⁷ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 11.2.

⁸ Criminal Law Act 1977, s 1(1).

⁹ The offences in Part 2 of the Serious Crime Act 2007.

¹⁰ See Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 8.1.

- 7.10 It is for this reason that Parliament and the courts have adopted a special, broader, approach to the question of jurisdiction in cases where D is charged with conspiracy. It is also why Parliament has recently taken forward our recommendations for special rules on extra-territoriality for the inchoate offences of encouraging or assisting crime. These rules are set out in section 52 of the Serious Crime Act 2007 and Schedule 4.

Coherence and consistency

- 7.11 As explained already in this report, the essence of a conspiracy is an agreement, a meeting of two or more minds, whether or not the object of the agreement is actually attained. This agreement may be concluded when the parties are in separate countries; for example, D in London may telephone E in Paris to finalise an agreement to injure V when they are all together in Rome. Equally, the process leading up to the formation of the final agreement may (indeed, is likely to) involve the exchange of e-mails, telephone calls and other communications which transcend national frontiers. For example, D in London and E in Paris may have spoken on the telephone on a number of occasions before finally agreeing on the course of action to be taken in relation to V.
- 7.12 As we explained in our CP, it is important that there should be a coherent set of rules governing when jurisdiction can be exercised for conspiracy.¹¹
- 7.13 Perhaps more importantly, there is also a need for consistency, in broad terms at least, as between the various inchoate offences which may involve conduct in a number of different countries. Conspiracy and the offences of encouraging or assisting crime are closely related, addressing similar kinds of activity. Indeed they may well be alleged as alternative counts on a single indictment. It would be anomalous, and inappropriate, if there were to be fundamentally different provisions governing jurisdiction as between these offences.
- 7.14 Given these facts, and Parliament's recent approach to jurisdiction for encouraging or assisting crime, we proposed in our CP that the extra-territoriality rules for conspiracy should be consistent with the special rules in the 2007 Act.¹²
- 7.15 Before setting out our recommendations, it may be helpful for the reader to have a brief summary of the extra-territoriality provisions of the 2007 Act and the key common law and statutory rules which govern whether the courts in England and Wales can try D for conspiracy. We provide this summary in the following paragraphs.¹³

¹¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 11.2.

¹² Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposals 10 to 13, paras 17.11 to 17.14.

¹³ The key statutory provision is s 1A of the Criminal Law Act 1977.

THE LEGAL BACKGROUND

Conspiracy outside the jurisdiction to commit an offence within England or Wales

- 7.16 In *Somchai Liangsiriprasert v Government of the United States of America*¹⁴ the Privy Council came to the following conclusion:

[There is] nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England [and Wales] inchoate crimes committed abroad which are intended to result in the commission of offences in England [or Wales].¹⁵

- 7.17 Importantly, the Privy Council held that there was no need for the prosecution to prove that an act pursuant to the conspiracy had occurred in the jurisdiction:

A conspiracy entered into [outside the jurisdiction] with the intention of committing the criminal offence of trafficking in drugs in [the jurisdiction] is justiciable in [the jurisdiction] even if no overt act pursuant to the conspiracy has yet occurred in [the jurisdiction].¹⁶

- 7.18 This has since been accepted as a correct statement of the law.¹⁷ In *Naini*,¹⁸ the Court of Appeal went further, opining that the criminal courts have jurisdiction to try D:

if the conspiracy wherever made is to do something [in England or Wales] or to do something which *may* be done [in England or Wales], whether wholly or in part, even if no overt act pursuant to the conspiracy is done in [England or Wales].¹⁹

- 7.19 It should be noted, however, that *Naini* was a case on the common law offence of conspiracy to defraud, rather than statutory conspiracy contrary to s 1(1) of the Criminal Law Act 1977.

¹⁴ [1991] 1 AC 225.

¹⁵ [1991] 1 AC 225, 251, cited with approval by Lord Hope of Craighead in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 233.

¹⁶ [1991] 1 AC 225, 251.

¹⁷ *Sansom* [1991] 2 QB 130, 138; *Manning* [1999] QB 980, 1000; *Naini* [1999] 2 Cr App R 398, 416.

¹⁸ [1999] 2 Cr App R 398.

¹⁹ Above, 416 (emphasis added).

7.20 The Criminal Justice Act 1993 may have a role to play in this context. Sections 1(3)(a) and 3(1) provide that D may be guilty of conspiracy to commit a “Group A” offence²⁰ regardless of D’s nationality or location at any material time; and section 3(2) provides that D may be so guilty whether or not D became a party to the conspiracy in the jurisdiction and whether or not any conduct in relation to the conspiracy occurred in the jurisdiction.²¹

Conspiracy in the jurisdiction to commit an offence elsewhere

7.21 At common law it was possible to try D for conspiracy – if the conspiracy was formulated in England or Wales to commit a substantive offence outside England and Wales – but only if the substantive offence was “one for which an indictment would lie here” if committed outside England and Wales.²²

7.22 According to the Court of Appeal in *Abu Hamza*, there is a “general principle of common law that an inchoate offence is not committed unless the conduct planned ... would, if carried out, be indictable in England [and Wales]”.²³

7.23 Thus, where it is possible to be tried in England and Wales for an offence committed overseas, but only if a particular condition is satisfied (for example, the perpetrator is a British citizen), the general common law principle was that D could be tried in England and Wales for conspiracy to commit that offence elsewhere only if that offence was committed (if committed) or would have been committed (if not committed) with the required condition.

7.24 In *Abu Hamza* the Court of Appeal recognised, however, that the offence of soliciting murder in section 4 of the Offences Against the Person Act 1861 established a statutory exception to this general principle. That is, although a perpetrator (P) can be tried in England and Wales for a murder allegedly committed abroad only if P is a British subject,²⁴ D can be liable for soliciting murder abroad, from within England or Wales, whether or not the person incited to murder is British. The same statutory exception also previously applied to conspiracy to murder, before the reference to conspiracy was removed from section 4 of the 1861 Act.²⁵

²⁰ These are listed in s 1(2) of the Criminal Justice Act 1993.

²¹ Section 3(2) of the Criminal Justice Act 1993 does not apply, however, if s 1A of the Criminal Law Act 1977 is relied on to provide jurisdiction to try D for conspiracy (contrary to s 1(1) of the Criminal Law Act 1977). See para 7.27 below.

²² *Board of Trade v Owen* [1957] AC 602, 634.

²³ [2006] EWCA Crim 2918, [2007] QB 659 at [17].

²⁴ Offences Against the Person Act 1861, s 9.

²⁵ By s 5(10) of the Criminal Law Act 1977 with Sch 13. Section 1(4) of the Criminal Law Act 1977 was included to replace s 4 of the Offences Against the Person Act 1861 in relation to conspiracy. This provision was subsequently amended to remove the reference to murder at the time when a general provision, s 1A, was inserted into the Criminal Law Act 1977 (see para 7.27 below).

- 7.25 The general position for a conspiracy formulated in England and Wales, where the substantive offence is intended to be committed elsewhere – in fact outside the United Kingdom²⁶ – is now governed by sections 1(4) and 1A of the Criminal Law Act 1977.²⁷
- 7.26 Section 1(4) of the 1977 Act provides that a conspiracy to commit an offence in section 1(1) means a conspiracy to commit an offence “triable in England and Wales”. So, it is possible to try D for, and convict D of, conspiracy (contrary to section 1(1)) if D conspires in the jurisdiction to commit an offence elsewhere and that offence, if committed, is one for which the perpetrator could be tried and convicted in the jurisdiction. Applying the general principle recognised in *Abu Hamza*,²⁸ if the agreement was that the intended substantive offence should be committed in a foreign country by P, there would be jurisdiction to try D under section 1(1) read with section 1(4) – disregarding section 1A for present purposes – only if P satisfies the requirements, such as a requirement as to nationality, necessary for P to be tried and convicted in the jurisdiction for the substantive offence.
- 7.27 Section 1A of the 1977 Act now provides a far broader basis for determining jurisdiction to try and convict an alleged conspirator, where the parties intended that the substantive offence should be committed outside the jurisdiction. This section does not create a separate statutory offence of conspiracy.²⁹ Rather, it provides the courts with jurisdiction to try D for conspiracy, contrary to section 1(1), if “the pursuit of the agreed course of conduct would at some stage involve (a) an act by one or more of the parties, or (b) the happening of some other event, intended to take place in a country or territory outside the United Kingdom” and three other conditions are satisfied.³⁰ The other three conditions are: “that [the] act or other event constitutes an offence under the law in force in that country or territory”,³¹ that the agreement would in other respects fall within section 1(1) as a conspiracy,³² and that:
- (a) a party to the agreement, or a party's agent, did anything in England and Wales in relation to the agreement before its formation, or
 - (b) a party to the agreement became a party in England and Wales (by joining it either in person or through an agent), or

²⁶ Section 1A(2) of the Criminal Law Act 1977 refers to the pursuit of the agreed course of conduct “intended to take place in a country or territory outside the United Kingdom”. However, s 72(1) of the Coroners and Justice Act 2009 will amend s 1A(2), replacing “United Kingdom” with “England and Wales”.

²⁷ Section 1A of the Criminal Law Act 1977 was inserted by s 5(1) of the Criminal Justice (Terrorism and Conspiracy) Act 1998.

²⁸ [2006] EWCA Crim 2918, [2007] QB 659 at [17].

²⁹ Compare, however, the contrary view expressed in M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) pp 146 to 147.

³⁰ This first condition is set out in s 1A(2) of the Criminal Law Act 1977. As noted above, s 72(1) of the Coroners and Justice Act 2009 will amend this subsection by replacing “United Kingdom” with “England and Wales”.

³¹ Criminal Law Act 1977, s 1A(3).

³² Criminal Law Act 1977, s 1A(4).

- (c) a party to the agreement, or a party's agent, did or omitted anything in England and Wales in pursuance of the agreement.³³

7.28 Section 4(5) provides that no proceedings for an offence triable by virtue of section 1A may be instituted except by or with the consent of the Attorney General.

Conspiracy outside the jurisdiction to commit an offence outside the jurisdiction

7.29 In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)*, Lord Hope of Craighead considered that:

the common law rule as to extraterritorial conspiracies laid down in *Somchai Liangsirprasert v. Government of the United States of America* [1991] 1 AC 225 applies if a conspiracy which was entered into abroad was intended to result in the commission of an offence, wherever it was intended to be committed, which is an extraterritorial offence in this country.³⁴

7.30 It should be noted, however, that, in context, Lord Hope was focusing on offences which are extra-territorial offences by virtue of an international convention. The extent to which this opinion may be said to represent the law more generally is unclear.

The jurisdiction provisions of the Serious Crime Act 2007

7.31 Section 52(1) of the 2007 Act allows a person (D) to be convicted of an offence of encouraging or assisting³⁵ another offence (offence X), wherever D's relevant conduct occurred, so long as D knew or believed that the conduct element of offence X³⁶ might be committed wholly or partly in England or Wales.

7.32 Section 52(2) provides that, if the prosecution cannot prove that D believed that the conduct element of offence X might be committed wholly or partly in England or Wales, D can nevertheless be convicted of encouraging or assisting offence X if the alleged facts fall within paragraph 1, 2 or 3 of Schedule 4 to the Act.

7.33 Paragraph 1 of Schedule 4 provides jurisdiction to try D if:

- (1) D's relevant conduct occurred wholly or partly in England or Wales;
- (2) D knew or believed that the conduct element of offence X might occur wholly or partly in a place outside England and Wales; and

³³ Criminal Law Act 1977, s 1A(5). Section 1A(11) provides that an "act done by means of a message (however communicated) is to be treated ... as done in England and Wales if the message is sent or received in England and Wales".

³⁴ [2000] 1 AC 147, 236.

³⁵ An offence under s 44, 45, or 46.

³⁶ Serious Crime Act 2007, s 52(3).

- (3) offence X would be triable under the law of England and Wales if committed in that place (or, if there are relevant conditions relating to citizenship, nationality or residence, offence X would be so triable if committed there by a person who satisfies the conditions).

7.34 If the substance of this provision were to be applied to conspiracy, then, in the following scenario, D could be tried in England and Wales for conspiracy on the same basis:

Example 7A

D in London telephones E in Paris and they agree that V should be murdered in Brussels.³⁷

7.35 It is the fact that D's relevant conduct occurred in England, together with the special nature of the offence D and E agreed to commit, which justifies the courts having jurisdiction to try D for conspiracy in this situation.

7.36 It would be possible to try D regardless of the location of his or her co-conspirator. In addition, the jurisdiction to try D in England and Wales would not depend on the actual citizenship, nationality or place of residence of the intended or anticipated perpetrator.

7.37 Where paragraph 1 of Schedule 4 to the 2007 Act is inapplicable, paragraph 2 of the Schedule provides jurisdiction to try D if:

- (1) D's relevant conduct occurred wholly or partly in England or Wales;
- (2) D knew or believed that the conduct element of offence X might occur wholly or partly in a place outside England and Wales; and
- (3) the conduct element of offence X would also be an offence under the law in force in that place.

7.38 If the substance of this provision were to be applied to conspiracy, D could be tried in England and Wales for conspiracy to commit robbery on the same basis in the following scenario:

Example 7B

D in Cardiff exchanges e-mails with E in Brisbane agreeing that a robbery will be committed in Sydney (an offence in New South Wales).

7.39 Again, under this basis for recognising jurisdiction to try D for conspiracy, the location of D's co-conspirator at the time of D's relevant conduct would be irrelevant.

³⁷ It would be possible to try D for conspiracy to murder because it is possible to try the perpetrator of a murder committed abroad, if that person is British; see Offences Against the Person Act 1861, s 9.

7.40 It is the fact that D's relevant conduct occurred in England or Wales, together with the nature of the offence D and E agreed to commit (that is, its status as an offence recognised in England and Wales and in the overseas jurisdiction), which justifies the courts having jurisdiction to try D for conspiracy in this situation.

7.41 Paragraph 3 of Schedule 4 to the 2007 Act provides jurisdiction to try D if:

- (1) D's relevant conduct occurred wholly outside England and Wales;
- (2) D knew or believed that the conduct element of offence X might occur wholly or partly in a place outside England and Wales; and
- (3) D could be tried in England and Wales (as the perpetrator) if he or she committed offence X in that place.

7.42 If the substance of this provision were to be applied to conspiracy, D could be tried in England and Wales for conspiracy to commit the rape of a child on the same basis in the following scenario:

Example 7C

D, a British citizen back-packing in the developing world, agrees with his travelling companion, E, to have sexual intercourse with a 12-year-old girl in the next village.³⁸

7.43 In this example it is D's status as a British citizen and the nature of the offence D and E agree should be committed which justifies the courts in England and Wales having jurisdiction to try D for conspiracy.

PROVISIONAL PROPOSALS AND RECOMMENDATIONS

7.44 The first proposal on jurisdiction set out in our CP, broadly reflecting (but being slightly wider than) section 52(1) of the 2007 Act, was that a conspiracy should be triable in England and Wales if D knew or believed that the intended substantive offence might be committed wholly or partly in England or Wales, irrespective of where the agreement was formed.³⁹

³⁸ Section 72 of the Sexual Offences Act 2003 with Sch 2 provide that D can be tried for certain sexual offences committed by D overseas if D is a British citizen (or UK resident) and the offence is also an offence in the country or territory where it was committed.

³⁹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 10, para 11.17.

- 7.45 This proposal is slightly wider than section 52(1) of the 2007 Act because that provision applies only if D believed that the anticipated *conduct* might take place wholly or partly in the jurisdiction.⁴⁰ Our view in the CP, consistent with the policy set out in our 2006 Report, *Inchoate Liability for Assisting and Encouraging Crime*,⁴¹ is that there should be jurisdiction to try D for conspiracy in any case where D foresaw that the conduct element or the consequence element of the intended substantive offence might occur in England or Wales.⁴² This should be the position regardless of D's location at any material time.
- 7.46 There was broad support for this proposal. Only the Criminal Bar Association disagreed with it, their reason being that the use of "might" rendered the proposed rule unacceptably wide.
- 7.47 Notwithstanding this objection, we believe that our original proposal should be carried forward into a recommendation. The reference to "might" was included, and we believe should be retained, for the following reasons:
- (1) it ensures that there will be, in broad terms, consistency between the rules on jurisdiction governing conspiracy and the separate, but similar, inchoate offences of encouraging or assisting crime,⁴³
 - (2) it reflects the fact that there may be uncertainty on the part of D as to where exactly the substantive offence will be committed (for example, D may agree with E to buy drugs intending that the sale should take place in France but realising that, for reasons beyond his or her control, the sale might in fact take place in England);
 - (3) its use is limited to the question of jurisdiction – in other words, the prosecution will still have to prove that D acted with the fault element required to be liable for conspiracy, including intention as to the conduct and consequence elements of the substantive offence; and
 - (4) it accords with the present common law rule as stated in *Naini*.⁴⁴
- 7.48 We believe this common law rule (as stated in *Naini*) should be codified in legislation for statutory conspiracies. As explained already, this would be broadly consistent with the present rule for encouraging or assisting crime set out in section 52(1) of the 2007 Act.⁴⁵

⁴⁰ See s 52(3) of the Serious Crime Act 2007. Compare the broader test in cl 7(1) and (3) of our draft Crime (Encouraging and Assisting) Bill, appended to *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300.

⁴¹ Law Com No 300.

⁴² The same point applies in relation to our other proposals on jurisdiction and the recommendations we set out below.

⁴³ Serious Crime Act 2007, s 52(1).

⁴⁴ [1999] 2 Cr App R 398; see para 7.18 above.

⁴⁵ See para 7.31 above.

7.49 Accordingly, we now recommend that

it should be possible to convict D of conspiracy to commit a substantive offence regardless of where any of D's relevant conduct (or any other party's relevant conduct) occurred so long as D knew or believed that the conduct or consequence element of the intended substantive offence might occur, whether wholly or in part, in England or Wales.⁴⁶

(Recommendation 12)

Example 7D

D and E in a foreign state conspire to commit theft by setting up a bogus website to defraud individuals who might be in England or Wales. It would be possible to try D for conspiracy to commit theft because D is aware that a person in England or Wales might transfer a sum of money from his or her bank account in England or Wales to pay for something advertised on the website.

- 7.50 Our second proposal on jurisdiction⁴⁷ addressed the situation where D was in England or Wales at a relevant time, and the agreement was to commit a substantive offence which D believed might be committed in some place outside England and Wales.
- 7.51 The policy which informed this proposal is reflected in section 52(2) of the 2007 Act, with reference to paragraph 2 of Schedule 4 (summarised above in paragraph 7.37). It also accords with the policy which underpins what is currently section 1A of the Criminal Law Act 1977.
- 7.52 We took the view, consistent with the broad scope of section 1A(5) of the Criminal Law Act 1977,⁴⁸ that it should be possible to convict D under this heading if D's relevant conduct in England or Wales was simply part of the process leading up to the final conspiracy (for example, the sending of e-mails preceding the parties' eventual agreement).

⁴⁶ See cl 2(4) of our draft Conspiracy and Attempts Bill, inserting a new s 1B(1) into the Criminal Law Act 1977.

⁴⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 11, para 11.20.

⁴⁸ See para 7.27 above.

7.53 We also drew support for this aspect of our policy from recent judicial comments on jurisdiction. In *Smith (Wallace Duncan) (No 4)* the Court of Appeal recognised that in relation to conspiracy, which does not require proof of any harmful consequence, “a broader approach has undoubtedly been adopted as to jurisdiction”.⁴⁹ Importantly, the Court of Appeal recognised that the law must be adapted to meet ever developing and advancing communications technology, and referred with approval to Lord Griffiths’ comments in *Somchai Liangsiriprasert v Government of the United States of America* that “it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy” and that the law must “face this new reality” that “crime is now established on an international scale”.⁵⁰

7.54 By proposing that the courts should have jurisdiction to try D in cases where D acted within England or Wales, even if the final agreement crystallised elsewhere, we recognised the importance of being able to address the international framework of many conspiracies and the desirability of intervening before intended offences are committed and harm caused.

7.55 All six of the consultees who commented on this proposal agreed with it.⁵¹

7.56 **Accordingly, we now recommend that**

it should be possible to convict D of conspiracy to commit a substantive offence, regardless of where any other party’s conduct occurred, if: D’s relevant conduct occurred in England or Wales; D knew or believed that the conduct or consequence element of the intended substantive offence might be committed wholly or partly in a place outside England and Wales; and the substantive offence, if committed in that place, would also⁵² be an offence under the law in force in that place (however described in that law).⁵³

(Recommendation 13)

7.57 In this context “relevant conduct” means any communication forming part of the process which led up to the final agreement.⁵⁴

⁴⁹ [2004] EWCA Crim 631, [2004] QB 1418 at [61].

⁵⁰ [1991] 1 AC 225, 251, cited in *Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418 at [61].

⁵¹ The Criminal Bar Association did so subject to removing “or believes” from the test, so that knowledge alone would suffice.

⁵² The intended substantive offence must be an offence recognised by the law of England and Wales.

⁵³ See cl 2 of our draft Conspiracy and Attempts Bill and Sch 1. Clause 2(4) adds a new s 1B(2) to the Criminal Law Act 1977 and cl 2(5) inserts a new Sch A1. Section 1B(2) and para 3 of Sch A1 provide jurisdiction in the situation described (if para 2 is inapplicable).

⁵⁴ See para 7.52 above; and see cl 2(5) of our draft Conspiracy and Attempts Bill (inserting a new Sch A1, paras 1 and 3(1)(b), into the Criminal Law Act 1977).

7.58 Our third proposal on jurisdiction,⁵⁵ informed by section 52(2) of the 2007 Act with paragraph 1 of Schedule 4,⁵⁶ addresses another situation where, broadly speaking, D in England or Wales agrees that a substantive offence should be (or believes that it might be) committed in a place outside England and Wales. This proposal was concerned with cases where the intended substantive offence, if committed in a place outside England and Wales, would nevertheless be triable in England and Wales (or would be so triable if committed by a person satisfying relevant citizenship, nationality or residence conditions).

7.59 All six consultees who addressed this proposal agreed with it.⁵⁷

7.60 Accordingly, we now recommend that

it should be possible to convict D of conspiracy to commit a substantive offence, regardless of where any other party's relevant conduct occurred, if: D's relevant conduct occurred in England or Wales; D knew or believed that the intended substantive offence might occur wholly or partly in a place outside England and Wales; and the substantive offence, if committed in that place, would be an offence triable in England and Wales (or would be so triable if committed by a person satisfying relevant citizenship, nationality or residence conditions).⁵⁸

(Recommendation 14)

7.61 Again, in this context "relevant conduct" means any communication forming part of the process which led up to the final agreement.⁵⁹

7.62 Our fourth proposal on jurisdiction,⁶⁰ informed by section 52(2) of the 2007 Act with paragraph 3 of Schedule 4,⁶¹ addressed the situation where D agrees to commit a substantive offence in a place outside England and Wales and the substantive offence is one for which D could be tried in England and Wales if D committed it in that place.

⁵⁵ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 12, para 11.24.

⁵⁶ See para 7.33 above.

⁵⁷ Again, the Criminal Bar Association did so subject to removing "believes" so that only knowledge would suffice.

⁵⁸ See cl 2 of our draft Conspiracy and Attempts Bill and Sch 1. Clause 2(4) adds a new s 1B(2) to the Criminal Law Act 1977 and cl 2(5) inserts a new Sch A1. Section 1B(2) and para 2 of Sch A1 provide jurisdiction in the situation described.

⁵⁹ See para 7.52 above; and see cl 2(5) of our draft Conspiracy and Attempts Bill (inserting a new Sch A1, paras 1 and 2(1)(a), into the Criminal Law Act 1977).

⁶⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 13, para 11.27.

⁶¹ See para 7.41 above.

7.63 If the substantive offence is one for which D could be tried in England and Wales even though D committed it outside England and Wales, and if D can be tried in England and Wales for encouraging or assisting another person to commit the offence even though D was outside England and Wales at the relevant time, then the same rule should apply to a conspiracy to commit the offence

7.64 All six of the consultees who addressed our proposal agreed with it.⁶²

7.65 We therefore now recommend that

it should be possible to convict D of conspiracy to commit a substantive offence, where D's relevant conduct occurred outside England and Wales,⁶³ if: D knew or believed that the intended substantive offence might occur wholly or partly in a place outside England and Wales and D could be tried in England and Wales (as the perpetrator) if he or she committed the substantive offence in that place.⁶⁴

(Recommendation 15)

7.66 Again, in this context "relevant conduct" means any communication forming part of the process which led up to the final agreement.⁶⁵

CONSENT OF THE ATTORNEY GENERAL

7.67 In the CP we also proposed that the consent of the Attorney General should be obtained for proceedings where it cannot be proved that D knew or believed that the intended substantive offence might be committed (wholly or partly) in England or Wales.⁶⁶

7.68 This proposal reflects what we considered to be the sensible safeguards which already exist in section 4(5) of the Criminal Law Act 1977 (in relation to section 1A) and section 53(a) of the 2007 Act (in relation to Schedule 4).

7.69 Three of our consultees disagreed with us. The basis of their disagreement was that the Attorney General's consent should not be considered necessary unless there was a question of it being absolutely essential to protect the national interest. It was also suggested that decisions made by the Attorney General could involve political considerations which may militate against the proper administration of justice.

⁶² Again, the approval of the Criminal Bar Association was qualified by a suggestion that there should be a requirement of knowledge and no reference to a corresponding belief.

⁶³ If D's relevant conduct occurred within England or Wales, para 2 of Sch A1 provides jurisdiction.

⁶⁴ See cl 2 of our draft Conspiracy and Attempts Bill and Sch 1. Clause 2(4) adds a new s 1B(2) to the Criminal Law Act 1977 and cl 2(5) inserts a new Sch A1. Section 1B(2) and para 4 of Sch A1 provide jurisdiction in the situation described.

⁶⁵ See para 7.52 above; and see cl 2(5) of our draft Conspiracy and Attempts Bill (inserting a new Sch A1, paras 1 and 4(1)(a), into the Criminal Law Act 1977).

⁶⁶ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 14, para 11.29.

7.70 Notwithstanding these concerns, we believe that the Attorney General's consent should be required for a prosecution in any case where it cannot be proved that D knew or believed that the intended substantive offence might be committed (wholly or partly) in England or Wales. There is a clear need for consistency, in broad terms at least, as between the provisions we recommend for conspiracy and those which now operate for allegations under Part 2 of the 2007 Act. Perhaps more importantly, a provision requiring the Attorney General's consent could only operate as a brake on the potential for using the extra-territoriality provisions we recommend. Given the wide ambit of these provisions, necessitated by the nature of conspiracies and the international context in which a conspiracy may be formulated, we believe that there should be a safeguard to prevent the provisions being applied too readily.

7.71 We therefore recommend that

the consent of the Attorney General should be obtained for a prosecution for conspiracy to proceed, in a case where it cannot be proved that D knew or believed that the intended substantive offence might be committed wholly or partly in England or Wales.⁶⁷

(Recommendation 16)

⁶⁷ See cl 5(3) of our draft Conspiracy and Attempts Bill, amending s 4(5) of the Criminal Law Act 1977 (para 7.28 above).

PART 8

ATTEMPTS

INTRODUCTION

- 8.1 In this Part we address the proposals we provisionally made in our CP for the offence of attempt.¹

PROPOSED INCHOATE OFFENCES

- 8.2 We provisionally proposed that the present offence of criminal attempt, contrary to section 1(1) of the 1981 Act,² should be replaced by two discrete inchoate offences carrying the same maximum penalty. We proposed that there should be a newly defined offence of attempt complemented by a new offence of “criminal preparation”.³ We suggested that these replacement offences would, materially, neither increase nor reduce the scope of inchoate liability associated with endeavouring to commit a criminal offence. However, we believed that these offences taken together would more accurately reflect, and more clearly explain, the basis of liability currently described by the 1981 Act.
- 8.3 We explained that the policy underpinning section 1(1) was that inchoate liability for attempting to commit another crime (the ‘intended’ or ‘substantive’ offence) should not be limited to the necessary last acts.⁴ We recognised, however, that this view required a broader understanding of attempt than the implicit linguistic meaning of *trying* to commit an offence.
- 8.4 We also explained that another policy goal underpinning section 1(1) of the 1981 Act was that inchoate liability should not extend too far back from the notion of trying to commit the intended offence.⁵ Our understanding was that Parliament intended that liability for attempt should encompass some preparatory acts but not “merely preparatory” acts. That is to say, the offence should not encompass preparatory acts unless they were sufficiently proximate to the final act necessary to commit the intended offence.⁶

¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, Parts 12 to 16.

² Under s 1(1) of the Criminal Attempts Act 1981, a person (“D”) is guilty of attempt if, “with intent to commit an offence ... [D] does an act which is more than merely preparatory to the commission of the offence”.

³ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposals 15 and 15A, paras 16.1 to 16.25.

⁴ We proposed, in line with s 1(1) of the Criminal Attempts Act 1981, that each offence would require proof that D intended to commit a substantive offence.

⁵ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 1.71; paras 13.19 to 13.25; and paras 15.1 to 15.7.

⁶ Above, paras 13.24 to 13.25; and, for examples of preparatory acts amounting to attempts, para 14.7.

- 8.5 In our CP, we explained that the current basis of liability under section 1(1) should encompass, but be limited to, just two narrow categories of conduct, namely:
- (1) the final conduct (last act) associated with actually *trying* to commit the intended offence; and
 - (2) the earlier (preparatory) conduct which could properly be regarded as part of the *execution* of D's plan to commit the intended offence.
- 8.6 We suggested that, according to one strand of Court of Appeal jurisprudence, these two categories are in fact already covered by section 1(1).⁷ However, we proposed that the present offence should be repealed and replaced by two discrete bases of inchoate liability, covering these separate categories.⁸
- 8.7 We concluded that Parliament intended, rightly in our view, that earlier preparatory acts – that is, “merely preparatory” acts – should not give rise to criminal liability under what is now section 1(1) of the 1981 Act. For example, D should not be liable for attempted murder if the prosecution evidence was simply that D had bought a knife intending to store it, and then to use it to kill another person after the passage of some days. We proposed that there should be no change to this approach at a general level.
- 8.8 In other words, we recognised that there should be no general offence of preparing to commit crime beyond the conduct described in paragraph 8.5(2) above. We accepted, however, as has Parliament on a number of occasions, that certain types of preparation falling under the general rubric of “merely preparatory” acts could justifiably be rendered criminal by the creation of *specific* offences of preparation, where such liability is necessary in a particular context.⁹
- 8.9 With regard to section 1(1) of the 1981 Act, it has been left to the courts to determine precisely where, on a given set of facts, the line between mere preparation and attempt lies. For trials on indictment, it is for the trial judge to determine whether D's conduct can legitimately be said to have crossed the line separating mere preparation from an attempt. If the judge rules that it can, it is for the jury to determine whether D's conduct was in fact a more than merely preparatory act.¹⁰ However, the judge's ruling may be challenged on appeal. In that way the Court of Appeal has been able to provide guidance for the trial courts.

⁷ Above, paras 14.4 to 14.7.

⁸ Above, proposal 15, para 16.1.

⁹ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.56 to 14.67.

¹⁰ Criminal Attempts Act 1981, s 4(3).

- 8.10 Even so, the Court of Appeal has not been consistent in its assessment of where the dividing line should be drawn. In our CP we therefore explained that there was a case for adopting a new approach. We expressed concern at some of the decisions of the Court of Appeal which suggest that the present offence of attempt must be interpreted unduly narrowly, with insufficient regard to the desirability of setting the liability threshold so as to encompass acts of preparation more-or-less immediately connected with the final conduct required to commit the intended offence.¹¹
- 8.11 The judgment giving rise to most concern was that in the case of *Geddes*.¹² In that case D had been found in a lavatory equipped with, amongst other things, a large knife, some lengths of rope and a roll of masking tape. The prosecution's case was that D, a trespasser, had been lying in wait to capture and restrain a boy who entered the lavatory and that this (preparatory) conduct was sufficient to justify a conviction for attempting to commit the intended offence of false imprisonment. The trial judge accepted that D's conduct was sufficiently proximate to the intended offence to be an attempt and, in the light of the judge's ruling, the jury convicted D. However, D's conviction was subsequently quashed because, according to the Court of Appeal, D had not yet "actually tried" to commit the intended offence.¹³ Rather, D "only got [himself] ready"¹⁴ to try to commit the offence, and that was insufficient for liability.¹⁵
- 8.12 In our CP, we suggested that the conduct of D, who had almost reached the stage of trying to commit his intended offence, was more than merely preparatory. We therefore took the view that the Court of Appeal should have held that his conduct fell within the scope of section 1(1) of the 1981 Act.¹⁶
- 8.13 We expressed concern that the approach to attempt adopted in some cases, including *Geddes*, was far too narrow, and therefore wrong. This may be illustrated by the following example:

Example 8A

D, intending to kill, creeps up behind V and withdraws his hands from his pockets in order (as D later admits) to strangle V. D's hands are seized by a police officer just before D strikes, thereby thwarting D's plan to commit murder.

¹¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 1.71 to 1.75; paras 14.4 to 14.10 and 14.15 to 14.17.

¹² (1996) 160 JP 697.

¹³ Above, 705.

¹⁴ Above.

¹⁵ Parliament had to introduce a specific offence to cover the facts of *Geddes* (1996) JP 697: see para 8.58 below.

¹⁶ Compare the examples given in Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.6 and 14.7.

- 8.14 According to the strand of Court of Appeal jurisprudence exemplified most starkly by *Geddes*, D would not be liable for attempted murder on these facts, notwithstanding his or her intention to kill V and the proximate steps taken to commit murder.¹⁷ It would not be possible to convict D of attempted murder because he or she did not actually *try* to strangle V, even though D had passed through every preparatory stage up to the final step of striking against V.
- 8.15 We suggested that a reason for this unduly narrow interpretation of section 1(1) of the 1981 Act may lie with the label Parliament attached to the offence.¹⁸ Our view was that the offence was designed to cover a range of behaviour extending back from the final conduct associated with trying to commit the intended offence, but the label ‘attempt’ has on occasion been a distraction. Because of the linguistic meaning usually given to the word ‘attempt’ in non-legal contexts, it seems an inference has been drawn from this label that D may be liable for the offence only if he or she has “actually tried” to commit the intended offence. On this approach, D can be liable for attempt if D committed the final act necessary to bring about the offence, and failed in the process of trying.¹⁹ But D cannot be liable if he or she was thwarted at an earlier stage along the path taken to execute the plan, regardless of how proximate his or her conduct was to the final act.
- 8.16 As explained above, we therefore proposed that, instead of the present offence of attempt, there should be two inchoate offences covering the same ground and carrying the same maximum penalty following conviction. We proposed that there should be:
- (1) a new offence of ‘attempt’; and
 - (2) a complementary offence of ‘criminal preparation’.²⁰
- 8.17 In line with the linguistic purport of the word ‘attempt’ and the narrow approach adopted in *Geddes*, the new offence of attempt would be limited to conduct comprising the *final* conduct necessary to commit the intended offence.
- 8.18 However, our proposed offence of criminal preparation would cover individuals who failed to reach the final stage of attempt (as newly defined) but proceeded beyond the stage of mere preparation. The offence would therefore encompass individuals whose preparatory conduct was more-or-less immediately connected with the commission of the intended offence, but, as with the present law, it would not encompass earlier preparatory acts.

¹⁷ Indeed, it seems doubtful that D would be guilty of *any* offence against the person.

¹⁸ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 1.76 and para 16.4.

¹⁹ On account of effective intervention by a third party or D’s inability, or perhaps for some other reason.

²⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposals 15 and 15A, paras 16.1 to 16.25.

- 8.19 By limiting the conduct element of attempt to final acts associated with the commission of the intended offence, we took the view that there would only rarely be any dispute as to whether D's conduct constituted an attempt or the offence of criminal preparation.
- 8.20 The dividing line between acts of criminal preparation and merely (non-criminal) preparatory acts would, however, continue to be blurred, as is the current line between merely preparatory conduct and attempts under section 1(1) of the 1981 Act.
- 8.21 To overcome this problem, and to ensure that the scope of the new offence of criminal preparation would be interpreted consistently, in line with our understanding of the present offence of attempt, we also proposed that guidance could be provided to the courts. This guidance, we suggested, would be given in the form of examples as to what conduct amounted to an act of criminal preparation as opposed to mere preparation.²¹ We set out a possible list of examples in our CP.²²
- 8.22 A further advantage of our proposed scheme, as we saw it, was that individuals incurring inchoate liability for conduct aimed at bringing about the commission of an intended offence would be properly labelled. Offenders would be labelled by the criminal law in a way which would properly describe their conduct and the proximity of their conduct to the commission of the intended offence. In appropriate cases, this would also assist the judge in his or her determination of the sentence D should receive.
- 8.23 By proposing that the current offence of attempt should be divided into two new offences with new labels, and by further proposing that the two offences should not encompass acts of mere preparation, we believed we would be able to give better effect to Parliament's intention when it passed the 1981 Act, following the Commission's recommendations in 1980.²³ The scope of inchoate liability associated with endeavouring to commit a crime would be clarified; but, importantly, it would not go beyond the framework of liability established by Parliament in the 1981 Act.
- 8.24 This approach also underpinned our proposal that the two offences should carry the same maximum penalty, the penalty now available for attempt under section 1(1) of the 1981 Act.²⁴
- 8.25 We should add that, in reaching our conclusion that there should be two new offences, we considered and rejected an alternative scheme whereby the offence of attempt in section 1(1) of the 1981 Act would be retained but supplemented by examples to provide the courts with guidance as to its true scope.

²¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 16, paras 16.26 to 16.46.

²² Above, proposal 17, paras 16.48 to 16.55.

²³ Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

²⁴ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 15A, paras 16.23 to 16.25.

- 8.26 Although this was in some respects an attractive option, given that there is little moral distinction between the two bases of inchoate liability described in paragraph 8.5 above, we believed that this approach would now be problematic for two reasons.
- 8.27 First, it would be necessary to adopt the unprecedented, and controversial, step of instructing Parliamentary Counsel to create an entirely new linguistic formula for attempt with no change in the scope of the offence or the policy considerations underpinning it. (We took the view that it would not be feasible to retain the present offence, as interpreted by the Court of Appeal over nearly three decades, and simply graft on new guidelines. If this were done, there would be a conflict between the guidelines and some of the Court of Appeal's judgments).²⁵
- 8.28 Secondly, because it would remain an offence of 'attempt',²⁶ this offence would appropriately label only those individuals who had *tried* but failed to commit the intended offence. It would inappropriately label individuals who had reached, but not passed, the stage of criminal preparation (that is, the stage of preparation beyond mere preparation). This problem would be exacerbated by the examples we proposed, given that many of them would not be regarded as attempts in ordinary parlance.
- 8.29 These problems would be eliminated by our principal proposal that the current offence of attempt should be replaced by two new offences, with no increase in the ambit of general inchoate liability, and by our supplementary proposal that the courts should be provided with guidance as to the proper scope of the offence of criminal preparation.²⁷

THE RESPONSE TO OUR PROPOSALS

- 8.30 Many of our consultees agreed that the current law of attempt is not applied consistently or satisfactorily by the courts. Unfortunately, however, there was no consensus as to the best way forward.

²⁵ Above, para 16.6.

²⁶ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 16.5.

²⁷ CMV Clarkson, "Attempt: the conduct requirement" [2009] *Oxford Journal of Legal Studies* 25, 34, argues that it would be inappropriate to convict someone such as D in *Geddes* (see para 8.11 above) with the offence of criminal preparation as this label has "little communicative meaning" whereas the "public understands (broadly) what is meant by" attempt. Clarkson suggests (at p 36) that "the best way forward would be to enact a new statutory definition of attempt backed up by a list of examples", which, he says (at p 39) would, encompass the behaviour of D in *Geddes*. However, according to the Court of Appeal in *Geddes*, D was not guilty of attempt because, by lying in wait, he was not *trying* to commit the intended offence. It is therefore reasonable to assume that many members of the public, if asked, would similarly associate "attempt" with "trying", and that a criminal preparation conviction would in fact communicate D's behaviour in *Geddes* in a more effective way than a conviction for attempt.

8.31 Crucially, there was little support for our view that section 1(1) of the 1981 Act should be replaced by two new offences. Although we received positive collective responses from the Police Federation and the Association of Chief Police Officers, other bodies, including the Council of Her Majesty's Circuit Judges, the Criminal Bar Association and the Crown Prosecution Service, were amongst the majority of collective and individual consultees who disagreed with our suggested approach.

8.32 We summarise the various objections to our proposed scheme, and our responses, in the following paragraphs. In each case, we first set out the objection and then provide a possible rejoinder.

Objection 1

8.33 The first objection was that it would be better to have a single offence of attempt,²⁸ defined so as to include preparatory acts of sufficient proximity to the commission of the intended offence to warrant inchoate liability. This new definition could be supplemented by examples to ensure it would not be interpreted too narrowly.²⁹

8.34 We have explained above why we did not make a proposal along these lines.³⁰

Objection 2

8.35 The second objection was that separating out the two bases of inchoate liability in the way we proposed would lead to pointless jurisprudence on the distinction between the two new offences.³¹

8.36 We have explained above why we do not regard this as a valid objection.³²

Objection 3

8.37 The third objection was that our new offence of attempt would be too narrow.³³

8.38 We would agree with this objection if there were to be no other offence to complement the new, narrower offence of attempt. However, given our proposal that there should be a complementary offence of criminal preparation carrying the same maximum sentence, but with a label which would more accurately reflect the offender's conduct, we are unable to regard this as a valid objection.

²⁸ Or a single offence of criminal preparation.

²⁹ An alternative along these lines is supported in CMV Clarkson, "Attempt: the conduct requirement" [2009] *Oxford Journal of Legal Studies* 25.

³⁰ See paras 8.25 to 8.28 above.

³¹ See, for example, CMV Clarkson, "Attempt: the conduct requirement" [2009] *Oxford Journal of Legal Studies* 25, 33: "There is a very real danger that voluminous case law could develop trying to draw the distinction". A further objection raised in this article is that the distinction between attempt and criminal preparation would be meaningless in the context of an offence D intends to commit by omission.

³² See para 8.19 above.

- 8.39 Our two proposed offences would cover the ground now covered by the present offence of attempt – if we disregard the unduly narrow *Geddes*³⁴ interpretation – so there would be no reduction in the scope of criminal liability.

Objection 4

- 8.40 The fourth objection was that, in cases of uncertainty, there could be a temptation to charge, or convict, D of the offence of criminal preparation rather than the offence of attempt, undermining fair labelling.
- 8.41 We have already explained³⁵ that the line separating the two new offences would be clearly defined. It follows that only rarely would D be charged with and/or convicted of criminal preparation when his or her conduct was so close to the commission of the intended offence that it was, in truth, an attempt.

Objection 5

- 8.42 The fifth objection was that, just as the label ‘attempt’ has led the Court of Appeal on occasion to interpret the present offence of attempt too narrowly, an offence of ‘criminal preparation’ might exert a linguistic pull on the way the offence is construed. This could lead the courts to interpret the offence more broadly than intended, resulting in over-criminalisation and an unsatisfactory overlap between the general offence and existing context-specific offences of preparation.³⁶
- 8.43 We accept that this is a legitimate concern. However, we took the view that the guiding examples we proposed, along with our explanation of how the offence should be construed in practice, would ensure that the offence of criminal preparation would not be interpreted too broadly.

Objection 6

- 8.44 The sixth objection was that, whilst there is a case for criminalising preparations to commit certain intended criminal acts which are particularly dangerous and anti-social, there could be no justification for a general offence of criminal preparation.

³³ See, for example, CMV Clarkson, “Attempt: the conduct requirement” [2009] *Oxford Journal of Legal Studies* 25, 33.

³⁴ (1996) 160 JP 697.

³⁵ See para 8.19 above.

³⁶ See also CMV Clarkson, “Attempt: the conduct requirement” [2009] *Oxford Journal of Legal Studies* 25, 34, suggesting that the offence of criminal preparation “would be too broad and could lead to the risk of over-criminalization” because “the examples ... seem to go way beyond anything Parliament intended in enacting the 1981 Act”.

8.45 We do not disagree with this objection as a statement of general principle. However, we believe the objection ignores the very narrow scope of our proposed offence and the fact that there is, in our view, already a general offence of this sort, covering the same restricted ground, within what is now section 1(1) of the 1981 Act.

8.46 It is worth repeating that our proposal was that the offence of criminal preparation would encompass nothing more than the type of conduct which could properly be regarded as part of the *execution* of D's plan to commit an intended offence.

Objection 7

8.47 The seventh objection was related to the sixth. It was argued that we had reached one of two possible interpretations of Parliament's intention in passing the 1981 Act, given the different approaches adopted by the Court of Appeal in different cases. The case for a general offence of criminal preparation therefore had to be considered on its own merits as a measure aimed at preventing, deterring and punishing criminal activity.

8.48 On this point, we have previously explained³⁷ that a general offence of criminal preparation, narrowly drawn, is indeed warranted, certainly for the more serious offences, regardless of the scope of the present offence of attempt.

8.49 We also believe that Parliament's intention is indeed as we understood it to be. We say this because:

- (1) Parliament adopted the "more than a merely preparatory" act formula in the draft Bill appended to Law Com No 102³⁸ for its definition of attempt in section 1(1) of the 1981 Act ("more than merely preparatory");
- (2) the policy underpinning this test was that D should be liable for attempt if D's preparatory steps were sufficiently proximate to the commission of the intended offence;³⁹
- (3) if Parliament had intended a narrower test, limited to the concept of *trying* to commit the intended offence, or to the final act necessary for the commission of that offence, Parliament would have used a different formula;⁴⁰ and

³⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.7 to 14.16; Part 15; and para 16.7. See also paras 8.10 to 8.12 above.

³⁸ Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, Appendix A, draft Criminal Attempts Bill, cl 1(1)(a).

³⁹ Above, paras 2.46 to 2.49.

⁴⁰ On the origins of the "more than merely preparatory" formula, see Criminal Law: Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.40.

- (4) there is a significant body of case law which supports a broad interpretation of section 1(1) of the 1981 Act.⁴¹

Objection 8

- 8.50 The eighth objection was that prosecutors would probably charge both offences in the alternative, which would lead to longer indictments.
- 8.51 On this point, we accept that the two offences might in some cases be charged in the alternative, but in truth we doubt this would happen very often given the narrow range of conduct which would be encompassed by our proposed offence of attempt.
- 8.52 In any event, splitting the present offence of attempt into two new offences would not lead to unduly long indictments. In the sort of case where D has acted with a view to committing an intended offence, but failed to commit that offence, the two new offences would most likely be the only general offences charged, albeit perhaps with an additional context-specific statutory offence of (mere) preparation tagged on.

Objection 9

- 8.53 The ninth objection was that defendants would wish to plead guilty to criminal preparation, rather than attempt, in the hope of receiving a lighter sentence.
- 8.54 We acknowledge that this could happen, particularly if the prosecution were to offer D the option.
- 8.55 However, we consider it to be an unlikely eventuality because defendants would be provided with legal advice explaining the maximum penalty available for each offence and the aggravating and mitigating factors relevant to the determination of his or her sentence.
- 8.56 Labelling aside, there would be little if any advantage in pleading guilty to the offence of criminal preparation rather than the narrower offence of attempt.

Objection 10

- 8.57 The tenth objection was that the present offence of attempt is satisfactory as it stands. Attempt has been interpreted widely, in line with our view of Parliament's intention, more often than it has been interpreted unduly narrowly; so, it was argued, there is no need for a new general approach which would have the effect of rendering the law more complicated than it currently is. In cases where an unduly narrow approach is adopted, it would be possible for Parliament to enact context-specific offences of preparation to deal with the resulting mischief.

⁴¹ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.6 to 14.7.

- 8.58 We consider this to be the most persuasive objection to our proposed scheme. We certainly accept that there is a significant body of case law which supports a broad interpretation of section 1(1) of the 1981 Act⁴² and that, where lacunae have been created by a narrow interpretation, Parliament may step in to plug the gap. Indeed Parliament's response to the judgment in *Geddes*⁴³ was to pass section 63 of the Sexual Offences Act 2003, creating a new offence of trespass with intent to commit a sexual offence.
- 8.59 Our position in the CP in relation to this point was that it would be better to have a general offence of the right breadth, ideally in the form of two offences with guidelines in the form of examples, rather than an inconsistently construed offence resulting in lacunae which would have to be addressed by the creation of new statutory offences on a piecemeal basis.⁴⁴
- 8.60 Nevertheless, we concede that this objection undermines any argument that the present offence of attempt is fundamentally flawed or that it has been rendered unworkable by the courts having adopted a consistently narrow approach when interpreting the 1981 Act.

Objection 11

- 8.61 A further objection⁴⁵ was that, while "the idea of having two separate ... offences is potentially a very fruitful one",⁴⁶ our proposed scheme was insufficiently radical or principled. It was argued that the offence of attempt should be defined with reference to how close D came in achieving his or her intended goal, largely covering the same ground as our two proposed offences (albeit with a new defence of "reasonable prospect of completion"),⁴⁷ and that there should be a further offence of preparation formulated on the basis of D's 'settled' criminal intention. On this basis it was suggested that the offence of preparation should be broader than the offence of criminal preparation we provisionally proposed. The argument was that, because the rationale of preparation would be D's commitment to bringing about an intended crime, it was inappropriate to limit the scope of the offence to conduct associated with the execution of D's plan. Rather, if D had a settled intention to commit an offence then that should be enough to justify the imposition of liability so long as D had done something "which contributes to the commission of the offence *and* corroborates D's settled intention to commit it".⁴⁸

⁴² See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.6 to 14.7.

⁴³ (1996) 160 JP 697.

⁴⁴ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 16.58 to 16.67.

⁴⁵ Set out in J Rogers, "The Codification of Attempts and the Case for 'Preparation'" [2008] *Criminal Law Review* 937.

⁴⁶ Above, 945.

⁴⁷ Above, 950.

⁴⁸ Above, 948 (emphasis in original).

- 8.62 This alternative offence of preparation would be much broader than the offence we proposed, so the requirement of conduct which corroborates D's state of mind was included as a safeguard. The proponent also suggested that additional safeguards might be required to prevent D being convicted if D did not in fact have that intent (for example, by tightening the rules on the admissibility of D's bad character as evidence of his or her intention) or if D had that intent but the relevant conduct took place in D's own home for an offence to be committed elsewhere.⁴⁹
- 8.63 Our reasons for not supporting a broader, general offence of preparation were set out in some detail in Part 15 of our CP,⁵⁰ particularly in paragraphs 15.12 to 15.16, and it would serve no useful purpose to repeat them here.⁵¹
- 8.64 However, we do perhaps need to stress that our purpose in setting out our proposals on the offence of attempt in the consultation paper was to rectify problems identified with the offence, while maintaining the policy formulated by the Commission in the report which led to the definition of the offence in section 1(1) of the 1981 Act. It was not (and is not) our purpose to consider root-and-branch reform, and the proposals set out for consideration in our consultation paper, and on which we sought our consultees' comments, were predicated on our view that the scope of the present offence, as we understand it, was broadly right.⁵² For this reason, the radical suggestion outlined above is not an approach we can now consider as a viable alternative.
- 8.65 That said, in addition to the points we made in the consultation paper on our opposition to a broader offence of preparation, we do have some specific reservations on this alternative scheme. The offence of preparation would require a new definition of intent, different from its meaning in the criminal law generally, which we believe would be an unattractive development, particularly if the offences of attempt and preparation were to be charged as separate counts on a single indictment. Nor are we attracted by a special rule which would disapply part of the law of criminal evidence just because of the nature of the offence charged. There may well be cases where evidence of D's bad character *should* be admitted to prove his or her intention, settled or otherwise. We believe it would be wrong to have a blanket prohibition on the admission of such evidence without reference, in the particular factual context of the case being tried, to the probative value of the evidence and the undue prejudice it might generate in the jury's mind.

⁴⁹ Above, 949.

⁵⁰ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183.

⁵¹ But we do endorse the view of CMV Clarkson, "Attempt: the conduct requirement" [2009] *Oxford Journal of Legal Studies* 25, 38 that, "to respect freedom, civil liberties and privacy, any expansion of the criminal law should involve a thorough investigation into whether it is necessary" and any such "investigation is easier when criminalizing specific acts of preparation, in that one is operating within a specific context with a clearly defined harm being targeted". This accords with our policy as set out in Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 15.12 to 15.16.

⁵² It is for this reason that we did not address s 1(2) and (3) of the Criminal Attempts Act 1981, which permit D to be liable for attempt even if it was impossible for D to commit the intended offence. See CMV Clarkson, "Attempt: the conduct requirement" [2009] *Oxford Journal of Legal Studies* 25, 34 to 35.

8.66 In addition, we would find it difficult to support a defence of “reasonable prospect of completion” to a charge of attempt, given D’s moral culpability in trying to commit a particular substantive offence.⁵³ That is to say, we are not persuaded by the argument that D should be liable for attempt only if he or she “created a real danger that the intended offence will be committed”.⁵⁴ To begin with, such a limitation would have to be subject to the rules permitting conviction for attempt when the attempt is impossible to carry out. Secondly, even with this qualification, the limitation is likely to produce no less uncertainty than the current law. Thirdly, the limitation seems to be vulnerable to unattractive claims to acquittal by those who have done all they can do to make an attempt successful. An example might be the claim of a would-be murderer that he or she should be acquitted of attempted murder if the jury is sympathetic to evidence that he or she is so unskilful that his or her shots presented no real danger to anyone.⁵⁵

Conclusion

8.67 It will be apparent from our responses to the various points raised by our consultees that, save for the tenth, we have not found the objections to be particularly persuasive. Indeed, in large measure we had already considered the same issues before formulating our proposal.

8.68 Nevertheless, two important facts remain:

- (1) The tenth objection⁵⁶ is a sound criticism of our policy as set out in the CP. Whilst we believe the law could be improved, we cannot say that there is a pressing need for reform.
- (2) There was very little support amongst our consultees for the changes we proposed. Opponents of our proposed scheme included the Council of Her Majesty’s Circuit Judges, the Crown Prosecution Service, the Criminal Bar Association, the Justices’ Clerks’ Society and a former Director of Public Prosecutions.⁵⁷

8.69 In the absence of sufficient support from our consultees, and bearing in mind the strength of the tenth objection, we accept that it would be inappropriate to recommend a change to the criminal law along the lines we provisionally proposed.

8.70 We have therefore decided *not* to make a recommendation in this report that the offence of attempt should be repealed and replaced by two new offences covering the same ground.

⁵³ See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 15.1 to 15.7.

⁵⁴ J Rogers, “The Codification of Attempts and the Case for ‘Preparation’” [2008] *Criminal Law Review* 937, 950.

⁵⁵ Above, 937, 951 suggests a test based on what a “reasonable, hypothetical bystander might have thought of D’s prospects of success”.

⁵⁶ See para 8.57 above.

⁵⁷ Mr Justice Calvert-Smith.

- 8.71 Nor, given our decision to abandon our proposal to replace the offence of attempt, and with it the existing case law on the offence, are we able to recommend that examples should be used to guide the courts in their interpretation of section 1(1) of the 1981 Act.
- 8.72 We accept that it might be feasible to alter the definition of the present offence of attempt and, as now, have a single offence to cover the ground we proposed should be covered by two inchoate offences. We also accept that a newly-defined offence of attempt could feasibly be supported by guiding examples to ensure that it was not construed too narrowly.⁵⁸
- 8.73 The definition of attempt would need to be reworked to encompass some preparatory acts, in line with what we believe is the appropriate reach of inchoate criminal liability (and our view that Parliament intended that the present offence of attempt should encompass some preparatory acts).
- 8.74 It follows that, in one sense, we would be instructing Parliamentary Counsel to create a new definition of the offence without any change in policy as to what is the appropriate reach of the offence. In another sense, however, there *would* be a change in policy because our view conflicts with some judgments of the Court of Appeal. That is to say, given the existing case law on the interpretation of the 1981 Act, and given that we have taken a view as to which line of authority should be followed, we would be requesting a broader offence of attempt to accommodate our proposed examples. This approach would bring its own problems.
- 8.75 First, although several of our consultees supported a single offence of attempt in tandem with guiding examples of the sort we proposed, there was no wider consensus that it was the right response to the problems we identified with the present offence or on where the examples should be set out. Nor was there sufficiently clear or broad support for our view that the situations described in our proposed list of examples should be covered by a general offence.
- 8.76 For example, the Criminal Bar Association opposed the use of examples; the Council of Her Majesty's Circuit Judges supported the idea of non-statutory examples; and Mr Justice Calvert-Smith supported the idea of statutory examples but opposed non-statutory examples. The Council of Her Majesty's Circuit Judges, the Justices' Clerks' Society, the Crown Prosecution Service and the Police Federation broadly agreed that our examples should give rise to criminal liability. However, the support of the Justices' Clerks' Society and the Crown Prosecution Service was hedged with concern that some of the examples set out, as guidance for the interpretation of a general offence, might result in the reach of the criminal law being extended too far, or beyond the stage intended by Parliament in the 1981 Act.

⁵⁸ Given existing case law on the area, it would not be possible to provide guiding examples without changing the present definition of attempt in s 1(1) of the Criminal Attempts Act 1981.

- 8.77 Secondly, as explained already, given the linguistic import of the word ‘attempt’, this alternative approach would continue to infringe the principle of fair labelling. Individuals guilty of the offence before reaching the stage of trying would on conviction be labelled, as they are now, as persons who had tried but failed to commit the offence intended.
- 8.78 In the light of the mixed response we have received from consultation, and the absence of any consensus amongst our consultees, we have reached the conclusion that it would be inappropriate for us to recommend that the present offence of attempt should be redefined and supported by a list of examples for guidance.
- 8.79 Section 1(1) of the 1981 Act should therefore be retained without amendment. As explained above, we are mindful of the fact that there have been many cases in which the Court of Appeal has accepted that the present offence of attempt should be interpreted broadly, contrary to the narrow approach exemplified by *Geddes*.⁵⁹ Bearing in mind the absence of any broad support from our consultees, and given that Parliament may intervene to rectify any future problems by creating new context-specific offences of preparation, we have concluded that the problem with the present law is insufficiently serious to warrant reform in the way we originally proposed.
- 8.80 It is worth adding, in closing, that the flexibility inherent in the present definition of the offence of attempt means that the courts currently have the power to draw the line separating mere preparation (incurring no liability) from attempt differently depending on the nature of the harm intended.
- 8.81 Where the line separating attempt from non-criminal preparation is drawn under the current law may depend on how serious, damaging and anti-social the intended offence is. In other words, it may be that the line will be drawn further back from the commission of the intended offence in proportion to the seriousness and/or anti-social nature of that offence. We accept that, if this is the approach which the courts adopt, consciously or otherwise, there is no compelling need for guiding examples. The inherent flexibility of the present inchoate offence, whatever label it bears, means that, by and large, the right decision will be reached for the type of offence intended.
- 8.82 On this view, cases such as *Geddes* should be seen as aberrations or deviations from the proper approach, and dealt with, as we suggest, by the creation of new context-specific offences where necessary.

REFORMING THE CRIMINAL ATTEMPTS ACT 1981 IN OTHER RESPECTS

- 8.83 In the following paragraphs we consider the issues we addressed in the CP, in relation to the offence of attempt, which are incidental to the principal proposals considered above. These issues are free-standing and therefore continue to be relevant despite our decision not to carry those proposals forward into recommendations.

⁵⁹ (1996) 160 JP 697.

8.84 We now consider these issues on the basis that section 1(1) of the 1981 Act remains unchanged. Section 1(1) provides as follows:

If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

8.85 There are eight issues which fall to be considered:

- (1) the meaning of the word “intent” in section 1(1) of the 1981 Act;
- (2) the elements of the relevant substantive offence to which D’s intent should relate;
- (3) whether proof of subjective recklessness⁶⁰ as to a circumstance element in the definition of the intended substantive offence should be sufficient for attempt where recklessness (as to that circumstance) is sufficient for D to be liable for the substantive offence;
- (4) whether proof of subjective recklessness as to a circumstance element in the definition of the intended substantive offence should be required for attempt where proof of a lesser degree of fault (or no proof of fault) as to that circumstance is required for D to be liable for the substantive offence;
- (5) whether proof of a fault element as to a circumstance which is higher than subjective recklessness (such as knowledge) should be required for attempt where it is required for D to be liable for the substantive offence;
- (6) whether the word “act” in section 1(1) of the 1981 Act should be replaced to encompass omissions (where the substantive offence is capable of being committed by an omission);
- (7) whether it should be permissible to bring a prosecution in a magistrates’ court for attempting to commit an offence which can be tried only summarily; and
- (8) whether the respective roles of the trial judge and jury should be revised, in cases where D is tried on indictment in the Crown Court.

8.86 The first five of these issues relate to the concept of fault and, accordingly, are addressed under the next heading.

⁶⁰ The unjustifiable taking of a foreseen risk.

Fault

The meaning of intent – direct and indirect intent

- 8.87 In our CP, we explained that a requirement of intent may commonly be satisfied for the general purposes of the criminal law in one of two ways.⁶¹ It may be satisfied by D having something as his or her purpose ('direct' intent). Alternatively, it may be satisfied by inference from the fact that D foresaw something as virtually certain to occur (an idea variously described as 'indirect' or 'oblique' or '*Woollin*' intent).⁶² That is to say, where the occurrence of something was not D's purpose, the jury or other tribunal of fact is nevertheless entitled to infer that D intended it if he or she foresaw its occurrence as a virtual certainty.⁶³ We explained that there is authority for the view that this general approach extends to the offence of attempt.⁶⁴
- 8.88 We supported the application of this broad approach to attempt, in preference to the narrower view which would confine the meaning of intention to purpose.⁶⁵
- 8.89 If D were to plant a bomb on board an aeroplane with a view to destroying it over the sea to claim on an insurance policy, and D was aware that the passengers on board were almost certain to die as a result, it would be quite wrong if D could not be convicted of attempted murder if the bomb failed to detonate. By the same token, if D's purpose was that an explosion should destroy only property but, because someone was passing by at the precise moment when D decided to detonate the bomb, D realised that a person was almost certain to be killed, it should be possible to convict D of attempted murder if the bomb failed to detonate or the passer-by somehow managed to survive the explosion.

⁶¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.27 to 14.32.

⁶² *Woollin* [1999] 1 AC 82.

⁶³ *Woollin* [1999] 1 AC 82. The law does not yet *define* indirect intent in terms of appreciating a virtual certainty: *Matthews* [2003] EWCA Crim 192, [2003] 2 Cr App Rep 461.

⁶⁴ *Pearman* (1985) 80 Cr App R 259. Further support for this proposition is provided by *Walker and Hayles* (1990) 90 Cr App R 226 and, more recently, by *D* [2004] EWCA Crim 1391.

⁶⁵ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 4.32 and proposal 18A, para 16.76.

- 8.90 We recognised that this broad approach to intent involves a departure from the idea of attempt as *trying* to commit an offence, in a strict sense, since that idea is intrinsically linked to the narrower understanding of intention as a synonym for purpose. However, what might be called a purist view of the nature of intention in attempts overlooks the fact, explained above,⁶⁶ that, according to one line of Court of Appeal jurisprudence, some acts of preparation can amount to an attempt even though D may not at that moment have been trying to commit the offence itself.⁶⁷ For example, D may be convicted of attempted rape where he physically tried to subdue his victim but did not go so far as to remove any items of clothing or perform any overtly sexual act.⁶⁸
- 8.91 In the CP, we therefore proposed that the word “intent” in section 1(1) of the 1981 Act should not be limited to purpose but should encompass ‘*Woollin*’ intent.⁶⁹
- 8.92 Our consultees were in broad agreement with this proposal. The only suggested qualification⁷⁰ was that a more appropriate test for the criminal law generally, and therefore for attempt, should be that taken from the Court of Appeal’s judgment in *Mohan*.⁷¹ On this view, intent should mean “a decision to bring about [a consequence], in so far as it lies within [D’s] power ... whether [D] desired that consequence or not”.⁷²
- 8.93 We see the merit in a general definition of this sort,⁷³ rather than the present position which allows the tribunal of fact to infer the necessary intent if D foresaw the relevant consequence as a virtual certainty. Nonetheless, we believe that it would be inappropriate to incorporate a special test for ‘intent’ in section 1(1) of the 1981 Act which would differ from the general definition used for other criminal offences.
- 8.94 We therefore take the view that ‘intent’ in section 1(1) should continue to encompass purpose and indirect intent in line with the general legal position.
- 8.95 In our view, it is unlikely that the criminal courts will come to a different view on this matter, and so it is unnecessary to make the point explicit in the 1981 Act. To put it another way, in the light of the responses we received from consultation, we make no recommendation in this report which would limit the meaning of ‘intent’ in section 1(1) of the 1981 Act to purpose.

⁶⁶ See para 8.6 above.

⁶⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.4 to 14.7.

⁶⁸ See, for example, *Dagnall* [2003] EWCA Crim 2441.

⁶⁹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 18, para 16.68.

⁷⁰ Suggested by Professor William Wilson.

⁷¹ [1976] QB 1.

⁷² Above, 11.

⁷³ See Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.14.

Conditional intent

8.96 In the CP, we set out a dictionary definition of a condition as “a stipulation; something upon the fulfilment of which something else depends”.⁷⁴ We explained that an intention can be conditional in this sense. D can intend to act only if something else occurs, or does not occur, or only in certain circumstances.

8.97 In *Saik*,⁷⁵ a recent case on conspiracy, Lord Nicholls said:

An intention to do a prohibited act is within the scope of [conspiracy] even if the intention is expressed to be conditional on the happening, or non-happening of some particular event A conspiracy to rob a bank tomorrow if the coast is clear when the conspirators reach the bank is not, by reason of this qualification, any less a conspiracy to rob Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside section 1(1) [of the Criminal Law Act 1977].⁷⁶

8.98 In our CP, we proposed, for conspiracy, that the mere fact that D has set him or herself conditions under which a criminal intent will be carried out should not in itself prevent that intent being regarded as a criminal intent.⁷⁷ Our view reflected what we described as the “robust approach”⁷⁸ to conditional intention for conspiracy adopted in *Saik*.

8.99 The requirement for attempt that D’s act be “more than merely preparatory” limits the opportunities for conditional intent to arise as a practical feature of attempts, but it is certainly possible to envisage such an intent being encountered in some contexts. For example, D may enter through V’s open window, intending to steal from within V’s house only if D finds something worth stealing;⁷⁹ or D may throw V on to a bed intending to rape her only if he finds that she is not tattooed; or D may hold a gun to V’s head intending to kill him only if he gives a certain answer to a question about his religious or political affiliation.

⁷⁴ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 16.69.

⁷⁵ [2006] UKHL 18, [2007] 1 AC 18.

⁷⁶ *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [5].

⁷⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, Part 5.

⁷⁸ Above, para 16.72.

⁷⁹ This is the last act necessary for the commission of burglary (with intent to steal) contrary to s 9(1)(a) and (2) of the Theft Act 1968.

- 8.100 In *Hussey*⁸⁰ D tampered with the door of a parked van containing a hold-all with certain equipment inside and was charged with attempted theft of the equipment. The trial judge directed the jury that D could be convicted of attempted theft if he had been about to inspect the hold-all with the intention of stealing the contents if they were valuable. This was held to be a misdirection, however, on the ground that “it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal”.⁸¹
- 8.101 To overcome the problem engendered by *Hussey*,⁸² the Court of Appeal formulated a procedural solution. If D opens a bag with the intention of stealing something only if it is something D needs, D can be convicted of attempted theft if he or she finds nothing worth taking, but *only if* the indictment (or information)⁸³ states that D intended to steal “some or all of the contents”.⁸⁴
- 8.102 However, as we explained in our CP,⁸⁵ this procedural solution is unsatisfactory. D may have had the intention to steal *something other* than the actual contents of the bag, or indeed the bag may have been empty.⁸⁶ Nevertheless, this solution is still the law today.⁸⁷
- 8.103 In our CP, we therefore took the view that for attempt, consistent with our and the courts’ approach to conspiracy, the procedural solution should be abandoned in favour of a new approach to the meaning of intent. Our view was that if D was found breaking into a car intending to steal only if he or she found something worth stealing, D should nevertheless be said to have acted with the intent to steal.⁸⁸
- 8.104 That is to say, if D has a condition in mind, such that his or her criminal intent will be carried out only if that condition is satisfied, then having that condition in mind should *not* prevent D’s intent from being regarded as a criminal intent for the purposes of section 1(1) of the 1981 Act.⁸⁹

⁸⁰ (1977) 67 Cr App R 131.

⁸¹ Above, 132.

⁸² (1978) 67 Cr App R 131.

⁸³ For summary proceedings.

⁸⁴ *Attorney General’s Reference (Nos 1 and 2 of 1979)* [1980] QB 180; *Smith and Smith* [1986] Criminal Law Review 166. Impossibility is no defence to a charge of attempt; see s 1(2) and (3) of the Criminal Attempts Act 1981.

⁸⁵ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 16.73 to 16.74.

⁸⁶ Compare Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, Appendix E, para 10, where, following *Attorney General’s Reference (Nos 1 and 2 of 1979)* [1980] QB 180, the Commission expressed a more sanguine view.

⁸⁷ *Smith and Smith* [1986] Criminal Law Review 166.

⁸⁸ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 18, para 16.68 and 16.75.

⁸⁹ By “condition is satisfied” we mean that D intends to carry out his or her intention to commit the relevant substantive offence only if something occurs (or does not occur) or in certain circumstances.

8.105 There was broad agreement with this proposal amongst the consultees who addressed the issue.

8.106 **Accordingly, we now recommend that**

the Criminal Attempts Act 1981 be amended to provide that, for the purposes of section 1(1), an intent to commit an offence includes a conditional intent to commit it.

(Recommendation 17)

8.107 Clause 7(1) of our draft Bill adds a new section 3A(6) to the 1981 Act. This new subsection provides that D satisfies the requirements of Part 1 of the 1981 Act relating to intent⁹⁰ even if D intended that the act, omission, behaviour or consequence (where relevant) should or would “take place or be brought about only if certain conditions were satisfied”.

The object of D’s intent

8.108 Given that D must intend the commission of the substantive offence it might be thought that, to be liable for attempting to commit offence X, D must:

- (1) intend the relevant *conduct* element of offence X;
- (2) intend the required *consequence* element of offence X, if any; and
- (3) intend (or know or believe) that the required *circumstance* element of offence X, if any, exists or will exist at the time of the conduct element.

8.109 Given the number of cases which suggest that, to be liable for attempt, D does *not* have to do the last act necessary for the commission of the intended substantive offence, it is necessary to draw a distinction between two separate types of conduct. First, there will be D’s *actual* conduct, the conduct which forms the basis of the prosecution’s case. Secondly, there will be the conduct which would be necessary for D to commit the substantive offence in question. Of course, if D does the last act necessary for the commission of the substantive offence, there will be only one relevant type of conduct.

⁹⁰ This includes s 1(1) of the Criminal Attempts Act 1981 and the new s 3A(2) (as to which, see paras 8.108 to 8.113 below).

- 8.110 Say, for example, that D is charged with attempted rape on the basis that he was apprehended just after he had grabbed V and forced her against a wall with his hand over her mouth.⁹¹ D must intend his own conduct at that time. This, however, is not usually regarded as an element of fault. (Intention as to the conduct element of the offence committed is usually regarded as an aspect of the offence's external element). In addition, D must intend the conduct element of the substantive offence of rape he intended to commit: D must intend to penetrate V's mouth, vagina or anus with his penis.⁹²
- 8.111 The word 'intent', as the fault element of attempt, therefore relates to the conduct which must be done by D to commit the substantive offence, rather than D's actual conduct, where the two are different. Clause 7(1) of our draft Bill makes this clear, adding a new section 3A(2)(a) to the 1981 Act which provides that D must "intend that any acts, omissions or other behaviour which are elements of the substantive offence shall take place".⁹³
- 8.112 In addition, if the substantive offence requires proof of a consequence for D to be liable for it, D must intend that the consequence should result from his act if he or she is charged with attempting to commit the substantive offence. Murder provides an example. It is a consequence crime because, for D to be convicted of murder, he or she must have caused the death of a human being. It is not necessary, however, that D should have intended the death of a human being to be convicted of murder. It suffices if D intended to cause grievous bodily harm.

⁹¹ In *Dagnall* [2003] EWCA Crim 2441, D was convicted of attempting to rape a woman on the ground that, with the necessary intent, he had "grabbed her and forced her against a fence".

⁹² Sexual Offences Act 2003, s 1(1)(a).

⁹³ The word "omissions" has been included on the basis that D may commit an attempt by doing a more than merely preparatory act intending to commit a substantive offence by omission. For example, D may lock his or her child in a room intending to starve the child to death (that is, intending to murder the child by omission). The words "other behaviour" are included to cover substantive offences such as possessing a drug with intent to supply, so D must intend to take possession of the drug to be liable for attempting to commit an offence of this sort.

- 8.113 Attempt is not a consequence crime. It is, however, a crime which requires proof of an intention to bring about the consequence required by the definition of the substantive offence (even if the substantive offence itself does not require that intention). So, for D to commit attempted murder he or she must intend to *kill* another human being, even though this intent is not required for murder.⁹⁴ Clause 7(1) of our draft Bill makes this clear, adding a new section 3A(2)(b) to the 1981 Act. This provides that, to be liable for attempting to commit a particular substantive offence, D must “intend to bring about any consequence which is an element of, or as to which proof of fault is required for, the [substantive] offence”.⁹⁵
- 8.114 As the law stands, D must intend the conduct and consequence elements of the relevant substantive offence.⁹⁶ However, as explained in our CP, the Court of Appeal has held that D does *not* have to intend that the *circumstance* element of the substantive offence (if any) should be present or know or believe that it will be present.⁹⁷
- 8.115 If the substantive offence in question includes a circumstance element, and the fault for the offence requires nothing more than subjective recklessness in relation to that circumstance, then, to be liable for attempt, it is sufficient that D was subjectively reckless as to the circumstance.

⁹⁴ On this point see *Walker and Hayles* (1990) 90 Cr App R 226.

⁹⁵ The words “or as to which proof of fault is required for” cover so-called ulterior intents; that is, any intention as to a consequence required by the fault element of the substantive offence where the consequence itself is not required for liability. An example is provided by the offence of theft contrary to s 1(1) of the Theft Act 1968. To be liable for theft, D must dishonestly appropriate property belonging to another person with the “intention of permanently depriving the other of it”. D will be liable for theft only if he or she acts with that intention, but it is not necessary that D actually did permanently deprive the other person of the property. To be convicted of attempted theft, the prosecution must prove that D had the same intention as to a consequence as that required for theft itself.

⁹⁶ In addition, where the intended substantive offence requires proof of a particular state of mind for liability, such as dishonesty, or the intention subsequently to commit another criminal offence, the prosecution will also need to prove that D acted with that state of mind to be guilty of attempt. For example, D can be liable for attempted burglary (as defined by s 9(1)(a) of the Theft Act 1968) only if, at the time of D’s more than merely preparatory act, he or she intended to commit one of the offences listed in s 9(2) of the Act. This would continue to be the case if the Criminal Attempts Act 1981 is amended by our draft Bill.

⁹⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.37 to 14.41.

8.116 In our CP,⁹⁸ we agreed with the courts' view⁹⁹ that the requirement of intent in section 1(1) should not apply to a circumstance element of the substantive offence if mere recklessness as to the circumstance suffices to be liable for that offence. We agreed with the view of the Court of Appeal in *Attorney-General's Reference (No 3 of 1992)*¹⁰⁰ that this approach is "one which accords with common sense, and does no violence to the words of [the 1981 Act]".¹⁰¹

8.117 The position we adopted in the CP for circumstance elements was as follows:¹⁰²

- (1) Where D need only be subjectively reckless as to the existence of a circumstance to be liable for the substantive offence, subjective recklessness as to that circumstance should suffice for attempt.
- (2) Where a lesser form of fault or no fault at all is required in relation to a circumstance to be liable for the substantive offence, subjective recklessness as to that circumstance should nevertheless be required for attempt.
- (3) Where a higher form of fault is required in relation to a circumstance to be liable for the substantive offence (for example, knowledge of the circumstance), the same fault should be required for attempt.

8.118 We rejected a simple extension of the courts' position for subjective recklessness.¹⁰³ This approach, if extended to attempts to commit no-fault offences, would require no fault on the part of D as to a required circumstance element and, in the absence of any consequence element, no fault at all other than the intention to commit the relevant conduct. We expressed the view that the level of culpability required by the formula "intent to commit an offence" in section 1(1) of the 1981 Act must require more than this.

8.119 The following example illustrates the application of the simplistic approach to attempt where the substantive offence has a circumstance element with no corresponding fault element:

⁹⁸ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.42 and 16.78.

⁹⁹ See *Khan* [1990] 1 WLR 813; *Attorney General's Reference (No 3 of 1992)* [1994] 1 WLR 409.

¹⁰⁰ [1994] 1 WLR 409.

¹⁰¹ Above, 419.

¹⁰² Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.46 to 14.55 and proposals 18B and 18C, paras 16.79 to 16.82.

¹⁰³ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.46 to 14.52.

Example 8B

D, 14, is charged with attempting to commit rape of a child under 13.¹⁰⁴ The prosecution case is that D entered V's bedroom, at V's invitation, with a view to having consensual sexual intercourse with her. V is a 12-year-old girl but D reasonably believed that she was 16.

- 8.120 On the simplistic approach, assuming that D's conduct might properly be regarded as a more than merely preparatory act,¹⁰⁵ D would stand to be convicted of an extremely serious offence and face, if not life imprisonment, a custodial sentence and registration as a sex offender.¹⁰⁶ It would be irrelevant that D reasonably believed that V was 16 and that, accordingly, he had no culpable state of mind in relation to the circumstance element of the substantive offence (that is, V's age).¹⁰⁷
- 8.121 We expressed our view that the simplistic approach, if extended by the courts to offences requiring no fault or mere objective fault, would be contrary to the demands of justice. It would be inimical to the protection of freedom from over-extensive criminal liability which the law of inchoate offences must secure.
- 8.122 We therefore proposed that, for attempt, it should be proved that D was at least subjectively reckless as to any circumstance element required by the intended substantive offence, regardless of the fact that a lesser fault element or no fault would need to be proved (in relation to that circumstance) if the substantive offence were charged.¹⁰⁸ So, in the example given above, D could be found guilty of an attempt to rape a child under 13 only if D went beyond the stage of mere preparation (intending to have sexual intercourse with V) and D realised that V might be under 13. This approach, we suggested, would strike a better balance between the demands of public protection and the demand that individual liberty be respected.¹⁰⁹

¹⁰⁴ An offence by virtue of s 5 of the Sexual Offences Act 2003.

¹⁰⁵ In *Tosti* [1997] Criminal Law Review 746 the Court of Appeal recognised that an attempt may comprise a number of sequential acts, and that the commission of one or more of those acts could justify a conviction notwithstanding that they might be described, technically, as preparatory. See also *Toothill* [1998] Criminal Law Review 876 where D was liable for attempted burglary with intent to rape (as the offence of burglary was then defined) by knocking on the door of V's home. But compare the narrow approach adopted in *Geddes* (1996) 160 JP 697, suggesting that D can be liable for attempt only if he or she physically *tries* to commit the intended offence.

¹⁰⁶ It should be noted, however, that, rather than facing prosecution under s 5 of the Sexual Offences Act 2003, D may be charged with the alternative offence in s 13 of the Act, which does not carry the label "rape of a child under 13". See generally *G* [2008] UKHL 37, [2009] 1 AC 92.

¹⁰⁷ See *G* [2008] UKHL 37, [2009] 1 AC 92.

¹⁰⁸ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 18B, para 16.78.

¹⁰⁹ Above, paras 14.51 to 14.52.

- 8.123 There was clear majority agreement amongst our consultees that the approach we proposed was the right one, although the members of the judiciary who considered it did not support it.¹¹⁰
- 8.124 The Council of Her Majesty's Circuit Judges expressed concern that there would be difficulties in directing the jury, and confusion for jurors, if D were to be tried in the alternative with the commission of the substantive offence and an attempt to commit that offence.
- 8.125 We recognise that a different direction would be required in cases where D is tried in the alternative with the commission of the substantive offence itself and an attempt to commit that offence. However, such trials are rare and, for this reason, we consider this argument, standing alone, to be an insufficiently compelling reason for abandoning the approach we provisionally proposed.
- 8.126 Some of our other consultees expressed the view that the reason the simplistic approach to attempt would produce an unfair result for substantive offences requiring no fault as to a circumstance element, as in the example given above for attempted child rape, was because of the way the substantive offences have been defined. The argument, therefore, was that the law relating to attempts did not need to be changed. Rather, it was the definition of the substantive offences themselves.
- 8.127 It was also suggested that, for offences which protect individual autonomy, if the importance of autonomy is such that the offence is defined without fault, then the same approach could be justified for attempt. This is because the rights of the individual to be able to live free from an unwarranted interference with that autonomy apply equally to an attempt as they apply to the actual commission of the substantive offence.
- 8.128 We accept that there may be merit in the first of these observations; but, if so, it does not detract from the important matter of principle that the problems inherent in the definition of some substantive offences should not be extended back to the inchoate offence of attempt. The key point here is that there may be very good reasons for defining a substantive offence with a requirement of objective fault, or with no fault at all, but the justification may be substantially weaker when applied to an inchoate offence of attempt. It must not be forgotten that, according to the strand of Court of Appeal jurisprudence with which we agree, an attempt may be committed by D at a preparatory stage before the stage of trying to commit the intended substantive offence.

¹¹⁰ The Council of Her Majesty's Circuit Judges and Mr Justice Calvert-Smith.

- 8.129 The offence of rape exemplifies this point. The fault element for rape was recently reduced from a requirement of subjective recklessness (for the offence as defined by section 1 of the Sexual Offences Act 1956) to one of negligence (for the offence as now defined by section 1 of the Sexual Offences Act 2003).¹¹¹ One of the reasons for this change is that, when two persons are engaged in sexual intercourse, it is more legitimate to judge them by what they ought reasonably to have been aware of, regarding the other person's state of mind (a relevant circumstance), than it would be in the absence of such intimate contact.¹¹² However, in the case of attempt, where the individuals concerned do not necessarily reach this stage of sexual intimacy, the argument for dispensing with a requirement of subjective fault is correspondingly weaker. We believe, therefore, that D should be liable for attempted rape only if he was aware of the possibility that V would not be consenting should they proceed to sexual intercourse.
- 8.130 Similarly, whilst we accept that some substantive offences have been defined primarily to protect individual autonomy, the argument that the same approach may legitimately be applied to the inchoate offence of attempt is weakened when it is acknowledged that D may incur liability on the basis of some preparatory acts. It is therefore feasible that D may be convicted of an attempt to commit a sexual offence, and labelled accordingly, even though the stage of intimate contact between D and V resulting in an infringement of V's sexual autonomy has not been reached.¹¹³
- 8.131 In addition, it is worth repeating our earlier point that the concept of a no-fault or negligence-based offence of attempt would not sit easily with the liability requirement for attempt that D act "with intent to commit an offence".
- 8.132 For the reasons given above, and in the light of the general support for our proposal amongst our consultees, we believe that we should take our proposal forward.

¹¹¹ Sexual Offences Act 2003, s 1(1)(c).

¹¹² Compare the offence of rape of a child under 13, contrary to s 5 of the Sexual Offences Act 2003. For this offence, the complainant's state of mind is irrelevant because he or she is deemed to be unable to consent to sexual intercourse.

¹¹³ See *Toothill* [1998] Criminal Law Review 876, where D was liable for attempted burglary with intent to rape (as the offence of burglary was then defined) by knocking on the door of V's home. The offence which has replaced burglary with intent to rape is a sexual offence (see the offence of "trespass with intent to commit a sexual offence", s 63 of the Sexual Offences Act 2003).

8.133 **We therefore recommend that**

for substantive offences which have a circumstance requirement but no corresponding fault requirement, or which have a corresponding fault requirement which is objective (such as negligence), it should be possible to convict D of attempting to commit the substantive offence only if D was subjectively reckless as to the circumstance at the relevant time.

(Recommendation 18)¹¹⁴

8.134 Clause 7(1) of our draft Bill creates a new section 3A of the 1981 Act. Section 3A(4) provides that, where it applies,¹¹⁵ “D must have a state of mind as to the existence at the material time of the fact or circumstance that satisfies the requirements of the [substantive] offence for proof of fault as to its existence”. Section 3A(5) provides that, for the purposes of section 3A(4):

- (a) a requirement to prove negligence, absence of reasonable belief or a similar state of mind is to be treated as a requirement to prove recklessness; and
- (b) an offence that does not require proof of fault as to the existence of the fact or circumstance is to be treated as requiring proof of recklessness as to its existence.

8.135 In our CP, we also proposed that, where the substantive offence is defined with a circumstance element having a corresponding fault requirement which is higher than subjective recklessness, the same fault requirement as to that circumstance should be required for an attempt to commit the offence.¹¹⁶ This fully accords with the notion of D being liable for an attempt only if he or she acts “with intent to commit” the substantive offence.

8.136 There was universal agreement amongst our consultees who addressed the issue that this was the right approach.¹¹⁷ However, as with conspiracy we have slightly modified our approach, to avoid the need to refer to higher forms of fault.

¹¹⁴ This accords with our recommendation for conspiracy.

¹¹⁵ Section 3A(4) of the Criminal Attempts Act 1981 applies “where the existence of a fact or circumstance is an element of, or a matter as to which proof of fault is required for, the [substantive] offence” (s 3A(3)).

¹¹⁶ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 14.54 and proposal 18C, para 16.80.

¹¹⁷ This also accords with our recommendation for conspiracy.

8.137 **Accordingly, we recommend that**

where a substantive offence has fault requirements not involving mere negligence (or its equivalent) in relation to a fact or circumstance, it should be possible to convict D of attempting to commit the substantive offence if D possessed those fault requirements at the relevant time.

(Recommendation 19)

- 8.138 Clause 7(1) of our draft Bill, adding a new section 3A(4) to the 1981 Act, implements this recommendation.¹¹⁸
- 8.139 We should add, as a final point, that, although our recommendations draw a distinction between the various external facets of the intended substantive offence (conduct, circumstance and consequence elements), this is not to say that new problems or complexities will necessarily arise as a result.
- 8.140 First, the courts already break down the elements of the offence to determine the fault required for attempt, where necessary, as we explained in our CP.¹¹⁹
- 8.141 Secondly, the definitions of many substantive offences do not require proof of more than one or two such elements which can be readily identified. For example, murder requires proof of conduct and consequence (the death of a person); and, to convict D of attempted murder, it will be necessary to prove that D intended both the consequence (a person's death) and the conduct which would have caused it. Burglary contrary to section 9(1)(a) of the Theft Act 1968 requires proof that D (knowingly or recklessly) entered a building or part of a building as a trespasser with the intent to commit an offence mentioned in section 9(2). To be guilty of attempted burglary, the prosecution would need to prove, in addition to D's "more than merely preparatory" act: that D intended to do the relevant conduct (that is, enter a building or part of a building); that D was subjectively reckless as to, or aware of, the relevant circumstance (being a trespasser upon entry); and that D had the intention to commit an offence mentioned in section 9(2).¹²⁰

¹¹⁸ See para 8.134 above.

¹¹⁹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.39 to 14.42.

¹²⁰ If a particular state of mind is required to be liable for the offence in s 9(2), it is necessary to prove that D acted with such state of mind to be liable for attempt. So, if it is alleged that D intended to steal, it is necessary to prove that D was dishonest and that D intended permanently to deprive the owner of his or her property (see Theft Act 1968, s 1(1)).

Conduct

Omissions

- 8.142 Section 1(1) of the 1981 Act provides that, to be liable for attempt, D must do “an act which is more than merely preparatory to the commission of the offence”.¹²¹
- 8.143 Although the courts have not yet considered the issue, it is conceivable – probable even – that the subsection will receive a restrictive interpretation, excluding liability for omissions.¹²² Indeed the Commission’s commentary on clause 49(1) of its Draft Criminal Code (1989) states that it “is generally believed” that omissions are not encompassed by the 1981 Act.¹²³
- 8.144 In our CP, we proposed that the offence of attempt should apply not only to acts but also to a failure to discharge a duty to act, where the intended substantive offence is itself capable of being committed by such an omission.¹²⁴ This proposal followed an earlier recommendation by the Commission in its formulation of the attempts provision in the Draft Criminal Code and in the corresponding commentary.¹²⁵ The Commission recommended that clause 49 should encompass omissions and included clause 49(3) to give effect to this recommendation.¹²⁶
- 8.145 In our CP, we explained that the apparent exclusion of omissions from the scope of attempt, where there is a recognised duty to act, is contrary to general principle and could lead to injustice.¹²⁷

¹²¹ Emphasis added.

¹²² In *Lowe* [1973] QB 702 the Court of Appeal held that a distinction had to be drawn between acts and omissions in the context of a particular type of manslaughter. And see also *Ahmad* (1986) 84 Cr App R 64, where the term ‘does acts’ in s 1(3) of the Protection from Eviction Act 1977 was interpreted to exclude a failure to rectify damage.

¹²³ A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 2, p 244, para 13.46.

¹²⁴ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.18 to 14.19 and proposal 19, paras 16.83 to 16.88.

¹²⁵ A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 1, cl 49; vol 2, p 244, para 13.46.

¹²⁶ Clause 49(3) states that act “includes an omission only where the offence intended is capable of being committed by an omission”.

¹²⁷ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 16.83.

- 8.146 We provided an example drawn from the old case of *Gibbins and Proctor*.¹²⁸ In that case the two defendants were convicted of murdering Gibbins' daughter by intentionally starving her to death. We expressed the view that if a person (D) is under a legal duty to another person (V) to provide sustenance and D deprives V of the same intending that V should die, D should not be permitted to escape liability for attempted murder if V's life happens to be saved by the fortuitous intervention of a third party.¹²⁹
- 8.147 We did, however, acknowledge the conceptual difficulty associated with identifying a preparatory omission and therefore an omission which is more than merely preparatory to the commission of the intended substantive offence. We also recognised that cases where D might be charged with an attempt by omission would be rare.
- 8.148 Amongst the consultees who addressed the issue, there was broad support for our view that the 1981 Act should be extended to encompass omissions, where the intended offence is capable of being committed by an omission. However, notwithstanding this support for our provisional proposal, we have come to the conclusion that only a narrower reform is warranted. This stems partly from the caveats mentioned in the previous paragraph, particularly the paucity of plausible factual scenarios beyond the example of attempted murder, partly from the additional complexity a general omissions provision would bring to the law of attempt, and partly from the very important principle that the reach of the criminal law should be broadened only to the extent strictly necessary to address an identifiable mischief.
- 8.149 The identifiable mischief in the present context is the likelihood that, as the law stands, D would not be liable for attempted murder by omission even if it was D's intention to kill V and the evidence is such that it would be possible for a jury to conclude, beyond reasonable doubt, that D had that intention.
- 8.150 We believe that this lacuna in the law should be filled, but, on reflection, we do not think it is necessary or desirable to extend the law of attempt in *general* terms to encompass omissions (where D failed to discharge a duty).
- 8.151 **Accordingly, we recommend that**

the Criminal Attempts Act 1981 be amended so that D may be convicted of attempted *murder* if (with the intent to kill V) D failed to discharge his or her legal duty to V (where that omission, unchecked, could have resulted in V's death).

(Recommendation 20)

¹²⁸ (1918) 13 Cr App R 134. At the time of writing, two defendants have been charged with allegedly murdering their seven-year-old child by starvation; and two persons in New South Wales, Australia, were recently found liable for the death of their daughter by starvation in 2007, one of them being convicted of murder.

¹²⁹ In fact it seems Parliament intended that some omissions would be covered by the Criminal Attempts Act 1981. See Ian Dennis, "The Criminal Attempts Act 1981" [1982] *Criminal Law Review* 5, 7 to 8.

- 8.152 Clause 6(1) of our draft Bill adds a new section 1(5) to the 1981 Act, providing that, for attempted murder, the reference to the doing of an “act” in section 1(1) includes a reference to a failure to act.¹³⁰
- 8.153 The provision does not expressly provide that D can be liable for attempted murder by omission only if D failed to do what he or she was legally required to do. This is a general principle of the criminal law which does not need to be made explicit in the draft Bill. There is no risk that the courts would interpret the provision in any other way.

Summary offences

- 8.154 In our CP, we provisionally proposed that it should be permissible to bring a prosecution for attempt in relation to an intended summary offence.¹³¹ It is not possible to do this as the law stands, because the offence of attempt can currently be committed only if D intends to commit one of a broad range of indictable offences.¹³²
- 8.155 Our proposal followed the Commission’s recommendation in the report which led to the 1981 Act.¹³³ The Commission’s reasoning in that report may be summarised as follows:
- (1) an attempt may fall just short of the completed crime and, in such instances, D’s conduct may be almost as serious as if D had been successful, a consideration which applies with equal force to summary offences;
 - (2) the distinction between indictable and summary offences does not necessarily reflect the distinction between relatively minor regulatory offences and other offences which are truly criminal;
 - (3) there are summary offences in relation to which it seems desirable that a charge of attempt should be available; and
 - (4) there is no real danger of a needless proliferation of charges of attempt to commit summary offences.
- 8.156 In our CP, we criticised the arbitrary line of demarcation between indictable and summary offences which currently determines whether or not a charge of attempt may be brought. We therefore proposed that this line should be abandoned and that it should be possible to bring a charge of attempt to commit a summary offence.

¹³⁰ This change is limited to the offence of attempt under the law of England and Wales (see cl 9(4)). No amendment is made, therefore, to the offence of attempt in other jurisdictions within the United Kingdom or to the relevant provisions in the Armed Forces Act 2006.

¹³¹ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, proposal 21, paras 16.96 to 16.100.

¹³² Criminal Attempts Act 1981, s 1(1) and (4).

¹³³ Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.105.

- 8.157 Our proposal was supported by the Police Federation, the Crown Prosecution Service, Mr Justice Calvert-Smith and the Justices' Clerks' Society.
- 8.158 Importantly, however, our proposal was opposed by the Criminal Bar Association; and the Council of Her Majesty's Circuit Judges doubted the need for this basis of liability, suggesting instead that context-specific offences could be created where necessary.
- 8.159 Our proposal was that the scope of criminal liability for attempt should be extended to include summary offences. Given that there would be an increase in the reach of the substantive criminal law, contrary to Parliament's intention when it passed the 1981 Act, we feel that it would be possible to take this proposal forward into a recommendation only if there was very broad consensus amongst our consultees. There was no such consensus.
- 8.160 Given this lack of consensus, and the fact that our proposal would enlarge the scope of criminal liability, we have decided to abandon the approach we provisionally proposed in the CP.
- 8.161 It follows that we do *not* recommend that section 1 of the 1981 Act be amended to allow D to be prosecuted for attempting to commit a summary offence. If there is a demonstrable need for an extension of liability in a specific context then, as the Council of Her Majesty's Circuit Judges suggests, a new offence can be created to address the problem.

The jury's role

- 8.162 Section 4(3) of the 1981 Act provides as follows:

Where, in proceedings against a person for [attempting to commit an offence], there is evidence sufficient in law to support a finding that he did an act [which is more than merely preparatory to the commission of the offence], the question whether or not his act [was more than merely preparatory to the commission of the offence] is a question of fact.

8.163 This provision codified the common law in the light of the majority judgment of the House of Lords in *DPP v Stonehouse*,¹³⁴ following the decision of the Court of Criminal Appeal in *Cook*.¹³⁵ It requires the judge to determine, as a question of law, whether there is sufficient evidence for the jury to be able to conclude that D's conduct was more than merely preparatory towards the commission of the intended offence. If so, it is then for the jury to determine not only whether the prosecution's factual allegation is made out beyond reasonable doubt (on the evidence placed before the jury) but also the separate question whether or not D's proven conduct went beyond the stage of mere preparation towards the commission of the intended offence. In other words, the jury is permitted to decide for itself whether or not D committed the conduct element of attempt, regardless of the stage D reached in his or her plan to commit the intended substantive offence.

8.164 In our CP, we provided the following example to demonstrate why we considered this approach to be problematic.¹³⁶

Example 8C

D is charged with attempted murder, the prosecution's case being that D fired a loaded rifle at V with the intention of causing V's death but missed. The prosecution discharges its evidential burden on these issues, establishing a case to answer.¹³⁷

8.165 In the absence of any concession from the defence, section 4(3) requires the judge to direct the jury to determine for itself:

- (1) whether D did in fact fire a loaded rifle at V, intending to cause V's death; and, assuming that D did this act,
- (2) whether firing a loaded rifle at a person (intending to kill) is a more than merely preparatory act towards the commission of murder.

8.166 The second issue is a matter for the jury to decide even if (as in example 8C) D, as a would-be perpetrator, committed the very last act towards the commission of the intended offence. This is why it has been said that section 4(3) provides that the jury "be given the opportunity to return a perverse or stupid verdict of acquittal".¹³⁸

¹³⁴ [1978] AC 55, 79 to 80, 87 to 88 and 93 to 94.

¹³⁵ (1963) 48 Cr App R 98. In that case the view of the law expressed in the 35th edition of *Archbold* – that the question was one for the judge alone to determine – was rejected.

¹³⁶ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, paras 14.20 to 14.25 and proposal 20, paras 16.89 to 16.95.

¹³⁷ Above, para 14.23.

¹³⁸ G Williams, "Wrong Turnings on the Law of Attempt" [1991] *Criminal Law Review* 416, 424.

- 8.167 In addition, and perhaps more importantly in practice, in cases where D's conduct cannot be regarded as the final act necessary for the commission of the intended offence, the jury is expected to resolve the question without any meaningful guidance as to what the law requires or the factors which are relevant to determining where the line between mere preparation and attempt is to be drawn. This approach could result in different verdicts on the same or virtually indistinguishable facts.
- 8.168 The Commission's reason for this approach in the 1980 report on attempt¹³⁹ which led to the 1981 Act was:
- as factual situations may be infinitely varied and the issue of whether an accused's conduct has passed beyond mere preparation to commit an offence may depend on all the surrounding circumstances, it is appropriate to leave the final issue to be decided as a question of fact.¹⁴⁰
- 8.169 In our CP, we explained that we were no longer persuaded by this argument, although we recognised that an alternative proposal would run counter to a majority decision of the House of Lords¹⁴¹ and the subsequent intention of Parliament in enacting the 1981 Act.¹⁴²
- 8.170 Our view was that the trial judge or magistrates' court, as the tribunal of law in criminal proceedings, should determine for itself where the line separating (criminal) attempt from (non-criminal) mere preparation lies as a question of law and then direct the tribunal of fact to determine whether D is guilty of attempt on that basis in the light of the evidence presented before it.¹⁴³
- 8.171 Our view was that some concepts, such as dishonesty and gross negligence, which are informed by values which reflect common standards of behaviour, could properly be left to the collective judgment and common sense of the jury with judicial guidance. We did not consider this to be an equivalent grey area. That is to say, we did not accept that the jury should be asked to determine when conduct ceases to be mere preparation if the judge has already determined the same issue in the light of legal authority.
- 8.172 The present law presupposes a line separating the merely preparatory from the more than merely preparatory. To ensure that the test is properly considered and applied, with reference to all relevant considerations of public policy, we took the view that the question should be for the tribunal of law alone.

¹³⁹ Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

¹⁴⁰ Above, para 2.50.

¹⁴¹ *DPP v Stonehouse* [1978] AC 55 (majority view), 79 to 80, 87 to 88 and 93 to 94.

¹⁴² In truth *Hansard* suggests there was little if any discussion of the issue in Parliament.

¹⁴³ As with any legal question, it would be open to the appellate courts to review the ruling.

8.173 In our CP, we explained that the policy reasons for imposing criminal liability for preparatory conduct occurring before D actually tries to commit another offence were:

- (1) the need for effective intervention by the police;
- (2) the desirability of imposing criminal liability in relation to conduct associated with a sufficiently vivid danger of intentional harm; and
- (3) the high moral culpability associated with preparatory acts closely linked in time with (what would be) the last act towards the commission of an intended offence.¹⁴⁴

8.174 We considered it to be inappropriate for a lay jury, having no proper understanding of these key factors, to be left to determine whether any particular act should or should not give rise to liability.¹⁴⁵ We therefore provisionally proposed that the question whether D's conduct, if proved, amounts to an attempt (as opposed to mere preparation) should no longer be a question for the jury. Our view was that the tribunal of fact's role should be limited to determining – on the evidence presented before it, and in the light of the legal ruling that D's conduct, if proved, was more than merely preparatory – whether D did what is alleged and acted with the required fault.

8.175 Most of the consultees who considered this issue agreed with our proposal. This group included the Crown Prosecution Service, the Justices' Clerks' Society, the Police Federation and Mr Justice Calvert-Smith.

8.176 However, the Council of Her Majesty's Circuit Judges did not find our arguments convincing and, for that reason, saw no good reason to depart from the present position. The Criminal Bar Association also objected on the ground that the position for attempt is no different from other areas of the criminal law, providing the example of grievous bodily harm: it is for the judge to determine whether an injury is *capable* of being grievous bodily harm, but it is for the jury to decide whether the injury is *in fact* grievous bodily harm. The Criminal Bar Association was concerned that our proposal would mean that the judge decides whether an offence has been committed and that the jury's role would be limited to deciding whether, on the evidence, D committed it.

¹⁴⁴ Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 12.16.

¹⁴⁵ Similarly, see Ian Dennis, "The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement" [1980] *Criminal Law Review* 758, 769 to 770. He points out that the jury are being given a question of interpretation and classification, and that "it is simply leaving too much to the jury to ask them to perform the task with such an imprecise criterion". The only safeguard is that the judge must provide the jury with "a careful direction ... on the general principle with regard to what acts constitute attempts": see *Cook* (1963) 48 Cr App R 98, 102.

- 8.177 On the grievous bodily harm point, we accept that the trial judge will direct the jury to decide for itself whether or not V's injury amounted to grievous bodily harm, certainly in borderline cases.¹⁴⁶ We also accept that this may properly be regarded as analogous to the situation now under consideration, where the jury is asked to determine for itself whether D's conduct was more than merely preparatory, once the trial judge has determined that it is capable of being so regarded (assuming, of course, that there is sufficient evidence for a jury to reach the same conclusion).
- 8.178 Nevertheless, there are good reasons for adopting a different approach for attempt, in line with the legal position as it was understood to be before 1963 (that is, before *Cook*¹⁴⁷ was decided).¹⁴⁸ The question whether D's conduct did or did not pass the point of being merely preparatory is not simply a straightforward question of fact. It goes to the very heart of the question whether D should incur *any* criminal liability.
- 8.179 In a case where D is charged with an offence requiring proof of grievous bodily harm, the question whether or not the victim or complainant (V) suffered such bodily harm is a question of fact with little in the way of complex policy considerations to understand. If the jury concludes that V's injury was not serious, but that D would have been liable for the alleged offence if it had been serious, D may nevertheless be liable for the separate offence of causing actual bodily harm. There is a spectrum of criminal liability corresponding to the various types of bodily injury a defendant might cause.
- 8.180 There is no such range of liability in cases where attempt is alleged. In the absence of an alternative context-specific statutory offence of (mere) preparation, where the line is drawn for the general inchoate offence of attempt is the fundamental issue determining the limits of the offence and therefore of D's liability.
- 8.181 Furthermore, as explained above, where the line is properly to be drawn between non-criminal preparation and criminal attempt requires an understanding of the complex policy considerations which underpin the scope of this offence. The offence extends back from final acts, but not so far back as to amount to mere preparation. In our view, the trial judge, aware of the relevant policy considerations, and aided by previous judgments of the Court of Appeal, is best placed to decide where the line should be drawn.

¹⁴⁶ See, for example, *Hicks* [2007] EWCA Crim 1500.

¹⁴⁷ (1963) 48 Cr App R 98.

¹⁴⁸ The approach we provisionally proposed was thought to be the position in England and Wales before 1963 (see, for example, *Russell on Crime* (12th ed, 1964) p 178). In addition, it is still the position in Canada and New Zealand (see, respectively, s 24 of the Canadian Criminal Code and s 72 of New Zealand's Crimes Act 1961).

- 8.182 The Criminal Bar Association also suggested that, if our proposal were to be adopted, it would be for the judge to determine whether an offence has been committed. There is some force in this argument, but it is not quite accurate. It would be for the jury to determine whether D actually did the conduct alleged and also whether D acted with the fault required for liability. In other words, it would be for the jury to determine whether an offence was committed *and* whether D committed it. The jury would simply be told whether, on the alleged facts, D had crossed the line separating mere preparation from attempt.
- 8.183 All that said, the important fact remains that our proposal was not supported by two very important constituencies; and we fully appreciate that the criminal law should be reformed only if there is sufficient support amongst our consultees. Furthermore, as we acknowledge above, the Criminal Bar Association's objections are not without merit.
- 8.184 For these reasons we have decided that it would be wrong to pursue the argument favouring an amendment to section 4(3) of the 1981 Act. We have therefore decided to abandon the approach we provisionally proposed in the CP. We make no recommendation which would alter the law as it stands in this respect.

PART 9

LIST OF RECOMMENDATIONS

CONSPIRACY

- 9.1 We recommend that a conspiracy must involve an agreement by two or more persons to engage in the conduct element of an offence and (where relevant) to bring about any consequence element of the substantive offence.

(Recommendation 1, paragraph 2.45)

- 9.2 We recommend that a conspirator must be shown to have intended that the conduct element of the offence, and (where relevant) the consequence element (or other consequences), should respectively be engaged in or brought about.

(Recommendation 2, paragraph 2.56)

- 9.3 We recommend that an alleged conspirator must be shown at the time of the agreement to have been reckless whether a circumstance element of a substantive offence (or other relevant circumstance) would be present at the relevant time, when the substantive offence requires no proof of fault, or has a requirement for proof only of negligence (or its equivalent), in relation to that circumstance.

(Recommendation 3, paragraph 2.137)

- 9.4 We recommend that where a substantive offence has fault requirements not involving mere negligence (or its equivalent), in relation to a fact or circumstance element, an alleged conspirator may be found guilty if shown to have possessed those fault requirements at the time of his or her agreement to commit the offence.

(Recommendation 4, paragraph 2.146)

- 9.5 We recommend that it should be possible for a defendant to deny that he or she possessed the fault element for conspiracy because of intoxication, whether voluntary or involuntary, even when the fault element in question is recklessness (or its equivalent).

(Recommendation 5, paragraph 2.164)

- 9.6 We recommend that agreements comprising a course of conduct which, if carried out, will amount to more than one offence with different fault as to circumstance elements or to which different penalties apply, should be charged as more than one conspiracy in separate counts on an indictment.

(Recommendation 6, paragraph 4.25)

- 9.7 We recommend that the present requirement for the Director of Public Prosecutions to give consent if proceedings to prosecute a conspiracy to commit a summary offence are to be initiated need not be retained.

(Recommendation 7, paragraph 4.35)

- 9.8 We recommend that the immunity for spouses and civil partners provided for by section 2(2)(a) of the Criminal Law Act 1977 should be abolished.

(Recommendation 8, paragraph 5.16)

- 9.9 We recommend that the present exemption for a non-victim co-conspirator should be abolished but that the present exemption for a victim (D) should be retained if:

- (a) The conspiracy is to commit an offence that exists wholly or in part for the protection of a particular category of persons;
- (b) D falls within the protected category; and
- (c) D is the person in respect of whom the offence agreed upon would have been committed.

(Recommendation 9, paragraph 5.35)

- 9.10 We recommend that the rule that an agreement involving a person of or over the age of criminal responsibility and a child under the age of criminal responsibility gives rise to no criminal liability for conspiracy should be retained.

(Recommendation 10, paragraph 5.45)

- 9.11 We recommend that the defence of acting reasonably provided for by section 50 of the Serious Crime Act 2007 should be applied in its entirety to the offence of conspiracy.

(Recommendation 11, paragraph 6.56)

- 9.12 We recommend that it should be possible to convict D of conspiracy to commit a substantive offence regardless of where any of D's relevant conduct (or any other party's relevant conduct) occurred so long as D knew or believed that the conduct or consequence element of the intended substantive offence might occur, whether wholly or in part, in England or Wales.

(Recommendation 12, paragraph 7.49)

- 9.13 We recommend that it should be possible to convict D of conspiracy to commit a substantive offence, regardless of where any other party's conduct occurred, if: D's relevant conduct occurred in England or Wales; D knew or believed that the conduct or consequence element of the intended substantive offence might be committed wholly or partly in a place outside England and Wales; and the substantive offence, if committed in that place, would also be an offence under the law in force in that place (however described in that law).

(Recommendation 13, paragraph 7.56)

- 9.14 We recommend that it should be possible to convict D of conspiracy to commit a substantive offence, regardless of where any other party's relevant conduct occurred, if: D's relevant conduct occurred in England or Wales; D knew or believed that the intended substantive offence might occur wholly or partly in a place outside England and Wales; and the substantive offence, if committed in that place, would be an offence triable in England and Wales (or would be so triable if committed by a person satisfying relevant citizenship, nationality or residence conditions).

(Recommendation 14, paragraph 7.60)

- 9.15 We recommend that it should be possible to convict D of conspiracy to commit a substantive offence, where D's relevant conduct occurred outside England and Wales, if: D knew or believed that the intended substantive offence might occur wholly or partly in a place outside England and Wales and D could be tried in England and Wales (as the perpetrator) if he or she committed the substantive offence in that place.

(Recommendation 15, paragraph 7.65)

- 9.16 We recommend that the consent of the Attorney General should be obtained for a prosecution for conspiracy to proceed, in a case where it cannot be proved that D knew or believed that the intended substantive offence might be committed wholly or partly in England or Wales.

(Recommendation 16, paragraph 7.71)

ATTEMPTS

- 9.17 We recommend that the Criminal Attempts Act 1981 be amended to provide that, for the purposes of section 1(1), an intent to commit an offence includes a conditional intent to commit it.

(Recommendation 17, paragraph 8.106)

- 9.18 We recommend that for substantive offences which have a circumstance requirement but no corresponding fault requirement, or which have a corresponding fault requirement which is objective (such as negligence), it should be possible to convict D of attempting to commit the substantive offence only if D was subjectively reckless as to the circumstance at the relevant time.

(Recommendation 18, paragraph 8.133)

- 9.19 We recommend that where a substantive offence has fault requirements not involving mere negligence (or its equivalent) in relation to a fact or circumstance, it should be possible to convict D of attempting to commit the substantive offence if D possessed those fault requirements at the relevant time.

(Recommendation 19, paragraph 8.137)

- 9.20 We recommend that the Criminal Attempts Act 1981 be amended so that D may be convicted of attempted *murder* if (with the intent to kill V) D failed to discharge his or her legal duty to V (where that omission, unchecked, could have resulted in V's death).

(Recommendation 20, paragraph 8.151)

(Signed) JAMES MUNBY, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
JEREMY HORDER

MARK ORMEROD, *Chief Executive*
30 July 2009

Appendix A - Conspiracy and Attempts Bill

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Conspiracy

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DRAFT
OF A
B I L L
TO

Amend the law relating to conspiracy and attempts to commit offences.

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:—

Conspiracy

1 Mental element of offence of conspiracy

- (1) The Criminal Law Act 1977 (c. 45) is amended as follows.
- (2) In section 1 (the offence of conspiracy)—
 - (a) in subsection (1), after “a person” insert “(referred to in this Part of this Act as “D”)” and for “he” substitute “D”, and 5
 - (b) omit subsection (2).
- (3) After that section insert—

“1ZA Mental element of offence of conspiracy: miscellaneous

 - (1) D is not guilty by virtue of section 1 of conspiracy to commit an offence unless the applicable requirements of subsections (2) and (4) are satisfied. 10
 - (2) D and at least one other party to the agreement must—
 - (a) intend that any acts, omissions or other behaviour which are elements of the offence shall take place; and 15
 - (b) intend to bring about any consequence which is an element of, or as to which proof of fault is required for, the offence.
 - (3) Subsection (4) (which is to be read in certain cases with subsection (5)) applies where the existence of a fact or circumstance is an element of, or a matter as to which proof of fault is required for, the offence. 20

- (4) Where this subsection applies, D and at least one other party to the agreement must have a state of mind as to the existence at the material time of the fact or circumstance that satisfies the requirements of the offence for proof of fault as to its existence.
- (5) For the purposes of subsection (4) – 5
- (a) a requirement to prove negligence, absence of reasonable belief or a similar state of mind is to be treated as a requirement to prove recklessness; and
- (b) an offence that does not require proof of fault as to the existence of the fact or circumstance is to be treated as requiring proof of recklessness as to its existence. 10
- (6) Where any provision of this Part requires it to be shown that a person intended any act, omission, behaviour or consequence to take place or be brought about, it is sufficient to show that the person intended the act, omission, behaviour or consequence in question to take place or be brought about only if certain conditions were satisfied.” 15
- (4) This section does not apply in relation to an agreement entered into before the commencement of this section, unless the conspiracy continued to exist after that date.
- 2 Jurisdiction for offence of conspiracy** 20
- (1) The Criminal Law Act 1977 (c. 45) is amended as provided in subsections (2) to (5).
- (2) In section 1 (the offence of conspiracy), omit subsection (4).
- (3) Omit section 1A (conspiracy to commit offences outside the United Kingdom).
- (4) Before section 2 insert – 25
- “1B Jurisdiction for offence of conspiracy**
- (1) D may be guilty by virtue of section 1 of conspiracy to commit an offence if D knows or believes that any conduct or consequence element of the offence might take place wholly or partly in England or Wales, no matter where D was at any relevant time. 30
- (2) If it is not proved that D knows or believes that any conduct or consequence element of the offence might take place wholly or partly in England or Wales, D may be guilty by virtue of section 1 of conspiracy to commit the offence only if paragraph 2, 3 or 4 of Schedule A1 applies. 35
- (3) In this section and Schedule A1, references to any conduct element of an offence are to any act, omission or other behaviour which is an element of the offence.”
- (5) Schedule 1 (which inserts a new Schedule A1 into the Criminal Law Act 1977) has effect. 40
- (6) In section 3 of the Criminal Justice Act 1993 (c. 36) (questions immaterial to jurisdiction in the case of certain offences), omit –
- (a) in subsection (2), the words “a charge of conspiracy to commit a Group A offence, or on”, and

- (b) subsection (5).
- (7) In section 5 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40), omit subsection (1) (which inserted section 1A into the Criminal Law Act 1977 (c. 45)).
- (8) This section and Schedule 1 do not apply in relation to an agreement entered into before the commencement of this section, unless the conspiracy continued to exist after that date. 5
- 3 Exemptions from liability for conspiracy**
- (1) Section 2 of the Criminal Law Act 1977 (exemptions from liability for conspiracy) is amended as follows. 10
- (2) In subsection (1) –
- (a) after “any” insert “protective”; and
- (b) for “is an intended victim of that offence.” substitute “ –
- (a) falls within the protected category; and
- (b) is the person in respect of whom the protective offence is to be committed.” 15
- (3) After that subsection insert –
- “(1A) For the purposes of subsection (1), a “protective offence” is an offence that exists (wholly or in part) for the protection of a particular category of persons (“the protected category”).” 20
- (4) In subsection (2) for the words after “agreement)” substitute “persons under the age of criminal responsibility”.
- (5) In subsection (3) for “(2)(b)” substitute “(2)”.
- (6) In Schedule 27 to the Civil Partnership Act 2004 (c. 33) (minor and consequential amendments), omit paragraph 56. 25
- (7) This section does not apply in relation to an agreement entered into before the commencement of this section, unless the conspiracy continued to exist after that date.
- 4 Reasonableness defence to conspiracy**
- (1) After section 2 of the Criminal Law Act 1977 insert – 30
- “2A Reasonableness defence to conspiracy**
- (1) D is not guilty of conspiracy to commit any offence or offences by virtue of an agreement falling within section 1(1) above if D proves –
- (a) that D knew certain circumstances existed; and
- (b) that in those circumstances it was reasonable for D to enter into the agreement. 35
- (2) D is not guilty of conspiracy to commit any offence or offences by virtue of an agreement falling within section 1(1) above if D proves –
- (a) that D believed certain circumstances to exist;
- (b) that D’s belief was reasonable; and 40

- (c) that in the circumstances as D believed them to be it was reasonable for D to enter into the agreement.
- (3) Factors to be considered in determining whether it was reasonable for D to enter into the agreement include –
- (a) the seriousness of the offence or offences to be committed; 5
 - (b) any purpose for which D claims to have entered into the agreement;
 - (c) any authority by which D claims to have entered into the agreement.”
- (2) This section does not apply in relation to an agreement entered into before the commencement of this section, unless the conspiracy continued to exist after that date. 10
- 5 Consent to prosecutions for conspiracy**
- (1) Section 4 of the Criminal Law Act 1977 (c. 45) (restrictions on the institution of proceedings for conspiracy) is amended as follows. 15
- (2) Omit –
- (a) subsections (1) and (2), and
 - (b) the words “which is not a summary offence” in subsection (3).
- (3) In subsection (5), for “1A above” substitute “1B(2) above and Schedule A1”.
- (4) This section does not apply in relation to an agreement entered into before the commencement of this section, unless the conspiracy continued to exist after that date. 20

Attempts

- 6 Attempted murder by omission**
- (1) The Criminal Attempts Act 1981 (c. 47) is amended as follows – 25
- (a) in section 1 (attempting to commit an offence), after subsection (4) add –
 - “(5) Subsection (1) has effect in its application to attempted murder as if the reference to the doing of an act included reference to a failure to act.”; 30
 - (b) in section 4 (trial and penalties), after subsection (3) insert –
 - “(3A) In relation to attempted murder, subsection (3) is to be construed in accordance with section 1(5) above.”
- (2) This section does not apply in relation to a failure to act occurring before the commencement of this section. 35

7 Mental element of offences of attempt

- (1) After section 3 of the Criminal Attempts Act 1981 (c. 47) insert –

“Mental element

3A Mental element of offences of attempt: miscellaneous

- (1) A person (“D”) is not guilty by virtue of section 1, or under a special statutory provision, of attempting to commit an offence unless the applicable requirements of subsections (2) and (4) are satisfied. 5
- (2) D must –
- (a) intend that any acts, omissions or other behaviour which are elements of the offence shall take place; and 10
- (b) intend to bring about any consequence which is an element of, or as to which proof of fault is required for, the offence.
- (3) Subsection (4) (which is to be read in certain cases with subsection (5)) applies where the existence of a fact or circumstance is an element of, or a matter as to which proof of fault is required for, the offence. 15
- (4) Where this subsection applies, D must have a state of mind as to the existence at the material time of the fact or circumstance that satisfies the requirements of the offence for proof of fault as to its existence.
- (5) For the purposes of subsection (4) –
- (a) a requirement to prove negligence, absence of reasonable belief or a similar state of mind is to be treated as a requirement to prove recklessness; and 20
- (b) an offence that does not require proof of fault as to the existence of the fact or circumstance is to be treated as requiring proof of recklessness as to its existence. 25
- (6) Where any provision of this Part requires it to be shown that a person intended any act, omission, behaviour or consequence to take place or be brought about, it is sufficient to show that the person intended the act, omission, behaviour or consequence in question to take place or be brought about only if certain conditions were satisfied.” 30
- (2) This section does not apply in relation to an act or failure to act occurring before the commencement of this section.

General

8 Repeals

- (1) Schedule 2 contains repeals. 35
- (2) The repeals have effect in accordance with the preceding provisions of this Act.

9 Short title, commencement and extent

- (1) This Act may be cited as the Conspiracy and Attempts Act 2009.

- (2) This section comes into force on the day on which this Act is passed, but otherwise this Act comes into force on such day as the Secretary of State may by order made by statutory instrument appoint.
- (3) An order under subsection (2) may –
 - (a) appoint different days for different purposes;
 - (b) make such provision as the Secretary of State considers necessary or expedient for transitory, transitional or saving purposes in connection with the coming into force of any provision of this Act.
- (4) This Act extends to England and Wales only.

5

SCHEDULES

SCHEDULE 1

Section 2(3).

INSERTED SCHEDULE A1 TO CRIMINAL LAW ACT 1977

The following Schedule is inserted as the first Schedule to the Criminal Law Act 1977 (c. 45) – 5

“SCHEDULE A1

Section 1B.

CONSPIRACY: CONDUCT OR CONSEQUENCES OUTSIDE ENGLAND AND WALES

- 1 In this Schedule, “relevant communication” means a communication, of any nature, which formed part of the process of arriving at and entering into the agreement to pursue the course of conduct in question; and for this purpose a communication whose recipient is remote is made at the place from which it is sent or otherwise despatched. 10
- 2 (1) This paragraph applies if – 15
 - (a) D makes a relevant communication, or arranges for one to be made, and either D is then in England or Wales or the communication is made there;
 - (b) D knows or believes that any conduct or consequence element of the offence might take place wholly or partly in a place outside England and Wales; and 20
 - (c) the offence falls within sub-paragraph (2).
- (2) An offence falls within this sub-paragraph if – 25
 - (a) it would be triable in England and Wales if committed in the place referred to in sub-paragraph (1)(b); or
 - (b) if there are relevant conditions, it would be so triable if it were committed there by a person who satisfies the conditions.
- (3) “Relevant condition” means a condition that – 30
 - (a) determines (wholly or in part) whether an offence committed outside England and Wales is nonetheless triable under the law of England and Wales; and
 - (b) relates to the citizenship, nationality or residence of the person who commits it.
- 3 (1) This paragraph applies if – 35
 - (a) paragraph 2 does not apply;
 - (b) D makes a relevant communication, or arranges for one to be made, and either D is then in England or Wales or the communication is made there;

- (c) D knows or believes that any conduct or consequence element of the offence might take place wholly or partly in a place outside England and Wales; and
- (d) the agreed course of conduct would, if the agreement is carried out in accordance with the intentions of the parties, amount to an offence under the law in force in that place. 5
- (2) The condition in sub-paragraph (1)(d) is to be taken to be satisfied in respect of an offence under the law of the place outside England and Wales unless, not later than rules of court may provide, the defence serve on the prosecution a notice – 10
- (a) stating that on the facts as alleged the condition is not in their opinion satisfied in that respect;
- (b) showing their grounds for that opinion; and
- (c) requiring the prosecution to show that it is satisfied.
- (3) The court, if it thinks fit, may permit the defence to require the prosecution to show that the condition is satisfied in that respect without prior service of a notice under sub-paragraph (2). 15
- (4) In the Crown Court, the question whether the condition is satisfied in that respect is to be decided by the judge alone.
- (5) Conduct punishable under the law in force in any place outside England and Wales constitutes an offence under that law for the purposes of this paragraph, however it is described in that law. 20
- 4 (1) This paragraph applies if –
- (a) D is not in England or Wales when D makes a relevant communication or arranges for one to be made, and the communication is not made there; 25
- (b) D knows or believes that any conduct or consequence element of the offence might take place wholly or partly in a place outside England and Wales; and
- (c) D could be tried under the law of England and Wales if D committed the offence in that place. 30
- (2) For the purposes of sub-paragraph (1)(c), D is to be assumed to be able to commit the offence in question.
- 5 Where by virtue of section 1B(2) and this Schedule a person may be guilty of conspiracy to commit an offence that is not triable in England and Wales, a reference in this Part of this Act to the offence is to be read so far as necessary as a reference to such offence as would have been triable in England and Wales in the absence of any jurisdictional restriction.” 35

SCHEDULE 2

Section 8

40

REPEALS

<i>Short title and chapter</i>	<i>Extent of repeal</i>
Criminal Law Act 1977 (c. 45)	Section 1(2) and (4). Section 1A.

<i>Short title and chapter</i>	<i>Extent of repeal</i>	
Criminal Law Act 1977 (c. 45) – <i>cont.</i>	In section 4 – (a) subsections (1) and (2), and (b) in subsection (3), the words “which is not a summary offence”.	5
Criminal Justice Act 1993 (c. 36)	In section 3 – (a) in subsection (2), the words “a charge of conspiracy to commit a Group A offence, or on”, and (b) subsection (5).	10
Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40)	Section 5(1).	
Civil Partnership Act 2004 (c. 33)	In Schedule 27, paragraph 56.	

EXPLANATORY NOTES

- A.1 The Draft Bill extends to England and Wales only.¹
- A.2 The new provisions on conspiracy do not apply to any conspiracy that has ended before they come into force.²
- A.3 The new provisions on attempts do not apply to any omission or act occurring before they come into force.³

THE OFFENCE OF CONSPIRACY

Clause 1 – fault requirements

- A.4 Clause 1 sets out the fault element of conspiracy. Clause 1(3) amends the Criminal Law Act 1977 by inserting section 1ZA into the Act. Section 1ZA is based on a division of the external elements of the substantive offence into conduct, consequence and circumstances.
- A.5 Section 1ZA(2)(a) provides that the alleged conspirator (D) and at least one other party to the agreement must intend⁴ that the conduct element of the substantive offence shall take place.⁵ The conduct element of the substantive offence is referred to as “acts, omissions or other behaviour” in order to cover offences where the conduct element is situational or consists of an omission as opposed to the doing of an act.⁶
- A.6 Section 1ZA(2)(b) relates to the fault requirement in relation to consequences. Where D1 and D2 agree to commit a substantive offence with a consequence element they must intend to bring about that consequence. The words “as to which proof of fault is required” refer to cases where the substantive offence has a fault element as to consequences rather than a requirement that a particular consequence be brought about. In such a case D1 and D2 must, again, intend to bring about the consequences.
- A.7 Subsections (3) to (5) of section 1ZA set out the requirements of fault as to the “fact or circumstance” elements of the substantive offence. The present section 1(2) of the Criminal Law Act 1977 is repealed.⁷

¹ Clause 9(4).

² Clauses 1(4), 2(8), 3(7), 4(2) and 5(4).

³ Clauses 6(2) and 7(2).

⁴ Intention has its common law meaning as defined in *Woollin* [1999] 1 AC 82.

⁵ The effect of this is to reverse the House of Lords decision in *Anderson* [1986] AC 27 where it was held that D could be guilty of conspiracy even if he or she did not intend the conspiracy to be carried out.

⁶ For example the offence of being in charge of a motor vehicle contrary to s 5(1)(b) Road Traffic Act 1988.

⁷ Clause 1(2).

- A.8 Section 1ZA(3) provides that subsection (4) applies in the case of conspiracy where the substantive offence at the core of the conspiracy includes some requirement of fault as to the existence of a “fact or circumstance”. Subsection (4) requires that D1 and D2 (the other party to the conspiracy) must have the same state of mind as to the relevant “facts or circumstances” as is required for the substantive offence.⁸ However, it needs to be read in conjunction with section 1ZA(5).⁹
- A.9 Section 1ZA(4) is qualified by subsection (5). Subsection (5)(a) provides that a requirement to prove “negligence, absence of reasonable belief or a similar state of mind”¹⁰ must be treated as requiring proof of recklessness. In other words, where D1 and D2 agree to carry out a substantive offence that has one of these objective fault requirements as to circumstances, there is a minimum requirement that they be reckless as to the circumstance element in order for conspiracy to be made out.¹¹
- A.10 Subsection (5)(b) relates to cases where the substantive offence contains a “fact or circumstance” element but no fault element relating to those circumstances. In such a case it must be shown that D1 and at least one other party to the agreement were reckless as to the existence of facts or circumstance.
- A.11 Subsection (6) provides that a conditional intent as to conduct or consequence is a sufficient basis for liability for conspiracy. It does not matter therefore that D has set conditions on which his intention is dependent.¹²

Clause 2 and Schedules – jurisdiction

- A.12 Clause 2 and Schedule 2 repeal the existing extra-territoriality provisions relating to statutory conspiracies.

⁸ Subsection (4) uses the words “at the material time” to provide for cases where the relevant circumstances or facts would be anticipated for some time in the future.

⁹ Section 1ZA(4) will apply when the substantive offence contains a subjective fault element as to circumstance.

¹⁰ In other words, the objective fault requirements.

¹¹ This means that the fault requirement as to circumstances in a conspiracy to rape will be recklessness. This is because the fault requirement as to the circumstances for the substantive offence of rape (contrary to s 1 Sexual Offences Act 2003) is absence of reasonable belief which equates to negligence (an objective standard). However, where the substantive offence contains a subjective fault requirement as to circumstances then s 1ZA(4) provides that the same fault element is requirement in respect of a conspiracy to commit that offence. For example if D1 and D2 agree to convert the proceeds of crime, the fault requirement as to circumstances for the offence of conspiracy will be knowledge or suspicion. This is because the fault requirement as to circumstances of the substantive offence is knowledge or suspicion (see ss 327(1) and 340 of the Proceeds of Crime Act 2002).

¹² This reflects the opinion of Lord Nicholls in *Saik* [2006] UKHL [18] at [5]:

A conspiracy to rob a bank tomorrow if the coast is clear when the conspirators reach the bank is not, by reason of this qualification, any less of a conspiracy to rob. Fanciful cases apart, the conditional nature of the agreement is insufficient to take the case outside section 1(1).

- A.13 Clause 2 and Schedule 1 (inserting a new Schedule A1 into the Criminal Law Act 1977) also create a new body of extra-territoriality provisions for statutory conspiracy. These new rules are broadly in line with those in force for the inchoate offences in Part 2 of the Serious Crime Act 2007.¹³
- A.14 The new rule sets out the situations where D can be tried in England or Wales for conspiracy to commit an offence, contrary to section 1(1) of the Criminal Law Act 1977. The new scheme permits section 1(4) of the Criminal Law Act 1977 to be repealed, and this is effected by clause 2(2). As with the Serious Crime Act 2007 it will remain the case, albeit now implicitly, that D can be convicted of conspiracy contrary to section 1(1) of the Criminal Law Act 1977 only if the intended offence is an offence recognised by the law of England and Wales.
- A.15 Clause 2(4) inserts a new section 1B into the Criminal Law Act 1977. Section 1B(1) provides that D can be tried and convicted in the jurisdiction (England and Wales) for conspiracy to commit an offence if it is proved¹⁴ that D knew or believed that any conduct element¹⁵ or consequence element of the intended offence might occur, whether wholly or in part, in England or Wales. Section 1B(1) also provides that D's location is irrelevant. So if D and P agreed outside the jurisdiction to commit an offence (recognised by the law of England and Wales) and D believed the offence might be committed in England or Wales, D can be convicted of conspiracy in this jurisdiction regardless of his or her location at any relevant time.
- A.16 Section 1B(2) provides that, if section 1B(1) does not apply, D may be tried and convicted in the jurisdiction for conspiracy to commit an offence, contrary to section 1(1), only if one of the grounds set out in new Schedule A1 applies.

Clause 3 – exemptions from liability for conspiracy

- A.17 Clause 3(1) makes amendments to section 2 of the Criminal Law Act 1977 which provides for exemptions from liability.

¹³ See ss 52 and 53 of the Serious Crime Act 2007 Act with Sch 4. A flowchart showing how the extra-territoriality provisions of the draft Bill would work is set out at the end of this Appendix.

¹⁴ The draft Bill does not set out any provisions for the procedure. Clearly, however, if D raises the question of jurisdiction as a preliminary issue the judge may need to determine whether the court has jurisdiction to try D, and may need to hold a hearing to resolve the point. If the judge is satisfied that there is sufficient evidence for a jury to be able to find that the relevant basis for accepting jurisdiction is made out, he or she will allow the trial to proceed and will ultimately leave the question to the jury. So, if section 1B(1) is relied on, the prosecution will need to adduce sufficient evidence by the close of its case for a reasonable jury to be able to conclude beyond reasonable doubt that D was a party to the alleged conspiracy *and* that D knew or believed that a conduct or consequence element of the intended offence might occur in England or Wales. If the prosecution do this, the jury will consider the matter at the end of the trial. If the jury is sure that D did indeed know or believe that a conduct or consequence element of the offence might occur in England or Wales, and that D was a party to the conspiracy, then it will convict D of conspiracy. The same approach would be adopted, with all necessary changes, if one of the grounds in Sch A1 is relied on.

¹⁵ Section 1B(3) provides that this means “any act, omission or other behaviour which is an element of the offence”.

- A.18 Clause 3(2)(a) inserts the word “protective” into section 2(1) of the Criminal Law Act 1977. The effect is to limit the exemption for the intended victim of a conspiracy to where the substantive offence is a “protective offence”. This is defined in new subsection (1A) (inserted by clause 3(3)) as an offence that exists wholly or in part for the protection of a particular category of persons. D must fall within this protected category and must be the person in respect of whom the protective offence is to be committed (clause 3(2)(b)) in order to benefit from this exemption.
- A.19 Clause 3(4) amends the present section 2(2) Criminal Law Act 1977 removing the exemption for those who conspire only with their spouse or civil partner, or only with the intended victim of the substantive offence. The exemption for those who conspire only with one or more people under the age of criminal responsibility remains.

Clause 4 – defences to conspiracy

- A.20 Clause 4(1) inserts a new section 2A into the Criminal Law Act 1977 which provides for a defence of reasonableness to the offence of conspiracy. The defence is available on a slightly different basis depending on whether D knew or believed circumstances existed which led him or her to enter into the agreement.
- A.21 Section 2A(1) provides that D is not guilty of an offence or offences which would otherwise fall within section 1(1) if D proves¹⁶ that he or she knew that certain circumstances existed and that it was reasonable for D to enter into the agreement.
- A.22 Alternatively, section 2A(2) provides that D will have a defence if D can prove that he or she believed certain circumstances existed and that this belief was reasonable, and that in the circumstances as D believed them to be it was reasonable for D to enter into the agreement.
- A.23 Section 2A(3) provides for some of the factors to be considered in determining whether it was reasonable for D to act in a particular way.

Clause 5 – consent to prosecutions for conspiracy

- A.24 Clause 5(2) provides that sections 4(1) and 4(2) of the Criminal Law Act 1977 be omitted.¹⁷ As a result, the requirement under section 4(1) for the consent of the Director of Public Prosecutions before the institution of proceedings for conspiracy to commit a summary offence or offences is removed.
- A.25 Similarly the requirement in section 4(2) Criminal Law Act 1977 for the consent of the Attorney General before the institution of proceedings for conspiracy to commit a summary offence which requires such consent is also removed.

¹⁶ It would be for D to prove this on the balance of probabilities.

¹⁷ Clause 5(2)(a).

- A.26 Clause 5(2) also removes the words “which is not a summary offence” from section 4(3) of the Criminal Law Act 1977¹⁸ with the effect that where the consent of the Director of Public Prosecutions or any other person is required before the institution of proceedings for any offence (whether summary or indictable) that person’s consent is also required for the institution of proceedings in respect of conspiracy to commit that offence.¹⁹

THE OFFENCE OF ATTEMPT

Clause 6 – attempted murder by omission

- A.27 Clause 6 amends the Criminal Attempts Act 1981 so that a person can be convicted of attempted murder if, with the intent to kill, he or she fails to do what he or she is under a legal duty to do.²⁰
- A.28 An example would be where D intentionally starves his or her child intending that the child should die, but the child is rescued before death occurs. It will be possible to convict D of attempted murder on the ground that D’s conduct in *failing* to act (that is, failing to feed the child) falls within the meaning of “an act” in section 1(1) of the Criminal Attempts Act 1981.
- A.29 This amendment to the Criminal Attempts Act 1981 will not extend the scope of section 1(1) in any other respect. Indeed, by expressly providing a basis for convicting D of attempted murder by omission, the change introduced by clause 6 provides tacit confirmation that the word “act” in section 1(1) generally excludes omissions.

Clause 7 – the fault elements of attempt

- A.30 Clause 7(1) adds a new section 3A to the Criminal Attempts Act 1981. Section 3A sets out certain fault requirements which the prosecution will have to prove in order to convict a person of attempting to commit some other offence (“the substantive offence”), complementing the definition of attempt in section 1(1) (“with intent to commit an offence”).

¹⁸ Clause 5(2)(b).

¹⁹ Any changes which are made in relation to the requirement for consent in respect of any substantive offence in other legislation will apply automatically for conspiracy.

²⁰ Clause 6 effects this change by inserting a new s 1(5) into the Criminal Attempts Act 1981.

- A.31 Section 3A(2) provides that D is liable for attempting to commit a substantive offence only if he or she intends that the conduct element²¹ of the substantive offence should occur and also intends to bring about a required consequence. The required consequence may be a consequence “which is an element of ... the [substantive] offence”²² or a consequence “as to which proof of fault is required” to be convicted of the substantive offence.²³
- A.32 Subsections (3) to (5) of section 3A address the situations where the intended substantive offence includes a “fact or circumstance” requirement²⁴ or, to be liable for the substantive offence, the alleged offender must have acted with fault in relation to a “fact or circumstance”.²⁵
- A.33 Subsection (4) provides that, in these situations, for D to be guilty of attempting to commit the substantive offence, D must have had the culpable state of mind in relation to the “fact or circumstance” which a perpetrator would need to have had to be guilty of the substantive offence.
- A.34 However, subsection (5) provides that where the substantive offence requires proof of objective fault in relation to the “fact or circumstance” (for example, negligence), or no fault at all in relation to it, then, for attempt, the prosecution must prove that D was (subjectively) reckless as to that “fact or circumstance”. For example, for D to be convicted of the offence of attempting to rape a child under the age of 13, D must have believed that the person whom he intended sexually to penetrate might be under the age of 13 (even though the substantive offence of child rape does not itself require proof of any culpable state of mind in relation to that fact).

²¹ Section 3A(2)(a). This covers acts, omissions and “other behaviour” such as unlawful possession of a drug.

²² Section 3A(2)(b). For example, to be guilty of attempted murder, D must have intended to *kill* another person (the consequence required to be guilty of murder).

²³ Section 3A(2)(b). To be guilty of burglary contrary to s 9(1)(a) of the Theft Act 1968, s 9(2) requires that D acted with the intention of permanently depriving a person of his or her property or the intention to cause another person grievous bodily harm or the intention to cause unlawful damage (within the building or part of a building D entered as a trespasser). Equally, one of these intentions must be proved for D to be convicted of attempted burglary in any case where D attempted to enter a building or part of a building as a trespasser.

²⁴ For example, to be guilty of the offence of “rape of a child under 13”, the person whom D sexually penetrated must be under the age of 13 (see s 5 of the Sexual Offences Act 2003).

²⁵ That is, the substantive offence is not defined with reference to a fact or circumstance, but to be liable for the offence it must be proved that D was at fault in relation to some fact or circumstance. For example, for D to be guilty of intentionally encouraging or assisting the offence of child rape, contrary to s 44(1) of the Serious Crime Act 2007, D must have intended to encourage or assist the sexual act (s 47(2)) and must at least have been reckless as to whether or not the person D believed would be sexually penetrated was under the age of thirteen (s 47(5)(b)); but the prosecution does not need to prove that there was such a person under that age whom another person intended sexually to penetrate. It is possible to charge a person with an attempt to commit the s 44 offence.

- A.35 Section 3A(6) provides that if D's intention is conditional on the existence of some fact he or she is nevertheless to be regarded as having the required intention. For example, if D places his or her hand in V's pocket intending to steal only if he or she finds something of value in it, D will be liable for attempted theft if the pocket was empty or contained only worthless items.

GENERAL PROVISIONS

Clauses 8 and 9

- A.36 These clauses are self-explanatory.

SCHEDULES

Schedule 1

- A.37 Schedule 1 to the draft Bill inserts a new Schedule A1 into the Criminal Law Act 1977, providing, in paragraphs 2 to 4, three alternative and mutually exclusive bases for trying D (for conspiracy) which are broadly consistent with the bases in Schedule 4 to the Serious Crime Act 2007 (for encouraging or assisting crime). One of the three bases in Schedule A1 may be relied on if, but only if, D did *not* know or believe that a conduct or consequence element of the intended substantive offence might take place wholly or partly in England or Wales.²⁶
- A.38 Whatever the basis for accepting jurisdiction relied on, there is in each case a connection with England and Wales which justifies trying D for conspiracy in this jurisdiction.²⁷
- A.39 Paragraph 2 provides the courts with jurisdiction to try D for conspiracy if: D made a "relevant communication" or arranged for one to be made²⁸ (D then being in England or Wales or the communication having been made in England or Wales); D knew or believed that a conduct or consequence element of the intended substantive offence might occur (wholly or partly) in some other place outside the jurisdiction; and the intended substantive offence is one for which a perpetrator in that place could be tried in the jurisdiction (for example, murder committed by a British citizen).²⁹

²⁶ See new s 1B(1) of the Criminal Law Act 1977, inserted by clause 2(4) of the Bill.

²⁷ This connection may, however, simply be the fact that the substantive offence in question is one for which any perpetrator may be tried in England and Wales (such as the offence of piracy on the high seas).

²⁸ A "relevant communication" is a communication in relation to the formulation of the conspiracy; see paragraph 1 of the Schedule. It may be possible to infer a relevant communication from the facts pertaining to the conspiracy.

²⁹ The effect of paragraph 2(2) and (3) is that any citizenship, nationality or residence requirement which has to be established for the courts to be able to try an alleged perpetrator of the substantive offence does not have to be established if paragraph 2 is relied on. So, although P can be tried in England and Wales for a murder committed by P in (say) France only if he or she is a British subject (Offences Against the Person Act 1861, s 9), D can be tried for a conspiracy to commit a murder in France without reference to this requirement.

- A.40 Paragraph 3 provides the courts with jurisdiction to try D for conspiracy, where paragraph 2 is inapplicable, if: D made a “relevant communication” or arranged for one to be made³⁰ (D then being in England or Wales or the communication having been made in England or Wales); D knew or believed that a conduct or consequence element of the intended substantive offence might occur (wholly or partly) in some other place outside the jurisdiction; and the intended substantive offence is one which, if committed in that place, would also be an offence in that place.³¹
- A.41 Paragraph 4 provides the courts with jurisdiction to try D for conspiracy if D was not in England or Wales when D made a “relevant communication” or arranged for such a communication to be made (and the communication was not made in England or Wales),³² but: D knew or believed that a conduct or consequence element of the intended substantive offence might occur (wholly or partly) in some other place outside the jurisdiction; and D him or herself could be tried in the jurisdiction as an alleged perpetrator of that offence if he or she were to commit it in that place.
- A.42 Paragraph 5 provides that in a case where D is convicted of conspiracy to commit an offence (contrary to section 1(1) of the Criminal Law Act 1977), and the substantive offence, if it had been committed in accordance with D’s belief, would not be an offence for which the alleged perpetrator could be tried in the jurisdiction (for example, an offence of theft committed in Switzerland), the offence is nevertheless to be treated as an offence recognised by the law of England and Wales for which the alleged perpetrator could be tried in the jurisdiction. So, for matters such as sentencing, the substantive offence would be addressed as if it were an offence for which the perpetrator could be tried in England and Wales.

Schedule 2

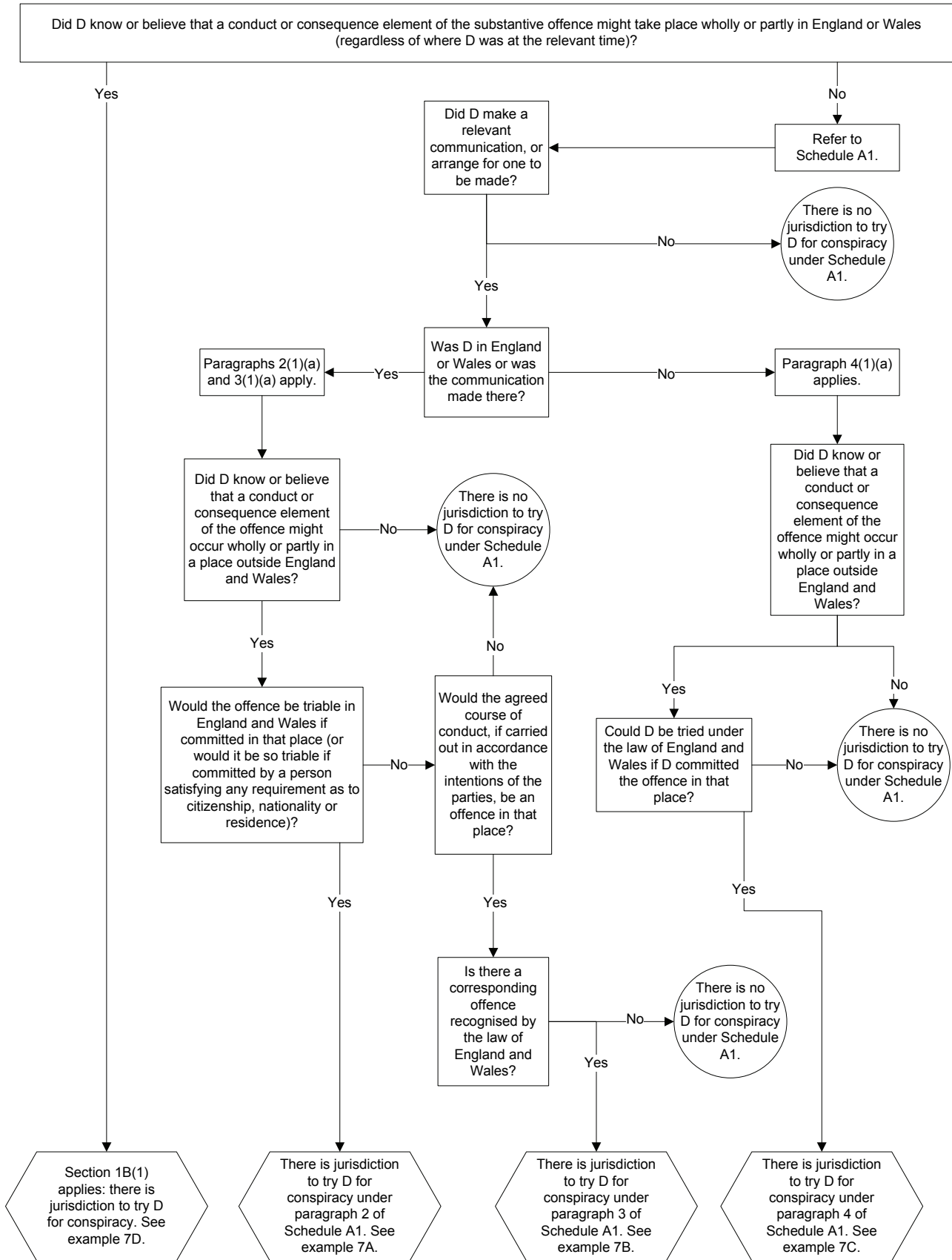
- A.43 This Schedule sets out the statutory provisions to be repealed.

³⁰ See fn 28 above.

³¹ The offence must also be an offence recognised by the law of England and Wales.

³² See fn 28 above.

JURISDICTION FLOWCHART



APPENDIX B

CONDITIONAL INTENTION

- B.1 In this Appendix, we consider the arguments made by Mr Glazebrook and Dr Williams in favour of making the fault requirement respecting circumstances, 'conditional intention'.

THE COUNTER-ARGUMENTS OF MR GLAZEBROOK¹ AND DR WILLIAMS²

- B.2 In his response to the CP, Mr Glazebrook suggested that conspiracy should be defined as follows:

A person who agrees with one or more others that one or more of them shall do what would, if done, be a crime or crimes, commits the offence of conspiracy to commit that crime or crimes.

"Do what would, if done, be a crime" ... would embrace ... agreeing to do X even if Y (that which makes the doing of X criminal) should prove to be the case

- B.3 In essence, this is support for the 'conditional' intent view of the way to approach the circumstance fault element (although Mr Glazebrook prefers to speak of what conspirators 'agreed' rather than of what they intended).³
- B.4 Supporting the 'conditional intent' approach, Dr Williams argues that conditional intent is not in fact simply 'recklessness in disguise'. In her view, whereas recklessness is appropriate for use in relation to completed crimes, conditional intent is the better fault element for an inchoate offence, such as conspiracy, which relates to a contemplated offence. In her response to the CP, she said:

The difference, then, is that recklessness is a one-dimensional and static *mens rea* element, perfect for use in a completed current offence where the question is what D's state of mind was as the rest of that offence came about. Conditional intent, on the other hand, is a more dynamic or two-dimensional form. It tells us not only what D's *mens rea* is now, but also what it will be given different alternative versions of the future.

- B.5 To illustrate what Dr Williams has in mind, we may use the example where D1 and D2 agree to bring sealed containers into the UK knowing that they may contain cocaine or flour.

¹ Jesus College, Cambridge.

² Pembroke College, Oxford.

³ We addressed this point earlier: see paras 2.99 to 2.126 above.

- B.6 Suppose that D1 and D2 simply realised that the containers *might* have cocaine in them. On this supposition, says Dr Williams, D1 and D2 would not have made up their minds what to do if it turned out that the containers did indeed have cocaine in them. What if some of the contents unexpectedly leaked out just as D1 and D2 were about to embark on their journey? In that case, D1 and D2 would have to make up their minds whether or not to continue with the plan, now knowing that it clearly involved criminality.
- B.7 By way of contrast, suppose that D1 and D2 conditionally intended to import cocaine: they intended to bring the containers into the UK 'even if' they had cocaine in them. Then, Dr Williams argues, there would be no need for D1 and D2 to make up their minds about anything, upon seeing the cocaine leak out of a container. In forming their conditional intent at the outset, they would have already made up their minds to bring the containers into the UK even if they had cocaine in them.
- B.8 We accept that there is indeed a distinction between conditional intention and recklessness, and that it can be illustrated by the sort of contrast that Dr Williams makes. At a theoretical level, making conspiracy a crime requiring an intention (whether or not conditional) that all elements will be present is a more straightforward and elegant solution than dividing the fault requirement into elements where intention must be proved, and elements where some other state of mind must be proved. However, that has not persuaded us to change our view that, so long as the law of conspiracy requires proof of some species of 'subjective' fault, in relation to the circumstance element (such as intention, knowledge, recklessness or suspicion), the law of conspiracy can be left to track the fault requirements of the substantive offence.⁴

⁴ As we have indicated, only in cases where there is no fault requirement – or only a requirement of negligence (or its equivalent) – in relation to circumstances, that the law of conspiracy should not track the substantive offence, and should instead require proof of recklessness: see recommendation 3, para 2.2 above.

THE INEVITABLY SPECULATIVE NATURE OF PROVING 'CONDITIONAL' INTENTIONS

- B.9 One of the difficulties about a test focused on conditional intention is that it involves speculation about what two or more people believed that they might or might not have gone on to do, had they definitely known that certain circumstances would obtain when the time came. It is certainly possible to prove beyond doubt that someone would still have done something had they known the true facts, even where those facts have crucial normative significance.⁵ So, to employ the example cited by Baroness Hale,⁶ we could in some cases be convinced that D1 and D2, having agreed to have sexual intercourse with V, would still have gone on to have sexual intercourse even if they had known that V would not consent.
- B.10 However, a problem with the speculative dimension to a 'conditional' intention test arises in cases where D maintains that he or she was of the view from the outset that he or she would only cross the bridge into definite criminal wrongdoing, 'if and when I come to it'. This state of mind falls short of conditional intention. It is not clear to us how the prosecution could meaningfully try to show beyond reasonable doubt on the facts of a case⁷ that D1 had not this state of mind, but the separate state of mind constituted by (conditionally) intending to go through with the deed even in the circumstances that made it criminal.
- B.11 Further, if the prosecution could not prove that D1 had the latter state of mind, then it would also not be possible to convict D2 of conspiracy, if D2 was the only other alleged conspirator. D2 would escape conviction, even if it could be shown that D2 intended from the outset to do the deed should it turn out to involve criminal wrongdoing in the circumstances.
- B.12 As Dr Williams recognises, there will be many cases in which it will not be realistic to suppose that D1 and D2 will have an opportunity to make up their minds whether to continue with their plan upon discovering that it will definitely involve criminality. An example we have already given is one where containers they have been asked to ship are tightly sealed. So, it is unclear to us what the real gain is, in making the fault element depend upon speculation about the attitude of the alleged conspirators to discovering at some post-agreement point (should that opportunity arise) that they had in fact agreed to something necessarily involving the commission of a crime.

⁵ It is, of course, far too easy to show that someone would still have done something even if they had known the true facts, where those facts have little or no relevance. So, in most circumstances we can easily be sure, for example, that someone set upon murdering his wife would still be set upon that course of action even if he was made aware that it had taken her two attempts to start her car that morning.

⁶ See para 2.117 above.

⁷ In other words, without relying on evidence of previous misconduct.

IS REQUIRING PROOF OF CONDITIONAL INTENT TOO GENEROUS TO THE ACCUSED, AND LIKELY TO PROVE TOO COMPLEX A REQUIREMENT?

B.13 There is another difficulty with the alternative proposal based on conditional intention. If it were adopted, it would allow D to 'pick and choose' between the offences whose commission he or she was, and those he or she was not, prepared to countenance in putting the conspiracy into effect, even though D intended the conduct and consequence elements to occur respecting all the offences in question.

B.14 Dr Williams says:

While a conditional intent is in principle sufficient... in relation to the three kinds of actus reus element, it should not be regarded as sufficient where the condition in question is that the offence as a whole should not take place.

B.15 As we have already indicated, where the condition in question concerns the conduct or consequence elements of the offence, this suggestion is right. D should not be guilty of conspiracy to murder, if he or she agreed to inflict serious bodily harm on V only on condition that V was not killed. The issue is whether the same approach should be taken to circumstance fault elements, even when the completed offence requires (at most) only recklessness as to such elements.

B.16 Dr Williams believes that a consistent approach should be taken. She therefore proposes an exception to the rule that D can be convicted of conspiracy if he or she was prepared to go through with the plan even if it involved criminal wrongdoing. The exception is that, "an intent shall not be regarded as fulfilling [the requirements for fault] where it is dependent upon a condition, fulfilment of which would negate the possibility of criminal liability for the relevant offence".⁸ This exception draws no distinction between conduct or consequence elements, and circumstance elements. Such a provision thus ensures that if, for example, an antiques dealer agrees to deal with property only if it is *not* stolen, this agreement should not be regarded as a criminal conspiracy even if (crucially) the dealer realised that the property to be dealt with might well be stolen.⁹

B.17 In our view, the case for this exception to the normal rule that a conditional intent is an intent is not as strong as it may seem, in so far as it applies to the circumstance elements of an offence. The difficulty with it is particularly acute when a conspiracy involves the commission, or possible commission, of a range of crimes involving essentially the same conduct element but graded, in terms of seriousness, by reference to differing circumstance elements.

⁸ See the American Model Penal Code, § 2.0.2(6).

⁹ See the discussion at para 2.123 above.

- B.18 An illustration of this is where, in a closely related range of offences, it is alleged that the participants in a conspiracy have conspired to commit are made criminal or differentiated in part only by relatively technical (albeit important) circumstance elements, such as the possession of a certificate. An example can be drawn from the range of offences created by the Firearms Act 1968. Under section 2 of the 1968 Act, it is an offence, punishable by up to five years' imprisonment, to acquire a shotgun without holding the relevant certificate. Under section 5 of the 1968 Act, it is also an offence, punishable with up to ten years' imprisonment, to acquire (amongst other similar weapons) a pump-action rifled gun,¹⁰ or what might broadly be called a 'machine' gun, without the authority of the Defence Council.¹¹ Now consider the following example:

D1, D2 and D3 are charged with conspiring to purchase firearms, contrary to section 5 of the Firearms Act 1968. D1 says he or she took part on the condition that the firearms involved would not be the more dangerous ones dealt with under section 5 (such as pump-action shotguns), but would be other sorts of illegal firearm (such as unlicensed double-barrelled shotguns). D2 says he or she took part only on condition that D3 had the authority of the Defence Council to purchase 'section 5' firearms. D3 says he or she thought that the weapons to be bought would be ones for which he or she had a valid certificate, and that he or she would not otherwise have sought to purchase them. D1, D2 and D3 admit that they were aware that the firearms they agreed to buy might turn out to be 'section 5' firearms, and D3 admits that he or she was aware that his or her certificate might not cover the firearms to be bought.

- B.19 In example 2B, under our recommendations, the only question will be, "did D1, D2 and D3 agree to purchase firearms, realising that they might in fact be 'section 5' firearms purchased without lawful authority?" If they did, they will be guilty of a conspiracy to purchase such firearms. In that regard, D3's mistake of law concerning the nature of his or her certificate will, of course, be irrelevant.
- B.20 By way of contrast, the conditional-intent-as-to-circumstance view would require a considerably more complex approach. The jury would have to decide whether or not either or both of D1's and D2's claims about the conditions on which he or she would take part might be true. If the jury decides the claim or claims in question might be true, either or both of D1 and D2 must be acquitted. Having said that, the jury would also have to be told that these (exculpating) conditions must be distinguished from the condition for participation set for himself by D3. That condition involves an irrelevant mistake of law, and cannot in itself affect his liability.
- B.21 However, the jury will also have to be told that D3 must also, after all, be acquitted, if the claims of *both* D1 and D2 may have been true, even though the condition D3 set for participation involves an irrelevant mistake of law. This is, of course, because the element of agreement on the essential elements of the offence between *two or more* persons (including D3) would not then be present.

¹⁰ Firearms Act 1968, s 5(1)(ab).

¹¹ Firearms Act 1968, s 5(1)(a).

B.22 This complex situation is far less likely to arise under our recommendations, because it is inherently less likely that there will be any doubt that one or other of D1 and D2 was simply aware that the firearms might be 'section 5' firearms.

Appendix C – Summary: Intervention & Options

Department /Agency: Law Commission	Title: Impact Assessment of Conspiracy and Attempts Report	
Stage: Report	Version:	Date: 12 November 2009
Related Publications: Conspiracy and Attempts (2009) Law Com No 318, Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183		

Available to view or download at:

http://www.lawcom.gov.uk/lc_reports.htm

Contact for enquiries: criminal@lawcommission.gsi.gov.uk

Telephone: 020 3334 0200

What is the problem under consideration? Why is government intervention necessary?

The problems under consideration relate to the current law on conspiracy and attempts:

1. Inconsistency with certain overlapping provisions on assisting and encouraging crime under the Serious Crime Act 2007.
2. The scope of the offences is unsatisfactory: too wide in some respects, too narrow in others.
3. Certain aspects of the law lack clarity.

The Criminal Law Act 1977 and the Criminal Attempts Act 1981 need amendment to resolve these.

What are the policy objectives and the intended effects?

1. To update the law and achieve consistency between the offences of conspiracy and attempts and with the offences of assisting and encouraging crime (under the Serious Crime Act 2007).
2. To ensure that the scope of these offences (including exemptions and defences) is neither over- nor under- inclusive.
3. To clarify certain provisions under the current law.

The effect will be to make the law fairer, more consistent and more effective.

What policy options have been considered? Please justify any preferred option.

Option 1: Do nothing

Option 2: Amend the existing statutory provisions, addressing specific issues within each offence. This is the preferred option because amendment would be sufficient to remedy the problems identified.

Option 3: Repeal the existing statutory offences and create new offences of conspiracy and attempts. For example the current law on attempt could be replaced with two new statutory offences - one relating to preparatory acts and one to the final acts carried out before the commission of the offence.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:

..... Date:

Summary: Analysis & Evidence

Policy Option: 2

Description: Amend existing statutory provisions

COSTS	ANNUAL COSTS	<p>Description and scale of key monetised costs by 'main affected groups'</p> <p>It is not anticipated that there will be any significant increase in prosecutions (with associated defence/Legal Aid and court costs) nor in the prison population.</p> <p>There may be a small initial (non-recurring) spike in appeals.</p>				
	<table border="1" style="width: 100%;"> <tr> <td style="width: 60%;">One-off (Transition)</td> <td style="width: 40%; text-align: center;">Yrs</td> </tr> <tr> <td style="background-color: #ffffcc;">£ Negligible</td> <td></td> </tr> </table>		One-off (Transition)	Yrs	£ Negligible	
	One-off (Transition)		Yrs			
	£ Negligible					
<table border="1" style="width: 100%;"> <tr> <td style="width: 60%;">Average Annual Cost (excluding one-off)</td> <td style="width: 40%;"></td> </tr> <tr> <td style="background-color: #ffffcc;">£ Negligible</td> <td></td> </tr> </table>	Average Annual Cost (excluding one-off)		£ Negligible			
Average Annual Cost (excluding one-off)						
£ Negligible						
Total Cost (PV)		£ Negligible				

Other **key non-monetised costs** by 'main affected groups'

BENEFITS	ANNUAL BENEFITS	<p>Description and scale of key monetised benefits by 'main affected groups'</p> <p>Clearer, more consistent law will be less likely to be subject to legal challenge thereby resulting in savings in court, prosecution and defence costs.</p>				
	<table border="1" style="width: 100%;"> <tr> <td style="width: 60%;">One-off</td> <td style="width: 40%; text-align: center;">Yrs</td> </tr> <tr> <td style="background-color: #ffffcc;">£</td> <td></td> </tr> </table>		One-off	Yrs	£	
	One-off		Yrs			
	£					
<table border="1" style="width: 100%;"> <tr> <td style="width: 60%;">Average Annual Benefit (excluding one-off)</td> <td style="width: 40%;"></td> </tr> <tr> <td style="background-color: #ffffcc;">£</td> <td></td> </tr> </table>	Average Annual Benefit (excluding one-off)		£			
Average Annual Benefit (excluding one-off)						
£						
Total Benefit (PV)		£				

Other **key non-monetised benefits** by 'main affected groups'

This option would create consistency with overlapping provisions on assisting and encouraging crime, make the scope of criminal liability more appropriate, improve clarity and certainty and increase public confidence.

Key Assumptions/Sensitivities/Risks

Key Assumption: That there will be no significant overall increase in prosecutions nor in demand for prison places. Risk (low likelihood): That our recommended amendments result in a greater number of appeals than anticipated.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England and Wales			
On what date will the policy be implemented?					
Which organisation(s) will enforce the policy?		Courts			
What is the total annual cost of enforcement for these organisations?		£ Negligible			
Does enforcement comply with Hampton principles?		Yes			
Will implementation go beyond minimum EU requirements?		Not applicable			
What is the value of the proposed offsetting measure per year?		£ Not applicable			
What is the value of changes in greenhouse gas emissions?		£ Not applicable			
Will the proposal have a significant impact on competition?		No			
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		Yes/No	Yes/No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£	Decrease of	£	Net Impact £ None anticipated

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 3

Description: Repeal the existing statutory provisions and create offences

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' The creation of new offences would create uncertainty and a greater risk of increased litigation with associated costs for the prosecution, defence/Legal Aid and courts.	
	One-off (Transition)	Yrs		
	£ Negligible			
	Average Annual Cost (excluding one-off)			
	£ Negligible		Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups' The new scheme proposed for attempts was criticised on the ground that there was a risk that the provisions would be misinterpreted and create either too wide or too narrow a basis for liability. Interfering with the existing law more than strictly necessary may undermine public confidence.				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' In the long term this option has the potential to increase certainty in the law and result in the savings listed under option 2 above. However in the shorter term, and perhaps beyond, there would be a significant risk of reducing certainty and increasing costs.	
	One-off	Yrs		
	£			
	Average Annual Benefit (excluding one-off)			
	£		Total Benefit (PV)	£
Other key non-monetised benefits by 'main affected groups' There is the potential for consistency with overlapping provisions on assisting and encouraging crime, appropriate scope of criminal liability, greater clarity and certainty, increased public confidence subject to the potential costs under "key monetised costs" above.				

Key Assumptions/Sensitivities/Risks

Key assumption: that the new offences would create uncertainty and result in increased litigation (and associated costs) and a loss of public confidence. While this option might resolve problems with the law in the long term this is less certain than with option 2 and the risk of significant cost is greater.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England and Wales	
On what date will the policy be implemented?			
Which organisation(s) will enforce the policy?		Courts	
What is the total annual cost of enforcement for these organisations?		£ Negligible	
Does enforcement comply with Hampton principles?		Yes	
Will implementation go beyond minimum EU requirements?		Not applicable	
What is the value of the proposed offsetting measure per year?		£ Not applicable	
What is the value of changes in greenhouse gas emissions?		£ Not applicable	
Will the proposal have a significant impact on competition?		No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase of £	Decrease of £	Net Impact	£ None anticipated

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

PROBLEMS UNDER CONSIDERATION

Conspiracy

The statutory offence of conspiracy is contained in the Criminal Law Act 1977, which makes it an offence for two or more people to form an agreement to commit an offence. The offence is committed when the agreement is made and consequently there is no need for the planned offence to be carried out or attempted.

(1) The limitations of the current law in relation to the fault element of conspiracy were highlighted by the House of Lords decision in the case of *Saik* [2006] UKHL 18; [2007] 1 A.C. 18, which related to a conspiracy to commit a money laundering offence. The case involved interpretation of section 1(2) of the Criminal Law Act 1977, which states that:

[W]here liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of the conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

The House of Lords held that this required the defendant to have knowledge as to the circumstance element of the offence (in this case, that the money represented the proceeds of crime). This means that whereas money laundering can be committed where the offender has only reasonable grounds to suspect the existence of the circumstance element (the money being proceeds of crime), in order to establish a conspiracy to commit that offence the prosecution would have to prove knowledge. This is not satisfactory because it leaves certain blameworthy conduct outside the scope of the offence.

(2) Section 2 of the Criminal Law Act 1977 provides for exemptions from liability for spouses or civil partners who conspire together but with no one else and for a person who conspires with the intended victim of the planned offence. These should be abolished: the first is an anachronism, the second is illogical and they both have the effect of exempting individuals who have engaged in blameworthy conduct from the scope of criminal liability.

(3) The exemption applying to the intended victim of the offence needs reform to clarify to whom it applies and to make it consistent with the exemption for victims under the assisting and encouraging provisions of the Serious Crime Act 2007.

(4) Section 4(1) of the Serious Crime Act 2007 provides that before a prosecution can be brought against a person for conspiracy to commit a summary offence the consent of the Director of Public Prosecutions must be obtained. This requirement is unnecessary, particularly since the introduction of the statutory charging regime under the Criminal Justice Act 2003.

(5) Since the offence of conspiracy is committed by forming an agreement to commit some other offence in the future it is more likely than many other offences to include an overseas element. For example, the agreement may be formed overseas to commit an offence in England and Wales such as importing illegal drugs, or conversely an agreement may be formed in England and Wales to commit an offence overseas. The existing law on extra-territorial jurisdiction over conspiracies is complex and spread between a number of statutes and the common law. This makes their application less straightforward than it should be. Codification of the existing law would resolve this. In addition new provisions on extra-territorial jurisdiction were also created in respect of the offences of assisting and encouraging crime under the Serious Crime Act 2007. Since there is a significant overlap between the offences of assisting and encouraging and conspiracy it is desirable that the same rules on extra-territorial jurisdiction should apply to both to the extent possible within the context of codifying the existing law.

(6) There is currently no defence to a charge of conspiracy where a person has entered into a conspiracy to prevent crime or protect national security or on other public interest grounds. The creation of such a defence would be consistent with the reasonableness defence applicable to the offence of assisting or encouraging crime under the Serious Crime Act 2007. Since there is a significant overlap between the offences of assisting and encouraging and conspiracy it is desirable that the same defence would be available in respect of both.

Attempts

The Criminal Attempts Act 1981 makes it an offence if a person “with intent to commit an offence ... does an act which is more than merely preparatory to the commission of the offence”.

(1) The current law does not satisfactorily provide for the situation where a person carries out an act more than merely preparatory to the commission of the offence intending only to commit that offence if certain conditions are fulfilled (in other words with conditional intent). To this extent the offence is under-inclusive and potentially omits certain blameworthy conduct from its scope.

(2) Where a person does an act more than merely preparatory to the commission of an offence that includes a circumstance element but no fault requirement or mere negligence as to those circumstances the current law is uncertain as to what fault element has to be proved for attempt. On one interpretation of the current law no fault element might have to be proved as to circumstances. This is unfair since attempt is a crime requiring intention and therefore criminal liability should depend upon proof of at least recklessness as to these circumstances. To this extent the current law is over inclusive and creates criminal liability where a person neither knows nor is reckless as to circumstances that make up an element of the substantive offence. (Under the current law where the substantive offence does include a fault element as to circumstances this also has to be proved in respect of the attempt and we recommend no change on this, although for clarity's sake we recommend this is set out in statute.)

(3) Section 1(1) of the Criminal Attempts Act 1981 specifies that liability for attempt depends on the performance of an act; consequently attempts carried out by way of omission fall outside the scope of the offence. However where, in contravention of a duty, a person attempts to kill someone by way of omission, for example by intentionally starving them, this should fall within the scope of the offence of attempted murder.

RATIONALE FOR GOVERNMENT INTERVENTION

It is in the public interest that the law on conspiracy and attempts should work properly: the scope of the offences should take in all sufficiently blameworthy conduct, there should be provision for defences and exemptions from liability where this is fair and there should be consistency with provisions under the Serious Crime Act 2007 on assisting and encouraging crime.

Currently the prosecution is required to work around the shortcomings in the law to ensure that wrongful conduct is prosecuted. This is undesirable since it means that the application of the law is less straightforward than it should be.

In order to address these issues and implement our proposals for reform, it is necessary to amend the provisions of the Criminal Law Act 1977 and the Criminal Attempts Act 1981. Government intervention is required to achieve this.

POLICY OBJECTIVES

1. To update the law and achieve consistency between the offences of inchoate liability and in particular with the offences of assisting and encouraging crime (under the Serious Crime Act 2007).
2. To ensure that blameworthy conduct falls within the scope of these offences and that non-blameworthy conduct falls outside it.
3. To clarify the existing law and provide for greater legal certainty.

SCALE AND CONTEXT

General comments

Although amendments to the law on conspiracy and attempts have the potential for wide application (since conspiracy can be committed in relation to most offences and attempt in relation to most indictable offences), our proposals will impact on only a small number of cases according to, for example, the fault element of the substantive offence to which they relate, or the identity of the defendant.

Data on the number of prosecutions brought each year in respect of conspiracies and attempts are unavailable because the current practice is to record these prosecutions as though they were brought in respect of the substantive offence to which they relate. This means, for example, that a conspiracy to commit a theft will be recorded as a theft rather than a conspiracy.

Given that the number of prosecutions brought (specifically) for conspiracy and attempts is not recorded it is not surprising that data on the number of cases in which the problems we identify arise and prevent or hinder a fair prosecution is unavailable. Given the lack of available data and because it is the prosecution who are primarily affected by the shortcomings in the law as it stands we have sought evidence from a range of practitioners in different prosecution agencies and the conclusions we tentatively draw are based on this.

Prosecutors have developed a range of strategies to deal with many of problems in these areas of the law. For example, they might charge the substantive offence in preference to conspiracy where the substantive offence has no fault requirement in respect of a circumstance element or has a fault element as to circumstances other than knowledge, or in the case of an attempt involving conditional intent, employ drafting strategies to work around the limitations in the law. However these strategies cannot provide a solution in every case. For example it would be impossible to charge a substantive offence instead of conspiracy where no substantive offence has been committed.

Conspiracy

The main reform proposed in our report is the change to the fault requirement as to circumstances in conspiracy. Our work in this area was requested following the House of Lords decision in *Saik*. This decision highlighted that the law placed a higher burden on the prosecution in respect of conspiracies, as compared with the substantive offence, where the substantive offence could be committed with no fault requirement as to circumstances or one requiring proof of fault other than knowledge. *Saik* concerned a conspiracy to commit a money laundering offence. It might be expected that following this decision the number of prosecutions brought in respect of conspiracy to commit a money laundering offence might have reduced. Although the figures for prosecutions brought for conspiracy are not available, data on the total number of money laundering prosecutions (including conspiracies) show a rise in overall prosecutions following *Saik*. In the year 2005-2006 (immediately before the *Saik* judgment) there were 1,467 prosecutions brought by the Crown Prosecution Service for money laundering offences under the Proceeds of Crime Act 2002 (which substantive offences require proof only of suspicion). However in the following year (2006-2007) the total number of prosecutions had risen to 2,610 and in 2007-2008 to 3,811. Of course we cannot know how many cases, within these totals, related to conspiracies but we can say that following *Saik* there was no overall reduction in the number of money laundering prosecutions. Anecdotal evidence would suggest that the reason for this is that prosecutors have tended to charge a substantive offence, rather than conspiracy, to avoid the difficulty highlighted by this case, in particular the offence of entering into or being concerned in an arrangement to launder money under section 328 of the Proceeds of Crime Act 2002.

Unlike money laundering, immigration crime offences (which also tend to be committed by way of conspiracy and have a fault element as to circumstances of other than knowledge) did show a small decrease following the *Saik* decision. There were 281 prosecutions brought by the Crown Prosecution Service for relevant offences under sections 25 – 25B of the Immigration Act 1971 in 2005-2006. Following the decision in *Saik* that number dropped to 228 in both 2006-2007 and 2007-2008. The total increased slightly in 2008-2009 to 263. Given the small number of cases involved, and the fact that we do not know how many of these prosecutions related to conspiracies, it would be inappropriate to attribute the decrease in cases to the *Saik* decision, since many other factors, and in particular detection rates, are relevant. Nonetheless the prosecution figures in these areas show there was no dramatic decrease in prosecutions for these offences following *Saik* which would tend to suggest that either prosecutors were able to prove knowledge or successfully bypassed this requirement by charging a substantive offence instead. This conclusion would also be supported by the prosecutors we spoke to.

The exemptions from criminal liability relating to conspiracy are limited to very specific groups and as such the question of their application arises infrequently. Further, even in cases where they do apply the exemption only prevents criminal liability in respect of conspiracy; it cannot prevent a prosecution in respect of any other offence that has been committed by the individuals concerned. Spouses or civil partners who conspire together or individuals who conspire with the intended victim of the planned offence may be charged instead with substantive offences. Our recommendation to abolish the spousal/civil partner exemption and that relating to a person who conspires with the victim of the crime would therefore have little impact as regards the overall number of prosecutions.

The exemption from liability for those who conspire to commit offences in respect of which they will be the victim is to remain under our recommendation but will be amended to make it clearer to whom the exemption applies. Inevitably the number of cases where the intended victim of a crime is a conspirator is very small. The number of these that will be affected by our refinement of the law with the result that the exemption will no longer apply is believed to be a very small subset of these.

Our proposed reasonableness defence is intended to apply only in limited circumstances. It is unlikely to have widespread application, since its terms are relatively narrow. In addition one of the main groups of people who would benefit from it, that is undercover operatives and informants authorised under the Regulation of Investigatory Powers Act 2000, may already enjoy protection from prosecution by virtue of section 27(3) of that Act and paragraph 2.10 of the Covert Human Intelligence Sources Code of Practice which provides that such an authorisation may, in a very limited range of circumstances “render lawful conduct which would otherwise be criminal”.

Our recommendations regarding extra-territorial jurisdiction reflect the provisions on extra-territorial jurisdiction on assisting and encouraging crime under the Serious Crime Act 2007. It is not anticipated that they will result in any significant increase in prosecutions, since the existing law already provides for extra-territorial jurisdiction to be exercised in respect of conspiracy in a variety of circumstances and because the overlap between the offences means that many conspiracies could be charged under the Serious Crime Act 2007 to take advantage of those provisions where this was considered desirable.

Attempt

Our recommendations on attempt relate to an even more limited group of cases than those on conspiracy since they relate to specific circumstances: (1) where the offender had conditional intent, (2) where the substantive offence includes a circumstance element but no fault element relating to it and (3) attempted murder by omission.

We recommend a change to the law affecting the small sub-category of attempts cases where the defendant had intended to commit the full offence only if certain conditions were met. Prosecutors currently employ drafting strategies to work around the limitations on conditional intent under the current law. Our proposal would mean that these strategies would no longer be necessary. This proposal would only result in any additional prosecutions in cases where the drafting strategies are currently ineffective. We understand that this would be very few.

In respect of an attempt to carry out an offence with a circumstance element but no fault requirement or one of mere negligence as to those circumstances we recommend that it must be proved that the defendant was reckless as to those circumstances. Our proposal clearly only applies to attempts committed in respect of this type of offence and the practical effect of this would be felt only in prosecutions where recklessness could not be proved. Anecdotal evidence suggests that the number of prosecutions for attempt brought in respect of substantive offences of this type currently undertaken where there would be difficulty in proving recklessness as to the circumstance element of the substantive offence would be extremely small.

Our recommendation to allow the offence of attempted murder to be committed by way of omission will inevitably lead to very few prosecutions since it relates to a scenario that is relatively rare. In many cases such conduct could be prosecuted as some other offence (for example child neglect) under the current law and in such a case the effect of our recommendation would be simply to enable the seriousness of the conduct to be reflected in the charge. However, in the very small number of cases where such conduct would fall outside the scope of a substantive offence of sufficient seriousness the implementation of this recommendation will have significant impact.

POLICY OPTIONS

The following three policy options have been identified:

Option 1: Do nothing

Leave the current law as it stands. This would mean that the problems identified in the current law, outlined above under the heading 'Problems under Consideration', would remain.

Option 2: Amend the existing statutory provisions

A second option, which could be regarded as moderate law reform, would be to amend the existing statutory provisions in order to target those problems identified under the current law. Our proposals to update and amend the law on conspiracy were met with majority approval during our consultation process:

- To change the fault element of conspiracy where the substantive offence has no fault element as to circumstances or one requiring proof of fault other than intention or knowledge so that, where the substantive offence has no fault element as to circumstances or mere negligence (or its equivalent), recklessness must be proved in respect of the conspiracy. In all other cases the fault element as to circumstances in the substantive offence must be proved in respect of the conspiracy.
- To remove the requirement for the consent of the Director of Public Prosecutions for a prosecution of conspiracy to commit a summary offence.
- To remove the exemption applying where spouses and civil partners who conspire with each other (but no one else) and to a person who conspires with the victim of the planned crime.
- To update the exemption applying to the victim who enters into a conspiracy so that it applies only in respect of a person whom the substantive offence was designed to protect.
- To introduce a defence to a charge of conspiracy where a person has acted reasonably on public interest grounds.
- To codify the existing law on the courts' extra-territorial jurisdiction over conspiracies and, to the extent compatible with this, to make the law on jurisdiction consistent with the provisions on assisting and encouraging crime.
- To allow for conditional intent in the offence of attempt
- To introduce, in respect of attempt, a fault element as to circumstances of recklessness where the substantive offence has a circumstance element but no corresponding fault element or one of mere negligence.
- To extend the scope of the law of attempt to include attempted murder by omission in breach of duty.

Option 3: Repeal existing provisions and create new statutory offences

Policy option 3 would involve replacing attempts with two new offences - a newly defined offence of attempt and a new offence of criminal preparation. It was not intended that these offences would increase the scope of criminal liability but that they would better reflect the position under existing law.

The majority of consultees who responded to our consultation paper disagreed with the proposal of creating two new offences in place of the current offence of attempt. Those against the proposals included the Council of Circuit Judges, the Criminal Bar Association and the Crown Prosecution Service. This policy option was objected to on the grounds that: (1) having two separate offences would create unnecessary jurisprudence establishing the boundary between the two; (2) the new offence of “attempt” would then be too narrow; (3) there would be a temptation to charge the lesser “criminal preparation” offence where it was easier to do so; (4) the use of the wording “criminal preparation” could lead to the courts interpreting the offence too widely; and (5) the prosecution would simply charge the two offences in the alternative.

In the absence of support amongst our consultees, and considering the cost involved, option three could not be justified in relation to attempts.

Regarding conspiracy, policy option 3, full scale reform, was never considered necessary. It is possible to remedy the specific problems identified under the current law through amendments to the primary legislation. A repeal of the existing offence and creation of a new one is unnecessary to achieve our policy objectives and would incur unnecessary additional cost.

CONSULTATION

Prior to writing the report on Conspiracy and Attempts we published a consultation paper on the project. The consultation was held between 10 October 2007 and the 13 February 2008. We received 21 written responses to the consultation paper. These responses came from academics, practitioners, the judiciary and police and prosecution organisations.

We also held a seminar on ‘Criminal Conspiracy and Criminal Attempts’ on 15 November 2007. The seminar was attended by 17 practitioners. In addition the proposals were discussed with the advisory group in a meeting on 4 March 2008.

The responses we received on consultation have informed our recommendations.

OPTION APPRAISAL

Option 1: Do nothing

Costs

There is an ongoing cost of doing nothing to address the law in these areas.

The reliance on strategies to bypass problems under the current law is undesirable since it means that the law and its application is more complicated and less transparent than it should be. In addition these strategies cannot resolve the difficulties in every case. This leaves the possibility that in a small number of cases blameworthy conduct could not be prosecuted with obvious negative consequences. Both of these shortcomings carry the risk of reduced public confidence.

Two of our recommendations aim specifically to clarify uncertain areas under the current law: (1) the fault requirement as to circumstances in attempt where the substantive offence contains a circumstance element but no fault requirement or one of mere negligence in respect of it, and (2) the exemption from liability for the intended victim of a conspiracy. Any unnecessary complication in the law has the potential to lead to longer trials and more appeals. This is a considerable cost given that a day’s sitting in the Crown Court costs HM Courts Service £5690, with the prosecution and defence costs to be added on top. HM Courts Service assesses its costs of a day’s hearing at the Court of Appeal as £14,415 and again the cost for the appellant and respondent would need to be added on top.

In some respects the offences of conspiracy and attempts are currently over-inclusive, resulting in criminal liability being incurred when this is unfair and contrary to the public interest, for example, the absence of a reasonableness defence, which leaves a person vulnerable to prosecution when they have acted reasonably in the public interest, and the absence of a fault requirement as to circumstance in attempt. The likelihood of harm flowing from these problems is small, in fact, because (1) certain people entering into conspiracies on public interest grounds may already enjoy protection from criminal liability under the Regulation of Investigatory Powers Act 2000 and (2) it is understood that there are few cases of attempt currently prosecuted where a requirement to prove recklessness as to circumstances could not be met. Nonetheless the existence of these small risks has obvious implications for public confidence.

Another important factor is that at present there are inconsistencies between the law on conspiracy and on assisting and encouraging crime in respect of extra-territorial jurisdiction, the liability of victims and the availability of a reasonableness defence. Since there is overlap in the scope of these offences inconsistency between them may result in a bias in charging practice, for example conduct that could be charged as either assisting and encouraging or conspiracy might be charged as assisting and encouraging simply to take advantage of the lesser fault requirement as to circumstances and of the provisions on extra-territorial jurisdiction. Again any distortion along these lines may result in a loss of public confidence.

Benefits

The benefit of doing nothing is the avoidance of any immediate implementation costs.

Option 2: Amend the existing statutory provisions

Costs

The most significant cost likely to be incurred as a result of the implementation of these recommendations will be associated with any overall increase in the number of prosecutions or in court time. However as we explain in the section headed "Scale and context" above we anticipate that there is unlikely to be any significant overall increase in prosecutions as a result of the implementation of our recommendations. This is because the prosecution currently adopts a number of strategies to work around the current shortcomings in the law. It is only in respect of the rare cases where these strategies cannot successfully be employed that our proposals will enable prosecutions to be brought that are currently impossible. Any additional cases prosecuted or any trial made longer as a result of our recommendations would result in additional costs relating to prosecution and defence work on the case and court time. A day's sitting in the Crown Court costs HM Courts Service £5690, with prosecution and defence costs to be added on top.

We anticipate that some of the recommended amendments, and in particular the scope of the new defence of reasonableness might be the subject of a small spike in appeals (as followed the coming into force of the Criminal Evidence Witness Anonymity Act 2008). However by the time our recommendations come into force it is anticipated that the most contentious of our recommendations that mirror those in the Serious Crime Act 2007 will have already been the subject of appeal. Any costs that do arise in this context will be non-recurrent: once a disputed point has been settled the potential for appeal (and the costs associated with it) falls away. HMCS assesses its costs of a day's hearing at the Court of Appeal as £14,415, with the cost for the appellant and respondent to be added on top.

There will be very minimal costs associated with publicising the changes to the law in this area. For the judiciary this would probably be achieved by inclusion in the monthly electronic newsletter circulated by the Judicial Studies Board, and by similar means within the prosecuting authorities and criminal defence services. There will also be inevitable cost flowing from drafting the Bill and parliamentary time.

Benefits

As a result of our recommendations the law will be fairer and the extent of criminal liability more appropriate. The scope of conspiracy will be extended to take in blameworthy conduct currently omitted, while the scope of attempts will be slightly narrowed so that an additional fault element as to circumstances will be required where this is currently not the case. A new offence of attempted murder by omission will be created. Removing exemptions from criminal liability for spouses/civil partners who conspire together and for those who conspire with the intended victims of the planned offence will mean that the law will better reflect common sense expectations of the types of wrongful conduct that should attract criminal liability. Conversely the introduction of the reasonableness defence will provide a defence for those who reasonably enter into a conspiracy on public interest grounds. There are strong public confidence benefits from the law setting criminal liability at the appropriate level.

In respect of the fault requirement as to circumstances in attempt and the victim exemption in conspiracy the law will be clarified, reducing the risk of extended legal argument on these points at trial and the cost associated with it (see under “Costs” above).

Application of the law will be simplified and more comprehensible to the lay person. The complicated and scattered law on extra-territorial jurisdiction over conspiracies will be brought together and codified. By making express provision for conditional intention in attempts and for the fault element in conspiracies formed in respect of substantive offences with a no fault requirement as to circumstances or one less than knowledge, prosecutors will be able to prosecute this wrong-doing without resorting to drafting strategies or alternative charges. In short the law will do what a lay person would reasonably expect it to do.

The law will be consistent so that the overlapping offences of conspiracy and assisting and encouraging crime under the Serious Crime Act 2007 are subject to the same provisions on exemption from liability for victims and on the reasonableness defence and to extent compatible with the existing law extra-territorial jurisdiction. Similarly our recommended provisions on the fault element as to circumstances are consistent as between attempt and conspiracy. This means that the decision on which inchoate offence to charge will be more straightforward and limited to which offence best fits the facts of the case rather than influenced by the different advantages conferred by each offence.

The removal of the requirement for the Director of Public Prosecution’s consent to be given in order to bring a prosecution in respect of a conspiracy to commit a summary only offence removes a small administrative burden from prosecutors and may result in very minimal savings.

Option 3: Repeal existing provisions and create new statutory offences

Costs

There would be minimal costs associated with publicising changes in the law (see under “Option 2: Amend the existing statutory provisions” above).

There was widespread opposition to this proposal on consultation from, amongst others, the Council of Circuit Judges, the Criminal Bar Association and the Crown Prosecution Service. The main objections centred on the uncertainty that creation of the new offences would introduce, the risk that the new offences would be misinterpreted and create too wide or too narrow a basis for liability, the cost of appeals to establish the scope of the new offences and the boundary between them and the fact that no real benefit was seen to be achieved by changing the law in this way. This negative reaction from key representatives of the judiciary, prosecution and defence indicated that there was a risk of widespread opposition to this option from those who would be applying the new provisions and, possibly, from the public at large.

Since option 3 involves the introduction of a more radical reform there is a greater risk that there will be increased legal argument, longer trials and more appeals as a result of this proposal, not least because of the opposition to it from those who will be applying it. The cost of a day's hearing at the Crown Court is £5690 and a day's hearing at the Court of Appeal costs HM Courts Service £14,415 with the parties' costs to be added on top.

Benefits

The benefit of wide scale reform under option 3 would be that it provides the opportunity to address all the current problems in the law of conspiracy and attempts. It would also provide an opportunity to achieve consistency between the inchoate offences of conspiracy and attempts and the newer offences of assisting and encouraging crime.

However, as stated above, we believe that this benefit can also be achieved through the more modest reform under option 2.

Cost/benefit analysis summary

Option 2 would provide necessary amendment and updating of the law at a proportionate cost.

KEY ASSUMPTIONS/RISKS

Key assumption

Since prosecutors are largely successful in working around the problems presented by the limitations under the current law it is not anticipated that there will be any significant overall increase in prosecutions.

It is assumed that once the difficulties under the current law are resolved prosecutors will abandon the strategies they currently employ to avoid the problems under the existing law and adopt a more straightforward approach to applying the law.

Where a prosecutor chooses to charge conspiracy rather than a substantive offence as a result of our recommendation it is anticipated that there will be no significant rise in the number of convictions or acquittals.

Since the maximum custodial penalty applicable to conspiracy is the same as that applicable to the substantive offence in respect of which it was formed and because the circumstances surrounding the offence will be the same whether conspiracy or the substantive offence is charged, it is not anticipated that there will be any significant increase in the number of custodial penalties or their length as a result of our proposals.

It is assumed that our recommendations will be enacted and applied in accordance with our report.

Risks

In the absence of any data on the number of prosecutions or convictions for conspiracy and attempts each year, and crucially the number of cases in which the current law causes difficulty, we have had to draw on anecdotal evidence from practitioners to anticipate the likely scale of the impact of our proposals.

There is therefore a risk that there are gaps in our knowledge and that as a result we may have underestimated how many additional prosecutions may be brought as a result of our recommendations. We have endeavoured to minimise this risk by speaking to prosecutors involved in different types of work in different agencies.

There is a risk that the provisions implementing our recommendations on the reasonableness defence are interpreted too broadly by the courts. There is also the risk that too many defendants will claim the defence, possibly resulting in more lengthy trials and more appeals. However other offences currently include reasonableness defences and this has not given rise to these problems: it is therefore anticipated that the likelihood of this risk materialising is small.

Although costs on appeal are generally non recurrent, different aspects of, for example, the reasonableness defence, might be the subject of separate appeals. It is expected that this risk will be minimised by the Court of Appeal taking a strong line in order to keep the scope of the defence narrow.

SPECIFIC IMPACT TESTS

Legal Aid: It is anticipated that the recommendations might have the potential to generate a very small additional number of prosecutions, and a small spike in appeals, which would have a knock-on cost to Legal Aid. This is expected to be minimal.

Human rights: It is not considered that the recommendations outlined have any human rights impact.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

APPENDIX D

LIST OF THOSE WHO COMMENTED ON CONSULTATION PAPER NO 183

Academics

John Child, University of Birmingham

Professor Chris Clarkson, University of Leicester

Professor Antony Duff, University of Stirling

Peter Glazebrook, University of Cambridge

Nicola Padfield, University of Cambridge

Dr Mike Redmayne, London School of Economics

Dr Jonathon Rogers, University College London

Professor John Spencer QC, University of Cambridge

Professor Victor Tadros, University of Warwick

Rebecca Williams, University of Oxford

Professor William Wilson, Queen Mary College London

Judiciary

Mr Justice Calvert-Smith

Council of Circuit Judges

Lord Justice Sedley

Mr Justice Fulford (on behalf of the Higher Courts Judiciary)

Legal practitioners

Criminal Bar Association

Ivan Krolick QC, Barrister

Justices' Clerks' Society

Police and prosecution organisations

Association of Chief Police Officers

Crown Prosecution Service

Police Federation of England and Wales