The Law Commission
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CONSPIRACY AND ATTEMPTS

A Consultation Paper

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

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This consultation paper, completed on 17 September 2007, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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THE LAW COMMISSION

CONSPIRACY AND ATTEMPTS

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CONSPIRACY AND ATTEMPT: THE NEED FOR LAW REFORM

INTRODUCTION

Setting this paper in context

1.1 In the summer of 2006, the Government requested the Law Commission to review the offence of statutory conspiracy as defined in the Criminal Law Act 1977 (the '1977 Act').[1] As it has been the Commission's aim to undertake a general review of inchoate liability and secondary liability,[2] we have taken the opportunity this request provided to include in this consultation paper a review of the law of criminal attempt.

General considerations

1.2 Before we outline the problems with the current law, and our provisional proposals for dealing with them, it is right to set out three considerations of great importance to any general review of the law of inchoate liability, and of conspiracy in particular.

1.3 First, there is the need to ensure that the law of inchoate liability as a whole is sufficiently coherent and consistent. We believe it is important that our proposals for reforming statutory conspiracy should be reasonably consistent with those that we are making in relation to criminal attempt and with our recommendations for the reform of the law governing inchoate liability for assisting and encouraging crime.[3] Acts amounting to a conspiracy may overlap with acts amounting to assistance or encouragement to commit crime and a conspiracy to commit a crime will sometimes immediately precede an attempt to commit it. Consequently, it would not be right to have widely divergent principles governing each of these kinds of inchoate crime. Our provisional proposals, particularly in relation to the fault element for conspiracy and attempt, are shaped by the need for coherence and consistency in the law.

[1] We therefore do not review any aspect of common law conspiracy. The statutory offence of conspiracy is set out at para 1.19 below.

[2] See Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300; Participating in Crime (2007) Law Com No 305.

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

1.4 Secondly, there is the need to ensure that the substantive criminal law reflects modern developments in criminal activity, criminal procedure and evidence-gathering. Crime is now more technologically based and more global in character than was ever envisaged when the 1977 Act was passed.[4] These developments provide opportunities for much more sophisticated organisation of criminal activity, both domestically and world-wide. Partly to meet this challenge, there has been an increasing emphasis within the criminal justice system on the detection and apprehension of serious crime at an early stage with a view to the prevention of harm. In this respect, an inchoate offence such as conspiracy can provide a very effective focus for the efforts of law enforcement agencies. When properly charged,[5] a count alleging conspiracy can serve to reflect the true extent over a period of time of the criminality of two or more defendants.[6] The fact that we are not proposing to abolish the crime of conspiracy, even though offences of assisting or encouraging crime will soon be on the statute book, is a reflection of the need to provide such a focus.[7]

1.5 In that regard, we cast no doubt on the generally accepted proposition that one of the main aims of the criminal law is to punish, to deter and thus to prevent the unlawful causing of harm ('the harm principle'). The forming of a conspiracy does not itself cause harm. Nonetheless, the achievement of the criminal law's principal aim would be substantially undermined if there could be no criminalisation of acts directed at causing harm, however determined the would-be criminals, however many people were drawn in to preparing to perpetrate the harm or however close they came to perpetrating it. It is now a theoretical commonplace that the harm principle extends the scope of justification for criminalisation to at least some kinds of acts that are aimed at causing harm or that pose serious risks of causing harm, even though those acts may not be harmful in themselves.[8]

1.6 Having said that, thirdly, in any reform of inchoate liability special care must be taken not to over-extend the scope of the criminal law. Professor Ashworth has observed that:

[4] Hence, there have had to be amendments to the 1977 Act to ensure that it has an appropriate application in an international context: see the Criminal Justice (Terrorism and Conspiracy) Act 1998, s 5(1).

[5] In other words, when there is a focus on the agreement and the acts and declarations said to be in furtherance of the conspiracy are evidence of the agreement itself as opposed to just being conveniently (for the prosecution) grouped under the umbrella conspiracy.

[6] See, for example, *Ali (Liaquat)* [2005] EWCA Crim 87, [2006] QB 322 where, in a case of money laundering, the prosecution claimed that, if it had charged a series of substantive offences, the rule against duplicity would have meant that each transaction which actually occurred would have had to form the basis of a separate count on the indictment thereby overloading it.

[7] See Part 2 below.

[8] See, for example, the discussion in Claire Finkelstein, "Is Risk a Harm?" (2003) 151 *University of Pennsylvania Law Review*, 963; A Von Hirsch, "Extending the Harm Principle: "Remote" Harms and Fair Imputation", in A P Simester and A T H Smith, *Harm and Culpability* (1996) p 259.

> …as the form of criminal liability moves further away from the infliction of harm, so the grounds of liability should become more narrow.[9]

1.7 This could be called the 'remoteness principle', protecting the interests of those who stand to be convicted of conspiracy. In broad terms, we endorse the remoteness principle. It will play an important role in our approach to the fault element in both conspiracy and attempt.[10]

Law Com No 300

PREVIOUS RECOMMENDATIONS

1.8 In the course of this paper, there is frequent reference to a report that we published in 2006: Inchoate Liability for Assisting and Encouraging Crime ('the 2006 report').[11] Some of the provisional proposals that we make in this paper can only be fully appreciated in the light of the recommendations that we made in that report, Accordingly, we believe that it will be helpful if at the outset we briefly outline the main recommendations contained in that report.

1.9 We recommended that there should be two core statutory inchoate offences:

(1) doing an act capable of assisting or encouraging the commission of a principal offence *intending* that the offence should be committed. ('the clause 1 inchoate offence'),

(2) doing an act capable of assisting or encouraging the commission of a principal offence believing:

(a) that the act will assist or encourage the commission of the principal offence; and

(b) that the principal offence will be committed. ('the clause 2 inchoate offence')[12]

1.10 Being inchoate offences, they would be committed irrespective of whether the principal offence was subsequently committed. The two offences would replace the common law inchoate offence of incitement. They would also fill the existing gap whereby at common law if D assists, but without encouraging, P to commit an offence that P subsequently does not commit or attempt to commit, D incurs no criminal liability.

[9] Andrew Ashworth, *Principles of Criminal Law* (5th ed 2006) p 423. See Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300. See also the observations of the Law Commission's Working Party (Inchoate offences (1973) Working Paper No 50): "It is only when some act is done which sufficiently manifests the existence of the social danger present in [D's] intent that authority should intervene. It is necessary to strike a balance … between individual freedom and the countervailing interests of the community."

[10] See Part 4 and Part 16 below.

[11] Law Com No 300.

[12] In the 2006 report we refer to the offence that is assisted or encouraged as the 'principal' offence. In the context of conspiracy, we refer to the offence that the parties agree to commit as the 'substantive' offence,

1.11 We recommended that there should be two defences:

(1) acting for the purpose of preventing the commission of an offence or to prevent or limit the occurrence of harm (applicable to both offences);

(2) acting reasonably in all the circumstances (applicable only to the clause 2 offence).

In respect of each defence, we recommended that the burden of proving the defence should be on D.

PART 2 OF THE SERIOUS CRIME BILL

1.12 In Part 2 of the Serious Crime Bill, the Government has taken forward the recommendations that we made in the 2006 report. Clauses 42 and 43 make provision for two inchoate offences of assisting or encouraging the commission of a principal offence. The offences are broadly consistent with the clause 1 offence and the clause 2 offence recommended in the 2006 report.

1.13 In some important respects, however, the Serious Crime Bill does depart from the recommendations in the 2006 report. For the purposes of this paper, we highlight two departures:

Example 1A

In return for payment, D drives P to a local pub. P tells D that he is going to take delivery of some video recorders. D, who has knowledge of those who frequent the pub, believes that the recorders in question might be stolen. D drives P to the pub. On arrival, they find that the police have arrested all those already in the pub.

In this example, the principal offence to which D's and P's conduct relates is handling stolen goods.[13] The offence is one that consists of a conduct element (handling goods) and a circumstance element (the goods must be stolen). [14]

1.14 In the 2006 report, we recommended that, if the principal offence consists of a conduct and circumstance element, D should only be guilty of the clause 2 inchoate offence if he or she believed that, were D to perpetrate the conduct element, P *would* do so in the circumstances required to be convicted of the principal offence. This strict test reflected the fact that what is at issue is D's liability for assisting or encouraging a principal offence that might never be committed. In example 1A, D does not satisfy that test because he or she is merely reckless as to whether the recorders are stolen. D believes that they might be stolen, not that they will be stolen.

[13] Contrary to Theft Act 1968, s 22.

[14] In this paper we frequently refer to the conduct, consequence and circumstance elements of an offence. The conduct element is usually the action or behaviour of D. The consequence element refers to the state of affairs which results from D's conduct. The circumstance element refers to the set of conditions, state of affairs or factual matrix in which the conduct must occur if the conduct or consequence is to be wrongful. For further discussion and examples illustrating these concepts, see Part 4, paras 4.6 to 4.15 below.

1.15 However, clause 45(5) of the Serious Crime Bill provides that it suffices that D was *reckless* as to whether the conduct element of the principal offence would be perpetrated in the circumstances required for conviction of the principal offence. In example 1A, D satisfies that test because he realised that there was a real possibility that the recorders would be stolen goods.

1.16 In addition, in the Serious Crime Bill there is no discrete defence of acting for the purpose of preventing the commission of an offence or to prevent or limit the occurrence of harm. Instead, clause 48 provides for a defence of acting reasonably.

1.17 The defence includes but is not confined to cases where D acts in order to prevent the commission of crime:

Example 1B

D works as a typist for P. P tells D to type a letter addressed to X who is employed by the local authority. The letter contains an offer of a substantial sum of money if X ensures that P's firm is awarded a contract by the local authority. D is very uncomfortable in typing the letter but is frightened that she will be dismissed if she fails to comply. She has no employment rights in the event of being dismissed. She types the letter.

Under the Serious Crime Bill, the burden would be on D to prove on a balance of probabilities that he or she had acted reasonably in all the circumstances. It would be a matter for the jury to decide whether D had discharged the burden.

A KEY PROBLEM IN THE LAW OF CONSPIRACY

The definition of statutory conspiracy

1.18 The 1977 Act makes it a criminal offence for two or more people to form an agreement to commit an offence. For example:

Example 1C

D1 and D2 agree to kill V. However, before they can put their plan into effect, the police arrest them.

Conspiracy is an 'inchoate' offence. It is an offence in its own right and can be charged even if the intended offence is not committed or attempted. Equally, however, it can be charged even if the intended offence is committed. In example 1C, D1 and D2 can be charged with and convicted of conspiracy to murder even if the substantive offence (the murder of V) takes place.[15]

1.19 Statutory conspiracy is defined by section 1 of the 1977 Act:

[15] There can be advantages in charging conspiracy even when it is also alleged that the completed crime took place. An example would be where the prosecution is not sure that a causal link can be established between D1's and D2's actions and V's death.

(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

(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.

(2) 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 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.[16]

The problem raised by the decision in Saik

1.20 The Government's decision to ask the Law Commission to consider statutory conspiracy was triggered primarily by the recent House of Lords decision in *Saik*,[17] a decision concerned with the proper interpretation of section 1(2) of the 1977 Act. In this case, D was the sole proprietor of a bureau de change. It had a turnover of £1000 a week and up to late 2001 had made a small annual profit of £8000. From that time onwards, however, D started purchasing large quantities of $100 bills. Between May 2001 and February 2002, D exchanged some $8 million. D was observed by surveillance officers meeting another of the alleged conspirators many times in D's car in a nearby street rather than at his office. On these occasions, sacks containing sterling were seen.

[16] Section 3 of the 1977 Act provides for penalties. In broad terms, it provides for the following penalties. Upon conviction for conspiracy to commit an imprisonable offence, D can be sentenced up to the maximum term permitted for the full offence. In a murder case, or in any case where a discretionary life sentence of imprisonment is a permissible sentence, then D is liable to punishment for up to a maximum term of life imprisonment. Where D is convicted of a conspiracy to commit more than one offence, to which different maxima apply, then the maximum penalty is a term not exceeding that available for the most serious offence.

[17] [2006] UKHL 18, [2007] 1 AC 18.

1.21 D was charged with a conspiracy to 'launder' the proceeds of crime.[18] D pleaded guilty on the basis that he suspected that his dealings involved 'dirty' money. However, the House of Lords held that D's suspicion about the source of the money was an insufficient basis for a conviction of conspiracy to launder the proceeds of crime. It was held that, in accordance with section 1(2) of the 1977 Act, D would have to have 'intended or known' (as opposed to merely suspected) that the money was the proceeds of crime.[19] Proof of a lesser degree of fault in that regard was insufficient. So, the high fault threshold of intention or knowledge required by the offence of conspiracy made D's conviction impossible to sustain.

1.22 Accordingly, it is not sufficient that the alleged conspirators knowingly take an unjustified risk that the prohibited circumstances might exist at the time of the offence. Consider a hypothetical example involving an agreement by D1 and D2 to rape V. The circumstance element of the offence of rape is V's lack of consent. D1 and D2 agree to have sexual intercourse with V whether or not V consents. We consider that this ought to be regarded as a conspiracy to commit rape but, following *Saik*, it will not necessarily be so regarded. The offence of rape does not require proof of knowledge that V will not consent and so section 1(2) applies. This means that the prosecution has to prove that D1 and D2 *knew* at the time of the agreement that V would not consent. However, it would be very easy for them plausibly to claim that they merely thought V 'might not' or 'probably would not' consent. That would not be an admission of fault sufficient to satisfy section 1(2), although we consider that it ought to be.

1.23 We do not disagree with the House of Lords' interpretation of the law on this point.[20] However, we consider the law itself to be defective. Lord Nicholls (himself in the majority) expressed a concern that the conclusion the majority had to reach was "not altogether satisfactory in terms of blameworthiness".[21] However, he was of the opinion that:

> … the desire to avoid an unattractive outcome in this case cannot justify a distorted interpretation of section 1(2). It is not for the courts to extend the net of criminal conspiracy beyond the reach set by Parliament.[22]

Saik was charged with conspiracy to commit what was then an offence under the Criminal Justice Act 1998, s 93C(2). The relevant offence is now contained in Proceeds of Crime Act, s 327 which, amongst other things, makes it an offence to convert criminal property. 'Criminal property' is property that the alleged offender "knows or suspects constitutes or represents benefit from criminal conduct" - Proceeds of Crime Act 2002, s 340(3).

19 There is, however, some ambiguity about the meaning to be given to 'intend or know' in the speeches of the majority in *Saik*: see Part 4.

20 Although we will argue in Part 4 that the speeches of the majority cannot necessarily be regarded as providing an entirely clear understanding of the meaning and scope of section 1(2) of the 1977 Act.

21 [2006] UKHL 18, [2007] 1 AC 18, at [33].

22 Above.

1.24 In this consultation paper we make provisional proposals to broaden the fault element and so address the 'unattractive outcome' referred to by Lord Nicholls.[23] Our main proposal is that the prosecution must prove, in relation to any circumstance element[24] of a substantive offence, that D1 and D2 were at least reckless as to whether that circumstance element would exist at the time the offence was to be committed. **[see proposal 3]** [25]

The ambiguous requirement that criminality 'necessarily' be involved

1.25 An analogous problem, capable of producing a similarly unattractive outcome, stems from the ambiguous requirement in section 1(1) of the 1977 Act that the agreement to pursue a course of conduct must be one that, if that agreement is carried out in accordance with the conspirators' intentions, will 'necessarily' result in or involve the commission of an offence.

1.26 So far as it relates to the conduct or consequence elements of an offence, the 'necessary involvement' requirement is an important safeguard against over-extension of the law of conspiracy. If D1 and D2 agree on a course of conduct that, if carried out in accordance with their intentions, merely 'might' involve criminal conduct or consequences, that agreement should not amount to a criminal conspiracy. D1 and D2 may, for example, agree to drive as fast as possible from London to Manchester, realising that there is a risk of causing death by dangerous driving in so doing. Whatever one may think of their agreement, it is not an agreement to cause death by dangerous driving and is hence not a criminal conspiracy. It is only if causing death by dangerous driving would necessarily be involved in what D1 and D2 plan to do that there is a conspiracy contrary to the 1977 Act.

1.27 If a substantive offence itself requires proof of actual knowledge of particular facts or circumstances, then section 1(1)(a) appears to require proof of such knowledge on a charge of conspiracy to commit that substantive offence. The same would be true under our proposals, because we believe that the prosecution should not have less stringent fault elements to satisfy in relation to a charge of conspiracy than in relation to the substantive offence.[26]

[23] See Part 4 below.

[24] See n 14 above.

[25] Our provisional proposals and questions in relation to conspiracy (and to attempt) can be found in Part 17 below.

[26] See Part 4 below.

1.28 However, it is unclear what the position is when an offence is not negligence-based or one of strict liability, and so on the face of it section 1(1)(a) rather than section 1(2) applies, but the circumstance element of the offence can be satisfied by proof of something less than knowledge. A case in point is the offence of handling stolen goods.[27] The substantive offence of handling stolen goods requires proof that D *knew or believed* that the goods were stolen. What, then, needs to be proved if D1 and D2 are charged with a conspiracy to handle stolen goods? The fault element relating to the circumstance element of the substantive offence is satisfied by proof of something less than knowledge (namely, belief that the goods are stolen). If that means section 1(2) applies, then it seems that the prosecution must prove that D1 and D2 actually knew that the goods to be handled were stolen goods. It would not be enough that D1 and D2 merely believed the goods would be stolen.[28]

1.29 We regard that conclusion as unduly generous to D1 and D2. What would be the result if section 1(1)(a) applies rather than section 1(2)? It would have to be shown that if the agreed course of conduct is carried out in accordance with D1 and D2's intentions, it would 'necessarily amount to or involve' handling stolen goods. It is unclear whether that requirement will always be satisfied in a case where D1 and D2 merely believe, rather than know, that the goods they intend to handle will be stolen goods.

1.30 We believe that if proof of either knowledge or belief that goods are stolen suffices for conviction for the substantive offence of handling stolen goods, it should suffice on a charge of conspiracy to handle stolen goods. Our provisional proposal reflects that belief.

Summary of our provisional proposals for the fault element in conspiracy

1.31 We therefore consider that the basic fault requirement in relation to the circumstance element of the substantive offence should be 'recklessness' whether those circumstances exist or will exist at the time that the offence is to be committed. **[see proposal 3]** However, where a more stringent fault requirement (such as knowledge) is required for the circumstance element of the substantive offence, the same requirement must be proved on a charge of conspiring to commit the offence.[29] **[see proposal 4]**

1.32 In that regard, it will need to be made clear that the words 'will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement', in section 1(1)(a) of the 1977 Act, relate to the conduct and (where relevant) the consequence elements of the substantive offence but not to the circumstance element of the offence.

[27] Contrary to the Theft Act 1968, s.22.

[28] But see the discussion of this kind of example by the House of Lords in *Saik*, Part 4 paras 4.70 to 4.90 below.

[29] We will also be making the same provisional in relation to criminal attempt. That is to say, the law should require proof of no less than recklessness as to the existence of a circumstance element. However if the substantive offence itself requires proof of a higher degree or kind of fault than recklessness in relation to a circumstance element, then proof of this higher degree or kind of fault should also be required on a charge of attempt.

1.33 Were they to become law, we believe that our provisional proposals would ensure that defendants such as Mr Saik, those who agree to commit rape believing that the victim 'might not' consent and those who agree to handle goods believing that, should they do so, the goods will be stolen, would all be guilty of statutory conspiracy.

Two alternatives

1.34 However, we would also like consultees to give consideration to two alternatives to our provisional proposal in relation to the fault requirement as it bears on the circumstance element of the substantive offence.

1.35 The first alternative would involve a more restrictive test for liability than that involved in our provisional proposal, although not as restrictive as the test in *Saik*. The second alternative would involve a potentially less restrictive test for liability than that involved in our provisional proposal.

1.36 We therefore ask consultees whether to be guilty of conspiracy, D must believe at the time of the agreement that any prohibited circumstance element will exist at the time that the offence is to be committed. **[see question 1]**

1.37 Alternatively, we ask consultees whether to prove that D is guilty of conspiracy, the prosecution should have to show merely that D possessed such fault element (if any) in relation to any prohibited circumstance element as is required for proof of the full offence.[30] **[see question 2]**

OTHER PROBLEMS WITH THE LAW OF CONSPIRACY

What must be intended by conspirators

1.38 Section 1(1) of the 1977 Act appears unambiguously to require that for a person to be convicted of conspiracy he or she must intend that the conduct element of the principal offence be perpetrated and that the consequence element (if any) of the substantive offence materialise. However, the well-known and much criticised decision of the House of Lords in *Anderson*[31] detracts from the clarity of this position. On the one hand, it requires that D must intend "to play some part in the agreed course of conduct."[32] On the other hand, it does not require that D should intend that the agreement be carried through to completion. In both respects, the decision is troublesome.

[30] See, for example, the Law Commission's proposals for the law of attempt in the Draft Criminal Code of 1989, para 13.44: '[A]n intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to circumstances suffices where it suffices for the offence itself.' See also R A Duff, "The Circumstances of Attempt" (1991) Cambridge Law Journal 100. We will be asking consultees whether they think that this would be a better alternative for the fault element in attempt. See Part 16 below.

[31] [1986] AC 27.

[32] Above, at 39.

1.39 First, there is no reason, in terms of statutory language or policy, for insisting that D must intend to play some part in implementing the agreement. If D1 and D2 agree to murder V, D1 ought to be convicted of conspiracy to murder even if it was not his or her intention to play any part in V's murder. Secondly, an agreement to commit an offence implies an intention that it should be committed, as section 1(1) of the 1977 Act seems to make clear. The idea of a conspiracy that the conspirators agree to take part in but which none intends to see carried out is very unsatisfactory.

1.40 Although we agree with the criticisms that have been made of *Anderson*, we are not making any provisional proposals for changing the wording of section 1(1) of the 1977 Act in order to reverse its effect. As we hope to show, the inchoate offences of assisting or encouraging crime that we recommended in the 2006 report[33] would address the main mischief (encouragement or assistance provided by a party to a conspiracy who is indifferent as to whether the substantive offence is committed) which the House of Lords sought to address by its decision in *Anderson*.

Defences to and exemptions from liability as a conspirator

1.41 Section 2 of the 1977 Act provides for exemptions from liability under section 1. It exempts from liability for conspiracy a person who agrees exclusively:

(1) with his or her spouse or civil partner;[34]

(2) a person under the age of criminal responsibility;[35] or

(3) an intended victim of the offence,[36]

as long as the person with whom the agreement is made is of that status at all times (both initially and during the currency of the agreement). In this paper, we consider in detail the merits of each of these exemptions.[37] In this Part, we briefly set out our conclusions.

Spousal immunity

1.42 We consider the exemption enjoyed by spouses (and civil partners) when they conspire exclusively with one another to commit an offence to be a conspicuous anomaly.

Example 1D

D1 and D2, a married couple, agree to murder V. However, before they can put their plan into effect, the police arrest them.

[33] See para 1.9 above.

[34] Section 2(2)(a).

[35] Section 2(2)(b).

[36] Section 2(2)(c).

[37] See Parts 9 and 10 below.

In this example, D1 and D2 have not taken a more than merely preparatory step towards killing V and therefore are not liable for attempted murder. However, despite having formed an agreement to commit a heinous offence, they are exempt from liability for conspiracy to murder.

1.43 The current law appears even more anomalous when one considers that, if there was another party to the agreement (for example D1's brother, D3), all three would be guilty of conspiracy to murder. This is because the exemption is confined to conspiracies in which the only parties are married to each other or are civil partners. In our view, the existence of the exemption is an embarrassment to a civilised system of law.

1.44 We therefore provisionally propose that the exemption from liability for statutory conspiracy for spouses and civil partners who agree to commit an offence should be abolished. **[see proposal 7]**

Co-conspirator is a child under the age of criminal responsibility

1.45 A child under the age of 10 years, is considered to be of insufficient maturity to form a criminal intent and so cannot be held criminally liable:

Example 1E

D1, aged 20, persuades D2, aged 9, to agree that they will rob a local shop. D2 was reluctant to agree but decided to because he looks up to D1. D2 then has second thoughts and tells his mother who informs the police.

It might be thought that the adult D1 should not benefit from the fact that his or her co-conspirator, D2, is under the age of criminal responsibility. This is particularly the case where the adult targets the vulnerable child to become part of the agreement.

1.46 We recognise that if the recommendations that we made in the 2006 report are implemented, in example 1E, D1 would be guilty of an offence of assisting or encouraging D2 to commit an offence.[38] However, the question remains whether D1's exemption from liability for conspiracy is justified.

1.47 On balance, we believe that the exemption is justified and that the exemption for the parties to a conspiracy involving a single responsible and culpable adult and a child or children under the age of ten should be retained. **[see proposal 9]** If the only party to a conspiracy other than a responsible adult is a child (or children) under the age of criminal responsibility, then there can be no meeting of 'criminal' minds of a kind at the heart of any criminal conspiracy.

1.48 However, we ask consultees whether it should be possible to find the responsible and culpable adult guilty of an attempt (or of criminal preparation with intent) to conspire. **[see question 6]**

Co-conspirator is a victim of intended offence

1.49 Under the current law, a person cannot be guilty of a conspiracy to commit an offence if he or she is the intended victim of that offence.[39] Further, the 1977 Act also exempts from liability any person who conspires exclusively with a victim of the substantive offence.[40] In this instance, not only has D1 formed an agreement, but the individual with whom the agreement has been made is of sufficient maturity to form a criminal intent:

Example 1F

D1, aged 40, persuades D2 (V), a 15 year old, to agree to have sexual intercourse with D1.

In this example, D1 and D2 (V) have agreed to have sexual intercourse. Sexual activity with a child under 16 is prohibited by section 9 of the Sexual Offences Act 2003. D2 (V), as the child whom the offence aims to protect, is considered a victim and it is widely accepted that D2 (V) should not be liable for conspiracy. However, it is difficult to see why this protection should extend to D1.

1.50 We provisionally propose that the current exemption for both the victim and non-victim co-conspirator should be abolished but that a defence should be provided for the victim co-conspirator D2 (V)). **[see proposal 8]**

Crime prevention and acting reasonably

1.51 In contrast to the above exemptions from liability, it is generally not a defence that one entered into a conspiracy in order to prevent crime or to prevent or limit harm. A key example is the police officer (or other person) who enters into a conspiracy for the purpose of exposing the criminals involved in the agreement, to frustrate the criminal enterprise or for some other lawful purpose.

1.52 It is true that in *Anderson*[41] Lord Bridge said that in order to be guilty of conspiracy a person must intend to "play some part in the agreed course of conduct".[42] It seems that he thought such a requirement would exonerate those who join a conspiracy in order to expose and frustrate criminals. However, it leads to arbitrary outcomes:

[38] Clause 11 of the draft Bill which accompanied the 2006 report was designed to ensure that D1 would be convicted of the offence even though P, being under the age of 10, cannot commit a criminal offence. The substance of cl 11 is now contained in cl 45(6) of the Serious Crime Bill. Under the current law, it is unclear whether it is possible to convict of incitement a person who encourages a child under the age of 10 to commit what would be an offence if the child was aged 10 or over.

[39] Criminal Law Act 1977, s 2(1) states that "a person shall not …be guilty of conspiracy to commit any offence if he is an intended victim of the offence."

[40] Criminal Law Act 1977 Act, s 2(2)(c).

[41] [1986] AC 27.

[42] Above, at 38.

Example 1G

D1, an undercover police officer, joins a conspiracy which involves D2 and D3, both drug dealers, agreeing to deliver a large quantity of prohibited drugs to X. D1 intends to arrest D2 and D3 before the delivery to X takes place.

Whether, on the authority of *Anderson*, D1 is guilty of conspiracy depends on whether he or she intends to play any part in the delivery of the drugs. Thus, if it is D1's intention to drive D2 and D3 to X's home and then arrest them, D1 is guilty of conspiracy. By contrast, if D1 intends to go independently with other police officers to X's home and lie in wait for D2 and D3 to arrive before arresting them, D1 is not liable.

1.53 The position has been complicated by the decision of the Privy Council in *Yip Chiu-Cheung v R*.[43] Contrary to *Anderson*, the Privy Council said that:

> The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out, it is the intention to commit the crime that constitutes the mens rea of the offence.[44]

The Privy Council held that if a person such as an undercover police officer intends that the principal offence should be committed, it is no defence that the officer's intention was to bring co-conspirators to justice.

1.54 Whether one applies *Anderson*, on the one hand, or *Yip Chiu-Cheung*, on the other hand, the result is equally unsatisfactory:

Example 1H

D1, an undercover police officer, joins D2 and D3, both drug dealers, in a conspiracy to deliver a quantity of prohibited drugs to X. D1's underlying purpose in joining the conspiracy is to bring D2 and D3 to justice.

According to Yip *Chiu-Cheung*, if D1 intends to arrest D2 and D3 before they deliver the drugs to X, D1 is not guilty of conspiracy. If D1's intention is to arrest them after the delivery to C, D1 is guilty of conspiracy. The intended timing of the arrest determines the outcome. According to *Anderson*, what determines the outcome is not the timing of the arrest but whether it is D1's intention to play any part in the delivery of the drugs to X.

[43] [1995] 1 AC 111.

[44] Above, at 118.

1.55 In the 2006 report, we recommended that D should have a defence to a charge of assisting or encouraging crime if he or she acted in order to prevent the commission of an offence or to prevent or limit the occurrence of harm and, in doing so, was acting reasonably.[45] The recommendation was designed to protect officers (or other people) from criminal liability in situations similar to that in example 1H.

1.56 The Serious Crime Bill contains no specific defence of acting to prevent crime or to prevent or limit harm. However, clause 48 does provide a defence of acting reasonably. Such a defence would be capable of exonerating those who act reasonably in the course of preventing crime or harm.

1.57 Such a defence, if also available on a charge of conspiracy, would cater for cases where, for example, it was reasonable for an undercover officer to agree to take some part in the realisation of a conspiracy. This might be necessary, for example, if his or her credibility is to be maintained to the point where an arrest can be made and his or her safety is not in jeopardy.

1.58 The defence would also be available in principle where the undercover officer agrees to play a more major role in the main criminal enterprise provided that he or she is acting reasonably in all the circumstances. This should ensure that the defence would only be available in meritorious cases. A reasonableness requirement would therefore play an important restraining function.

1.59 We believe and are provisionally proposing that there should be a 'reasonableness' defence to statutory conspiracy modelled on that contained in clause 48 of the Serious Crime Bill. **[see proposal 6]** We appreciate that in the 2006 report, for the purposes of the inchoate offences of assisting or encouraging crime, we recommended a discrete defence of acting in order to prevent crime or harm. However, given that the Government prefers a generic defence of 'acting reasonably', we believe that such a defence to conspiracy is the best way forward. It is important that as far as possible there should be consistency in the defences available to different inchoate offences.

1.60 We envisage that the application of the defence to conspiracy will primarily be the context of crime prevention and prevention of harm. However, we acknowledge that the defence in the Serious Crime Bill of 'acting reasonably' could apply to a wider range of actions. In Part 8, we consider the consequences of this for the offence of conspiracy.

[45] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300 paras 6.1 to 6.17.

1.61 Some of these consequences might be thought to be beneficial, particularly where 'double inchoate' liability is in issue.[46] An example might be where the tribunal of fact wishes to acquit D1 and D2 of conspiring to assist P to commit a crime (that in the end is never committed), because it regards their act as a reasonable one to have engaged in given its remoteness from the commission of the substantive offence. On the other hand, there is the danger that a defence of 'acting reasonably' could be used by conspirators claiming that their agreements to commit offences were in pursuit of motives that they believed to be honourable.

1.62 Accordingly, we are asking consultees whether they would prefer the defence not to have this kind of wider application. We are asking whether the defence of 'acting reasonably' under clause 48 of the Serious Crime Bill should be restricted, in its application to conspiracy, to acts aimed at the prevention of crime or harm. **[see question 9]**

Procedural and jurisdictional issues

Consent to prosecute conspiracy

1.63 Under the current law, the Director of Public Prosecutions ('the DPP') must give consent to a prosecution for conspiracy to commit a summary offence.[47] This requirement stems in part from the differing nature of conspiracy and summary offences. Conspiracy is triable only on indictment. Accordingly, the DPP must be satisfied that the nature of the agreement to commit the summary offence or offences in question is such as to justify a trial on indictment.

1.64 We are asking whether a conspiracy to commit a summary offence or offences should itself be triable as a summary offence. **[see question 5]** If so, we believe that this would mean that the DPP's consent for a prosecution of conspiracy to commit a summery offence would no longer be needed simply because the substantive offence in question was a summary one. **[see question 4]**

1.65 However, there is a different set of circumstances in which we would like consultees' views on whether the DPP's consent to prosecution should be required. This is when it is proposed to prosecute in a case involving 'double inchoate' liability, such as conspiracy to incite or an attempt to conspire. Such cases can involve conduct very remote from the commission of the offence itself. As a safeguard against abuse, it may be desirable that the DPP's consent should be required in such circumstances. We therefore ask consultees whether the DPP's consent should be required in any case of conspiracy involving 'double inchoate' liability **[see question 8]**

[46] On 'double inchoate' liability see paras 1.90 to 1.99 and Part 7 below.

[47] Criminal Law Act 1977, s 4(1).

Indictments alleging conspiracy

1.66 One consequence of our provisional proposal for the fault element of conspiracy in relation to the circumstance element of the substantive offence,[48] is that in some instances the way in which agreements are charged as conspiracies must be changed. These are cases in which the commission of more than one offence might, depending on how the circumstances turn out, be the consequence of perpetrating the intended course of conduct.

1.67 An example would be one in which, in return for payment, D1 and D2 agree to import some "dodgy packages" from abroad. The conspirators realise that the packages may contain illegal drugs of perhaps different classes, possibly also some money that is the proceeds of crime and possibly also some pornographic photos of young children. In such cases, the conspirators intend the conduct element of the crime (importing the packages) and are reckless with regard to the circumstance element (the prohibited nature of the packages' contents). How should the indictment against D1 and D2 be framed?

1.68 It is our view that an agreement in which the parties are reckless as to the circumstance element of more than one substantive offence should not be charged as a single conspiracy. Rather, there should be separate counts of conspiracy relating to each substantive offence.[49] The same approach should apply to an agreement comprising a course of conduct which, if carried out in a way that the conspirators know might occur, would involve the commission of more than one substantive offence with different penalties applicable. **[see proposal 5]**

Extra-territorial application

1.69 We discuss the limitations on the application of the law of conspiracy to acts taking place outside England and Wales. We consider that the extra-territorial application of the law of conspiracy should be brought into line with the extra-territorial application of the Government's proposed offences of assisting and encouraging crime.[50] **[see proposals 10 to 14]**

A KEY PROBLEM IN THE LAW OF ATTEMPT

1.70 The law of attempt is governed by the Criminal Attempts Act 1981 ('the 1981 Act'). Under section 1(1) of the 1981 Act, a person is guilty of a criminal attempt if:

> with intent to commit an offence … [that] person does an act which is more than merely preparatory to the commission of the offence … .

[48] See para 1.31 above.

[49] With the exception of pre- Proceeds of Crime Act 2002 conspiracies to 'launder' unidentified criminal proceeds. A statutory distinction was formerly drawn between the substantive offences of dealing with the proceeds of drug trafficking and dealing with the proceeds of crime. The Proceeds of Crime Act 2002 now provides for one general 'laundering' offence which applies regardless of the illicit origins of the money.

[50] Serious Crime Bill, cl 50.

1.71 A key aim of the 1981 Act was to ensure that the law of criminal attempt was neither under nor over-inclusive. On the one hand, conduct should not be regarded as an 'attempt' to commit a crime if it involved mere preparation, such as going out to buy materials to be used in a crime at a later date. On the other hand, an 'attempt' must not be defined too narrowly. It must be capable of including some preparatory steps more-or-less immediately connected with the commission of the offence itself. Examples might be forcing someone to undress with a view to raping them, trying the handle of a door with intent to gain entry as a trespasser and then stealing or starting to knock a prison wall down with a view to escaping.

1.72 Unfortunately, the courts have taken widely divergent views on how best to conduct this difficult balancing exercise, as indeed they did before the 1981 Act came into force. The statutory wording ('an act which is more than merely preparatory') has not proved successful in introducing consistency in interpretation and understanding. We are particularly concerned at some of the decisions that have sought to narrow the scope of the offence. An example is the decision of the Court of Appeal in *Geddes*.[51]

1.73 In that case, D had been found in a boys' lavatory in a school 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 Lord Chief Justice Bingham (as he then was), D had not yet "actually tried" to commit the intended offence.[52] Rather, he had "only got [himself] ready"[53] to try to commit the offence and that was insufficient.

1.74 On the particular facts of *Geddes*, a defendant would now be caught by the purely preparatory offence created by section 63(1) of the Sexual Offences Act 2003.[54] However, we do not believe that someone, like Mr Geddes, who has travelled so far along the path towards the commission of an (intended) offence should ever have been regarded as falling outside the intended scope of the 1981 Act.

[51] (1996) 160 JP 697.

[52] Above, 705.

[53] Above.

[54] It should be noted that the offence under s 63 is limited to trespassers. It would not cover a school janitor who acted in the way that Mr Geddes did.

1.75 Take, for example, the situation where D creeps up right behind V and withdraws his hands from his pockets in readiness (as D later admits) to strangle V from behind. Suppose that D's hands were to be grasped by a third party, thereby preventing the action of strangling in itself (the 'actual trying'). If *Geddes* were followed, D would on these facts not be liable for attempted murder. It seems doubtful that D would be guilty of any offence against the person. We suggest that this result would be wrong in principle.[55]

1.76 We suggest that the very narrow reading of the 1981 Act that has given rise to decisions such as *Geddes* can be attributed to the fact that there is only one general inchoate offence of which defendants can be convicted in such situations. That offence is 'attempt' and, whatever the wording of the 1981 Act, 'attempt' seems to imply nothing less than actually trying to commit the offence itself. Our preferred solution to this problem involves the creation of two offences to replace the single offence in the 1981 Act.

Our provisional proposal: the offence of 'attempt'

1.77 We are provisionally proposing that there should be an offence of 'attempt' confined to those who, with intent to commit a substantive offence, were engaged in the last acts needed to commit it. In other words, their attempt was complete or all-but complete. **[see Proposal 15(1)]**[56]

Our provisional proposal: the offence of 'criminal preparation'

1.78 We are provisionally proposing that there should be a new offence of 'criminal preparation' applying to those who, with intent to commit the offence, were still only preparing to commit it but had proceeded beyond the stage of mere preparation. In other words, their preparation was immediately connected with the commission of the offence. **[see Proposal 15(2)]** [57]

OTHER PROBLEMS WITH THE LAW OF ATTEMPT

The fault element in attempt

1.79 As we said at the outset, a primary aim of this Consultation Paper is to secure coherence in and consistency as between the offences of conspiracy and attempt. So, for example, 'intention' should bear the same meaning in both offences, it should include so-called 'conditional' intention in both offences and it should be the fault element of both offences in relation to both the conduct element and the consequence element (if any) of the substantive offence.

[55] D's conduct would fall within the scope of the new offence of 'criminal preparation' that we are provisionally proposing: see para 1.78 below.

[56] Our proposals and questions for consultees in relation to attempt are in Part 17.

[57] We are also listing examples of conduct that we believe should be regarded as amounting to criminal preparation – see the discussion in Part 16.

1.80 With regard to the fault element of each offence in relation to the circumstance element of the substantive offence, our provisional view is that there should be no difference between conspiracy and attempt. In that regard, our provisional proposals for attempt will be the same as for conspiracy.[58] In other words, proof of recklessness in relation to the circumstance element should be required unless the offence itself requires a more stringent fault element (such as knowledge) in which case proof of that more stringent element should be required. **[see Proposals 18B and 18C]**

1.81 That said, we are asking consultees whether, in cases of attempt, they would prefer a potentially less generous but more straightforward fault requirement in relation to the circumstance element of the substantive offence, namely the fault element required for conviction of the substantive offence. The question is:

1.82 Should the test for fault in relation to a circumstance element in the law of attempts be whether D possessed the fault element (if any) required for the completed offence?[59] **[see attempts Question 3]**

The respective roles of judge and jury

1.83 Under the current law, both judge and jury have a role in deciding whether an alleged attempt to commit a crime involved 'more than merely preparatory' steps. The judge must rule on the question of whether D's conduct has passed the stage of mere preparation; but then the judge must instruct the jury to answer the very same question. This is not a sensible duplication of labour and we believe that it may lead to inconsistency.

1.84 We are provisionally proposing that the question whether D's conduct, if proved, amounts to attempt or criminal preparation should be one of law for the judge. The jury's role should be limited to determining whether the Crown has proved that D committed the alleged conduct (with the fault required). **[see Proposal 20].**

Omissions

1.85 It seems doubtful that the law currently allows for an attempt by omission. However, since the most serious offences, such as murder, can be committed in some circumstances by omission, it seems wrong not to make it clear in law that there can be an attempt to commit offences by omission.

1.86 We are provisionally proposing that attempt and criminal preparation should cover omissions where, as a matter of law, the offence intended is capable of being committed by an omission. **[see Proposal 19]**

Summary offences

1.87 At present, the law does not allow a prosecution for an attempt to commit a summary offence. We believe that this constitutes an anomalous gap in the law. It should be possible to charge someone with an attempt to commit – or with preparing to commit - a summary offence.

[58] See Part 16 below.

[59] See question 2 in relation to conspiracy in para 1.37 above.

1.88 We are provisionally proposing that It should be an offence to attempt to commit or to criminally prepare to commit a summary offence. **[Proposal 21]**

1.89 In addition, we are asking whether the consent of the DPP should be required for any prosecution of attempting to commit or criminally preparing to commit a summary offence **[see attempts Question 4]**

AN ISSUE RELEVANT TO BOTH CONSPIRACY AND ATTEMPT

'Double inchoate' liability

1.90 'Double inchoate' liability occurs when D is held liable for an inchoate offence which relates to another inchoate offence. The two offences may be of the same type. For example D1 incites D2 to incite D3 to rape V. Under the current law D1 is guilty of inciting D2 to incite rape.[60] However, the offences need not be of the same type. For example, D1 and D2 conspire to incite D3 to murder. Under the current law, D1 and D2 are guilty of conspiracy to incite.[61]

1.91 In the 2006 report, we said that the current law on double inchoate liability was "an incoherent and confusing muddle".[62] We said that there was a need to introduce coherence and consistency into this part of the law. We made recommendations in relation to our proposed inchoate offences of assisting or encouraging crime. Those recommendations have been taken forward in the Serious Crime Bill.

1.92 As a result, in certain circumstances it will be an offence for D1 to assist or encourage D2 and D3 to conspire to commit an offence. It will also become an offence for D1 to assist or encourage D2 to conspire with D1 to commit an offence. These would constitute important changes from the current law.[63] In this paper, we revisit the recommendations that we made. We conclude that they are sound.

Attempting (or criminally preparing) to conspire

1.93 An aspect of double inchoate liability that we had no occasion to consider in the 2006 report is liability for attempting to commit a statutory conspiracy. By virtue of section 1(4)(a) of the 1981 Act, under the current law, it is not an offence to attempt to commit a statutory conspiracy:

[60] *Sirat* (1985) 83 Cr App R 41.

[61] Criminal Law Act 1977, s 1(1). In this paper, we focus on liability for assisting and encouraging a conspiracy and and for attempting to commit a statutory conspiracy.

[62] Para 7.6.

[63] Section 5 (7) of the Criminal Law Act 1977 provides:

> Incitement… to commit the offence of conspiracy (whether the conspiracy incited …would be an offence at common law or under section 1 above or any other enactment) shall cease to be [an offence].

Example 1J

D1 is soon to come into possession of a large quantity of stolen goods. He arranges a meeting with D2, a shop owner, to discuss the possibility of selling the goods in D2's shop. D2 is aware that the goods are stolen. The two meet but fail to reach an agreement.

In this example, D1 and D2 have not formed an agreement and therefore cannot be guilty of conspiracy. However, they have gone beyond the merely preparatory stages in forming an agreement to commit a criminal offence but, under the current law, cannot be charged with attempted conspiracy.

1.94 We believe that this position should be reviewed. We are asking consultees whether section 1(4)(a) of the Criminal Attempts Act 1981 should be repealed so that a person may be convicted of attempting (or criminally preparing) to commit a statutory conspiracy. **[see Question 6]**

1.95 In considering this issue, it will be particularly important to consider the impact of the provisions of the Serious Crime Bill giving effect to our recommendations for assisting and encouraging crime. Adoption of our recommendations means that it will become an offence intentionally to assist or encourage the formation of a statutory conspiracy. If it becomes an offence intentionally to assist or encourage the formation of a conspiracy, then acts such as those of D1 in example 1J will be caught by that offence. Is it desirable additionally to have an offence of attempting to conspire?

1.96 It could be argued that if it is an offence intentionally to assist or encourage conspiracy, then (logically) it ought also to be an offence to attempt to conspire. An attempt is regarded as a distinctive wrong in criminal law. It involves a more than merely preparatory act taken towards the commission of an offence, something that it would not be necessary to show on a charge of assisting or encouraging the commission of an offence.

1.97 If it is accepted that it should be an offence to attempt to conspire, then because of the reforms that we are proposing for the law of criminal attempt, it must also be accepted that it should be an offence to engage in 'criminal preparation' with intent to conspire. As we indicated above,[64] 'criminal preparation' is the new offence that we propose to cover acts falling short of an attempt but involving more than *mere* preparation with the intention of committing an offence.

1.98 However, we are concerned that our proposal may lead to criminalisation of acts very remote from the commission of offences. This has always been a possibility under the existing law when double inchoate liability is in issue.

1.99 Accordingly, we are asking consultees whether they believe that the defence of 'acting reasonably'[65] should be applied to all instances of double inchoate liability, including attempting (or criminally preparing) to conspire. **[see Question 6]**

[64] Para 1.78.

[65] See cl 48 of the Serious Crime Bill.

STRUCTURE OF THE PAPER

1.100 In Part 2 we discuss the rationale of the conspiracy offence.

1.101 In Part 3 we provide the common law background to the offence of conspiracy, and examine the role of the Law Commission in the development of statutory conspiracy.

1.102 In Part 4 we set out our provisional proposals for reforming some aspects of the fault element of conspiracy.

1.103 In Part 5 we analyse the concept of conditional intent.

1.104 In Part 6 we consider how conspiracies involving conditional intent and conspiracies to commit more than one offence should be charged.

1.105 In Part 7 we examine the concept of a "double inchoate" offence, and of defences to such an offence. We explain the way in which the recommended offences of assisting and encouraging crime apply to the offence of conspiracy. We discuss the absence of an offence of attempting to conspire.

1.106 In Part 8 we set our proposals for a defence to conspiracy of 'acting reasonably'. We explain how that defence relates to the defence of 'acting reasonably' proposed for assisting and encouraging crime under the Serious Crime Bill.

1.107 In Part 9 we explain our proposal to abolish the limitation on liability for conspiracy of a husband and wife and those in civil partnerships.

1.108 In Part 10 we consider the current exemptions that apply to conspiracies where one of the parties is a law enforcement agent or a 'protected' person such as a child under the age of criminal responsibility.

1.109 In Part 11 we consider the question of extra-territorial jurisdiction.

1.110 In Part 12 we give an overview of our proposals relating to reform of the law of criminal attempt.

1.111 In Part 13 we explain the background to the present offence of attempt.

1.112 In Part 14 we analyse the way in which the courts have given effect to the Criminal Attempts Act 1981 and we briefly consider the broader context in which other preparatory offences have been created.

1.113 In Part 15 we set out the key principles having a bearing on inchoate liability for preparing or attempting to commit an offence.

1.114 In Part 16 we explain our proposals for resolving the problems with the law of criminal attempt for making them more consistent with the offence of conspiracy, as well as setting out additional proposals and questions.

1.115 In Part 17, we list our provisional proposals and questions for consultees in relation to both conspiracy and attempt.

1.116 In Appendix A we summarise the relevant case law on the fault requirement of statutory conspiracy in relation to the circumstance element of the intended offence.

1.117 In Appendix B we examine the references made to Scottish law by the Law Lords in *Saik*.

1.118 In Appendix C we provide a list of statutory offences which might properly be regarded as inchoate offences of preparation.

1.119 In Appendix D we provide an account of the law of criminal attempt in some other common law and civil law jurisdictions.

PART 2
THE RATIONALE OF THE CONSPIRACY OFFENCE

2.1 We believe that conspiracy should continue to be an offence under English law. However, we acknowledge that the justification for the continued existence of the crime has been challenged.[1] In this Part, we respond to those challenges.

IS 'PURE' CONSPIRACY EFFECTIVELY REDUNDANT AS AN OFFENCE?

The arguments for conspiracy being an unnecessary offence

2.2 There are two distinct but related arguments in favour of the view that conspiracy is an unnecessary offence. First, it is said that conspiracy is unnecessary because 'bare' conspiracies are only likely to come to light when they are made manifest by overt acts aimed at committing offences. The moment that the act aimed at committing the offence is manifested, all the conspirators become complicit in the ensuing attempt to commit the crime. This argument is articulated by Simester and Sullivan (although they do not unequivocally indicate that they endorse it):

> The ground covered by conspiracy and conspiracy alone is narrow. Moreover, in practical terms, conspiracies which have manifested themselves in nothing more than the fact of agreement are rarely prosecuted. Such bare agreements will seldom come to light, since criminals do not plan their crimes on the public record. Typically, evidence of a conspiracy is inferred from concerted criminal activity. Moreover, when a crime has been committed, anyone who has agreed to its commission will, almost invariably, be an accomplice of the principal offenders. It may be doubted whether it is worth retaining such a complex body of law merely to proscribe non-consummated agreements.[2]

2.3 Secondly, it is said that if there are inchoate offences of assisting or encouraging crime, as recommended in our 2006 report and now provided for in the Serious Crime Bill, practically all conspiratorial acts will constitute offences of assisting or encouraging crime. Simester and Sullivan put the argument this way:

[1] There is a helpful discussion in A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) pp 303 to 304. See also Ian Dennis, "The Rationale of Criminal Conspiracy" (1977) 93 *Law Quarterly Review* 39.

[2] A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) p 303 (footnote omitted).

> The Law Commission has recently proposed two inchoate offences relating, respectively, to encouraging crimes and assisting crimes. Neither proposed offence requires the commission of a substantive offence. On enactment of these proposals, the ground covered exclusively by conspiracy would be limited to non-consummated agreements where D's agreement with E that E should commit a crime does not constitute any form of encouragement or assistance in relation to the projected offence. Even if such forms of agreements are theoretically possible, it would hardly seem worthwhile retaining conspiracy to deal merely with them.[3]

There is clearly merit in these arguments. However, there are counter-arguments.

Counter-arguments

Conspirators, accomplices and the changing nature of police intervention

2.4 Although Simester and Sullivan doubt whether it is worth preserving conspiracy in order to be able proscribe non-consummated agreements, they do note that:

> Non-consummated conspiracies are occasionally prosecuted as, for example, in the case of terrorist conspiracies to cause explosions which are intercepted by police at a preparatory stage.[4]

This is an important point because, for a number of reasons, we believe that it is one of wider application.

2.5 First, the police seek to intervene at an early stage not only in terrorist cases but also in other cases where organised criminal activity underpins the commission of the offences in question. Drug, weapons or people trafficking together with money laundering are examples.

2.6 Secondly, what the authors refer to as 'intercept[ion] by police at a preparatory stage' has now become part of the domain of 'problem-orientated' policing and, in particular, of 'intelligence-led' policing as a dimension of what is known as the National Intelligence Model developed by the National Criminal Intelligence Service. Both these kinds of policing are meant to be contrasted with a more simplistic model of policing, so-called 'fire brigade' policing, in which the police simply react to events such as a report that a crime is in progress.

2.7 Although they both have a broadly preventative or forestalling aim, there are differences between problem-orientated policing (POP) and intelligence-led policing (ILP). Professor Nick Tilley[5] has explained them in the following way:

[3] A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) p 304 (footnote omitted).

[4] Above, p 303 n 165.

[5] Nottingham Trent University.

> POP implies attention to problems exploiting available pinch-points in the conditions generating problems. This may include targeting prolific offenders, criminal organisations, those recruiting new criminals, or stolen goods markets, any or all of which are likely to be focused on also in well-executed ILP. Unlike ILP, however, POP is equally if not more interested in reductions in opportunity of the sort stressed in situational crime prevention. Both POP and ILP require specialist analysts. They both make much greater and much more systematic use of information. The focus of the information-collection and analysis in ILP is on offenders and networks of offenders, to inform smart enforcement focused in serious and prolific offending patterns.[6]

2.8 Professor Tilley goes on to explain in more detail how each kind of policing differs in its strategic approach:

> analysis in ILP tends naturally to focus on current or very recent offending patterns. The intelligence used is often elicited from informers. Its collection and use is often covert. For ILP the major information task is thus finding and drawing together ways of tracking offender and offending patterns as they emerge, better to disrupt them through targeted enforcement. The focus of information collection and analysis in POP is on problematic patterns of behaviour that produce police-relevant problems for the community, and on plausible points of intervention to reduce them, remove them, or prevent the harm caused by them.[7]

2.9 We believe that the continued existence of preparatory crimes, including conspiracy, is important because it facilitates the effective use of intelligence-led policing in particular. The notion that the crime of conspiracy can be abandoned, because one can usually seek to rely on evidence that a substantive crime has been committed at a later stage, seems to be based on the simplistic 'fire-brigade' model of policing and prosecution practice.

2.10 There will always be concerns about the threat to civil liberties that may be involved in intrusive forms of policing. However, legislation is in place to address these concerns, an example being the Regulation of Investigatory Powers Act 2000. Professor Ashworth and Dr Redmayne have said of this Act:

[6] Nick Tilley, 'Problem-Orientated Policing, Intelligence-Led Policing and the National Intelligence Model', Jill Dando Institute of Crime Science, www.jdi.ucl.ac.uk/downloads/publications/crime_science_short_reports/problem_oriented_policing.pdf.

[7] Above. (references omitted). See also, for example, the Intelligence Strategy developed by the South Yorkshire Police, www.southyorks.police.uk/.

> The Regulation of Investigatory Powers Act 2000 represents a significant step towards protecting human rights in the process of gathering evidence through surveillance methods.[8]

The special threat posed by two or more people deciding to commit an offence

2.11 A conspiracy is an agreement to pursue a course of conduct which, if carried out, necessarily involves the commission of an offence. It may quite properly be asked why, if the taking of a firm decision or commitment by *an individual* to commit an offence is not itself an offence, the taking of such a decision jointly by two or more people is criminalised.[9] It might be thought that an individual's decision or commitment to perpetrate an offence is capable of posing just as much of a threat of harm as a corresponding decision taken by two or more people. It can be perfectly legitimate to criminalise acts of individuals (including the making of commitments) that threaten harm as well as acts that cause harm.

2.12 The US Supreme Court has given the following harm-based justification for the focus on group, rather than individual, activity:

> Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.[10]

2.13 Parliament has not made it a criminal offence for an individual simply to *decide* to engage in criminal activity in some form.[11] We believe that this approach, focussing instead on the cases in which two or more people take such a decision, is clearly justified as a matter of principle.

[8] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (3rd ed 2004) p 114. It is right to point out that the authors do criticise the Government for having taken what they call a 'minimalist' view of the requirements of Article 8 of the European Convention on Human Rights and Fundamental Freedoms on some questions addressed by the Regulation of Investigatory Powers Act 2000.

[9] The question is posed by, amongst others, Professor Ian Dennis, "The Rationale of Criminal Conspiracy" (1977) 93 *Law Quarterly Review* 39. An initial point to make in countering the argument is that, increasingly, Parliament is criminalising purely preparatory acts engaged in by individuals with a view to committing crime. There are a number of such examples in the Terrorism Acts, the Sexual Offences Act 2003, and also in recent legislation such as the Fraud Act 2006: see the analysis of Professor David Ormerod, "The Fraud Act 2006 – Criminalising Lying" [2007] *Criminal Law Review* 193, 210 to 213, discussing the offence in s 6 of the Act: "a person is guilty of an offence if he has in his possession or under his control any article for use in the course of or in connection with any fraud".

[10] *Callanan v United States* 364 US 587, 593 to 594 (1961).

[11] Unless, under the Terrorism Act 2006, the taking of such a decision in the form of a binding commitment could be described, for the purposes of s 5, as an instance in which D, "with the intention of – (a) committing acts of terrorism … he engages in any conduct in preparation for giving effect to his intention." Other than in exceptional cases, this seems unlikely.

2.14 Aside from the 'harm principle' argument,[12] the main justification for this focus is the loyalty to the group, and hence to its criminal ends, that an individual is likely to experience upon agreeing to become part of the group, a loyalty that has no real parallel when an individual's commitment to his or her own plans is concerned. In that regard, Professor Katyal[13] has recently given two important bases on which the criminalisation of conspiracy can be justified, an economic and a psychology-based justification.

2.15 The economic justification is that the formation of a conspiracy, like the formation of a firm,[14] permits specialisation of labour (someone acting as a lookout, or a bag carrier) and economies of scale (weapons and equipment being shared between members). A conspiracy can take advantage of the division and specialisation of labour. A conspiracy may also create a framework of trust between members that reduces the transaction costs involved in forming new contacts.[15] These factors make it possible to attempt much more ambitious crimes than could be attempted by an individual acting alone. Moreover, the sense a group member may develop that he or she is just a cog in the machine may remove what might otherwise have been internal constraints to becoming involved in criminal activity:

> A person who drives a person from point A to point B may not feel he is doing something gravely immoral, even when the driver is driving away from the scene of the crime. The forces of morality and social norms are thus subverted through strategies that disaggregate human behaviour, playing on the idea that little bad acts are excusable. This makes crime both easier and cheaper to carry out.[16]

2.16 Professor Katyal then goes on to explain the psychology-based justification:

> … what are somewhat less obvious, but at least as important, are psychological accounts of the dangers of group activity. Advances in psychology over the past thirty years have demonstrated that groups cultivate a special social identity. This identity often encourages risky behaviour, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against non-members. The psychological and economic accounts explain why the law treats conspiracy in a distinctive way.[17]

[12] See Part 1, para 1.5 above.

[13] Neal Kumar Katyal, "Conspiracy Theory" (2003) 112 *Yale Law Journal* 101.

[14] See Ronald Coase, "The Nature of the Firm" (1937) 4 *Economica* 390.

[15] Richard A Posner, "An Economic Theory of the Criminal Law" (1985) 85 *Columbia Law Review* 1193, 1219.

[16] Neal Kumar Katyal, "Conspiracy Theory" (2003) 112 *Yale Law Journal* 101, 117.

[17] Above.

2.17 It might be thought that this kind of group solidarity could only be characteristic of long-established groups with special ties, such as family ties. Even if this were true, it must be kept in mind that criminal gangs frequently are relatively long-established, through school and neighbourhood ties that bind them from an early age.[18] However, even fleeting or arbitrary group membership can lead to a sense of solidarity amongst group members. Professor Katyal argues:

> A second series of experiments, dubbed the 'minimal group' ones, found that even arbitrary formation of groups with no previous history between the members produces similar results ['a significant discrimination of favour of one's own group']. Indeed, individuals favoured their group even when it was against their absolute self-interest. This research suggests that the initial decision to agree to conspire is an important pivot point. Once an individual has made such an agreement, group identity can take hold and lead her to submerge self-interest to the group.[19]

2.18 Groups are more likely to develop self-serving practices favouring their activities, such as the formation of beliefs that other members of the group are more likely to be correct and non-members wrong, and that members are fairer than non-members.[20] This is more likely to result in justification for belief and action coming from within the group, with the result that:

> When criminal groups develop self-serving inferences, it reinforces their tendencies towards crime. Members may feel more justified in pursuing criminal activity to help other members and may develop rationalisations (some drug dealers, for example, believe they perform the positive work of pharmacists and steer customers away from violent dealers). Such rationalisations can also thwart co-operation with law enforcement. The group encourages a feeling of solidarity and cultivates the view that each member needs the co-operation of the others.[21]

[18] See Marshall, B, Webb, B and Tilley N, *Rationalisation of Current Research on Guns, Gangs and Other Weapons: Phase 1* (2005), Jill Dando Institute of Crime Science.

[19] Neal Kumar Katyal, "Conspiracy Theory" (2003) 112 Yale Law Journal 101, citing eg Henri Tajfel et al, "Social Categorisation and Intergroup Behaviour" (1972) 1 *European Journal of Social Psychology* 149, 171.

[20] Dominic Abrams, "Knowing what the think by knowing who you are: self-categorisation and the nature of group formation, conformity and group polarisation'"(1990) 29 *British Journal Social Psychology* 97.

[21] Neal Kumar Katyal, "Conspiracy Theory" (2003) 112 *Yale Law Journal* 101, 113 citing Norman W Philcox, *An Introduction to Organised Crime* (1978) p 20.

2.19 Accordingly, there is more than symbolic significance in retaining the offence of conspiracy. It provides the right label for activity that creates a special kind of threat. That threat is constituted by the joint and several 'group' responsibility to see the offence through, a responsibility that is likely to come with the reaching of an agreement with others to commit a crime. Voluntarily to assume such a responsibility, through entering the conspiracy, is a unique kind of wrong that the criminal law is entitled to mark with a special offence. The mere fact that conspiracy may overlap with other offences does not mean that there is a strong case for abolishing it, given that it has this convincing, free-standing justification.

Procedural and evidential considerations

2.20 As in the United States of America,[22] a charge of conspiracy attracts special procedural and evidential rules that will not apply to the offences of assisting or encouraging crime in Part 2 of the Serious Crime Bill. This is because the offences in Part 2 are not specifically concerned with common enterprises, such as conspiracy, for which the rules were designed.[23] These rules, which are of great importance in terms of the admissibility of evidence in conspiracy trials, ensure that:

(1) acts and declarations made by D1 in furtherance of the common design of the conspiracy may be admitted as evidence against D2 (and vice versa) provided the prosecution can show that at the time when the actor declaration was made D2 had in fact joined the conspiracy.[24] This is because such evidence is thought to go to the existence, nature and extent of the conspiracy as well as to show the participation of D2 notwithstanding his absence at a time when the declaration or act was made or done;[25]

(2) the act or declaration of D1 can be admitted against D2 or D3 regardless of whether D1 is present or absent at the trial of D2 and D3 and even if D1 has been acquitted at a previous trial;

(3) acts or declarations made by agents, including innocent third parties, of a conspirator are also admissible against all other conspirators;[26] and

[22] Federal Rules of Evidence, 801(d)(2)(E).

[23] As Professor Glanville Williams pointed out, the rules may be equally applicable when defendants are charged with being each others' accomplices: *The Proof of Guilt* (2nd ed 1958) ch 9.

[24] *Walters* (1979) 69 Cr App R 115; *R v Governor of Pentonville Prison ex parte Osman* [1990] 1 WLR 277, 316.

[25] This rule on the admissibility of hearsay evidence was expressly preserved by Criminal Justice Act 2003, s 118(1).

[26] *Devonport and Pirano* [1996] 1 Cr App R 221.

(4) in a joint trial of only D1 and D2 where there is evidence of a conspiracy, the trial judge must consider whether there is a material distinction in the evidence against D1 and D2. If he or she is satisfied that there is not, then he or she can direct that the jury must acquit or convict both of them together. This is because, although section 5(8) and (9) of the 1977 Act abolished the requirement that in a joint trial between only D1 and D2 the jury *had* to be directed either to acquit both or to convict both, the wording still permits such a direction in a proper case.[27]

2.21 We do not believe it would ever be acceptable to abandon these rules, as they apply to inchoate offences, through the abolition of the crime of conspiracy.

The increasing prevalence of conspiracy-related offences

2.22 Far from becoming redundant, conspiracy-related offences are becoming a more popular means of tackling planned and organised crime, especially but not solely as a counter-terrorist measure.

2.23 An example is section 56(1) of the Terrorism Act 2000:

> A person commits an offence if he directs, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism.[28]

2.24 Another example is section 6(1) of the Terrorism Act 2006:

> A person commits an offence if –
>
> (a) he provides instruction or training in any of the skills mentioned in subsection (3) [such as making or handling noxious substances]; and
>
> (b) at the time he provides the instruction or training, he knows that a person receiving it intends to use the skills in which he is being instructed or trained –
>
> (i) for or in connection with the commission or preparation of acts of terrorism or Convention offences … .[29]

[27] Section 5(8) and (9) provides: (8) The fact that the person or persons who, so far as appears from the indictment on which any person has been convicted of conspiracy, were the only other parties to the agreement on which his conviction was based have been acquitted of conspiracy by reference to that agreement (whether after being tried with the person convicted or separately) shall not be a ground for quashing his conviction *unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons in question.* (9) Any rule of law or practice inconsistent with the provisions of subsection (8) above is hereby abolished. (Emphasis added.)

[28] See also Terrorism Act 2000, s 12(1).

[29] For very closely related offences, see the Terrorism Act 2000, s 54.

2.25 A final example is section 14 of the Sexual Offences Act 2003 which makes it an offence to intentionally arrange or facilitate the commission of a child sex offence. The editor of Smith and Hogan's *Criminal Law* suggests that, in the interpretation of the term 'arranging', "[t]he courts might draw upon the case law relating to the completion of an agreement in conspiracy".[30]

2.26 Whilst these are not conspiracy offences as such, they are closely allied offences, and have a similar rationale. As we have suggested,[31] organised activity of the kind proscribed by these provisions provides benefits to those involved that cannot be achieved by individuals acting alone. These include specialisation of labour, division of labour and the making of economies of scale. Much more ambitious and hence potentially dangerous criminal activity is made possible when such benefits have been established. Building on such benefits, the group or organised nature of the activity is likely to bring with it a blameworthy responsibility or commitment on the part of the participants to 'see through' or to help to see through the proscribed activity in issue.

2.27 Having said that, we think it may be questioned whether such offences[32] would really be necessary if the offence of statutory conspiracy was reformed in the way that we provisionally propose. We believe that an offence of statutory conspiracy reformed in line with the proposals that we are making together with the inchoate offences of assisting or encouraging crime contained in the Serious Crime Bill will cover most if not all of the important ground.[33]

2.28 As a matter of policy, we believe it is better to have a smaller number of clear, general offences than a large number of separate offences with very different, context-dependent, conduct and fault elements. As the Government has itself said in relation to its proposed reform of the complex structure of non-fatal offences against the person:

> [The Government] does not intend to make the law either tougher or more lenient, but to make it clearer and easier to use…Making the law more accessible will help to smooth the passage of thousands of cases each year, enabling the citizen to understand the criminal offences more easily, and enabling the police to explain and charge offences that are more readily understood. It should also make the task of judges, magistrates and juries more straightforward in the day to day administration of justice.[34]

[30] Smith and Hogan, *Criminal Law* (11th ed 2005) p 634. The concept of an 'arrangement', as the basis for a preparatory offence, is also to be found in, for example, the Terrorism Act 2000, ss 17 and 18. See, by way of comparison, the definition of conspiracy in French law, which prohibits (amongst other things), "[L']*entente* établie en vue de la préparation … d'un ou plusieurs crimes …" ([an] *understanding* established with a view to the preparation … of one or more serious offences') (our emphasis): Art 450-1 of the Code Pénale.

[31] See paras 2.14 to 2.19 above.

[32] As outlined in paras 2.23 to 2.25 above.

[33] The 'ground' referred to includes, for example, assisting or encouraging, or conspiracy to commit, offences contrary to the Explosive Substances Act 1883, the Biological Weapons Act 1974, and the Chemical Weapons Act 1996: see the Terrorism Act 2000, s 62.

[34] Home Office, *Violence*: *Reforming the Offences Against the Person Act 1861* (1998), paras 2.1 and 5.1.

2.29 In that regard, under the proposals that we make in this paper in relation to conspiracy[35] and in relation to the offences of assisting or encouraging crime in the Serious Crime Bill, there would be a relatively straightforward general defence of 'acting reasonably'.[36] The defence would be available to, amongst others, those who conspired to commit crime and to those who assisted or encouraged crime if they did so in order to prevent the commission of an offence or to prevent or limit harm.[37] Such a defence might be important to someone who is charged with one of the preparatory offences under the Terrorism Acts, whose claim is that he or she infiltrated a terrorist network only in order to expose those involved and break up the network. There is no such defence to a charge under section 56 of the Terrorism Act 2000 (see paragraph 2.23 above) or to a charge under section 6 of the Terrorism Act 2006 (see paragraph 2.24 above). The general defence of 'acting reasonably' should be contrasted with the much more specific defences provided to some, but not all, offences under the Terrorism Act 2000 which we will now briefly outline.

2.30 There is a defence to a charge of providing instruction or training in the use of weapons,[38] that the action in question 'was wholly for a purpose other than assisting, preparing for or participating in terrorism'.[39] This is similar but not perhaps identical to the defence to a charge of possessing an article 'in circumstances which give rise to a reasonable suspicion that …possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'.[40] This is the defence that 'possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism'. [41] The first defence requires positive proof of an alternative purpose, whereas the second defence encompasses proof that there was no purpose lying behind the possession of the article in question.

2.31 There is also a law-enforcement related defence of 'co-operation with the police', in relation to offences connected with entering into arrangements that may involve financing terrorist activity.[42] There is also a seemingly broader defence of 'reasonable excuse' on a charge of failing to disclose information about acts of terrorism,[43] a defence that is also available on a charge of collecting or making a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism.[44]

[35] See Part 8 below.

[36] The defence is set out in cl 48 of the Serious Crime Bill.

[37] Provided that, in doing so, they acted reasonably.

[38] Terrorism Act 2000, s 54(1).

[39] Above, s 54(5).

[40] Above, s 57(1).

[41] Above, s 57(2).

[42] Above, s 21.

[43] Above, s 38B(4). It seems likely that a reasonable excuse might include the wish not to 'blow one's cover' during an investigation of terrorist activity.

[44] Above, s 58(3).

2.32 We believe that it is important to have a measure of consistency, clarity and simplicity in the way that defences apply to offences of the same general kind. We believe that our proposals for a defence to a charge of conspiracy of 'acting reasonably', when set alongside the fact that there is a similar defence to the offences of assisting and encouraging crime contained in the Serious Crime Bill, would provide that kind of consistency in relation to inchoate offences.

CONCLUSION

2.33 In summary, we believe that there is ample justification for a separate offence of conspiracy. Most importantly, the justification is to a large extent 'free-standing'. Conspiracy is not an offence in itself simply because it may well lead to the commission of the substantive offence (a 'derivative' justification), although that is part of the justification. It is an offence because it typically involves taking on or becoming imbued with a loyalty to the group and a commitment to see the conspiracy through to its end, a kind of loyalty and commitment absent when a single individual simply makes up his or her mind to commit an offence.

2.34 Finally, it is worth noting that conspiracy plays an important part in the armoury of prosecutors. Her Majesty's Revenue and Customs Prosecution Office told us that they regarded conspiracy as a useful offence at the 'top end' of their criminal case work. Approximately 50 cases out of their current case-load of about 1200 are conspiracy cases. In the cases that they prosecuted for the Serious Organised Crime Agency, conspiracy accounted for approximately 50% of the charges, mostly charges of conspiracy to import controlled drugs. There have also been highly significant increases in recorded instances of at least one kind of conspiracy.[45] The number of recorded instances of threats or conspiracies to murder rose from 8,533 in 1996 to 23,733 in 2004/05.[46] There are now as many such recorded instances as there are of serious wounding actually inflicted together with other acts that endanger life. This is so, even though the number of prosecutions and convictions for conspiracy to murder currently remains far smaller.[47]

[45] Unfortunately, it is only possible to isolate conspiracy to murder (and, even then, without distinguishing it from solicitation to murder), because other kinds of conspiracy are not separated out from substantive offences in the criminal statistics.

[46] Home Office Statistical Bulletin, Crime in England and Wales 2005/06 (July 2006).

[47] In 1996, there were 69 prosecutions and 7 convictions. In 2005, there were 61 prosecutions and 13 convictions (RDS, Office for Criminal Justice Reform, IOS 153-07). By way of contrast, in the USA, more than one-quarter of all federal prosecutions involve prosecutions for conspiracy: see Beth Allison Davis and Jose Vitullo, "Federal Criminal Conspiracy" (2001) 38 *American Criminal Law Review* 777, 778 n 9.

PART 3
THE COMMON LAW OF CONSPIRACY AND THE ROLE OF THE LAW COMMISSION IN THE DEVELOPMENT OF STATUTORY CONSPIRACY

INTRODUCTION

3.1 In this Part we look at how the main aspects of the fault element of conspiracy developed at common law. We then go on to look at the role of the Law Commission in formulating what became the statutory definition of conspiracy in the Criminal Law Act 1977. Finally, we revisit the proposals on conspiracy contained in the Draft Criminal Code which we published in 1989.

EARLY DEVELOPMENT OF THE LAW OF CONSPIRACY

3.2 In the nineteenth century the law of conspiracy only required an agreement to do an unlawful act. This unlawful act did not have to be a criminal act but could involve only a breach of civil law. Consequently, conspiracy was used to target behaviour considered anti-social and it was used against the early trade unions to criminalise what effectively amounted to an agreement to strike. Conspiracy therefore often functioned more as an additional substantive offence than an inchoate offence.

3.3 Changes introduced by the Conspiracy and Protection of Property Act 1875 and the Trade Disputes Act 1906 went someway towards stopping this use of the offence in respect of non-criminal conduct which was thought to be anti-social, but did not entirely prevent it.[1] In *Kamara v DPP*[2] the defendants were convicted of conspiracy to trespass, despite the fact that trespass was only a civil wrong. It was not until the House of Lords decision in *DPP v Withers*,[3] where convictions for conspiring to effect a public mischief were quashed on the basis that no generalised offence of conspiracy to effect a public mischief was known to law, that the ambit of the offence was properly restricted. With the Criminal Law Act 1977, which is examined in more detail below, it was finally made clear that a person could only be guilty of statutory conspiracy if the agreement was to commit a criminal act.

THE FAULT ELEMENT AT COMMON LAW

The common law requirement that the parties must intend the agreement to be carried out

3.4 In this section, we outline how the courts developed a fault element requirement at common law that the parties must intend the agreement to be carried out.

1 Andrew Ashworth, *Principles of Criminal Law* (5th ed 2006) p 456.

2 [1974] AC 104.

3 [1975] AC 842.

3.5 In *Thomson*[4] the trial judge, Lawton J, said it had become "judicial usage"[5] to explain to juries the nature of conspiracy in the words used by Willes J:

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.[6]

3.6 The issue in *Thomson* was whether a party to an agreement could be liable for conspiracy if, contrary to what he had indicated to the other parties, he or she never had any intention to carry out an unlawful purpose. Relying on the majority decision of the Supreme Court of Canada in *O'Brien,*[7] Lawton J ruled 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".[8]

3.7 In *DPP v Kamara*,[9] Lord Hailsham LC stated that the fault element, "consists in the intention to execute the illegal elements in the conduct contemplated by the agreement."[10] In the more recent case of *Yip Chiu-Cheung*,[11] the common law offence was defined by the Privy Council in the following terms:

> The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea for the offence. … an undercover agent who has no intention of committing the crime lacks the necessary [fault element] to be a conspirator.[12]

3.8 Accordingly, at common law, a party to an agreement to commit a crime could only be liable for conspiracy at common law if he or she (and at least one other party to the agreement) had the commission of the agreed offence as his or her purpose.

The common law requirement of knowledge as to circumstances

3.9 In this section, we examine the case of *Churchill v Walton*[13] which concerned a conspiracy to commit a strict liability substantive offence.[14] The certified question for the House of Lords was:

4 (1965) 50 Cr App R 1 (Assizes).

5 Above, 2.

6 *Mulcahy* (1868) LR 3 HL 306, 317. See also *Brailsford* [1905] 2 KB 730, 746; *Meyrick* and *Ribuffi* (1929) 21 Cr App R 94.

7 [1954] Can. L. Rep 666.

8 (1965) 50 Cr App R 1, 2.

9 [1974] AC 104.

10 Above, 119. Lord Morris and Lord Simon concurred.

11 [1995] 1 AC 111. The case emanated from Hong Kong and the defendant was charged with conspiracy to traffic in a dangerous drug contrary to *common law*.

12 Above, 118.

13 [1967] 2 AC 224.

> Whether mens rea is an essential ingredient in conspiracy to commit the absolute offence charged in count 2 of the indictment, and if so, what knowledge of the facts and/or law on the part of the defendant must be established to prove the charge.

3.10 In essence, the decision was that fault as to the circumstance element of the substantive offence is necessary even where the substantive offence is one of strict liability. At one point, Viscount Dilhorne appeared to play down the significance of fault. He said that it:

> … is only an essential ingredient in conspiracy insofar as there must be an intention to be a party to an agreement to do an unlawful act; that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws light on what was agreed.[15]

3.11 However, he continued:

> If, on the facts known to them, what they agreed to do was lawful, they are not rendered artificially guilty by the existence of other facts, not known to them, giving a different and criminal quality to the act agreed upon.[16]

3.12 Previous decisions of the Court of Appeal had indicated that there was no fault element requirement over and above an intention to agree.[17] Commentators have been keen to observe that, even where the conspiracy was to commit a strict liability offence, proof of fault should be required.[18] This was because of the inchoate nature of the crime of conspiracy and the fact that the completed offence can be very far removed from the actual harm contemplated in the substantive offence.

3.13 With the draft Bill, which accompanied our 1976 report on conspiracy,[19] we aimed to put the decision in *Churchill v Walton* on a statutory footing. The next section examines the recommendations in the 1976 report and the accompanying draft Bill.

[14] The substantive offence was one of using in road vehicles heavy oils in respect of which a rebate of duty had been allowed but a sum equivalent to the rebate had not been paid to the Commissioners of Customs and Excise – Customs and Excise Act 1952, s 200(2).

[15] [1967] 2 AC 224, 237.

[16] Above.

[17] *Clayton* (1943) 33 Cr App R 113; *Jacobs* [1944] KB 417; *Sorsky* (1944) 2 All ER 333.

[18] Professor David Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185. At 190 he refers to Glanville Williams *Criminal Law, The General Part* (1953) p 666.

[19] Conspiracy and Criminal Law Reform (1976) Law Com No 76 ('the 1976 report').

RECOMMENDATIONS OF THE LAW COMMISSION LEADING TO THE CRIMINAL LAW ACT 1977

3.14 The following paragraphs outline the main recommendations contained in the 1976 report. A summary of all of those recommendations is detailed at paragraphs 7.1 to 7.7 of that report. The draft Bill is in appendix 1 of the 1976 report.

Recommendations as to fault

3.15 In the 1976 report, we sought to codify the common law position and recommended that "the law should require full intention and knowledge before a conspiracy can be established".[20]

3.16 We intended that the prosecution should have to prove that the defendant agreed with at least one other person that a course of conduct should be pursued which would result in the commission of a criminal offence.

Fault as to the circumstances and consequences elements of the substantive offence

3.17 Regarding the mental element as to the circumstance element of the substantive offence, our recommendation that there had to be intention and knowledge differed from the provisional proposal in the preceding Working Paper[21] which had been framed in terms of intention and the lesser requirement of *recklessness* as to circumstances and consequences. We justified the stringency of the requirement as to knowledge by the fact that conspiracy is an inchoate offence which is committed before any prohibited event has in fact taken place. Concerning the fault element, we stated:

> A person should be guilty of conspiracy if he agrees with another person that an offence shall be committed. Both must *intend* that any consequence specified in the definition of the offence will result and both must *know* of the existence of any state of affairs which it is necessary for them to know in order to be aware that the course of conduct agreed upon will amount to the offence.[22]

3.18 The draft Bill which accompanied our report was introduced into Parliament. Clause 1(2) provided that where a person was charged with conspiracy to commit an offence:

[20] Above, para 1.39.

[21] Inchoate Offences: Conspiracy, Attempt and Incitement (1973), Working Paper No 50, paras 48 to 53. For further discussion, see Part 4 below.

[22] Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76 para 7.2(5) (emphasis added). For further discussion, see Part 4 below.

> … both he and the other person or persons with whom he agrees must intend to bring about any consequence which is an element of that offence, even where the offence in question may be committed without that consequence actually being intended by the person committing it.[23]

3.19 Clause 1(2), however, was rejected by Parliament. As a result, there is an absence of reference to intention as to consequence in the statutory definition of conspiracy. Therefore, for all the external elements, other than the facts or circumstances necessary for the substantive offence for which a specific mental element is provided, as noted by Lord Nicholls, the "conspirators' state of mind must also satisfy the mental ingredients of the substantive offence."[24] Lord Nicholls in *Saik* gave the example that if the prescribed state of mind regarding the consequence of the prohibited act is recklessness, then recklessness as to consequence suffices for the offence of conspiracy.

Law Com No 300[25]

3.20 By way of contrast, our recommendations for offences of assisting or encouraging crime require that D should either intend that a criminal act be done in the circumstances or with the consequences required for conviction of the principal offence or that D believes that it will be done in those circumstances or with those consequences. Accordingly, the fault element in relation to the consequence element is on the face of it more stringent for offences of assisting and encouraging than it is for conspiracy.

3.21 However, the Serious Crime Bill dilutes the recommendations that we made in relation to assisting or encouraging crime. It provides that, if the offence assisted or encouraged is one requiring proof of particular circumstances or consequences (or both), it is sufficient if D is reckless as to whether or not the offence would be done in those circumstances or with those consequences.[26]

Other recommendations

3.22 We made the following other recommendations in our 1976 report which proved to be uncontroversial and were enacted in sections 2 to 5 of the 1977 Act.

3.23 We did not recommend any change to the rule that a husband cannot conspire with his wife.[27]

[23] Above, cl 1(2) Draft Conspiracy and Criminal Law Reform Bill.

[24] *Saik* [2006] UKHL 18, [2006] 2 WLR 993, at [4].

[25] Inchoate Liability for Assisting and Encouraging Crime Law Com (2006), para 5.118.

[26] Serious Crime Bill, cl 45 (5)(b).

[27] Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76, paras 1.46 to 1.49.

3.24 We recommended that the following categories of defendant should be exempt from prosecution.[28] First, where one party to an agreement was a child under the age of criminal responsibility. Secondly, a potential victim who was a party to the agreement. Further, we recommended that the individual with whom the exempt party conspired should also be exempt from liability for conspiracy.[29] The exemptions which we proposed are provided for in section 2(2) of the 1977 Act.[30]

3.25 We also recommended that there should be no rule of law that one conspirator should be entitled to an acquittal on a charge of conspiracy merely because another person or persons, with whom he is found to have agreed, were acquitted, whether they are tried at the same time or separately.[31]

THE CRIMINAL LAW ACT 1977

3.26 This Act aimed to implement the recommendations contained in our 1976 report. Commentators were critical of the 1977 Act from its inception. In the following Parts of this CP, we analyse in detail those aspects of the Act which appear to have been problematic and which are the main focus of our proposals.[32]

THE DRAFT CRIMINAL CODE 1989

3.27 In 1989 we published the Draft Criminal Code[33] which, with some modifications and additions, restated at clause 48 the relevant provisions of Part 1 of the 1977 Act.

3.28 Clause 48 of the Draft Criminal Code provides as follows:

> (1) A person is guilty of conspiracy to commit an offence or offences if-
>
> (a) he agrees with another or others that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement; and
>
> (b) he and at least one other party to the agreement intend that the offence or offences shall be committed.
>
> (2) For the purposes of subsection (1) an intention that an offence shall be committed is an intention with respect to all the elements of the offence (other than fault elements), except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.

[28] Above, paras 1.50 to 1.58.

[29] Above, para 1.58.

[30] We also recommended that where one of two parties to an agreement was not liable for prosecution for the substantive offence, both parties should be exempt from prosecution for conspiracy – see paras 1.52 to 1.54.

[31] *Shannon* [1975] AC 717.

[32] See Part 1, paras 1.18 to 1.69 above for a summary.

[33] A Criminal Code for England and Wales, (1989) Law Com No 177.

(3) Subject to section 52 “offence” in this section means any offence triable in England and Wales; and

(c) It extends to an offence of murder which would not be so triable; but

(d) It does not include a summary offence, not punishable with imprisonment, constituted by an act or acts agreed to be done in contemplation of a trade dispute.

(4) Where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of conspiracy to commit that offence.

(5) A conspiracy continues until the agreed act or acts is or are done, or until all or all save one of the parties to the agreement have abandoned the intention that such act or acts shall be done.

(6) A person may become a party to a continuing conspiracy by joining the agreement constituting the offence.

(7) It is not an offence under this section, or under any enactment referred to in section 51, to agree to procure, assist or encourage as an accessory the commission of an offence by a person who is not a party to such an agreement; but-

(a) a person may be guilty as an accessory to a conspiracy by others; and

(b) this subsection does not preclude a charge of conspiracy to incite (under section 47 or any other enactment) to commit an offence.

(8) A person may be convicted of conspiracy to commit an offence although-

(a) no other person has been or is charged with such conspiracy;

(b) the identity of any other party to the agreement is unknown;

(c) any other party appearing from the indictment to have been a party to the agreement has been or is acquitted of such conspiracy, unless in all the circumstances his conviction is inconsistent with the acquittal of the other; or

(d) the only other party to the agreement cannot be convicted of such conspiracy (for example, because he was acting under duress by threats (section 42), or he was a child under 10 years of age (section32(1)) or he is immune from prosecution .

3.29 Subsection (1)(a) set out the external elements of conspiracy. It did not exactly reproduce the language of subsection (1)(1) of the 1977 Act because the Code's concept of doing an "act"[34] superseded the imprecise notion of pursuing a course of conduct.

3.30 Section 1(b) set out the fault element and effectively restated section 1 of the 1977 Act. However, our clarification of the fault element rendered otiose the reference to conduct "necessarily" amounting to an offence. (As will be seen in Part 4 it is our view that consideration should be given to omitting the word "necessarily" in the statutory definition of conspiracy.)[35]

Fault as to the circumstance element of the substantive offence

3.31 The effect of the rule in subsection (2) is that where for the circumstance element of the substantive offence recklessness is sufficient, then recklessness as to the circumstance element will also suffice for a charge of conspiracy to commit the substantive offence.

Procedural

3.32 Subsection (3) merely restated section 1(3) and 1(4) of the 1977 Act.

Exemptions from liability

3.33 Clause 48 did not provide for the continuation of the exemptions from liability for a conspiracy formed by D with a spouse or a child under the age of criminal responsibility. However, it did provide for exemption from liability for an intended victim of the substantive offence.[36].

Spousal immunity

3.34 In the Draft Criminal Code, we considered that the spousal exemption was an anomaly. In Part 9 we revisit this issue and, as noted in Part 1, we are also proposing that the 1977 Act be amended so that a husband and wife can be guilty of conspiring with each other.[37]

[34] A Criminal Code for England and Wales, (1989) Law Com No 177, para 7.4 we stated:

> The definition of an offence commonly refers to circumstances that must exist if there is to be liability, or to a result that a person's act or omission must cause or fail to prevent, or to both. …for the sake of economy of drafting… (we preferred a) term that could be understood to refer to omissions, states of affairs and occurrences as well as physical acts; and not only to these bases of liability but also to their relevant results and attendant circumstances. The term …adopted is "act" which …has the advantage…of being both noun and verb.

[35] See Part 4, para 4.20 below.

[36] Cl 48(4).

[37] Part 9, para 9.29 below.

Conspiracy with a child under the age of criminal responsibility

3.35 In the Draft Criminal Code, we felt unable to justify our previous exemption for the individual who forms a conspiracy with a child under the age of criminal responsibility.[38] As noted in Part 1, we will be considering the arguments for and against this exemption in Part 10. We ask consultees to consider whether the adult co-conspirator who forms a conspiracy with a child should be guilty of attempted conspiracy.[39]

Conspiracy with intended victim

3.36 In the Draft Criminal Code,[40] we stated that the exemption from liability for the intended victim should be retained. In this paper, we propose that both the exemptions for the victim and for the non-victim co-conspirator should be abolished and a defence provided for the victim.[41] However, we also consider the option of retaining both exemptions but that the non-victim co-conspirator should be guilty of attempted conspiracy.

Assisting or encouraging conspiracy

3.37 Clause 48(7) of the Draft Criminal Code provides that D can commit conspiracy as a secondary party. A distinct question is whether there is a recognised offence of incitement to commit conspiracy. At common law there was such an offence. However, section 5(7) of the 1977 Act abolished the common law offence. Clause 47 of the Draft Criminal Code was intended to restore the offence. We address this issue in Part 7.

Conspiracy to incite

3.38 Under section 1 of the 1977 Act it is an offence for D1 and D2 to conspire to incite X to commit an offence. In the 1976 report, we said that such an offence is justified.[42] We continue to hold that view.

[38] Clause 48(8).

[39] Para 10.42 and Part 7 below.

[40] Clause 48(4).

[41] Para 10.31 below.

[42] Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76, para 1.44.

PART 4
THE FAULT ELEMENT FOR CONSPIRACY

A SUMMARY OF OUR PROVISIONAL PROPOSALS

4.1 In this Part we examine the fault element required for statutory conspiracy. Our most important proposals are as follows.

4.2 We propose that a different approach should be taken to the fault element bearing on the conduct or consequence elements of the substantive offence, as compared with the circumstance element.[1] Whereas intention must be shown in relation to the former (conduct or consequences), recklessness should suffice for the latter (circumstance element).

4.3 However, we also propose that a more restrictive approach to the circumstance fault element should be taken where the substantive offence itself requires a higher fault element than recklessness in relation to circumstances.

4.4 This is a summary of our provisional proposals:

> **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.**
>
> **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.**
>
> **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 circumstance is required by the substantive offence).**
>
> **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,[2] 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.**

4.5 As well as inviting comment on these proposals, we have some questions for consultees:

[1] For an explanation of the terms 'conduct', 'consequence' and 'circumstance' elements, see paras 4.8 to 4.15 below.

[2] Such as knowledge that the circumstance obtains or a belief that it obtains (as opposed to a belief that it may obtain).

Question 1: 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?

Question 2: 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?

A PRELIMINARY ISSUE: THE DISTINCTION BETWEEN THE CONDUCT, CONSEQUENCE AND CIRCUMSTANCE ELEMENT

4.6 An important preliminary issue is the distinction between the conduct, consequence and circumstance elements of an offence. This is important because we propose that 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.

4.7 As we said in relation to our recommendation for inchoate offences of assisting and encouraging crime:

> A criminal offence can consist of one or more of three external elements: conduct, the circumstances in which the conduct takes place and the consequences of the conduct. However, although an offence can comprise all three elements, not all three elements are integral to the definition of every completed offence. Whether one, two or all three elements are part of the definition of an offence varies a great deal.[3]

4.8 The conduct element is almost always the action or behaviour of the defendant, although for present purposes it may include a state of affairs, such as being 'in possession'[4] or being 'found drunk'.[5]

4.9 The consequence element refers to, "those circumstances, events or state of affairs which are the result of (i.e. caused by) the defendant's behaviour."[6]

[3] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 303, para 5.23 (footnotes omitted).

[4] See, for example, the Misuse of Drugs Act 1971, s 5(2), making it an offence for a person to have a controlled drug in his possession.

[5] See the offence of being found drunk on any highway or other public place: Licensing Act 1872, s 12.

[6] Simester and Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) p 78.

4.10 The circumstance element is the set of conditions, state of affairs or factual matrix in which the conduct must occur if the conduct or consequence is to be wrongful. This may include the victim's state of mind.

4.11 In relying on these distinctions, we recognise that they will not always be clear cut in relation to every criminal offence. Even so, the distinctions are clear enough in most cases. We also believe that the courts can be relied upon, when there is a lack of clarity about the matter, to interpret the offence in a just and satisfactory way.

4.12 The following examples provide illustrations of these distinctions.

4.13 Under section 4 of the Protection from Harassment Act 1997:

> A person whose course of conduct cause another to fear, on at least two occasions, that violence will be used against him, is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

In this offence, the conduct element might involve, for example, repeated visits to the victim's home or repeated telephone calls. The consequence element is the fear caused, on at least two occasions, by that course of conduct.

4.14 To give another example, under section 1(1) of the Theft Act 1968:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly.

In this example, the conduct element is appropriating property. The circumstance element is that the property appropriated 'belong[s] to another'.

4.15 A final example is the offence of violent disorder, contrary to section 2(1) of the Public Order Act 1986:

> Where 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder.

In this example, the conduct element is using or threatening violence. The unlawfulness of the violence used or threatened is a circumstance element. Similarly, the requirement that the use or threat of violence must be such as would cause a person of reasonable firmness present at the scene to fear for his personal safety is also a circumstance element.[7] Had the offence required a person present at the scene *actually to fear* for his or her personal safety, that would have been a consequence element (restricting the scope of the offence).

[7] To return to the definition of a circumstance element in para 4.10 above, it is an evaluative 'condition'.

PROPOSAL 1: AN AGREEMENT TO ENGAGE IN CRIMINAL CONDUCT AND TO BRING ABOUT CRIMINAL CONSEQUENCES.

4.16 Section 1(1) of the 1977 Act provides that:

> (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
>
> (b) …
>
> he is guilty of conspiracy to commit the offence or offences in question.[8]

4.17 We will not review here every legal dimension to the notion of an agreement under the 1977 Act.[9] Our principal concerns are with the fault element as it relates to the consequence and circumstance elements of the offence it is alleged D1 and D2 conspired to commit and with the related question whether, if D1 and D2 act on the agreement as intended, it must 'necessarily' amount to or involve the commission of an offence.

4.18 To turn directly to provisional proposal 1, the wording of section 1(1) only refers to an agreement to pursue a 'course of conduct' that will necessarily end in or involve the commission of an offence. It does not refer to an agreement to bring about prohibited consequences that involve the commission of an offence. That is an omission that should be rectified, even though the former has been understood to include the latter.[10]

4.19 To give an example supplied by Smith and Hogan:[11]

Example 4A

D1 and D2 agree to kill V by putting poison in his tea.

[8] Section 1(1)(b) has been omitted as it is not directly relevant to the present discussion.

[9] For further discussion, see Smith and Hogan, *Criminal Law* (11th ed 2005) pp 362 to 366.

[10] *Bolton* (1991) 94 Cr App R 74.

[11] Smith and Hogan, *Criminal Law* (11th ed 2005) p 367.

This ought to be regarded as a conspiracy to murder, even though the 'course of conduct' intended, putting poison in V's tea, will not 'necessarily' amount to the offence of murder, as V might not drink the tea or might not be fatally affected by drinking it.[12] It should be clear on the face of the 1977 Act that an agreement to bring about an outcome that involves a criminal offence is a criminal conspiracy to commit that offence. An explicit reference of this kind will also make clearer the distinction we wish to maintain between the fault element in relation to criminal conduct and consequences, and the fault element in relation to the circumstances in which the conduct or the consequences take place.

4.20 There is a related question whether, if D1 and D2 act on the agreement as intended, it must "necessarily amount to or involve" the commission of an offence, as required by section 1(1), even when the substantive offence involves a circumstance as well as a conduct or consequence element. We believe that this phrase should be replaced with a distinction between the fault requirement for the conduct and consequence (if any) elements, and the circumstance elements (if any). An intention to commit the offence should be required only in relation to conduct and consequence (if any) elements of the offence.[13]

Provisional proposal

4.21 We provisionally propose that:

> **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**.

PROPOSAL 2: THE NEED FOR EACH CONSPIRATOR TO INTEND THAT THE CONDUCT AND CONSEQUENCE ELEMENT (IF ANY) OCCUR

4.22 Clause 1(2) of the Commission's draft Bill required intention and knowledge of consequences, even where the substantive offence in question could be committed without that consequence actually being intended.[14] However, that provision was not included in the Bill when it was introduced in Parliament.[15]

4.23 We believe that this was unfortunate. Uncertainty as to the fault requirement has since been generated by the decision of the House of Lords in *Anderson.*[16] The House of Lords dispensed with any requirement that the conspirators must intend the offence to be committed.

[12] On a literal reading of the 1977 Act, D1 and D2 could be guilty only of a conspiracy to attempt murder, as that is the offence that their intended course of conduct 'necessarily' involved.

[13] We address the issue of fault requirements in relation to circumstance elements at paras 4.42 to 4.132 below.

[14] See Part 3, paras 3.14 to 3.19 above.

[15] Smith and Hogan *Criminal Law* (11th ed 2005) p 374.

[16] [1986] AC 27.

4.24 The decision is understandable, because it enabled the law of conspiracy to fill a gap in the criminal law. This gap was the absence of any inchoate offence of offering assistance to another person to commit a crime. We have recommended that that gap be filled by the creation of an offence of assisting or encouraging crime[17] and the Government has taken this recommendation forward.[18]

4.25 Accordingly, it is right now to focus solely on the respects in which the approach taken in *Anderson* was contrary to the common law understanding of conspiracy, and to the intention of Parliament in placing conspiracy on a statutory footing.[19] The decision in *Anderson* has been roundly criticised.[20] As Smith and Hogan point out,[21] the House of Lords' interpretation of the statutory offence in that case has since been overlooked or ignored on more that one occasion by the Court of Appeal.[22] We will now examine the decision in *Anderson* in further detail.

The decision in Anderson[23]

4.26 In *Anderson,* D had agreed with P and others to help P escape from prison by providing diamond wire (capable of cutting through metal bars) in exchange for a sum of money. D had intended to supply the wire but claimed, first, that he had not intended that the escape plan be carried out and, secondly, that he had believed it could not possibly succeed.[24] The House of Lords held that D may be held liable as a conspirator:

> … if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve.[25]

4.27 Lord Bridge also stated that he:

[17] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

[18] Serious Crime Bill, Part 2.

[19] The Lord Chancellor, agreeing the amendment to cl 1(2), stated:

> What has been sought to be done, and what I think has been conceded in the speeches made today, is that the law should require full intention and knowledge before conspiracy can be established.

HL, vol l379, col 55 cited in Smith and Hogan *Criminal Law* (11th ed 2005) p 374.

[20] See, eg, Smith and Hogan, *Criminal Law* (11th ed 2005) pp 375 to 376 and P W Ferguson, "Intention, Agreement and Statutory Conspiracy" (1986) 102 *Law Quarterly Review* 26.

[21] Smith and Hogan, *Criminal Law* (11th ed 2005) p 375.

[22] See, eg, *Edwards* [1991] *Criminal Law Review* 44.

[23] [1986] AC 27.

[24] D's intention was apparently to supply the wire then demand £10,000 as advance payment before providing any further assistance, and decamp to Spain without providing that assistance.

[25] [1986] AC 27, 39 by Lord Bridge.

> … reject[ed] any construction of the statutory language which would require the prosecution to prove an intention on the part of each conspirator that the criminal offence or offences which will necessarily be committed by one or more of the conspirators if the agreed course of conduct is fully carried out should in fact be committed.[26]

4.28 There are problems with this understanding of the scope of conspiracy, which runs contrary to our recommendation[27] and to Parliament's understanding[28] that the offence has a more limited scope.

4.29 First, in the passage cited above at paragraph 4.26, Lord Bridge appears to be suggesting that, to be a conspirator, someone must envisage taking an 'active' role in ensuring that the agreed course of conduct takes place, by playing his or her part. This has never been a requirement of conspiracy. A conspiracy is complete when D1 agrees with D2 that the offence be committed, even if D1 intends to play no active or further part in the plan.[29] As Smith and Hogan put it, "an agreement between A and B that A will supply a proscribed drug to B is a conspiracy between them to supply the drug".[30]

4.30 Secondly, one consequence of *Anderson* is that liability for conspiracy does not now depend on any particular party to the agreement having the commission of the agreed offence as his or her purpose.[31] On this point, the decision has been criticised in the following terms:

> The decision that no intention need be proved on the part of one alleged principal offender in conspiracy would significantly alter the scope of the offence. If no intention needs to be proved on the part of conspirator A, then none needs to be proved on the part of another, B. But if A and B are the only parties, and neither has the intention that it should be carried out, how can there be a crime of conspiracy: a conspiracy which no one intends to carry out is an absurdity, if not an impossibility.[32]

[26] [1986] AC 27, 38 by Lord Bridge.

[27] Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76.

[28] See n 19 above. The relevant clause was cl 1(2) in the Draft Bill in Law Com No 76. See Part 3 n 22 above.

[29] See *Siracusa* (1989) 90 Cr App R 340.

[30] Smith and Hogan, *Criminal Law* (11th ed 2005) p 377. See *Drew* [2000] 1 Cr App R 91.

[31] See the passage cited above at para 4.27.

[32] Smith and Hogan, *Criminal Law* (11th ed 2005) p 375.

An alternative approach to the problem addressed in Anderson

4.31 Someone who helps conspirators, for example by providing them with encouragement or equipment but without sharing the conspirators intention to commit the offence, would be guilty under the Serious Crime Bill of an inchoate offence of assisting or encouraging crime.[33] So, there is no longer a need artificially to expand the law of conspiracy to catch such persons within the criminal law's net.

4.32 The need to provide for this perceived gap was a key strand of the justification given by Lord Bridge for the decision in *Anderson*:

> I am clearly driven by consideration of the diversity of roles which parties may agree to play in criminal conspiracies to reject any construction of the statutory language which would require the prosecution to prove an intention on the part of each conspirator that the criminal offence or offences…should in fact be committed… The proprietor of a car firm agrees for a substantial payment to make available a hire car for a gang to use in a robbery…Being fully aware of the circumstances of the robbery in which the car is proposed to be used he is plainly a party to the conspiracy to rob…Yet, once he has been paid it will be a matter of complete indifference to him whether the robbery is in fact committed or not…. Parliament cannot have intended that such parties should escape conviction of conspiracy on the basis that it cannot be proved against them that they intended that the relevant offence or offences should be committed.[34]

4.33 In the example Lord Bridge provides in this passage, it would be possible to prosecute the person in question for an inchoate offence of assisting or encouraging crime under the provisions in the Serious Crime Bill. Given that these provisions address 'the diversity of roles' that those on the fringes of a conspiracy may play, the approach to conspiracy itself taken in *Anderson* is no longer appropriate or necessary.

The meaning of intention under section 1(1) of the 1977 Act.

4.34 Conspiracy is a crime of 'specific' intent, like an attempt to commit a crime. This means that, in both instances, D must be shown to have intended to commit the conduct or consequence element (if any) of the offence. As Lord Griffiths put it in *Yip Chiu-Chueng*:

> The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the *mens rea* of the offence.[35]

[33] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300; Serious Crime Bill, Part 2.

[34] [1986] AC 27, 38 by Lord Bridge.

[35] [1995] 1 AC 111, 118.

4.35 In relation to the law of attempts, it has been argued that by 'intention' the law should mean nothing less than 'direct' intent or purpose, because only when D acts with such an intent can it be said that D has 'attacked' an interest of V's.[36] On this view, it should not be possible to find that there was a criminal attempt when D thought that the consequence in question would be a virtually certain result of his or her conduct, because that is merely an instance of an 'endangerment' of V's interests.

4.36 The case for taking this approach in the law of conspiracy might seem even stronger because a conspiracy involves intention in the form of a *decision* to take a course of conduct or to bring about a consequence. It may seem in principle relatively easy to disentangle what it was specifically 'decided' by D1 and D2 to do from what was merely foreseen by them as virtually certain to occur as a result. This may seem easier than trying to disentangle what was merely foreseen as virtually certain to occur from an intention 'in action' (as it is sometimes called), such an intention being the kind of intention at issue in an attempt.[37]

4.37 The courts have rejected this narrow understanding of intention in the law of attempt.[38] On a charge of attempt, the jury is entitled to find that D intended, and hence attempted, to bring about a result if that result was foreseen as a virtually certain consequence of what he or she was 'primarily' doing.[39] In the USA, the Model Penal Code explicitly includes foresight of virtual certainty as a part of the fault element in attempt. It states that D must act, "with the purpose of causing or with the belief that [the act] will cause" the result.[40] The commentary on the Code justifies this stance on the basis that:

> The manifestation of the actor's dangerousness is just as great – or very nearly as great – as in the case of purposive conduct. In both instances a deliberate choice is made to being about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause the result to occur.[41]

[36] R A Duff, *Criminal Attempts* (1996), pp 369 to 371.

[37] On the distinction between decisions and intentions-in-action, see Michael Bratman, *Intention, Plans and Practical Reason* (1987), 111 to 138; John Gardner and Heike Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 *Oxford Journal of Legal Studies* 559.

[38] *Pearman* (1985) 80 Cr App R 259.

[39] The idea of a 'primary' purpose is taken from *Pearman* (1985) 80 Cr App R 259, 263.

[40] Model Penal Code, s. 5.01(b)

[41] Model Penal Code, commentary to s 5.01, cited by R A Duff, *Criminal Attempts* (1996) p 20. The Canadian Law Reform Commission has also endorsed this position: *Secondary Liability*, p 29.

4.38 English law does not go quite this far, in that it regards foresight that a forbidden consequence is virtually certain to occur only as a basis for finding or inferring intent, rather than as an alternative form of fault element in itself.[42] We believe that this is the right approach for both conspiracy and attempt. In particular, it would be wrong to have different tests for intention in each of these closely allied inchoate offences.

4.39 Although he himself prefers the narrow view of intention, Professor Duff has expressed the advantages of the Model Penal Code or English law approach very clearly:

> There is, many argue, no intrinsic moral difference between direct and oblique intention: the mere fact that an agent foresaw harm as a side-effect of her action, rather than directly intending it, cannot make her any less culpable; she still chose to bring about a harm which she could have avoided. Nor need the difference between direct and oblique intention mark any difference in the dangerousness either of the action or of its agent: so a law of attempts that aims either to prohibit dangerous acts or to capture dangerous agents, should not require direct rather than oblique intent.[43]

4.40 We find these arguments provide persuasive backing for the approach of the courts to the meaning of intention in the law of attempts, and we believe that such an approach is equally appropriate in the law of conspiracy. When D1 and D2 decide to blow up a plane when it is in mid-air, to collect on the insurance for property damaged in the explosion, it should be possible for the jury to find that they intended (decided) to kill anyone on board, if they foresaw that killing someone was a virtually certain result of their action.

4.41 We do not believe that any change in the law is required to express our view. We believe that, if called upon to do so, the courts would apply the understanding of intention outlined in paragraphs 4.38 and 4.39 above to the law of conspiracy.

PROPOSAL 3: THE FAULT ELEMENT IN RELATION TO CIRCUMSTANCES

A brief summary of the existing law and its flaws

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

> 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 the fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

[42] See *Woollin* [1999] 1 AC 82.

[43] R A Duff, *Criminal Attempts* (1996) p 20.

4.43 The subsection was meant to apply to no-fault offences and to offences with a fault element less than knowledge (or intention).[44] It was meant to ensure that on any charge of conspiracy to commit such an offence, an intention to commit that offence, with knowledge or intention of the circumstance elements, if any, must be proven.[45]

4.44 This is consistent with the view that conspiracy is a free-standing offence of specific intent (see paragraph 4.34 above). It is also consistent with the requirement of section 1(1) (discussed in Part 1, paragraphs 1.25 to 1.30) that the agreement, if carried out in accordance with the defendants' intentions will *necessarily* amount to or involve the commission of a criminal offence. Suppose someone is charged with conspiracy to commit a strict liability offence. By virtue of section 1(2) of the 1977 Act, the fact that no fault would have to be shown if the substantive offence was charged, will not relieve the prosecution of the duty to show an intention to commit the offence on the charge of conspiracy.[46]

4.45 We believe that there are at least two important flaws in section 1(2). We will now briefly outline these flaws before examining the problems with the existing law in more detail at paragraphs 4.64 to 4.112 below.

4.46 First, the sub-section does not distinguish, in the way that we believe it should, between the conduct/consequence elements and the circumstance element of an offence. Our approach involves distinguishing between these elements for the purpose of determining the required fault element in conspiracy.

4.47 Secondly, and perhaps partly by virtue of the failure to make the distinction just mentioned, section 1(2) requires too high a degree of fault in relation to the circumstance element of an offence. On the face of it, the section requires intention or knowledge as to all elements of the offence. As we have said, this requirement is meant to correspond with the requirement in section 1(1) that there 'necessarily' be a connection between the defendants' intentions and the commission of a criminal offence. This requirement is a manifestation of the restrictive approach to criminal liability for inchoate offences that the Commission endorsed over twenty-five years ago.[47]

[44] See Professor Sir John Smith, "Conspiracy Under the Criminal Law Act 1977" [1977] *Criminal Law Review* 598.

[45] See, further, the discussion of *Sakavickas* [2004] EWCA Crim 2686, [2005] 1 WLR 857 at paras 4.65 to 4.69 below.

[46] For general discussion, see Smith and Hogan, *Criminal Law* (11th ed 2005), pp 377 to 381.

[47] Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, paras 214 to 218.

4.48 On our preferred approach, whereas the conduct/consequence elements must be intended, the circumstance element need not be. *Recklessness* as to the possible existence of a circumstance element should suffice, unless the substantive offence requires a higher degree of fault than that in relation to a circumstance element.[48] This approach is to a greater degree consistent with the Commission's more recent approach to the fault requirement relating to circumstance elements of an offence,[49] and is essentially the same as the Commission's much earlier Working Paper proposals.[50]

4.49 The 'remoteness' principle[51] dictates that it would be wrong to criminalise conduct relating to, but remote from, the harm of the substantive offence without fully subjective fault requirements. Unless that principle is observed, too much ostensibly innocent conduct would fall within the criminal law's net even though D did not intend it to, or realise that it might, involve committing an offence.

Illustrating proposal 3 in relation to particular crimes

4.50 It would be helpful to illustrate our proposal using crimes featuring different fault requirements as regards the circumstance element of the substantive offence. The first example, criminal damage,[52] requires recklessness as to its circumstantial elements. The second example, handling stolen goods,[53] involves knowledge or belief that the goods handled are stolen. The final example, rape,[54] involves an absence of reasonable belief that V is consenting.

Criminal damage

4.51 On our approach, a conspiracy to commit criminal damage ought to involve proof of an agreement, and hence an intention, to damage property (the conduct element); but it should not require proof of actual knowledge on the part of the conspirators that the property to be damaged belonged to another person (the circumstance element). The prosecution should need to show no more than that the conspirators were reckless as to that circumstance element (whether property of another would be damaged).

4.52 This is not simply because recklessness as to the circumstance element is what is required for the substantive offence of criminal damage.[55] It is because recklessness as to a circumstance element is the minimum degree of fault we believe should, in that regard, be required on a charge of conspiracy.

[48] In using the term 'recklessness', we adopt the meaning given to that term in *G* [2003] UKHL 50, [2004] 1 AC HL 1034, discussed at paras 4.114 to 4.123 below.

[49] A Criminal Code for England and Wales (1989) Law Com No 177, cl 49(2).

[50] Inchoate Offences: Attempt, Conspiracy and Incitement (1973), Working Paper No 50, paras 88 to 89.

[51] See Part 1 para 1.7 above.

[52] Contrary to the Criminal Damage Act 1971, s 1.

[53] Contrary to the Theft Act 1968, s.22 (1).

[54] Contrary to the Sexual Offences Act 2003, s.1.

[55] See *G* [2003] UKHL 50, [2003] 167 JP 621. For the argument that this should be the law's approach to the circumstance fault element, see paras 4.145 to 4.160 below.

Handling stolen goods

4.53 By way of contrast, a conspiracy to handle stolen goods should require both an agreement, and hence intention, to handle goods (the conduct element), and either knowledge or belief that the goods handled will be stolen goods (the circumstance element). Recklessness as to whether the goods handled will be stolen goods should be insufficient in this particular case. This is because the substantive offence of handling stolen goods requires a higher fault element than recklessness in relation to the circumstance element. The substantive offence requires that the handler knows or believes that the goods are stolen.[56]

Comparing the two examples above

4.54 For reasons of principle, our proposal involves making this distinction between the fault element in conspiracy to commit criminal damage and the fault element in conspiracy to handle stolen goods.

4.55 The prosecution should not find that there are less demanding fault elements on a charge of conspiracy to commit an offence than there are on a charge of committing the substantive offence itself. If that were the law, it would provide an unwarranted incentive to charge conspiracy to commit an offence, even when the defendants have actually completed the conduct element of the offence. In such a case prosecutors would, by charging conspiracy, be able to take advantage of more generous evidentiary rules governing the inculpation of D1 by D2 that apply when conspiracy is charged but do not apply when the substantive offence is charged. This would not be right.

4.56 Take the following example:

Example 4B

D1 and D2 have together handled stolen goods, but claim that they thought at the time that the goods might have been acquired legitimately.

As we have just indicated, in relation to any charge of handling stolen goods the prosecution would have to show that D1 and D2 knew or believed that the goods were stolen at the time of handling. It would not be right that the prosecution could avoid having to meet this proof requirement by charging conspiracy to handle stolen goods instead. This would happen if on such a charge it sufficed that D1 and D2 were reckless at the time of the agreement whether the goods would be stolen. As noted above, on such a conspiracy charge, prosecutors would be able to use evidence against D1 showing furtherance of the conspiracy against D2 as well, a powerful weapon unavailable when the substantive offence is charged. This underlines the importance of ensuring it is not easier, in relation to the fault element, to charge conspiracy rather than the substantive offence.

[56] Theft Act 1968, s 22.

The modern law of rape: a test case for our proposal

4.57 In our final example, a conspiracy to commit rape should require proof of an agreement, and hence, intention, to have sexual intercourse (the conduct element), and proof of recklessness whether V would consent to the intercourse (the circumstance element). Proof of recklessness as to the presence or absence of consent should be required on a charge of conspiracy to rape, even though the lower fault requirement of absence of reasonable grounds for believing that V consents suffices for the substantive offence.[57] Again, the justification for this is a matter of principle.

Example 4C

D1 and D2 agree to have sexual intercourse with V. It has not occurred to them that V will not consent because they assume V will consent. However, they should have known that V would not consent. They subsequently abandon their plan.

In this example, D1 and D2 have agreed to do something that objectively involves an unjustified risk of wrongdoing, namely having non-consensual sexual intercourse. There is an absence of reasonable grounds for believing that V would consent (the circumstance element). However, they are not aware of any unjustified risk of committing wrongdoing at the time of the agreement, and so they are not reckless. Accordingly, in our view, their conduct being remote from the commission of the offence itself, liability cannot be imposed on the basis of objective fault (absence of reasonable grounds for a belief) in relation to the circumstance element.

4.58 Before the passing of the Sexual Offences Act 2003, the Court of Appeal in *Khan*,[58] where the charge was attempted rape, took an approach that would be consistent with our proposal 3. It was held that recklessness as to the circumstance element (lack of consent to intercourse) was sufficient proof of fault for the purposes of the Criminal Attempts Act 1981, so long as sexual intercourse itself (the conduct element) was intended.[59]

[57] Sexual Offences Act 2003, s 1(1).

[58] [1990] 2 All ER 783.

[59] However, it is doubtful that the Court of Appeal, in reaching its decision, intended to anticipate what we are proposing in proposal 3. The Court was ruling that, on a charge of attempt, the fault required of D in relation to the circumstance element should be the same as that required were D to be charged with the substantive offence. For this approach, see the discussion in paras 4.145 to 4.160 below.

4.59 However, since the decision in *Khan*, the definition of the substantive offence of rape has changed. A requirement of proof of recklessness as to the absence of V's consent (the circumstance element) has been replaced by a requirement of proof of absence of a reasonable belief that V is consenting.[60] It may follow that the courts will adapt to this change by making the fault element respecting lack of consent in attempted rape consistent with the fault element for the substantive offence of rape. This would obviously involve finding that D attempts rape where he takes a more than merely preparatory step towards sexual intercourse, having no reasonable belief that V will consent.

4.60 Professor Ashworth provides support for such a development, arguing that the fault element for an attempt and the fault element for the substantive offence (at least in this instance) must be the same:

> the offence of rape itself is committed where D does not reasonably believe that V is consenting. If two men set out to have sexual intercourse with two women, not caring whether they consent or not, it would be absurd if the one who achieved penetration was convicted of rape, whilst the other, who failed to achieve penetration despite trying, was not liable even for attempted rape…[U]nder the 2003 Act that reasoning would have to be extended to cover a person who intends to have sexual intercourse while not holding a reasonable belief that V is consenting - in effect, combining intended conduct with negligence as to the relevant circumstances.[61]

4.61 On this approach to the circumstance fault element, the requirement is that the prosecution must prove the same kind and degree of fault as that (if any) required for the substantive offence. In question 2 (paragraph 4.5 above), we ask consultees whether they would prefer to take this approach and we discuss this point below.[62]

4.62 However, it is not our provisionally preferred approach. Far from regarding as "absurd" differences in the fault element for attempt or conspiracy on the one hand, and for the substantive offence attempted or agreed upon on the other hand, we have already said that we believe that such differences reflect an important principle: the 'remoteness' principle.[63] This states that when criminalising acts leading up to but distinct from the substantive offence, a more demanding fault element is appropriate regarding liability for those acts, as compared with the fault element for the substantive offence.[64]

[60] Sexual Offences Act 2003, s 1(1).

[61] Andrew Ashworth, *Principles of Criminal Law* (5th ed 2006) pp 448 to 449.

[62] See paras 4.145 to 4.160 below.

[63] See Part 1, para 1.7 above.

[64] See Part 1, para 1.6 above.

4.63 This may lead to difficult cases, such as the rape examples given by Professor Ashworth. In these cases, the remoteness principle may seem hard to defend. Why should D benefit from a more generous fault element when, for example, he or she has done the last act he or she needs to do to commit the crime and is only foiled by the intervention of a police officer? In answering this question, it must be kept in mind that both attempts and conspiracies extend much further back in time than such 'last acts'. They extend to a great deal of conduct that is ostensibly innocent and only rendered criminal by virtue of D's state of mind. It is in such cases (the clear majority, we suggest) that the remoteness principle has an important role to play. It prevents the criminal law's net from being spread too widely, on the basis of a judgement by the tribunal of fact that D was negligent with respect to whether the conduct agreed on might result in the commission of a criminal offence.

More detailed analysis of the problems with the existing law

4.64 We said earlier that section 1(2) of the 1977 Act was intended to apply to conspiracies to commit no-fault offences or offences with a fault element less stringent that intention or knowledge. The aim of the sub-section was to ensure that the prosecution must prove that there was intention or knowledge on a charge of conspiracy to commit such an offence. Unfortunately, the meaning and intent of the sub-section have not been clear to all courts and commentators.

***Sakavickas*[65]**

4.65 The courts appeared to accept our understanding of the meaning and intention of the sub-section until the Court of Appeal decision in *Sakavickas.* This was a money laundering case concerned with the proceeds of tobacco smuggling. D2 operated a bank account for D1's benefit. The prosecution case was that D2 was laundering the profits of D1's tobacco smuggling. They were charged with conspiring to facilitate the retention by another of that person's proceeds of criminal conduct, knowing or suspecting that that person was or had been engaged in or benefited from criminal conduct.[66] Both D1 and D2 claimed that they did not know that the tobacco being imported had been imported illegally.

4.66 On our understanding of sub-section 1(2), the sub-section applies because a fault element less than intention or knowledge (suspicion) suffices in relation to the circumstance element of the substantive offence. It should have led the Court of Appeal to hold that D1 and D2 had to intend or know at the time of the agreement that they would be facilitating D2's retention of the proceeds of crime. The Court of Appeal thought otherwise.

[65] [2004] EWCA Crim 2686, [2005] 1 WLR 857.

[66] Contrary to the Criminal Justice Act 1988, s.93(A).

4.67 The Court of Appeal said that the sub-section did not apply because that sub-section was concerned only with no-fault offences and the money laundering offence in issue was an offence requiring proof of fault.[67] However, the Court of Appeal held that the requirement of knowledge was nonetheless satisfied. The Court held that if the prosecution established that D1 and D2 suspected that they might be agreeing to launder the proceeds of crime, they automatically established knowledge on the part of D1 and D2 of that suspicion and that was enough to satisfy the knowledge requirement in sub-section 1(2).

4.68 Of this approach, Lord Hope said in *Saik* that, "the solution adopted by the Court of Appeal is open to the objection that it avoids, rather than solves, the problem [of the meaning of section 1(2)]".[68] We endorse what Lord Hope went on to say about this problem:

> The problem has not been assisted by the practice of prosecuting several acts of money laundering which have taken place over a period under the umbrella of the statutory offence of conspiracy. Concepts which were designed to fit with the idea that conspiracy is an inchoate offence are being applied to cases where the only proof that there was a conspiracy is provided by evidence of the course of conduct, from which inferences as to the state of mind of the participants are then drawn.[69]

4.69 We will not review here other decisions that, in different ways, have also been based on misunderstandings of sub-section 1(2) of the 1977 Act, or misunderstandings of the offences to which it does and does not apply.[70] It is enough to say that that provision has not provided a clear and stable basis for the prosecution of conspiracy, especially in the money laundering context. We will proceed instead to a discussion of the recent decision of the House of Lords in *Saik*.[71]

[67] Professor Elliott argued (in our view, wrongly) that one implication of the sub-section was that it required proof of intention or knowledge on charges of conspiracies to commit no-fault or low culpability offences, but did not require such proof on charges of conspiracies to commit offences that themselves involved proof of intention or knowledge. This he called the 'scandalous paradox': Professor D W Elliott, "Mens Rea in Statutory Conspiracy" [1978] *Criminal Law Review* 202.

[68] *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [69]

[69] Above, at [63].

[70] See Appendix 1. For a thorough and detailed review, commended by Lord Nicholls and Baroness Hale in *Saik*, see Professor Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185.

[71] *Saik* [2006] UKHL 18, [2007] 1 AC 18.

***Saik*[72]**

4.70 The appellant operated a bureau de change and changed large amounts of sterling into foreign currency on behalf of his co-defendants.[73] All three defendants were charged with conspiracy to convert the proceeds of drug trafficking and/or criminal conduct, the substantive offence being that contained in section 93C(2) of the Criminal Justice Act 1988. Saik's co-defendants both pleaded guilty to the charge of conspiracy on the basis that they knew that they were dealing in illicit property. The basis of Saik's plea to conspiracy however was recorded as follows: "on the basis of laundering money which he *suspected* was the proceeds of crime" [emphasis added].

4.71 The question for the House of Lords was whether or not the appellant's mere suspicion was enough to satisfy the circumstance fault requirement in section 1(2) of the 1977 Act for conspiracy to commit the substantive offence. Their Lordships rightly held that mere suspicion was not enough to satisfy the fault element on a charge of conspiracy. However, in our view, the House has still not provided a definitive statement as to the requirements of section 1(2).

4.72 Their Lordships agreed that the requirements of section 1(1) of the 1977 Act had been fulfilled. There was an agreement to pursue a course of conduct and that conduct, if carried out, would necessarily involve the commission of a crime by both parties.[74]

4.73 So far as section 1(2) of the 1977 Act was concerned, the majority of the House of Lords (Baroness Hale dissenting) held that the requirements of section 1(2) had not been fulfilled. Accordingly, the appellant's conviction had to be set aside.

4.74 Speaking of sub-section 1(2), Lord Nicholls (with whom Lord Steyn agreed) said:

> Its essential purpose is to ensure that strict liability and recklessness have no place in the offence of conspiracy … proof of the mental element needed for the commission of a substantive offence will not always suffice on a charge of conspiracy to commit that offence. In respect of a material fact or circumstance conspiracy has its own mental element. In conspiracy this mental element is set as high as "intend" or "know". This subsumes any lesser mental element, such as suspicion, required by the substantive offence in respect of a material fact or circumstances.[75]

4.75 In other words, although a substantive offence may involve a mental element falling short of intention in relation to 'any particular fact or circumstance necessary to the commission of the offence', for conspiracy to commit the offence proof of nothing short of intention or knowledge in relation to that fact or circumstance will suffice.

[72] [2006] UKHL 18, [2007] 1 AC 18.

[73] A fuller account of the facts can be found in Part 1, paras 1.20 to 1.21 above.

[74] Lord Hope at [77]; Baroness Hale at [96]; Lord Brown at [115]. Lord Nicholls, with whom Lord Steyn agreed, focuses his comments on the requirements of s 1(2). Implicit in his discussion is an assumption that s 1(1) poses no difficulty for the case.

[75] At [6] and [8].

4.76 In relation to the facts of *Saik*, Lord Nicholls (with whom Lord Steyn agreed), Lord Hope (with whom Lord Brown agreed) and Baroness Hale all held that the provenance of the money was a 'fact or circumstance necessary to the commission of the offence' under section 93C(2) of the Criminal Justice Act 1988. The substantive offence is made out if D suspects that the money has a criminal provenance. That being so, conspiracy to commit the offence is governed by section 1(2) of the 1977 Act. Their Lordships agreed that on a conspiracy charge it was necessary to show the appellant 'knew or intended' that the money had a criminal provenance. Unfortunately, their Lordships differed in their interpretation of exactly what this requirement entailed. We will consider here the opinions of the majority.[76]

LORD NICHOLLS

4.77 Lord Nicholls stated that:

> The rationale underlying [the approach of section 1(2)] is that conspiracy imposes criminal liability on the basis of a person's intention. This is a different harm from the commission of the substantive offence. So it is right that the intention which is criminalised in the offence of conspiracy should itself be blameworthy.[77]

4.78 In the opinion of Lord Nicholls it followed that the mental element necessary to make out the offence of conspiracy differs depending on whether the conspiracy agreement involved unidentified or identified property.[78]

4.79 In the case of unidentified property, the prosecution were not required to prove that the origins of the property were criminal.[79] Rather, they would only be required to prove that, at the time the agreement was formed, the conspirators intended that the property would be the proceeds of criminal conduct.[80]

[76] The dissenting speech of Baroness Hale is addressed in Part 5.

[77] At [13].

[78] Lord Nicholls did not indicate into which of these two categories of case *Saik* itself fell.

[79] The property need never materialise in order for a conspiracy to be complete: Lord Nicholls at [24]. It has since been held that there is no need for the prosecution to prove that the property is criminal in fact: *Suchedina* [2006] EWCA 2543 [2007] 1 Cr App R 23.

[80] After all, in the case where the property was yet to be identified at the time of the agreement, it would not be possible for the conspirator to *know* the property's origins were criminal.

4.80 By way of contrast, in a case where the property was identified at the time that the conspiracy was formed, Lord Nicholls held that the prosecution must prove that the conspirators 'knew' that the property was the proceeds of crime.[81] Lord Nicholls here seems to have excluded the possibility that if the defendant *intended* the identified property to have a criminal provenance that state of mind would satisfy section 1(2) in a case where the agreement relates to identified property. However, it has since been held by the Court of Appeal that in these circumstances there is no need for the prosecution to prove that the property in fact has a criminal provenance.[82]

4.81 Furthermore, Lord Nicholls adopts a strict interpretation of when someone can be found to have known that something is the proceeds of crime:

> On the ordinary use of language a person cannot "know" whether property is the proceeds of crime unless he participated in the crime. He can only believe this is so, on the basis of what he was told.[83]

4.82 Lord Nicholls then went on to reject the possibility that such a belief could satisfy the requirements of section 1(2), on the grounds that such an interpretation was not supported by the statutory language.

4.83 As far as Lord Nicholls is concerned, a defendant cannot be convicted of conspiracy to commit the section 93(2) offence unless he participated in the criminal activity through which the money was obtained. In his view, it would not suffice that D was told that the money had criminal origins, as this could lead only to belief about its origins, and such a state of mind falls short of the knowledge necessary to satisfy the requirement of section1(2).

4.84 This is a highly restrictive view of the scope of section 1(2). Lord Nicholls implies that knowledge of the circumstances can only be knowledge, for the purposes of section 1(2), if it is 'direct' knowledge, knowledge that comes through personal contact with and understanding of the circumstances. We do not believe that section 1(2) embodies an understanding of knowledge of that kind. Those who take part in the agreement, but take no part in its execution, can still have knowledge of the circumstances for the purposes of section 1(2). Broadly speaking, the question will be whether they are justified in holding a (true) belief that the circumstances will exist, and equally justifiably do not envisage circumstances in which they will be proved wrong.[84]

LORD HOPE (WITH WHOM LORD BROWN AGREED)

4.85 The approach of Lord Hope and Lord Brown differs markedly from that of Lord Nicholls. Neither drew a distinction between identified and unidentified property. Nor did they conclude that suspicion would always necessarily fall short of the requirement in section 1(2).

[81] At [25].

[82] *Suchedina,* n 80 above.

[83] At [25].

[84] Our provisional proposal 3 reflects our belief that, as a matter of policy, even this broader understanding of knowledge is too restrictive.

4.86 Lord Hope seems to agree with the Court of Appeal's reasoning in *Ali* [85] that a person must know at the time of the agreement that the property was the proceeds of crime.[86] Suspicion, he said, 'falls short of knowledge'.[87] However, his Lordship also said that:

> The margin between knowledge and suspicion is perhaps not all that great where the person has reasonable grounds for his suspicion. Failure to ask or obtain an answer to the obvious question may be described as wilful blindness. … But in this case all we know is that the appellant suspected that the money "was" the proceeds of crime. The appellant must be dealt with according to the terms of his plea. We cannot say that he was wilfully blind as to the purpose of the agreement, because that is not what he admits to.[88]

4.87 This suggests that Lord Hope regards 'wilful blindness' as tantamount to knowledge. Lord Hope relies, in this regard, on a passage from the judgment of Lord Justice James in *Griffiths*[89] (a case in which handling stolen goods was alleged), where Lord Justice James said that deliberately closing one's eyes to the circumstances can amount to knowledge or belief that goods are stolen.[90] These remarks must be seen in context. The offence of handling stolen goods can be committed where D *believes* goods being handled are stolen, as well as when D knows that they are.[91] By way of contrast with the fault requirement in section 1(2) of the 1977 Act, proof of knowledge, and nothing short of knowledge, is not necessary.

4.88 Nonetheless, in agreeing with Lord Hope, Lord Brown also said that:

> Handling is committed by those who know or believe that the goods are stolen. … if an agreement is made to handle goods believed to be stolen I for my part would have little difficulty in concluding for the purposes of section 1(2) of the 1977 Act that the conspirators intended or knew that they would be stolen.[92]

4.89 Our view is that, in so far as this passage suggests that belief can be treated as equivalent to knowledge, it involves too broad a reading of section 1(2), where nothing short of intention or knowledge will suffice. Whilst wilful blindness may be evidence of knowledge it is not to be equated with it.[93]

[85] [2005] EWCA Crim 87, [2006] QB 322.

[86] At [74].

[87] At [61].

[88] At [62] and [80].

[89] (1974) 60 Cr App R 14.

[90] Above, 18. See the discussion of 'wilful blindness' at paras 4.94 to 4.106 below.

[91] It is, in fact, not clear to us that closing one's mind to something obvious should necessarily be equated with a belief in that something. Such a closing of one's mind is consistent with mere suspicion, a state of mind to be distinguished from belief.

[92] At [119].

[93] See the discussion of 'wilful blindness' in paras 4.94 to 4.106 below.

4.90 As we will see, the approach of Lord Brown and Lord Hope has been adopted by the US Supreme Court,[94] but the approach has not proved to be a stable basis for understanding the circumstance fault element.

PROBLEMS WITH THE CURRENT LAW AS STATED IN SAIK

4.91 It should be evident that in some crucial respects the ratio in *Saik* is unclear. Lord Nicholls (with whom Lord Steyn agreed) drew a distinction between cases where the agreement related to unidentified property and cases where the agreement related to identified property. According to Lord Nicholls, conspiracy could only be made out in the former situation if the defendant intended the circumstance at issue. In the latter situation, Lord Nicholls held that conspiracy could only be established if the defendant had first-hand knowledge of the circumstance at issue. Being told of the circumstance by a co-conspirator would amount only to belief in its existence, which would fall short of knowledge. Lord Brown, in contrast would be prepared to hold that 'belief' in the existence of a circumstance element satisfied the section 1(2) requirement, while Lord Hope held that wilful blindness would suffice.

4.92 There is, therefore, no single test espoused by the majority and so no definitive statement as to what section 1(2) requires. Moreover, there may be real difficulties with a test which requires a distinction to be drawn between identified and unidentified property. It is not clear, for example, whether a property's status as identified is to be established objectively or whether what matters is that the particular conspirators had identified the property.[95]

4.93 What is clear from the opinions of the majority however is that several states of mind fall short of meeting the section 1(2) requirement. Mere suspicion or recklessness as to a necessary circumstance are insufficient to ground liability for conspiracy under section 1(2).

'Wilful blindness' and knowledge in American and English courts

AMERICAN COURTS

4.94 The Supreme Court has consistently held that the central fault element for conspiracy is an intent to further the aims of the conspiracy.[96] In that regard, it is a requirement that D knows of the unlawful goals of the conspiracy.

4.95 Under the Model Penal Code, wilful blindness can be treated as knowledge:

> When knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.[97]

[94] (1969) *Leary v US* 395 US 6F. See paras 4.96 and 4.97 below.

[95] See *Suchedina* [2006] EWCA Crim 2543, [2007] 1 Cr App R 23.

[96] (1961) *Scales v US*, 367 US 203; Model Penal Code, § 5.03.

[97] Model Penal Code, § 2.02(7). See also § 2.02(2)(b)(i).

4.96 This understanding of knowledge is built on the definition given in *Spurr v US*,[98] in which the court said that, "an evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not".[99] This understanding has since been confirmed in *Leary v US*.[100] In that case, D was charged with knowingly transporting illegally imported marijuana. He challenged as unconstitutional a presumption in the statute that he "knew" marijuana was imported. In invalidating the presumption, the Supreme Court relied on the Model Penal Code definition of knowledge given above. Since the decision in *Leary*, each of the federal circuits has adopted the Model Penal Code definition.[101]

4.97 However, in conspiracy cases, the lower courts have responded in different ways to the decision in *Leary*. There are differences of opinion over whether the 'wilful ignorance' notion should be used freely, or only rarely, and differences over the evidentiary standards for, and relevance of, a finding of deliberate ignorance or wilful blindness.[102]

4.98 It has been held by one circuit court that 'wilful blindness' can be used as proof that D 'knew' the nature of the unlawful goals of the conspiracy, but that it cannot also amount to proof that the intention to further the goals was present at time of the conspiracy.[103] However, it has been held by another circuit court that 'wilful blindness' can be used as proof of *both* knowledge and intention.[104] Under a third approach, the 'wilful blindness' test is appropriate only when D denies knowledge of relevant facts, and when he or she engaged in deliberate acts to avoid knowledge of that fact.[105]

[98] (1899) 174 US 728.

[99] Above, 735.

[100] (1969) 395 US 6.

[101] (1986) *US v Picciandra*, 788 F 2d 39; (1978) *US v Restrepo-Granda*, 575 F 2d 524; (1976) *US v Jewell*, 532 F 2d 697; (1974) *US v Olivares-Vega*, 495 F 2d 827. In *US v Jewell*, the court found support for its approach in the work of Professor Perkins, *Criminal Law* (2nd ed 1969), p 776, where he says, "One with a deliberate antisocial purpose in mind … may deliberately 'shut his eyes' to avoid knowing what would otherwise be obvious to view. In such cases, so far as criminal law is concerned, the person acts at his peril in this regard and is treated as having 'knowledge' of the facts as they are ultimately discovered to be." See Professor Kozlov-Davis, "A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases" (2001-2002) 100(2) *Michigan Law Review* 473.

[102] See the discussion by Professor Kozlov-Davis, "A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases" (2001-2002) 100(2) *Michigan Law Review* 473, 477.

[103] (2000) *US v Ferrarini*, 219 F 3d 145.

[104] (1993) *US v Investment Enterprises Inc*, 10 F 3d 263.

[105] (2000) *US v Delreal-Ordones*, 213 F 2d 1263.

4.99 This third approach is the most restrictive of the three. Its function has been said to be to alert the jury to the fact that the act of avoidance may (ironically) be motivated by a sufficient guilty knowledge to satisfy the requirement that D 'knew' the unlawful goals of the alleged conspiracy.[106] The motivating force behind the adoption of the third approach is to avoid jury confusion between knowledge and recklessness.[107]

ENGLISH COURTS

4.100 In *Westminster CC v Croyalgrange Ltd*,[108] Lord Bridge said that so far as the relationship between knowledge and wilful blindness is concerned:

> … it is always open to the tribunal of fact, when knowledge on the part of the defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not want to have his suspicions confirmed.[109]

4.101 This resembles the first approach outlined in paragraph 4.98 above, and is broadly consistent with the approach of Lord Brown and Lord Hope in *Saik*. However, as Professor Simester and Professor Sullivan have said of the doctrine of wilful blindness "The conditions under which the doctrine applies are not capable of being stated precisely … the line between wilful blindness and recklessness is a fine one".[110] Indeed, English courts have sometimes endorsed what looks like the more restrictive third approach in paragraph 4.99 above.[111]

4.102 We suggest that the reason for the lack of certainty is that, as Professor Simester and Professor Sullivan suggest, the wilful blindness doctrine "*imputes* knowledge to the defendant for legal purposes, where there is not, in fact, such knowledge".[112] We do not believe it to be sound policy to impose a requirement of knowledge, as part of the fault element of an offence, but then to permit knowledge to be imputed in certain circumstances.

4.103 As we have already said, in our view whilst wilful blindness may be evidence of knowledge it is not to be equated with it. At best, wilful blindness can be equated with a *belief* that the goal of a conspiracy is an unlawful one. Much more probably, 'wilful blindness' will be a kind of recklessness.

4.104 The terms 'knowledge' and 'belief' are often used in conjunction, because they are interrelated: knowledge is predicated on belief. That does not mean that they can be identified with one another. As Professor Shute has argued, a belief cannot be classed as knowledge until:

[106] Professor Kozlov-Davis, "A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases" (2001-2002) 100(2) *Michigan Law Review* 473, 480.

[107] Above.

[108] [1986] 1 WLR 674.

[109] Above, at 684.

[110] A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) p 143.

[111] *Ross v Moss* [1965] 2 QB 396.

> (a).. the proposition forming the subject matter of the belief is true, ... [b] the person whose belief it is, must be justified in holding that belief …[and c] the person who holds the belief … must have a degree of commitment to her belief over and above the belief *per se.* [113]

4.105 The experience of the American courts seems to us to show that, tempting though it may be to do so, once courts treat some kinds of belief as knowledge, confusion and uncertainty will be the result.

4.106 Having said that, for some consultees, the reading given by Lord Hope and Lord Brown to section 1(2) of the 1977 Act may be an attractive one in terms of law reform. There is a need to have stringent and narrow fault elements in the law of conspiracy, but not as restricted or narrow as in section 1(2). So, restricting the circumstance fault element to a minimum of belief that the circumstance will obtain, could be a way of meeting this need. This possible reform is considered below as an alternative to our provisional proposal.[114]

Is section 1(2) too narrow?

4.107 As a matter of statutory interpretation, on the facts the correct conclusion was reached by the majority of the House of Lords in *Saik*. As Lord Nicholls noted, "[a] decision to deal with money suspected to be the proceeds of crime is not the same as a conscious decision to deal with the proceeds of crime".[115] Only the latter behaviour is prohibited on the correct construction of section 1(2).

4.108 However, in our view, this reading of section 1(2) renders the offence unacceptably narrow. If the prosecution have to prove in every case that, at the time of the agreement, the parties actually knew or intended that the relevant facts or circumstances existed, then the law is too generous to those who plan to engage in conduct that may well be criminal. It does not extend to highly blameworthy behaviour that we believe should be encompassed within the offence of conspiracy:

Example 4D

D1 and D2 agree to have sexual intercourse with an acquaintance, V. They harbour a hope that V will consent, but realise that she will probably not do so. They intend to go ahead regardless.

[112] A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) p 144 (emphasis added).

[113] Stephen Shute "Knowledge and Belief in the Criminal Law" in A P Simester and S C Shute (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) p 171.

[114] See paras 4.136 to 4.144 below.

[115] [2006] UKHL 18, [2007] 1 AC 18 at [32].

On such facts, it will not always be possible to prove beyond reasonable doubt that D1 and D2 *knew* that V would not consent, in part because the circumstances in which consent could be given have not arisen at the time of their agreement.[116] Further, D1 and D2 do not intend a lack of consent. It is not their purpose to have non-consensual sex, as such, and they do not foresee the absence of consent as a virtual certainty. They simply intend to have sex (regardless of consent) rather than non-consensual sex. A lack of consent is not integral to their plan. Consequently, following the majority view in *Saik*, they do not fulfil the requirements of section 1(2).

4.109 Having said that, D1 and D2 in this example are prepared to go ahead with the plan, even if it turns out that V does not consent. At the time of agreeing to go through with the conduct element of the offence (sexual intercourse), they have a reckless disregard for consent (the circumstance element). In our provisional view, this should be sufficient as a basis for holding them liable for conspiracy to rape.

4.110 In *Saik*,[117] Baroness Hale sought to reach this conclusion whilst insisting that D1 and D2 in the example under discussion do intend to rape.[118] Her analysis depends for its success on accepting that D1 and D2 'conditionally' intend to rape; that is, they intend to have non-consensual sexual intercourse should V not, in fact, consent to the intercourse. This approach was not adopted by the majority in *Saik*, and in Part 5 we give our reasons for endorsing the approach of the majority.

4.111 A second situation in which it ought to be possible to find that a conspiracy exists, but where one cannot be established unless the intention or knowledge requirement is relaxed, is illustrated by the following example:

Example 4E

D1 agrees to supply D2, who runs an antique shop, with antiques on the express understanding that some of them may be fakes. D1 and D2 both anticipate that D2's customers will buy the items on the strength of D2's representations as to their authenticity (D2 plans to sell all the goods he receives from D1 as genuine antique furniture). The profits from sales are to be shared between D1 and D2. D2 operates a 'don't ask, don't tell' policy, so that the authenticity of the antiques is not to be further discussed between D1 and D2. D2 therefore will not know if any given lot he will receive from D1 contains fake items.

[116] There will be some cases in which a knowledge requirement as to lack of consent at the time of the offence could clearly be satisfied, as when D1 and D2 agree to have intercourse with someone they know to be incapable of giving consent.

[117] [2006] UKHL 18, [2007] 1 AC 18.

[118] Above, at [99].

D2 is reckless as to the origins of the property he plans to sell to his customers. Section 2 of the Fraud Act 2006 provides for an offence of fraud by false representation, and states that it is sufficient if the person making the representation knows that it "might be" untrue or misleading.[119] However, D2 will not be guilty of the substantive offence of fraud by false representation until such time as he actually makes a representation dishonestly to a customer that an item is an antique when it is not, being reckless whether the representation was true or false. Moreover, he is certainly not guilty of conspiracy with D1 to commit fraud by false representation. This is because, on the interpretation of the majority in *Saik,* he does not 'intend or know' that items or lots sold will be a fake antiques. It was not D2's purpose, as such, to sell fake antiques on any given occasion.

4.112 Yet, in making the arrangement, D1 and D2 accept that, if need be, one result of their activities is that a customer will be sold a fake antique as if it were genuine. That being so, it should be possible to describe the arrangement between D1 and D2 as a conspiracy to commit fraud by false representation. The offence of conspiracy should be broad enough to encompass the activities of D1 and D2 in that respect.[120]

Provisional proposal

4.113 We provisionally propose that:

> **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 circumstance is required by the substantive offence).**

The definition of recklessness

4.114 In that regard, we have in mind the definition of recklessness given by Lord Bingham in *G*:

> A person acts recklessly … with respect to –
>
> (i) a circumstance when he is aware of a risk that it exists or will exist…
>
> and it is in the circumstances known to him, unreasonable to take the risk.[121]

[119] See s 2(2)(b).

[120] D1 and D2 also act dishonestly. In example 4E the requirement of dishonesty on the charge of conspiracy will overlap to a degree with the requirement of recklessness as to the origins of the property. We also note that it is possible that D1 and D2's agreement is a conspiracy dishonestly to fail to disclose information they are under a legal duty to disclose, contrary to s 3 of the Fraud Act 2006. It may be possible to prove that they did 'intend or know' that they would fail to disclose to would-be purchasers that items might not be antiques. This is as much a matter of convenient coincidence as anything else.

[121] *G* [2003] UKHL 50, [2004] 1 AC 1034 at [41].

4.115 There are two aspects to this definition. The first is that D must, at the time that the agreement is reached with fellow conspirators, be aware of a risk that the circumstance element would exist when the conspiracy was put into effect. The second is that in the circumstances known to D1 and to D2, it is unreasonable to (agree to) take the risk in question.

FIRST REQUIREMENT

4.116 This first requirement means that the defendant in a case such as *Saik* would be convicted of the conspiracy to launder the proceeds of crime if (as in *Saik*) he or she admitted suspecting that the money he or she was to handle would be, in whole or in part, the proceeds of crime. A suspicion involves an awareness of risk, however fleeting, and thus satisfies the first part of the definition of recklessness just given.

4.117 This requirement would also mean that, in example 4D, where D1 and D2 agree to have sexual intercourse with V whether or not she consents to it, D1 and D2 are guilty of conspiracy to commit rape. Similarly, in example 4E, D1 and D2 would be guilty of a conspiracy to commit fraud by false representation. In both these examples, D1 and D2 are aware of the risk that the relevant circumstance (lack of consent, the goods being fake antiques) may or will exist, and yet they still agree to perpetrate the relevant conduct element (sexual intercourse, selling the goods). This awareness makes them in principle reckless in agreeing to take that risk.

4.118 A further example is the offence of sexual activity with a child.[122] It is an offence for A to touch B, where the touching is sexual, B is under 16 and A does not reasonably believe that B is 16 or over:

Example 4F

D1 and D2, both 15, agree to wait for V (with whom they are infatuated) to emerge from school, to ask her if she is willing to pose for them whilst she is naked, and then photograph her.[123] Both assume that V is at least 16, although they ought to know that she is in fact 15. D1 and D2 subsequently lose their nerve and do not wait for V to come out of school.

In this example, at the time of the agreement D1 and D2 possess the fault element for the substantive offence, in that (we have assumed) although they believe that V is 16 they do not have an adequate reason for assuming this. Nonetheless, our provisional view is that they should not be convicted of a conspiracy to engage in sexual activity with a child, unless they were reckless as to V's true age at the time of the agreement. The tribunal of fact should have to be satisfied that they were aware at the time of the agreement that V might be under the age of 16 when the posing for photographs was to take place.[124]

[122] Contrary to Sexual Offences Act 2003, s 9.

[123] See, eg, *Sutton* (1978) 66 Crim App R 21.

[124] It must also be unreasonable to agree to do as they intended to do, given that awareness.

SECOND REQUIREMENT

4.119 As noted above, the second requirement is that, in the circumstances known to D1 and to D2, it is unreasonable to (agree to) take the risk in question.[125] In many conspiracy cases, it will not be difficult to satisfy this requirement. It is, for example, clearly unreasonable to take a risk that V will not consent to sexual intercourse. However, in other cases, it will be a question of degree, and the burden will be on the prosecution to show that the risk of which D1 and D2 were aware was an unreasonable one to take. It would be helpful to provide a contrast between two examples.

4.120 On the one hand, the facts of *Saik* provide an illustration of a risk it was clearly unjustified to take, the risk being that the money being handled was the proceeds of crime. *Saik* had been buying large quantities of $100 bills and shortly thereafter exchanged $8m. Surveillance revealed him to be talking to another of the alleged conspirators in a car in streets surrounding his bureau (rather than in the bureau), where sacks of sterling were also seen. It is hardly surprising that he admitted to a suspicion that the money was the proceeds of crime. It was, surely, wholly unjustifiable for him, in agreeing to handle the money, to have taken the risk that it was the proceeds of crime.

4.121 By contrast:

Example 4G

D1, a bank manager agrees with D2, a customer, to set up a second account and deposit a large sum of money. D1 is aware that D2 has, for many years, not had much money and is suspicious of such a large deposit. Despite this, D1 believes that it right to give D2 the benefit of the doubt, and so he creates the account.

In this example, other things being equal, it seems perfectly justified for D1 to take the risk that D2 may launder money through the account.

4.122 It may be helpful to provide a further contrast, this time with the example of the fraudulent antique dealers (example 4E). In example 4E, we believe that the tribunal of fact would have no difficulty concluding that, in the circumstances, there was no justification for agreeing to take the risk that the goods to be sold would be fake antiques. Contrast that example with the following example:

[125] The question whether the risk is an unjustifiable one to take is an objective one for the tribunal of fact. Although, to be found reckless, he or she must (as we have just said) be aware of the risk, D need not additionally him or herself be found to have realised that the risk was an unjustified one to take.

Example 4H

D1 and D2 are art dealers, who agree to specialise in paintings by a famous artist whose work has over hundreds of years been much copied with a view to passing the copies off as originals. They believe they have the expertise to spot fakes, and would never knowingly sell one, but realise that there will be a risk (as there always has been) that a copy will be sold as if it were genuine. However, in the case of this artist they believe that it has always been 'buyer beware', so as long as they are satisfied that a painting is genuine they do not intend to take further measures to alert potential buyers to the risks.[126]

In this example, it is strongly arguable that the risk D1 and D2 have agreed to take is a perfectly justifiable one to take. Their agreement is therefore unlikely to be regarded as a conspiracy to commit fraud by a dishonest failure to disclose information they are legally bound to disclose.

4.123 In between such examples there will, of course, be less clear-cut cases. Here, the good sense of prosecutors in deciding whether there is a sufficient degree of fault or a public interest in prosecution, and of tribunals of fact when they consider such cases, must sift out those cases that fall on one side of the line or the other. It must be kept in mind that the prosecution bears the burden of proof beyond reasonable doubt in relation to the issue of a lack of justifiability in risk-taking.

Comparison with the approach in the Serious Crime Bill

4.124 We are reinforced in our conclusion that a requirement of recklessness is the right approach to the fault element in relation to the circumstance elements, by the approach that the Serious Crime Bill has taken in relation to such a fault element on a charge of assisting or encouraging crime. Where the allegation is that D has committed an inchoate offence of assisting or encouraging crime, clause 45 of the Bill provides in relation to the fault element that:

> In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence –
>
> (b) if the offence is one requiring proof of particular circumstances … it must be proved that –
>
> (i) D believed that, were the act to be done, it would be done in those circumstances …, or
>
> (ii) D was reckless as to whether or not it would be done in those circumstances … .

[126] As we said in relation to example 4E discussed in paragraph 4.111, an issue of dishonesty arises in relation to this example. The same considerations that point towards an absence of dishonesty on the part of D1 and D2 also point towards the conclusion that they are not reckless in taking a risk that a copy will be sold as if it were genuine.

4.125 The following example illustrates this point:

Example 4J

D hears that P is intending to persuade V to have sexual intercourse with him (P) whether V consents or not. Knowing that V is unlikely to consent, but wishing to ensure that P is successful, D provides P with a 'date rape' drug. In the event, P never approaches V.

In such circumstances, D can be convicted of the inchoate offence of assisting rape under the Serious Crime Bill. He can be convicted, because although he does not necessarily have the state of mind in clause 45(5)(b)(i) above, he has the state of mind in clause 45(5)(b)(ii). In other words, although D does not believe that sexual intercourse between P and V *will* take place without V's consent, in providing his assistance D is reckless as to whether it will. Such recklessness is sufficient for the fault element of the inchoate offence under clause 45.[127]

4.126 The approach taken in clause 45 casts the net of criminal liability wider than we recommended in our report on inchoate liability for assisting and encouraging crime.[128] In that report, we recommended that, to be liable for assisting or encouraging crime in a case where the crime had a circumstance element, D would have to believe that the conduct element *would* be done with the circumstance element present.[129] Our more restrictive approach to the fault element would have meant that, in example 4J, the prosecution would have to prove that D believed that V would not be consenting to intercourse with P. It would not be enough that D merely thought it unlikely that V would consent.

4.127 Clearly, we could also adopt that restrictive approach in relation to the circumstance fault element for conspiracy but we are not now proposing to do so.

4.128 Our provisional view is that it would be anomalous if the fault element in relation to circumstance elements differed as between the inchoate offences of assisting and encouraging crime and conspiracy. The facts of *Anderson* (paragraph 4.26 above) show how easily some defendants collaborating closely in the preparation of criminal offences may fall into one category (assistors or encouragers), whilst other defendants fall into the other category (conspirators). If the Serious Crime Bill becomes law, it would be undesirable for the circumstance fault elements in relation to each of the crimes to differ widely, as the circumstances in question and the risk of their occurrence may be the same whichever offence is in issue.

4.129 Further, it is our provisional view that it would be wrong to make the fault in relation to the circumstance element differ as between conspiracy and attempt. Consider the following example:

[127] To be guilty, D will also have to proved to have been reckless as to whether P will act with the fault element for rape.

[128] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

[129] See para 4.137 below for the relevant provision from our Bill.

Example 4K

D1, D2 and D3 agree that they will try to kidnap a young person for sexual purposes, but cannot agree on whether it should be a boy or a girl. D1 and D2 think it should be a boy whereas D3 thinks that it should be a girl. D3 makes it clear that he wants no more part in the plan. D1 and D2 resolve to kidnap the young son of D1's neighbour but do nothing further. D3 goes on to try to force intercourse on a young girl. D1 and D2 believe that the neighbour's son is 15, and D3 believes the girl he is trying to kidnap is 15. In fact, both children are 12 years old.

The substantive offence relevant to this example is section 5 of the Sexual Offences Act 2003, which makes it an offence to rape a child under 13. The circumstance element of this offence is the age of the child. The question in D1 and D2's case is whether there was a conspiracy to rape a child under 13 years old. The question in D3's case is whether there has been an attempt to rape a child under 13.

4.130 We believe that it would be wrong if either D1 and D2 were in a more favourable position, or D3 was in a more favourable position, so far as the fault requirements in relation to the relevant circumstance element (V's age) are concerned. We do not believe that any consideration of principle or policy dictates that there be differentiation between the two in that regard.[130] We note that recklessness has provided a satisfactory resolution as to the question of the appropriate fault element in relation to circumstances in at least one other jurisdiction that has considered the issue.[131] Our provisional view is that the circumstance fault element for both conspiracy and attempt should be recklessness.

4.131 An alternative way to achieve consistency between conspiracy and attempts would be to require proof, for both conspiracy and attempt, of the fault element (if any) for the substantive offence, even if the fault element is 'objective' in character, such as absence of a reasonable belief. We have asked consultees to consider this approach in question 2[132] which we will discuss further below.[133] However, this is not our proposal.

4.132 As we have indicated, our proposal is that the fault requirement in relation to a circumstance element, on a charge of conspiracy, should be recklessness as to whether that circumstance will exist at the time of the offence, unless the substantive offence requires a higher degree of fault in that respect.

[130] We do not accept that the possibly greater degree of remoteness in point of time from the substantive offence involved when conspiracy is in issue, as compared with attempt, justifies a different approach to fault in relation to the circumstance element. See, further, J R Spencer, "Conspiracy and recklessness" [2005] *Cambridge Law Journal* 279.

[131] Canadian Law Reform Commission, *Re-codifying Criminal Law*, Report 31, recommended that recklessness as to circumstances suffice for any crime with a fault element of purpose or knowledge.

[132] See para 4.5 above.

[133] See paras 4.145 to 4.149 below.

PROPOSAL 4: FAULT AS TO THE CIRCUMSTANCE ELEMENT HIGHER THAN RECKLESSNESS

4.133 We are proposing that recklessness as to the existence of a circumstance element should be a minimum fault requirement on a charge of conspiracy. What if the substantive offence itself requires a higher (more culpable) fault element? This can be shortly dealt with. An example is provided by the offence of handling stolen goods, where the substantive offence requires knowledge or belief that the goods handled are actually stolen.[134]

4.134 The quality of 'being stolen' is a circumstance element. That does not mean that, in accordance with our general policy, on a charge of conspiracy to handle stolen goods recklessness as to whether they will be stolen should suffice as proof of fault in relation to the circumstance element of 'being stolen'. The prosecution should not be better placed, so far as proof of fault is concerned, in relation to a charge of conspiracy than they are in relation to charging the substantive offence. If it seems unduly demanding that the prosecution should have to show, in relation to the conspiracy charge, that D1 and D2 knew or believed that the goods would be stolen, the fault lies with the stringency of the fault requirements of the substantive offence.

Provisional proposal

4.135 We provisionally propose that:

> **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,[135] 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**.

QUESTION 1: SHOULD FAULT IN RELATION TO THE CIRCUMSTANCE ELEMENT BE NARROWER THAN RECKLESSNESS?

4.136 We recognise that, if our proposal is adopted, some consultees may not consider the consequent breadth of the offence of conspiracy to be desirable. They may believe that a stricter fault element in relation to circumstances is warranted for an offence so far removed from the commission of the substantive offence. As indicated above, this was the approach that we took in our recommendations for the introduction of inchoate offences of assisting or encouraging crime.

4.137 In relation to the fault element for the inchoate offences of assisting or encouraging crime, clause 1(3) of our draft Bill contained the following recommendation:

> If particular circumstances … must be proved for conviction of the principal offence, a person is not guilty of an offence under this section unless –

[134] Theft Act 1968, s 22(1)

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

(a) he intends the criminal act to be done –

(i) in those circumstances…or

(b) he believes that, were another person to do the criminal act, that person would do it –

(i) in those circumstances … .

4.138 In short, we were recommending that when providing the acts of assistance or encouragement for an offence with a circumstance element, D must intend that the perpetrator commit the offence in the circumstances in issue, or believe that the perpetrator would commit it in those circumstances. This recommendation was in line with the position we took over twenty-five years ago, in relation to the circumstance fault element for both attempt and conspiracy.[136]

4.139 We indicated earlier that, in *Saik*, Lord Hope and Lord Brown interpreted the existing law of conspiracy to require a kind of fault in relation to a circumstance element along very similar lines.[137] They thought that where D agreed with another person to handle money and turned a blind eye to whether the money was the proceeds of crime, this could be a state of mind that satisfied the requirement of 'knowledge' in section 1(2) of the1977 Act. As a matter of law, we disagreed with that interpretation. The question is whether it provides an attractive basis for reform of section 1(2).

4.140 In our report recommending an offence of assisting or encouraging crime, we justified a narrow fault element in relation to circumstances, at least a belief that the circumstances *would* exist, by a comparison with the offences of conspiracy and attempt:

> When D1 and D2 conspire to commit an offence, they agree on a joint criminal enterprise. Together, they engage in conduct that is, as in the case of an attempt to commit a crime, designed to lead eventually to the commission of an offence. By way of contrast, in the case of encouraging or assisting crime, D's own conduct relates to the separate conduct of another person who is to commit the offence. That conduct is not agreed upon and does not necessarily involve D's future participation. Therefore, there is a sense in which liability for encouraging or assisting crime is at least "twice removed" from the commission of the crime itself. It is inchoate liability … but, by way of contrast with conspiracy and attempt, it also necessarily relates to the separate conduct of another person. The fact that offences of encouraging or assisting crime are "twice removed" from the commission of the principal offence is what makes an uncompromisingly narrow fault element essential.[138]

[136] Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, paras 214 to 218.

[137] See paras 4.85 to 4.90 above.

[138] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 5.116 to 5.117.

4.141 A conspiracy to commit an offence, like an attempt to commit it, is 'once removed' from the substantive offence in the sense that it is removed only in point of time.[139] The inchoate offence of assisting and encouraging crime is 'twice removed' in the sense that, not only is it removed in point of time, but also *necessarily* involves conduct related to the separate activities of another person.

4.142 Bearing in mind this justification for distinguishing between the inchoate offence of assisting and encouraging, and the offences of conspiracy and attempt, we believe that recklessness in relation to a circumstance element is the right minimum level of fault, unless it is insufficient for the substantive offence.

4.143 However, we invite comment on the suggestion that it should be narrowed, in line with the understanding of the present law set out by Lord Hope and Lord Brown in *Saik*, and with what we recommended in relation to assisting or encouraging crime.

4.144 Our first question for consultees is:

> **Question 1: 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, a conspirator believed that the offence *would* take place in the specified circumstances?**

QUESTION 2: SHOULD THE CIRCUMSTANCE FAULT ELEMENT BE THE SAME FOR CONSPIRACY AS FOR THE SUBSTANTIVE OFFENCE?

4.145 Our second question for consultees is as follows:

> **Question 2: 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, a conspirator had the circumstance fault element (if any) required by the substantive offence itself?**

[139] It would have been possible to argue that conspiracy was 'twice removed' from the offence, and attempt only 'once removed', had the law retained the qualitative distinction between them in the form of a requirement that, in attempt, D have done the last act that he needed to do to commit the offence. With the demise of that requirement, and the institution of the test that D's acts need only be 'more than merely preparatory', there is no longer such a clearly qualitative distinction between the ways in which conspiracy and attempt are removed from the completed offence. It is conceivable that even the forming of a conspiracy may be a 'more than mere merely preparatory act', in some circumstances, as when the commission of the crime is imminent in any event.

4.146 As we have indicated, our provisional proposal that the minimum fault requirement in relation to a circumstance element should be recklessness is founded on respect for the 'remoteness' principle. According to this principle, offences relating to the primary harm, but remote from its commission, should have demanding (meaning 'subjective') fault requirements. They should have such fault requirements, because they may involve ostensibly innocent conduct made criminal only because of the offenders' state of mind. The concern is that the criminal law's net will be cast too widely if ostensibly innocent conduct can too easily be rendered criminal by a judgement, after the fact, that there was objective fault (such as negligence) at the time the conduct was engaged in.

4.147 However, we recognise that this is not an uncontroversial proposal. Whilst some consultees may feel that the way in which we seek to satisfy the remoteness principle, through insistence that recklessness be shown in relation to circumstances, still casts the net too wide, other consultees may feel that it does not cast the net wide enough.

4.148 In particular, we recognise that one approach to this issue is to say that the fault requirement for the circumstance element should be the same for conspiracy as it is for the substantive offence. We saw above that Professor Ashworth argued that it would be 'absurd' to have one kind of fault requirement in relation to the circumstance element for attempted rape, and another kind in relation to the substantive offence of rape.[140] There is a very large range of offences that can be committed with no fault element as to circumstances, or a less demanding fault element than recklessness. Accordingly, it may seem as if the only way to avoid this supposed absurdity, is to permit the fault requirement for circumstance elements to vary with the requirements of the individual offence.

4.149 We argued above that there is in fact no necessary absurdity in insisting on a more demanding fault element for inchoate offences than for substantive offences. However, it can be argued that the alternative approach now under discussion, permitting the fault requirement for circumstance elements to vary with the requirements of the individual offence, makes for much greater simplicity in point of proof as well as for consistency between offences.

The analogy with the fault element in attempts to commit crimes

4.150 On a charge of criminal attempt, it must be shown (amongst other things) that D acted 'with intent to commit the offence'.[141] However, it has been clear for some years that this does not necessarily mean that D must intend that each and every one of the external elements of the offence comes about. In broad terms, the law draws a distinction between the conduct or consequence (if any) elements, and the circumstance (if any) elements of an offence.[142] Whereas, in any criminal attempt, the conduct or consequence elements must be intended, it will suffice if D has the fault requirement respecting any circumstance element for the substantive offence.

[140] See para 4.60 above.

[141] Criminal Attempts Act 1981, s.1(1).

[142] For a discussion of the approach in which the elements are distinguished in understanding the fault element, see R A Duff, *Criminal Attempts* (1996) pp 10 to 16.

4.151 An example is provided by the case of *Khan*.[143] The defendant was charged with attempted rape. The question arose whether such a charge required proof that the defendant intended to have *non-consensual* intercourse, since lack of consent was part of the definitional element of the crime of rape. The Court of Appeal decided that there was no such requirement. It was held that a man has an intention to commit rape, for the purposes of the wording 'with intent to commit an offence' in the Criminal Attempts Act 1981, if he intends to have sexual intercourse, being reckless whether V consents. As Smith and Hogan remark, had the Court held that D must intend the intercourse to be non-consensual:

> in practical terms it would be virtually impossible to prove that D intended that the person with whom he had intercourse did not consent. The valuable protection offered by the offence of attempt would be severely curtailed.[144]

4.152 In effect, for the purposes of the law of criminal attempt, the decision in *Khan* draws a distinction between conduct (or consequence) elements, and circumstance elements. The former, in this case the sexual intercourse, must be intended. So far, the case is consistent with our provisional proposal 3 for the law of conspiracy. By way of contrast, the latter, in this case the absence of consent to the intercourse, involves proof of whatever fault requirement (if any) is stipulated by the substantive offence. So, in this case, at least at the time *Khan* was decided, the prosecution had to show that D was reckless as to this circumstance element, namely the absence of V's consent.

4.153 On this approach, as the modern law of rape requires proof in relation to the circumstance fault element of no more than an absence of reasonable belief that V will consent or is consenting, proof of that should suffice on a charge of attempt. It should no longer be necessary to show that D was reckless whether V would consent. This approach, permitting the circumstance element to vary with the particular requirements of the substantive offence, is the approach taken in attempts cases under the American Model Penal Code.[145]

4.154 This approach to the fault requirement respecting circumstance fault elements on a charge of criminal attempt was approved (obiter) in *Attorney-General's Reference (No 3 of 1992)*.[146] The Court of Appeal said that, 'in order to be guilty of an attempt, [D] must be in one of the states of mind required for the commission of the full offence'.[147]

4.155 The approach is also defended by some academics. Professor Duff argues that:

[143] [1990] 2 All ER 783. See the discussion at para 4.58 above.

[144] Smith and Hogan, *Criminal Law* (11th ed 2005) p 404.

[145] American Law Institute, Model Penal Code and Commentaries (1985) Pt 1, pp 301 and 302, commentary to §. 5.01.

[146] [1993] 2 All ER 121.

[147] Above, 126. It is worth noting, however, that the Court of Appeal speaks in terms of 'states of mind' required for the full offence. This suggests that the Court of Appeal might take a different view if the question is whether D can be found to have attempted a strict liability offence, unaware of the possible existence of the prohibited circumstances: see the discussion of example L at para 4.157.

> The doctrine that attempts should require only the fault element which the complete offence requires as to aspects of the offence for which intention is not required … is … surely right: if the agent would be guilty of a complete offence if he succeeded in doing what he intends to do, he should be guilty of an attempt if he fails.[148]

4.156 It would be possible to take the same approach to the law of conspiracy. This would mean that not only in example 4D above[149] but also in example 4C above,[150] D1 and D2 would be guilty of conspiracy to rape. In both instances, they ought to know that V may not consent, even though only in example 4D were they actually aware of this possibility.

4.157 Here is a further example of how this alternative approach would work, in a case where there is no fault requirement respecting a circumstance element:

Example 4L

D1 and D2 (aged 16) agree to have consensual intercourse with V (aged 12). D1 and D2 reasonably believe that V is aged 16 and therefore old enough to consent. They subsequently abandon their plan.

4.158 In this example, under our proposal 3, D1 and D2 would not be guilty of a conspiracy to rape a child under 13, contrary to section 5 of the Sexual Offences Act 2003, unless, in reaching their agreement, they took a reckless risk that V might be aged under 13. However, under the approach presently being discussed, they could be convicted of a conspiracy to rape a child under 13. This is because the substantive offence created by section 5 does not require any fault to be shown respecting the circumstance element (V's age).

4.159 The advantage of this approach is that it makes for simplicity when a completed offence, on the one hand, and a conspiracy or an attempt to commit that offence, on the other hand, are being charged in the same proceedings. In such cases, the prosecution will not have to prove subjective fault in relation to the conspiracy or attempt, when they do not have to prove such fault in relation to the substantive offence.

4.160 However, our provisional view is that this is not an advantage that outweighs the importance of paying regard to the remoteness principle. We agree with the late Professor Sir John Smith when, relying as we do on the importance of the remoteness principle, he said that the approach currently under discussion 'goes too far'.[151] It was for this reason that, in the Draft Criminal Code, we said (in relation to attempts):

[148] R A Duff, *Criminal Attempts* (1996) p 26.

[149] See para 4.108 above.

[150] See para 4.57 above.

[151] Professor J C Smith, "Attempts, Impossibility, and the Test of Rational Motivation" (1984) *Auckland Law Review* 25.

an intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.[152]

[152] Clause 49(2).

PART 5
CONDITIONAL INTENT IN CONSPIRACIES

INTRODUCTION

5.1 The Oxford dictionary defines a 'condition' as 'a stipulation; something upon the fulfilment of which something else depends'. An intention can be conditional in this sense. D can intend to act only if something else occurs or only in certain circumstances. The important question for legal purposes is whether a conditional intention should sometimes or should always be treated as an intention to commit an offence.

5.2 In this Part we examine the relevance of 'conditional' intention to the law of conspiracy. We provide examples of conspirators who we consider can properly be shown to have acted on a conditional intent.

5.3 We also address those cases where there is an agreement to engage in conduct 'even if' it involves committing a crime. Such conspiracies have sometimes been construed as examples of conditional intention so that the requirement of the current law, which requires intention (or knowledge) as to the circumstance element of the substantive offence, is satisfied. However, we consider that these examples are not true instances of conditional intention, but that the parties are in fact reckless. We believe that if our proposal, that the fault requirement for the circumstance element in conspiracy should be replaced by a test of recklessness, is adopted then there will no longer be any need to artificially construe such cases as demonstrating conditional intent.

CONDITIONAL INTENT IN CONSPIRACY[1]

The basic principle: a conditional intent satisfies the fault element

5.4 The issue of conditional intent arises most clearly in cases (conspiracy cases being a prime example) where D has time and opportunity to settle on an intention as to future conduct: to make a decision about what to do at a later point.[2] In such cases, D may set for him or herself, or for others, conditions under which he or she, or the others, are or are not to engage in criminal conduct.

5.5 For example:

Example 5A

D1 and D2 agree to burgle a house, provided the owner is not present.

[1] Our stance on conditional intent in assisting and encouraging is detailed in our report, Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 5.122 to 5.126.

[2] The contrast here is with intention 'in action': see eg Michael Bratman, *Intention, Plans and Practical Reason* (1987) pp 111 to 138; John Gardner and Heike Jung, "Making Sense *of* Mens Rea: Antony Duff's Account" (1991) 11 *Oxford Journal of Legal Studies* 559.

Example 5B

D1 and D2 agree that they will cause explosions in the event that a ceasefire does not continue.[3]

However, the simple fact that there are conditions under which an intent will not be carried out does not in itself make that intent a 'conditional' intent. For example, a professional assassin who has agreed to kill someone may readily concede that the killing will only go ahead if, when the time comes, he or she has not by then decided to give up a life of crime. This does not make his or her intent to kill truly 'conditional'.[4]

5.6 Suppose someone consciously sets for him or herself a set of circumstances in which a criminal intention will or will not be carried out. Even then, that fact will rarely lead to the conclusion that this 'conditional' intention, if such it truly is, should not be regarded as an intention to commit the offence. In relation to the offence of conspiracy contrary to section 1(1) of the Criminal Law Act 1977, Lord Nicholls expressed the point in *Saik* as follows:

> 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 a conspiracy to rob. … Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside section 1(1).[5]

5.7 We agree with this robust approach to 'conditional' intention in conspiracy cases. We therefore agree 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.

[3] The facts of this example are based on *O'Hadhmaill* [1996] *Criminal Law Review* 509.

[4] See Gideon Yaffe, "Conditional Intent and *Mens Rea*" (2004) 10 *Legal Theory* 273, 276 to 277: "Intentions that are in various ways subject to conditions are not thereby conditional intentions … .For instance, for almost every intention there is some condition such that if it were to obtain the agent would not do the intended action. We almost never intend to do something *no matter what*."

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

Applying the basic principle to attempt cases

5.8 It should not normally make a difference whether conditions are factual (as in Lord Nicholls' example in paragraph 5.6 above) or evaluative.[6] So, if D1 and D2 agree to kill V, 'if he is as obnoxious towards us tomorrow as he was today', that is a conspiracy to murder even though the condition upon which the carrying out of the conspiracy depends is an evaluative one.[7]

5.9 In that regard, our view casts doubt on the Court of Appeal's approach to conditional intention in cases of criminal attempt, cases that may be relevant to conspiracy cases because there is the same requirement for intention in each.

5.10 In *Husseyn*,[8] the Court of Appeal indicated 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'.[9] The decision in *Husseyn* meant that, if D broke into a car searching for something of value to steal but found nothing, he or she would have to be acquitted of an attempt to steal. The decision has been much criticised and has effectively been sidelined, but it has not been overruled.[10]

5.11 In our view, the decision in *Husseyn* is not only inconsistent with *Saik,* but it was also undesirable. We believe that if D breaks into a car intending to steal if he or she finds something worth stealing, that is an intention to steal. Such an intention is functionally equivalent to the intention of someone who drops a stone off a tall building, saying, 'I intend this stone to hit anyone who happens to be passing below'. Such a person intends to strike someone with the stone, even though he or she may well anticipate that the stone will not hit anybody and even though there is no particular individual that he or she is trying to hit.[11]

5.12 In our view, what has been stated about conditional intention in paragraph 5.7 above is equally applicable to the meaning of intention under the Criminal Attempts Act 1981.

6 Some examples are given by Baroness Hale in *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [97].

7 *O'Hadhmaill* [1996] *Criminal Law Review* 509 may be an example of a case in which the conditions for the fulfilment of the intention were, in part, evaluative. The conspirators agreed to cause explosions, but only if the peace process broke down. That (quite rightly) did not prevent the Court of Appeal finding that there was an intention to carry out the crime when the agreement was made.

8 (1978) 67 Cr App R 131.

9 Above, 132. The condition in question here, 'if I find something worth stealing', has a strong resemblance to what is sometimes called a 'potestative' condition, a condition that is entirely within the control of the person setting it: see Unfair Terms in Contracts (2002) Law Com CP No 166, para 4.133.

10 *Attorney-General's References (Nos 1 and 2 of 1979)* [1980] QB 180.

11 Such a person's fault element is, therefore, different to the fault element of the person who throws a stone over the edge of a tall building realising that it might hit someone below but not caring whether it does. The latter is merely reckless whether or not he or she will hit someone below with the stone.

Conditions said to undermine the existence of a conspiracy

5.13 The approach should be different if the nature of the condition is such as, to use Lord Nicholls words, to 'cast doubt on the genuineness of a conspirator's expressed intention to do an unlawful act'.[12] So, an agreement by D1 and D2 to kill V tomorrow, 'if it seems right then', is unlikely to amount to a conspiracy to murder because no decision has been taken at the time of the agreement to murder V.[13] By way of contrast, in the case where two people agree to steal 'if there is something worth stealing', a decision to steal *has* been taken. That is so, even though the carrying out of that decision is made to depend on a future evaluation of the value of an external element of the offence, the property belonging to another.

5.14 However, there are other cases that might be thought to fall under this heading but which, in our view, should be regarded as conspiracies. A helpful place to start is the relevant provision of the American Model Penal Code:

> When a particular purpose is an element of an offence, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offence.[14]

5.15 The example given in the commentary on this section of the Code runs as follows:

> [I]t would not be an assault with intent to rape, if the defendant's purpose was to accomplish the sexual relation only if the mature victim consented; the condition negatives the evil with which the law has been framed to deal.[15]

This example is one of a general type in which D1 says, 'I agree to engage in this course of conduct, but not if circumstances Y exist'. Another example might be one in which D1 agrees with D2 to sell guns, 'so long as they are not unlicensed'.

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

[13] There is no true agreement or decision, because a key factor provisionally excluded when a genuine agreement or decision to do something is made (the merits of engaging in the conduct in question) are still to be settled, namely whether killing V will be worth it tomorrow. It is conceivable that some examples where the merits of committing the offence have not been completely settled could still amount to criminal conspiracies. An example might be where D1 and D2 agree to kill V tomorrow 'if he makes us angry enough'. In this example, it might be claimed that no decision has been taken to kill V tomorrow because that decision is being made to depend on whether the merits of killing seem compelling to D1 and D2 when enraged. However, *ex hypothesi*, D1 and D2 have agreed that the restraining role of reason will be disregarded should V sufficiently provoke D1 and D2 and that restraining role would ordinarily bear on the merits of killing V at the relevant time. So, in this example, D1 and D2 have settled a key aspect of the merits of killing V the following day, namely that the restraining role of reason should not stand in the way. Accordingly, they can be convicted of a conspiracy to kill V.

[14] § 2.02(6).

[15] Model Penal Code, § 2.02. The example looks odd to English lawyers because of the wide fault element for rape under the Sexual Offences Act 2003. In the example, there would be no need to set a condition unless D was aware that V might not consent, in which case (in English law) D easily satisfies the fault element for rape in any event and the condition-setting is irrelevant.

5.16 In these examples, we believe that D1 should be convicted of conspiracy if he or she was reckless as to whether (in the Code example in paragraph 5.15) V would be consenting, or as to whether (in the example in paragraph 5.15) the guns are unlicensed. Our provisional proposal in Part 4, respecting reform of the fault element for conspiracy, makes it clear that recklessness as to the circumstance elements of such offences (V's consent, the licensing of the guns) will suffice in the sense that it will satisfy the fault element of conspiracy.[16]

5.17 However, it may be that consultees know of examples in which the conditions upon which two or more people 'agree' to engage in criminal conduct are such as to undermine the claim that there was any real intention to engage in that conduct. Therefore we ask consultees:

Question 3: 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?

Must conspirators agree on a course of conduct that 'necessarily' amounts to or involves the commission of a criminal offence?

5.18 The 1977 Act says that a criminal conspiracy is formed only if an agreed course of conduct will 'necessarily' amount to or involve a criminal offence, if carried out in accordance with the conspirators' intentions.[17] Read too literally, this qualification might exclude many cases of conditional intention:

Example 5C

D1 and D2 agree to burgle V's house and, if V resists, to murder V.

Example 5D

D1 and D2 agree to beat V to find out information V has and, if V does not reveal it, to kill him.

In these examples, if the course of conduct on which D1 and D2 are agreed is regarded as the robbery or as the beating (assault), it seems undeniable that murder will not 'necessarily' be committed. If robbery or assault respectively are regarded as the courses of conduct on which D1 and D2 are agreed, then these agreements should not be regarded as conspiracies to murder.[18]

[16] So long, of course, as there is also an agreement to perpetrate the conduct element of the offence.

[17] As we indicated in Part 4, para 4.20 we believe that the word 'necessarily' should be removed from section 1(1) of the 1977 Act.

[18] See the discussion in Smith and Hogan, *Criminal Law* (11th ed 2005) pp 371 to 372.

5.19 However, we believe it is right to regard D1 and D2 as having conspired to murder in these examples. Quite apart from their agreements respectively to rob and to assault V, D1 and D2 have agreed on a *hypothetical* course of conduct (killing V) that will necessarily amount to a criminal offence if carried out in accordance with their intentions. That agreement falls squarely within section 1(1) of the 1977 Act.

5.20 In analogous situations the courts have found conspiracies to commit a crime on a hypothetical set of facts.[19] They have said that there is in effect an agreement on two courses of conduct, respectively (in the examples above) burglary or assault and (hypothetically) murder.[20] This is the right approach, so long as each course of conduct is dealt with in a separate count in the indictment.[21]

5.21 This approach will also be adequate to deal with cases in which D1 and D2 have agreed on an innocent course of conduct but have also agreed that if, in carrying it out, certain circumstances arise they will commit a criminal offence.

5.22 Consider the following two examples:

Example 5E

D1 and D2 agree to question V and, if the questioning reveals that V has 'grassed them up', they agree that they will kill him.

Example 5F

D1 and D2 agree to visit people who have asked them for help in committing suicide. D1 and D2 intend, if possible, to persuade those individuals not to commit suicide. However, if that is not possible, they intend to help them to commit suicide as painlessly as possible.[22]

In these examples, D1 and D2 have agreed on a course of conduct (questioning, counselling against suicide) that is in itself not criminal. However, they have also agreed that, should certain circumstances arise, a further course of conduct should be engaged in that necessarily amounts to a criminal offence (murder, assisting or encouraging suicide). Accordingly, although D1 and D2 only agree to commit a criminal offence under certain circumstances, they can be charged with a conspiracy to commit that criminal offence.

[19] See eg *Jackson* [1985] *Criminal Law Review* 442.

[20] *Attorney-General's Reference (No 4 of 2003)* [2004] EWCA Crim 1944, [2005] 1 WLR 1574, at [14]; *Hussain* [2002] EWCA Crim 6, [2002] 2 Cr App R 26, at [27].

[21] See, for a contrary suggestion, *Roberts* [1998] 1 Cr App R 441. In our view, the fact that there is only one agreement does not necessarily justify relying on a single count in relation to all the offences to which the agreement relates. See Part 6 for further discussion.

[22] This example is loosely based on *Reed* [1982] *Criminal Law Review* 819.

Agreements to engage in conduct 'even if' it involves committing a crime

5.23 In relation to the current law, it has been argued that difficulties may be posed by cases where it is not clear whether any crime, or a particular crime, will be committed if the relevant course of conduct agreed on is carried out in accordance with the conspirators' intentions.[23] Typically, in such cases, the conspirators are aware that they may commit an offence if they engage in the agreed course of conduct, but its commission is not an essential part of their agreement. So, it could be said that such an agreement does not satisfy the part of section 1(1) of the 1977 Act that requires that the agreed course of conduct, if carried out in accordance with their intentions, 'will necessarily amount to or involve the commission of any offence or offences'. For example:

Example 5G

D1 and D2 agree to bring D3's lorry into Britain from France, with 'no questions asked' about the contents of the lorry. D1 and D2 believe that the lorry may contain illegal drugs, illegal firearms, illegal immigrants, or (less probably) something it is lawful to import but they have no firm view on which of these is in the lorry.

Such a case has sometimes been analysed as one of 'conditional' intention to commit an offence, in a form such as, 'if that is what is involved, we intend to engage in illegal importation and thereby commit an offence'. However, we do not believe that this example represents a true case of conditional intent. If such a state of mind can be proven, it is no more than an indication by D1 and D2 that their *unconditional* intention, the intention to bring D3's lorry into Britain, will be carried out regardless of certain possible criminal consequences.

5.24 We do not accept the minority view put forward by Baroness Hale in *Saik*, that such cases fall unproblematically within section 1(1) of the 1977 Act because they involve a conditional intention to commit an offence.[24] That view equates such cases with those dealt with in the preceding section (paragraphs 5.18 and 5.22 above) where there genuinely is both an unconditional intention to commit one offence and a conditional intention to commit another offence.

5.25 In practice, the courts have not been unduly troubled when confronted by cases with facts such as those in example 5G.[25] However, the editor of Smith and Hogan's *Criminal Law* believes that a problem arises over whether section 1(1) of the 1977 Act can be fulfilled:

> Clearly they [D1 and D2] ought to be guilty of something but it is hard to see how the carrying out of the course of conduct can be said *necessarily* to amount to [any of the] crime[s]. Logically, it will not do so … .[26]

[23] For discussion, see Smith and Hogan, *Criminal Law* (11th ed 2005) pp 371 to 372.

[24] *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [99].

[25] *El-Kurd* [2001] *Criminal Law Review* 234; *Taylor (RJ)* [2002] *Criminal Law Review* 205.

[26] Smith and Hogan, *Criminal Law* (11th ed 2005) p 372.

5.26 Example 5G is better dealt with as one in which, in carrying out their unconditional intention to bring a lorry-load of goods into Britain, D1 and D2 have been reckless as to whether a criminal offence may be committed.[27] We addressed such cases in Part 4, where we provisionally propose that it should be possible to convict D1 and D2 of conspiracy in such circumstances.

[27] Professor Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185.

PART 6
CHARGING CONSPIRACIES OF CONDITIONAL INTENT OR CONSPIRACIES WHERE DIFFERENT SUBSTANTIVE OFFENCES ARE CONTEMPLATED

INTRODUCTION

6.1 In Part 5 we referred to cases of conditional intention when D1 and D2 agree on a hypothetical course of conduct.

> **Example 6A**
>
> D1 and D2 agree to burgle V's house and, if V resists, to murder V.

We said that we believe that it is right in such circumstances to regard D1 and D2 as having conspired to burgle and to murder.[1]

6.2 In this Part we consider the question of how such a conspiracy should be charged, particularly in light of the Indictment Rules (which have recently been amended) and the policy underlying the duplicity rule.

Summary of conclusions

6.3 It is our view that charging a conspiracy of conditional intent,[2] such as in example 6A, as a single count was not 'duplicitous' under the former Indictment Rules[3] and is not prohibited under the new Indictment Rules.[4] However, having examined the policy reasons which underlie the duplicity rule, we consider that in such conspiracy cases of conditional intent[5] then, with certain exceptions, one agreement should be charged as two conspiracies. In our view there is a danger that if such conspiracies are not charged with particularity, then this may cause precisely the same sort of problems which the rule against duplicity was designed to avoid.

1 Part 5, para 5.19 above. Further, we said that in circumstances where D1 and D2 agree on an innocent course of conduct but have also agreed that, if in the course of that conduct certain circumstances arise, they will commit a criminal offence, then this amounts to a variation on the above and they can be charged with a conspiracy to commit that offence. However, this latter type of case does not present a problem as far as the charge is concerned because it clearly involves only one possible criminal conspiracy.

2 We refer here to conspiracy cases of conditional intent where D1 and D2 reach an agreement which contains two courses of conduct one of which is hypothetical and which, if perpetuated, will amount to a separate criminal offence.

3 Indictment Rules 1971, SI 1971/1253.

4 Criminal Procedure (Amendment) Rules 2007, SI 2007/699.

5 We refer here to conspiracy cases of conditional intent where D1 and D2 reach an agreement which contains two courses of conduct one of which is hypothetical and which will separately amount to a separate criminal offence.

THE FORMER INDICTMENT RULES

6.4 Under the old Indictment Rules,[6] a count was duplicitous if it alleged more than one offence. The rule was stated in rule 4(2) of those Rules. 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 … .

6.5 If the evidence called in support of the count or the further and better particulars[7] disclosed more than one offence, then it was incumbent on the prosecution to apply to amend that one count or split the count into additional counts reflecting the individual offences. Where an indictment was found to be defective because of duplicity, a conviction resulting from it could be quashed.[8]

6.6 However, the indictment rules have now been amended, and the rule against duplicity has been recast, by the Criminal Procedure (Amendment) Rules of 2007. We will now examine these new rules below.

THE NEW INDICTMENT RULES

6.7 The Criminal Procedure Rule Committee has made new rules ('Criminal Procedure (Amendment) Rules 2007') concerning indictments which came into force on 2 April 2007 ('SI 2007/699'). Rule 3 revokes the Indictment Rules of 1971. Amendments to the Criminal Procedure Rules 2005 are specified. Rule 9 of SI 2007/699 substitutes Part 14 of the Criminal Procedure Rules 2005 as set out in schedule 2 of SI 2007/699. The relevant part of schedule 2 is rule 14.2 which provides:

> (1) An indictment must be in one of the forms set out in the Practice Direction and must contain, in a paragraph called a "count"-
>
> (a) A statement of the offence charged that –
>
> (i) describes the offence in ordinary language, and
>
> (ii) identifies any legislation that creates it; and
>
> (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.
>
> (2) 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 commission.

[6] Indictment Rules 1971, SI 1971/1253.

[7] This term refers to details provided in response to a request for further information concerning the charge and the way that the prosecution is putting its case.

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

6.8 The new rules concerning indictments[9] necessarily have a major impact on the rule against duplicity. This is because they allow for more than one incident to be included in a count in certain circumstances and there is therefore no longer explicit reference to any prohibition on duplicity. The explanatory memorandum which accompanies the new rules states that rule 14.2(2) "recasts" the rule against duplicity. As the editors of Archbold point out however, whilst the new rule is 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 commission … common sense, fairness and good practice will frequently dictate that separate instances of the same offence should be charged separately.[10]

We agree with this proposition for reasons which we will outline below.

6.9 Examples of offending where a compendious count may be appropriate are cases where:

> (i) the victim on each occasion was the same, or there was no identifiable individual victim as, for example, in a case of the unlawful importation of controlled drugs or money laundering;
>
> (ii) the alleged incidents involved a marked degree of repetition in the method employed or in their location, or both;
>
> (iii) the alleged incidents took place over a clearly defined period, typically (but not necessarily) no more than about a year;
>
> (iv) in any event, the defence is such as to apply to every alleged incident without differentiation. Where what is at issue differs between different incidents, a single "multiple incidents" count will not be appropriate, though it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.[11]

6.10 The circumstances which the compendious count is designed to accommodate do not include conspiracy. The Consolidated Criminal Practice Direction contemplates occasions where, "even in circumstances such as those set out [above a prosecutor may choose not to use such a] count". Examples include but are not limited to the following:

[9] See para 6.7 above.

[10] Archbold, *Criminal Pleading, Evidence and Practice* (2007 ed) supplement 1-135.

[11] Amendment No 15 to the Consolidated Criminal Practice Direction and sch 3 to that amendment. The list cited above is not intended to be exhaustive.

(i) charging separate counts in order to bring a case within section 75(3)(a) of the Proceeds of Crime Act;[12]

(ii) sexual offences where the penalty for the offence has changed during the period over which the alleged incidents have taken place.[13]

6.11 As we explain below, we think that in certain cases of conspiracy (which is one offence and not an instance of multiple offending) the compendious count which is now provided for by rule 14.2.2 will not be adequate. We consider that the reasons justifying a rule against duplicity highlight the potential dangers of a compendious count and that these dangers should be avoided by using separate counts on the indictment. We will now examine these reasons for the duplicity rule.

REASONS FOR THE FORMER RULE AGAINST DUPLICITY

6.12 In order to address the question of when it will be considered "good practice" to charge separate instances of the same offence in more than one count, it is necessary to outline the main reasons for the previous rule against duplicity.[14] This is because some of the reasons apply equally to the circumstances with which we are presently concerned, namely the fairness or otherwise of the either/or conspiracy.

6.13 First, in the absence of prohibition on duplicitous charging, there may be uncertainty as to what precisely D was convicted of and his or her conviction may therefore be unsafe.

6.14 This has obvious implications for sentencing in that the judge may be left in a situation where he or she is uncertain as to the exact culpability of the offender. Although it is often the role of the trial judge to decide on the level of culpability of a convicted offender, a lack of clarity about which offences D has been convicted of undermines the integrity of the concept of trial by jury.

6.15 The previous rule that only one offence should be included in each count also had the practical effect of enabling a defendant who wishes to plead guilty to one offence and not guilty to another to be able to do so.

[12] If a defendant can be said to have a "criminal lifestyle", one of the ways of this being established being that he is convicted of three or more offences in the same proceedings, then various assumptions as to his benefit as a result of or in connection with his criminal conduct can be made under s 10 of the Proceeds of Crime Act 2002 for the purpose of confiscation proceedings.

[13] Amendment No 15 to the Consolidated Criminal Practice Direction and Schedule 3 to that amendment. Part entitled 'Settling the Indictment', paras IV 34.9 and 34.10.

[14] We still refer to the rule against duplicity although the new indictment rules mean that there is no longer a rule which precludes duplicity.

6.16 If more than one potential offence is included in a count, it may lead to a situation where 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 find the other offence proved but not the first then it could lead to an unsafe verdict. Where there is a similar danger in relation to ingredients of the offence, a special direction known as a 'Brown direction'[15] will be required. This was demonstrated in the case of *Turner*.[16]

6.17 In *Turner*, D was charged with one count of indecent assault on the following facts. D had touched V twice but in circumstances that did not necessarily amount to indecency. V agreed with this proposition. D had then caused V to fear assault in circumstances which probably did amount to indecency. The trial judge was found to have erroneously directed the jury as if the matters were two distinct offences (when D could have been but was not charged with two offences) and it could not be known if they had convicted on the basis of one incident or the other.

6.18 Secondly, if D does not know of what he has been convicted then this may mean that he can be prevented on a future occasion from pleading autrefrois convict.[17]

6.19 Thirdly, the rule against duplicity enabled D to know the case he had to meet in relation to matters affecting the conduct of the trial, such as submissions of no case to answer.[18] This is a rule of elementary fairness.[19] It is designed to counter a real risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain.

6.20 Fourthly, evidence may be admissible in relation to one offence alleged but not another. So, using the example we cited in paragraph 6.1 above, character evidence as to D's propensity to offend may be admissible under the Criminal Justice Act 2003[20] in relation to burglary, but not to murder.

[15] *Brown* (K) (1983) 79 Cr App R 115 held that each ingredient of the offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction). However where a number of matters are 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; but (because of the first principle above) any such matter must be proved to the satisfaction of the whole jury. The jury should be directed accordingly, and it should be made clear to them as well that they should all be satisfied of the ingredient.

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

[17] The plea of autrefois convict is used when the accused has already been convicted of the offence with which he is charged and he maintains that to proceed would therefore amount to an abuse of process: *Connelly v DPP* [1964] AC 1254.

[18] The defence may make this submission after the prosecution has closed its case, on the grounds that the evidence does not disclose a case to answer regarding one or all of the counts on the indictment.

[19] *Ministry of Agriculture, Fisheries and Food v Nunn Corn and Coal* (1987) Ltd [1990] *Criminal Law Review* 268.

[20] The relevant provisions are ss 101(1)(d) and 103(1)(a).

THE REASON WE CONSIDER THAT A SINGLE COUNT OF CONSPIRACY TO COMMIT MORE THAN ONE OFFENCE DID NOT BREACH THE FORMER RULE AGAINST DUPLICITY

6.21 As noted above, we consider that a single count of conspiracy did not breach the former rule against duplicity but that, for policy reasons, the compendious count should, in our view, not be used in all cases. This view is also potentially applicable to the new rules, notwithstanding that they have mitigated the rule against duplicity. Therefore, in this section we examine the reason as to why we consider that, although it is possible to use the compendious count as demonstrated by the cases analysed below, good practice dictates that it would be preferable to avoid it in certain instances.

6.22 Conspiracy is a free standing offence and the 1977 Act clearly contemplates not only that there can be a conspiracy to commit more than one offence but that the offences which are the subject of one conspiracy may be offences to which different maximum penalties apply.

6.23 Section 1(1)(a) of the 1977 Act provides:

> ”If a person agrees with any other person or persons that a course 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 … .

Section 3(3) 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).

6.24 Thus a conspiracy to commit more than one offence is not "duplicitous".[21] The situation is analogous to one where Parliament has created a specific offence that consists of more than one offence each of which can also be charged separately.[22] Further, rule 7[23] of the old Indictment Rules permitted what was, in effect, one offence (notwithstanding that one offence can be committed in any one of several different ways) to be charged in one count.[24] It is important not to lose sight of the fact that a conspiracy to embark upon a course of conduct which will amount to more than one offence is one offence. In *Roberts*,[25] the Court of Appeal had no difficulty in interpreting the provisions of sections 1(1)(a) and 3(3) of the 1977 Act to mean that one count of conspiracy can embrace a number of differing offences which, if properly charged, will not lead to unfairness. We will now examine this case.

[21] A count which alleges more than one conspiracy is obviously a different matter.

[22] *Asif* (1980) 82 Cr App R 123. In this case the appellant was arraigned on an indictment which contained one count only involving the commission of offences under ss 38(1) and 38(2) of the Finance Act 1971 contrary to s 38(3) of that Act. Section 38(3) provides that where a person's conduct during any specified period must have involved the commission by him of one or more offences under the preceding provisions of this section, then, whether or not the particulars of that offence or those offences are known, he shall, by virtue of this subsection be guilty of an offence. It was held that this section created one offence embracing the commission of numerous offences which themselves, if the details were known, could be individually charged under ss 38(1) and 38(2). Accordingly, the indictment was not bad for duplicity.

[23] Although as from 2 April 2007, Rule 7 is revoked, para 6.7 above.

[24] Rule 7 provided "where an offence created by or under an enactment states the offence to be the doing or the omission to do any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions or other matters stated in the enactment or subordinate instrument may be stated in the alternative in an indictment charging the offence." The editors of Archbold state that rule 7 does not provide a test for determining whether any offence-creating provision creates one or more offence and further that that is an issue that can only be resolved by construing the particular provision. They state that rule 7 comes into operation once it has been determined that one offence only has been created, which offence can be committed by doing one of a number of acts. An example of such an offence is handling stolen goods (2007 edition at para 1-141).

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

Roberts[26]

The decision of the Court of Appeal

6.25 The appellants were charged with a single count of conspiracy to commit criminal damage. The prosecution alleged that their campaign against exporters of live freight had included an agreement to commit offences of criminal damage, criminal damage with intent to endanger life, criminal damage being reckless as to whether life was endangered and arson. On appeal, counsel for D1 submitted that the single count embraced three separate conspiracies and was void for duplicity. Counsel for D2 argued that the single count embraced four separate offences and that a guilty verdict would not indicate which or how many of the offences were made out. Counsel for D3 argued that as the indictment alleged a conspiracy to cause just criminal damage and not damage in one of the aggravated forms, then those aspects of the prosecution case which had been devoted to establishing arson with recklessness as to life endangerment were irrelevant and prejudicial.

6.26 Lord Justice Phillips delivered the judgment of the Court. It was held first, that the case that the prosecution advanced was that the appellants had agreed on a course of conduct that embraced all of the offences created by section 1 of the Criminal Damage Act 1971 "other than arson that involved risk to life".[27]

6.27 Secondly, the case involved a single agreement to pursue a single course of conduct[28] and did not therefore include a number of conspiracies.

6.28 Thirdly, it would have been legitimate for the prosecution to allege in a single count, a conspiracy to commit all or a selection of the offences embraced by section 1 of the Criminal Damage Act. Section 1(1) and (3) of the 1977 Act makes it plain that a single count of conspiracy can charge a course of conduct involving a number of offences carrying different penalties.[29] If a single count charges a conspiracy in relation to the commission of more than one offence:

> … each offence probably constitutes an essential element of the conspiracy so that, unless the Crown proves that the conspiracy extended to all the offences alleged, the charge will not be made out. We think that it is quite plain that as the maximum sentence is governed by that which attaches to the ulterior offence that carries the longest term of imprisonment, the jury must be satisfied that the conspiracy embraced at least that offence. It may be arguable, that if satisfied of that, the jury need not be satisfied also that the conspiracy embraced the lesser offences alleged to be embraced by the conspiracy, although we incline to the view that such argument is not sound.[30]

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

[27] Above, 448.

[28] Above, 449 .

[29] Above, 449 .

[30] Above, 449.

6.29 A count alleging a conspiracy in relation to one or more offences must identify the individual offences in question.[31] The indictment in the present case merely charged a single conspiracy to commit just criminal damage. This was not duplicitous but was inadequate as the prosecution put the case on the bases of the aggravated forms of criminal damage.[32] The judge merely directed the jury on the basis that the conspiracy was proved if the elements of simple criminal damage were proved. Therefore, it was not known what was found by the jury in relation to whether the conspiracy extended to arson or a course of conduct that was intended to endanger life or that was reckless to this danger.

6.30 This was unsatisfactory because it meant that "the judge arrogated to himself [for the purpose of sentence] the decisions that were of most significance in the case".[33] Finally, "such an approach cannot be appropriate in a conspiracy that involves different offences subject to different maximum penalties. For these reasons the procedure adopted in this case was fatally flawed."[34]

6.31 It was observed that where the prosecution alleged a single conspiracy embracing a number of offences it was open to them to break the indictment into separate counts. Lord Justice Phillips[35] cited the following *obiter* comments of Lord Bridge in *Cooke (Anthony)*[36] in support of this proposition:

> 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, e.g. a conspiracy to steal a car and a conspiracy to obtain money by deception by selling the car with false registration plates and documents.

Comments on Roberts

6.32 Although a conspiracy alleging a course of conduct which embraces offences to which different maximum penalties apply is perfectly sound, unless it is broken down in one of the ways suggested by Lord Justice Phillips then the same problems which the rule against duplicity was designed to avert may arise. As we have seen at paragraphs 6.12 to 6.20[37] above this would not be desirable.

[31] At p 449, the court relied on rule 3(1) of the Indictment Rules 1971:

> Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

[32] *Roberts, Taylor, Chapman and Daly* [1998] 1 Cr App R 441, 450.

[33] Above, 451.

[34] Above, 451.

[35] Above, 449.

[36] [1986] AC 909, 919.

[37] That which should be avoided being a multiplicity of offences to which different penalties apply.

6.33 Further, we agree with the observation of Lord Justice Phillips which we have cited at paragraph 6.28 that (by implication) it would be inadequate for the jury to be satisfied only of the most serious offence.[38]

The "either/or" conspiracy

6.34 The decision in *Roberts,* namely that a single count of conspiracy can properly contain more than one offence has recently been extended to the concept of a course of conduct where the offences agreed upon do not carry different penalties but one of the offences agreed upon is hypothetical.[39] This is sometimes referred to as the "either/or conspiracy". The point was recently considered by the Court of Appeal in *Attorney General's Reference (No 4 of 2003)*[40] and thereafter in *Suchedina.*[41] We will now examine these two cases.

[38] See *Taylo*r [2001] EWCA Crim 1044, [2001] WL 483042.

The appellants were convicted of one count of conspiracy to import class A drugs and a separate count of conspiracy to import class B drugs contrary to Customs and Excise Management Act 1979 s 170. The appellants contested the direction to the jury that they should convict the defendants on both counts provided that they were certain that the defendants knew the conspiracy was to import drugs regardless of their class. The appellants argued that an offence involving class A drugs was distinct from one involving class B drugs, as reflected in the different penalties available. Knowledge as to the particular class of drugs had to be proven in accordance with the fault element requirement of section 1(2) 1977 Act. Allowing the appeal, the court quashed the conviction on the count involving class A drugs. There was no appeal regarding the second count relating to class B drugs. The court accepted the appellants submission that one did not prove an agreement to import class A drugs by proving an agreement to import class B drugs.

The decision was however criticised rightly, in our view, for its further assertion that an indictment alleging conspiracy to import class B drugs is satisfied by proof of an agreement to import class A drugs. See Professor J C Smith [2002] *Criminal Law Review* 205.

[39] As such, it is analogous to the example in para 6.1 above.

[40] [2004] EWCA 1944, [2005] 1 WLR 1574.

[41] [2006] EWCA 2543, [2007] 1 Cr App R 23.

Attorney General's Reference (No 4 of 2003)[42]

The facts

6.35 D was convicted of conspiracy to convert or transfer the proceeds of drug trafficking or of criminal conduct, contrary to section 1 of the 1997 Act.[43] A confiscation order was then sought. A precondition of the confiscation order is that the defendant is being sentenced for "one or more drug trafficking offences."[44] The sentencing judge refused to make the confiscation order, on the ground that this precondition had not been met. He ruled that the offender's conviction was not included within the definition of a "drug trafficking offence." This was because the count was formulated in the alternative: the offender was found guilty of the single offence of conspiring to deal with proceeds of drug trafficking, contrary to the Drug Trafficking Act 1994,[45] *or* criminal conduct, contrary to the Criminal Justice Act 1988.[46] The judge's refusal was the subject of the prosecution appeal.

6.36 Lord Justice Latham delivered the Court of Appeal's judgment. The Court held that the precondition had been met and that the confiscation order should have been granted.

6.37 The court noted that section 1 of the 1977 Act clearly states that the single offence of conspiracy can consist of one agreement to commit one or more offences. The Court observed that:

> The offence of conspiracy itself is completed by the agreement and not by the way in which the agreement is to be implemented. Thus an agreement to commit a number of different offences remains an offence under s1 of the 1977 Act even if only one, or even none of those offences is in fact committed. Equally, if the agreement is to commit either of two offences, there is also an indictable conspiracy. For example, if conspirators agree that they will steal a particular item and that they will, if necessary, either commit burglary or commit robbery in order to obtain that item, that will amount to an agreement to commit the offences of theft, burglary and robbery … .The fact that the agreement to burgle or rob is contingent on the particular circumstances, does not affect the nature of the conspiracy.[47]

6.38 Consequently, D's conviction showed that the jury had found him guilty of conspiracy to convert or transfer proceeds of drug trafficking *and* of criminal conduct. D was therefore being sentenced for "one or more drug trafficking offences" and the precondition for a confiscation order had been met.

[42] [2004] EWCA 1944, [2005] 1 WLR 1574.

[43] A statutory distinction was drawn between the substantive offences of dealing with proceeds of drug trafficking (Drugs Trafficking Act 1994) and dealing with the proceeds of crime (Criminal Justice Act 1988). The Proceeds of Crime Act 2002 now provides for one general offence which applies regardless of the illicit origins of the money.

[44] Drug Trafficking Act 1994, s 2.

[45] The substantive offence was prohibited under the Drug Trafficking Act 1994, s 49.

[46] The substantive offence was prohibited under the Criminal Justice Act 1988, s 93C.

[47] [2004] EWCA 1944, [2005] 1 WLR 1574 at [14].

Suchedina[48]

The facts

6.39 D in *A-G's Reference (No 4 of 2003)*[49] was Mr Suchedina. Subsequently he challenged his conviction following the ruling of the House of Lords in *Saik*.[50] Counsel made three submissions. The first submission was that the jury had been misdirected because the judge had not made clear that only intention or knowledge as to the illicit origin of the proceeds converted or transferred would suffice. The second submission was that an either/or conspiracy was not known to law. The third submission was that, in any event, in order to be convicted a defendant charged with conspiracy must be proved to have known from which of the two possible illicit sources the money came.

6.40 Lord Justice Hughes delivered the judgment of the Court of Appeal in which the first submission was accepted and a retrial therefore ordered. However, both the second and third submissions were rejected.

6.41 Regarding the second submission, the court noted that a count framed as an either/or conspiracy is not bad for duplicity for it alleges one agreement and therefore one offence of conspiracy. The wording of section 1 of the 1977 Act provides that a conspiracy is an agreement which if carried out will necessarily lead to the commission of an offence or offences. The offender's agreement, if carried out, would necessarily lead to the commission of an offence, regardless of whether the illicit origin of the money involved was drug trafficking, contrary to the Drug Trafficking Act 1994, or criminal conduct, contrary to the Criminal Justice Act 1988.[51]

6.42 Regarding the third submission, the court noted that all that is required is that the offender agreed to launder money which he intended should be of one or other illicit origin.[52] Intention or knowledge as to the precise illicit source of the money was not required. Regardless of its illicit origin, the offender was agreeing to conduct which would, if carried out in accordance with his intention, necessarily involve the commission of one or other or both of the two substantive offences of dealing with the proceeds of drug trafficking and dealing with the proceeds of criminal conduct.[53]

6.43 In reiterating that the compendious count was not bad for duplicity, the court observed that as the offence of conspiracy is constituted by the agreement, it:

[48] [2006] EWCA 2543, [2007] 1 Cr App R 23.

[49] [2004] EWCA 1944, [2005] 1 WLR 1574.

[50] [2006] UKHL 18, [2007] 1 AC 18.

[51] At para 20 the court observed that "the shorthand proposition sometimes encountered that *Montila* applies equally to conspiracies as to substantive charges is therefore not accurate". *Montila* is referred to in Appendix A at A.7.

[52] [2006] EWCA 2543, [2007] 1 Cr App R 23, at [19].

[53] Above.

> matters not that only one of the substantive offences is in the end committed … (nor) if neither substantive offence is in the end committed.[54]

CIRCUMSTANCES IN WHICH THE COMPENDIOUS COUNT IS JUSTIFIED

6.44 Generally, as Professor Ormerod has observed, "the compendious conspiracy count is … appropriate where the agreement relates to property which is unidentified."[55] An example is the defendant who intends to deal with the proceeds regardless of whether its origins are in drug or non-drug crime. As Professor Ormerod puts it, "if they fulfil their agreement, in accordance with their intentions they must necessarily have committed one or both offence(s)."[56]

6.45 Further, the offences carry the same penalty and any distinction is one of form as opposed to one of substance.

6.46 Professor Ormerod has identified one possible problem as follows:

> If D, perhaps on somewhat perverse moral grounds, agrees that he will launder criminal property but wants nothing to do with drugs or the profits of the drugs trade, D has in those circumstances only agreed to launder the proceeds of crime other than drug trafficking, and deserves to be acquitted on a compendious count unless the Crown disprove D's claim that he agreed to a "not if it is a drugs laundering conspiracy.[57]

6.47 The fact that the legislature has now merged section 49(2) Drugs Trafficking Act 1994 and section 93C(2) (b) into one offence under the Proceeds of Crime Act 2002 means that the compendious count will only continue to apply to the pre-Proceeds of Crime Act ('POCA') cases.

6.48 In our view, the compendious count is sufficient for the limited number of (pre-POCA) cases to which it will now apply.

CONCLUSION

6.49 For the reasons which were outlined in *Roberts*,[58] we suggest that a compendious count is not an appropriate way of charging either an either/or type conspiracy or one which embraces offences to which different maximum penalties apply.

[54] [2006] EWCA 2543, [2007] 1 Cr App R 23, at [20].

[55] *Criminal Law Review* [2007] 301, 304.

[56] Above.

[57] Above. Our test of recklessness makes this problem less acute.

[58] See paras 6.25 to 6.31 above.

6.50 We have considered the two options referred to by Lord Justice Phillips in *Roberts*.[59] The two options were first, that each offence should be identified in the count and regarded as an essential ingredient of the conspiracy or secondly, that the indictment should be broken down into several counts each of which allege a conspiracy, those conspiracies being the product of one agreement.

6.51 For the following reasons, we do not think that the former proposal presents the most satisfactory way of charging such conspiracies. First, if each contemplated substantive offence is to be regarded as an essential ingredient of the conspiracy, then the failure to prove one of those offences (or to adduce sufficient evidence amounting to a case to answer) will mean that the charge fails. This is arguably unfair to the prosecution. The problem that Professor Ormerod has identified in relation to the pre-POCA compendious count and which we have referred to at paragraph 6.46 above provides an example of this. Charging the matter as several conspiracies will obviate the problem.

6.52 Secondly, for the reasons given in relation to the former rule against duplicity at paragraphs 6.12 to 6.20 above, it is generally clearer and therefore fairer to the defence to break down the allegation into separate counts.

6.53 Thirdly, in Part 4 we provisionally propose that for a conspiracy to commit substantive offences that require a fault element as to circumstance that is less than intention, a fault element of recklessness will suffice for the conspiracy. It is therefore conceivable that where a course of conduct involving various different offences is alleged, the fault element as to circumstances may be recklessness for one of those offences[60] and intention and knowledge for another.[61] They would therefore need to be charged as separate conspiracies notwithstanding that they are the product of one agreement.

6.54 Fourthly, we do not think this is a distortion given that in the context of *A-G's Reference No 4 of 2003*[62] the following point was observed. In the case where D1 and D2 agree to pursue a course of conduct A (which will necessarily involve a crime) and, if the circumstances necessitate, performance of crime B as well, they are arguably guilty of two conspiracies.[63]

6.55 We therefore conclude that the second option outlined above at paragraph 6.50 is preferable.[64] Finally, for the reasons that we stated at paragraph 6.7 to 6.11 this proposal is not precluded by the new rule 14.2.(2).[65]

[59] See paras 6.25 to 6.31 above.

[60] Eg, where D is charged with fraud.

[61] Eg, where D is charged with handling stolen goods.

[62] [2004] EWCA Crim 1944, [2005] 1 WLR 1574.

[63] Professor Ormerod "Making Sense of *Mens Rea* in Statutory Conspiracy" [2006] 59 *Current Legal Problems* 185 at 225 states "[t]his is surely right". He refers to Professor J C Smith in the *New Law Journal* (1977) 1164, 1165.

[64] Equally, we consider that under the Serious Crime Bill, there is no reason why when more than one offence or an either/or offence is alleged to have been encouraged or assisted, that they should not be specified in the indictment by way of being charged in separate counts.

PROVISIONAL PROPOSAL

6.56 We provisionally propose that:

> **Proposal 5: with the exception of pre-Proceeds of Crime Act 2002 conspiracies to launder unidentified criminal proceeds, agreements which are based on conditional intent and agreements comprising a course of conduct which, if carried out, will comprise more than one offence to which different penalties apply, should be charged as more than one conspiracy in separate counts on an indictment**.

FURTHER PROCEDURAL ISSUES

6.57 In this section we consider whether it should be necessary to require the consent of the Director of Public Prosecutions to a prosecution for conspiracy to commit a summary offence. We ask whether, either additionally or instead, conspiracy to commit a summary offence should itself be a summary offence.

THE REQUIREMENT OF CONSENT FROM THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE PROSECUTION OF CONSPIRACY TO COMMIT A SUMMARY OFFENCE

Background: a different approach to conspiracy to commit summary offences?

6.58 The law has sometimes distinguished between offences triable on indictment and offences triable only summarily when setting the limits to inchoate offences. For example, no charge can be brought for an attempt to commit a summary offence under the Criminal Attempts Act 1981.[66] So far as conspiracy is concerned, the consent of the Director of Public Prosecutions must be obtained before a charge of conspiracy to commit a summary offence can be brought.[67] In that regard, it should be kept in mind that conspiracy is an offence triable only on indictment.

6.59 Traditionally, many summary offences themselves do not involve the infliction of harm but are concerned largely with activities that only *risk* harm (such as speeding) or are regulatory offences (such as failing to have a licence to engage in a controlled activity of some kind). Inchoate offences are justified by the fact that they involve activity (including the making of agreements) directed at causing harm. There is thus a threatened harm involved in the making of the agreement. However, when conspiring to commit a summary offence, the offender will normally be 'twice removed' from the commission of actual harm. The argument for a much more restrictive approach to summary offences is therefore that the substantive offence itself will be concerned with risk-taking or regulation, rather than with actual harm, and the inchoate nature of D's liability makes his or her conduct even more remote from the commission of such 'harm'.

[65] It should also be noted that the either/or conditional conspiracy cannot properly be described as a "course of conduct" as envisaged by the new rule.

[66] Criminal Attempts Act 1981, s 1(4).

[67] Criminal Law Act 1977, s 4(1).

6.60 However, if the Serious Crime Bill becomes law, no distinction will be drawn between indictable and summary offences in this regard, so far as the offences or assisting or encouraging crime are concerned.

Four options for conspiracy to commit a summary offence

6.61 Existing provisions or proposals point to four possible directions the law could take:

(1) no criminal liability for agreeing to commit a summary offence (the solution under the Criminal Attempts Act 1981);

(2) retaining the requirement of the consent of the DPP to a prosecution for conspiracy to commit a summary offence (the 1977 Act solution);

(3) no procedural restrictions on charging conspiracy to commit a summary offence (the Serious Crime Bill solution);

(4) a more demanding fault element for conspiracy to commit a summary offence than for conspiracy to commit an offence triable only on indictment or a triable either-way offence.

6.62 We take the view that the first of these possible solutions is unattractive, because it is too 'absolutist'. As Smith and Hogan remark, in relation to the 1981 Act:

> Since 1981 the policy aimed at disposing of more cases in magistrates' courts has resulted in an increase in the number of offences that are triable only summarily, including common assault and battery. The effect was to abolish the former offence of attempted assault, which leaves an undesirable gap in the law. There seems to be no good reason why it should not be an offence to attempt to commit a summary only offence and the policy should be reconsidered.[68]

We agree. The same considerations point towards it being possible in principle to charge conspiracy to commit a summary offence.

6.63 We also believe that the third solution is undesirable. Naturally, the prosecution would still be obliged to consider if any prosecution was in the public interest. However, the very substantial 'net widening' effect of being able to charge a conspiracy or an attempt to commit a summary offence means that there ought to be some restriction on the bringing of such charges.

6.64 The fourth option involves having a different (more restrictive) fault regime for conspiracy to commit summary offences. It would, for example, be possible to require the prosecution to prove that, at the time of the agreement, D1 and D2 believed that the substantive offence *would* be committed, where that offence was a summary offence.[69]

[68] Smith and Hogan, *Criminal Law* (11th ed 2005) p 416.

[69] For discussion of this option more generally, see Part 4, paras 4.136 to 4.144 above.

6.65 Whatever its merits in theory, this solution would not be consistent with the approach of the Serious Crime Bill to the offences of assisting or encouraging crime. We consider that it would be undesirable to have a regime for conspiracy that was inconsistent with the law on assisting or encouraging crime. Under the Serious Crime Bill, proof of recklessness whether the conduct element will take place in particular circumstances, or with particular consequences, is sufficient whether the offence is triable on indictment or only summarily.[70]

6.66 Whilst there are legitimate differences between the offence of conspiracy and the offences of assisting or encouraging crime, we do not believe that they warrant a significantly different approach to the fault element for conspiracy to commit a summary offence, especially in relation to the circumstance element.

6.67 Consequently, subject to question 5 below, we are asking consultees whether they consider the second option to be preferable. The question is:

Question 4: should the law retain the requirement of the consent of the Director of Public Prosecutions to a prosecution for conspiracy to commit a summary offence?

SHOULD CONSPIRACY TO COMMIT A SUMMARY OFFENCE ITSELF BECOME A SUMMARY OFFENCE?

6.68 Under the current law, a conspiracy to commit a summary offence is triable on indictment. The reason for this is partly symbolic and partly procedural, as the penalty imposed for conspiracy to commit a summary offence cannot exceed that available for the summary offence itself. Trial on indictment is meant to reflect the seriousness of the offence and sometimes, additionally, the complexity of the factual background to an offence. Whilst an individual summary offence may not be serious in itself, a conspiracy to commit, for example, a series of such offences may be more serious and involve greater complexity:

Example 6B

D1 (a wholesaler) and D2 (a delivery company) agree that D2 can have the contract to distribute D1's goods nation-wide, on condition that D2 agrees that his drivers will break the speed limit whenever necessary to keep to the delivery times D1 has agreed with retailers.

In this example, D1 and D2 have agreed that purely summary offences will be committed (if and when it is required), but the nature of their agreement may involve a large number of people in committing such offences on a regular basis.

6.69 Nonetheless, it may seem more logical to make conspiracy to commit a summary offence itself a summary offence. It must be kept in mind that the maximum penalties for committing a summary offence are now higher than they were when the 1977 Act was passed.

Question 5: should conspiracy to commit a summary offence itself be a summary offence?

[70] Serious Crime Bill, clause 45(5)(b).

PART 7
CONSPIRACY AND DOUBLE INCHOATE LIABILITY

INTRODUCTION

7.1 This Part addresses issues of principle relating to "double inchoate" form of liability. We use this term to describe instances where someone is charged with an inchoate offence relating to another inchoate offence. The following are examples of double inchoate liability:

(1) D1 incites D2 to attempt to commit an offence.

(2) D1 incites D2 to incite D3 to commit an offence.

(3) D1 conspires with D2 to incite D3 to commit an offence.

(4) D1 incites D2 to conspire with D1 and D3 to commit an offence

(5) D1 attempts to form a conspiracy with D2 to commit an offence.

7.2 In law, D1 can incite D2 to attempt an offence (example 1 above) and D1 can incite D2 to incite D3 to commit an offence (example 2 above). Further, under section 1(1) of the 1977 Act, it is an offence for D1 and D2 to conspire to incite D3 (example 3 above). For example, if D1 and D2 agree that they will offer D3 £20,000 to kill V, they are guilty of conspiracy to incite murder. This is so irrespective of whether they actually proceed to make the offer to P.

7.3 By way of contrast, it is not an offence to incite someone to conspire (example 4 above), or to attempt to conspire with someone (example 5 above). These two scenarios will be the focus of discussion in this Part.

7.4 For some years, we have criticised the arbitrary and confusing nature of the law relating to double inchoate liability.[1] In 1989, we said:

> If the evidence shows that D incited [X] to agree with [P] to wound G, section 5(7) of the Criminal Law Act 1977 apparently prevents a charge against D of incitement to conspire … . But if D incited [P] to incite [X] … wound G, D can be charged with incitement to incite. Such an absurd distinction cannot be restated in a code.[2]

7.5 In consequence, we recommended at that time that it should be possible in law to incite someone to conspire.

[1] See 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; Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 7.19.

[2] 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.

7.6 We have recently addressed the problem of double inchoate liability again, in our report on inchoate liability for assisting and encouraging crime. (Under our recommendations, 'encouraging' is to replace 'incitement'). We affirmed our view that there should be no absolute bar to double inchoate liability.[3]

7.7 However, we sought to give double inchoate liability a principled basis. We recommended that it be confined to instances in which D intended the second inchoate offence to be committed. In that way, we sought to confine double inchoate liability to those whose aim was to assist or encourage the commission of an inchoate offence. It should not be sufficient for the purposes of double inchoate liability that, for example, D realised, without intending, that his or her act would encourage the commission of an inchoate offence.[4]

7.8 One consequence of this approach is that, under our existing recommendations, it would be an offence for D to assist or encourage the formation of a conspiracy, if D intended that the conspiracy should be formed.[5]

7.9 In this Part, we examine two key issues in relation to double inchoate liability.

7.10 First we will revisit the issue of whether, and in what circumstances, it should be an offence to assist or encourage the formation of a conspiracy. We will affirm our previous recommendation that it should be an offence.

7.11 Secondly, we address the situation where D1 attempts (or criminally prepares) to conspire to commit an offence. We ask consultees whether it should become an offence to attempt (or to criminally prepare) to conspire.

7.12 Both these forms of double inchoate liability are controversial. Neither is at present a criminal offence, although the first form of liability (assisting or encouraging the formation of a conspiracy) will become an offence under the provisions in the Government's Serious Crime Bill.[6] They are controversial because they involve a potentially lengthy chain of inchoate liability. So, there is an obvious danger of over-extension of the criminal law.

7.13 However, although it is important not to over-extend the criminal law, there are arguably reasons of principle and policy for having an offence of attempting (or of criminally preparing) to conspire. In that regard, before considering the law and the options for reform, it is important to start by explaining why we do not believe that the option of introducing an offence of attempting (or of criminally preparing) to conspire is unwarranted as a matter of principle.

[3] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 3.33 to 3.39 and Part 7.

[4] Above, Part 7.

[5] Above, para 7.21.

[6] Cl 47(4) and sch 3, para 32.

7.14 In Part 1, we committed ourselves to the 'remoteness principle', the principle that the further removed D's conduct is from the actual infliction of harm, the narrower the grounds should be for imposing liability.[7] In Part 4, this principle led us to propose that there should be a minimum requirement of subjective recklessness in relation to any circumstance fault element of a substantive offence that it is alleged D conspired to commit, as well as a requirement of intention with respect to any conduct element or consequence element (if any).[8]

7.15 Clearly, an attempt to conspire (or criminal preparation with a view to conspiring) to commit an offence may be very remote from the realisation of any potential harm. However, so long as it satisfies the conditions for compliance with the 'remoteness principle', such remoteness should not in itself be regarded as an absolute bar to liability.

7.16 Accordingly, under our proposals, if there were to be an offence of attempting (or of criminal preparation with intent) to conspire, it would have to be shown that D was clearly at fault subjectively. There must be an intention that the conspirator acts with the fault element required for the offence of conspiracy.

7.17 An attempt (or criminal preparation with intent) to conspire may involve an 'objectively innocent' act, such as simply meeting a would-be fellow conspirator. However, when such acts are engaged in with proven criminal intent, as just described, society has no reason to shield them from the scope of liability even if those acts are remote from the commission of the substantive offence.

7.18 As we show in Part 1, English law contains many statutory examples of preparatory offences falling well short of attempts to commit crimes. Many of these statutory offences have played an unchallenged and uncontroversial role in the criminal law for a very long time. The Government intends to introduce a further such offence of a general kind, according to which it will be possible to convict someone when they have assisted or encouraged a conspiracy.[9] That being so, we do not believe that the introduction of an offence of attempting (or criminally preparing) to conspire is contrary to the traditions or principles of criminal law. Moreover, it is line with modern developments in criminal law targeting the organisation and management of criminal activity prior to substantive offences actually taking place.

7.19 Further, as indicated in paragraph 7.4 above, we are also concerned about the need to avoid anomaly and arbitrariness in the scope of the criminal law. If it is to become an offence intentionally to assist or encourage the formation of a conspiracy (under the Serious Crime Bill), it might seem anomalous or arbitrary not to have an analogous offence of attempting (or of criminally preparing) to form a conspiracy.

[7] See paras 1.6 to 1.7 above.

[8] See Part 4 above. We recommend the same requirements for the law of attempt and criminal preparation: see Part 16 below.

[9] Serious Crime Bill: cl 47(4) and sch 3, para 32.

7.20 Finally, as we will see below in Part 8, we will be proposing a defence to conspiracy of 'acting reasonably', along the lines of the defence that is to be applicable to assisting or encouraging crime under clause 48 of the Serious Crime Bill. It would provide scope for D to argue that his or her act was reasonable to engage in because it was too remote from the offence to be regarded as worthy of criminalisation.

7.21 We will also be asking consultees whether they believe that the 'acting reasonably' defence should be applicable to any case in which D is faced with double inchoate liability. This defence could also apply if consultees agree that there should be an offence of attempting to conspire.

ASSISTING AND ENCOURAGING A CONSPIRACY

Introduction

7.22 In this section we begin by outlining the current law. We proceed briefly to examine any relevant comments we have made in our previous publications. We then assess the policy reasons for and against providing for an offence of assisting or encouraging a conspiracy. We conclude by endorsing our previous recommendation that this should be an offence.

The current law

7.23 Under the common law, it was possible to incite a conspiracy.[10] However, section 5(7) of the 1977 Act abolished the offence.[11] It provides that:

> Incitement … to commit the offence of conspiracy (whether the conspiracy incited would be an offence at common law or under section1 above or any other enactment) shall cease to be offences.

Our previous proposals and recommendations

Working Paper No 50[12]

7.24 We considered that an offence of incitement to conspire could not be justified because it "takes (the law) further back in the course of conduct to be penalised than is necessary or justifiable." We stated that meritorious instances would be "dealt with by a charge of incitement to commit the substantive offence."

Law Com No 76[13]

7.25 In this report, we only addressed the issue of conspiracy to commit other inchoate offences[14] and so did not make any recommendation on this point.

[10] *De Kromme* [1892] 56 JP 682, 17 Cox CC 492.

[11] This was not based on any Law Commission recommendation.

[12] Inchoate Offences: Conspiracy, Attempt and Incitement (1973), para 44.

[13] Report on Conspiracy and Criminal Law Reform (1976).

[14] Above, para 1.44.

Law Com No 177[15]

7.26 In our commentary on the draft criminal code, we stated that "the present law has reached the point of absurdity."[16] We noted that there is no offence of incitement to conspire but that there is a common law offence of incitement to incite. Consequently, the following situation arises. If D1 incites D2 to agree with D3 to wound X, D1 cannot be charged with incitement to conspire as this offence was abolished by the 1977 Act. However, if D1 incites D2 to incite D3 to wound X, D1 can be charged with incitement to incite. To address this "absurdity", we recommended that conspiracy should not be excluded from the scope of incitement.[17] Clause 47 therefore provides that D can commit an offence of inciting conspiracy.

Law Com No 300[18]

7.27 We addressed the question of double inchoate liability in part 7 of Law Com No 300. We concluded that in principle D should be liable for assisting and encouraging a conspiracy (or any other inchoate offence), but only if D intends that the conspiracy should be assisted or encouraged.[19] As indicated in paragraph 7.7 above, this would limit the chain of inchoate liability, restricting it to those whose intention is that others should commit an inchoate offence.[20] This does mean it will be possible to impose criminal liability even though the acts of assisting and encouraging are twice removed from the commission of actual harm. However, the limitation to cases where it is D's intention that a second inchoate is committed is meant to ensure that the extension of the criminal law is not unwarranted.

7.28 We gave the following example:

Example 7A

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 so that they can hatch a plot to murder V. The meeting breaks up in acrimony without any agreement being reached.[21]

[15] Criminal Law: A Criminal Code for England and Wales (1989).

[16] Above, vol 2, Commentary on Draft Criminal Code Bill (1989), para 13.13.

[17] Clause 48(7) of the Draft Criminal Code. The text is cited in Part 3 at para 3.28.

[18] Inchoate Liability for Assisting and Encouraging Crime (2006).

[19] In our report we recommended two offences of assisting or encouraging: to be guilty of the clause 1 offence, D must *intend* that the criminal act should be done or that the person will be encouraged or assisted to do it; to be guilty of the clause 2 offence, D must *believe* that the criminal act will be done and that his or her own act will encourage or assist the commission of the criminal act.

[20] Paras 10 and 18 of sch 1 to the draft Bill attached to our report on assisting and encouraging crime gives effect to this recommendation. It provides that D cannot commit the clause 2 offence by doing an act capable of encouraging or assisting conspiracy, whether a statutory conspiracy or a common law conspiracy.

[21] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 7.20, example 7H.

Under our recommendations, D has committed the offence of assisting and encouraging a conspiracy because he has done an act capable of assisting X and P to conspire to murder, intending that X and P should commit the offence of conspiracy to murder. However, D will not commit any offence if, purely for financial gain he or she merely rents out a room to X and P, believing that X and P will meet to hatch a plot to kill V.

Policy concerns

Arguments against an offence of assisting and encouraging a conspiracy

7.29 The principal argument against providing for an offence of assisting and encouraging a conspiracy is based on the argument that that there should not be an undue extension of the criminal law.[22] The offence of conspiracy already prohibits conduct on the basis of a potential or threatened harm. We should therefore be wary of criminalising activity that is even more remote from this prospective harm.[23] As indicated at paragraph 7.24 above, this concern influenced our thinking in 1973.

7.30 The following example illustrates the need for caution, even when D intends the second inchoate offence to be committed.

Example 7B

D and P are both animal rights activists. P tells D that she is unsure whether to attend a local animal rights meeting where she believes members will be discussing criminal methods of protest. D, who supports this type of protest but refuses to go himself because the local group never "do" anything, nevertheless encourages P to attend. P does so and at the meeting she conspires with other members to commit a criminal method of protest.

Under our recommendations, D would be liable for encouraging P to conspire to commit a substantive offence, because he intended the second inchoate offence (conspiracy) to be committed. D would be liable, notwithstanding the fact that he did not believe that the group's efforts or any ensuing conspiracy would come to anything. The concern is that the remoteness of his conduct and the nature of his state of mind (not believing that an offence will ever be committed) together make this an instance in which the imposition of criminal liability would be oppressive.

[22] Above, para 7.5.

[23] It has also been argued that it may only be in the "rarest cases that a person could aid, abet, counsel or procure a conspiracy without becoming a party to the agreement and so a principal conspirator." Professor J C Smith, "Secondary Participation in Inchoate Offences" in *Crime Proof and Punishment, Essays in Memory of Sir Rupert Cross* (1981) at p 28. However, in this article the author also noted that participation can fall short of involvement in the conspiracy.

Arguments in favour of an offence of assisting and encouraging a conspiracy

7.31 The world has changed dramatically since our Working Party addressed these issues in 1973. Developments in communication and globalisation have resulted in a considerable number of threatened and actual harms that were not contemplated when we considered the limits of conspiracy-related offences, and when Parliament legislated in 1977. Examples of conduct threatening harm that were not envisaged at that time would be the following:

Example 7C

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.

Example 7D

D1 sets up an internet 'chatroom' so that people experienced in on-line fraud can pool their expertise with a view to developing a sophisticated identity theft scam.

It is in the light of developments such as the internet and the globalisation of crime that one should consider whether Parliament was right to abolish the common law offence of incitement to conspire. Is it satisfactory that such activity should continue to fall outside the ambit of the criminal law?

7.32 In evaluating our recommendation that it should be an offence to assist or encourage conspiracy, it is important to take into account the defences that we recommended should apply to assisting and encouraging crime.[24] We believe such defences go a long way to ensuring that liability would not be imposed in inappropriate circumstances. Our recommendations have been translated by Government into a single defence of 'acting reasonably'.[25]

7.33 The defence of 'acting reasonably' is discussed in detail in Part 8 below. The defence would enable D to argue, for example, that the purpose for which he or she assisted or encouraged the commission of an offence (including another inchoate offence) made it reasonable to act as he or she did. If he or she proves that to the satisfaction of the tribunal of fact, he or she is entitled to be acquitted. In that regard, it would be open to D to argue that his or her acts were of such minor significance in context, that it was reasonable for him or her to engage in those acts in spite of the fact that they assisted or encouraged an offence.

[24] Inchoate Liability of Assisting and Encouraging Crime (2006) Law Com No 300, para 6.16

[25] Serious Crime Bill, cl 48.

7.34 The existence of the defence of 'acting reasonably', when pleaded, gives tribunals of fact an opportunity to acquit when they believe that D's acts were too remote from the commission of the offence to be regarded as criminal in themselves, so long as the tribunal regards it as reasonable to have engaged in those acts. We will also be asking whether the consent of the DPP should be required before there can be a prosecution in a case involving double inchoate liability, as a safeguard against oppressive charging in such cases.[26]

7.35 We have already said that we believe it is anomalous to have an offence of incitement to incite but not one of assisting or encouraging an offence of conspiracy.[27] Finally, our recommendation reflects our view that conspiracy is a free-standing crime, and that it can thus be assisted or encouraged just like any other such crime.[28]

ATTEMPTING (OR CRIMINALLY PREPARING) TO CONSPIRE

7.36 In this section we outline the current law on attempted conspiracy and briefly examine any relevant comments we have made in our previous publications. We then assess the policy reasons for and against providing for such an offence and conclude by asking consultees whether section 1(4)(a) Criminal Attempts Act 1981 should be repealed.[29]

The current law

7.37 Under the common law, it was possible to attempt a conspiracy. However, section 1(4)(a) of the Criminal Attempts Act 1981 states that one cannot attempt the offence of conspiracy. It provides that the offence of attempt:

> … 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).

[26] See para 7.58 below.

[27] Para 7.4 above.

[28] See Part 2 above.

[29] See para 7.57 below.

Our previous proposals and recommendations

Working Paper No 50[30]

7.38 The Working Party stated that its general position was that such an extension of the law could not be justified. However, it did note one scenario where an offence of attempting conspiracy could be of "practical value".[31] This was where an individual forms an agreement with a police informer or someone who otherwise intends to frustrate the plan. It distinguished this scenario from one in which an individual forms an agreement with a child because in the former scenario "he knows nothing of facts which prevent the conduct from being a genuine agreement to do a criminal act." However, it concluded that "he will in any event most probably be guilty of incitement"[32] or of attempting to commit a substantive crime and therefore did not propose that where a person mistakenly believes he is conspiring with another he should be guilty of attempted conspiracy.

Law Com No 76[33]

7.39 In this report, we only addressed the issue of conspiracy to commit other inchoate offences and so did not make any recommendation on this point.[34]

Law Com No 177[35]

7.40 We noted that we had previously recommended that incitement to conspire should be restored as an offence. In the interest of consistency, we also recommended that attempted conspiracy should be restored as an offence. The scenario we referred to as justifying this innovation is where D conspires with the police informer who intends to frustrate the commission of the offence:

> There is no completed conspiracy because (the police informer) lacks the required intention. But D has done everything he can to conspire and does intend the offence to be committed. There seems no reason why he should not be guilty of attempted conspiracy.[36]

[30] Inchoate Offences: Conspiracy, Attempt and Incitement (1973).

[31] Above, para 45.

[32] Above.

[33] Report on Conspiracy and Criminal Law Reform (1976).

[34] Above, para 1.44. We did comment that the offence of conspiracy to attempt an offence was unnecessary because "such an agreement would always be an agreement to commit the offence itself."

[35] Criminal Law: A Criminal Code for England and Wales.

[36] Above, vol 2, Commentary on Draft Criminal Code Bill (1989), para 13.48.

Policy concerns

Arguments against an offence of attempting (or criminally preparing) to conspire

7.41 The need for caution when extending the criminal law to conduct that may be far removed from the harm involved in the substantive offence is, again, an important consideration in this context. The considerations are the same as those we have already discussed at paragraphs 7.29 to 7.35 in relation to assisting and encouraging a conspiracy.

7.42 In addition, there are three other principal arguments against repealing section 1 (4)(a) of the Criminal Attempts Act 1981.

7.43 First, it is possible that there will be alternative offences already available to prosecute the culpable individual. For example, if the Serious Crime Bill becomes law, our recommendations on assisting and encouraging an offence would criminalise the individual who intends to encourage or assist the commission of an inchoate offence including conspiracy).[37] This is likely to cover some of the ground that would be covered by an offence of attempting (or criminally preparing) to conspire.

7.44 Secondly, there may be thought to be a conceptual obstacle to double inchoate liability for attempting (or criminally preparing) to conspire. Attempt and criminal preparation themselves have greater proximity to the substantive offence than conspiracy because they involve the doing of an act which is more than merely preparatory to the commission of the offence.[38] So, it may seem to make little sense to place an attempt or preparation offence (attempt to, or criminal preparation in order to, conspire) one step removed from a conspiracy to commit the substantive offence in question, in the chain of criminal liability.

7.45 Thirdly, there is currently no proposal for an 'acting reasonably' defence in relation to this double inchoate offence. However, this problem could easily be remedied by an extension of the defence to attempting (or criminally preparing) to conspire, and we are asking consultees whether they believe that there should be such a defence.

Arguments for an offence of attempting (or criminally preparing) to conspire

7.46 The arguments in favour of providing for an offence of attempted conspiracy are as follows.

[37] Serious Crime Bill: cl 47(4) and sch 3, para 32.

[38] See Part 16 below. Under our proposals, 'criminal preparation' will not cover more ground that the current offence of attempt.

7.47 First, an attempt to conspire is not by nature as remote from the commission of the substantive offence as an act that encourages or assists the formation of a conspiracy to commit a substantive offence. This is because an attempt (or criminal preparation) requires an act that is more than merely preparatory to the commission of offence, whereas an act of assisting or encouraging need not have that degree of proximity to the offence. So, the argument against attempting (or criminally preparing) to conspire on the grounds of over-extension of the criminal law has less force than in relation to assisting and encouraging conspiracy.

7.48 Secondly, although one or other of the alternative offences with which D could be charged (see paragraph 7.43 above) might be applicable on the facts of the case of an attempt (or criminal preparation in order) to conspire, it does not follow that the latter offence would be redundant. There are many instances in the criminal law where an offence of engaging in preparatory conduct aimed at committing a substantive offence co-exists with an offence of attempting to commit that substantive offence. An example is the offence of being in possession of something with intent to commit criminal damage,[39] an offence that co-exists with the offence of attempting to commit criminal damage.[40] It has long been recognised that attempts to commit crimes are a distinct wrong, and may be criminalised as such, even if other offences cover some or all of the ground.[41]

7.49 Thirdly, the advantage of providing for an offence of attempting (or criminally preparing) to conspire is that this would ensure that those who seek to conspire exclusively with individuals who intend to frustrate the plan, or who we recommend should remain exempt from the law of conspiracy, could still be prosecuted. Three examples can be given.

7.50 The first example is the one already referred to[42] of a conspiracy formed exclusively between D and an individual who intends to frustrate the commission of the substantive crime. This individual never intends the agreement to be carried out and so is not guilty of conspiracy.[43] As noted in the Draft Criminal Code,[44] it is not right that D is also not guilty of an offence: D considered he was involved in a genuine plan to commit a crime and his culpability is not diminished by the 'good fortune' of having agreed with an individual who in fact never intended to carry out this plan. Further, as a matter of fair labelling, a charge of attempted conspiracy would accurately describe the conduct of which D is guilty.

[39] Criminal Damage Act 1971, s 3. Clearly, not all attempts to commit criminal damage involve being in possession of something, for legal purposes, so neither offence covers all the ground covered by the other in this example.

[40] Contrary to the Criminal Attempts Act 1981, s 1.

[41] See R A Duff, *Criminal Attempts* (1996) pp 363 to 368.

[42] See paras 7.38 and 7.40 above.

[43] This can be compared to the situation where the individual acting to prevent crime or limit harm in fact intended the agreement to be carried out. Under our recommendations he would be afforded a defence. The law would therefore acknowledge that he had fulfilled the fault and conduct element for the offence but was justified in so acting. D could therefore still be convicted of conspiracy for there would be a co-conspirator, albeit a co-conspirator with a defence: Part 8.

[44] See para 7.40 above.

7.51 The second example is the conspiracy formed exclusively between D and a child under the age of criminal responsibility. The child under the age of criminal responsibility is exempt from liability for conspiracy. A contemporary example of the sort of situation that we envisage would be one where D targets a child under the age of criminal responsibility and persuades him to agree to "mind" guns or drugs for him.[45] If the offence is actually committed D could be convicted of the substantive offence, with the child being treated as an innocent agent. In the light of policy considerations supporting the possibility of the early intervention of the law,[46] it should be possible to prosecute D before the intended crime actually occurs. However, as there is no co-conspirator a charge of conspiracy cannot be brought. The offence of attempting (or criminally preparing) to conspire could be used in this instance.

7.52 The third example is the agreement formed exclusively between D and an individual who is exempt from liability for conspiracy because he or she is a victim of the substantive offence. In this example, D has once again formed the necessary fault element, and should not benefit from an exemption that aims only to assist those in a protected category. Indeed, as in the example in paragraph 7.51, D is arguably even more culpable for having formed a criminal plan with a particularly vulnerable person. If the exemption is retained, a charge of attempting (or criminally preparing) to conspire would ensure D is held accountable for his actions and would accurately reflect the nature of the wrong committed by D.[47]

7.53 If the law should not be amended to provide for an offence of attempting (or criminally preparing) to conspire, consideration would have to be given to how the scenarios outlined above would be addressed. We consider this issue in Part 10.

7.54 Putting aside these specialised examples, there is a broader case for having an offence of attempting (or criminally preparing) to conspire. The following examples illustrate the case.

[45] We are inviting views on whether this exemption should be retained but are of the provisional view that it should be retained: Part 10, para 10.41 below.

[46] See Part 2 above.

[47] In Part 10 below, at para 10.31 we discuss and invite views on the alternative option of abolishing the exemption and providing the victim of the intended offence with a specific defence. In these three examples, it may be argued that it is 'legally' impossible to commit the offence of conspiracy and thus that there can be no charge of attempting conspiracy as a matter of principle. We reject that view. The offence with which D1 will be charged is conspiring to import illegal drugs, to hide illegal weapons, or to commit a sexual offence (or whatever), all offences known to law. It is only the facts (about D2's status or intention) that make the crime impossible to commit and that should be no bar to conviction: see *Shivpuri* [1987] AC 1.

Example 7E

D1, D2 and D3 are rival drug barons who hate and mistrust each other. However, their immediate common concern is the emergence of another rival, V. They agree that they will meet at a hotel with a view to seeing whether, at least, temporarily, they can put aside their differences and reach an agreement for eliminating V. The police, through intelligence, learn about this and put a listening device in the room where they believe the meeting will take place. D1 D2 and D3 meet. Predictably, the meeting is tense and acrimonious. Progress towards an agreement is slow. The meeting breaks up because D3 is suspicious of a police presence and they do not reconvene.

Example 7F

D1, a career criminal, arranges to meet with D2 to ask for money so that he can buy and sell on a batch of stolen merchandise. D1 and D2 have made similar deals on many occasions, splitting the profits from the sale. However, on this occasion, D2 is given a better offer and despite D1's best efforts, D1 is unable to secure D2's agreement to give him the money.

In both examples, the Ds have done something more than merely preparatory in relation to a conspiracy that is never formed. The question arises whether, assuming that there is sufficient evidence as to their intentions, they should be liable for attempting (or criminally preparing) to conspire. The argument against imposing liability is that it involves a considerable extension to the chain of inchoate liability. However, our view is that conspiracy should be regarded as a free-standing offence and therefore it arguably should be possible to attempt it, just as it is possible to attempt any other indictable or triable either way offence. As policing becomes more intelligence-led and criminals' tools of communication become more sophisticated, the argument for an extended chain of inchoate liability is stronger.

7.55 Fourthly, we would again refer to the relationship between attempt and the other inchoate offences. Introducing an offence of attempting (or criminally preparing) to conspire would cohere with the current law and with our previous recommendations. First, the common law has since 1873 recognised an offence of attempted incitement.[48] For example, if D sends a letter to P urging P to murder V and the letter is intercepted before it reaches P, D is nevertheless guilty of attempting to incite murder. Secondly, in our recommendations on assisting and encouraging crime, we recommended that it ought to be possible to convict D of assisting and encouraging P1 and P2 to conspire. The Government intends to act on this recommendation through enactment of Part 2 of the Serious Crime Bill. Therefore, there is a strong case for making it possible to convict D of attempting (or criminally preparing) to conspire.

[48] *Banks* [1873] 12 Cox 393. For a recent example see *Goldman* [2001] *Criminal Law Review* 822.

7.56 Finally, it would be possible, as in the case of assisting or encouraging conspiracy, to require that the consent of the Director of Public Prosecutions is needed to bring a charge of attempting to conspire (see question 8 below). This requirement would be one way of meeting any concerns about oppressive use of the criminal law in this area.

Our questions:

7.57 We ask consultees the following:

> **Question 6: 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?**

7.58 As an additional safeguard against oppressive use of double inchoate liability, we ask consultees the following questions:

> **Question 7: Should the defence of 'acting reasonably' in clause 48 of the Serious Crime Bill be applied to any case in which D is charged with an offence involving double inchoate liability, in particular attempting (or criminally preparing) to conspire.**
>
> **Question 8: Should the consent of the Director of Public Prosecutions should be required for prosecutions involving double inchoate liability?**

PART 8
A DEFENCE OF ACTING REASONABLY

INTRODUCTION

8.1 In this Part we discuss our provisional proposal that it should be a complete defence to conspiracy if D proves that he or she was 'acting reasonably'.[1] We explain below why we consider that the application of this defence would primarily be justified in the context of crime prevention and the prevention or limitation of harm. However, in order to ensure consistency with the new offences of assisting or encouraging crime in the Serious Crime Bill,[2] we propose that it should be formulated as a defence of 'acting reasonably' rather than a specific crime prevention defence.

CRIME PREVENTION AND PREVENTION OF HARM

Introduction

8.2 A person (D) participating in a conspiracy may have an ulterior motive of crime prevention. For example, he or she may intend to prevent the commission of further offences by exposing the substantive offence that is the object of the conspiracy immediately before or after its commission.[3] Alternatively, D may be acting in order to prevent or limit the harm caused by the planned criminal activity.[4]

[1] As we indicated in Part 7, we are also asking consultees whether this defence should be applied to cases involving double inchoate liability.

[2] Clause 48 of the Serious Crime Bill provides for a defence of acting reasonably.

[3] A police informer or undercover agent may conspire with a criminal gang to sell drugs to another, but intend that the drugs deal should be exposed immediately after the sale so that the gang could be prosecuted and therefore prevented from continuing their criminal activity.

[4] *Clarke* (1984) 80 Cr App R 344: D participated in a burglary but claimed to have done so in order to prevent the other participants escaping and to ensure that the property would be recovered.

8.3 Under the current law, if D intends that the agreement should be carried out, it is no defence to a charge of conspiracy that he or she was acting in order to prevent crime or to prevent or limit harm.[5] Therefore, provided D intends that the agreement should be implemented, D will be guilty of conspiracy regardless of his or her motives.[6] Further, in the light of the authorities decided since *Yip Chiu-Cheung v R,*[7] it is highly unlikely that the courts will create such a defence of their own motion. We consider in this section the desirability of providing for such a defence to conspiracy.

8.4 We begin by setting out our previous recommendation for a defence of crime prevention to assisting and encouraging crime (which was not actually adopted in the Serious Crime Bill). We proceed to consider the case of *Yip Chiu-Cheung v R,* in which the Privy Council stated that there was no defence of crime prevention to a charge of conspiracy. We then examine the arguments for and against such a defence to conspiracy. In particular, we consider whether a defence should be limited in its availability to formal and informal[8] agents of the state. We conclude by explaining that it is our view that a defence should be provided when an individual acts to prevent crime (or harm) but that this defence should be formulated in terms of 'acting reasonably'. Our proposal will therefore be consistent with the Government's proposed reasonableness defence to a charge of assisting or encouraging crime.[9]

Our previous recommendation for a defence of crime prevention to inchoate offences of assisting or encouraging crime

8.5 In the 2006 report, we recommended that, to each of the inchoate offences of assisting or encouraging crime that we were recommending, there should be a defence of acting in order to prevent the commission of an offence or in order to prevent or limit harm. We recommended 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) to prevent or limit the occurrence of harm; and

[5] *Yip Chiu-Cheung v R* [1995] 1 AC 111. It is true that *Yip Chiu-Cheung* is a decision of the Privy Council in which the issue was D's liability for a common law conspiracy and not a statutory conspiracy under Criminal Law Act 1977,s 1. However, Lord Griffiths, in delivering the judgment of the Privy Council, does not suggest that different principles apply depending on the nature of the conspiracy.

[6] It is true that in *Anderson* [1986] AC 27 Lord Bridge thought that those who joined conspiracies in order to expose and frustrate criminals would not be liable if they intended to play no part in the agreed course of conduct. However, despite never having been overruled, *Anderson* is a discredited decision.

[7] See para 8.11 below.

[8] The term 'informal agents of the state' refers to police informants.

[9] Serious Crime Bill, Part 2, cl 48. This is particularly important when one considers the potential overlap between acts that could be characterised as assisting and encouraging and acts that could be characterised as a conspiracy.

(2) it was reasonable to act as D did in the circumstances.[10]

8.6 We made this recommendation principally for two reasons.[11] First, it is in the public interest that acts be done in order to prevent crime or to prevent or limit the occurrence of harm. Secondly, if the person's overall purpose is to prevent or limit harm then he or she is acting as a good citizen and should not be stigmatised as a criminal.

8.7 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.[12] So if 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 the defendant acted reasonably in all the circumstances. If it was reasonable to commit offence *x* in order to prevent offence *y*, then the defence should succeed.[13]

8.8 Acknowledging that the defence could be open to abuse, we recommended that there should be two restraining features. 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 is intended to filter out unjustified claims.

8.9 Secondly, we recommended that D should bear the legal burden of proving the defence on a balance of probabilities. We explained 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.[14]

8.10 However, our recommendation for a discrete crime prevention defence to offences of assisting or encouraging crime was not taken forward by the Government in the Serious Crime Bill. Instead, it provides only for a defence of acting reasonably.[15]

[10] Para 6.16.

[11] Para 6.8.

[12] Para 6.12.

[13] 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 to commit theft, he should be able to plead the proposed defence to a charge of encouraging or assisting theft.

[14] Para 6.15.

[15] Clause 48.

The current law in relation to conspiracy : Yip Chiu-Cheung v R[16]

8.11 In this section, we analyse the decision in *Yip Chiu-Cheung v R* in which the Privy Council concluded that there was no defence of crime prevention to a charge of conspiracy. We then explore the reasons why we think such an approach should not be followed.

Facts of the case

8.12 D arranged with an undercover law enforcement agent ("the agent") to export heroin unlawfully from Hong Kong and import it unlawfully into Australia. The agreement was that the agent would fly to Hong Kong where D would supply him with heroin which the agent would then take by aeroplane to Australia. The agent was acting with the intention of trying to identify and arrest both the suppliers and the distributors of the drug. He kept informed the Hong Kong and Australian authorities of his plan. There was no doubt that he intended to carry out the agreement formed with D. However, he missed the pre-arranged flight to Hong Kong and decided to proceed no further with the plan. D was charged with conspiracy to traffic in a dangerous drug and was subsequently convicted.

8.13 On appeal, D submitted that the agent had lacked the necessary fault element for the offence and so could not be a co-conspirator. If the Privy Council agreed that the agent was not guilty of conspiracy, and so was not a co-conspirator, it would have to conclude that the defendant was also not guilty of conspiracy. This is because the offence of conspiracy requires at least two individuals to agree to commit the substantive offence.[17]

The decision of the Privy Council

8.14 The Privy Council dismissed D's appeal. Lord Griffiths said that the requisite fault element for conspiracy was an intention to carry out the agreement and that the agent had indeed intended to carry out the agreement.[18] Therefore, the agent was a co-conspirator. Although acknowledging that the agent was acting "courageously and with the best of motives",[19] it was irrelevant that the agent's motive was to apprehend the drug dealers. Further, the fact that the authorities were aware of the plan was also irrelevant. There was no power to authorise a breach of the relevant law.[20]

[16] [1995] 1 AC 111.

[17] In *R v Testouri* [2003] EWCA Crim 3735, (2004) 2 Cr App R 4 a similar situation was addressed. Referring specifically to *Yip Chiu-Cheung*, the court said "there must be evidence of an agreement to achieve a criminal purpose. If there is no evidence of that because, for example, on one view of the evidence only one defendant can be shown to have been dishonest, then, if that view of the evidence is taken, both defendants must be acquitted and the jury must be so directed."

[18] Previously, the House of Lords in *Anderson* [1986] AC 27, 38 had held that an intention to implement the agreement was not an essential ingredient of conspiracy.

[19] [1995] 1 AC 111, 118.

[20] Above. The court referred to the Australian case of *A v Hayden* (No.2) [1984] 156 CLR 532 where the court stated that there was no general defence of superior orders or of executive fiat. The Privy Council confirmed that this "applies with the same force in England."

8.15 The Privy Council distinguished the present case from the situation referred to by Lord Bridge in *Anderson*[21] where a law enforcement agent pretends to join a conspiracy without any intention of taking part but intending only to frustrate the planned crime. In that situation the agent has no intention of committing the crime and lacks the necessary fault element.[22] However, in *Yip Chiu-Cheung,* the agent intended the substantive offence to be committed and, therefore, there was a conspiracy.

8.16 The approach taken in *Yip Chiu-Cheung* has been followed in other cases.[23] In *Kingston*[24] the House of Lords cited with approval the Privy Council's rejection of the argument that an understandable motive is sufficient in itself to negative the necessary mental element of the offence. In *Clegg*[25] the House of Lords referred to *Yip Chiu-Cheung* as a recent illustration of the principle that there is no general defence in English law of obedience to superior orders. In the more recent case of *Jones and Warburton,*[26] Lord Justice Buxton confirmed that:

> There is no authority in English criminal law that it is a defence on the part of someone who has actually committed a crime that he was doing so with the ulterior motive of law enforcement.

Criticism of the decision

8.17 We believe that the Privy Council in *Yip Chiu-Cheung* was correct in holding that an essential ingredient of conspiracy is an intention to carry out the agreement and that the agent had that intention. However, it was wrong to conclude that the agent had no defence to a charge of conspiracy.The decision was expedient because it enabled D's conviction to be upheld. It has been noted that the strength of the court's reasoning "is only as great as its context: the fact that it was Yip in the dock, rather than (the agent)."[27] We will now examine the reasons why we consider a defence should be available where the individual has acted to prevent crime or further harm.

Why a defence should be available where the defendant has acted to prevent crime or harm

8.18 We consider that the individual who conspires in order to prevent crime should be able to avail himself or herself of a defence for the following reasons.

[21] *Anderson* [1986] AC 27, 38. See Part 4 above.

[22] The agent cannot therefore be guilty of conspiracy and, as there is no co-conspirator the culpable D with whom the agent conspired would also be not guilty. In Part 7 we asked consultees whether D should be guilty of attempted conspiracy in such a scenario.

[23] *X* [1994] *Criminal Law Review* 827. This case also concerned the fault element required of an individual who engaged in drug trafficking with a blameless motive. It was held that "so far as conviction was concerned, it was immaterial whether X was acting for the purposes of law enforcement or not. As regards sentence, it was a most material consideration."

[24] [1995] 2 AC 355, 366, by Lord Mustill.

[25] [1995] 1 AC 482, 498, by Lord Lloyd.

[26] [2002] EWCA Crim 735 at [13].

[27] Simon Gardner, "Criminal Defences by Judicial Discretion" [1995] *Law Quarterly Review* 177, 179.

8.19 First, as we argued in the 2006 report on assisting and encouraging crime,[28] there are strong policy reasons for protecting from prosecution the individual who acts to prevent crime or prevent or limit the occurrence of harm. It is in the public interest that such conduct is encouraged, or at least tolerated, and not condemned. Further, in accordance with the principle of fair labelling, such citizens should not be shamed with the same criminal label as the very individuals they are seeking to expose.

8.20 Secondly, the current position effectively means that law enforcement officers and others seeking to prevent crime are reliant on the discretion of the prosecuting authorities. This is unsatisfactory.

8.21 It should be noted that we are not advocating that the conduct element or the fault element of the crime of conspiracy should be modified. So, the culpable D would not necessarily be acquitted on the fortuitous basis that his co-conspirator happened to be an undercover law enforcement agent who was acting to prevent crime. The agent would still satisfy the constituent requirements of the conspiracy offence by forming the agreement and intending it to be carried out. Instead, we would be providing the agent who acts reasonably with a defence. Therefore, on the facts of *Yip Chiu-Cheung*, D could still be prosecuted for the crime of conspiracy, because the agent would be a co-conspirator, albeit a co-conspirator with a defence. So it is simply that the agent himself or herself would be afforded protection if criminal proceedings, which in principle could be brought, were initiated.

8.22 As we noted in Part 1,[29] the current law requires a distinction to be made between the undercover agent who intends to expose the commission of the offence immediately after the agreement is executed, thus frustrating the overall object of the conspiracy, and the agent who intends to frustrate the commission of the offence prior to the agreement being executed. This distinction is illustrated by the following two examples.

Example 8A

D1, an undercover police officer, agrees with D2, a drug dealer, to take part in the sale of a large quantity of prohibited drugs. D1 intends to arrest D2 immediately *after* the sale takes place.

In example 8A, under the current law, both D1 and D2 are guilty of conspiracy because both parties intend the agreement to be carried out.

Example 8B

D1, an undercover police officer, agrees with D2, a drug dealer, to take part in the sale of a large quantity of prohibited drugs. D1 intends to arrest D2 *before* the sale takes place.

[28] Para 6.8.

[29] Paras 1.51 to 1.54 above.

8.23 In example 8B, under the current law the officer (D1) is not a co-conspirator because he did not intend to carry out the agreement. Thus, neither D1 nor D2 is guilty of conspiracy. D2 therefore benefits unfairly from the arbitrariness of the current law that does not reflect the culpability of D1 and D2.

8.24 We believe that in example 8A the officer (D1) should be provided with a defence. However, providing D1 with a defence assumes that he or she intended that the agreement should be carried out. Accordingly,it would still be possible to convict D2 of conspiracy on the facts.

8.25 In example 8B, the officer, D1, does not intend the substantive offence to be committed. Accordingly, there is no need for any special defence in order to ensure that he or she is not convicted. At the same time, as noted above, it is not possible to convict D2 of conspiracy, assuming that D2 is the only other person involved. In Part 7,[30] we asked consultees the question whether section 1(4)(a) of the Criminal Attempts Act 1981 should be repealed so as to make attempted conspiracy an offence known to English law. Were it to be an offence, it would be possible in example 8B to convict D2 of attempting to conspire to supply controlled drugs.

8.26 The objection could be made that a defence of reasonable action taken to prevent crime or harm would be susceptible to abuse by criminals in multi-handed trials or by law enforcement agents.[31] Therefore, we will now examine what form the defence should take. We will outline two restraining features that could prevent the defence from being abused. The first is a reasonableness requirement and the second is placing the legal burden of proof on D. We also examine the merits of restricting the availability of the defence to formal and informal agents of the state.

Limiting the scope of the defence

REASONABLENESS OF ACTION REQUIREMENT

8.27 It is our view that in order to plead this defence, it must have been reasonable in the circumstances for D to act as he or she did. This is for the same reasons given in the 2006 report.[32] A requirement of reasonableness would ensure that D can only successfully plead the defence if what D did was proportionate to the seriousness of the offence or the harm that D was trying to prevent or limit. An objective requirement of reasonableness would therefore play an important restraining function, as it does in the defence of duress or self-defence. The Government has incorporated the recommendation in the 2006 report into the Serious Crime Bill.[33]

[30] See para 7.57 above.

[31] See Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com 2006, paras 6.9(3) and 6.10.

[32] Para 6.14.

[33] Clause 48(1)(b).

REASONABLENESS OF BELIEF REQUIREMENT

8.28 To maintain consistency with other similar defences (such as duress), and with our recommendation in the 2006 report, we also propose that D's belief that he or she was acting in order to prevent crime or harm should have to be based on reasonable grounds. It should not be sufficient that D honestly believed in a need to act to prevent crime or harm, however absurd, biased or prejudiced the basis for that belief may have been. Again, the Government has incorporated the recommendation in the 2006 report into the Serious Crime Bill.[34]

BURDEN OF PROOF

8.29 By placing the legal burden of proof on D, fraudulent claims to the defence would be less likely to succeed. The burden of proving the conduct element and the fault element would rightly remain on the prosecution, in accordance with the presumption of innocence. It would only be for D to prove on the balance of probabilities that he or she had acted reasonably. If the burden remained on the prosecution, it would have to disprove the defence beyond reasonable doubt which would be an excessively difficult hurdle to surmount.

8.30 It is our view that placing the burden on D is compatible with the presumption of innocence as enshrined in article 6(2) of the European Convention of Human Rights and Fundamental Freedoms. The majority of the House of Lords in *Sheldrake*[35] noted that a reverse burden for a defence may constitute an interference with the presumption. However, the Convention does not prohibit "presumptions of law and fact but requires that these should be kept within reasonable limits."[36] Therefore one must assess whether first, a legitimate aim is pursued and, secondly, whether the interference is proportionate to this aim.

8.31 There is clearly a legitimate aim of limiting fraudulent claims to the defence. Further, the relevant matters would be "conditioned by (D's) own knowledge and state of mind."[37] Therefore, a reverse burden of proof would serve the legitimate aim of ensuring that an impossible task of gathering evidence about the defendant's own state of mind is not imposed on the prosecution.

8.32 We believe that reversing the burden of proof is a proportionate response to achieve these aims. In particular, it should be noted that D is only required to prove the defence on the balance of probabilities and can provide his or her own testimony as evidence.

[34] Clause 48(2)(b).

[35] [2004] UKHL 43, [2004] 1 AC 264.

[36] Above, at [21] by Lord Bingham.

[37] Above, at [41] by Lord Bingham.

SHOULD THOSE TO WHOM A DEFENCE IS AVAILABLE BE RESTRICTED?

Arguments in favour of restricting the defence to formal and informal agents of the state

8.33 The arguments in favour of restricting the defence to formal and informal agents of the state are strong.[38] Law enforcement is the primary responsibility of the state and if the defence were available to all, there would be a risk that private vendettas would be pursued and the activities of the law enforcement agencies disrupted.

8.34 In addition, conspiracy is subject to peculiar procedural and evidential rules that do not apply to the joint prosecution of offenders in other cases.[39] The most important of these rules is 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.[40] If a defence like the one proposed was generally available then there is a danger that a participating informant, D1,[41] would be able to build evidence against another D2 simply by his own acts and declarations knowing that he or she (D1) has a defence. This might lead to applications to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984.[42] As far as agents of the state are concerned, they are 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 of entrapment. It is possible to set boundaries both in law, in terms of what will be admissible, and in policy.[43]

[38] Lord Hoffmann in *Jones* [2006] UKHL 16, [2007] 1 AC 136 at [74] raised the question, "whether one judges the reasonableness of the defendant's actions as if he was the sheriff in a western, the only law man in town, or whether it should be judged in its actual social setting, in a democratic setting with its own appointed agents for enforcement of the law." This supports the idea that it is for the agents of the state, not citizens on a frolic of their own, to enforce the law. Lord Hoffmann does acknowledge, however, at [81] that "in a moment of emergency, when individual action is necessary to prevent some imminent crime…, it may be legitimate, praiseworthy even for the citizen to use force on his own initiative."

[39] See Part 2, para 2.20 above.

[40] 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.

[41] Whether he or she is an agent of the state or civilian working for an agent of the state.

[42] Section 78 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.

[43] *Looseley; Att.-Gen.'s Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 1 WLR 2060.

8.35 Further, it is possible to see how, if the defence were to be generally available, this would increase the risk that it would be abused. In a joint trial for example, D1 could claim 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.[44] D2 could then seek exclusion of the evidence or severance of the trial from D1. It is not easy to see how placing the legal burden of proving the defence on the defendant would necessarily prevent this sort of abuse, particularly if defendants collude with each other in order to achieve long term gains such as severance.

Arguments against restricting the defence to formal and informal agents of the state

8.36 If it were decided that the defence should be limited to certain individuals or categories this would be inconsistent with our recommendations in the 2006 report[45] and also with the provisions in the Serious Crime Bill.[46] Consistency between conspiracy and inchoate offences of assisting and encouraging is particularly important as acts of assisting and encouraging are likely to overlap with conspiratorial acts. If there was a distinction regarding the availability of the 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 assisting or encouraging crime.[47]

8.37 Further, it may be difficult to define exhaustively who would be eligible to plead the defence. This may lead to cases turning on technical considerations, for example whether the defendant was operating as a formal or, more particularly, an informal agent of the state.[48]

8.38 In addition, the argument for restricting the availability of the defence is perhaps more persuasive if the defence was restricted to instances where the individual acted to prevent crime. However, when one considers that the proposed defence would also apply to those who act to prevent or limit harm, one can envisage examples where those who were not acting as formal or informal agents of the state should be afforded the defence.

[44] Such a situation is contemplated in the Judicial Studies Board specimen direction ('Plea of Guilty/Conviction of One Defendant, Effect on Defendant on Trial') 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.

[45] We recommended that the defence should not be limited to particular individuals or categories – see paras 6.9 to 6.11.

[46] Clause 48.

[47] In much the same way as they presently opt for charging conspiracy instead of the substantive offence because of the advantages that it offers for them.

[48] See 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.

8.39 The following examples illustrate this point:

Example 8C

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 agree to damage V's car instead. D1 is charged with conspiracy to cause criminal damage.

Example 8D

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 agree 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, the police apprehend D1 and D2. D1 is charged with conspiracy to burgle.

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 was prevented.

8.40 It is therefore our view that the defence should not be restricted in its availability.

Conclusion

8.41 In our view, a defence to a charge of conspiracy should be available where an individual acts to prevent crime or harm provided that, in doing so, he or she acts reasonably. However, in formulating such a defence, we must bear in mind the Government's decision in the Serious Crime Bill to reject our earlier recommendation to provide a discrete crime prevention defence to the inchoate offences of assisting or encouraging crime. Instead, the Serious Crime Bill implements the other recommendation that we made in the 2006 report, namely that there should be a discrete offence of acting reasonably. We therefore consider that, in the interests of consistency, the defence to conspiracy should be similarly formulated.[49] We will now examine how such a defence of acting reasonably could apply to conspiracy.

[49] This is particularly important when one considers the potential overlap between acts that could be characterised as assisting and encouraging and acts that could be characterised as a conspiracy.

DEFENCE OF ACTING REASONABLY

Introduction

8.42 In the 2006 report, we recommended that there should a defence of acting reasonably.[50] The Government agreed and, accordingly, clause 48 of the Serious Crime Bill sets out the following defence to a charge of assisting or encouraging crime:

> (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…;
>
> (b) any purpose for which he claims to have been acting;
>
> (c) any authority by which he claims to have been acting.

8.43 It is clear from the way in which clause 48(3) is drafted that the defence makes provision for those who act in order to prevent crime or, more broadly, those who act under the authority of law enforcement agencies. We believe that, so understood, clause 48 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. It would simply be arbitrary to permit the defence for acts of assistance or encouragement but not for acts amounting to conspiracy. However, the net is cast more widely.

[50] Para 6.26.

The wider ambit of clause 48(3)(b) and its application to conspiracy

8.44 In the 2006 report we recommended that the 'acting reasonably' defence should have a wider application in cases where D did not have as his or her purpose the assistance or encouragement of crime but merely foresaw that his or her acts would assist or encourage the commission of a crime. In such cases, there would not be any theoretical or practical limits on the kinds of purpose that D could rely on as showing that he or she was 'acting reasonably' in assisting or encouraging crime. In the 2006 report, we noted that in other contexts the law has recognised broad defences based on the acceptability of conduct.[51] 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 conduct was reasonable."

8.45 An example where our 'acting reasonably' defence might have a broader 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 under-age boy may not actually drive the car. The question is whether the personal assistant and the garage worker should have a defence to a charge of assisting or encouraging crime of having 'acted reasonably'. We recommended that they should be able to submit that they fall within the defence. That recommendation is embodied in clause 48(3)(b).[52]

8.46 If clause 48 were applied to conspiracy, we anticipate that only in a most exceptional and unusual case would and should D succeed with the defence, other than when his or her purpose was closely analogous to a case falling within clause 48(3)(a) or 48(3)(c). This is because in a conspiracy case not only has D agreed with another person to commit an offence but D also intends the offence crime to be committed. We fully expect the courts to rule, for example, that if a 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 authority for his or her actions ought to ensure that the defence is unsuccessful.

[51] Paras 6.20 to 6.21.

[52] Although cl 48(1)(b) does not limit the defence to cases in which D did not have as his or her purpose the assistance or encouragement of crime. If D did have the assistance or encouragement of crime as his or her purpose, under cl 48 that will simply count against him or her in the determination of whether what was done was reasonable in the circumstances.

8.47 In any event, as we have already indicated in Part 4,[53] if a conspiracy involves a known risk that conduct will be undertaken in the presence of the circumstance element, the tribunal of fact will already be bound to consider whether the risk taken was in the circumstances an 'unreasonable' one. That may well already involve consideration of the purpose for which D agreed to engage in the conduct.

8.48 However, we do ask consultees whether the defence should be restricted when applied to the offence of conspiracy so as to eliminate the wider ambit of the defence as set out in clause 48(3)(b) of the Serious Crime Bill.

Our provisional proposal

8.49 We provisionally propose that:

> **Proposal 6: the defence of 'acting reasonably' provided by clause 48 of the Serious Crime Bill should be applied in its entirety to the offence of conspiracy**.

Our question

8.50 Our question is:

> **Question 9: are the interests of simplicity and consistency are 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?**

[53] Paras 4.119 to 4.123.

PART 9
SPOUSAL IMMUNITY

INTRODUCTION

9.1 This Part considers the rule that a husband and wife, or civil partners, cannot be guilty of conspiracy if they are the only parties to the agreement.[1] We begin by setting out the current law before referring briefly to recent consideration of the rule by both Parliament and the Law Commission. We then set out the main arguments for and against retention of the rule. We include a summary of the approach taken in the United States. The Part concludes with a provisional proposal that the rule be abolished.

CURRENT LAW

Common law

9.2 Prior to the 1977 Act, it was thought that it was a defence at common law to the offence of conspiracy if the only parties to the agreement were married to each other at the time of agreement. However, there was no English authority directly on the point.[2] In *Mawji*[3] the Judicial Committee of the Privy Council proceeded on the assumption that it was a rule of English criminal law that a husband and wife cannot by conspiring with each other be guilty of conspiracy.

9.3 The spousal exemption from liability continues to subsist at common law for common law conspiracies.[4]

Statute

9.4 This rule is now embodied in section 2(2)(a) of the 1977 Act which states that a person is not guilty of a statutory conspiracy:

> … 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 ….

[1] We refer to this rule as spousal immunity even though it also applies to civil partners. We use the term because it is customary.

[2] There may be a conspiracy between husband and wife in the civil law: *Midland Bank Trust Co Ltd v Green (No 3*) [1979] Ch 496.

[3] [1957] AC 126. Also, in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496, 510 Oliver J stated that "it has likewise been assumed to be the case by most of the modern textbook writers on the criminal law … ."

[4] The common law offences are conspiracy to defraud, corrupt public morals or to outrage public decency and were preserved by the Criminal Law Act 1977, s 5(2) and (3).

9.5 The rule does not apply if the marriage takes place after the agreement is formed.[5] Further, if there is a third party to the agreement, the married couple can be held liable for the offence of conspiracy.[6] 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.[7]

PREVIOUS CONSIDERATION OF THE EXEMPTION

The Law Commission

9.6 In its report in 1976,[8] the Commission recommended that the spousal immunity should be retained.[9] The Working Party and consultees were divided on the issue but the majority of Commissioners were persuaded both by the policy arguments in favour of its retention and also by the recommendation of the Law Reform Commission for Victoria[10] that the rule should remain unaltered. The "practical disadvantages" of potentially undermining the stability of marriage were considered to outweigh the arguments in favour of the abolition of spousal immunity.

The legislature

9.7 The exemption has recently been referred to on two occasions in Parliament but on neither occasion were its merits explored.

Civil Partnership Act 2004

9.8 The immunity from prosecution for statutory conspiracy enjoyed by spouses was extended in 2004 to civil partners.[11] It was one of a long list of additional references to civil partners where an existing statute referred only to spouses. This amendment aimed "to ensure that civil partners benefit from the same exemption for liability for the offence of conspiracy that currently applied to a spouse."[12] There is no indication that the particular amendment to section 2(2)(a) of the 1977 Act was the subject of debate in Parliament.

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

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

7 *Chrastny* [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."

8 Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76.

9 Above, para 1.49.

10 Law Reform Commissioner (Victoria), Report No.3, Criminal Liability of Married Persons (Melbourne, June 1975). For further detail see paras 9.14 to 9.15 below.

11 Civil Partnerships Act 2004, s 261(1), sch 7, para 56.

12 Explanatory Notes to Civil Partnerships Bill.

The Fraud Bill (2005)

9.9 The merits of the exemption were questioned by Baroness Anelay St Johns during the passage of the Fraud Bill. She queried whether such a rule could "really be right in the 21st century".[13] The Attorney-General thought it an important point, but not an appropriate one to be addressed within the context of the Fraud Bill.[14]

ARGUMENTS FOR RETAINING IMMUNITY

9.10 The arguments in favour of retaining the rule are based principally on its original rationale.

Unity of husband and wife

9.11 The idea of spousal immunity has a biblical origin.[15] The rule is essentially based on the legal fiction that a husband and wife represent one legal entity. Hawkins wrote that "they are esteemed but one person in law, and are presumed to have but one will."[16] As a conspiracy requires an agreement between two minds, such a single legal unity will not suffice.[17]

Public policy considerations

9.12 The rule was also informed by public policy considerations that may provide a more convincing justification for the application of the rule today.

9.13 The main public policy consideration is that the stability of marriage would be undermined if a husband and wife could be liable for conspiracy. The rule therefore ensures that marital confidences remain private, that the law enforcement authorities cannot apply improper pressure and that the peace of families is preserved.

9.14 Further, as the Victorian Law Reform Commission stressed, the law should not set up a conflict between the duty owed by a wife to her husband (or vice-versa) and the duty she (or he) owes to the state not to breach the law:

> in such circumstances the making of the agreement may be much less reprehensible than the making of a like agreement between persons owing no duties to each other.[18]

[13] 19 July 2005 *Hansard* (HL) vol 673, col 1453.

[14] 19 July 2005 *Hansard* (HL) vol 673, col 1455.

[15] Genesis ch 3, v 16 states that the husband shall "rule over" the wife and Genesis ch 2, vs 21 to 24 states that woman was created from man and that in union they become "one flesh". Oliver J in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496, 520 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 of her own."

[16] Pleas of the Crown, 1 Hawk, c 27, s 8, p 488.

[17] Lord Goldsmith referred to the idea that "man and wife were regarded as a unity, and unities cannot conspire with themselves" 19 July 2005 *Hansard* (HL) vol 673, col 1455.

[18] Law Reform Commissioner (Victoria), Report No.3, Criminal Liability of Married Persons (Melbourne, June 1975), para 65, p 27. See also *Gotliffe v Edelston* [1930] 2 KB 378, 385.

9.15 The Victoria Law Reform Commission also stated that the agreement of a spouse will make the acting out of the crime less likely than the agreement of a third party:

> the addition of the agreement of one spouse to the project of the other is less likely than the agreement of a stranger would be, to bring in additional resources or make the agreement a formidable one.[19]

ARGUMENTS AGAINST RETAINING IMMUNITY

Unity of husband and wife

9.16 The fiction that a husband and wife represent one will or that one should subsume their identity in that of the other is anachronistic[20] and inaccurate.

Public policy considerations

9.17 With regard to the public policy argument referred to in paragraph 9.13 above, Professor Glanville Williams has written, "the ordinary confidences of husband and wife are one thing, concerting to commit a crime quite another."[21] The concern to avoid improper pressure being brought to bear on another could equally apply to other people in close relationships and so its application here appears arbitrary.[22] It is also arguable that if the law is so concerned to preserve the peace of families it would extend immunity to a couple who have married after the formation of the conspiracy. However, it does not.[23]

9.18 Further, the obligation to fulfil the duty not to breach the law outweighs any special duty one may owe to a spouse, especially where the proposed substantive crime is a serious one. If a couple conspire to traffic people or cause explosions, but they are married to each other, few would say that the conspiracy is any less reprehensible, still less that it should not be possible to prosecute.

9.19 The idea that the support of a spouse will have less impact than that of another is debatable: in some cases the support of a spouse will have far more impact than that of any other person.

[19] Law Reform Commissioner (Victoria), Report No.3, Criminal Liability of Married Persons (Melbourne, June 1975), para 65, p 27.

[20] Oliver J in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496, 525 described it as a "primitive and inaccurate maxim" and (p 527) as a "mediaeval axiom which was never wholly accurate and which appears to me now to be as ill-adapted to the society in which we live as it is repugnant to common sense."

[21] "The Legal Unity of Husband and Wife" [1946] 10 *Modern Law Review* 16.

[22] For example, a threat to arrest a suspect's 14-year-old child may have more of an impact than a threat to arrest his adult wife.

[23] *Robinson's case* (1976) 1 Leach 37.

9.20 The rule also draws an arbitrary line between those who are married or are civil partners and those who have been in a long-standing and stable extra-marital relationship.[24]

9.21 The law has rejected such policy considerations in other areas of the criminal law. For example, in certain criminal proceedings, a spouse or civil partner can now be compelled to give evidence against the other.[25] The proceedings in question include those where it is alleged that one spouse (or civil partner) assaulted, injured or threatened to injure the other spouse (or civil partner).

Inconsistency and incoherence of the current law in comparison to other offences

9.22 The exemption creates anomalies within the law. A spouse may be convicted of inciting his or her spouse to commit an offence but not of conspiring with his or her spouse to commit an offence. In addition, if one spouse subsequently commits the substantive offence that they have agreed to commit, they can both be convicted of the substantive offence, one as the principal offender and the other as the secondary party. In our view, there is no logical reason for these distinctions.[26]

9.23 Further, once a third party joins the conspiracy, each spouse can be prosecuted for conspiracy. As Professor John Smith points out in a commentary on a case where D's conviction for conspiracy was quashed because it had not been proved that she had conspired not only with her husband but also her son:

> … neither [D's] dangerousness to the public nor her moral culpability would seem to vary significantly according to whether or not her son was a party to the fraudulent scheme found by the jury to have been operated by her and her husband.[27]

9.24 We agree with Professor Smith that the danger the conspirators pose to the public and the moral culpability of those who have formed a concrete agreement to commit a substantive crime does not, and should not, depend on their relationship to each other.

9.25 Further, in all cases apart from those where a spouse conspires exclusively with his or her spouse, a spouse can be prosecuted regardless of any considerations such as maintaining the stability of marriage, the privacy of marital confidences or the peace of families.

[24] Professor J C Smith, *Lovick (Sylvia)* [1993] *Criminal Law Review* 890, comments that "the anomaly is more obvious today … because it would not extend to the common practice of unmarried men and women living together as 'partners', however long-lasting and stable the relationship."

[25] Police and Criminal Evidence Act 1984, s 80.

[26] Professor John Smith, *Lovick (Sylvia)* [1993] *Criminal Law Review* 890 described the exemption for conspiracy as "anomalous"

[27] Above.

COMPARATIVE ANALYSIS

United States

9.26 LaFave has commented that "virtually every jurisdiction which has had occasion to consider the issue has rejected the common law rule."[28] For example, in *United States v Dege*[29] the Supreme Court considered and departed from the rule. It is true that three of the Supreme Court judges in this case dissented. One of the minority, Chief Justice Warren, said that he "cannot agree that the rule is without justification." He observed:

> A wife, simply by virtue of the intimate life she shares with her husband, might easily perform acts that would technically be sufficient to involve her in a criminal conspiracy with him, but which might be far removed from the arm's-length …agreement typical of that crime… such a possibility should not be permitted to endanger the confidentiality of the marriage relationship…the concept of the "oneness" of a married couple may reflect an abiding belief that the communion between husband and wife is such that their actions are not always to be regarded by the criminal law as if there were no marriage.[30]

9.27 However, the judgment delivered by Mr Justice Frankfurter in the majority is instructive:

> Such an immunity to husband and wife as a pair of conspirators would have to attribute to Congress one of two assumptions: either that responsibility…of husband and wife for joint participation in a criminal enterprise would make for marital disharmony, or that a wife must be presumed to act under the coercive influence of her husband and, therefore, cannot be a willing participant. The former assumption is unnourished by sense; the latter implies a view of American womanhood offensive to the ethos of our society.

OUR PROVISIONAL PROPOSAL

9.28 We conclude that the underlying rationale and policy considerations of the spousal immunity rule are anachronistic and it results in unacceptable anomalies within our criminal law.

9.29 We therefore provisionally propose that:

> **Proposal 7: the spousal immunity provided for by section 2(2)(a) of the Criminal Law Act 1977 should be abolished.**

[28] LaFave, *Criminal Law* (3rd ed 2000) p 608.

[29] (1960) 364 US 51.

[30] Above, 57 to 58.

9.30 It is acknowledged that our terms of reference do not include a review of the common law conspiracies and that our recommendation would only extend to the provisions of the Criminal Law Act 1977. It may therefore be argued that to abolish the rule only for some conspiracies is undesirable and would simply create an anomaly of a different kind.[31] However, the limited scope of our terms of reference should not be an excuse for allowing an unjust and anachronistic rule to remain law. In due course, we would hope that the exemption would cease to apply to common law conspiracies.

[31] Lord Goldsmith commented that it may be "equally unsatisfactory and anomalous to abolish the rule for some conspiracies but not others." 19 July 2005 *Hansard* (HL) vol 673, col 1455.

PART 10
EXEMPTIONS WHEN ONE CO-CONSPIRATOR IS A LEGALLY 'PROTECTED' PERSON

INTRODUCTION

10.1 In this Part we consider three exemptions under the current law that apply when a conspiracy is formed between D and one or more legally 'protected' persons. The first two exemptions concern the situation where D conspires exclusively with a person who is the intended victim of the substantive offence. In such a case, the victim is exempt from liability.[1] In addition, D ('the non-victim co-conspirator') is also exempt.[2] The third exemption applies where D conspires with a child under the minimum age of criminal responsibility.[3]

CO-CONSPIRATOR IS THE INTENDED VICTIM OF THE INTENDED SUBSTANTIVE OFFENCE

Introduction

10.2 In this section we consider the current exemptions which apply when one co-conspirator is the intended victim of the substantive offence. We begin by outlining the current law and its rationale. We then examine the approach that we took in the 2006 report on assisting and encouraging crime before decribing the approach adopted in the United States. Our provisional proposal is stated at paragraph 10.31 below.

The current law

10.3 Section 2(1) of the 1977 Act provides:

> A person shall not … be guilty of conspiracy to commit any offence if he is an intended victim of that offence.

10.4 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.

[1] Criminal Law Act 1977, s 2(1).

[2] Criminal Law Act 1977, s 2(2)(c).

[3] Criminal Law Act 1977, s 2(2)(b). The minimum age of criminal responsibility is 10 years – Children and Young Persons Act 1933, s 50.

10.5 The term 'victim' is not defined in the Act.[4] It is our view that 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 which he or she cannot be convicted of committing or inciting. Secondly, he or she is the person against whom the substantive offence would be committed if the agreement were carried out. An example would be an agreement between an adult and a child under sixteen to have sexual intercourse.[5]

The rationale of the current law

10.6 As the law stands, both the victim and the non-victim co-conspirator are exempt from criminal liability.[6]

10.7 The reason for the exemption of the victim is as follows. Certain provisions of the criminal law are designed to protect particular persons who are deemed vulnerable and open to exploitation. Such persons are not criminally liable for committing or inciting a substantive offence that exists for their protection.[7] Accordingly, it should not be possible for that person to be held criminally liable for agreeing to commit such an offence, an act one step removed from the commission of the substantive offence. This would be contrary to the policy and legislative intent underlying the substantive offence.

10.8 The reason for the exemption of the non-victim co-conspirator is more difficult to justify. It would appear to rely on the same reasoning that applies to the other exemptions in section 2 of the 1977 Act. The essence of a conspiracy is a meeting of two criminal minds to form an agreement to commit an offence. If one of those minds is that of a person who would be a 'victim' of the offence, that person is considered incapable of being a party to the offence. Therefore, in a situation where the agreement is exclusively between the victim and D, there is not a meeting of two criminal minds and there is no conspiracy.

Criticism of the rationale

10.9 We accept that the rationale underpinning the exemption for the victim of the intended offence is sound.

[4] Smith and Hogan, *Criminal Law* (11th ed 2005) p 395, suggest that a person is a victim of an offence "when the offence is held to exist for his protection with the effect that he is not a party to that offence when it is committed by another with his full knowledge and co-operation."

[5] In the Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76, we commented that "we know of no case in which this situation has ever arisen and we do not believe it has any practical importance." (para 1.55).

[6] The non-victim co-conspirator must conspire exclusively with the intended victim(s) of the substantive offence in order to be to be exempt from liability.

[7] *Tyrrell* [1894] 1 QB 710.

10.10 However, regarding the exemption from liability of the non-victim co-conspirator, we consider the rationale to be questionable. We have already said why we consider the rationale that there is no meeting of two minds between husband and wife (or civil partners) can no longer be sustained.[8] Therefore, the question arises as to whether this rationale can be applied to an agreement between a victim and a non-victim co-conspirator.

10.11 On one view, when a person is considered to be a 'victim' of an offence it is not simply that they are provided with a defence. As a member of a protected category, they are unable to commit the substantive offence itself or to incite its commission.[9] On this view, their status is akin to that of a child under ten. The latter is treated not as a person who requires a defence but as a person who is incapable of committing a criminal offence because he or she cannot form a criminal intent. Both the victim and child under ten are incapable of being parties to an agreement to commit an offence and so are unable to be co-conspirators.

10.12 However, the victim can be distinguished from the child under the minimum age of criminal responsibility. The victim who is not a child under the minimum age of criminal responsibility is considered to be of sufficient maturity to be able to form a criminal intent. It is simply that he or she is recognised as being particularly vulnerable and in need of legal protection from conviction. So a conspiracy with a victim who is not a child under the minimum age of criminal responsibility does involve in law the meeting of two minds capable of forming a criminal intent, albeit that one of those minds is that of a person deemed in need of protection by the law.

10.13 Further, the person (D) who forms an agreement with the intended victim of the substantive offence is no less culpable than the person who forms an agreement with a person who is not the intended victim. Indeed, D's actions may be even more reprehensible if he or she has targeted a person whom the law has identified as particularly vulnerable and open to exploitation. There seems to be no principled reason why D should benefit from the exemption enjoyed by the victim co-conspirator.

Law Com No 300

10.14 In the 2006 report on inchoate liability for assisting and encouraging crime,[10] we concluded 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… .
>
> It should suffice that one reason for enacting the offence was to protect a particular category of persons.[11]

[8] See Part 9, para 9.16 above. We will also discuss in this paper how this rationale may still be valid when applied to the exemption for the person who forms an agreement with a child under the minimum age of criminal responsibility which is currently 10 years ten: see paras 10.39 to 10.40 below.

[9] *Tyrrell* [1894] 1 QB 710; *Whitehouse* [1977] QB 868.

[10] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

10.15 However, we also noted that there may be cases where a person within the protected category encourages the commission of an offence against another person within the protected category. For example, a girl of 14 may encourage sexual activity between her friend who is under 13 and a boy of 18. It was our view that it would not be right for the 14-year-old to be exempt from liability based purely on her protected status. To qualify as a victim, the person belonging to the protected class must also be the person against whom the offence was committed or was intended to be committed.

Recommendation for defence

10.16 We therefore recommended that it should be a defence to a charge of assisting or encouraging 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;

(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 had it had been committed.[12]

10.17 This recommendation has been adopted by the Serious Crime Bill.[13] In Appendix A of the 2006 report we noted that "we would expect this defence to be extended to cover conspiracy (and secondary liability) in due course."[14]

Application of this recommendation to the law of conspiracy

10.18 The recommendation detailed above at paragraph 10.16 differs from the current law of conspiracy in two ways.

10.19 First, it states explicitly under what circumstances a person would be deemed a victim of an offence and worthy of protection. It is our preliminary view that it is desirable to adopt this approach to conspiracy. It would clarify what is meant by the term 'victim', a term currently undefined in the 1977 Act. Further, adopting this approach would promote consistency amongst the inchoate offences.

10.20 Secondly, the recommendation only provides an exemption for the person who is a victim of the offence. By way of contrast, the current law of conspiracy expressly exempts both the victim and the non-victim co-conspirator.

[11] Paras 6.38 to 6.39.

[12] Para 6.44.

[13] Cl 49.

[14] Appendix A, para A.66.

10.21 We accept that the victim of the intended offence should be protected from prosecution for conspiracy. One option, therefore, is simply to retain the current exemption which applies to the intended victim.[15] Alternatively, the exemption could be abolished and the defence recommended in the 2006 report for the 'protected' victim could provide a template for a similar defence to a charge of conspiracy. We consider this latter option preferable to retaining the current exemption because it would clarify under what circumstances an individual should be considered a victim and would promote consistency amongst the inchoate offences.[16]

10.22 Further, for the reasons given in paragraphs 10.10 to 10.13 above, we believe that the exemption that applies to the non-victim co-conspirator should also be abolished.

10.23 We therefore conclude that both the exemptions that apply to the victim and non-victim co-conspirator, as stated in section 2(1) and 2(2)(c) of the 1977 Act, should be abolished. A defence analogous to the defence recommended in the 2006 report should be provided for the victim co-conspirator.

Attempting conspiracy

10.24 There is also another possible option. The Criminal Attempts Act 1981 could be amended to provide for the new offence of attempting conspiracy.[17] Section 1(4)(a) currently states that one cannot attempt a conspiracy pursuant to section 1 of the Criminal Law Act 1977. The repeal of this provision would mean that if the co-conspirator agreed to commit an offence with a victim of the intended offence and he or she took a more than merely preparatory act in forming this conspiracy, he or she could be held liable for attempted conspiracy. As a matter of fair labelling, this may seem to be a better approach.

10.25 Smith and Hogan have noted that this would "be a considerable extension of the law, with the conduct being doubly remote from the substantive offence."[18] However, as we have seen in Part 7 the law does allow for this 'pairing up' of inchoate offences. Under the current law, X can be convicted of inciting Y to commit an inchoate offence.[19] We have also recommended that there should be an offence of assisting and encouraging another person to conspire, attempt or assist and encourage an offence, and the Government intends to act on that recommendation.[20]

[15] Criminal Law Act 1977, s 2(1).

[16] We acknowledge that adopting this latter option would provide a defence, rather than an exemption, for the intended victim. We consider this appropriate and that it is right that the issue of whether an individual is a victim is treated as a trial issue.

[17] In our Criminal Code for England and Wales (1989) Law Com No 177 we recommended that attempt to conspire should be restored as an offence (para 13.48). Under our current proposals for reform of the law of attempt, if the proposal under discussion were accepted, it would also have to become possible to convict someone of criminal preparation with intent to conspire.

[18] *Criminal Law* (11th ed 2005) p 416.

[19] Inchoate Liability for Assisting and Encouraging (2006) Law Com 300, para 3.33.

[20] Above, paras 7.16 to 7.24; Serious Crime Bill, Part 2.

10.26 The extension of the law of attempt (and of criminal preparation) to conspiracy may also help address the problem identified in Part 8 of the co-conspirator who conspires with a law enforcement agent. Such an agent may never have intended that the agreement should be carried out, with the result that the agent cannot be a co-conspirator and the other culpable party to the agreement cannot be charged with the offence of conspiracy. If there was an offence of attempting conspiracy, the culpable individual could be charged with that offence. He or she would then no longer benefit wrongly from the fortuitous circumstances of his co-conspirator's state of mind.

10.27 In Part 7, we asked consultees whether the current rule that there can be no offence of attempting conspiracy should be rejected.[21]

Comparative analysis

United States

10.28 Under the common law, a person who is part of a legislatively protected class of persons cannot be held guilty of conspiring to commit that crime.[22] Further, if there is only one other co-conspirator, he or she too is exempt from liability.

10.29 In the leading case of *Gebardi v United States*,[23] a man and woman conspired to transport the woman across state borders for the purposes of engaging in sexual intercourse with the man contrary to the Mann Act.[24] The court noted that the Mann Act did not hold the woman liable for the substantive offence which reflected an "affirmative legislative policy to leave her acquiescence unpunished." It followed from this legislative intent that the law would similarly not hold the woman liable for conspiring to commit the offence.[25] Regarding the man's liability the court simply stated that "as there is no proof that (he)…conspired with anyone else…, the convictions of both petitioners must be reversed." It would appear to be grounded on the premise that, as a victim, the woman could not be a party to the conspiracy and so, without a co-conspirator, the man was also not guilty.

10.30 The Model Penal Code also states that if a person cannot be convicted of the substantive offence as an accomplice, he or she cannot be convicted of conspiracy to commit that offence.[26] However, in contrast to the common law in the United States and our current law, the Model Penal Code takes a unilateral approach to the law of conspiracy so the non-victim co-conspirator can be found convicted of conspiracy.[27]

[21] See para 7.61 above.

[22] LaFave, *Criminal Law* (3rd ed 2000) pp 609 to 612.

[23] (1932) 287 U.S. 112, 53 S.Ct. 35,77 L.Ed. 206.

[24] Mann Act 1910, s 2 states that it is a felony to knowingly transport a female for immoral purposes.

[25] "It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers."

[26] S 5.04(2).

[27] S 5.04(1).

Our provisional proposal

10.31 We provisionally propose that:

> **Proposal 8: Both the present exemptions for the victim and non-victim co-conspirator should be abolished but D should have a defence to a charge of conspiracy 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.**

10.32 An alternative option may be available if question 6 is answered in the affirmative and consultees consider that an offence of attempted conspiracy should be provided. The current exemptions for both the victim and non-victim co-conspirator stated in section 2(1) of the 1977 Act could be retained and the non-victim co-conspirator could then be found guilty of this double inchoate offence. Consultees may believe that this change is sufficient to see justice done without formally abolishing the exemptions from liability.

CO-CONSPIRATOR IS A CHILD UNDER THE AGE OF CRIMINAL RESPONSIBILITY

Introduction

10.33 In this section we consider the current exemption where the agreement is formed with a person under the age of criminal responsibility. We outline the current law and its rationale. We then consider the arguments for and against retention of this rule. We conclude that the exemption should be retained.

The current law

10.34 The current law is detailed in the 1977 Act. Section 2(2)(b) states that 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.

10.35 There is a conclusive presumption that a child under 10 cannot be guilty of a criminal offence.[28] Therefore, there is no conspiracy if there is an agreement only between an adult and a child under 10.

[28] Section 2(3) states that a person is under the age of criminal responsibility "so long as it is conclusively presumed, by virtue of section 50 of the Children and Young Persons Act 1933 that he cannot be guilty of any offence." 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 can be guilty of an offence."

The rationale of the current law

10.36 A person under the age of criminal responsibility is not considered capable of forming a criminal intent. The essence of conspiracy is the meeting of two minds in an agreement to commit a criminal act. If one of the persons involved is incapable of forming the mental element required, the basis of the offence collapses.

Arguments against retaining rule

10.37 It may appear unsatisfactory that the adult's criminal responsibility rests on the age of his or her co-conspirator. If the adult agrees with a 9 year old, no criminal charge for conspiracy can be brought, whereas if the co-conspirator happens to be 10 years' old, a charge of conspiracy can be brought. However, the adult may be equally as culpable in either scenario.

10.38 Further, the policy of facilitating early intervention of the criminal law means that the law enforcement authorities should be able to act prior to the harm being committed and secure a conviction, rather than being forced to wait until the substantive crime is attempted.

Arguments in favour of retaining rule

10.39 As stated in Part 3, in our report of 1976[29] we recommended that if an individual conspires only with a person under the age of criminal responsibility, that individual should be exempt from liability. When one of the two conspirators is a child under 10 there is not the requisite meeting of two criminal minds. Further, we observed in 1976 that once the substantive offence has in fact been committed, the responsible adult will be guilty, even though he or she did not do the act himself, on the basis that he or she committed the offence through an innocent agent.[30] This argument still has force today.

10.40 The law of conspiracy is justified by the existence of reasons to distinguish in law between the lone individual who forms a criminal intent and a criminal agreement between two or more persons. In the latter situation, there is a greater threat to society in the form of greater commitment to carrying out the crime and an increased likelihood that the criminal plan will be carried out.[31] However, this policy consideration has less weight when the only co-conspirator is a child under 10 of necessarily limited capability and unable to form a criminal intent.

Our provisional proposal

10.41 Our provisional proposal is*:*

> **Proposal 9: 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.**

[29] Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76.

[30] Above, para 1.51.

[31] See the discussion in Part 2 above.

10.42 It is important to note that we have asked consultees in Part 7 whether it should become legally possible to attempt (or to criminally prepare) to conspire. If this were an offence, it would capture the responsible and culpable individual who seeks to conspire with a child or with children under the age of criminal responsibility.[32]

[32] See discussion in Part 7 above.

PART 11
EXTRA-TERRITORIAL JURISDICTION

INTRODUCTION

11.1 The primary basis of English criminal jurisdiction is territorial. This means that a court in England and Wales[1] has jurisdiction to try a person, regardless of his or her nationality, for an offence committed in England and Wales. There are certain statutory provisions, however, that allow a court to try a person for an offence committed *outside* England and Wales.[2] This is described as extra-territorial jurisdiction.[3]

11.2 The phenomenon of globalisation and the emergence of international criminal organisations have resulted in a significant number of serious crimes crossing national boundaries.[4] This development is particularly pertinent to inchoate offences[5] and so it is important to ensure that a coherent set of jurisdictional rules govern when extra-territorial jurisdiction can be exercised.

11.3 In the 2006 report on assisting and encouraging crime,[6] we examined the circumstances in which such extra-territorial jurisdiction can be exercised in the context of inchoate offences. We concluded by recommending new jurisdictional rules that would govern the inchoate offences of assisting or encouraging crime.[7] We also recommended that:

> consideration be given to providing a statutory scheme of jurisdictional rules for conspiracy to run in tandem with [this] scheme.[8]

11.4 Therefore, in this Part we will examine the jurisdictional rules that should apply to conspiracy, focusing particularly on the desirability of proposing a statutory scheme to run in tandem with the rules governing assisting and encouraging crime. We will begin by outlining what we recommended in relation to assisting and encouraging crime. We then outline the jurisdictional rules that currently apply to conspiracy. Finally we review the options for reform and state our provisional proposals at paragraphs 11.12 to 11.29.

1 We refer in this Part to England and Wales as "the jurisdiction".

2 There is a "strong presumption" that Parliament did not intend that conduct occurring outside the jurisdiction should be an offence triable within the jurisdiction: *Treacy* [1971] AC 537, 551 by Lord Reid; *Air India v Wiggins* [1980] 1 WLR 815.

3 For a discussion of when an act is committed within the jurisdiction, see paras 11.30 to 11.38 below.

4 Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com 300, Part 8, paras 8.1 and 8.7.

5 For example, it is not uncommon to encounter conspiracies formed in one country to import drugs, firearms or people into another country. See Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com 300, Part 8, para 8.1.

6 Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, Part 8.

7 These are out-lined at paragraph 11.5 below.

8 Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, para 8.29.

LAW COM NO 300[9]

11.5 In the 2006 report on assisting and encouraging crime, we noted that there was a dearth of direct authority on the issue of extra-territorial jurisdiction in relation to incitement.[10] In the light of this, we made the following recommendations:

(1) that D should be guilty of one of the new inchoate offences if D knew or believed that the principal offence[11] might be committed wholly or partly in England and Wales, irrespective of where D did the act capable of assisting and/or the commission of the principal offence.[12]

(2) that D might commit one of the new inchoate offences if:

(a) D did an act wholly or partly within the jurisdiction capable of assisting and/or encouraging a person to commit what would be a principal offence under the law of England and Wales;

(b) D knew or believed that the principal offence might be committed wholly or partly outside the jurisdiction;

(c) the principal offence was also an offence under the law of the territory where D knew or believed that it might wholly or partly take place.[13]

(3) that D might commit one of the new inchoate offences if:

(a) D did an act wholly or partly within the jurisdiction capable of assisting and/or encouraging a person to commit a principal offence under the law of England and Wales;

(b) D knew or believed that the principal offence might be committed wholly or partly in a place outside the jurisdiction;

9 Inchoate Liability for Assisting and Encouraging Crime (2006).

10 Above, para 8.16.

11 In the 2006 report we refer to the offence that is assisted or encouraged as the 'principal' offence. In the context of conspiracy, we refer to the offence that the parties agree to commit as the 'substantive' offence.

12 (2006) Law Com 300, Part 8, para 8.18. See Appendix A, paras A.69 to A.70 for an explanation. For example, D in Afghanistan sends an email to P in Manchester encouraging P to plant a bomb in central London.

13 Above, para 8.22. See Appendix A, paras A.75 to A.76 for an explanation. For example, D in London emails P in Brisbane encouraging him to commit robbery while he is in Sydney. D can be convicted in England or Wales of the offence of intentionally encouraging or assisting robbery because robbery is also an offence in New South Wales.

(c) the principal offence, if committed in that place, was an offence for which the perpetrator could be tried in England and Wales (if he or she satisfied a relevant citizenship, nationality or residence condition, if any).[14]

(4) that D might commit one of the new offences if:

(a) D's conduct took place wholly outside the jurisdiction;

(b) D knew or believed that the principal offence might be committed wholly or partly in a place outside the jurisdiction;

(c) D could be tried in England and Wales if he or she committed the principal act in that place.[15]

(5) In cases where it could not be proved that D knew or believed that the principal offence might take place wholly or partly within the jurisdiction, no proceedings could be instituted except by or with the consent of the Attorney-General.[16]

CONSPIRACY: THE CURRENT LAW

Introduction

11.6 The rules that govern when a court can assume jurisdiction for an offence of conspiracy have already been examined in our earlier report on assisting and encouraging crime.[17] This section is largely based on that review.

11.7 The offence of conspiracy is committed once an agreement is formed. The parties may therefore conspire outside the jurisdiction to commit a crime within the jurisdiction. Conversely, a conspiracy may be formed within the jurisdiction to commit a crime outside the jurisdiction.

[14] Above, para 8.24. See Appendix A, paras A.73 to A.74 for an explanation. For example, D in London sends a letter to a person in Jakarta encouraging him to commit an act of piracy on the high seas. D can be convicted in England and Wales of the offence of intentionally encouraging or assisting piracy on the high seas because, if piracy were to be committed on the high seas, it would be possible to convict the perpetuator in England or Wales.

[15] Above, para 8.26. See Appendix A, paras A.77 to A.78 for an explanation. For example, D (British citizen) in the Philippines encourages a man to rape a 10 year-old girl in Manila. D can be convicted in England or Wales of encouraging or assisting child-rape because, as a British citizen, it would be possible to convict D in England or Wales if he perpetrated that offence in Manila (Sexual Offences Act 2003, s 72 and sch 2).

[16] Above, para 8.28.

[17] Above, paras 8.8 to 8.11.

Conspiracy formed outside the jurisdiction to commit a crime within the jurisdiction

11.8 The House of Lords in *DPP v Doot*[18] held that an "overt act" in pursuance of a conspiracy must occur within England and Wales if the courts are to assume jurisdiction.[19] However, the Privy Council in *Somchai Liangsinpraseret v United States*[20] took a different approach, informed by the policy concern that authorities should be able to intervene prior to the commission of the substantive crime.[21] Lord Griffiths observed:

> If the inchoate crime is aimed at England with the consequent injury to English society, why should the English courts not accept jurisdiction to try it if the authorities can lay their hands on the offenders?… . Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of offences in England.[22]

Conspiracy formed within the jurisdiction to commit a crime abroad

Common law

11.9 A more restrictive approach has been adopted where the conspiracy is formed within the jurisdiction to commit a crime abroad. In *Board of Trade v Owen*[23] Lord Tucker concluded:

> that the decision of the Court of Criminal Appeal that a conspiracy to commit a crime abroad is not indictable in this country … is correct.[24]

The exception noted by the court was if the substantive offence was one that could be tried in England and Wales even if it was committed abroad.[25]

Statute

11.10 However, section 1A of the Criminal Law Act 1977[26] now provides that a court in England and Wales can try parties who conspire within the jurisdiction to commit an offence abroad. Four conditions must be fulfilled:

[18] [1973] AC 807.

[19] This was also the view expressed in our Working Paper of 1970 entitled, "Territorial and Extraterritorial Extent of the Criminal Law" (at p 54, para 96).

[20] [1991] 1 AC 225.

[21] "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" (above, by Lord Griffiths at p 251.)

[22] [1991] 1 AC 225, 250 to 251.

[23] [1957] AC 602.

[24] Above, 634. He went on to say that "in so deciding I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad."

[25] Examples are cited at p 628. For example, Offences Against the Person Act 1861, s 4.

(1) the pursuit of the agreed course of conduct must at some stage involve an act by one or more of the parties or the happening of some event intended to take place in a country or territory outside the UK;

(2) that act or event must constitute a criminal offence under the law of the foreign country concerned;

(3) the act would be a criminal offence under English law if committed within the jurisdiction;[27]

(4) a party to the agreement must:

(a) do something within the jurisdiction in relation to the agreement before its formation; or

(b) become a party to the agreement within the jurisdiction; or

(c) do or omit anything in England and Wales in pursuance of the agreement.

Further, section 4(5) states 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.

Limitations of section 1A of the Criminal Law Act 1977

11.11 Section 1A of the 1977 Act refers to conspiracy to commit offences "outside the United Kingdom" but does not apply to Scotland. This creates a potential problem in that it will not apply in circumstances where D1 and D2 agree on an act intended to take place in Scotland. This is because Scotland is not outside the United Kingdom for the purpose of the section. However, our proposals for extra-territorial jurisdiction are sufficiently wide as to be able to encompass the above example.[28]

THE CASE FOR REFORM

11.12 In this section we take each of our recommendations regarding the jurisdictional rules for assisting and encouraging and consider how, if applied to conspiracy, they would alter the current law for this inchoate offence and whether this would be desirable. We conclude each discussion with our proposal.

[26] Inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, s 5(1).

[27] The exact wording of this third condition is as follows: "the agreement would fall within section 1(1) above as an agreement relating to the commission of an offence but for the fact that the offence would not be an offence triable in England and Wales if committed in accordance with the parties' intentions."

[28] See para 11.20 below.

Substantive[29] offence anticipated to take place wholly or partly in England and Wales

11.13 The first recommendation made in our report on assisting and encouraging crime (detailed at paragraph 11.5(1) above) is largely based on the position of the common law as articulated by Lord Griffiths in *Somchai Liangsinpraseret v United States.*[30] As noted above at paragraph 11.8, in this case it was held that for the court to assume jurisdiction where the conspiracy has been formed out of the jurisdiction to commit the principal crime within the jurisdiction, there is no requirement of an overt act within England and Wales. Lord Griffiths stated that there is:

> … nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of offences in England.[31]

11.14 However, our first recommendation goes further than this. It would be sufficient if D knew or *believed* that the principal offence might be committed wholly or partly in England and Wales.

11.15 There are two reasons why we consider a similar recommendation should be made for conspiracy. First, it would ensure a consistent and coherent statutory scheme applied to both inchoate offences. This is particularly important when one considers that a single act might legally constitute an act both of assisting and/or encouraging and conspiracy.[32]

11.16 Secondly, we believe that it would be desirable to bestow jurisdiction on the courts when D believes that the substantive offence might occur within the jurisdiction, even if this was not D's intention. The following example illustrates this point:

Example 11A

D1 and D2 agree to take part in an illegal drugs deal. It will involve them travelling to France where they will buy a large quantity of prohibited drugs from X and sell them to a dealer Y (also in France) for a large profit. Although this is their intention, Y has been unreliable in the past and they only agree to make the deal because they recognise that if Y lets them down, they will be able to sell the drugs on back in England.

[29] In our report on assisting and encouraging crime, we refer to the crime that is assisted or encouraged as the "principal offence". In the context of conspiracy, we refer to the crime that the parties agree to commit as the "substantive offence."

[30] [1991] 1 AC 225.

[31] Above, 251.

[32] It will be an exceptional case where the forming of an agreement could not also be construed as an act of encouragement.

In this example, D1 and D2 have conspired to buy and sell prohibited drugs, intending that the substantive offence should occur in France, but believing that it might occur in England and Wales. It would be consistent with Lord Griffiths observation that inchoate crimes were developed with the principal object of frustrating the commission of a contemplated crime by arresting and punishing the offenders before they committed the crime to allow the English courts to assume jurisdiction in this case.

11.17 We therefore propose that:

> **Proposal 10: an offence of conspiracy should be triable in England and Wales if D knew or believed that the substantive offence might be committed wholly or partly in England and Wales, irrespective of where the agreement was formed**.

Substantive offence not anticipated to take place wholly or partly in England and Wales

D's acts done within the jurisdiction

11.18 The second recommendation for assisting and encouraging crime (paragraph 11.5(2) above) would provide the courts with jurisdiction where the act of assistance and/or encouragement has taken place within the jurisdiction but the principal offence is anticipated to take place abroad. In making this recommendation we specifically stated that this was a "similar provision to section 1A"[33] of the Criminal Law Act 1977. Our recommendation therefore broadly reflected this section's double requirement of criminality together with the fact that there has to be some act of D within the jurisdiction, as well as the safeguard requirement of the Attorney General's consent.[34]

11.19 To adopt this second recommendation for conspiracy would not therefore substantially alter the current jurisdictional rules governing conspiracy.[35] Further, it would be desirable to have a similar rule governing the inchoate offences of assisting or encouraging on the one hand and conspiracy on the other.

11.20 We therefore propose that:

> **Proposal 11: an offence of conspiracy should be triable in England and Wales if:**
>
> > **D conspires wholly or partly within the jurisdiction to commit what would be a substantive offence under the law of England and Wales and:**
> >
> > **(a) D knows or believes that the substantive offence might be committed wholly or partly outside the jurisdiction;**

[33] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com 300, para 8.21.

[34] Above, para 8.19

[35] The first condition stated in section 1A is reflected in point (b) of the recommended rule. The second condition of section 1A is reflected in point (c) of the recommended rule. The third condition of section 1A is reflected in point (a) of the recommended rule. The fourth condition of section 1A is also reflected in point (a) of the recommended rule.

(b) the substantive offence is also an offence under the law of the territory where D knows or believes that it might wholly or partly take place.

THE SUBSTANTIVE OFFENCE IS NOT AN OFFENCE UNDER THE LAW OF THE FOREIGN TERRITORY

11.21 The general approach taken in our earlier report requires that D should only be liable if the principal offence is an offence under the law of the foreign territory.[36] However, the third recommendation for assisting and encouraging outlined above at paragraph 11.5(3) states that D should be liable, even if it is not an offence under the law of the foreign territory, if the principal offence would be triable within England and Wales were it to be committed in the foreign territory.

11.22 An example would be the following:

Example 11B

D1 and D2 agree to commit an act of piracy on the high seas. If piracy were to be committed on the high seas, it would be possible to convict the perpetrator in England or Wales.[37]

We consider that it should also be possible for the courts of England and Wales to assume jurisdiction for the conspiracy charge.

11.23 As noted in our report on assisting and encouraging crime, if D could be tried within the jurisdiction for the principal offence, it ought to be possible to also try D within the jurisdiction for conspiring to commit this harm.[38] This would enable the authorities to intervene at the earliest possible opportunity so as to avoid the commission of the threatened harm.

11.24 We therefore propose that:

Proposal 12: an offence of conspiracy should be triable in England and Wales if:

(a) D conspires wholly or partly within the jurisdiction to commit a substantive offence under the law of England and Wales;

(b) D knows or believes that the substantive offence might be committed wholly or partly in a place outside the jurisdiction;

(c) the substantive offence, if committed in that place, is an offence for which the perpetrator could be tried in England and Wales (if he or she satisfies a relevant citizenship, nationality or residence condition, if any).

[36] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com 300, para 8.22 (3) and sch 2, para 2(1) of the Bill attached to that report.

[37] Piracy is considered a crime against humanity, a crime against the law of nations. Any sovereign state can assume jurisdiction.

[38] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com 300, para 8.23.

D's act takes place wholly outside the jurisdiction

11.25 The final scenario to be addressed is where D1 and D2 (being British citizens) conspire abroad to commit an offence abroad. There is clearly no obvious nexus with England and Wales and the general rule should be that the courts cannot exercise jurisdiction. However, it may be that if the agreement is actually carried out so the substantive offence is committed in the foreign territory, this substantive offence could be tried in England and Wales. In such circumstances, we consider that it ought to be possible to also assume jurisdiction *prior* to the commission of the substantive offence in order to prevent the envisaged harm. (This policy approach also informed our third recommendation in our report on assisting and encouraging crime which we propose should be adopted for conspiracy.)[39]

11.26 The following example illustrates this point.

> **Example 11C**
>
> D1 and D2 are British citizens who conspire in the Philippines to rape a 10 year old in Manila. If they carry out the agreement, it would be possible to convict D1 and D2 in England and Wales of child-rape.[40]

Again, we consider that in such circumstances the courts of England and Wales should also be able to assume jurisdiction if the Ds were apprehended prior to the commission of the crime.

11.27 We therefore propose that:

Proposal 13: the offence of conspiracy should be triable if:

(a) D's conduct takes place wholly outside the jurisdiction;

(b) D knows or believes that the substantive offence might be committed wholly or partly in a place outside the jurisdiction;

(c) D could be tried in England and Wales if he or she committed the substantive act in that place.

Consent of the Attorney-General

11.28 The final recommendation in Part 8 of our earlier report on assisting and encouraging crime drew directly from the current law governing the law of conspiracy which provides that:

[39] See paras 11.5(3) above.

[40] Sexual Offences Act 2003, s 72: (1) Subject to subsection (2), any act done by a person in a country or territory outside the United Kingdom which (a) constituted an offence under the law in force in that country or territory, and (b) would constitute a sexual offence to which this section applies if it had been done in England and Wales or in Northern Ireland, constitutes that sexual offence under the law of that part of the United Kingdom.(2) Proceedings by virtue of this section may be brought only against a person who was on 1 September 1997, or has since become, a British citizen or resident in the United Kingdom.

> … no proceedings for an offence triable by virtue of section 1A above may be instituted except by or with the consent of the Attorney-General….[41]

We described this provision as a "sensible safeguard to ensure that proceedings are only brought in appropriate cases."[42]

11.29 We therefore propose that the requirement of Attorney-General's consent be retained so that:

> **Proposal 14: in cases where it cannot be proved that D knew or believed that the substantive offence might take place wholly or partly within the jurisdiction, no proceedings may be instituted except by or with the consent of the Attorney-General.**

ACT OF CONSPIRACY TAKING PLACE "WHOLLY OR PARTLY WITHIN THE JURISDICTION"

11.30 There are references in the proposals above, which are modelled on our recommendations for assisting and encouraging crime, to an act of conspiracy occurring "wholly or partly within the jurisdiction".[43] Two questions arise. First, when does an act of conspiracy occur "within" the jurisdiction? Secondly, can an act of conspiracy occur "partly" within a jurisdiction, and if so, what does this mean?

"Within the jurisdiction"

11.31 In determining whether a substantive offence has been committed within the jurisdiction, the orthodox view was that the last element needed to complete the offence had to take place within the jurisdiction.[44] Therefore, if an offence consisted of both a conduct and a consequence element, the consequence had to take effect within the jurisdiction. This was described as the "last act rule" or "terminatory theory".[45]

[41] Criminal Law Act 1977, s 4(5).

[42] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com 300, para 8.27.

[43] See paras 11.20 and 11.24 above.

[44] *Manning* [1999] QB 980.

[45] Professor Glanville Williams, "Venue and the Ambit of Criminal Law" (1965) 81 *Law Quarterly Review*, 276, 518.

11.32 However, an alternative approach described as the "initatory" or "comity theory" has now been adopted.[46] Lord Diplock advocated this approach in *Treacy v DPP.*[47] He commented that comity only precluded a person being tried for the offence "where *neither* the conduct *nor* its harmful consequences took place in England and Wales."[48] In *Smith (Wallace Duncan) No 4,*[49] the Court of Appeal, noted that "in relation to conspiracy, a broader approach has undoubtedly been adopted as to jurisdiction".[50] It therefore confirmed that it was sufficient that a substantial measure of the activities constituting the offence took place within the jurisdiction, irrespective of where the last element of the offence occurred.[51]

11.33 We noted in our report on assisting and encouraging crime that the policy that underpins this decision is that, given the prevalence of international activity, jurisdiction should not be restricted by the technicality of the terminatory theory. The court in *Smith (Wallace Duncan) No 4* specifically referred to Lord Griffiths comments in *Somchai Liangsinpraseret v United States.*[52] He observed 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."[53]

11.34 However, it is also important to recognise that in *Smith (Wallace Duncan) No 4,* Lord Chief Justice Woolf commented that it was not authority for the view that an English court has jurisdiction merely because to do so would not breach international comity. Rather, an English court can assume jurisdiction only if the alleged offence has a "substantial connection with this jurisdiction."[54]

[46] For a recent example of how this principle is referred to in determining the scope of jurisdiction see *Hamza* [2006] EWCA Crim 2918, [2007] QB 659 at [40] and [41]. This comity approach has been the subject of criticism. See for example, D Ormerod and T Rees "Jurisdiction: jurisdiction of English courts – obtaining by deception" [2004] *Criminal Law Review* 951, 953.

[47] [1971] AC 537.

[48] [1971] AC 537, 564 (emphasis in original).

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

[50] Above at [61].

[51] Whether a "substantial measure" of activity has occurred within the jurisdiction is an evaluative question which must be interpreted in the light of advancing communications technology and also considering international comity. The open-textured nature of the term allows the court flexibility in determining when to exercise jurisdiction.

[52] [1991] AC 225.

[53] [2004] EWCA Crim 631, [2004] QB 1418, at [61].

[54] Above, at [58].

"Partly within the jurisdiction"

11.35 We turn now to the second question of whether a conspiracy can occur "partly" within a jurisdiction, and if so, what this means. The essence of a conspiracy is an agreement, a meeting of two minds. This agreement may be concluded when the two parties are in separate countries: for example D1 in London phones D2 in New York and they finalise the agreement to beat up their rival gang-member V. Further, the process leading up to the formation of this agreement may involve the exchange of numerous emails, letters or phone-calls which transcend national frontiers: for example D1 in London and D2 in New York email back and forth in order to negotiate how to deal with the rival gang-member V.

11.36 There are possible interpretations of the phrase "partly occur". First, one could consider that to occur "partly" within the jurisdiction, at least one party must be present in England and Wales when the actual agreement is formed, even if the other party is outside the jurisdiction and the negotiations and exchanges leading to the settled agreement have occurred abroad. Secondly, one could consider that to occur "partly" within the jurisdiction, it is sufficient that part of the process leading up to the formation of the agreement (for example, exchanges of letters and emails) occurred in England and Wales.

11.37 This second option is preferable. It would provide greater flexibility for the courts, for whom international comity is one of the guiding factors in determining whether to exercise jurisdiction.[55] It would also be more consistent with the approach articulated above at paragraph 11.32 that an act is considered to occur within the jurisdiction when a substantial measure of the activities constituting the offence takes place within the jurisdiction, irrespective of where the last element occurred.[56] This approach places emphasis on simply having some substantial measure of activity occurring within the jurisdiction which provides the relevant nexus.

11.38 In determining what level or type of activity would suffice, one could turn to the wording of the current law as provided in section 1A of the Criminal Law Act 1977. This states that a party to the agreement must have done something within the jurisdiction in relation to the agreement before its formation, or become a party to the agreement within the jurisdiction or done or omitted anything in England and Wales in pursuance of the agreement. Further, at subsection 11 it states that if the act is done by means of a message (however communicated), it is to be treated (for the purposes of the fourth condition)[57] as done within the jurisdiction if it is sent or received in England and Wales. To follow this approach would therefore be consistent with the current law, as well as allowing the courts the flexibility to exercise jurisdiction in appropriate circumstances.

[55] For a recent example of how this principle is referred to in determining the scope of jurisdiction see *Hamza* [2006] EWCA Crim 2918, [2007] QB 659 at [40] and [41].

[56] Whether a "substantial measure" of activity has occurred within the jurisdiction is an evaluative question which must be interpreted in the light of advancing communications technology and also considering international comity. The open-textured nature of the term allows the court flexibility in determining when to exercise jurisdiction.

[57] See para 11.10(4) above.

PART 12
ATTEMPTS - INTRODUCTION

BACKGROUND

12.1 The late Professor Sir John Smith noted in 1962 that the (then) common law of attempts had been described as "more intricate and difficult of comprehension than any other branch of the criminal law", and that the solution to its problems, "like *la belle dame sans merci*, has eluded many a zealous pursuer".[1]

12.2 The Law Commission first became one such "zealous pursuer" some thirty years ago, when it considered attempt as part of its broader programme to codify the common law inchoate offences. A Working Party established by the Commission set out a number of recommendations in its fourth Working Paper on the criminal law[2] and, following consultation, the Commission published its final recommendations in 1980.[3] These recommendations were largely implemented by Parliament with the enactment of the Criminal Attempts Act 1981 ('the 1981 Act').

12.3 Attempt was reviewed again by the Commission in its 1989 paper, A Criminal Code for England and Wales, Report and Draft Criminal Code Bill ('the Draft Criminal Code').[4]

12.4 In 2006 the Commission published its recommendations for abolishing the common law inchoate offence of incitement and creating new inchoate offences of assisting and encouraging crime.[5] We now believe that the time is ripe for reconsideration of the other principal inchoate offence alongside conspiracy – that is, attempt – in the light of the case law the statutory offence has engendered over the past quarter-century.

12.5 In that regard, our most important provisional proposal **[Proposal 15]** will be that section 1(1) of the 1981 Act should be amended so that it is comprised of two separate offences.

12.6 First, there should be an offence of criminal attempt wherein the conduct element of the offence is limited to the last acts that the defendant has to do to secure completion of the offence.[6]

1 J Smith, "Two Problems in Criminal Attempts Re-examined – I" [1962] *Criminal Law Review* 135.

2 Inchoate Offences, Conspiracy, Attempt and Incitement (1973) Working Paper No 50.

3 Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

4 A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 1, pp 64 to 65 (cl 49) and vol 2, paras 13.42 to 13.49.

5 Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300. See now Part 2 of the Government's Serious Crime Bill.

6 In other words, the attempt must be complete or all-but complete.

12.7 Secondly, there should be an offence of 'criminal preparation'. This offence (which will require the same fault element as criminal attempt) can be committed when someone has engaged in conduct preparatory to the commission of an offence. Nonetheless, to amount to criminal preparation, the conduct must go sufficiently far beyond merely preparatory conduct so as to amount to part of the execution of the intention to commit the intended offence itself. This offence will have the same maximum penalty as the completed offence **[Proposal 15A]**.

12.8 Case law development over many years, and previous reform proposals, have been aimed at covering through one offence of 'attempt' some or all of the conduct at issue in both of the proposed offences just outlined. The outcome has never been a stable practical basis for the law, and we believe that, after more than a century of continuing uncertainty, no such basis is now likely to emerge. We also believe that our new approach – creating two offences to tackle conduct that should be labelled as a serious albeit incomplete offence - is at least as sound in theory and principle as the older 'one offence' approach.

12.9 We do not believe that our approach will lead to the redundancy of the offence of (completed) attempt, with prosecutors consistently preferring to charge criminal preparation. In practice, it is already the case that the vast majority of charges of attempt relate to situations in which the defendant has in effect done the last act needing to be done, or that he or she believed needed to be done, to secure completion of the offence.

12.10 Just as D is in an appropriate case convicted of attempted murder, theft, or whatever, so, under our proposed new offence, in an appropriate case D would be convicted of preparing to commit murder, theft, or whatever. Similarly, just as a criminal attempt may, or may not, have involved the infliction of bodily harm or damage, the same is true of criminal preparation. An act of criminal preparation engaged in by D with intent to commit an offence may itself involve the commission of a different offence, perhaps involving bodily harm or damage.

PROBLEMS WITH THE CURRENT LAW

12.11 The current definition of attempt is set out in section 1(1) of the 1981 Act. It provides as follows:

> If, with intent to commit an offence to which this section applies,[7] 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.

12.12 We explain below[8] that the 'more than merely preparatory' formula was used to ensure that the offence would cover some acts of preparation but not 'mere' preparation. The offence was drafted to cover the sort of conduct associated with 'trying' to commit an intended offence; but it was also designed to encompass earlier preparatory acts – acts sufficiently proximate to a completed attempt to justify the imposition of criminal liability.

[7] Indictable offences other than those excluded by s 1(4) of the Act.

[8] See Part 14 paras 14.4 to 14.7 below.

12.13 However, as a mechanism for determining the criminal liability of persons who take proximate steps towards trying to commit an offence, we believe this inchoate offence is unsatisfactory. We believe that a change of approach, through legislative intervention, is necessary.

12.14 First of all, in the absence of clear, consistent guidelines the 'more than merely preparatory' test of proximity has proved to be too vague and uncertain a basis for a court to determine whether an attempt has been committed. We explain this problem, and the desirability of providing guidance, in paragraphs 16.26 to 16.47. We provisionally propose that specific guidance should be provided on the kinds of conduct that should be regarded as 'criminal' preparation, for the purposes of the proposed new offence of that name [**Proposal 15]** and that such guidance should be provided in our final report rather than in legislation. **[Proposal 16]**.[9] We provisionally propose a number of specific situations that should fall within the scope of the offence of 'criminal preparation **[Proposal 17]**

12.15 Secondly, because of the absence of any clear, consistent guidance, the Court of Appeal has had to determine where the line between mere preparation and attempt is to be drawn. As a result too much emphasis has on occasion been placed on the offence's label ('attempt') – and therefore on the notion of 'trying' to commit an offence. Too little regard has correspondingly been paid to the underlying rationale for the offence. Under our provisional proposals, clarity would be introduced to the law of attempt in this respect, because the offence of 'attempt' would be confined to the last acts D needs to do to bring about the commission of the offence. The key distinction would become one between 'mere' preparation and 'criminal' preparation, for the purposes of that proposed new offence.

12.16 In that regard, we take the view that there are a number of sound policy reasons for imposing criminal liability for some preparatory conduct occurring before D actually completes or all-but completes an attempt to commit another offence. These are:

(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.[10]

[9] We do, however, ask consultees whether they would prefer to see such guidance appear in (secondary) legislation and up-dated from time to time.

[10] We discuss these points in Part 15 below.

12.17 The case of *Geddes*[11] (explained in Part 1) provides perhaps the most worrying example of the Court of Appeal's restrictive approach to the offence of attempt. In our view, it gives rise to the accusation that the criminal law does not adequately protect the public in the way that it interprets that offence. Unfortunately, *Geddes* is not an isolated example.

12.18 Another troubling example is *Campbell.*[12] In that case D's conviction for attempted robbery was quashed even though he had been apprehended with an imitation firearm as he came within a metre of the door of a post office he intended to rob, with the aid of a threatening note for the cashier. The Court of Appeal's view was that there was no evidence on which a jury could "properly and safely" find that D's acts were more than merely preparatory.

12.19 Commenting on the judgment in *Campbell*, Smith and Hogan's *Criminal Law* states:

> From the viewpoint of public safety it is an unhappy decision. ... [The police] may feel obliged to wait until [D] has entered the post office and approached the counter before arresting him. The extra danger to post office staff, the public and the officers themselves is obvious.[13]

12.20 As in *Geddes*, there was by chance an alternative, preparatory offence of which Campbell could have been convicted: possession of an imitation firearm with intent to commit an indictable offence.[14] This is a very serious offence, carrying a maximum term of life imprisonment. However, it will not be possible to utilise a comparable offence in many other cases on slightly different facts, for example where D is armed with some other weapon. In practical terms, moreover, the sentence which will be imposed for attempted robbery (with an imitation firearm) is inevitably going to be greater than that for a specific possession offence.[15]

12.21 We agree with Smith and Hogan that "[f]rom the viewpoint of public safety [*Campbell*] is an unhappy decision".[16] Like the decision in *Geddes*, it is best explained by the reluctance of some courts to extend the scope of the crime of attempt beyond a 'trying' that involves D having done all he or she needs to do or believes he or she needs to do to bring about the completion of the offence: a 'completed attempt'.

[11] (1996) 160 JP 697. See Part 1, para 1.73 above.

[12] (1990) 93 Cr App R 350.

[13] Smith and Hogan*, Criminal Law* (11th ed 2005) p 413. Similarly, Professor K J M Smith, "Proximity in Attempt: Lord Lane's 'midway course'" [1991] *Criminal Law Review* 576, 580 states that "as a matter of penal policy ... the boundaries of attempt have been too tightly drawn".

[14] Firearms Act 1968, s 18(1).

[15] Campbell was sentenced to six years' imprisonment for his attempted robbery (quashed on appeal) and three years' imprisonment for his offence of possession with intent (although it is to be noted that this was an offence to which he had pleaded guilty).

[16] *Criminal Law* (11th ed 2005) p 413.

12.22 As noted above, Campbell, like Geddes, could on the facts be convicted of a highly specific preparatory offence.[17] However, our provisional proposals will ensure that defendants such as Geddes and Campbell are in future convicted of a more serious criminal offence of general application, an offence that properly reflects their moral culpability and the real danger they represent to society. At present, this does not happen because the Court of Appeal has in some cases imposed what we believe to be an unduly narrow interpretation on section 1(1) of the 1981 Act. This has come about because of an unfortunate disjunction between ordinary English usage (the meaning of 'attempt') and the policy of the criminal law underlying the 1981 Act: to criminalise more advanced kinds of criminal preparation as well as 'last acts'.

12.23 A large number of specific (inchoate) offences of preparation and endangerment currently supplement the general offence of attempt.[18] However, these offences are almost always highly context-specific, and hence insufficient to deal with advanced forms of preparation or endangerment which, we believe, ought to give rise to more serious kinds of criminal liability at a general level. Some types of conduct which could and should be brought within the scope of s 1(1) of the 1981 Act almost certainly fall outside it and are not adequately dealt with by any other offence.

12.24 Our third reason for believing section 1(1) of the 1981 Act to be unsatisfactory is that it would appear omissions are currently excluded from the scope of the offence.[19] We take the view that there is no reason in principle, or indeed as a matter of policy, why attempts should be limited to the commission of positive acts, particularly as the Crown must always prove D's intention. If D deliberately starves his or her baby to death, this is murder even though the death is achieved through 'doing nothing' rather than by a positive act of killing.[20] Suppose, however, that someone overhears D admitting that he or she is endeavouring to starve his or her baby to death and has already denied the baby food for a couple of days. We believe it would be wrong if D could avoid liability for attempted murder in such circumstances, but it may well be that this is the present legal position. We address this problem in paragraphs 16.83 to 16.88 and provisionally propose **[Proposal 19]** that the law be clarified to ensure that D will incur inchoate liability in such circumstances.

[17] Firearms Act 1968, s 18(1).

[18] Appendix C provides a list of offences which might properly be regarded as inchoate offences of preparation.

[19] See Part 14 paras 14.18 to 14.19 below.

[20] Where, as in the case of parents and children, someone owes a positive duty of care to another person, "doing nothing" can be regarded as the cause of harm if it amounts to a failure to discharge that duty.

12.25 Our fourth reason relates to the current requirement[21] that the jury should be directed to determine whether D's proven or admitted conduct amounts to an 'attempt' for the purposes of the 1981 Act, even when the trial judge has already made a ruling on this issue. This is difficult to reconcile with the general division of roles between judge and jury in criminal proceedings. More worryingly, lay triers of fact may have an insufficient understanding of the scope of the offence, or of the policy considerations underpinning it, to be able to apply it in the way it was intended to be applied. The present test may give rise to inconsistent or perverse verdicts. We address this area in paragraphs 16.89 to 16.95. Under our provisional proposal **[Proposal 20]**, the relevant question will be one of law for the trial judge. Under Proposal 15, that question will be whether an act it is alleged that D has engaged in can amount to criminal preparation. The role of the jury will be to decide whether an act ruled capable of amounting to criminal preparation in fact took place.

12.26 Finally, there is a lack of clarity in relation to the fault element required for circumstance elements of an attempt to commit an offence.[22] it may be that inchoate liability can now arise for attempting an (indictable) offence of strict liability regardless of whether the accused 'intended' to do anything unlawful (and even regardless of whether he or she had any culpable state of mind at all). This question is addressed in paragraphs 14.46 to 14.53 and 16.79 to 16.83. In Proposals 18A to 18C we provisionally propose that the fault element for attempt should be intention in relation to conduct and consequence elements **[Proposal 18A]**, and at least subjective recklessness in relation to a circumstance element **[Proposal 18B]**. However, where a substantive offence requires a higher form of fault than recklessness in relation to a circumstance element, that higher element should be required for an attempt to commit that offence **[Proposal 18C]**.

12.27 We believe it is of crucial importance that the law should properly address the relationship between the various stages in the run up to the commission of an intended offence. There are in effect three such stages:

(1) Stage 1: the preliminary preparatory steps taken by D;

(2) Stage 2: the 'on the job' preparatory steps taken by D (that is, the preparatory acts immediately preceding the (attempted) commission of an intended offence);

(3) Stage 3: conduct beyond what would ordinarily be regarded as 'on the job' preparation, where D is attempting to commit the intended offence.

12.28 For the criminal law to deal properly with this area, a number of questions need to be answered:

(1) Should criminal attempt be restricted, to a specific kind of behaviour prior to the commission of a substantive offence, namely last acts needing to done by D to commit the offence?

[21] Criminal Attempts Act 1981 Act, s 4(3).

[22] See Part 14 paras 14.37 to 14.55 below.

(2) If so, should there also be a separate offence of 'preparation' (or additions to the existing battery of offences of preparation) to cover:

(a) some or all of the types of preparatory conduct which were originally intended to fall within the scope of the present offence of attempt; or

(b) an even wider band of preparatory conduct?[23]

(3) Alternatively, should section 1(1) of the 1981 Act be retained but remodelled so that its label and/or definition accord more visibly with the true scope of the offence as intended by Parliament (that is, an offence extending back beyond the notion of trying or endeavouring to commit an offence)?

(4) If so, should there be a further general offence of 'preparation' (or additions to the existing battery of offences of preparation) to cover other preparatory conduct warranting criminal liability?

OUR PROVISIONAL PROPOSALS

12.29 In this consultation paper we provide an analysis of the present law of attempt and the related concept of preparing to commit a crime. In endeavouring to answer the questions set out above, we describe the areas we consider to be problematic and set out a number of provisional suggestions for reform.

12.30 Our provisional view is that *general* inchoate liability for preparatory conduct relating to an intended offence should not extend back any further from the band of conduct currently encompassed by the offence of attempt (encompassing stages 2 and 3 but omitting stage 1).[24]

12.31 We appreciate, however, that *particular* types of preparatory or endangering conduct may be sufficiently grave in terms of moral culpability and the danger presented to society to justify the retention or creation of offences of preparation or endangerment in specific contexts. This is particularly so when the circumstances would allow a court readily to infer D's intention to commit another substantive offence (or a substantive offence falling within a relatively narrow category of offences).

Three options for reform

12.32 We believe there are only three feasible options to choose from to address the key problems we have identified with section 1(1) of the 1981 Act **[Options 1, 2 and 3 below]**.

[23] There are many offences which impose liability for preparatory conduct in specific contexts, but there is no general inchoate offence of preparation.

[24] See para 12.27 above.

12.33 In formulating these options it is important to emphasise that we do not depart from the conclusion of the Commission in 1980 that there should be general inchoate liability encompassing acts of preparation which immediately precede the intended final act.[25] Further, as explained above, we accept that there should be no general offence to address the type of preparatory conduct which remains in stage 1.[26]

12.34 We also accept that there must continue to be a general offence of 'attempt', carrying the same maximum penalty as the intended offence, so that offenders who do the last acts necessary to commit an offence are properly labelled by society for their culpable, dangerous conduct. 'Attempt' is too important and well-understood an offence label to be abandoned.

Option 1: two offences (without elaboration)

12.35 There would be a narrower general offence of 'attempt' limited in scope to cases of completed or all-but completed attempt where the offender is engaged in the last acts needed to bring about the commission of the offence. However, there would also be a new general offence of 'criminal preparation' (with intent) limited in scope to the narrow band of preparatory acts immediately preceding an attempt (that is, stage 2).[27] This option would expressly declare through the definition given to 'criminal preparation' that the broad interpretation of the present offence of attempt is correct, contrary to the restrictive approach of the Court of Appeal in *Geddes*.[28] However, individuals whose conduct goes no further than stage 2 would no longer be labelled as 'attemptors'.

12.36 The definition of 'criminal preparation' would not be elaborated upon in the relevant legislation. Additional guidance for the courts would, however, be provided in the form of examples set out in our final report.[29]

12.37 This option would not require a detailed review of the various specific offences of preparation already in existence. Nevertheless, identifiable lacunae could be addressed with a view to filling significant gaps.

Option 2: two offences (with statutory examples)

12.38 This approach would follow option 1 in all respects, save for one key difference. Specific examples of 'criminal preparation' would be provided in the legislation to guide the courts in their interpretation of the offence and their understanding of the types of conduct falling within stage 2 (paragraph 12.27 above). No such examples would be provided for the new, narrower offence of 'attempt' because, being limited to last acts needing to be done by D to bring about the commission of the crime, there would be no ambiguity as to its scope.

[25] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, paras 2.6 and 2.46 to 2.48.

[26] Para 12.27(1) above, explained in Part 15 below.

[27] This approach would cover the same ground as the present offence of "attempt", broadly interpreted, but as two separate (general) offences rather than the one offence.

[28] (1996) 160 JP 697.

[29] See para 12.39 below.

Examples of criminal preparation

12.39 Irrespective of whether option 1 or option 2 is preferred, we believe that the new general offence of criminal preparation should encompass the following situations:

(1) D gains entry into a building, structure, vehicle or enclosure or (remains therein) with a view to committing the intended offence there and then or as soon as an opportunity presents itself.

(2) D examines or interferes with a door, window, lock or alarm or puts in place a ladder or similar device with a view there and then to gaining unlawful entry into a building, structure or vehicle to commit the intended offence within.

(3) D commits an offence or an act of distraction or deception with a view to committing the intended offence there and then.

(4) D, with a view to committing the intended offence there and then or as soon as an opportunity presents itself:

(a) approaches the intended victim or the object of the intended offence, or

(b) lies in wait for an intended victim, or

(c) follows the intended victim.

Option 3: the minimalist approach

12.40 Under this approach, there would continue to be a single inchoate offence of 'attempt', as currently defined, and its breadth would continue to be controlled by interpretations of section 1(1) of the 1981 Act given by the Court of Appeal.

12.41 However, on the assumption that the courts may come to the definitive conclusion that 'attempt' is to be interpreted narrowly, in line with the Court of Appeal's judgment in *Geddes*,[30] the battery of specific statutory offences of preparation would be carefully reviewed with a view to eliminating anomalies. Our approach would be predicated on the desirability of ensuring that individuals who reach stage 2 (paragraph 12.27 above) in their plan to commit an intended offence do not escape all criminal liability.

[30] (1996) 160 JP 697.

Our current preference

12.42 We currently favour Option 1. We believe that there should be two new statutory inchoate offences, 'criminal attempt' and 'criminal preparation', to replace section 1(1) of the 1981 Act Both of these general offences would require an intention to commit the relevant substantive offence and both would carry the same maximum penalty on conviction.[31] At this stage, we believe that it would be preferable for the guidance to help the courts determine whether or not an act is an act of criminal preparation to be in our final report.

Additional proposals

12.43 We also provisionally propose the following:

PROPOSAL 18: FAULT

(1) 'Intention' in the two proposed offences should bear its normal meaning, namely that given to it by the House of Lords in *Woollin*,[32] but should also encompass so-called conditional intent;[33]

(2) Intention in the sense just given should be required for the conduct elements and (if any) consequence elements of an offence of attempt or of criminal preparation, but not for the circumstance elements (if any);[34]

(3) If the completed offence requires recklessness, negligence or no fault as to a circumstance element, the fault requirement in relation to an attempt to commit that offence, or in relation to the offence of criminal preparation, should be subjective recklessness;[35]

(4) If the completed offence requires a higher degree of fault in relation to a circumstance element than recklessness (such as knowledge), then that higher degree of fault should also be required in relation to the circumstance element on a charge of attempt or of criminal preparation.[36]

PROPOSAL 19: OMISSIONS

12.44 The two proposed offences should be drafted to cover omissions where, as a matter of law, the intended offence is capable of being committed by an omission.[37]

[31] See Part 16 paras 16.18 to 16.22 below.

[32] [1999] 1 AC 82.

[33] See Part 16 paras 16.68 to 16.75 below.

[34] See Part 16 paras 16.76 to 16.78 below.

[35] The unjustifiable taking of a foreseen risk. See Part 16 para 16.79 below.

[36] See Part 16 paras 16.80 to 16.82 below.

[37] See Part 16 paras 16.83 to 16.88 below.

PROPOSAL 20: THE ROLES OF JUDGE AND JURY

12.45 The procedural rule under the 1981 Act,[38] that it is for the jury to determine not only whether D acted in the way the Crown alleges but also whether that proven conduct amounts to the commission of an attempt, should be abolished in relation to the proposed offences.[39]

PROPOSAL 21: APPLICATION TO SUMMARY OFFENCES

12.46 It should be permissible to prosecute D for attempting or preparing to commit a summary offence.

12.47 However, we ask whether the consent of the Director of Public Prosecutions should be required in such cases.[40]

THE STRUCTURE OF THIS SECTION OF THE CONSULTATION PAPER

12.48 In Part 13 of this paper we explain the historical background to the present offence of attempt. We therefore summarise:

(1) the common law position prior to the enactment of the 1981 Act;

(2) the approach proposed by the Commission's Working Party in 1973;[41] and

(3) the recommendations of the Commission which led to the enactment of the 1981 Act.[42]

12.49 In Part 14 we describe the present statutory offence of attempt[43] and explain how it has been interpreted by the Court of Appeal, with reference to the Commission's Draft Criminal Code.[44] We also briefly examine the body of statutory offences, primarily offences of possession, which impose criminal liability in relation to conduct occurring much earlier than a (prospective) attempt to commit another substantive offence.

12.50 In Part 15 we describe the principles and considerations which underpin inchoate liability for preparing and/or trying to commit a crime.

12.51 In Part 16 we explain our three proposals for resolving the identified problems and explain the reasons behind our additional proposals.

12.52 In Part 17 we summarise our proposals for reform and list the questions we would like consultees to consider.

[38] Section 4(3).

[39] See Part 16 paras 16.89 to 16.95 below.

[40] See Part 16 paras 16.96 to 16.100 below.

[41] Inchoate Offences, Conspiracy, Attempt and Incitement (1973) Working Paper No 50.

[42] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

[43] Criminal Attempts Act 1981, s 1(1).

[44] A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 1, pp 64 to 65 (cl 49).

PART 13
HISTORICAL BACKGROUND

ATTEMPT AT COMMON LAW

Conduct

13.1 In the nineteenth century case of *Eagleton,*[1] Parke B provided the following explanation of the scope of the common law offence:

> The mere intention to commit a misdemeanor is not criminal, some act is required; and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it; but acts immediately connected with it are ... .[2]
>
> [I]n this case no other act on the part of the defendant would have been required. It was the last act depending on himself towards the payment of the money, and therefore it ought to be considered as an attempt.[3]

13.2 The first limb of this explanation of the law established what came to be known as the 'proximity' test for attempt ("acts immediately connected with" the intended offence).[4] In the subsequent case of *Roberts,*[5] Parke B said:

> I quite agree with the law laid down in *Reg v Eagleton* ... that an attempt at committing a misdemeanor is not an indictable attempt unless it is an act directly approximating to the commission of an offence ... .[6]

13.3 The second limb of Parke B's dictum in *Eagleton,*[7] referring to the "last act depending on [D] himself", was probably not intended to be a statement of law to be applied in all cases. A legitimate interpretation, as noted in *Russell on Crime*,[8] is that this part of the dictum "was merely uttered as applicable to the case before the court".[9]

13.4 The *Eagleton* proximity test was subsequently approved by the Court of Criminal Appeal in *Robinson,*[10] where Lord Reading CJ said:

1 (1855) 6 Cox CC 559.

2 Above, 571.

3 Above.

4 Above.

5 (1855) Dears 539.

6 Above, 551. The proximity test was also approved in the same case by Jervis CJ, Wightman J and Cresswell J.

7 (1855) 6 Cox CC 559.

8 *Russell on Crime* (12th ed 1964) vol 1.

9 Above, p 179.

10 [1915] 2 KB 342; see para 13.15(1) below.

> Applying the rule laid down by Parke B., we think that the appellant's act was only remotely connected with the commission of the full offence, and not immediately connected with it.[11]

13.5 Attempt at common law was finally considered by the House of Lords in 1977 in *DPP v Stonehouse.*[12] D, who had fabricated the appearance of his death by drowning abroad shortly after insuring his life in England for the benefit of his wife, was held to be liable for attempting to obtain property (in England) by deception. D unsuccessfully argued before their Lordships that his conduct did not amount to an attempt as he had merely undertaken acts of preparation to create a situation in which his wife could claim the money from the insurance companies.

13.6 Lord Diplock explained the relevant law in the following terms:

> The constituent elements of the inchoate crime of an attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence. Acts that are merely preparatory to the commission of the offence such as, in the instant case, the taking out of the insurance policies are not sufficiently proximate to constitute an attempt. They do not indicate a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so. … In other words the offender must have crossed the Rubicon and burnt his boats.[13]

13.7 We take the view that the reference to D's having "crossed the Rubicon" does not detract from the validity of the proximity test, which Lord Diplock expressly endorsed. It would appear, in the context of his Lordship's speech, that the reference was made simply to demonstrate that in the instant case D had satisfied the proximity test. Lord Diplock was not positing an alternative 'last act' test for establishing liability.

13.8 The key question at common law, as Viscount Dilhorne explained in *DPP v Stonehouse*,[14] was whether D's conduct was "a step preparatory to the commission of a crime" or "part of its execution".[15] In other words, to be liable for attempt at common law, D did *not* have to go so far as to do "the last act depending on himself"[16] towards the commission of the intended offence.

[11] Above, 349. The rejection of a "last act" test is implicit in Lord Reading CJ's comment at p 348 that the appellant would have been liable for attempting to obtain money by false pretences if he "had communicated to [the underwriters] the facts of the pretended burglary *upon which a claim was to be subsequently based*" (emphasis added).

[12] [1978] AC 55.

[13] Above, 68. Lord Diplock went on to conclude (p 68) that it was "quite unarguable that … [D's] acts were not sufficiently proximate to the complete offence … to be capable in law of constituting an attempt to commit that offence". Viscount Dilhorne (p 71), Lord Salmon (p 77), Lord Edmund-Davies (p 87) and Lord Keith (p 94) agreed that D's conduct had amounted to an attempt.

[14] Above.

[15] Above, 71.

[16] *Eagleton* (1855) 6 Cox CC 559, 571.

13.9 Clearly, however, if the allegation against D was that he or she attempted to *perpetrate* the intended offence then proof that D did in fact do the last act necessary for him or her to commit that offence with the required fault was sufficient to establish liability.[17]

Fault

13.10 With regard to the fault element of attempt at common law, it was well established that D could be liable for attempting to commit a substantive offence only if he or she *intended* the commission of that offence.

13.11 In *Mohan*[18] it was held that "intent ... is an essential ingredient of the offence", and that it comprises::[19]

> … a decision to bring about, in so far as it lies within the accused's power, the commission of the offence ... no matter whether the accused desired that consequence of his act or not.[20]

13.12 It was argued in the fourth edition of Smith and Hogan, *Criminal Law*,[21] however, that intention was not required for a circumstance element of the intended offence if it was not required to be liable for the complete offence.[22]

13.13 This approach was adopted in *Pigg*,[23] where the Court of Appeal accepted that recklessness as to whether the complainant was not consenting was sufficient for liability for attempted rape in the same way that it was sufficient for liability for the substantive offence of rape (as then defined).[24]

[17] In the fourth edition of Smith and Hogan, *Criminal Law* (1978) p 256, it was accepted, in our view correctly, that where D was charged as a perpetrator (principal offender) his or her last act towards the commission of the intended offence should always render him or her liable. However, the last act of a *secondary* party (accessory) would not necessarily amount to an attempt. The qualification for secondary parties explains Lord Edmund-Davies's view in *DPP v Stonehouse* [1978] AC 55, 86, that a last act would not always amount to an attempt.

[18] [1976] QB 1.

[19] Above, 8.

[20] Above, 11.

[21] (1978) p 249.

[22] Leaving aside the question of fault, the definition of a criminal offence comprises one or more of the following "external" elements: (1) a conduct element, (2) a consequence element and (3) a circumstance element.

[23] (1982) 74 Cr App R 352.

[24] The fault requirement for rape changed when s 1 of the Sexual Offences Act 2003 came into force.

THE LAW COMMISSION'S PREVIOUS RECOMMENDATIONS

Working Paper No 50

13.14 The Commission's Working Party, which published its proposals in Working Paper No 50,[25] concluded that the police should be able to intervene to prevent the commission of substantive offences at the earliest practicable stage which is consistent with the public interest:

> It is only when some act is done which sufficiently manifests the existence of the social danger present in [D's] intent that authority should intervene. It is necessary to strike a balance ... between individual freedom and the countervailing interests of the community.[26]

13.15 Because of this perceived need to permit intervention "at a sufficiently early stage to prevent a real danger of the substantive offence being committed",[27] the (majority) view of the Working Party was that D should be liable for attempt in cases such as *Robinson*,[28] *Komaroni and Rogerson*[29] and *Comer v Bloomfield*:[30]

(1) In *Robinson,* D falsely represented to the police that jewellery he had insured had been stolen, his intention being to claim money from the insurers. The Court of Criminal Appeal held that he was not liable for attempting to obtain money by false pretences as he had not communicated to his insurers the false factual basis of his intended claim.[31]

(2) In *Comer v Bloomfield*, D created the false factual basis for his claim (by pretending that his van had been stolen) *and* sent his insurers a letter asking whether he could make a claim for theft under his policy. It was held that the magistrates had been entitled to rule that his conduct could not amount to an attempt to obtain money by deception.

(3) In *Komaroni and Rogerson*, D and his confederate followed a lorry for 130 miles with a view to stealing its load. They were not liable for attempted theft as their conduct had merely amounted to a continuous act of preparation.

13.16 The Working Party therefore proposed that D should be liable for attempting to commit a substantive offence if, with the intent to commit that offence, he or she had taken a "substantial step" towards its commission.[32]

[25] Inchoate Offences: Conspiracy, Attempt and Incitement (1973) Working Paper No 50, paras 63 to 91.

[26] Above, para 65.

[27] Above, para 73.

[28] [1915] 2 KB 342.

[29] (1953) 103 LJ 97.

[30] (1970) 55 Cr App R 305.

[31] Robinson would almost certainly now be guilty of fraud under the Fraud Act 2006, by virtue of having dishonestly made a false representation.

[32] Inchoate Offences: Conspiracy, Attempt and Incitement (1973) Working Paper No 50, paras 78 to 87, a test based on the American Law Institute's Model Penal Code, s. 5.01. See also Glanville Williams, "Wrong turnings on the law of attempt" [1991] *Criminal Law Review* 416, 420 to 421.

13.17 If the proposal had been adopted, the question whether a substantial step had been taken would have been determined with the assistance of a non-exhaustive list of illustrations as a guide.[33]

13.18 The following eight illustrations were provided:[34]

(1) committing an assault for the purpose of the intended offence (for example, where D assaults a child's mother in order to kidnap the child);

(2) lying in wait for, searching out or following the contemplated victim or object of the intended offence;

(3) enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission;

(4) reconnoitring the place contemplated for the commission of the intended offence;

(5) unlawful entry upon a structure, vehicle or enclosure, or remaining thereon unlawfully for the purpose of committing or preparing to commit the intended offence;

(6) acquiring, preparing or equipping oneself with the materials to be employed in the commission of the offence, which are specially designed for such unlawful use or which serve no lawful purpose in the circumstances;

(7) preparing or acting on a falsehood for the purpose of an offence of fraud or deception;[35] and

(8) soliciting any person, whether innocent or not, to engage in conduct constituting an external element of the offence.

Law Com No 102

13.19 In the report which laid the groundwork for the Criminal Attempts Act 1981,[36] the Commission reaffirmed the need to balance social and individual interests when defining the scope of attempt. A further "relevant consideration" was said to be the desirability of encompassing only conduct which the layman would properly regard, in a linguistic sense, as being an 'attempt'.[37]

[33] Inchoate Offences: Conspiracy, Attempt and Incitement (1973) Working Paper No 50, para 76.

[34] Above, paras 78 to 87.

[35] Some examples of this kind of conduct would now be caught by the Fraud Act 2006.

[36] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

[37] Above, para 2.8.

13.20 The Commission accepted that the decision in *Robinson*[38] was "unsatisfactory" and had been "much-criticised".[39] However, it was not persuaded by the Working Party's "unacceptably wide" test, the disadvantages of which were said to "greatly outweigh any advantage to be gained from it".[40]

13.21 In particular, the Commission was of the view that possessing implements for the purpose of committing an offence and reconnoitring the place contemplated for the commission of the intended offence were two preparatory forms of behaviour which should not give rise to liability for attempt.[41] The test which found favour was one of "proximity" – that is, "more than an act of mere preparation" – which would, it was said, be a "rationalisation of the present law".[42]

13.22 It is to be noted that the Commission provided a definition of attempt with reference to an "act" beyond "an act of mere preparation".[43] The Commission suggested as an aside that it was not necessary to address omissions because "it is difficult to give any meaning" to the concept of an attempt by way of an omission to act.[44]

13.23 The recommended fault element for attempt was an "intent to commit" the substantive offence,[45] that is, the "decision to bring about, in so far as it lies within [D's] power, the commission of the offence".[46]

[38] [1915] 2 KB 342 - see para 13.15(1) above.

[39] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.39.

[40] Above, paras 2.37 and 2.45.

[41] Above, paras 2.33 and 2.46.

[42] Above, para 2.47. This test was recommended as the only one "which may be thought broadly acceptable", although it was conceded that it was "imprecise" and had "not worked well [at common law] in some cases".

[43] Above, para 2.49 and p 86.

[44] Above, para 2.105.

[45] Above, paras 2.18 and p 86.

[46] Above, para 2.17

13.24 A conclusion which may be drawn from the Commission's statement that the recommended proximity test would "enable difficult cases to be reconsidered and their authority questioned"[47] is that it was felt that *some* of the Working Party's illustrations should be regarded as attempts.[48] In particular, there can be little doubt that the Commission saw *Robinson*[49] as one of the types of case which should be covered by the proposed proximity test.[50] This may have been too optimistic a view, however, for it has been noted[51] that the (common law) proximity test was applied in that case.[52]

13.25 We should add that, whilst we accept that proximity is the right test for a general offence of inchoate liability, and that the test reflects the will of Parliament when it passed the 1981 Act,[53] we are far from convinced that the facts of *Robinson*[54] satisfy it.

13.26 Finally, the Commission also recommended the retention of the common law procedural rule on the role of the judge and jury definitively established by a majority of the House of Lords in *DPP v Stonehouse*.[55] The House of Lords held that, once the trial judge has decided as a matter of law that D's conduct, if proved, falls within the scope of attempt, the same question should be placed before the jury as a question of fact.[56] It would therefore be permissible for the jury to decide that D's proven conduct did not fall within the definition of attempt, even though the judge had decided that it did.

[47] Above, para 2.45.

[48] The Commission stated that "even if the [Working Party's] examples were allowed to remain as part of the test, *some* ... are probably unsatisfactory" (above, para 2.33, emphasis added).

[49] [1915] 2 KB 342- see para 13.15(1) above.

[50] The Commission opined (above, para 2.42) that, in the light of the proximity test recognised in *DPP v Stonehouse* [1978] AC 55, *Robinson* [1915] 2 KB 342 may have been incorrectly decided. Professor K J M Smith ("Proximity in attempt: Lord Lane's 'midway course'" [1991] *Criminal Law Review* 576, 579) and Ian Dennis ("The Law Commission Report on Attempt ... The elements of attempt" [1980] *Criminal Law Review* 758, 767) each recognise that the Commission wished to cover a case such as *Robinson*.

[51] See para 13.4 above.

[52] It is the *description* of the proximity test recognised in *Eagleton* (1855) 6 Cox CC 559 and *Robinson* [1915] 2 KB 342 (requiring conduct "immediately connected with" the substantive offence) which is different from the modern test (requiring "more than ... mere preparation").

[53] The then Home Secretary said (*Hansard* (HC) 19 January 1981, vol 997, col 24):

> The conduct ... follows exactly the wording recommended by the Law Commission and ... is not intended to mark any change of substance in the present requirement of proximity.

[54] [1915] 2 KB 342.

[55] [1978] AC 55, following *Cook* (1963) 48 Cr App R 98.

[56] See Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, paras 2.50 to 2.52.

13.27 The Commission was influenced by this majority judgment of the House of Lords, but also by the fact that "most commentators on the Working Paper and participants at [a] seminar [in 1974] thought that whether on the evidence in the particular case conduct in fact amounted to an attempt was a matter to be left to the jury".[57]

13.28 The Commission's reason was that:

> 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 upon all the surrounding circumstances, it is appropriate to leave the final issue to be decided as a question of fact.[58]

[57] Above, para 2.50.

[58] Above.

PART 14
THE CURRENT LAW

THE CRIMINAL ATTEMPTS ACT 1981

14.1 The inchoate offence of attempt is now defined by section 1 of the Criminal Attempts Act 1981. Like its common law counterpart, a person (D) is liable for statutory attempt only if he or she intends to commit the substantive offence and does an act which is sufficiently proximate to its commission:

> If, with intent to commit an offence to which this section applies,[1] 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.[2]

14.2 A narrow external element ensures that there will almost invariably be a sound evidential basis from which the jury or magistrates can infer that D acted with the necessary intent.[3] It also ensures that only persons who were 'on the job' with the intention of committing a substantive offence will be labelled as 'attemptors'.

14.3 Clause 49(1) of the Law Commission's Draft Criminal Code[4] effectively restates the offence as defined by section 1(1) and (4) of the 1981 Act. It provides that a person is guilty of attempt if, intending to commit an indictable offence, he or she "does an act that is more than merely preparatory to the commission of the offence".[5]

Conduct

More than mere preparation

14.4 D's 'merely' preparatory acts are excluded from the ambit of the offence, under the 1981 Act. However, it should have been clear from the wording of the 1981 Act that D may nonetheless be liable for attempt even though his or her own final act was not the last act necessary for the commission of the intended substantive offence and was still in some sense a 'preparatory' act.

1 Indictable offences other than those excluded by s 1(4) of the Act.

2 Criminal Attempts Act 1981, s 1(1).

3 See generally Part 15 below.

4 A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177.

5 Above, vol 1, pp 64 to 65; and commentary in vol 2, para 13.43.

14.5 To elaborate further, preparatory conduct by D which is sufficiently close to the final act to be properly regarded as part of the execution of D's plan can be an attempt. Such conduct is not merely preparatory but more than merely preparatory. It is, for want of a better expression, 'executory'.[6] It is the preparatory conduct associated with the actual execution of D's plan, when, as a matter of common sense, D can properly be said to be 'on the job'. In other words, it covers the steps immediately preceding the final act necessary to effect D's plan and bring about the commission of the intended offence.

14.6 A good example is provided by *Tosti*,[7] where it was held that D had moved beyond the stage of mere preparation, in respect of the substantive offence of burglary, by examining the bolt on the door to the premises he intended to enter. D was liable for attempted burglary even though he had not taken any steps to force the lock or enter the premises. 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 as in a sense preparatory.[8]

14.7 Similarly, it has been held that D may be convicted of:

(1) attempted burglary with intent to rape, by knocking on the door of V's home;[9]

(2) attempted murder, by pointing a gun at V;[10]

(3) attempted rape, by physically molesting V, even in the absence of any evidence that D had tried to penetrate or even undress V;[11]

(4) attempted arson, by pouring petrol over the door of a house (while in possession of a cigarette lighter).[12]

6 See Part 13 para 13.8 above.

7 [1997] *Criminal Law Review* 746.

8 In the words of Beldam LJ, an attempt may be committed on the basis of "acts which were preparatory, but not merely so".

9 *Toothill* [1998] *Criminal Law Review* 876.

10 *Jones* [1990] 1 WLR 1057. D had not removed the safety catch of his gun; nor had he pulled, or even placed his finger upon, the trigger. In Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.47, the Commission said:

> The definition of sufficient proximity must be wide enough to cover ... those instances where a person has to take some further steps to complete the crime ...; for example, when the defendant has raised the gun to take aim at another but has not yet squeezed the trigger.

11 *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".

12 *Litholetovs* [2002] EWCA Crim 1154.

14.8 We believe that this is the right approach to the 1981 Act.[13] The general inchoate offence of attempt may be justified not only by the desirability of imposing criminal liability commensurate with the moral culpability of D's conduct and the concomitant risk of harm associated with it, but also on two further grounds:

(1) the desirability of affording the police the opportunity to intervene in good time so as to prevent harm; and

(2) the deterrent effect criminal liability has on potential offenders.

14.9 Indeed, the desirability of effective intervention was the Commission's principal justification for the test it recommended in 1980.[14]

14.10 The approach of the Court of Appeal in cases such as *Tosti*[15] gives due weight to all of these legitimate rationales and proper effect to Parliament's intention when it approved the proximity test. In this respect, the decision in *Tosti* is in our view clearly but unfortunately at odds with the decisions in *Geddes* and *Campbell*,[16] in terms of the policy adopted towards the construction of section 1(1) of the 1981 Act, notwithstanding that the decisions concern different kinds of factual scenario. As we have said, we believe that the approach in *Tosti* is to be preferred.

14.11 However, we should consider a contrary argument that the public is sufficiently well protected by the narrow or restrictive policy approach to liability for attempt adopted in *Geddes* and *Campbell*, even in the absence of the additional offence of criminal preparation the creation of which we propose.

[13] For other examples, see: *Griffin* [1993] *Criminal Law Review* 515 (attempted child abduction, where D presented herself at the children's school and asked that they be released to visit the dentist); and *Isaac v DPP* [2002] EWHC 2448 (attempting to obtain property by deception where, through his innocent agent (G), D asked a bank to release £9000 in G's account but did not commit the final act of tendering a signed withdrawal slip).

[14] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.7. See also Professor K J M Smith, "Proximity in Attempt: Lord Lane's 'midway course'" [1991] *Criminal Law Review* 576, 581 and Ian Dennis, "The Law Commission Report on Attempt ... The Elements of Attempt" [1980] *Criminal Law Review* 758, 760.

[15] [1997] *Criminal Law Review* 746.

[16] Part 1 para 1.73 above.

14.12 Section 24(1)(c) of the Police and Criminal Evidence Act 1984 (as amended)[17] allows a police officer to intervene to arrest without a warrant any person "whom he has reasonable grounds for suspecting to be about to commit an offence".[18] This provision also addresses the rationale based on intervention, referred to above.[19] It might be argued, therefore, that the offence of attempt could acceptably be limited in the way that *Geddes* and *Campbell* limit it without being supplemented by an offence of criminal preparation. On this view, section 24(1)(c) of the 1984 provides adequate protection for the public in terms of official power to intervene to prevent potentially offending conduct falling short of a completed attempt.

14.13 We do not believe that this approach is the right one. It might mean that, in serious cases, the police are tempted to delay their intervention to a later stage, to be sure of obtaining a conviction for the general offence (that is, attempt) even when there is a risk to the public involved in so doing.[20] Smith and Hogan's *Criminal Law* points out that:

> … the police may not know whether the suspect is armed or equipped and, whether they know or not, they will naturally wish to obtain a conviction for the more serious offence which they believe he intends to commit.[21]

14.14 Regardless of whether there is an alternative lesser offence of possession or preparation that may by chance cover D's preparatory acts, the deterrent effect of the criminal law would be undermined by the absence of a graver, general offence covering sufficiently proximate acts of preparation. There is, after all, little if any deterrent effect in the mere power to arrest under section 24 of the Police and Criminal Evidence Act 1984.

[17] The section as originally enacted was replaced by a new version (with effect from 1 January 2006) by section 110(1) of the Serious Organised Crime and Police Act 2005.

[18] This summary power of arrest is, however, circumscribed by s 24(4). This section states that the police officer must have reasonable grounds for believing that the arrest is necessary for one of the reasons listed in s 24(5)(a) to (f). These reasons include the need to prevent the person in question "causing physical injury to … any other person" (s 24(5)(c)(i)) or "causing loss or damage to property" ((s 24(5)(c)(iii)).

[19] See Part 14 para 14.8(1) above.

[20] The power of summary arrest under s 24(1)(c) of the Police and Criminal Evidence Act 1984 cannot lead to a conviction (unless of course D was in the process of committing a specific statutory offence of preparation or committing the offence of attempt as defined by s 1(1) of the Criminal Attempts Act 1981).

[21] Smith and Hogan, Criminal Law (11th ed 2005) p 413, n 394.

14.15 The benefit of the present statutory offence, as interpreted by the Court of Appeal in cases such as *Tosti*[22] and *Dagnall*[23] is that D may be convicted of attempt even though his or her culpable conduct did not effectively amount to the final act necessary to commit the substantive offence. In our view, this test of proximity or execution strikes the right balance between individual freedom and the countervailing interests of society as a whole.[24] However, the Court of Appeal has sometimes been reluctant to give broader effect to the rationale based on intervention, as is evident from its judgment in *Geddes*,[25] a decision which seems to confuse (what we call) executory preparation with a 'last act' requirement for liability. As we have seen,[26] in that case D's conviction for attempting to commit the intended offence of false imprisonment was quashed even though he had been lying in wait in a boys' lavatory, equipped with a knife, some lengths of rope and a role of masking tape. Lord Bingham CJ said:

> It is, we think, an accurate paraphrase of the statutory test and not an illegitimate gloss upon it to ask whether the available evidence, if accepted, could show that a defendant has done an act which shows that he has actually *tried* to commit the offence in question ... Had he moved from the realm of intention, preparation and planning into the area of execution or implementation?[27]

14.16 According to this approach, to lie in wait for an intended victim to arrive is 'mere preparation'. This is so even though it may be the last act D commits before perpetrating the actual attack and regardless of the fact that D may be extremely close in both time and space to the point when the attack is to be made.[28] The corollary, of course, is that to pursue or stalk an intended victim or even perhaps to raise a knife against them, with a view to committing the intended offence as soon as the opportunity arises, are also nothing more than illustrations of 'mere preparation'.[29]

14.17 We doubt whether the Commission or, for that matter, Parliament intended or expected the statutory offence of attempt to be construed so narrowly.[30]

[22] [1997] *Criminal Law Review* 746.

[23] [2003] EWCA Crim 2441, n 11 above.

[24] It is apparent, however, that not every ostensibly "proximate" act will justify a conviction for attempt. In particular, it is implicit in *Tosti* that to reconnoitre the place contemplated for the commission of the intended offence is not an attempt, even if it is done just prior to the time when D intends to commit that offence.

[25] (1996) 160 JP 697.

[26] For the facts of this case, see Part 1 para 1.73 above.

[27] (1996) 160 JP 697, 705 (emphasis added). It is to be noted that, contrary to our preferred view, execution is regarded as synonymous with physically trying to commit the offence.

[28] In *Geddes* (1996) 160 JP 697 it would seem that D, by waiting in a lavatory, had only one further act to perform: that of pouncing on to his intended victim.

[29] This was the position adopted (at common law) in *Komaroni and Rogerson* (1953) 103 LJ 97, para 13.15(3) above.

[30] The problems posed by the current law are addressed in Proposals 15 to 17 (see Part 16 paras 16.1 to 16.75).

Omissions

14.18 Section 1(1) of the 1981 Act provides that D is liable for attempt only if he or she does a more than merely preparatory "act". The word 'act' was also used in the draft Bill appended to the Commission's Report on attempt,[31] but the question whether D should be liable for attempt on the basis of an omission was not specifically addressed.[32]

14.19 Although the courts have not yet considered the issue, it is conceivable – perhaps likely – that the subsection will receive a restrictive interpretation, excluding liability for omissions.[33] Indeed, the Commission's commentary on clause 49(1) of the Draft Criminal Code states that it "is generally believed" that omissions are not encompassed by the 1981 Act.[34] Smith and Hogan's *Criminal Law*[35] describes this as "an unfortunate gap in the law".[36] We believe that it needs to be made clear that there can be an attempt by omission, even though such cases will be rare. We gave an example of a possible case in paragraph 12.24 above and we address this issue in Proposal 19 (Part 16, paragraphs 16.83 to 16.88).

The jury's role

14.20 Section 4(3) of the 1981 Act provides that, where there is evidence sufficient in law to support a finding that the accused did a more than merely preparatory act, the question whether or not his act falls within section 1(1) is a question of fact. This test crystallised the common law as it appears from the majority judgment of the House of Lords in *DPP v Stonehouse*.[37] It is repeated in clause 49(4) of the Draft Criminal Code.[38]

[31] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, p 86.

[32] Above para 2.105 where there is a passing reference but nothing more.

[33] 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 constructive manslaughter. 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.

[34] A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 2, para 13.46.

[35] (11th ed 2005).

[36] Above, p 414.

[37] [1978] AC 55, pp 79 to 80, 87 to 88 and 93 to 94. Unfortunately, because the speeches of the majority do not separately address the issue, the reasoning which informed the decision is not completely clear. It does appear, however, that their Lordships were influenced by a similar approach adopted by the Court of Criminal Appeal in *Cook* (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.

[38] A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 1, p 65. Para 13.47 of the Commentary (vol 2) explains that s 4(3) of the 1981 Act is restated "with some simplification of wording but no change of substance". The two-stage test was, however, expressly approved by the Commission in Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.50.

14.21 The structure of this subsection is odd. It requires the Crown to establish a prima facie case before it can be left to the jury (or the magistrates in summary proceedings). The subsection might therefore be thought to accord with the general requirement in criminal proceedings that a case will only be permitted to proceed beyond the end of the Crown's presentation of evidence[39] if the Crown has discharged its evidential burden.

14.22 However, the subsection goes further than this. Section 4(3) first requires the judge to determine, as a question of law, whether D's conduct, if established, was capable of being more than merely preparatory. Having concluded that D's conduct was capable of being more than merely preparatory, one would expect the task of the jury to be to consider, as a question of fact, what D's conduct was and, on that basis, to apply the judge's ruling to those facts. However, the subsection requires, secondly, that the jury considers as a question of fact the question the judge has already considered as a question of law. In other words, it is for the jury to determine for itself, as a fact, whether particular conduct is or is not more than merely preparatory, the judge having already determined that the same conduct is, as a matter of law, capable of being more than merely preparatory.

14.23 Accordingly, if D is charged with attempted murder, the Crown's case being that D fired a loaded rifle at V with the intention of causing V's death but missed, and a prima facie case is established, the judge must direct the jury to determine:

(1) whether D actually committed the alleged act (in line with the rule that questions of fact are for the jury to determine); *and*

(2) if so, whether that proven act was 'attempted murder' for the purposes of the 1981 Act.

14.24 The second issue is a matter for the jury to decide even if (as in the example) D, as a would-be perpetrator, committed the last act towards the commission of the intended offence. Furthermore, in cases where D's conduct cannot be regarded as the final act necessary for the commission of the intended offence, the jury is nevertheless expected to resolve the question without any meaningful guidance as to what the law requires.

14.25 In our view section 4(3) of the 1981 Act is flawed. The procedural requirement conflicts with the general position in criminal proceedings on the relationship between questions of law and questions of fact. We therefore believe that this is an issue which ought to be revisited and an alternative put forward for consultation. This alternative can be found in Proposal 20 (Part 16, paragraphs 16.89 to 16.95).

Fault

14.26 The fault element for attempt is defined by section 1(1) of the 1981 Act as the "intent" to commit the substantive offence.

[39] Or 'half-time'.

Direct and 'indirect' (oblique) intent

14.27 The requirement of intention may be satisfied, for the general purposes of the criminal law,[40] and the Commission's Draft Criminal Code,[41] in two instances. First, by D's having the occurrence of a consequence as his or her purpose. Secondly, where, although the occurrence of a particular consequence was not D's purpose, the tribunal of fact nevertheless infers that D intended it in circumstances where he or she foresaw it as a virtual certainty.[42] We have addressed this issue in more detail in our recent report on murder.[43]

14.28 There is authority for the view that this two-prong test for intent governs the law of attempts.[44] This view would certainly seem to have informed the Commission's approach when producing its Draft Criminal Code.[45]

14.29 We support the application of this two-prong (or '*Woollin*'[46]) test for intention within the current law of attempts, in preference to the narrower view that would confine the meaning of intention to acting with the purpose of bringing about a consequence. We recognise that our view seems to involve, in one sense, a departure from the idea of attempt as 'trying' to commit an offence, since that idea is intrinsically linked to the narrower understanding of intention-as-purpose. The problem with this - 'purist' - view of the nature of attempts, at least as an account of the existing law, is that it cannot accommodate the way in which most courts have understood the conduct element of an attempt.

[40] *Woollin* [1999] 1 AC 82.

[41] Clause 18(b).

[42] The law does not yet *define* indirect intent in terms of appreciating a virtual certainty: *Matthews* [2003] EWCA Crim 192, [2003] 2 Cr App R 30. The legal position is that it is permissible for the tribunal of fact to infer the required intent in relation to a consequence if D appreciated that it was virtually certain that his or her conduct would cause it.

[43] *Murder, Manslaughter and Infanticide* (2006) Law Com No 304, paras 3.9 to 3.15.

[44] *Pearman* (1984) 80 Cr App R 259. Further support for this proposition is provided by *Walker and Hayles* (1989) 90 Cr App R 226 and, most recently, by *MD* [2004] EWCA Crim 1391.

[45] The definition of "intent" in clause 18(b) of the Code applies to the offence of attempt as defined by cl 49.

[46] From *Woollin* [1999] 1 AC 82.

14.30 Most courts have found that some acts of preparation can amount to an attempt even though D may not have been at that moment 'trying' to commit the offence itself. For example, D may be found to have attempted rape where with intent to rape he attempted to subdue his victim but did not remove any items of clothing or perform any overtly sexual act.[47] The fact that courts do not, *Geddes* and *Campbell* apart, approach the conduct element of attempts in terms of 'trying' to commit an offence suggests that such an approach may also be flawed as a way of understanding the fault element. The notion of attempt as "trying to commit the offence itself" has little intrinsic value as a guide to the proper scope of the statutory offence.[48]

14.31 That some rare cases of attempt in law (where D has no element of the offence as his or her actual purpose) shade into cases that could be as well described as ones of vivid endangerment is not a weakness but a strength of the existing law. It avoids the need for what would, in all probability, be a much broader and vaguer general offence of 'endangerment' to buttress what would otherwise be an excessively narrow offence of attempt focused exclusively on a completed 'trying'.

14.32 The good sense of the *Woollin* approach to intent in the context of attempt is evident if we refer to the classic example, taken from *Pearman*,[49] where D plants a bomb on board an aeroplane with a view to destroying it over the sea to claim on an insurance policy. If D is aware that the passengers on board are almost certain to die as a result, it would be wrong if D could not be convicted of attempted murder if the bomb should fail to detonate. The same applies if D's purpose is that an explosion should destroy only property but, because someone is passing by at the precise moment when D must detonate the bomb, D realises that a person is almost certain to be killed. It should be possible to convict D of attempted murder if the bomb fails to detonate or the passer-by manages to survive the explosion. We have taken the same view in relation to the meaning of intention in conspiracy.[50]

The object of D's intent

14.33 In providing, as section 1(1) of the 1981 Act does, that D must intend the commission of the substantive offence – or, more accurately, the external elements of that offence[51] – it might be thought that, regardless of whether some other state of mind suffices for the actual commission of the substantive offence itself, to be liable for attempting to commit it, D must:

(1) intend his or her conduct;

[47] See, eg, *Dagnall* [2003] EWCA Crim 2441, para 14.7(3) and n 11 above, and *Paitnaik* [2000] 3 *Archbold News* 2.

[48] Under our Proposal 15 for reform of the offence of attempt (see Part 17 below), 'trying' will be an accurate account of the conduct element, but will not entirely capture the fault element which, as we have indicated, will include '*Woollin*' intent.

[49] (1984) 80 Cr App R 259, 263.

[50] See Part 4 above.

[51] See Part 13, n 22 above.

(2) intend any required consequence; and

(3) know (or believe) that any circumstance element of the offence exists or will exist.

14.34 This is an accurate understanding of the fault element for attempts so far as what must be intended is concerned, namely the conduct and consequence elements.

14.35 Proposal 18A makes it clear that what must be intended in an attempt is the conduct and (if any) consequence element of the offence.

14.36 However, this understanding is not accurate so far as the fault element relating to circumstance elements (if any) is concerned. Knowledge or belief that the circumstance element (if any) exists or will exist is not, and should not, always be required.

RECKLESSNESS AND CIRCUMSTANCE ELEMENTS

14.37 We can begin an examination of this issue with a discussion of offences that require (or have historically required) recklessness as to, rather than knowledge of, the existence of the circumstance element. A helpful example to consider is rape prior to the reforms brought about by the Sexual Offences Act 2003. The example is helpful because the question of what the fault element should be in relation to circumstances, on a charge of attempt to commit rape, was directly confronted by the courts.

14.38 Under the Sexual Offences Act 2003 (the same was true under the old law), liability for the full offence of rape requires conduct (penile penetration of V) and a circumstance (V's lack of consent). An important difference that the 2003 Act has made is to broaden the fault requirement. The only fault now required, over and above D's intention to penetrate V with his penis, is that D does not reasonably believe that V consents.[52] We will consider the implications of this change for the law of attempt in paragraph 14.50.

14.39 However, before the Sexual Offences Act 2003 came into force the fault to be proved for rape in relation to the circumstance element (V's lack of consent) was D's knowledge that V was not consenting *or* D's subjective recklessness as to that fact.[53] In *Khan*,[54] the Court of Appeal held that (under the old law) to be liable for attempted rape D need only have been reckless as to the absence of consent. The 'intent' explicitly required by section 1(1) of the 1981 Act did not imply a knowledge requirement as to this circumstance element of the substantive offence.

[52] Sexual Offences Act 2003, s 1(1)(c).

[53] By 'subjective recklessness' we mean the unjustifiable taking of a foreseeable risk.

[54] [1990] 1 WLR 813. See also *Breckenridge* (1983) 79 Cr App R 244, 249 and *Millard and Vernon* [1987] *Criminal Law Review* 393, 394.

14.40 The approach in *Khan* accords with Smith and Hogan's view that if, "recklessness as to circumstances is a sufficient [fault requirement] for the completed crime, it should be so for an attempt".[55] The approach in *Khan*[56] also reflects the Commission's earlier approach in clause 49(2) of the Draft Criminal Code[57] that, for the purposes of attempt:

> An intention to commit an offence is an intention with respect to all elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.[58]

14.41 According to this approach, D can be liable for attempt if he or she:

(1) intends the conduct element; and

(2) intends a required consequence element;

(3) but where D need only be reckless as to the existence of a circumstance for the substantive offence, recklessness as to that matter also suffices for attempt.

14.42 We agree with the view of the Court of Appeal in *Attorney-General's Reference (No 3 of 1992)*[59] that the decision in *Khan*[60] is "one which accords with common sense, and does no violence to the words of the statute".[61]

14.43 Therefore Proposal 18B says that when subjective recklessness as to a circumstance element suffices for the completed offence, it should suffice on a charge of attempt.

[55] Smith and Hogan, *Criminal Law* (11th ed 2005) p 403. See also G Williams, "The Problem of Reckless Attempts", [1983] *Criminal Law Review* 365; R A Duff, "The Circumstances of an Attempt" (1991) 50 *Cambridge Law Journal* 100; and Davies, "Signals of Symmetry in Reckless Attempts" (1996) 25(3) *Anglo-American Law Review* 367. Compare Richard Buxton, "Circumstances, Consequences and Attempted Rape" [1984] *Criminal Law Review* 25.

[56] [1990] 1 WLR 813.

[57] A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177.

[58] Above, vol 2, paras 13.44 to 13.45. This was also the view expressed in Inchoate Offences: Conspiracy, Attempt and Incitement (1973) in Working Paper No 50, para 89. However, compare the contrary position adopted in Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, paras 2.12 to 2.18, where it was suggested that D should intend all the external elements of the substantive offence.

[59] [1994] 1 WLR 409.

[60] [1990] 1 WLR 813.

[61] [1994] 1 WLR 409, 419.

14.44 As we said when discussing this issue in relation to conspiracy,[62] the approach of the Court of Appeal in *Khan*[63] to the crime of attempted rape can be used as a basis for developing a more general principle of broader application. This is the principle that, in the absence of any clear indication in relation to the complete offence that an alternative approach is to be taken, a requirement of recklessness as to a circumstance element is the minimum kind and degree of fault required in the relation to such an element.

14.45 Mention of this possible general principle brings us to the question of the circumstance fault element required for an attempt when something less than recklessness – or no proof of fault - is required in relation to a circumstance element of the completed offence.

STRICT (NO-FAULT) LIABILITY OFFENCES AND OFFENCES OF NEGLIGENCE

14.46 In *Attorney-General's Reference (No 3 of 1992)*[64] the Court of Appeal stated, albeit obiter, that "in order to be guilty of an attempt, [D] must be in one of the states of mind required for the commission of the full offence".[65] It may be that, by this, the Court of Appeal meant that if an offence has a stricter fault element than recklessness as to a circumstance element, then that fault element must be proven (proof of recklessness being insufficient). If so, then we agree with it.

14.47 However, the passage raises the issue of what fault elements, if any, there should be when what is in issue is an attempt to commit a no-fault offence (or an offence that is in part no-fault) or an offence requiring only negligence with regard to a circumstance element. Some offences of this type involve great stigma on conviction. Consequently, care must be taken to ensure that a principled approach is taken in shaping the law's policy on attempts to commit such offences.

14.48 We will consider first what can be called the seemingly logical or simplistic approach, an approach based on one reading of *Attorney-General's Reference (No 3 of 1992).*[66] On this approach, whether – and what degree of - fault is required in relation to a circumstance or consequence element depends entirely on what (if anything) is required in this respect by the completed offence. On this approach an attempt to commit any no-fault offence should require no fault elements other than an intention to engage in the conduct that took D beyond a more than merely preparatory step. In other words, there should be no requirement of fault in relation to either the consequence or circumstance elements (if any) of the no-fault offence, on a charge of attempt, because the completed offence has no such requirements. It is perfectly possible that the courts may take this simplistic approach, although the matter is yet to be decided.

[62] See Part 4 above.

[63] [1990] 1 WLR 813.

[64] [1994] 1 WLR 409.

[65] Above, 417.

[66] Above.

14.49 This approach would have the following effect. Suppose D, aged 14, is charged with attempting to commit the offence of rape of a child under 13.[67] The facts are that D called round at V's house with a view to having consensual sexual intercourse with her, V having invited D there for this purpose. V is a 12-year-old girl whom D reasonably believed was 16. On the simplistic approach, assuming that calling at V's house is a more than merely preparatory act, D would stand to be convicted of the extremely serious offence of attempted (statutory) rape and might well face, even if not life imprisonment, a custodial sentence and registration as a sex offender. This would be the case even though D only took steps towards fulfilling a wish to have consensual sexual intercourse with someone he reasonably believed to be over the age of 16. This is because on the simplistic approach it is irrelevant that D had no culpable state of mind in relation to the circumstance element, V's age.

14.50 The simplistic approach would have a similar effect in offences where negligence suffices as the fault element in relation to the circumstance or consequence elements of a substantive offence. An example is the modern offence of rape under section 1 of the Sexual Offences Act 2003. Under the simplistic approach, as no more than a kind of negligence on D's part is required by the substantive offence of rape in relation to the circumstance element of V's lack of consent, nothing more is required on a charge of attempted rape. Suppose that, as in *Toothill*,[68] D knocks on V's door with a view to having sexual intercourse. In law, this is a more than merely preparatory act and if D intents to rape V he will therefore be guilty of attempted rape at that point. Under the simplistic approach, however, he can also be guilty of attempted rape even if, when knocking on V's door, D was sure that V would give full consent to have intercourse with him. He will be guilty if, at that point, he should have realised that he or she might not consent.

14.51 If this is the law, we suggest that it does not sit easily with the requirement in section 1(1) of the 1981 Act that D must have the "intent to commit an offence". As Smith and Hogan's *Criminal Law* remarks, "it goes beyond anything actually decided and beyond any recommendation of the Law Commission".[69] We also believe that the simplistic approach is contrary to the demands of justice, and inimical to the protection of freedom from over-extensive criminal liability that the law of inchoate offences must secure, as we said when discussing the same issue as it arises in conspiracy cases.[70] It is possible that the courts will reject the simplistic approach, and develop the decision in *Khan* into a general principle that, on a charge of attempt, D must be shown to have been at least (subjectively) reckless as to any circumstance element of the offence. On that broader principled approach it would follow that in the example given in paragraph 14.50 above, to be found guilty of an attempt to rape a child under 13, it would have to be proved that D called on V (with a view to having sexual intercourse with her) realising that there was a risk that she might be under 13.

[67] An offence of (in effect) strict liability by virtue of the Sexual Offences Act 2003, s 5

[68] [1998] *Criminal Law Review* 876.

[69] (11th ed 2005) p 405.

[70] See Part 4 above.

14.52 In our view, that broader principled approach would strike a better balance between the demands of public protection and of respect for individual liberty. Proposal 18B gives effect to that approach, in line with our provisional proposals for reform of the law of conspiracy.

14.53 As in the case of conspiracy, however, we are also asking consultees whether they would prefer instead what we have described as the 'simplistic approach'.

KNOWLEDGE OR BELIEF THAT A CIRCUMSTANCE EXISTS

14.54 Some completed offences specifically require knowledge or belief that a circumstance element exists. The offence of handling stolen goods is an example, in that D must know or believe that the goods handled are stolen goods.[71] In such cases, although there is no direct authority in point, we believe that with respect to an attempt to commit such an offence the law requires proof of the same (high) kind of degree of fault in relation to the relevant circumstance element.[72] As we pointed out in relation to the same issue as it arises in conspiracy cases,[73] were it otherwise, the law would be imposing a less stringent test for proof of fault when a crime is attempted than when it is completed; and that cannot be right.

14.55 Proposal 18C gives effect to this approach.

STATUTORY OFFENCES OF MERE PREPARATION

14.56 As the law stands there is no general inchoate offence to address the problem of mere (preliminary) preparation. Preparation which goes beyond mere preparation is, of course, covered by the general offence of attempt, as explained above.

14.57 There are, however, a number of statutory offences which address particular types of preliminary preparation. These cover situations which Parliament considers to be sufficiently serious, in terms of culpability and the risk of harm, to justify the imposition of criminal liability even though D's conduct may be far removed from – or even unrelated to – a possible attempt to commit a more serious offence.[74]

14.58 Parliament has adopted three approaches to the question of preliminary preparation:

[71] Theft Act 1968, s.22(1): "a person handles stolen goods if…knowing or believing them to be stolen goods, he dishonestly receives the goods … ."

[72] See *Anderton v Ryan* [1985] AC 560; *Shivpuri* [1987] AC 1.

[73] See Part 4 above.

[74] Appendix C lists the current body of statutory offences which might legitimately be regarded as offences of "merely preparing" to commit some other, more serious, offence.

(1) it has provided that an act of possession is of itself sufficient for criminal liability, without requiring proof of an intention to commit a more serious crime, because of (what is in effect) an objective presumption, based on a valid generalisation drawn from experience, that such possession may well result in future harm;[75]

(2) it has focused on a particular serious offence, or a particular category of serious offences, and provided that D is liable only if he or she was in possession of an item with the intent to commit that offence or one of that category of offences;

(3) it has defined substantive offences in a particular area wholly or largely in the inchoate mode, making the need for preparatory offences more limited

14.59 The first approach has been used in relation to possession in a public place of some types of offensive weapon[76] and/or bladed or sharply pointed articles.[77] Here there is an objective risk of physical injury to other members of the public and therefore a "strong public interest" in discouraging members of the public from carrying such items (without good reason).[78] The qualification 'for good reason' is important. It is a defence to a charge under section 1(1) of the Prevention of Crime Act 1953 that D had "lawful authority or reasonable excuse" for his or her possession.[79] Similarly, D has a defence to a charge under section 139(1) of the Criminal Justice Act 1988 of "good reason or lawful authority" for the possession.[80]

14.60 Although it is for D to prove lawful authority, reasonable excuse or good reason[81] these defences do ensure that ordinary citizens who have no intention of committing a crime, but whose articles fall within the scope of the relevant prohibition, should not incur criminal liability. They therefore "strike a fair balance between the general interest of the community in the realisation of a legitimate legislative aim and the protection of the fundamental rights of the individual".[82]

[75] D may be able to escape liability, however, if he or she can prove a good reason for the possession, thereby rebutting the presumption of future harm in relation to him or herself as an individual.

[76] Prevention of Crime Act 1953, s 1(1), with reference to s 1(4) ("any article made or adapted for use for causing injury to the person").

[77] Criminal Justice Act 1988, s 139(1).

[78] See *SL v DPP* [2001] EWHC 882, [2003] QB 137, at [27] and *Matthews* [2003] EWCA Crim 813, [2004] QB 690, at [21] and [25].

[79] Prevention of Crime Act 1953, s 1(1).

[80] Criminal Justice Act 1988, s 139(4).

[81] *SL v DPP* [2001] EWHC 882, [2003] QB 137 and *Matthews* [2003] EWCA Crim 813, [2004] QB 690 (cases on s 139 of the Criminal Justice Act 1988).

[82] *Matthews* [2003] EWCA Crim 813, [2004] QB 690, at [27].

14.61 The first approach adopted by Parliament may also be discerned in statutory offences such as section 2(1) of the Sporting Events (Control of Alcohol etc) Act 1985, which provides that it is an offence to possess alcohol at a designated sporting event. The underlying policy objective justifying the infringement of the individual's general right to possess alcohol in a public place is of course the desirability of reducing the possibility of alcohol-fuelled offences of violence at sporting events (particularly association football matches).[83]

14.62 By its very nature, the first approach may raise legitimate concerns about the acceptable reach of the criminal law and civil liberties, even more so if the legislation in question provides no defence of reasonable excuse or good cause. Any individual may be arrested and prosecuted, having been found in possession of an article deemed by a police officer to fall, technically, within the scope of a provision proscribing the possession of certain items. This is so, even if he or she had no intention to commit any offence whatsoever and accordingly there was neither moral culpability nor the risk of anyone or anything being harmed. Moreover, the mere fact that a person has been arrested and detained permits the police to take and retain his or her fingerprints as well as a DNA sample for the national DNA database.[84]

14.63 Parliament's second approach (paragraph 14.58(2) above), with its requirement that the prosecution prove beyond reasonable doubt that D was acting with the intention to commit a more serious offence, is far less likely to give rise to any legitimate concerns as to the scope of the criminal law. The requirement of proof that the preparatory act was done with a criminal intention ensures:

(1) that D will incur criminal liability only if he or she takes steps towards giving effect to a morally culpable purpose; and

(2) that prosecutions will be brought only in cases where there is cogent evidence of that purpose, perhaps because the preparations were so far advanced that an attempt to commit the intended offence was evidently imminent.

14.64 Examples of such offences of 'preparation with intent' are:

(1) section 5(1) of the Terrorism Act 2006 (preparation for giving effect to an intention to commit an act of terrorism);

(2) section 63(1) of the Sexual Offences Act 2003 (trespass on any premises with intent to commit a sexual offence);[85]

(3) section 5(3) of the Misuse of Drugs Act 1971 (possession of a controlled drug with intent to supply to another person);

[83] See the Sports Grounds and Sporting Events (Designation) Order 2005, SI 2005 No 3204.

[84] See the Police and Criminal Evidence Act 1984, ss 61, 63 and 64.

[85] This offence now covers the facts of *Geddes* (1996) 160 JP 697, assuming that D, a trespasser, intended to commit a relevant sexual offence.

(4) section 9(1)(a) of the Theft Act 1968 (trespass in a building or part of a building with the intent to steal, inflict grievous bodily harm on a person or cause criminal damage);

(5) section 25(1) of the Theft Act 1968 (possession of an article away from one's place of abode for use in connection with a burglary or theft);

(6) section 6 of the Fraud Act 2006 (possession or control of any article for use in the course of or in connection with any fraud); and

(7) section 1(1) of the Prevention of Crime Act 1953 (possession in a public place of an article with the intent that it be used to cause injury to the person).[86]

14.65 The only significant concern which may arise in relation to offences of this sort is that the offender might ultimately have changed his or her mind and never taken the further step towards an attempt to commit the offence he or she intended to commit when apprehended. However, this may be an unreal concern in practice. As explained above, the evidential basis for drawing an inference as to D's intention is likely to be provided by the advanced nature of D's preparatory steps.

14.66 The third approach is illustrated by the Fraud Act 2006. Under the Act, offences that previously required a consequence to occur, as in the offence of dishonestly obtaining property by deception, have now been replaced by offences where there is no need to show that a fraud led to any actual transfer or property, gain or loss. So, for example, section 2 creates the offence of dishonestly making a false representation, intending thereby to make a gain, cause a loss to another or expose another to a risk of loss. Someone who makes such a dishonest representation, but fails in fact to make a gain or cause a (risk of) loss, is already guilty of the substantive offence in section 2 in any event, whereas before the 2006 Act he or she would only have been guilty (at best) of an attempt.[87]

14.67 There will, of course, still be scope for the application of the law of attempt to fraud offences. An example would be where, with the requisite intent, D engages in a more than merely preparatory act aimed at the making of a false representation.[88]

14.68 It may be that this third approach is uniquely suited to fraud offences, and so it will not be further examined in this context.

[86] It has been seen above that possession in a public place of an article which was "made or adapted for use for causing injury to the person" gives rise to liability under the same provision regardless of D's intention, subject to the defence of "lawful authority or reasonable excuse".

[87] *Hensler* (1870) 11 Cox CC 570. Under the Fraud Act 2006, actually causing a loss or making a gain as a result of fraudulent activity will presumably be regarded as an aggravating feature of the case at the sentencing stage.

[88] Although, where such conduct involves the possession, manufacture or supply of articles for use in fraudulent activity, it is already covered by the preparatory offences in sections 6 and 7 of the 2006 Act.

14.69 A question arising from consideration of the first two approaches is whether D should be liable for an inchoate offence, when it is possible that he or she might subsequently have withdrawn, or it can be shown that D had already decided to withdraw, from the plan to commit a more serious offence.

14.70 It is of course quite illogical to provide a defence of withdrawal in relation to inchoate liability given that D's liability crystallises at the time he or she does his or her relevant preparatory act with the required intention. Indeed, we have explained elsewhere our view that there should be no defence of withdrawal in the context of inchoate liability, even if, unlike the preparatory offences now under discussion, the inchoate offence in question requires something less than an intention to commit the more serious offence.[89] Similarly we do not propose that there should be a defence of withdrawal if D is charged with the inchoate offence of conspiracy.

14.71 Of more concern is whether the specific offences of preparation with intent, taken with the Court of Appeal's narrow interpretation of attempt in cases such as *Campbell*[90] and *Geddes*,[91] adequately address the question of inchoate liability for conduct preparatory to the commission of an intended offence.

14.72 We have already expressed our view that the conviction in *Geddes* should have been upheld as an attempt for the purposes of section 1(1) of the 1981 Act.[92] But assuming the Court of Appeal was right to interpret the subsection so narrowly, is there an alternative offence of preparation with intent, which adequately deals with the sort of culpable conduct considered in that case? Section 63(1) of the Sexual Offences Act 2003 now covers the type of situation which was considered in *Geddes*,[93] but this new offence is itself of limited scope because it depends on the fortuity of a proven trespass. It would not, for example, cover the situation where D, an employee of a department store, lies in wait for a victim in one of the store's lavatories. Nor does the offence extend to intended offences other than sexual offences, for example where D lies in wait to murder his or her intended victim.

14.73 Indeed, assuming the present offence of attempt is inapplicable, it is not difficult to think of a number of other preparatory acts immediately preceding the intended commission of an offence (that is, conduct which should be regarded as more than merely preparatory) which would give rise to no criminal liability.[94] For example:

(1) following an intended victim with the intent to kill or commit a non-fatal offence against the person;

[89] See our recent report, Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 6.52 to 6.58.

[90] (1990) 93 Cr App R 350 – see Part 12 para 12.18 above.

[91] (1996) 160 JP 697 – see Part 1 para 1.73 above.

[92] See Part 1 para 1.73 above.

[93] Above.

[94] Or perhaps some criminal liability (eg, where D carries a knife in public) which does not properly equate to D's level of culpability given the intention and proximity of the preparatory steps to the commission of the intended offence.

(2) lying in wait outside an intended victim's house intending to kill or commit a non-fatal offence against the person;

(3) approaching an off-licence intending to rob the proprietor; and

(4) having trespassed on V's property, reconnoitring the rear garden of the intended victim's house, looking for a means by which to break in.

14.74 These factual scenarios are considered further as an aspect of Proposal 17, in Part 16 below.

PART 15
RELEVANT PRINCIPLES

15.1 Inchoate liability for intentionally preparing or trying to commit an offence may be justified on a number of bases, namely:

(1) criminal liability should be imposed, and punishment administered, for D's inherently *immoral* act of taking steps to commit a substantive offence, with the seriousness of D's offence (reflecting the extent of D's moral culpability) being dependent on how close to the commission of the substantive offence those steps took D;[1]

(2) criminal liability should be imposed, and punishment administered, for D's act of taking steps towards causing *harm* and, in the case of attempt, the vivid threat of harm associated with steps which are more than merely preparatory towards the commission of a substantive offence;[2]

(3) the police should be able to *intervene* to prevent the commission of a substantive offence and any harmful consequences; that is to say, criminal liability should arise not only when a substantive offence is committed, but also at some stage prior to its commission so that effective steps can be taken to prevent D's plan being taken to completion;[3] and

(4) prospective perpetrators should be *deterred* from trying, and from preparing themselves to try, to commit a substantive offence.[4]

15.2 The statutory offence of attempt requires proof, first, that D intended to commit an indictable offence[5] and, secondly, that (according to D's understanding of the facts)[6] D's conduct brought him or her close to the point where that substantive offence would be committed.

[1] Where D actively tries but fails, fortuitously, to commit the intended offence – that is, where D commits the last act necessary for the commission of the offence – he or she is regarded by many as as culpable as a successful perpetrator.

[2] This rationale of course applies only in relation to preparation or attempts where the completed offence would involve harm, for some substantive offences would appear to be justified on moral grounds alone without reference to any harm caused (eg, the offence of intercourse with an animal contrary to s 69(1) or (2) of the Sexual Offences Act 2003).

[3] The police have the power to intervene by virtue of s 24(1)(c) of the Police and Criminal Evidence Act 1984 (summary power of arrest). However, as explained already in paras 14.12 to 14.14, it may be insufficient to address this rationale for an inchoate offence which imposes liability for conduct leading up to the intended commission of an offence.

[4] The mere power to arrest under s 24(1)(c) of the Police and Criminal Evidence Act 1984 has little if any deterrent effect (see para 14.14).

[5] Criminal Attempts Act 1981, s 1(1) and (4). Section 1(4) also provides that certain indictable offences cannot be attempted.

[6] Criminal Attempts Act 1981, s 1(2) and 1(3)(b).

15.3 These twin requirements of intention and proximity – which, in addition, are usually associated with a concomitant, vivid threat of harm – underpin the high moral culpability associated with liability for attempt and the fact, therefore, that D may be sentenced to the maximum term available for committing the intended offence itself.

15.4 The requirement of proximity does, however, detract from the utility of the offence as a means by which to intervene and prevent the occurrence of harm, although the extent of this detraction depends on where, along the continuum of steps, the line between 'mere preparation' and 'attempts' is drawn. The requirement of proximity also means that deterrence has little value as a justifying principle in this context, for, of course, the substantive offence itself serves that function.

15.5 That said, attempt has been defined in broad enough terms to cover *some* acts of preparation. It has been seen that Parliament intended to give effect to the rationale based on intervention by defining the offence so it would encompass those acts which are preparatory but more than *merely* so. The underlying assumption is that such acts, though preparatory, are nonetheless sufficiently proximate to the commission of the substantive offence to satisfy the level of culpability and risk of harm sufficient to justify conviction as an 'attemptor'. The law, by bringing a limited continuum of preparatory acts within the scope of the offence, enables the police to intervene to prevent the commission of the substantive offence in circumstances where D may be regarded as sufficiently culpable to justify being punished and labelled as an 'attemptor'. Further, by limiting the encompassed preparatory acts to a narrow continuum leading up to the commission of the substantive offence, there will usually be enough circumstantial evidence of D's intent to found a conviction.

15.6 The present offence of attempt is therefore the product of a delicate balancing exercise between two needs. On the one hand there is a need to allow effective intervention to prevent harm. On the other there is a need to ensure that only sufficiently culpable individuals, whose conduct brings with it a clear threat of harm, are labelled and punished as 'attemptors'. Professor Andrew Ashworth recognises the validity of these twin (but competing) interests:

> … the law should not only provide for the punishment of those who have culpably caused … harms but also penalize those who are trying to cause the harms. A person who tries to cause a prohibited harm and fails is, in terms of moral culpability, not materially different from the person who tries and succeeds: the difference in outcome is determined by chance rather than by choice, and a censuring institution such as the criminal law should not subordinate itself to the vagaries of fortune by focusing on results rather than on culpability. There is also a consequentialist justification for the law of attempts, inasmuch as it reduces harm by authorizing law enforcement officers and the courts to step in *before* any harm has been done, so long as the danger of the harm being caused is clear.[7]

[7] Ashworth, *Principles of Criminal Law* (5th ed 2006) p 445 (emphasis in original).

15.7 The offence of attempt is (and ought to be) limited to conduct which is proximate to the commission of the intended offence. It carries the same maximum penalty as the intended substantive offence and a label which reflects the nature of D's conduct and culpability and the immediate threat of harm. In such cases D's moral culpability is (broadly) comparable to that of a successful offender. Moreover, it is probably only in such cases that there is likely to be sufficient evidence from which D's intention may be inferred.

15.8 As explained in Part 14,[8] Parliament has also created a large number of other statutory inchoate offences, particularly offences of possession, liability for which may or may not depend on proof that D intended to commit a particular substantive offence.[9] Clearly, however, where intention is required such offences supplement the general offence of attempt by imposing criminal liability considerably further back along the continuum of culpable conduct. It is not necessary for D to have done anything encompassed by our term 'executory preparation' to incur criminal liability, let alone the final act towards the commission of the intended offence. Specific offences of 'possession with intent' impose criminal liability for *mere* preparation.[10]

15.9 However, it should not be thought that the existence of these statutory offences of preparation undermines the case for a general inchoate offence of attempt (as currently defined). Attempt is a distinctive wrong carrying a label which communicates a particular message about the proximate nature of D's conduct and his or her culpability. The existence of offences based on mere preparation (with intent) can be justified only by the specific context in which they are placed. In that sense, their justification is also different from the justification that underpins our proposed offence of criminal preparation (Proposal 15, in Part 18). That proposed offence is, like criminal attempt, justified by the fact that the acts caught by it are immediately and not merely remotely connected with the commission of the offence.

[8] Paragraphs 14.56 to 14.74 above.

[9] Eg, s 4(1) of the Vagrancy Act 1824 (presence in a dwelling house, outhouse etc for any unlawful purpose); s 64 of the Offences Against the Person Act 1861 (making or possessing gunpowder etc with intent to commit or enable a person to commit an offence); s 139(1) of the Criminal Justice Act 1988 (possession of a bladed article in a public place); s 3 of the Criminal Damage Act 1971 (possessing something with intent to destroy or damage property) and s 25(1) of the Theft Act 1968 (possession away from one's place of abode of an article for use in the course of or in connection with a burglary or theft).

[10] Section 1(4) of the Prevention of Crime Act 1953 (with reference to any article "made or adapted for use for causing injury to the person") and s 139(1) of the Criminal Justice Act 1988 (with reference to bladed or sharply pointed articles) do not require proof of intent. However, they do provide a defence of lawful authority or reasonable excuse / good reason. They therefore appear to be based on the presumption that someone who carries a weapon in public intends to use it to cause harm or the threat of harm, or will develop that intention should an opportunity arise. For that reason these offences may in this context be regarded as offences of possession with intent, complementing the offence of attempt. The key difference, of course, is that the prosecution does not actually have to prove intention if D is charged with possessing a knife or some other offensive weapon in a public place. It is for D to prove his or her defence of lawful authority or reasonable excuse /good cause.

15.10 The relevance of intervention and deterrence, as opposed to moral culpability and threat of harm, is of course more evident in the context of specific preparatory offences, where the steps taken by D may still be far removed from the final steps necessary for the commission of a substantive offence. Indeed, D's conduct may be so far removed from the commission of the substantive offence that it might be impossible, in the absence of other cogent evidence, to drawn any legitimate inference as to his or her intentions.[11] This is why a number of offences of preparation do not require proof that D intended to commit a particular offence and explains the relatively low penalties which many such offences (requiring no proof of a specific intent) carry.[12]

15.11 Furthermore, many of these offences have their own cut-off point, reflecting the important principle that, as we move further back from the commission of the substantive offence, the moral culpability and concomitant risk of harm associated with mere preparation may be insufficiently high to warrant criminal liability. This is particularly so if competing considerations are thought to carry more weight. In a free and democratic society where the right to privacy, freedom of conduct and civil liberties generally are respected, the balance may come down firmly against imposing criminal liability. An example is where purely preparatory conduct takes place in D's home rather than in a public place, as when D possesses in his or her own bedroom an offensive weapon[13] or an item to assist in a burglary or theft.[14] The right to privacy and freedom from intrusive official investigation trumps any competing public interest there might be in prosecuting D for his or her conduct even if it involves preparation for an intended offence.[15]

15.12 Whether any act of mere preparation should be covered by the criminal law therefore depends on a range of interests. These include:

(1) the extent of D's moral culpability;

[11] Clearly there will be some exceptions, for example, where D's garage is in effect a bomb factory and the presence of other circumstantial evidence allows a clear inference to be drawn that D was manufacturing devices for a terrorist outrage.

[12] Eg, s 4(1) of the Vagrancy Act 1824 (above), requiring presence for "any unlawful purpose", currently carries a maximum sentence of three months' imprisonment (to be reduced to a fine when para 146(1) to (2) of Sch 32 to the Criminal Justice Act 2003 comes into force). Compare s 1(1) of the Prevention of Crime Act 1953 (possession of an offensive weapon in a public place), which, as explained above, could be said to address conditional intent to cause harm or serious harm should the need arise. This offence carries a maximum sentence of four years' imprisonment.

[13] Compare s 1(1) of the Prevention of Crime Act 1953 (possession of an offensive weapon in a public place).

[14] Compare s 25(1) of the Theft Act 1968 (equipped for burglary or theft when not at one's place of abode).

[15] There may, however, be exceptions where the balance comes down in favour of investigating and prosecuting D for preparatory conduct in his or her own home notwithstanding the invasion of D's privacy. For example, if the intended offence is a terrorist offence the significant danger to society justifies early intervention (see the Terrorism Act 2006, s 5(1)(a)). Further, if the allegation is possession of illicit drugs with intent to supply, effective law enforcement may require that D can be investigated and prosecuted even though the drugs were being stored at home (see the Misuse of Drugs Act 1971, s 5(3)).

(2) the nature and seriousness of the intended offence;

(3) the danger to society;

(4) the difficulty of establishing D's intention;

(5) the rights and liberties of the individual (at common law and under the European Convention on Human Rights and Fundamental Freedoms); and

(6) the extent to which the law should allow persons involved in 'mere preparation' to have an opportunity to change their mind.

15.13 Point (6) should not be disregarded. The absence of an offence of mere preparation relevant to the type of conduct may provide D with an incentive to abandon his or her criminal enterprise voluntarily before liability (particularly serious liability) is incurred. This could discourage D from pursuing his or her plan any further. Conversely, if D realises that he or she has already committed a serious offence by preparing for another offence, D may feel he or she has little left to lose by going on to commit that offence. Naturally, we realise that these considerations are largely speculative and likely to remain unproven either way.

15.14 It follows that there should not be a general offence of mere preparation designed to cater for every eventuality, so we endorse the piecemeal approach of Parliament in this respect. Consequently, we are not proposing that there should be a general inchoate offence of mere (preliminary) preparation with intent.

15.15 Insofar as there is a need to crack down on would-be wrongdoers at the stage of mere preparation through the substantive criminal law,[16] the need is met by having ancillary offences relating to specific types of preparation. In other words, where there is a proven or recognised need for criminal liability to attach to a person for conduct arising before the stage of (what should be) an attempt, then less proximate acts may be covered by specific preliminary offences usually carrying a lower penalty.[17]

15.16 We should add that the very fact that the sentence for a proscribed merely preparatory act is (generally) considerably less than that available for attempting the intended offence is a further reason for confining the scope of the general offence of attempt.[18]

[16] As noted already, by virtue of s 24(1)(c) of the Police and Criminal Evidence Act 1984, a police officer has the power to arrest without warrant any person he or she "has reasonable grounds for suspecting to be about to commit" an offence (including the offence of attempt).

[17] Occasionally the maximum penalty will be the same for preparation as for attempt; see, in particular, s 5 of the Terrorism Act 2006 ("preparation of terrorist acts") carrying a discretionary life sentence.

[18] Or any similar offence designed to replace it, to a narrow range of conduct.

PART 16
ANALYSIS AND PROPOSALS FOR REFORM

CONDUCT

Proposal 15: We propose that section 1(1) of the Criminal Attempts Act 1981 should be repealed and replaced by two separate inchoate offences, both of which would require an intention to commit the relevant substantive offence:

(1) an offence of criminal attempt, limited to last acts needed to commit the intended offence; and

(2) an offence of criminal preparation, limited to acts of preparation which are properly to be regarded as part of the execution of the plan to commit the intended offence.

A matter of degree

16.1 The present offence of attempt is not limited to conduct associated with actually trying to commit the intended offence. It extends to some preparatory conduct. So, it must be accepted that the question whether D has or has not attempted to commit an intended offence is one of degree, and the answer is dependent on the particular factual circumstances of the case. Some imprecision in the definition of the conduct element is therefore an inevitable feature of a general inchoate offence formulated to extend to some preparatory acts whilst excluding more distant, preliminary acts of preparation.

16.2 As long ago as 1855, in *Roberts*,[1] it was said to be "difficult, and perhaps impossible, to lay down a clear and definite rule"; and in *DPP v Stonehouse*[2] Lord Diplock said:

> There are some crimes whose definition incorporates as a constituent element a concept which is imprecise in that it involves some matter of degree ... . In the crime of attempt the concept of proximity between the acts of the accused and the complete offence that he intended to commit involves this kind of imprecision; but the imprecision is limited in its range.[3]

16.3 The definition of attempt, or of any new inchoate offence designed to cover preparatory conduct immediately connected with committing the offence, in our view must be flexible and therefore imprecise. If it is not, it will fail to cater for the vast range of substantive offences and factual circumstances to which it must be applied.

[1] (1855) Dears 539.

[2] [1978] AC 55.

[3] Above, 69. See also *Comer v Bloomfield* (1970) 55 Cr App R 305, 308.

16.4 We have already expressed our view that there should continue to be a general inchoate offence of 'attempt'. This offence would cover, at the very least, conduct that reasonable people would regard as an attempt because it involves one of the last acts needing to be done by D before the offence can be completed.[4] 'Attempt' is an important label which, when understood as an ordinary English word, provides a great deal of information about D's moral culpability and the immediacy of the danger his or her conduct posed to society. If D acts as just described but fails to commit an offence, he or she should be publicly condemned as an 'attemptor' and face the maximum penalty available for that intended offence. We consider this to be a basic principle. It goes almost without saying that the present offence of attempt under the 1981 Act encompasses the situation where D 'tries' but fails to commit an indictable offence he or she intended to commit.[5] It has been seen that we take the view that the present offence was designed to cover even earlier conduct – preparatory conduct beyond preliminary preparation – a view supported by a number of decisions of the Court of Appeal.[6] The contrary argument, best illustrated by the Court of Appeal's judgment in *Geddes*,[7] is that attempt covers nothing but the situation where D has done everything within his or her power to commit it. In the latter case, the label attached to the offence – 'attempt' - appears to have skewed the courts' understanding of the breadth it was intended to have in law.

16.5 One way of ensuring a definitive judicial interpretation of 'attempt' in line with our opinion as to its proper scope would be simply to re-label the offence, removing all references to 'attempt'. In that way, its true scope could be made explicit with a reduced risk that the courts would continue to focus on the concept of trying as the defining characteristic. This possible solution to the problem falls at the first hurdle, however, because it conflicts with our basic principle.[8] We believe that someone who is engaged in the final acts they need to do to rape or murder another person should continue to be convicted of 'attempted rape' or 'attempted murder' (as the case may be) rather than an offence carrying a label which fails adequately to explain the nature of D's conduct and culpability.

[4] The perpetrator must, of course, also intend the offence to be committed. The fault element in attempts is discussed below, paras 16.68 to 16.82.

[5] Subject to exceptions found in s 1(4) of the 1981 Act.

[6] See Part 14 paras 14.6 and 14.7 above.

[7] (1996) 160 JP 697.

[8] See para 16.4 above.

16.6 An alternative approach might be to provide in the Criminal Attempts Act 1981 a number of examples to guide the courts as to the proper scope of the present offence of attempt. We return to the question of examples in some detail below, but we need only make the short point at this stage that this would not be a feasible solution. It would be unprecedented, and almost certainly impracticable, to graft on new statutory guidelines for the interpretation of a criminal offence which has already been on the statute book and interpreted by the Court of Appeal for nearly three decades. We are reinforced in our opinion on this point by the fact that the examples of 'more than merely' preparatory conduct we have in mind[9] would stand in stark contrast with the interpretation of the offence in *Geddes*[10] and *Campbell*.[11]

16.7 Nevertheless, we believe there should be a general inchoate offence to address the situation where D is in the process of executing his or her plan to commit an (intended) offence but has not yet reached the stage of perpetrating the last acts needed to commit it. This view is supported by the principles and policy considerations to which we have referred in Part 15 and, as already mentioned, by a number of other decisions of the Court of Appeal.[12]

16.8 For the reason given above, we also accept that this general offence will need to be defined with a degree of imprecision. We therefore believe that the courts should be provided with guidance to assist them in their interpretation of the offence. In that case, however, this broader basis of criminal liability can no longer be encompassed within the existing offence of attempt, for the reasons we have just given.

16.9 We therefore take the provisional view that the offence of attempt should be expressly limited so that it applies only to persons who were engaged in the last acts needed to commit an intended offence. The descriptive adequacy of the term 'attempt' as a condemnatory label depends on the narrowness of this approach.[13]

[9] See paras 16.48 to 16.55 below.

[10] (1996) 160 JP 697.

[11] (1990) 93 Cr App R 350.

[12] See Part 14 paras 14.6 to 14.7 above.

[13] Although this approach does not involve confining attempts to the very narrowest extent: to literal 'trying'. That would require attempts to be confined to instances where it was D's direct purpose to bring about the offence, and we reject so narrow an understanding of the fault element: see Part 14 para 14.29 above.

16.10 It is worth repeating the view of the Commission in 1980[14] that the conduct encompassed by the offence of 'attempt' should if possible accord with society's understanding of this word. There should be the "desirable coincidence of social policy and ordinary language".[15] This approach has been criticised,[16] and there are certainly a number of offences where no such coincidence can be found.[17] However, we continue to find merit in the view that the substantive criminal law should comprise a body of offences that are readily understandable to the lay person as well as to those working in the criminal justice system. We therefore accept that a relatively high degree of coincidence between social policy and ordinary language is desirable in this instance.

16.11 It may be objected that our approach will make the offence of attempt too narrow to be of use in practice. We reject that view. The Association of Chief Police Officers has indicated to us that it would normally only regard someone as having committed attempted murder when, for example, a shot has been fired at someone, or someone has actually been stabbed, with lethal intent. In practice, most cases charged as attempts will have involved a last act or acts needing to be done.[18] So, our proposal is unlikely to have a great impact on the utility of the offence of attempt.

16.12 It follows that the two separate bases of liability which we believe currently co-exist within the present offence of attempt – that is, liability for last acts needing to be done, and liability for preparing oneself on the brink of committing a 'last act' – should be separated into two distinct offences.

16.13 As we have said, an important plank in our justification for these proposals is our view that previous reform proposals have focused too exclusively on the breadth of a single offence with insufficient regard to the question whether there should be separate offences to cover the two bases of liability separately. This may be because of the way the single offence of 'attempt' developed at common law or because of the perceived exigencies of legislative economy. Whatever the reason, we regard it as insufficiently cogent to justify a single offence given the countervailing considerations to which we have referred.

16.14 A single offence catering for two bases of liability can be supported only if the courts accept that this is the position. If, however, the courts focus too much on the label and as a result infer that there is only one basis of liability, then the legislative economy is a false one. This, we suggest, is what has happened with attempt.

[14] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

[15] Above, para 2.8. As Professor Sir John Smith pointed out, "unless the contrary has been decided, or the context so requires, it must be assumed that the words used in the law have their ordinary, natural meaning; for otherwise the difficulties of knowing what the law is would be insuperable". "Two Problems in Criminal Attempts Re-examined–I" [1962] *Criminal Law Review* 135, 136.

[16] Glanville Williams, "Wrong Turnings on the Law of Attempt" [1991] *Criminal Law Review* 416, 422.

[17] E.g., "use" of a motor vehicle without insurance, contrary to section 143(1)(a) of the Road Traffic Act 1988, where D leaves his broken-down vehicle parked on a road (*Elliott v Grey* [1960] 1 QB 367).

16.15 Accordingly, we provisionally propose that there should be two new offences with a common fault requirement of intention to replace section 1(1) of the Criminal Attempts Act 1981: 'attempt', and 'criminal preparation'.

16.16 Each offence would deal with a separate but connected basis of inchoate liability:

(1) 'attempt' would be defined with a 'last acts' requirement to cover defendants who were engaged in the last acts needed to secure commission of the offence, but nonetheless failed to commit the intended offence;

(2) 'criminal preparation' would be defined to cover defendants who are in the process of executing a plan to commit an intended offence but for one reason or another do not continue to the 'last act' (in the senses described in (1)).

16.17 So far as the new version of the attempt offence is concerned, as should be evident from the phrasing we have been using, 'last acts' should not be understood to extend only to the very last act that was required on D's part to complete his or her attempt to commit the offence. It is sufficient that the attempt is all-but completed as well as when it is completed. So, if D is using a hammer to break into a house in order to steal, but still needs a few more blows to effect entry, he or she may be convicted of attempted burglary at that point. In this example, it seems clear that D is engaged in one of the last acts needed to achieve the commission of the offence. Similarly, if D points a gun at V, intending to kill V, and removes the safety catch so that the gun will fire, D has done one of the last acts needed to commit the offence, and can be convicted of attempted murder. By way of contrast, if, in either of these examples, D is arrested when approaching the building or victim (respectively), D could not be convicted of attempt. D would, at best, be guilty of criminal preparation.

16.18 Both offences would require an intention to commit the substantive offence being attempted, or for which preparations were being made, and both offences would carry the same maximum penalty (the same maximum penalty available for the intended offence, as under section 1(1) of the 1981 Act). **[Proposal 15A]**

[18] Something will be said about the meaning to be given to 'last act' at para 16.17 below.

16.19 In line with the two bases of liability within the present offence of attempt, and our view on inchoate liability for preliminary acts of preparation,[19] the new offence of 'criminal preparation' would not cover less proximate preparatory steps. It would not cover conduct "which is … merely preparatory to the commission of the [intended] offence".[20] It follows that our proposal would not entail any enlargement of the law governing general inchoate liability beyond that which Parliament intended when enacting the 1981 Act. We take the view that Parliament intended that only executory (or 'on the job') acts of preparation should be covered by section 1(1) of the 1981 Act[21] to give effect to the underlying policy considerations we have mentioned.[22]

16.20 It is, in any event, worth reiterating that proving the intent required for liability will be possible in most cases only if D has actually moved close to the commission of it. Absent some earlier statement of intent by D, little practical benefit would result if the threshold between mere preparation and attempt were to be fixed too far from the last act D needs to perform, notwithstanding the greater scope for protective intervention by the police.[23]

16.21 The problem of mere preparation is best dealt with by enacting specific offences for specific types of intended offence, so that the balance between the interests of the individual and the wider interests of society can be assessed in their proper context.[24] No such exercise is necessary, of course, if the preparatory conduct in question is sufficiently connected to the commission of the intended offence for D to be properly regarded as being 'on the job'. In such cases the need to intervene, deter and punish almost always outweighs any concerns related to the rights of the individual to non-intervention and the desirability of affording D an opportunity to abort his or her enterprise.

16.22 We suspect that some consultees might wish to argue for a lower maximum penalty for acts of preparation which do not reach the stage of trying to commit the intended offence. However, we believe that both offences should carry the same penalty, in line with the present offence they would replace **[Proposal 15A]**. Given the requirement of proof of intention and the exclusion of acts of mere preparation, the differences in terms of moral culpability and the risk of harm between the two types of criminal behaviour are insufficient to justify different maximum penalties. There might also be considerable complexity involved in deciding what the different maximum penalty should be in each case for the offence of criminal preparation.

[19] See Part 15 para 15.13 above.

[20] Criminal Attempts Act 1981, s 1(1), emphasis added. Our reasons are given in paras 15.10 to 15.16 above.

[21] See Part 13, n 53 above.

[22] See Part 12 para 12.16 above.

[23] We should also point out here that there could be real practical difficulties in terms of procedure and sentencing if there were to be a broadly defined offence such as "preparation with the intent to commit an offence" or "preparation with the intent to commit an indictable offence". By keeping the focus on D's intention to commit a *particular* substantive offence we ensure that the court can, readily ascertain his or her true culpability, and the concomitant risk of harm to society.

[24] See Part 15 paras 15.11 to 15.13 above.

Proposal 15A: We propose that the two new offences should carry the same maximum penalty, that is, the penalty available for an attempt to commit the intended offence.

16.23 It is not our intention in this paper to formulate a definition of 'last acts' or of 'criminal preparation'. This would be a matter for Parliamentary Counsel when preparing a draft Bill for our final paper in line with our recommended policy. The policy we now propose is that D should be liable for the proposed offence of 'criminal preparation' only if D is in the process of executing his or her plan to commit an intended offence. His or her acts must be immediately and not merely remotely connected with the commission of the offence, even if they do not as yet involve one of the last acts he or she needs to do to commit the offence.

16.24 It is worth pausing here to make the point that there would be an overlap between the two offences in some cases. It will obviously not always be clear when preparation ends and the 'last acts' begin. However, we believe that in practice there is almost always likely to be a clear choice of charge between the two offences. This is because attempt is in practice mostly charged when D has in fact done the last act needed to complete the attempt. In a case involving any significant doubt concerning whether D was engaged in one of the last acts needed to commit the offence, the correct (safer) charge would be one of criminal preparation.

16.25 We believe that judges should be perfectly capable, without further guidance, of ruling as a matter of law on whether the conduct – if proved – amounted to one of the 'last acts' needed to commit the offence. However, a greater degree of imprecision necessarily comes with the notion of criminal preparation. It may quite often be difficult to decide whether D was 'on the job' or merely preparing to embark 'on the job'. For this reason, we believe guidance should be provided so that the trial judge or magistrates can decide whether there is a case to answer on a charge of criminal preparation.

GUIDANCE ON THE MEANING OF 'CRIMINAL PREPARATION'

Proposal 16: We propose that the guidance should be comprised of a list of examples in our report. Illustrations would be provided of the sort of continuum of conduct which might be expected to precede the last act towards the commission of an intended offence.

16.26 We provisionally propose that examples of 'criminal preparation' should be provided in our final report: the types of preparatory conduct associated with being 'on the job'. The judiciary would be able to refer to our examples for guidance. The Judicial Studies Board, mindful of our report, could also provide training and specimen directions to assist trial judges in their task.

16.27 Alternatively, we are asking consultees whether they would prefer that the guidance should be comprised of a list of examples in the legislation itself. The examples would not be definitive, but would provide the basis for the drawing of analogies in cases involving facts not already covered. The guidance would have to be updated from time to time **[Attempts Question 1]**.

16.28 This proposal would involve incorporating a number of examples of 'criminal preparation' within the relevant primary legislation. That is to say, the offence of 'criminal preparation' would be defined in terms of D being in the process of executing his or her plan, in line with our policy, but the legislation would then proceed to explain that this definition includes certain listed scenarios.

16.29 In *Gullefer*[25] it was said that the line separating mere preparation from what we have referred to as executory or 'on the job' preparation is to be drawn at the stage where D "embarks upon the crime proper".[26] This test would certainly seem to accord with the meaning of, and policy underlying, section 1(1) of the 1981 Act; and it is our policy that a similar test should establish the parameters of our proposed offence of 'criminal preparation'.

16.30 However, standing alone, a definition of this sort would provide little if any practical assistance for tribunals charged with determining D's liability. Insofar as it is practicable to do so, the courts need to be told where to draw the line between mere preparation and 'criminal preparation'. Without satisfactory guidance:

(1) the same factual scenario may be decided in different ways on different occasions;

(2) the offence may be interpreted too narrowly or too broadly; and/or

(3) the police may remain uncertain as to when or whether they can intervene to frustrate the commission of a substantive offence (with a view to securing a criminal conviction).

16.31 A list of examples, drafted in accordance with the principles of proximity and culpability which underlie our proposed offence of 'criminal preparation', would result in greater clarity in the law and consistency of approach in its application. It would also ensure that police officers, and the tribunal determining the issue at D's trial, have coherent, practical guidance to assist them in the performance of their respective roles. There are two example-based approaches – embodied in Proposal 16 and Attempts Question 1 – which might be used to assist the court in determining whether D's conduct had passed from mere preparation (stage 1)[27] to executory or 'on the job' preparation (stage 2).[28]

[25] [1990] 1 WLR 1063.

[26] Above, 1066. It was held that D was not liable for attempted theft by disrupting a dog race with a view to having it declared "no race" (so that he could recover the money he had staked on one of the losing dogs). Compare *Button* [1900] 2 QB 597 where D, a fast runner, was liable at common law for attempting to obtain property by false pretences at an athletic meeting, by pretending to be a moderate runner entitled to a long start in two races. (D won his races but was found out before he could apply for the prizes.)

[27] See Part 12 para 12.27 above

[28] Above.

16.32 We believe guidance with reference to recurring factual situations, whether set out in primary legislation or in our report, would go a considerable way towards ensuring that decisions on the facts are consistent as between cases and consonant with the policy considerations underpinning the offences.[29] The examples would be framed to satisfy the twin requirements of effective intervention and high moral culpability which underpin the present offence of attempt and informed the judgment of the Court of Appeal in cases such as *Tosti*.[30]

16.33 Further illustrations could also be included in our report (under Proposal 16) to demonstrate the types of continuum of preparatory acts which can precede D's last act towards the commission of an intended offence.[31] These illustrations, we suggest, could form the basis of an addendum to the Judicial Studies Board's specimen direction on attempt[32] to be referred to by trial judges and magistrates as and when necessary.

16.34 In formulating our proposal that guidance should be provided in the form of examples, we are not departing from the Commission's earlier analysis of the law in 1980[33] or its recommendations. In our view the Commission was right to reject the Working Party's 'substantial step' test, given its vagueness and the criticism it generated.[34] Nevertheless, we believe that insufficient regard may have been given to whether the Commission's proposed test of "more than ... mere preparation"[35] could be supplemented by specific examples covering borderline scenarios which are likely to reoccur. We agree with the view of Professor Duff that:

> … examples can serve to make more precise the legal meaning of a concept whose ordinary usage is insufficiently determinate; that the common law courts are well used to dealing with authoritative examples in the form of precedents; and that courts should be able to learn new methodological tricks which would make the law more certain and consistent.[36]

[29] For the examples originally suggested by the Commission's Working Party, Inchoate Offences: Conspiracy, Attempt and Incitement (1973) see Working Paper No 50, paras 78 to 87, and Part 3 para 13.18 above. This followed the American Law Institute's Model Penal Code, s 5.01(2). The American Law Institute's Commentary explains that examples are necessary "to reduce contrariety of decision in a number of recurring situations".

[30] [1997] *Criminal Law Review* 746. See part 14 para 14.6 above.

[31] For two provisional suggestions, see para 16.57 below.

[32] http://www.jsboard.co.uk/criminal_law/cbb/mf_02b.htm#10.

[33] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

[34] Above, para 3.32.

[35] Above, para 2.49.

[36] R A Duff, *Criminal Attempts* (1996) p 57.

16.35 A list of examples would also permit comparisons to be made with other factual scenarios, allowing novel cases to be decided "on the basis of their resemblances to, or differences from, members of that paradigm set":[37]

> … the fact that the law can provide no determinate general specification of the conduct element in attempts is neither surprising nor dismaying; and the provision of a list of authoritative illustrations … can be seen not as a counsel of despair, but as an appropriate statutory instantiation of practical reasoning.[38]

16.36 The provision of examples has been recommended by a number of other distinguished scholars, including Professor Glanville Williams,[39] Professor KJM Smith[40] and Professor Ian Dennis.[41] Professor Dennis has pointed out that the Commission's original scepticism about illustrative examples overlooks their additional value to enforcement authorities as guidelines for intervention,[42] and that the use of examples:

> … would be a logical step towards ensuring convictions in those cases about which the Law Commission are unhappy, and it would provide the useful guidelines for intervention which are missing from the present proposal.[43]

16.37 In our view the case for examples is made out. Accordingly, the question is not so much whether we should be proposing examples at all but whether, once formulated, the examples should be expressly set out in the legislation itself (so that they have the force of law) or merely included in our final report to be referred to when it is thought necessary or desirable to do so.

16.38 We have no principled objection to the inclusion of examples within criminal legislation, particularly if the definition of the offence to which they relate involves a matter of degree, as is the case with 'criminal preparation'. We recognise, however, that such examples would need to be drafted very carefully to ensure they fall squarely within the definition of the offence. There should be no inconsistency between the definition and examples.

[37] Above, p 66.

[38] Above. Similarly, Professor I Dennis, "The Law Commission Report on Attempt ... The Elements of Attempt" [1980] *Criminal Law Review* 758, 772 notes that statutory examples would be "helpful by way of analogy".

[39] "Wrong Turnings on the Law of Attempt" [1991] *Criminal Law Review* 416, 421 to 422.

[40] "Proximity in Attempt: Lord Lane's 'midway course'" [1991] *Criminal Law Review* 576, 582: "the Court of Appeal should ... provide lower courts with a collection of illustrations ... indicating the desirability of giving attempt a greater reach than currently recognised."

[41] "The Law Commission Report on Attempt ... The Elements of Attempt" [1980] *Criminal Law Review* 758.

[42] Above, 767.

[43] Above, 771.

16.39 We should add that if a policy of statutory examples were to be adopted, the list would not be exhaustive,[44] and provision would be made in the legislation for the Secretary of State to amend the list with the authority of Parliament. The Court of Appeal would of course also be able to add to the list, not directly but by reviewing convictions (and acquittals) on analogous facts. Trial judges and magistrates would themselves be able to consider novel factual scenarios with reference to the examples and determine whether they were sufficiently analogous to be considered acts of criminal preparation.

16.40 Nevertheless, although we believe statutory examples would provide a neat, functional scheme, and note that an approach of this sort appears to work well in the United States,[45] our provisional proposal is that the examples should be included in our final report but omitted from the relevant legislation. There are a number of reasons for this.

16.41 First, although a strong case can be made for statutory examples to explain a broad offence encompassing more than one basis of criminal liability, the same is not true for offences with only one basis. The Criminal Attempts Act 1981 would no doubt have benefited from statutory examples of what is 'more than merely preparatory' conduct so that the courts could have focused on the true scope of the offence rather than on the label 'attempt'. However, this risk of misinterpretation does not arise if the label and definition of the offence clearly accord with its intended scope. Our proposed offence of criminal preparation would be defined with reference to D being in the process of executing his or her plan to commit an intended offence. There would consequently be less ambiguity about its scope than there is in the present offence of attempt.

16.42 Accordingly, although there is a need for guidance to assist the court in determining whether D has passed from mere preparation (stage 1) to executory preparation (stage 2), the need is perhaps insufficiently strong to justify including examples in the legislation itself. In this new context, a sufficient tool would be provided by including examples within our final report, particularly if they were also to be included in the explanatory notes published with the legislation. In short, the case for statutory examples is insufficiently strong to rebut what is in effect a long-standing presumption that the definition of a criminal offence should stand alone to be interpreted solely by the courts.

16.43 Secondly, the inclusion of statutory examples might detract from the overarching importance of the definition itself, so that too much attention is paid to the examples at the expense of the offence as worded. The courts should be afforded sufficient flexibility to apply the offence to situations we have not contemplated. We would not wish to undermine the importance of the definitional elements of the offence and, in particular, the flexibility inherent within the definition of the conduct element. Examples should guide the courts; they should not force the courts into a straitjacket. That is to say, so long as the definition of an offence and its underlying policy considerations are sufficiently clear, the courts should be trusted to interpret the offence sensibly.

[44] For example, it could be provided that "the offence of criminal preparation shall include the following …".

[45] Section 5.01(2) of the American Law Institute's Model Penal Code.

16.44 Thirdly, as far as we are aware, no other statutory offence in England and Wales is explained with reference to examples within the legislation.[46] Although that of itself is an insufficient reason for rejecting a new approach, we would not wish to place on the courts an additional interpretative burden when a familiar and practicable alternative is readily available. As explained already, the courts could simply refer to our report and the examples therein to understand the scope of the offence.

16.45 Finally, we wish consultees to focus on the desirability of separating the present offence of attempt into two new offences so that the criminal law is improved. We fear that an additional proposal to include statutory examples to supplement the definition of our proposed offence of 'criminal preparation' may become the focus of too much attention and thereby distract consultees from this key issue.

16.46 We therefore propose that the definition of our proposed offence of 'criminal preparation' be left unexplained by the legislation. Examples would, however, be set out in our final report. **[Proposal 16]**

16.47 We would however welcome views on whether the examples should instead be included within the legislation. **[Attempts Question 1]**

PROPOSED EXAMPLES OF 'CRIMINAL PREPARATION'

Proposal 17: In whatever form guidance is provided, we propose that the new general offence of criminal preparation should encompass at least the following situations:

(1) D gains entry into a building, structure, vehicle or enclosure or (remains therein) with a view to committing the intended offence there and then or as soon as an opportunity presents itself.

(2) D examines or interferes with a door, window, lock or alarm or puts in place a ladder or similar device with a view there and then to gaining unlawful entry into a building, structure or vehicle to commit the intended offence within.

(3) D commits an offence or an act of distraction or deception with a view to committing the intended offence there and then.

(4) D, with a view to committing the intended offence there and then or as soon as an opportunity presents itself:

[46] Examples are not unprecedented in other areas, however, where the issue is procedural or related to a defence to criminal liability. Section 44(6) of the Criminal Justice Act 2003 lists examples of cases where there may be evidence of a "real and present danger" of jury tampering for determining whether an order may be made to try a case without a jury. In effect, section 139(5) of the Criminal Justice Act 1988 provides three examples of situations where D has a defence to a charge under section 139(1) of the Act. By virtue of section 139(1) it is an offence to have a bladed or sharply-pointed article in a public place. Section 139(4) provides a defence of "good reason or lawful authority" which D must prove. Section 139(5) provides that, "without prejudice to the generality of subsection (4)" D has a defence if he proves that he had the article with him (a) for use at work; (b) for religious reasons; or (c) as part of any national costume.

(a) approaches the intended victim or the object of the intended offence, or

(b) lies in wait for an intended victim;[47] or

(c) follows the intended victim.[48]

Example (1)

16.48 Although this example would overlap with burglary contrary to section 9(1)(a) of the Theft Act 1968,[49] it would also cover cases where a charge of burglary was not available or where a burglary conviction would fail to reflect the gravity of D's culpability and the harm intended, for example where:

(1) D climbs through an open window into V's bedroom intending to cause him actual bodily harm;

(2) D breaks into V's house intending to commit murder; or

(3) D, having entered lawfully, decides to remain in a department store after closing time to rape a cleaner.

16.49 This example would also cover the facts of *Geddes*,[50] where D was in effect 'on the job', intent on detaining and presumably ill-treating a young boy. As we have already explained, a person who travels this far down the continuum towards the intended offence should be liable for the offence of criminal preparation.[51]

Example (2)

16.50 This example is self-explanatory. It is worth noting that if D is preparing to enter a building and his or her intended offence falls within section 9(2) of the Theft Act 1968, D could be liable for criminal preparation in respect of burglary[52] as well as in respect of the intended offence.

[47] As in *Geddes* (1996) 160 JP 697. See Part 1 para 1.73 above.

[48] We depart from the view of the Working Party in respect of "searching out for", primarily because we believe this is too vague a basis for fixing liability. We also regard it as insufficiently proximate to the commission of the intended offence to justify liability. Indeed, in the absence of a pre-existing statement of intent, we doubt whether it would be possible to infer the requisite state of mind in many cases of this sort.

[49] To be liable under s 9(1)(a) of the Theft Act 1968, D must intend to steal, inflict grievous bodily harm or cause criminal damage (s 9(2)).

[50] (1996) 160 JP 697. See Part 1 para 1.73 above.

[51] The facts of *Geddes* (1996) 160 JP 697 would also fall within example (5)(b), below, and the offence under s 63(1) of the Sexual Offences Act 2003.

[52] Contrary to Theft Act 1968, s 9(1)(a).

Example (3)

16.51 This example accords with the Working Party's suggestion that D should be liable for attempting to kidnap a child if he or she assaults the child's mother in order to commit that offence.[53] This example is more widely framed, however, referring to an offence or an act of distraction or deception rather than an assault.[54] It would therefore cover the type of situation where D:

(1) lures a mother away so that her child can be abducted without resistance;

(2) distracts a shopkeeper so that D can shoplift; or

(3) distracts a pedestrian in order to pick his or her pocket.

Example (4)

16.52 Example (4) actually comprises three separate examples linked by a common theme. We can see no distinction between lying in wait for a victim and following a victim, save for the fact that the latter type of conduct is possibly even more deserving of punishment because the groundwork for the intended attack has already been prepared.

16.53 Example (4) would:

(1) encompass cases such as *Komaroni and Rogerson*,[55] where D followed a lorry for 130 miles with a view to stealing its load, and *Campbell*,[56] where D was apprehended no more than a metre or so from the entrance to a post office, armed with an imitation firearm and threatening note;

(2) accord with the Canadian case of *Henderson*,[57] where D was guilty of attempted robbery when he approached to within sight of the bank he (and his confederates) intended to rob;[58]

(3) render D liable for a serious offence sooner in a case such as *Jones*,[59] where it would appear no liability under section 1(1) of the 1981 Act for attempted murder arose until D had physically entered V's car and pointed his loaded gun at him.[60]

[53] See Part 13 para 13.18(1) above.

[54] A person now commits an offence under s 62(1) of the Sexual Offences Act 2003 if he or she commits any other offence with the intention of committing a relevant sexual offence.

[55] (1953) 103 LJ 97. See Part 13 para 13.15(3) above.

[56] (1990) 93 Cr App R 350. See Part 12 para 12.18 above.

[57] (1948) 91 CCC 97 (Supreme Court of Canada).

[58] They fled following the arrival of a police car.

[59] [1990] 1 WLR 1057. See part 14 para 14.7(2) above.

[60] Under our proposal, D would be liable as he approached V's car with his loaded gun.

16.54 Our various examples would set out where the line between mere preparation and criminal preparation is to be drawn, so, subject to proving D's intent, we would expect the situations described to give rise to liability under the new offence and the trial judge to direct the jury accordingly.

16.55 We welcome consultees' views on Proposal 17, namely the proposal that the offence of criminal preparation should include at least these examples. We would also welcome consultees' views on any other examples consultees might be minded to propose for our consideration.

Additional illustrations

16.56 As explained above,[61] a further tool would be to provide illustrations in our final report setting out some of the types of continuum of conduct which might be expected to precede 'last acts' by D.

16.57 The following two possible suggestions relate to D's intention to commit sexual assault on a child:

> **Continuum 1**: D buys rope and masking tape to use in the offence (mere preparation). D reconnoitres the local boys' school on Tuesday and Wednesday to establish the best time to commit the intended offence on Thursday (mere preparation). D leaves home on Thursday and heads for the school, equipped with his rope and masking tape (mere preparation). D sneaks into the school premises to find a suitable place from which to launch his attack (criminal preparation). D finds a children's lavatory, and prepares himself to attack the next boy who arrives on the scene (continuation of criminal preparation). D leaps out at an unsuspecting boy (criminal attempt)**.**[62]

> **Continuum 2**: D watches the various children who deliver newspapers to his door, with a view to selecting a victim to abuse (mere preparation). D buys a notebook in order to leave a note for one of the children (mere preparation). D writes a note inviting a particular boy to meet him outside the public lavatory in the local park at 16:00 the next day (mere preparation). D leaves the note under an empty milk bottle on his doorstep (mere preparation). D drives to the park entrance the following day at 15:30 and waits in his car (mere preparation). D leaves his car and walks towards the lavatory at 15:50 (criminal preparation). D finds no-one at the lavatory, but waits for 15 minutes (continuation of criminal preparation).[63] When a boy arrives, D greets him (continuation of criminal preparation). D endeavours to engage in a sexual act with the boy (criminal attempt)**.**

[61] See para 16.33 above.

[62] As we have indicated, in this example D may be guilty of a preparatory offence under the Sexual Offences Act 2003, s.63(1), but only in a case where he is a trespasser on the premises.

[63] Impossibility is no defence, so D would be liable for attempt regardless of whether the child arrives.

MINIMAL CHANGE

Attempts Question 2: We ask consultees' views on whether the present offence of attempt should be retained without amendment or the provision of guidance. Instead amendments and additions should be made to statutory inchoate offences of preparation. However, there should be no *general* inchoate offence to cover preparations which consist of nothing more than a preliminary stage in D's plan to commit an intended offence (what would now be regarded as 'mere preparation').

16.58 A different (third) option, as an alternative to Proposals 15 and 16, is the minimalist approach. Under this third option, section 1(1) of the 1981 Act would be retained in its present form. The Court of Appeal would be expected to continue to interpret the single offence of attempt. Naturally, our hope would then be that this paper and our final report would encourage a definitive interpretation consonant with the underlying policy considerations to which we have referred,[64] rejecting the narrow view espoused in *Geddes*[65] in favour of the broader approach exemplified by *Tosti*.[66]

16.59 Nevertheless, we realise that the higher courts could follow the narrow *Geddes* approach in future cases. Over time, this would in all probability highlight a number of arbitrary gaps and omissions that can be found in other inchoate statutory offences of preparation.[67] So, under this option, there would need to be a review of the various offences of preparation[68] with a view to making recommendations for removing anomalies and gaps in this corpus of inchoate liability.

16.60 The amendments would be aimed at ensuring that an individual who is in the process of executing his or her plan, but who has not yet reached the stage of 'last act', would incur criminal liability in as wide a range of circumstances as can be realistically achieved by such amendments. That is to say, individuals who are 'on the job' would incur criminal liability under one or more specific offences if not by virtue of a general inchoate offence. The implementation of recommendations made pursuant to such a review would do something to achieve our stated policy, albeit in a piecemeal way.

16.61 The following examples show how this third option, if adopted, could be taken forward:

[64] See Part 15 above.

[65] (1996) 160 JP 697. See Part 1 para 1.73 above.

[66] [1997] *Criminal Law Review* 746. See Part 14 para 14.6 above.

[67] See Part 14 paras 14.56 to 14.74 above.

[68] See Appendix C below.

(1) Section 9(1) of the Theft Act 1968 currently provides that D commits burglary if he or she enters a building or part of a building as a trespasser intending to commit one of the offences specified in section 9(2). The specified offences in that subsection are currently theft, inflicting grievous bodily harm and doing unlawful damage, a relatively arbitrary selection of crimes.[69] Pursuant to option three, thus, section 9(2) should be enlarged so that it includes a far wider range of offences, certainly all the indictable offences D might plausibly intend to commit in such circumstances. For example, D would be liable for burglary contrary to section 9(1) if his or her intention was to cause actual bodily harm or kidnap or kill a person and would be labelled and punished accordingly. We would also recommend extending the scope of section 9(1) so that it applies if D unlawfully remains in a building (or part of a building) thereby becoming a trespasser (having originally entered as a lawful visitor).[70]

(2) Section 63(1) of the Sexual Offences Act 2003 provides that D commits an offence is he or she trespasses on any premises intending to commit a sexual offence. This offence, like burglary, depends on D's being a trespasser, presumably in this case to ensure that remote preparatory acts are not covered. This gives rise to an anomaly, however, as explained in paragraph 14.72. It seems right to replace the requirement of trespass with a requirement that the prosecution prove that D was lying in wait for or following someone. We would also recommend an equivalent statutory offence (but not in the Sexual Offences Act 2003) to cover the situation where D intends to commit a non-sexual offence against the person.

(3) Section 9(1) of the Criminal Attempts Act 1981 provides that D commits an offence if he or she interferes with a motor vehicle or trailer (or anything therein) intending to commit an offence specified in section 9(2).[71] We would recommend extending this provision beyond interference with vehicles, so that D would be liable for a preparatory offence of interference in other contexts (for example, interfering with a door, window, lock or alarm system) where his or her intention relates to a specified offence other than the offences listed in section 9(2).[72]

[69] It would appear that these three offences were chosen, along with rape (now removed from the list), simply because there were reported instances of trespassers having committed them (see Criminal Law Revision Committee, Eighth Report, "Theft and Related Offences" (1966), Cmnd 2977, para 77).

[70] A further possible reform would be to create a new offence framed in similar terms to s 9(1)(a) for the situation where D enters private land but does not yet enter a building or part of a building.

[71] Theft or taking a conveyance without consent.

[72] Compare *Tosti* [1997] *Criminal Law Review* 746. See Part 14 para 14.6 above.

(4) There are a number of possession offences which require an intention to commit some other specified offence. For example, section 3 of the Criminal Damage Act 1971 provides that D commits an offence if he or she possesses something ("anything") intending to use it to commit a criminal damage offence; and section 25(1) of the Theft Act 1968 provides that D commits an offence if he or she possesses "any article" away from his or her place of abode for use in connection with any burglary or theft. It may be that offences of this sort should be consolidated within a single offence of more general application. This might be drafted in terms of possessing any article away from one's home with the intention of using it in connection with the commission of a specified offence (or any offence within a limited category of comparable offences).[73]

16.62 A positive aspect of this option is that it should, we think, be relatively uncontroversial. It would ensure that many persons whose preparatory conduct brings them close to the point of endeavouring to commit an intended offence would be criminally liable for their conduct. It would also be consistent with Parliament's inclusive approach to preparatory conduct in some other contexts. To take a recent example, section 5(1) of the Terrorism Act 2006 provides that D commits an offence if, with the required intention,[74] he or she "engages in any conduct in preparation for giving effect to his intention".[75]

16.63 This approach would also allow for (indeed it is predicated upon) the possibility that the Court of Appeal would wish to limit the scope of section 1(1) of the 1981 Act in the way that *Geddes* and *Campbell* have done.

16.64 It is, however, a piecemeal and somewhat complicated solution to a general problem, and for that reason it is not our preferred option. For example, it would leave untouched instances in which D lies in wait near someone's home with the intention of harming them when they return, instances that would ordinarily be caught by our proposed offence of criminal preparation.

[73] Certainly, it would seem sensible to amend section 1(1) of the Prevention of Crime Act 1953 so that the offence is committed by D if he or she is in possession of an offensive weapon away from his or her own home. At present the offence is committed only if D is in a "public place", so it does not extend to the situation where D is on someone else's private property (unless of course it can be inferred that D carried it there through a public place).

[74] The intention of committing an act of terrorism or assisting another to commit an act of terrorism.

[75] For other examples of preparatory offences drafted in broad terms, see section 7 of the Official Secrets Act 1920 ("any act preparatory to the commission" of a specific offence) and section 170B(1) of the Customs and Excise Management Act 1971 ("knowingly concerned in the taking of any steps with a view to the fraudulent evasion … of any duty of excise").

16.65 Indeed it is possible this approach might result in a reduction of the scope of the present criminal law and, for that reason, create fresh lacunae. Under this option, there would be no general basis for convicting D on account of his or her preparation while 'on the job'.[76] Although D would of course incur inchoate liability if his or her conduct were to fall squarely within one of the specific offences, there would be no such liability, and therefore less protection for the public, in other cases. Importantly, it would not be possible to draw on examples for the interpretation of a general offence should an unforeseen situation arise. In such cases Parliament would have to intervene on an *ad hoc* basis by creating further offences.

16.66 Ultimately, we would prefer to see the present battery of statutory offences of preparation reduced by the creation of a general offence of criminal preparation to replace them, with Parliament enacting a general solution to address a general problem. This would not only be far simpler to create and understand, it would be more flexible and almost certainly more comprehensive.

16.67 This would accord with the policy in our recent report on inchoate liability for assisting or encouraging crime.[77] In that report we recommended general inchoate offences of assisting or encouraging crime to deal with a problem currently addressed, inadequately, by numerous statutory offences demonstrating a "piecemeal and haphazard approach".[78]

FAULT: THE MEANING OF INTENT

Proposal 18: We propose for the purposes of the proposed offences of attempt and criminal preparation that an intention to commit an offence should include:

(a) *Woollin*[79] intent; and

(b) a conditional intent to commit the offence.[80]

16.68 In our discussion of conspiracy[81] we explored the relevance of conditional intention and set out proposals for reform. Our proposals for the law of attempt should be consistent with those for conspiracy. Accordingly, we will briefly rehearse the arguments.

[76] Unless the Court of Appeal were to adopt a consistent, broad interpretation of section 1(1) of the 1981 Act, in line with cases such as *Tosti* [1997] *Criminal Law Review* 746 - see Part 14 para 14.6 above. However, increasing the scope of the existing inchoate offences of preparation would no doubt militate against a broad interpretation of attempt.

[77] Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300.

[78] Above, para 4.9.

[79] [1999] 1 AC 82.

[80] See Part 14 paras 14.27 to 14.32 above.

[81] See Part 5 above.

16.69 The Oxford dictionary defines a condition as "a stipulation; something upon the fulfilment of which something else depends". An intention can be conditional in this sense. D can intend to act only if something else occurs, or only in certain circumstances. The question for present purposes is whether a conditional intention should be treated as an intention to commit an offence for the purposes of our proposed offences of attempt and criminal preparation.

16.70 In Part 5,[82] we observed that the simple fact that there are conditions under which an intent will not be carried out does not in itself make that intent a 'conditional' intent. For example, D, a professional assassin, who has agreed to kill someone may readily concede that the killing will only go ahead if, when the time comes, D has not by then decided to give up a life of crime. This does not make D's intent to kill truly 'conditional'.[83]

16.71 We considered a scenario where someone consciously sets for him or herself a set of circumstances in which a criminal intention will or will not be carried out. We decided that, even then, this fact would only rarely lead to the conclusion that this 'conditional' intention should not be regarded as an intention to commit the offence. In relation to the crime of conspiracy contrary to section 1(1) of the Criminal Law Act 1977, we take note of Lord Nicholl's observation in *Saik*:[84]

> 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 a conspiracy to rob. Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside section 1(1)'.[85]

16.72 We agreed with this robust approach to 'conditional' intention for conspiracy and proposed 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.[86]

[82] Para 5.5 above.

[83] See Gideon Yaffe, "Conditional Intent and Mens Rea" (2004) *Legal Theory* 273, 276 to 277.

[84] [2006] UKHL 18, [2007] 1 AC 18.

[85] Above, at [5].

[86] See Part 5 para 5.7 above.

16.73 With regard to attempt, in *Husseyn*[87] the Court of Appeal took the view that it could not be said that one who has it in mind to steal only if what he or she finds is worth stealing has a present intention to steal.[88] 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) states that D intended to steal "some or all of the contents".[89] This procedural solution to the problem thrown up by *Husseyn*[90] is unsatisfactory, because D had the intention to steal something other than the actual contents of the bag.

16.74 In our view, the approach taken in *Husseyn*[91] is wrong. If D breaks into a car intending to steal if he or she finds something worth stealing, that is an intention to steal. Such an intention is functionally equivalent to the intention of someone who drops a stone off a tall building, saying, "I intend this stone to hit anyone who happens to be passing below". Such a person intends to strike someone with the stone.

16.75 Accordingly, consistent with our proposals for conspiracy, we propose for the purposes of attempt and our proposed offence of criminal preparation that an intention to commit an offence should include a conditional intention to commit it.

FAULT: THE OBJECT OF D'S INTENT

Proposal 18A: We propose that an intention to commit the substantive offence should be an intention to commit any conduct or consequence elements of that offence.

16.76 We propose that, for the purposes of attempt and our proposed offence of criminal preparation, D must be found to have intended the conduct and consequence elements, whether or not a fault element is required respecting those elements by the completed offence.

16.77 For example, to be liable for attempting to commit an assault occasioning actual bodily harm,[92] D would have to intend not only his own physical conduct but also the consequence that another person (V) should suffer actual bodily harm.[93]

87 (1977) 67 Cr App R 131.

88 The condition in question here – "if I find something worth stealing" – bears a strong resemblance to what is sometimes called a "potestative" condition, a condition that is entirely within the control of the person setting it: see, Unfair Terms in Contracts (2002) Law Commission Consultation Paper No 166, para 4.133.

89 *Husseyn* (1977) 67 Cr App R 131; *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) to (3) of the 1981 Act and cl 50 of the Commission's Draft Criminal Code.

90 (1977) 67 Cr App R 131.

91 Above.

92 Offences Against the Person Act 1861, s 47.

93 The completed offence merely requires intention or subjective recklessness as to the consequence that another person should suffer (or be put in fear of suffering) the application of unlawful force: *Parmenter* [1992] 1 AC 699.

16.78 We have already explained that, in our view, the approach adopted by the Court of Appeal in *Khan*[94] and *Attorney-General's Reference (No 3 of 1992)*[95] is the right one.[96] There is, thus, nothing novel about Proposal 18A. It accords with the present legal position for offences such as attempted murder and attempted criminal damage, where attempt requires greater fault than the substantive completed offence.[97]

FAULT: CIRCUMSTANCE ELEMENTS

Proposal 18B: We propose that subjective recklessness with respect to a circumstance should suffice where subjective recklessness suffices for the substantive offence, and such recklessness should be required with respect to a circumstance where objective recklessness, negligence or no fault suffices for the substantive offence.

Attempts Question 3: However, we also ask alternatively in relation to 4B whether, if something less than subjective recklessness (or no fault) is required in relation to a circumstance element of an offence, the offences of attempt and criminal preparation should require the same lower (or no) fault element in relation to that circumstance element.

16.79 We gave our reasons for this in Part 14.[98] The Proposal is consistent with our proposals for conspiracy.[99]

Proposal 18C: We further propose that a higher fault element (such as knowledge) with respect to a circumstance should be required for attempts where it is required for the substantive offence.

16.80 We gave our reasons for this in Part 14.[100] The Proposal is consistent with our proposals for conspiracy.[101]

[94] [1990] 1 WLR 813.

[95] [1994] 1 WLR 409.

[96] See Part 14 paras 14.37 to 14.42 above.

[97] Although recklessness as to whether another person's property is damaged suffices for criminal damage contrary to s 1(1) of the Criminal Damage Act 1971, attempt to commit that offence requires an intention to damage another's property; see, e.g., *Millard and Vernon* [1987] *Criminal Law Review* 393. Similarly, although D may be liable for murder if he kills V with the intention to cause serious harm, he may be liable for attempted murder only if he acts with the intention to kill. On this point see *Walker and Hayles* (1989) 90 Cr App R 226 (this was also the position at common law: *Whybrow* (1951) 35 Cr App R 141).

[98] Paras 14.37 to 14.53 above.

[99] See Part 4 above. See also Draft Criminal Code: A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, cl 49(2).

[100] Paras 14.54 to 14.55 above.

[101] See Part 4 above. See also Draft Criminal Code: A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, cl 49(2).

16.81 We accept that there may be an occasional difficulty in some cases distinguishing between a 'circumstance' and a 'consequence'. Problems of this sort should occur only rarely in practice, however; and where a problem does arise, the courts should be able to resolve the issue by defining the external elements of the offence in a sensible fashion. In its Commentary on the Draft Criminal Code, the Commission also noted the problem but, similarly, were:

> … prepared to tolerate [it] because in the mainstream cases where the rule is likely to operate, namely rape and obtaining property by deception, the rule appears to work well. The distinction ... is plain on the face of the definitions of the offences.[102]

16.82 We should add that our draft Crime (Assisting and Encouraging) Bill, appended to our recent report, Inchoate Liability for Assisting and Encouraging Crime,[103] also distinguishes between the 'circumstance' and 'consequence' elements of the substantive offence.[104] This distinction has been carried forward by the Government in its Serious Crime Bill.[105]

CONDUCT: OMISSIONS

Proposal 19: We propose that the inchoate offences should cover omissions where, as a matter of law, the offence intended is capable of being committed by an omission.

16.83 Our view is that the exclusion of omissions from the scope of attempt, where there is a recognised duty to act, is contrary to general principle.[106] There was little discussion of the question by the Commission in 1980,[107] but the failure to address the question in any depth may have been related to the conceptual difficulty of identifying a preparatory omission and therefore an omission that is more than merely preparatory.

[102] A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 2, para 13.45.

[103] (2006) Law Com No 300.

[104] Above, pp 146 to 147 (cl 1(3) and cl 2(4)).

[105] Clause 45(5)(b).

[106] We therefore agree with the view in Smith and Hogan, *Criminal Law* (11th ed 2005) p 414 that the absence of liability for attempt in cases of omission is "an unfortunate gap in the law".

[107] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.105.

16.84 The desirability of encompassing omissions is, however, demonstrated by the facts of *Gibbins and Proctor*,[108] where the two defendants were convicted of murdering Gibbins' daughter by intentionally starving her to death. 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, there can be no good reason for allowing D to escape liability for attempted murder if V's life happens to be saved by the fortuitous intervention of a third party.[109]

16.85 We acknowledge that there may be conceptual difficulties associated with identifying preparatory – and therefore more than merely preparatory – omissions. However, there can clearly be some situations where D's conduct is such that he or she is clearly 'on the job' even though there is no positive act, as in our example in paragraph 12.24 above. As the Commission noted in the commentary on clause 49 of its Draft Criminal Code:

> Where a substantive offence, such as murder or manslaughter, can be committed by omission, it seems right to provide for the possibility of an attempt to commit such an offence by omission.[110]

16.86 The Commission proposed that clause 49 should encompass omissions,[111] and included clause 49(3) to have this effect.[112]

16.87 We agree that this is the right approach, in relation to the offence of attempt and the offence of criminal preparation. These offences should be interpreted to include omissions where, as a matter of law, the intended offence is capable of being committed by an omission.

16.88 We note that this may provide a broader basis for imposing criminal liability when compared with liability arising from positive acts, particularly if the conduct is an ongoing failure to discharge a duty. Equally, however, we note that cases of this sort are unlikely to come before the courts.

CONDUCT: THE ROLE OF THE JURY

Proposal 20: We propose that:

(1) the question whether D's conduct amounts to criminal preparation or attempt in relation to the intended offence should be one of law for the judge, guided by our suggested examples;

(2) the jury's role should be limited to determining whether the Crown has proved to the criminal standard that D committed that conduct with the fault required for liability.[113]

[108] (1918) 13 Cr App R 134.

[109] It seems, moreover, that Parliament intended that some omissions would be covered by the 1981 Act. See Dennis, "The Criminal Attempts Act 1981" [1982] *Criminal Law Review* 5, 7 to 8.

[110] A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 2, para 13.46.

[111] Above.

16.89 Because we are suggesting a departure from the present statutory test, we would particularly welcome views on this issue.

16.90 Section 4(3) of the 1981 Act requires the judge to determine, as a question of law, whether D's conduct was capable of being 'more than merely preparatory'. Then, having concluded that it is, the section requires the judge to direct the jury to consider the very same question for themselves as one of fact, even if it was the last act which was in D's power to commit. The Commission's reason for this approach in 1980 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 ... .[114]

16.91 We are no longer convinced by this justification, although we recognise that an alternative proposal would run counter to a majority decision of the House of Lords[115] and, of course, the subsequent intention of Parliament in enacting the 1981 Act.[116]

16.92 We fully accept that some concepts, such as dishonesty and gross negligence, which are informed by values which reflect common standards of behaviour, may properly be left to the collective judgment and common sense of the jury with judicial guidance. However, we do not now believe that the jury should be asked to reassess, as a question of fact, when conduct ceases to be mere preparation if the judge has already determined the same issue as a question of law. This is particularly so if (as is currently the position) the jury is deprived of any judicial guidance. It is to be noted that the Court of Appeal has not been reluctant to impose its particular view on where the border lies. That is to say, there is often considered to be a right and a wrong answer to the question whether conduct is more than merely preparatory.

[112] Clause 49(3) states that act "includes an omission only where the offence intended is capable of being committed by an omission".

[113] Compare s 5.01(2) of the American Model Penal Code. This sets out a number of examples of the "substantial step" test in s 5.01(1)(c). It also provides that, so long as the jury finds that D's conduct is "strongly corroborative of [his or her] criminal purpose", conduct falling within an example "shall not be held insufficient as a matter of law". In other words, in such cases the trial judge is not permitted to intervene and hold that D's conduct was not an attempt (not a "substantial step"). However, for other factual situations the judge has the power to intervene and prevent a conviction on the basis that D's conduct cannot reasonably be regarded as a "substantial step".

[114] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.50.

[115] *DPP v Stonehouse* [1978] AC 55 (majority view), pp 79 to 80, 87 to 88 and 93 to 94.

[116] In truth, there was little if any discussion of the issue in Parliament.

16.93 It is true that there may be a fine line separating the last act of mere preparation from the first act of executory preparation. However, the present law is predicated on the reality of this line and, to ensure that the test is properly considered and applied, with reference to all relevant considerations of policy, we take the view that the question must be for the tribunal of law alone. The trial judge or magistrates, as the tribunal of law in criminal proceedings, should determine where the line lies as a question of law. In cases of genuine doubt, they would still be able to rely on analogies with the examples provided in our report or in legislation. However, as with any legal question, it should be open to the appellate courts to review the ruling following the conclusion of the trial.

16.94 In short, we doubt whether 12 lay individuals are properly able or equipped to determine whether any particular preparatory act should give rise to liability, given that they will have no understanding of the underlying policy considerations.[117] But the present two-stage test is unsatisfactory for two additional reasons:

(1) it may result in different verdicts on the same or virtually indistinguishable facts; and

(2) it requires that the jury "be given the opportunity to return a perverse or stupid verdict of acquittal", as noted by Professor Glanville Williams.[118]

16.95 We take the view that the trial judge should determine whether D's act, if proven, is capable of being an attempt or an act of criminal preparation. Once this determination has been made, the jury should simply be asked, in accordance with general principles, whether it has been proved that D committed that act (with the required fault).[119] Certainly in a case where D's proven conduct falls within one of the suggested examples, that would be provided under Proposal 17, the jury should be directed that D is guilty of criminal preparation in relation to his or her intended offence. It would be wrong to provide a firm example of what is an offence, and then allow the jury to be directed that they are entitled to find that that conduct is not an offence.

SUMMARY OFFENCES

Proposal 21: We propose that it should be permissible to bring a prosecution for attempt or for criminal preparation in relation to an intended summary offence.

Attempts Question 4: We ask whether the consent of the Director of Public Prosecutions should be required for prosecutions in relation to summary offences.

[117] Similarly, see Professor Ian Dennis, "The Law Commission Report on Attempt ... The Elements of Attempt" [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".

[118] "Wrong Turnings on the Law of Attempt" [1991] *Criminal Law Review* 416, 424.

[119] The general position for trial on indictment requires the judge to direct the jury on the definitional elements of an offence and the jury to determine (as a question of fact) whether it has been proved that D acted in that way.

16.96 This proposal is in line with our proposals for conspiracy. However (in line with our proposals for conspiracy),[120] we ask consultees whether proceedings should be commenced in such cases only by or with the consent of the Director of Public Prosecutions.

16.97 In 1980[121] the Commission recommended that the inchoate offence should apply to summary offences but, for two reasons, this recommendation was not adopted by Parliament. First, it was thought that there was no evidence of a need to extend the ambit of attempt to summary offences. Secondly, it was thought that too much time could be taken up in magistrates' courts with complicated questions of attempts to commit minor offences.[122]

16.98 Section 1(4) of the 1981 Act therefore limits the scope of section 1(1) to indictable offences (offences which are 'triable either way' or 'triable on indictment only').

16.99 There is force in the view that attempt should be limited to indictable offences, in that many summary offences are regulatory in nature and carry relatively minor penalties. However, it must be borne in mind that "the distinction between indictable and summary offences today does not necessarily reflect the distinction between regulatory and other offences".[123] Some summary offences are relatively serious, for example: driving with excess alcohol; driving while disqualified; battery; assaulting a police officer; and taking a vehicle without the owner's consent.

16.100 We therefore believe that there should no longer be this arbitrary line of demarcation based on the distinction between indictable and summary offences.

[120] See Part 6 above.

[121] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102.

[122] Above, paras 2.102 to 2.105. See also I Dennis, "The Criminal Attempts Act 1981" [1982] *Criminal Law Review* 5, 7 and A Criminal Code for England and Wales, Report and Draft Criminal Code Bill (1989) Law Com No 177, vol 2, para 13.12.

[123] Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, para 2.105.

PART 17
CONSULTATION ISSUES

17.1 We would welcome views on the following proposals and questions.

CONSPIRACY

17.2 We provisionally propose 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.

[**Proposal 1: paragraphs 4.4 and 4.21**]

17.3 We provisionally propose that 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.

[**Proposal 2: paragraph 4.4**]

17.4 We provisionally propose that 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 circumstance is required for the substantive offence).

[**Proposal 3: paragraphs 4.4 and 4.113**]

17.5 We provisionally propose that, as a qualification to proposal 3, where a substantive offence has a fault requirement more stringent than recklessness in relation to a circumstance element,[1] 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.

[**Proposal 4: paragraphs 4.4 and 4.135**]

17.6 We provisionally propose that, with the exception of pre-Proceeds of Crime Act 2002 conspiracies to launder unidentified criminal proceeds, agreements which are based on conditional intent and agreements comprising a course of conduct which, if carried out, will comprise more than one offence to which different penalties apply, should be charged as more than one conspiracy in separate counts on an indictment.

[**Proposal 5: paragraph 6.56**]

[1] Such as knowledge that the circumstance obtains or a belief that it obtains (as opposed to a belief that it may obtain).

17.7 We provisionally propose that the defence of 'acting reasonably' provided by clause 48 of the Serious Crime Bill should be applied in its entirety to the offence of conspiracy.

[**Proposal 6: paragraph 8.51**]

17.8 We provisionally propose that the spousal immunity provided for by section 2(2)(a) of the Criminal Law Act 1977 should be abolished.

[**Proposal 7: paragraph 9.29**]

17.9 We provisionally propose that both the present exemptions for the victim and non-victim co-conspirator should be abolished but D should have a defence to a charge of conspiracy 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.

[**Proposal 8: paragraph 10.31**]

17.10 We provisionally propose 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.

[**Proposal 9: paragraph 10.41**]

17.11 We provisionally propose that, by analogy with the relevant provisions in the Serious Crime Bill, it should be an offence of conspiracy triable in England and Wales if a conspirator knew or believed that the substantive offence might be committed wholly or partly in England and Wales, irrespective of where the agreement was formed.

[**Proposal 10: paragraph 11.17**]

17.12 We provisionally propose that, by analogy with the relevant provisions in the Serious Crime Bill, it should be an offence of conspiracy triable in England and Wales if:

(a) D conspires wholly or partly within the jurisdiction to commit what would be a substantive offence under the law of England and Wales;

(b) D knows or believes that the substantive offence might be committed wholly or partly outside the jurisdiction; and

(c) the substantive offence is also an offence under the law of the territory where D knows or believes that it might wholly or partly take place.

[**Proposal 11: paragraph 11.20**]

17.13 We provisionally propose, by analogy with the relevant provisions in the Serious Crime Bill, that it should be an offence of conspiracy triable in England and Wales if:

(a) D conspires wholly or partly within the jurisdiction to commit a substantive offence under the law of England and Wales;

(b) D knows or believes that the substantive offence might be committed wholly or partly in a place outside the jurisdiction;

(c) the substantive offence, if committed in that place, is an offence for which the perpetrator could be tried in England and Wales (if he or she satisfies a relevant citizenship, nationality or residence condition, if any).

[**Proposal 12: paragraph 11.24**]

17.14 We provisionally propose, by analogy with the relevant provisions in the Serious Crime Bill, that it should be an offence of conspiracy triable in England and Wales if:

(a) D's conduct takes place wholly outside the jurisdiction;

(b) D knows or believes that the substantive offence might be committed wholly or partly in a place outside the jurisdiction;

(c) D could be tried in England and Wales if he or she committed the substantive act in that place.

[**Proposal 13: paragraph 11.27**]

17.15 We provisionally propose that, in cases where it cannot be proved that D knew or believed that the substantive offence might take place wholly or partly within the jurisdiction, no proceedings may be instituted except with the consent of the Attorney-General.

[**Proposal 14: paragraph 11.29**]

17.16 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 a conspirator believed, at the time of the agreement, that the offence *would* take place in the specified circumstances?

[**Question 1: paragraphs 4.5 and 4.144**]

17.17 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, a conspirator had the circumstance fault element (if any) required by the substantive offence itself?

[**Question 2: paragraphs 4.5 and 4.145**]

17.18 Are there circumstances in which the conditions where 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?

[**Question 3: paragraph 5.17**]

17.19 Under the current law, the Director of Public Prosecutions must give consent if proceedings to prosecute a conspiracy to commit a summary offence are to be initiated. Subject to Question 5 below, should this requirement be retained?

[**Question 4: paragraph 6.67**]

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

[**Question 5: paragraph 6.69**]

17.21 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?

[**Question 6: paragraph 7.57**]

17.22 Should the defence of 'acting reasonably' in clause 48 of the Serious Crime Bill be applied to any case in which D is charged with an offence involving double inchoate liability, in particular attempting (or criminally preparing) to conspire to commit an offence?

[**Question 7: paragraph 7.58**]

17.23 Should the consent of the Director of Public Prosecutions should be required for prosecutions involving double inchoate liability?

[**Question 8: paragraph 7.58**]

17.24 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?

[**Question 9: paragraph 8.52**]

ATTEMPTS

17.25 We provisionally propose that section 1(1) of the Criminal Attempts Act 1981 should be repealed and replaced by two separate inchoate offences, both of which would require an intention to commit the relevant substantive offence:

(a) an offence of criminal attempt, limited to last acts needed to commit the intended offence; and

(b) an offence of criminal preparation, limited to acts of preparation which are properly to be regarded as part of the execution of the plan to commit the intended offence. Guidance should be provided to help the courts determine whether or not D's conduct is an act of criminal preparation.

[**Proposal 15: paragraph 16.1**]

17.26 We provisionally propose that the two new offences should carry the same maximum penalty, that is, the penalty now available for an attempt to commit an intended offence.

[**Proposal 15A: paragraph 16.22**]

17.27 We provisionally propose that the guidance referred to in 17.25(b) would be comprised of a list of examples in our report. Illustrations would be provided of the kinds of conduct which ought to be regarded as going beyond mere preparation and as amounting to criminal preparation.

[**Proposal 16: paragraph 16.26**]

17.28 We provisionally propose that, in whatever form guidance is provided, the new general offence of criminal preparation should encompass at least the following situations:

(1) D gains entry into a building, structure, vehicle or enclosure or (remains therein) with a view to committing the intended offence there and then or as soon as an opportunity presents itself.

(2) D examines or interferes with a door, window, lock or alarm or puts in place a ladder or similar device with a view there and then to gaining unlawful entry into a building, structure or vehicle to commit the intended offence within.

(3) D commits an offence or an act of distraction or deception with a view to committing the intended offence there and then.

(4) D, with a view to committing the intended offence there and then or as soon as an opportunity presents itself:

(a) approaches the intended victim or the object of the intended offence, or

(b) lies in wait for an intended victim, or

(c) follows the intended victim.

[**Proposal 17: paragraph 16.48**]

17.29 We provisionally propose that, for the purposes of both of the proposed new offences, an intention to commit an offence should include:

(a) *Woolin* intent; and

(b) a conditional intent to commit the offence.

[**Proposal 18: paragraph 16.68**]

17.30 We provisionally propose that, for the purposes of both of the proposed new offences, an intention to commit the substantive offence should be an intention to commit any conduct or consequence elements of that offence.

[**Proposal 18A: paragraph 16.76**]

17.31 We provisionally propose that, for the purposes of both of the proposed new offences, so far as any circumstance element of the substantive offence is concerned, proof of subjective recklessness should suffice where subjective recklessness suffices for the substantive offence, and such recklessness should be required where objective recklessness, negligence or no fault suffices for the substantive offence.

[**Proposal 18B: paragraph 16.78**]

17.32 We provisionally propose that, for the purposes of both of the proposed new offences, a higher fault element (such as knowledge) with respect to a circumstance should be required where it is required for the substantive offence.

[**Proposal 18C: paragraph 16.79**]

17.33 We provisionally propose that both the proposed new offences should cover omissions where, as a matter of law, the offence intended is capable of being committed by an omission

[**Proposal 19: paragraph 16.83**]

17.34 We provisionally propose that the question whether D's conduct, if proved, amounted to criminal preparation or attempt should be one of law for the judge. The jury's role should therefore be limited to determining whether the Crown has proved to the criminal standard that D committed the alleged conduct with the fault required for liability.

[**Proposal 20: paragraph 16.89**]

17.35 We provisionally propose that it should be permissible to bring a prosecution for attempt or for criminal preparation in relation to an intended summary offence.

[**Proposal 21: paragraph 16.96**]

17.36 As an alternative to **proposal 16**, we ask consultees whether they would prefer the guidance to be comprised of a list of examples in the legislation itself. The examples would not be definitive, but would provide the basis for the drawing of analogies in cases involving facts not already covered. The guidance would have to be updated from time to time.

[**Attempts question 1: paragraph 16.47**]

17.37 We ask consultees' views on whether, instead of **Proposals 15 and 16**, the present offence of attempt should be retained without amendment or the provision of guidance. Instead, amendments and additions should be made to statutory inchoate offences of preparation. However, there should be no *general* inchoate offence to cover preparation consisting of nothing more than a preliminary stage in D's plan to commit an intended offence (what would now be regarded as 'mere preparation').

[**Attempts question 2: paragraph 16.58**]

17.38 We ask as an alternative to **Proposal 18B** whether, if something less than subjective recklessness (or no fault) is required in relation to a circumstance element of an offence, both the proposed new offences should require the same lower (or no) fault element in relation to that circumstance element.

[**Attempts question 3: paragraph 16.78**]

17.39 We ask whether the consent of the Director of Public Prosecutions should be required for prosecutions in relation to attempts or criminal preparation to commit a summary offence.

[**Attempts question 4: paragraph 16.96**]

APPENDIX A
SUMMARY OF THE ADDITIONAL CASE LAW ON CONSPIRACY

Mir[1]

A.1 In *Mir*, D1 and D2 were alleged to have conspired to cause a fire and an explosion at D2's store in order to make a claim on D2's insurance policy. They had spread petrol around the premises and turned on the gas taps before being arrested. The trial judge applied *Caldwell* recklessness to the fault element of conspiracy.

A.2 On appeal, counsel for D2 submitted that the prosecution had to establish that D1 and D2 knew that the gas taps were on, that it would create an obvious risk to life by the risk of explosion and that they recognised the risk but went on to take it nevertheless. The Court agreed allowing the appeal but the basis of the decision is unclear.[2]

Comments on Mir

A.3 This was a decision which was predicated on the erroneous assumption that endangerment of life was a circumstance of the offence which needed to exist for the full offence of aggravated criminal damage to be committed. It does not.[3] It is therefore not necessary in a conspiracy to commit aggravated criminal damage to prove that D knew or intended endangerment of life.[4]

[1] Unreported, 22 April 1994. See Professor Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185, n 47.

[2] Professor Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185, 196 has identified the following three possibilities:

(i) the prosecution had to prove knowledge or intention of the circumstances that life was endangered;

(ii) there was a requirement of proof of recklessness as to whether life was endangered; or

(iii) there was a requirement that the prosecution had to prove that D1 and D2 knew of the circumstances which a reasonable person would consider posed a risk to life.

On the basis of what is said at A.3, namely that it is not necessary to prove that endangerment of life is in fact a circumstance of the offence then (i) and (ii) are wrong. (iii) makes sense subject to the caveat of Caldwell recklessness applying.

[3] *Parker* [1993] *Criminal Law Review* 856.

[4] Although Professor Ormerod concedes that if it is argued that endangerment of life is a consequence of the offence then there is a need to prove D's intention in relation to that consequence under section 1(1) of the Act. We would agree with this on the basis of our Proposal 2 (see Part 4.)

Browning[5]

A.4 *Mir* was followed in *Browning.* D1 and D2, who were environmental campaigners opposed to quarrying in the Mendip Hills, had severed a railway line in between a quarry and a mainline station. Banners and torches were placed beside the relevant part of the railway. The driver of the train saw the banners but not the severed line. D1 and D2 were convicted of conspiracy to cause criminal damage being reckless as to whether life was endangered contrary to section 1(1) of the Criminal Law Act 1977 ('the 1977 Act').

A.5 D1 and D2 appealed on the ground that it was necessary for the prosecution to prove that they and their co-conspirators appreciated the risk of endangering life and that the judge had misdirected the jury by stating that it was the appreciation of such a risk by an ordinary reasonable bystander which was the test. Mantell LJ stated:

> We are unable to make any sensible distinction between the case of *R v Mir* and the present case. If we follow the same reasoning, as we are bound to do, the result must be the same.

Comments on Mir and Browning

A.6 *Mir* and *Browning* were decided at a time when *Caldwell* recklessness applied to offences under the Criminal Damage Act 1971. Thus, as far as the substantive offence was concerned, the fact or circumstance that had to be proved was that either:

(1) the Ds *saw the risk* of life endangerment from the damage to property that they intended;

(2) were reckless about causing such damage and, continued to damage property; or

(3) that the reasonable bystander *would have realised that there was a risk* of life endangerment from the damage which the Ds intended or about which they were reckless.

It was not actual life endangerment, which was required. In other words, negligence was a sufficient fault element for the substantive and so, for conspiracy, section 1(2) of the 1977 Act should apply. D1 and D2 must therefore have to be shown to have intended the circumstance of not knowing that there was a risk to life but of knowing that there were circumstances that a reasonable bystander would have realised might pose a risk of a threat to life.

[5] *Browning* [1998] All ER (D) 553. See Professor Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185, 194 to 196.

Montila[6]

A.7 This was a case where the defendants were not charged with conspiracy but with substantive offences of money laundering contrary to section 49(2) Drugs Trafficking Act 1994 and section 93C(2) of the Criminal Justice 1988. The case is significant because the court held that the fact that the money which was the subject of the charges was illicit was an essential part of the conduct element of the offence.

A.8 Nine defendants were charged with the above substantive offences. It was alleged that they had concealed, disguised, converted or transferred property knowing or having reason to suspect that the property represented another person's proceeds of criminal conduct or drug trafficking.

A.9 At a preparatory hearing the judge ruled that under the 1988 Act it was necessary for the prosecution to prove that the property being converted was in fact the proceeds of crime. In a prosecution under the 1994 Act the judge ruled that it was necessary to prove that the property being converted was in fact the proceeds of drug trafficking. The prosecution successfully appealed the ruling under section 35(1) Criminal Procedure and Investigation Act 1996. The defendants appealed to the House of Lords.

A.10 The House of Lords held that the first instance judge at the preparatory hearing had been right to rule that it was necessary for the prosecution to prove the origin of the proceeds according to the substantive offences under section 49(2) of the1994 Act and section 93(C)(2) of the1988 Act. The fact that the legislation did not provide a defence if the property turned out not to be another persons' proceeds[7] indicated that the wording of section 93C(2) of the 1988 Act and section 49(2) of the 1994 Act proceeded on the basis that the property in question was in fact proceeds of the kind described.

Comments on Montila

A.11 Before the House of Lords decision in *Montila,* the Court of Appeal had held that for the substantive offences (under sections 93C(2) of the 1988 Act (proceeds of crime) and 49(2) of the 1994 Act (proceeds of drugs) the prosecution did not need to prove the fact or circumstance of the illicit nature of the property being transferred.[8]

6 *Montila* [2004] UKHL 50, [2004] 1 WLR 3141.

7 Lord Hope in a judgment with which their Lordships agreed stated at para 30:

> It is in regard to section 4E property turns out to have been another person's proceeds of drug trafficking or his criminal conduct. What this subsection says is that an offence is committed by a person who, having the state of mind that it describes, acquires the property for no, or for inadequate, consideration. This makes sense if the Crown has to prove that the origin of the property was of the kind described. But it makes no sense to say that the defendant was guilty of money laundering simply because he acquired the property for no or for inadequate consideration, having reasonable grounds to suspect that this was its origin…if he is in a position to prove that it was not property of that kind at all.

8 *El-Kurd* [2001] *Criminal Law Review* 234.

A.12 Prior to *Montila*, therefore, the application of section 1(2) of the 1977 Act was erroneous because there was no circumstance of the conduct element of the offence, namely the illicit provenance of the monies. This being so, the Court of Appeal need only have held that section 1(2) did not apply. The significance of *Montila* is that it is only since this decision that there has actually been a fact or circumstance in these substantive offences to which section 1(2) can be said to apply. It would have followed that before *Montila,* on a charge of conspiracy, there was no need for the conspirators to have intention or knowledge in relation to such a fact or circumstance.

Rizvi and Christi[9]

A.13 In *Rizvi* customs officers conducted a surveillance of a bureau de change in Leicester Square after the owner reported a number of suspicious transactions to NCIS which had involved the exchange of large numbers of banknotes into Dutch guilders. It was the prosecution case that from 1 February to 20 April 2001, R was a party to a conspiracy to launder another person's proceeds of drug trafficking or crime. R's co-conspirators included C[10] who was in business with his brother H. The laundering was for their or their client's benefit. Surveillance revealed that the appellant R took the guilders which he had exchanged to H's house. R was working for H in his foreign exchange business. His defence was that he had innocently participated in some of their transactions. He had merely been following instructions in the course of his employment. He said that there was no reason to believe that there was anything suspicious in what he had been asked to do and denied any involvement in some of the transactions. The prosecution were unable to say whether the money was the proceeds of drug trafficking or criminal conduct or both.

A.14 The substantive offences were under section 93C of the Criminal Justice Act 1988 and section 49(2) of the Drugs Trafficking Act 1994[11] (now replaced by sections 327 to 329 of the Proceeds Of Crime Act 2002.)[12] Both sections criminalised converting property knowing or having *reasonable grounds* to suspect that the property is the proceeds.

A.15 It was submitted on appeal that a direction to the jury which did not take account of section 1(2) of the 1977 Act meant that there could be a conspiracy between two people, neither of whom knew that the money that they were laundering was the proceeds of crime, but simply on the objective basis that there were reasonable grounds for suspicion. Such a finding would of course defeat the intention of section 1(2).

A.16 It was held that D's knowledge must be established only in regard to the facts or circumstances on which his or her suspicion was formed and not as to the fact or circumstance of the provenance of the money which is the material circumstance of the substantive offence.

9 [2003] EWCA Crim 3575. It is important to note that this case was decided before *Montila.*

10 Who appealed his sentence.

11 They were not in the particulars of the indictment but no point was taken on this.

12 For which the fault element is knowledge or suspicion: see s 340(3)(b).

Comments on Rizvi

A.17 This case obviates the reasoning which, as we have seen, later prevailed in *Montila.*[13] It holds that D's knowledge of facts which raise a suspicion that the property belongs to A is the same as saying that D "knows" the property belongs to A. Section 1(2) of the 1977 Act of course requires more than knowledge of preliminary facts.

A.18 In any event, the reasoning was wrong because as *Montila* had not actually been decided, there could not be said to have been any circumstance to which section 1(2) applied. Further, even if section 1(2) had been applicable, then proof that D1 and D2 knew that the money with which they proposed to deal *might* be illicit is not equivalent to *knowledge that it would be* or was illicit.

Harmer[14]

A.19 *Harmer* was again a case under section 93C(2)(b) Criminal Justice Act 1988 and/or section 49(2)(b) Drugs Trafficking Act 1994. D and his co-defendant were charged with conspiracy to convert or transfer property (currency) which they had reasonable grounds to suspect, in whole or in part represented another persons' proceeds of drug trafficking or criminal conduct.

A.20 The prosecution accepted that it could not establish that the various amounts of money were the proceeds of crime and it was not alleging that the appellant knew that the money was another persons' proceeds of crime or drug trafficking.

A.21 The trial judge directed the jury that it was not really for them to draw a distinction between criminal conduct generally and drug trafficking in determining whether the offence was proved. He did not direct them that it was necessary for the prosecution to prove that the relevant money was in fact the proceeds of either criminal conduct or drug trafficking.

A.22 The appellant appealed on the ground that following *Montila* the prosecution had to prove the money was the proceeds. In other words, *Montila* applied to conspiracies as well as to substantive offences.

A.23 It was held first, that an allegation of conspiracy to convert or transfer property which D had reasonable grounds to suspect represented another person's proceeds of crime required proof that the property was the proceeds of crime. This was because, in the absence of such proof there was no evidence that the object of the agreement was an offence within the meaning of section 1(1) of the 1977 Act.

[13] [2004] UKHL 50, [2004] 1 WLR 3141. A person may have reasonable grounds to suspect that property is one thing (A) when in fact it is something different (B). But that is not so when the question is what a person knows. A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there is the question whether the person knows that the property is A.

[14] [2005] EWCA Crim 1, [2005] 2 Cr App R 23.

A.24 Secondly, it was held that although the offence of conspiracy comprised an agreement to commit an offence, not the subsequent committing of the agreed offence, the agreement had to have a material object. Where the substantive charge involved would only be that D had reasonable grounds to suspect that the money was the proceeds of crime, he or she would not be guilty of conspiracy unless he or she and at least one other party to the agreement intended or knew that the money would be the proceeds of crime. It was observed that in holding that knowledge as a state of mind can only be borne of something which is true,[15] a requirement of knowledge imports a requirement of proof of the fact or circumstance that the money is illicit.

Comments on Harmer

A.25 The court recognised the impact of *Montila* in conspiracies as well as substantive offences. Yet it failed to comprehend the full implications of the free-standing nature of the offence of conspiracy.[16]

A.26 With conspiracy what actually has to be proved is that at the time of the agreement, the conspirators agreed on a course of conduct which if carried out in accordance with their intentions would necessarily constitute an offence. In other words, if D1 and D2 intend or know that that they *will be* dealing with illicit property there is no actual requirement that it has to be proved that it is illicit. [17]

Ali and others*[18]*

A.27 In *Ali and others* A and H were convicted on two counts and K was convicted on one count of conspiracy to contravene section 49(2) Drugs Trafficking Act 1994. Again, these were conspiracies where the liability for the substantive offences[19] arose where D knew or had reasonable grounds to suspect that the property concerned was illicit. The prosecution had alleged that the defendants either knew or had reasonable grounds to suspect that the property was criminal.

A.28 The appellants, relying on *Harmer* and *Montila*, claimed that an agreement to deal with that property that the defendants wrongly assumed was criminal property would only necessarily amount to the commission of an offence where D1 and D2 *knew* that the property concerned was criminal.

A.29 The court held, first, that section 1(2) of the 1977 Act applied. Secondly, it held that it was not necessary (for the purpose of conspiracy), for the prosecution to prove that the property was criminal. Thirdly, the court observed:

[15] At [26], May LJ stated:

> If the prosecution cannot prove that the money was the proceeds of crime, they cannot prove that the appellant knew that it was.

[16] See the discussion of *Suchedina* in Part 6 at para 6.39. In *Suchedina* [2006] EWCA 2543, [2007] 1 Cr App R 23 it was made clear by the Court of Appeal that it is not correct to say that *Montila* applies to conspiracies.

[17] This was observed by Professor Ormerod, D Ormerod, "Making Sense of *Mens Rea* in Statutory Conspiracies" (2006) 59 *Current Legal Problems* 185, 204. See also, Baroness Hale in her dissenting judgment in the House of Lords decision in *Saik* [2006] UKHL 18, [2007] 1 AC 18.

[18] [2005] EWCA Crim 87, [2006] QB 322.

[19] Drug Trafficking Act 1994, s 49(2)(a) and/or Criminal Justice Act 1988, s 93(C)(2).

> In the light of our analysis of the cases and of our decision that *R v Harmer* reflects the law as it stands after *Montila* the jury should not have been directed to convict if a defendant only suspected that at least part of the money he was dealing with was another person's proceeds of drug trafficking.[20]

A.30 The decision in *Rizvi* as to it being enough to establish D1 and D2's (objective) knowledge as to facts which ought to give rise to suspicion was finally rejected.

A.31 The Court agreed with Professor Ormerod's commentary that *Mir* had been decided on the wrong basis, namely, that it was necessary on a conspiracy to commit aggravated criminal damage, to prove intent and knowledge as to life endangerment. [21]

[20] [2005] EWCA Crim 87, [2006] QB 322, at [148].

[21] Above, at [130].

APPENDIX B
REFERENCES TO SCOTTISH LAW IN SAIK: PROSECUTION OF MULTIPLE OFFENDING

Introduction

B.1 In this Appendix, we examine the references made to Scottish law by the Law Lords in *Saik*.[1] These references were made whilst discussing the problem of how to formulate a non-duplicitous count in a case of multiple offending, which involves the commission of a series of identical criminal acts. *Saik* demonstrates how prosecutors frequently opt to charge such a multiple offender with conspiracy in order to avoid the problem of duplicity, even where the crime agreed upon has been committed. Such prosecutorial practice has been the subject of much criticism.[2] Lord Hope notes that, by way of contrast, in Scottish law it is possible to bring a single charge that alleges a continuing course of criminal conduct and he invites consideration of how this approach could inform reform of our current law.

B.2 We begin with a summary of this Appendix. We then note in greater detail first what was stated by the Law Lords in *Saik*[3] and secondly the relevant subsequent developments.[4]

Summary

The duplicity rule

B.3 A count is duplicitous if it alleges more than one offence. Rule 4(2) of the Indictment Rules 1971 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 single paragraph called a count ….

B.4 The problem arises as to how to formulate a count where there is a series of repeated criminal acts over a specified period of time. Examples of such multiple offending are cases involving offences of money laundering.[5]

1 [2006] UKHL 18, [2007] 1 AC 18.

2 *Boulton* [1871] 12 Cox CC 87, 93, by Lord Cockburn CJ: "I am clearly of the opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it." See Glanville Williams, "The Added Conspiracy Count" (1977) 128 *New Law Journal* 24. See also *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [41] by Lord Hope: " the statutory offence of conspiracy was not designed for use in this way."

3 See paras B.5 to B.7 below. See also Part 1, paras 1.20 to 1.21 above.

4 See paras B.14 to B.22 below.

5 See for example *Ali* [2005] EWCA Crim 87, [2006] QB 322.

Saik

B.5 In *Saik*, the Law Lords expressed dissatisfaction with the prosecutor's decision in that case to charge the defendant, who had engaged in a series of money laundering acts, with conspiracy in order to avoid the problem of duplicity:

> It has become the practice in cases of this kind in order to avoid the problem of duplicity which arises where a defendant is charged on one count of having committed two or more separate offences to charge the defendant on a single count of conspiracy …. Dealing with a series of completed criminal acts by charging the defendant with conspiracy is a device. Its aim is to ensure that the entire course of conduct is brought under scrutiny in one count and that, when it comes to sentence, the defendant is punished for the totality of his criminal activity. This is as it should be, of course. But the statutory offence of conspiracy was not designed for use in this way. The prosecutor is trying to fit a square peg into a round hole.[6]

B.6 In discussing this issue, Lord Hope compared the current law with the contrasting position in Scotland, where the prosecutor can allege by way of a single charge that the defendant engaged in a continuing course of criminal conduct.[7]

B.7 Lord Hope invited further consideration of the Scottish position. He concluded that something must be done if:

> … offences of the kind … found in Part 7 of the Proceeds of Crime Act 2002 are not to be impossible of prosecution, or at least more difficult to prosecute than the wording used to describe those offences contemplates, because of the duplicity rule.[8]

[6] [2006] UKHL 18, [2007] 1 AC 18 by Lord Hope, at [39] and [41]. Also see Lord Brown at [123] and para B.13 below.

[7] Above at [84]. For further detail see para B.13 below.

[8] *Saik* [2006] UKHL 18, [2007] 1 AC 18 at [87]. See also Archbold, *Criminal Pleading, Evidence and Practice* (2007 ed) 34-56 (2)(a): "sometimes a charge of conspiracy may be the simpler way of presenting the case or reflecting the overall criminality of the case".

Subsequent developments

B.8 In his discussion, Lord Hope referred to the Law Commission report of 2002 which addressed the problem of effective prosecution of multiple offending.[9] In this report, the idea of introducing a course of conduct offence was discussed and rejected.[10] However, the recommendation to provide for a two stage trial process has now been implemented.[11] Further, the criminal procedure rules have been amended to allow for a course of conduct to be included in a count in certain circumstances.[12] It is therefore arguably the case that the concerns highlighted by the Law Lords, including the desirability of the Scottish approach to charging a course of criminal conduct, have been addressed.

Relevant extracts from *Saik*

Lord Hope

B.9 Lord Hope contrasted the device of using conspiracy to charge a series of criminal acts in a single count, with the approach taken in Scotland.

B.10 He observed that in Scotland:

> … it is not the practice to resort to a conspiracy charge in cases where the substantive offence is a statutory one. The reason is that the Crown does not need to do this in order to obtain a conviction for engaging in a continuing course of conduct … . But it has always been open to the prosecutor in Scotland can allege by way of single charge [count] that the defendant engaged in a continuing course of criminal conduct which involved the commission of a series of identical criminal acts. This practice is resorted to in a wide variety of cases…where acts tend to be repeated many times …. If this had been done in *R v Ali* each act of money laundering … would have been treated not as a separate offence but as part of the same continuing course of criminal conduct. If the defendant had been found guilty a single sentence would have been imposed on him, not for each act of money laundering taken separately but for engaging in a course of criminal conduct that was made up of all the acts that were proved against him …. In that way the objection that he was at risk of being charged in one count for two or more separate offences would have been avoided.[13]

B.11 He also observed that

[9] The Effective Prosecution of Multiple Offending (2002) Law Com 277.

[10] Above, para 5.4. See also para B.17 below.

[11] See para B.19 below.

[12] See para B.20 below.

[13] [2007] UKHL 18, [2007] 1 AC 18, at [83] to [85].

> An attempt was made …, in section 17 of the Domestic Violence, Crime and Victims Act 2004 to devise a system which was suitable for use in England and Wales which would overcome the problem caused by the duplicity rule. But strong opposition was expressed … and it had not yet been brought into force.[14]

B.12 Lord Hope concluded by stating:

> A further study of how these matters are handled in Scotland might point the way forward … something must be done soon ... .[15]

Lord Brown

B.13 Lord Brown said:

> As Lord Hope makes plain, the reality here is that the Crown is using the offence of conspiracy purely as a device to circumvent the problems caused in England (although not, it appears, in Scotland) by the duplicity rule. To avoid the need for each substantive offence to be charged separately, thereby absurdly overloading the indictment, the Crown instead charge conspiracy which allows them to roll together into a single charge the events of a continuing course of conduct.[16]

Relevant subsequent developments

Law Commission Report on Prosecution of Multiple Offending[17]

B.14 At paragraph 5 of the executive summary, it is noted by the Commission that:

> there are strict limitations to the inclusion of more than one offence in any single charge/count[18] …and there is a limit to the number of separate counts or charge that can be managed within a trial.

B.15 Further, the decision of *Kidd and Ors*[19] determined that it offended a fundamental legal principle for the court to treat the offences the defendant is convicted of as sample counts and then be sentenced for the totality of offending.[20]

[14] Above, at [87].

[15] Above.

[16] Above, at [123].

[17] (2002) Law Com No 277.

[18] Rule 4(2) of the Indictment Rules 1971.

[19] [1998] 1 WLR 604.

[20] (2002) Law Com No 277, paras 2.1 to 2.4.

B.16 Thus the dilemma identified was that the court cannot deal with an indictment with hundreds of separate counts and also the courts cannot sentence for the totality of offending in the absence of a decision on each instance of offending.[21] At paragraph 4(2) of the executive summary the Commission states that "it should be possible to sentence for totality of offending. Defendants should not escape punishment because procedure cannot accommodate this."

CONSIDERATION OF A COURSE OF CONDUCT OFFENCE[22]

B.17 At paragraph 5.4 the Commisison states that in the informal consultation paper it did consider the possibility of a course of conduct offence. However, there were concerns expressed as to the concept of a course of conduct. These were namely that:

(1) it would be difficult to establish;

(2) it could lead to vague and uncertain charging;

(3) it could lead to the defendant having to be acquitted on some cases where the jury are sure of some offences but not of others; and

(4) the judge may not be able to determine the basis for sentencing from the verdict of the jury.

RECOMMENDATIONS

B.18 The Law Commission therefore made the following recommendations to confront the problems posed by prosecution of multiple offending.[23] First, regarding conduct that is a continuous offence, it recommended special verdicts should be used as a means of informing judges, for the purposes of sentencing, of the extent of offending of which the jury is sure. This is referred to as the compound allegation. Secondly, that in other instances of repetitious offending, a two-stage procedure is implemented. The first stage would be a normal trial of specimen counts and at the second stage the judge alone would determine the guilt regarding any scheduled offences linked to the specimen count on which he or she has been convicted. Thirdly, it recommended that s 458 of the Companies Act 1985 be extended to incorporate non-fraudulent traders.

[21] Above, para 2.11.

[22] There is the common law concept of continuous offence. This arises "where there are many transactions of the same type, frequently individually of the same value, against the same victim, and it is convenient to reflect the overall criminality to put them together in one information, or one count." It is a question of fact and degree if the acts amount to a single criminal enterprise but clearly it is limited in scope. See The Effective Prosecution of Multiple Offending (2002) Law Com No 277, paras 3.3 and 3.5.

[23] Above, para 6 of executive summary.

IMPLEMENTATION OF RECOMMENDATIONS

B.19 Regarding the introduction of a two-stage trial process in certain multiple offending cases, the recommendation has been legislated for in the Domestic Violence, Crime and Victims Act 2004 in chapter 28, part 2, section 17.[24] Since the *Saik* decision, the section has come into force.[25] It provides the following:

> (1) The prosecution may apply to a judge of the Crown Court for a trial on indictment to take place on the basis that the trial of some, but not all, of the counts included in the indictment may be conducted without a jury.
>
> (2) If such an application is made and the judge is satisfied that the following three conditions are fulfilled, he may make an order for the trial to take place on the basis that the trial of some, but not all, of the counts included in the indictment may be conducted without a jury.
>
> (3) The first condition is that the number of counts included in the indictment is likely to mean that a trial by jury involving all of those counts would be impracticable.
>
> (4) The second condition is that, if an order under subsection (2) were made, each count or group of counts which would accordingly be tried with a jury can be regarded as a sample of counts which could accordingly be tried without a jury.
>
> (5) The third condition is that it is in the interests of justice for an order under subsection (2) to be made.
>
> (6) In deciding whether or not to make an order under subsection (2), the judge must have regard to any steps which might reasonably be taken to facilitate a trial by jury.
>
> (7) But a step is not to be regarded as reasonable if it could lead to the possibility of a defendant in the trial receiving a lesser sentence than would be the case if that step were not taken.

[24] The accompanying explanatory notes to the Act at para 8 confirm that the provisions in part 2 are intended to "give effect to" the recommendation.

[25] On 8 January 2007, see SI 2006/3423, Art 3, Transitional provision:

> The coming into force of ss 17 to 20 of the 2004 Act has no effect in relation to cases where one of the following events has occurred before 8th January 2007:
>
> (a) the defendant has been committed for trial;
>
> (b) a notice of transfer has been given under s 4 of the Criminal Justice Act 1987 (serious or complex fraud) or Art 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988;
>
> (c) a notice of transfer has been given under s 53 of the Criminal Justice Act 1991 (cases involving children) or Art 4 of the Children's Evidence (Northern Ireland) Order 1995; or
>
> (d) the prosecution evidence has been served on the defendant in a case sent for trial under s 51 of the Crime and Disorder Act 1998.

(8) An order under subsection (2) must specify the counts which may be tried without a jury.

(9) For the purposes of this section and sections 18 to 20, a count may not be regarded as a sample of other counts unless the defendant in respect of each count is the same person.

Changes to the Criminal Procedure Rules

B.20 The Criminal Procedure Rule Committee ('the Committee') has made new rules concerning indictments which came into force in April 2007.[26] These recast the rule against duplicity. Rule 14.2 provides:

(1) An indictment must be in one of the forms set out in the Practice Direction and must contain, in a paragraph called a "count":

(a) a statement of the offence charged that:

(i) describes the offence in ordinary language; and

(ii) identifies any legislation that creates it; and

(b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.

(2) 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 commission.

B.21 The new rules allow for more than one incident to be included in a count in certain circumstances. The relevant circumstances are where all the offences charged are:

(a) founded on the same facts; or

(b) form or are part of a series of offences of the same or similar character.

B.22 The change facilitates the prosecution of defendants that commit the same offence on multiple occasions. Therefore, the prosecution will be able to charge the substantive offence without there being an excessive number of counts and so avoid an unnecessary trial for conspiracy. In the explanatory notes to these new rules it states that:

[26] These new rules have been considered in Part 6 above in the context of conditional intent conspiracies or conspiracies where different substantive offences are contemplated.

> The new rule allows a prosecutor in certain circumstances to bring a single charge against a defendant even though that includes more than one incident of the offence alleged, for example, where the defendant has laundered the proceeds of drug trafficking in comparatively small weekly sums for week after week.[27]

It concludes that:

> The committee was satisfied that the new rule reflects what judgments of the House of Lords in the past have found consistent with fundamental principles of fairness.[28]

B.23 These notes also state that the "Criminal Procedure Rule Committee consulted widely on these rules between March and June 2006 … and took account of the corresponding rules in Scotland."[29]

Conclusion

B.24 Since Lord Hope delivered his judgment in *Saik*, English law has been modified and the duplicity rule "recast": most notably the rules governing criminal procedure have been amended. It would therefore appear that the concerns expressed by Lord Hope have been largely addressed. Certainly, the Committee has considered how these matters are handled in Scotland and new rules now provide for a charge involving a criminal course of conduct.

[27] Explanatory memorandum to the Criminal Procedure (Amendment) Rules 2007, para 7.6.

[28] Above.

[29] Above.

APPENDIX C
PREPARATORY OFFENCES[1]

CUSTOMS AND EXCISE

Customs and Excise Management Act 1979 s 170(1)	Possession of restricted goods with intent to defraud Her Majesty of any duty payable, or evade any prohibition or restriction on the goods.
Customs and Excise Management Act 1979 s 170B(1)	Knowingly taking any steps with a view to the fraudulent evasion of any duty of excise on any goods.

DAMAGE TO PROPERTY

Criminal Damage Act 1971 s 3	Possession of anything (without lawful excuse) with intent to use it to destroy or damage property belonging to another or to destroy or damage property in a way that known to be likely to endanger life.

DRUGS

Criminal Justice (International Co-operation) Act 1990 s 19(2)(a)	Possession on a ship of a controlled drug knowing or having reasonable grounds to suspect it is intended to be imported.
Misuse of Drugs Act 1971 s 5(3)	Possession of a controlled drug with intent to supply.
Misuse of Drugs Act 1971 s 9(c)(i)	Possession of any pipes or other utensils for use in connection with opium, with intent to use them in that connection or with intent that others use them in that connection,

FORGERIES AND COUNTERFEITS

Forgery and Counterfeiting Act 1981 s 5(1)	Possession an instrument that is known or believed to be false with intent to use or with intent that another will use it to induce somebody to accept it as genuine.
Forgery and Counterfeiting Act 1981 s 5(3)	Possession of a machine or implement or paper or any other material, specially designed or adapted for the making of an instrument with intent to make, or with intent that another will make, an instrument which is false that will be used to induce somebody to accept it as genuine.
Forgery and Counterfeiting Act 1981 s 16(1)	Possession of anything known or believed to be a counterfeit of a currency note or of a

[1] Omitted from this list are offences of assisting and encouraging, conspiracy and attempt.

	protected coin with intent to pass or tender it as genuine or to deliver it to another with intent that he or another shall pass or tender it as genuine.
Forgery and Counterfeiting Act 1981 s 17(1)	Possession of anything with intent to use it, or permit any other person to use it, for the purposes of making a counterfeit of a currency note or of a protected coin and with intent that the counterfeit be passed or tendered a genuine.
Forgery and Counterfeiting Act 1981 s 19(1)(b)	Possession of, or reproducing on any scale, any British imitation coins with a view to sale or distribution without prior permission of the Treasury.
Trade Marks Act 1994 s 92(1)(c)	Possession in the course of business, without consent, with a view to personal gain, of any goods with a view to doing anything that would be an offence under para (b) (selling or letting, offering or exposing or distributing goods bearing or packaging bearing a registered trademark).
Trade Marks Act 1994 s 92(2)(c)	Possession in the course of business, without consent, with a view to personal gain or with intent to cause loss to another, of any material with a view to doing anything that would be an offence under para (b) (using material bearing a trademark for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods).
Trade Marks Act 1994 s 92(3)(b)	Possession in the course of business, without consent, with a view to personal gain or with intent to cause loss to another, of an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark knowing or believing it will be used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods.

FRAUD

Fraud Act 2006 s 6(1)	Possession of any article for use in the course of or in connection with any fraud.

IMMIGRATION

Asylum and Immigration (Treatment of Claimants) Act 2004 s 4(1)	Arranging the arrival into the UK of an individual with intent to exploit or believing that another is likely to exploit that individual in the UK or elsewhere.
Asylum and Immigration (Treatment of Claimants) Act 2004 s 4(3)	Arranging the departure from the UK of an individual with intent to exploit or believing that another is likely to exploit that individual outside the UK or elsewhere.

PUBLIC ORDER

Public Order Act 1986 s 23(1)	Possession of threatening, abusive or insulting written material or recordings of visual images or sounds with a view display, publishing, distribution, or inclusion in a programme service, with intent thereby to stir up racial hatred.
Vagrancy Act 1824 s 4	Committing any of the acts listed in the section with intent to commit an arrestable offence.

PUBLICATIONS OFFENCES

Children and Young Persons (Harmful Publications) Act 1955 s 2(1)	Possession of any book, magazine or other like work, which is of a kind likely to fall into the hands of children or young persons, portraying violence etc, for the purpose of selling it or letting it on hire.
Video Recordings Act 1984 s 10(1)	Possession of a video recording with no classification certificate for the purpose of supplying it.

ROAD TRAFFIC OFFENCES

Goods Vehicles (Licensing of Operators) Act 1995 s 38(1)(c)	Possession of any document or other thing closely resembling any document to which this section applies (vehicle licences), with intent to deceive.
Public Passenger Vehicles Act 1981 s 65(2)(b)	Possession of any document or thing closely resembling any document or thing listed in section 65(1) (licences) with intent to deceive.
Road Traffic Act 1988 s 173(1)(c)	Possession of or making of any document or thing so closely resembling a document or other thing to which this section applies (licences) with intent to deceive.

SECURITY OFFENCES

Incitement to Disaffection Act 1934 s 2(1)	Possession of any document, the dissemination of which would be likely to procure the commission of an offence under s 1 of this Act (disaffection) with intent to aid, abet, counsel or procure such an offence.
Official Secrets Act 1920 s 1(1)(c) and (e)	Possession of any forged, altered or irregular official document, die, seal or stamp or any counterfeited die, seal or stamp for the purpose of gaining admission to a prohibited place or for any purpose prejudicial to the interests to the State.
Official Secrets Act 1920 s 7	Doing any act preparatory to the commission of an offence under the principal Act or this Act.

SEXUAL OFFENCES

Protection of Children Act 1978 s 1(1)(c)	Possession of any indecent photograph or pseudo-photograph of a child, with a view to its being distributed or shown to others.
Sexual Offences Act 2003 s 14(1)	Arranging the commission of a child sex offence under sections 9 to 13 with intent to do that offence, or with a belief that another person will do that offence, in any part of the world.
Sexual Offences Act 2003 s 15(1)	Meeting a child (under 16) following sexual grooming with intent to commit a relevant offence.
Sexual Offences Act 2003 s 50(1)	Intentionally arranging child involvement in prostitution or pornography in any part of the word.
Sexual Offences Act 2003 s 57(1)	Intentionally arranging the arrival into the UK of an individual with intent to commit a relevant offence, or believing another person is likely to commit a relevant offence in any part of the world.
Sexual Offences Act 2003 s 58(1)	Intentionally arranging travel within the UK by a child with intent to commit a relevant offence during or after the journey or believing another person is likely to commit a relevant offence, during or after the journey.
Sexual Offences Act 2003 s 59(1)	Intentionally arranging the departure from the UK of a child with intent to commit a relevant offence, or believing another person is likely to commit a relevant offence after the

	departure.
Sexual Offences Act 2003 s 61(1)	Intentionally administering a substance to another with intent to overpower that other person so as to engage in sexual activity involving the other person, without consent.
Sexual Offences Act 2003 s 62(1)	Committing an offence with intent to commit a relevant sexual offence.
Sexual Offences Act 2003 s 63(1)	Trespassing with intent to commit a relevant sexual offence.
Sexual Offences Act 2003 s 67(4)	Installing equipment, or constructing or adapting a structure or part of a structure with intent to commit and offence under subsection (1) (voyeurism).

TERRORISM OFFENCES

Nuclear Material (Offences) Act 1983 s 2	Holding nuclear materials with intent to do an act, which is an offence by virtue of sections 1(1)(a) or (b) (homicide, offences against the person and criminal damage).
Terrorism Act 2006 s 5(1)(a)	Engaging in any conduct in preparation for committing acts of terrorism.
Terrorism Act s 6(2)	Receiving instruction or training with intent to use the skills obtained for or in connection with the preparation of acts of terrorism.

Terrorism Act 2006 s 8(1)	Attending a place in the UK or elsewhere for training for purposes connected with the commission or preparation of acts of terrorism.
Terrorism Act 2006 s 9(1)	Possession of a radioactive device or material with intent to use the device or material in the course of or in connection with the commission or preparation of an act of terrorism or for the purposes of terrorism, or of making it available to be so used.
Terrorism Act 2000 s 12(2)	Arranging a meeting with knowledge that it is to support a proscribed organisation, to further the activities of a proscribed organisation or to be addressed by a person who belongs or professes to belong to a proscribed organisation.
Terrorism Act 2000 s 15(2)	Receiving money with intent that it should be used, or having reasonable cause to suspect that it may be used, for the purposes of terrorism.
Terrorism Act 2000 s 16(2)	Possession of money or other property with intent that it should be used, or having reasonable cause to suspect that it may be used, for the purposes of terrorism.
Terrorism Act 2000 s 57(1)	Possession of an article in circumstances which give rise to a reasonable suspicion that the possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.
Terrorism Act 2000 s 58(1)	A person commits an offence if he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism or he possesses a document or record containing information of that kind.

THEFT AND RELATED OFFENCES

Criminal Attempts Act 1981 s 9	Interfering with a motor vehicle or trailer with intent that an offence specified in subsection (2) shall be committed (theft offences).
Theft Act 1968 s 9(1)(a)	Entering a dwelling with intent to commit an offence in subsection (2) (stealing inflicting GBH and criminal damage).
Theft Act 1968 s 25(1)	Possession of an article for use in connection with any burglary or theft.

WEAPONS OFFENCES

Explosive Substances Act 1883 s 3(1)	Possession of an explosive substance with intent by means thereof to endanger life or cause serious injury to property, or enable another to do so, in the UK or elsewhere.
Firearms Act 1968 s 16	Possession of any firearm or ammunition with intent by means thereof, or with intent to enable another person by means thereof, to endanger life or to enable another person by means thereof to endanger life.
Firearms Act 1968 s 16A	Possession of any firearm or imitation firearm with intent by means thereof to cause, or to enable another person by means thereof to cause any person to believe that unlawful violence will be used against him or another person.
Firearms Act 1968 s 18(1)	Possession of a firearm with intent to commit an indictable offence or to resist arrest or prevent the arrest of another.
Offences Against the Person Act 1861 s 64	Possession of any dangerous substance, machine or instrument with intent to commit, or intent to enable another to commit, any felony under the Act.

APPENDIX D
COMPARATIVE LAW

D.1 This appendix sets out the law of attempt in Scotland, Northern Ireland, Ireland, Canada, Australia, New Zealand, the United States, South Africa, France and Germany. All of these countries make reference to a law of 'attempt' and have no additional law of preparation, although all of the countries have laws that criminalise specific preparatory acts.

D.2 What follows will set out each of the above countries' approach to the following issues (where material has been available):

(1) the conduct element of the offence of attempt;

(2) the fault element of the offence of attempt, and the position in relation to strict liability and absolute liability offences;

(3) whether it is possible to for D to commit an attempt by an omission;

(4) whether the law on attempt applies to indictable and summary offences and how these offences are tried; and

(5) the respective roles of the judge and jury in determining whether an attempt has been committed.

SCOTLAND

D.3 Attempts law in Scotland is set out in the common law.

The conduct element

D.4 The most authoritative definition of the conduct element of attempt is set out in the High Court case of *HM Advocate v Camerons*.[1] The court stated that the test for determining whether the conduct element of an attempt had been committed was whether D had crossed from preparation to perpetration of the principal offence. However, this was as far as the definition went, the court stating that where preparation ended and perpetration began was "a question of degree".[2] The High Court in *Morton v Henderson*[3] built on this test and stated the line between preparation and perpetration would not be crossed until there had been "some overt act, the consequences of which cannot be recalled by the accused".[4]

1 (1911) 6 Adam 456 (HC).

2 Above by Lord Justice General Dunedin.

3 1956 JC 55 (HC).

4 Above, by Lord Justice General Clyde at 58.

D.5 The decision in *Morton* appears to suggest a test akin to one that includes last acts and conduct immediately preceding last acts. However, the Scottish Law Commission's comments in its Draft Criminal Code appear to suggest the test is more akin to acts that are more than merely preparatory to the commission of the offence. The Commission have suggested remodelling the preparation/perpetration test and propose a test of whether D "embarks on, but does not complete, the commission of the offence".[5]

The fault element

D.6 The test for the fault element of attempt is set out in the High Court case of *Geo McAdam*.[6] The court held that to be convicted of an attempt D had to intend to commit the principal offence, although it is not clear whether this referred to direct or indirect intent. However, the High Court case of *Cawthorne v HM Advocate*[7] held that where the offence was attempted murder, "recklessness as to show that D was regardless of the consequences of his act"[8] would suffice for the fault element. The High Court stated this was because murder and attempted murder were essentially the same except in the latter case V did not die.[9] *Cawthorne* has since been held to be authority for the proposition that recklessness suffices for the fault element of an attempt where it suffices for the fault element of the completed offence.[10]

D.7 However, the Scottish Law Commission, in their Draft Criminal Code, retain the language of 'intent', and nothing is said of the approach to offences requiring recklessness. The definition of intent proposed is whether D "intends to act in a way which would involve the commission of an offence".[11] The Commission explain that the test means that D need not intend to act in a criminal way, it is enough that he or she intends to commit acts that in fact amount to an offence.

[5] A Draft Criminal Code for Scotland, (2003) Scottish Law Commission No 2, 52.

[6] Unreported 1959, High Court at Glasgow.

[7] 1968 JC 32 (HC).

[8] Above, 36 by the Lord Justice General.

[9] Above.

[10] See the comments of Gone and Stoddart, "A casebook on Scottish criminal law", (3rd ed 2001).

[11] A Draft Criminal Code for Scotland, (2003) SLC No 2, 52.

Omissions

D.8 It is not clear whether the Scottish law on attempts extends to omissions. In *Camerons* the High Court throughout the judgment uses the language of "overt acts".[12] Further, the position on attempts in Scotland generally is that there is only liability where an omission causes a result.[13] It therefore appears that there will only be liability where either a statute makes causing a result by an omission an offence; D is under a duty to act; or D exposes another to a risk of injury and does nothing to avert that risk.[14] Presumably therefore, in Scotland D can not be liable for an attempt where he or she omits to act.

Summary and indictable offences

D.9 As to how attempts are charged, section 294 of the Criminal Procedure (Scotland) Act 1995 provides that attempts to commit indictable offences are indictable offences themselves and attempts to commit complaint offences (summary offences) are complain offences themselves.

The role of the judge and jury

D.10 As to the role of the judge and jury, the court in *Camerons*[15] stated the matter of whether D had gone from preparation to perpetration was for the jury to determine.

NORTHERN IRELAND

D.11 Attempts law in Northern Ireland is set out in the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983.[16] The Order follows the Criminal Attempts Act 1981 to the letter so that:

(1) the conduct element is a 'more than merely preparatory' test;[17]

(2) the fault element is intent;[18]

(3) there is only mention of 'acts' in the Order, not omissions;

(4) the judge determines as a question of law whether D's conduct was capable of being 'more than merely preparatory' and then the question whether or not D committed an attempt within the meaning of the Order is one of fact;[19] and

[12] (1911) 6 Adam 456 (HC) by Lord Justice General Dunedin and see also *Morton v Henderson* 1956 JC 55 (HC) by Lord Justice General Clyde at 58.

[13] See the discussion in A Draft Criminal Code for Scotland, (2003) SLC No 2, 40 to 41.

[14] Above.

[15] (1911) 6 Adam 456 (HC).

[16] SI 1983/1120, NI 13.

[17] Article 3(1).

[18] Above.

[19] Article 5(2).

(5) there is no offence of double inchoate liability provided for.[20]

Summary and indictable offences

D.12 However, the Order differs from the Criminal Attempts Act 1981 in one material aspect, namely, it applies to both summary and indictable offences.[21] As to how these offences are tired, the Order provides indictable offences are triable on indictment and 'either way' offences and summary only offences are triable summarily.[22]

IRELAND

D.13 Attempts law in Ireland is set out at common law.

The conduct element

D.14 The conduct element in Ireland is defined in terms of the 'proximity theory'.[23] According to this theory there must be an "embarkation"[24] upon committing the offence and this embarkation must be "more than preparation".[25] Charleton et al therefore state D must, "proceed upon an act or acts close to the commission of the offence that would have resulted in his or her intention to commit it being proximately fulfilled had the event which caused it to fail or which interrupted it not occurred".[26] This suggests a test akin to one that includes last acts and conduct immediately preceding last acts however, according to case law, this 'proximity' test is effectively the same as the English 'more than merely preparatory' test.[27]

The fault element

D.15 The fault element for an attempt is intent.[28]

CANADA

D.16 Attempts law in Canada is set out in section 24 of the Criminal Code.

[20] Article 3(4)(a) to (d).

[21] Article 3(4), the equivalent of section 1(4) omits reference to an offences triable "as an indictable offence", merely stating it applies to "any offence … triable in Northern Ireland".

[22] Article 5(1)(b) to (d).

[23] Charleton, McDermott and Bolger, "Criminal law" (1999), para 4.38 and the case *of The People (Attorney General) v Thornton* [1952] IR 91 (Court of Criminal Appeal) and *Attorney General v Richmond* [1981] IR 233 (SC).

[24] Above.

[25] Above.

[26] Above.

[27] See Walsh J in *The People (Attorney General) v Sullivan* [1964] IR 169 (SC).

[28] Charleton, McDermott and Bolger, "Criminal law" (1999).

The conduct element

D.17 The Code provides that for the conduct element of attempt to be proven D must do an act or omit to do something with the purpose of carrying out his or her intention to commit an offence.[29] In determining whether D has done something for the purpose of carrying out his or her intention, the Code provides that "mere preparation" to commit an offence is too remote to constitute an attempt.[30]

D.18 The courts have on several occasions tried to define what 'mere preparation' means. Suggestions include a "sufficiently proximate" test;[31] a "directly connected with the commission of the offence" test;[32] and a "next step beyond preparation" test.[33]

D.19 However, both the cases of *Cline*[34] and *Olhauser*[35] noted that an abstract test was probably impossible. At present, the Supreme Court in Deutsch provides the most authoritative definition of the conduct element of attempt.[36] The court agreed that generally there was no satisfactory general criterion for distinguishing between mere preparation and attempt and stated the test should be left to "common sense judgement".[37] However, LeDain J provided the following 'loose' test:

> The distinction between preparation and attempt is essentially a qualitative one involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.[38]

[29] Section 24(1).

[30] Section 24(2) provides "the question whether an act or omission by a person who has intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt…".

[31] *Henderson* [1948] SCR 226 and *Sorrell* (1978) 41 CCC (2d) 9 (Ont CA).

[32] *Henderson* [1948] SCR 226, *Olhauser* (1970) 11 CRNS 334 (Alta CA) and *Godfrey* (1974) 18 CCC (2d) 90 (Alta CA).

[33] *Cline* (1956) 115 CCC 18, 29 (Ont CA), *Sorrell* (1978) 41 CCC (2d) 9 (Ont CA), *Olhauser* (1970) 11 CRNS 334 (Alta CA).

[34] (1956) 115 CCC 18 (Ont CA).

[35] (1970) 11 CRNS 334 (Alta CA).

[36] (1986) 52 CR (3d) 305 (SC).

[37] Above, para 26.

[38] Above, para 27.

This 'relative proximity test' test is not a 'last act' test.[39] LeDain J stated that an act which "on its face was an act of commission" would not lose this quality "because further acts were required or because a significant period of time may have elapsed before the completion of the offence".[40]

The fault element

D.20 The Code provides the fault element for attempt is "intent to commit an offence".[41] Again there have been attempts at common law to define what is meant by intent. The Supreme Court in the case of *Ancio*[42] provides the most authoritative definition. McIntyre J, speaking for the majority, held that section 24 of the Code confirmed that the [direct] intent to commit the desired offence was a basic element of the offence of attempt.[43] According to Stuart[44] this negates having a test of recklessness for the circumstance element of the attempted offence and a strict liability test for attempted strict liability offences.

Omissions

D.21 It is clear from the wording of section 24 that attempts can be committed by omissions.[45]

Summary and indictable offences

D.22 Section 24 applies to both summary and indictable offences.[46]

The role of the judge and jury

D.23 As to the role of the judge and jury, the question of whether D's act or omission was or was not 'mere preparation' is one of law.[47]

[39] It encompasses conduct up to and including the final act necessary to commit the relevant substantive offence.

[40] Above para 31.

[41] Section 24(1).

[42] (1984) 1 SCR 225 (SC).

[43] Above, 247.

[44] Stuart , "Canadian Criminal Law", (4th ed 2001), p 657.

[45] Section 24(1) states everyone who "does or omits to do".

[46] Section 24(1) applies simply to attempts to commit "an offence"..

[47] Section 24(2).

AUSTRALIA

COMMON LAW

The conduct element

D.24 As to the conduct element the test that is applied is a 'proximity' test. The test was set out in the Victorian Court of Appeal case of *Britten v Alpogut*[48]. The court stated D would be guilty of an attempt if he or she did an act or acts that were "seen to be sufficiently proximate to the commission of the said crime and not seen to be merely preparatory to it".[49]

The fault element

D.25 As to the fault element the Australian High Court in *Giorgianni v The Queen*[50] stated that only intent based upon knowledge or belief of the necessary facts would suffice and recklessness would not.[51]

D.26 However, the South Australian Court of Appeal in *Evans*[52] held that where a lesser fault element was required by the circumstance element of the full offence, the same lesser fault element would be required for the attempted offence. The Court of Appeal in England and Wales in *Khan*[53] subsequently followed this case.

D.27 For strict liability offences the same conduct element and fault elements apply. The Australian High Court in *Trade Practices Commission v Tubemakers of Australia Ltd*[54] stated that the fault element for attempts was intention and the fault element, or lack thereof, for the full offence was irrelevant for the purposes of the attempt.

Omissions

D.28 According to *Britten v Alpogut*[55] the above definitions apply to both acts and omissions.[56]

Summary and indictable offences

D.29 The court in *Britten v Alpogut*[57] speaks of the definitions applying to "recognised crimes".[58] Therefore, as nothing to the contrary has been provided by later cases, the definitions would appear to apply to summary and indictable offences.

[48] [1987] VR 929 (Vic CA).

[49] Above, by Murphy J, 935.

[50] (1985) 156 CLR 473 (Aus HC).

[51] Above, 473. This was followed by the cases of *Knight v The Queen* (1992) 175 CLR 495 (Aus HC) and *McGhee v The Queen* (1995) 183 CLR 82 (Aus HC).

[52] (1987) 48 SASR 35 (SA CA).

[53] [1990] 2 All ER 783.

[54] (1983) 47 ALR 719 (Aus HC).

[55] [1987] VR 929 (Vic CA).

[56] [1987] VR 929 (Vic CA), by Murphy J, 935.

[57] [1987] VR 929 (Vic CA).

COMMONWEALTH AND THE AUSTRALIAN CAPITAL TERRITORY

D.30 Attempts law in the Commonwealth and Capital Territory is the same and is set out in the Criminal Code Act 1995 and the Criminal Code 2002 respectively.

The conduct element

D.31 As to the conduct element, the Codes adopt a 'more than merely preparatory' test. D is therefore guilty of an attempt if he or she carries out conduct[59] that is "more than merely preparatory to the commission of the offence".[60]

The fault element

D.32 The fault elements for each physical element[61] of the offence attempted are intention[62] and knowledge.[63]

Omissions

D.33 The Codes make no specific reference to omissions and instead use 'conduct'.[64] However, it might be argued as nothing specific is provided the common law above applies.

Summary and indictable offences

D.34 The sections apply to both summary and indictable offences, however, the Acts do not provide whether attempts to commit summary offence offences are triable summarily.

The role of the judge and jury

D.35 As to the role of the judge and jury, the question whether conduct is more than merely preparatory is one of fact.[65]

[58] Above, by Murphy J, 934.

[59] Division 4.1 of Part 2.1 and section 13 provide that "conduct" includes acts and omissions.

[60] Division 11.1(2) of part 2.4 and section 44(2).

[61] Division 4.1 of Part 2.1 and section 14 provide that "physical element" refers to the conduct, consequence and circumstance elements of an offence.

[62] Division 5.2 of Part 2.1 and section 18 define "intention" as follows:

(i) A person has intention with respect to conduct if he or she means to engage in that conduct.

(ii) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(iii) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

[63] Division 11.1(3) of part 2.4 and section 44(5). Division 5.3 of Part 2.1 and section 19 defines "knowledge" as follows:

> A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.

[64] Division 11.1(2) of Part 2.4 and section 44(2).

[65] Division 11.1(2) of part 2.4 and section 44(3).

NEW SOUTH WALES

D.36 The Crimes Act 1900 makes it an offence to commit an attempt.[66] However, the Act does not provide a definition of attempt so the law on attempts in New South Wales is the same as the common law. The Act applies to any summary or indictable offence contained in the provisions of the Act. However, it does not indicate how such offences are to be tried.[67]

NORTHERN TERRITORY, QUEENSLAND AND WESTERN AUSTRALIA

D.37 The law of attempt in the Northern Territory, Queensland and Western Australia is the same and is set out in the Criminal Code Act, Criminal Code 1899 and the Criminal Code respectively.

The conduct element

D.38 As to the conduct element the Codes provide if D "begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence" he or she is guilty of an attempt.[68]

D.39 Although it is not clear what "means adapted to its fulfilment" refers to, the common law in Queensland has compared it to the common law proximity test.[69] Presumably the Northern Territory and Western Australia definitions are construed in the same manner.

D.40 The tests are also not 'last act' tests as the Codes provide that whether or not the accused has done all that is necessary on his or her part for completing the intended offence is immaterial.[70]

The fault element

D.41 The Codes provide that the fault element for attempt is intent and intent in this sense refers to direct intent as to the conduct, consequence and circumstance elements of the offence.[71]

Omissions

D.42 The Codes refer to "overt acts" so presumably the provisions do not extend to omissions.[72]

[66] Section 344A.

[67] Above.

[68] Paragraph 4(1) of schedule 1, section 4(1) and section 4.

[69] *Williams* [1965] Qd R 86 (Qd SC).

[70] Paragraph 4(2), section 4(2) and section 4. It therefore covers conduct up to and including the final act necessary to commit the relevant substantive offence.

[71] Above.

[72] Paragraph 4(1) of schedule 1, section 4(1) and section 4.

Summary and indictable offences

D.43 These provisions apply to both summary and indictable offences. However, the Codes do not provide whether attempts to commit summary offence offences are triable summarily.

SOUTH AUSTRALIA

D.44 The Criminal Consolidation Act 1935 makes it an offence to commit an attempt.[73] However, the act does not provide a definition of attempts so the definition is the same as the common law, outlined above.

D.45 The Act applies to both summary and indictable common law and statutory offences.[74] As to how attempts offences are tried, attempts to commit indictable offences are triable on indictment and attempts to commit summary offences, are triable summarily.[75]

TASMANIA

D.46 The law of attempt in Tasmania is set out in the Criminal Code Act 1924.

The conduct element

D.47 The conduct element of attempt is proven if D does an act or omits to do an act and the act or omission is "part of a series of events, which if it were not interrupted would constitute the actual commission of the crime".[76] When the series of events begins depends upon the circumstances of each case.[77]

The fault element

D.48 The fault element for attempt is intent.[78] Intent in this Act has been held, by the Tasmanian Court of Appeal, to have a wider meaning in rape cases than the Act suggests. In *Bell*[79] the court held that awareness as to the possibility of non-consent would be sufficient for the purposes of attempted rape.

Omissions

D.49 The Act's definition applies to attempts committed by both acts and omissions.[80]

The role of the judge and jury

D.50 As to the role of the judge and jury, the question whether an act or omission is too remote to constitute an attempt is a question of law.[81]

[73] Section 270A.

[74] Above.

[75] Section 270A(4).

[76] Section 2(1).

[77] Section 2(3).

[78] Section 2(1).

[79] [1972] Tas SR 127 (Tas CA).

[80] Section 2(1)

VICTORIA

D.51 The law of attempt in Victoria is set out in the Crimes Act 1958.

The conduct element

D.52 The conduct element of attempt is defined in terms of a 'more than merely preparatory' test. Therefore, D is not guilty of attempting to commit an offence unless his or her conduct is "more than merely preparatory to the commission of the offence" and "immediately and not remotely connected with the commission of the offence".[82]

The fault element

D.53 The fault element for an attempt is fulfilled only if D intends that the offence be committed and intends or believes that any fact or circumstance (being any element of the offence) will exist at the time the offence is to be committed.[83]

Omissions

D.54 The Act refers to "conduct". However, it might be argued as nothing specific is provided the common law above applies.

Summary and indictable offences

D.55 These sections apply to indictable offences only.[84]

NEW ZEALAND

D.56 The law of attempt in New Zealand is set out in the Crimes Act 1961.

The conduct element

D.57 As to the conduct element, the original common law 'unequivocality' test set out in *Barker*[85] was overturned by the Act in favour of a 'proximity test'. Under the Act, if D "does or omits to do an act for the purpose of accomplishing his or her object" he or she is guilty of an attempt.[86]

D.58 D's act "may" be held to be for the purpose of accomplishing his or her object and thus constitute an attempt "if it is immediately or proximately connected with the intended offence".[87]

[81] Section 2(4).

[82] Section 321N(1).

[83] Section 321N(2).

[84] Section 321M.

[85] [1924] NZLR 865, 874 (NZ CA).

[86] Section 72(1).

[87] Section 72(3).

The fault element

D.59 As to the fault element the test is intent, and, in addition, there need not be an unequivocal act that shows intent to commit the offence.[88]

Omissions

D.60 The Act applies to acts and omissions.[89]

The role of the judge and jury

D.61 As to the role of the judge and jury, section 72(2) of the same Act provides that the question of whether the act done or omitted was "only preparation" for the commission of the offence and was thus too remote to constitute an attempt is one of law.

UNITED STATES

D.62 The law of attempt in the United States is set out in section 5.01 of the Model Penal Code.

The conduct element

D.63 As to the conduct element, D is guilty of an attempt if he or she either:

(1) engages in conduct that would have been a full offence had the circumstances been as he or she believed them to be;[90]

(2) does or omits to do something with the purpose of causing, or belief that it will cause, a particular result that is an element of the full offence;[91] or

(3) purposely does or omits to do something which, under the circumstances as D believes them to be, constitutes a substantial step in the course of conduct planned to commit the full offence.[92]

D.64 The 'substantial step' test in (3) is defined as something "strongly corroborative of the actor's criminal purpose".[93] The section also sets out a non-exhaustive list of examples of acts that will be strongly corroborative. These include: lying in wait; searching for or following the contemplated victim; reconnoitering the contemplated scene of the crime; unlawful entry into a structure or building in which the crime will be committed; and possession of the materials to commit the offence.[94]

[88] Section 72(1) and section 72(3).

[89] Section 72(1).

[90] § 5.01(a).

[91] § 5.01(b).

[92] § 5.01(c).

[93] § 5.01(2).

[94] Above.

D.65 The test is not a 'law act' test.[95] The commentary to the Code provides that the purpose of enacting the offence of attempts was to draw a line between attempt and preparation "further away from the final act" so that the test becomes "essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose".[96]

[95] (1) and (2) are designed to cover cases where D commits the 'last proximate act', American Law Institute, Comment to §5.01, 321.

[96] American Law Institute, Comment to §5.01, 295.