The Response of the Council of Her Majesty's Circuit Judges to the Law Commission's Consultation Paper No 183

"Conspiracy and Attempts

1. The Council of Her Majesty's Circuit Judges welcomes the opportunity to respond to the Law Commission's Consultation Paper No 183 "Conspiracy and Attempts".

2. We agree that it is necessary to reconsider the law of conspiracy and attempts in order to resolve the problems which cases since the commencement of the present legislation have highlighted. Further, we agree that it is important to seek to ensure consistency of approach to inchoate offences especially in the light of the changes to the law of incitement affected by the Serious Crime Act 2007.

3. **The proposals and questions posed relating to the law of conspiracy.**

4. We agree that there remains a need for a law of conspiracy and that the new offences of encouraging and assisting in the commission of offences would not provide a complete regime to cover situations which should be subject to criminal responsibility.

5. We agree that the analysis of the agreement into conduct, circumstance and consequence elements is a useful one by which to consider the standards of the "fault element" and affords an approach which should overcome the problems raised in the cases referred to in Chapter 4.

6. We consider that the approach of the law should be to provide criminal liability where there is an agreement to commit a substantive offence. In our view, the elements of the substantive offence should define the elements which should be proved to establish the aim of the conspiracy. This view has a direct bearing on our replies to Questions 1 and 2 and our view of the appropriate fault element to be applied in respect of the circumstance element of the offence of conspiracy. We adhere to this view in our submissions in respect of attempts to commit a substantive offence.

7. In our view to require a greater or lesser standard of knowledge for the "fault element" than that required by the substantive offence would be inappropriate and produce unfairness to a defendant where a lesser standard is required, and unfairness to the prosecution where a higher standard is required. Furthermore, it would be capable of producing an unsatisfactory situation in cases in which the substantive offence has in fact been committed but for good reason, a charge of conspiracy in laid.

8. We shall therefore now respond to the proposals and questions in the light of this expression of our views.

9. **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.**

10. We agree with this proposition.

11. 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.

12. We agree with this proposition.

13. 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).

14. We agree with this proposal.

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

16. We agree with these proposals which we believe accord with the propositions we have set out above.

17. 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?

18. **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?**

19. We agree with both these propositions. We consider it is appropriate to adopt the level of fault in the circumstance element of an offence which is prescribed for the substantive offence. We have already submitted that we consider that to prescribe the circumstance element to be always "recklessness" would produce unfairness to either the defendant where the substantive offence required the higher standard of "belief" or to the prosecution where the lower standard of carelessness or "no fault" were prescribed by the substantive offence.

20. We do not consider that the factor of remoteness should be accorded great significance when determining the fault element. In most cases the fault element remains the same from the inception of the conspiracy through to its implementation. Thus two or more may enter into an agreement to launder money which they suspect will be the proceeds of crime. As the execution of their plan is effected their state of knowledge may progress to belief or actual knowledge but it is difficult to understand how it is to become less than a suspicion.

21. If "remoteness" were to be given prominence so as to affect the fault element, we believe it could outweigh the practical problems which we believe could and would be likely to occur. We give the following scenario as an example of a practical problem which could occur. In a case of handling stolen goods, the fault element is "knowledge or belief that the goods being handled are stolen". Such a level is, of course higher than "recklessness". If, as is often the case, the Prosecution were to charge a conspiracy even though the substantive offence has been committed, the defendant would face a lower threshold of fault element as to that circumstance than he would if the substantive offence were to be charged. Yet there may be proper evidential reasons for charging the offence as one of conspiracy. Conversely as in the case of rape where the fault element is a lack of a reasonable belief that the complaint is consenting, were the completed offence to be charged as a conspiracy, the prosecution would have to prove the higher standard. We consider that this is inappropriate and could lead to unfairness in such cases.

22. Furthermore we consider that it is unnecessarily complicated for the direction to a jury. Where a charge of conspiracy is laid, the trial judge will often define the substantive offence and then explain the charge of conspiracy to commit that offence with reference to the substantive offence. If the fault element as to circumstance is always to be defined as recklessness as to those circumstances, it becomes more complicated to explain to the jury that whereas the substantive offence may require knowledge or belief or carelessness, because it is charged as a conspiracy the fault element will be different and indeed one not even mentioned in the definition of the substantive offence.

23. **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?**

24. We are unable to think of any such examples. Obviously, if the parties include a condition which would negative the existence of one of the essential ingredients of the substantive offence, then we would suggest that the parties have not in such circumstances actually formed the necessary agreement namely to commit a criminal offence. Thus where the parties purport to enter into an agreement to sell guns "so long as they are not unlicensed" such agreement is prevented from being a criminal conspiracy because the condition renders their agreement lawful.

25. However, we do consider that even where the performance of the conspiracy depends upon a specific circumstance occurring, the parties who enter into an agreement intending to commit the offence should that circumstance come to pass, should be guilty of the offence of conspiracy. It is then for the sentencing judge to make such allowance for the inclusion of the condition in their conspiracy as he thinks appropriate to reflect their culpability.

26. 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.

27. We agree with this proposition. We would also make the following comments which we hope may be of assistance. Although Rule 14(2) Criminal Procedure Rules 2005 permits the inclusion of more than one incident in the commission of the offence, even in relation to substantive offences, the practice continues of charging such incidents in separate counts. The reasoning is set out in Paragraphs 6.13 to 6.15 of the Consultation paper. We consider the same practice should be adopted in relation to the offence of conspiracy. We would add that if a composite charge is preferred in an indictment where separate counts of conspiracy could or should be preferred, we would suggest that it should be necessary for the Prosecution to prove each of the offences said to be the subject of the conspiracy. It should not be sufficient for the Prosecution to establish the offence which carries the longest term of imprisonment. We would support the doubts expressed in the passage cited at 6.28 from R v Robert, Taylor, Chapman and Daly [1998] 1 Cr App R 441 at 449. Given the Prosecution has the choice of preferring separate charges of conspiracy, to require proof of all offences specified would not be unfair to the Prosecution and would provide necessary clarity for sentencing purposes.

28. **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?**

29. We consider that the present provisions of the Prosecution of Offences Act 1984 continue to afford some restraint on the institution of proceedings for which the consent of the Director of Public Prosecutions is required. We note that the recommendations made in Item 11 of the Sixth Programme of Law Reform: Criminal law published on behalf of the Law Commission have not been implemented and would have afforded greater control. We submit that such consent should continue to be required before proceedings in respect of a conspiracy to commit a summary offence can be instituted.

30. **Question 5: should conspiracy to commit a summary offence itself be a summary offence?**

31. We do not consider that there is any necessity for an offence of conspiracy to commit a summary offence. If such is considered necessary then it should be triable summarily and proceedings should only be instituted with the consent of the Director of Public Prosecutions.

32. We do, however, consider that there is a cogent argument for the existence of an offence of conspiracy to commit summary **offences**. We suggest that it should be triable on indictment and that the maximum penalty should exceed the maximum for a summary offence. We do not consider that to limit the maximum in such cases would provide an adequate level of punishment for the culpability or potential harm which such conduct might create. We suggest a maximum of at least two years imprisonment would be appropriate.

    (a) Our justification for this proposition is this. Two or more persons may agree on a course of conduct which will involve the repeated commission of summary offences. The present law provides for a maximum penalty of 6 months imprisonment for summary offences which are punishable with imprisonment even where the defendant is convicted of more than one offence. Many such offences do not even carry a sentence of imprisonment e.g. using a vehicle without insurance. We consider that the law should provide for such a situation and provide more serious penalties than those available for the commission of the individual summary offences committed. For example, a man agrees to employ another as a driver. He knows that the other is disqualified from holding or obtaining a licence. It follows that there can be no valid policy of insurance and that every time that the other will be driving on the road he will be committing the offences of driving whilst disqualified and using a vehicle without insurance. The maximum penalty for using a vehicle without insurance is a fine and for driving whilst disqualified is six months. In our opinion

more onerous penalties should be available than are at present to match the culpability.

33. **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?**

34. 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?

35. Subject to the comments which we make under Proposal 8 below, we have no observations to make.

36. **Question 8: should the consent of the Director of Public Prosecutions be required for prosecutions involving double inchoate liability?**

37. We consider that this should be required.

38. **Proposal 6: the defence of "acting reasonably" provided by clause 48 of the Serious Crime Bill (now Section 50 of the Serious Crime Act 2007) should be applied in its entirety to the offence of conspiracy.**

39. We agree that in accordance with the approach that similar principles should apply in respect of all inchoate offences, the terms of the defence of "acting reasonably" available under Section 50 of the Serious Crime Act 2007, should also be enacted to apply to the law of conspiracy. Any other approach would lead to confusion and inconsistency.

40. **Question 9: 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 under authority, as set out in clause 48(3)(a) and 48(3)(c) of the Serious Crime Bill?[now Section 50(3)(a)and 50(3)(c)]**

41. We doubt that a defence relying upon clause 48(3)(b) will often arise in practice. We agree that the fact of having entered into an agreement which the defendant intends shall be carried out is likely to preclude such a defence. However, we could envisage this defence being raised in, for example a charge of conspiracy to commit criminal damage which involved a group who held the view that "the ends justify the means" such as an animal rights group. However, we do not consider either that the rarity nor the peculiararity of circumstances in which the defence may be relied upon should lead to the interests of simplicity and consistency being overridden by the exclusion of Clause 48(3)(b).

42. Proposal 7: the spousal immunity provided by section 2(2)(a) of the Criminal Law Act 1977 should be abolished.

43. We agree with the reasoning set out in paragraphs 9.16 – 9.27. The rule in an anachronism and should be abolished.

44. **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 person;

(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.**

(d) We agree that the protection provided by the law for a victim of an age of criminal responsibility should provide also that such person should not be criminally liable if he or she enters into a conspiracy to commit an offence of which he or she is the victim. We also agree that the culpability of a non-victim co-conspirator is such that he or she should not be exempt from liability. The essential issue therefore is the mechanism by which the present law should be amended. The Commission envisages either providing for an offence of attempting to conspire by the non-victim co-conspirator or abolition of the present exemption and provision of a specific defence to the victim conspirator. We would prefer the latter approach. Firstly, it would be consistent with the approach taken in Section 51 of the Serious Crime Act 2007 in respect of offences of "encouraging and assisting an offence". Secondly, we consider that it would be simpler to direct a jury in such circumstances. Both would involve explaining the nature of conspiracy which could include a simple statement of the defence if the victim was not on trial but the former would also require an explanation of the nature of an attempt which would be more complex.

(e) **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.**

(f) We agree with this proposal. We repeat our observations given at Paragraph above.

(g) **Proposals 10 to 14.**

(h) We agree with the proposals as to jurisdiction and the requirement of the Attorney General's consent to prosecute

as set out in these Proposals. It is clearly sensible and appropriate for the rules to be similar to and consistent with those provided in respect of the offences of encouraging and assisting in an offence as set out in Sections 52 and 53 of the Serious Crime Act 2007. Moreover we agree that the development of international crime necessitates such bases for jurisdiction. We specifically endorse the view that the fault element should be extended to include "belief" and not be restricted to "intention".

45. **The Proposals and Questions in relation to the law of Attempts.**

46. We agree with the statement of underlying principles as set out in Part 15 "Relevant Principles" and that the present ambit of the law is appropriate and should not be expanded. We agree that there is a role for specific situations to be met by specific statutory inchoate offences such as Going Equipped for Theft but the creation of a general offence amounting to "mere preparation" would be inappropriate for the reasons given in the Consultation Paper.

47. We consider it regrettable that the Criminal Attempts Act 1981 has been give such a narrow interpretation and submit that the reform of the law should be to maintain one offence of attempt but that it should be given the wider meaning which it might reasonably be argued was the intention of Parliament and can be achieved using the traditional canons of interpretation. We accept that such an approach may require guidance on the meaning of the term "mere preparation". We acknowledge that although the fault elements may be held by the offender, his or her actions may properly be regarded as too remote from the commission of the substantive offence.

48. 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:

an offence of criminal attempt, limited to last acts needed to commit the relevant substantive offence; and
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.

49. We regret that we do not feel able to support this proposition. We consider that the law as, we believe it was intended to be by parliament in the Criminal Attempts Act 1981 should be the law.

50. We consider that the creation of two separate offences is likely to create practical problems in jury trials. We consider it likely that prosecutors

will charge both offences which will lead to longer indictments. They will be laid as alternatives. The jury will probably be directed to consider the charge of attempt first and only consider the offence of criminal preparation if they acquit of the offence of attempt. Given the distinction between the two offences would depend upon whether the defendant had committed the last or one of the last acts needed to commit the relevant offence, one can easily envisage a situation in which the jury may be split on that decision but could agree on the offence of criminal preparation. They would however, be unable to return a verdict on the second count. This could lead to a retrial and all the consequent expense which would necessarily follow. This situation could arise even if the division of roles envisaged in Proposal 20 were implemented. We acknowledge that the advantage of a verdict where both offences are charged is that the trial judge knows the basis on which the jury has convicted and the disadvantage of retaining one offence is that the judge is left to consider the basis upon which to sentence. We believe, however, that the advantage is outweighed by the real risk that juries may have difficulty in deciding upon a narrowly based offence.

51. We believe that there are further undesirable situations which are likely to arise. It is pointed out in footnote 1 Page 203 Part 15 "Relevant Principles" "where D actively tried 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 being as culpable as a successful perpetrator." We consider that is a realistic comment and states an arguably appropriate approach to determining a defendant's culpability. The necessary consequence is that it may reasonably be argued that a person who has not progressed so far to the commission of the offence is less culpable or, at least should be less seriously punished. We believe it is likely that where either only attempt is charged or the offences are charged in the alternative, it will be common for the defendant to offer a plea of guilty to the offence of criminal preparation so as to be able to argue for a lesser penalty. One may argue that prosecutors would not accept such pleas if not appropriate, in reality, we consider it unlikely they would readily reject such a plea and risk either an acquittal altogether or may be a lengthy and expensive trial.

52. Proposal 15A: We propose that the two new offences should carry the same maximum penalty, that is, the penalty now available for an attempt to commit the intended offence.

53. If two were offences were created, we agree that the maximum penalties should be the same.

54. Proposal 16: We propose that the guidance should be 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.

55. We agree that any guidance would be of value in assisting in determining those cases in which the conduct should be regarded as too remote to attract criminal liability.

56. Proposal 17: in whatever form guidance is provided, we propose that the new general offence of criminal preparation should encompass the following situations.

57. We agree that if such an offence were to be created and guidance given, at least the situations set out should be encompassed.

58. Attempts Question 1

59. We do not consider that it would be appropriate to include examples within the legislation. Definitions in legislation generally set out the principle or the necessary ingredients of an issue which is involved. It is then for the court is to interpret such definition and/or apply it to a given set out facts. Examples on the other hand would necessarily be fact specific. There may be a tendency to elevate the examples to set the boundaries of the offence. One can readily anticipate that arguments may be advanced (and accepted) which could then, unnecessarily restrict the proper ambit of the law and become precedents rather than purely illustrative of the application of the law.

60. As indicated above we do not take the view that there would be no value in providing such examples but suggest that they should be included in an Explanatory Note. With respect to the Law Commissioners we question whether inclusion in the Final Report of the Law Commission would reach sufficiently wide an audience.

61. 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 intent; and

(b) a conditional intent to commit the offence.

62. We agree with this proposal.

63. 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.

64. We agree with this proposal.

65. Proposal 18B: We propose that subjective recklessness with respect to 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.

66. We agree that where subjective recklessness suffices for the substantive offence, such a fault element is appropriate. However we do not agree

that it should have the universal application suggested in the second clause of the proposal. We do not agree that it is appropriate where objective recklessness, negligence or no fault elements arise in the substantive offence as regards the circumstance element.

67. 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 offence of attempt and criminal preparation should require the same lower (or no) fault element in relation to that circumstance element.

68. We agree with this proposition. In support of our contention may we proffer the following situation. A man is charged with an offence of rape. He denies that he has penetrated the victim and alleges that he reasonably believed that the victim was consenting. It would be necessary for the judge to leave to the jury the alternative verdict of attempted rape. On the basis of the law as suggested in Proposal 18B, the judge would have to direct the jury that if they found the defendant had penetrated the victim they should consider whether he may have reasonably believed that the victim was consenting. On the other hand, if they were not satisfied that he had penetrated the victim , they would have to be satisfied of the higher standard of recklessness as to the victim's belief. We consider that such a situation would be at best, confusing to a jury.

69. 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.

70. We agree with this proposition.

71. 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.

72. We agree

73. Proposal 20: We propose that :

74. 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;

75. We shall give our response to this Proposal below.

76. 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.

77. We consider it sensible for the judge to decide whether, assuming the facts set out by the Prosecution were true, they would amount to "criminal preparation" or "last acts attempt". To leave the issue entirely to jury would raise difficult issues of remoteness which would be

difficult to explain in any direction to them. The judge's direction that the facts if proved could amount to "criminal preparation" would set a minimum standard. We think that the same should apply in respect of a "last acts attempt". WE doubt however that the risk that the jury will not follow the direction given by the judge is limited. One may say that in such circumstances there is therefore no point in leaving the issue for their decision. We can see force in that argument.

78. However, we see little merit in the additional reasons argument. Firstly, that it may result in different verdicts on the same or virtually indistinguishable facts. We pose the question, how would this be known. The jury is not required to give its reasons let alone the facts which it found. How is one to know that they have taken a different view on what should constitute the offence when their decision could, and more likely would be made on the basis that they had rejected the Prosecution evidence? The second reason that it would afford an opportunity to return a perverse or stupid verdict of acquittal is unimpressive. The same criticism could be made of any decision of a jury. The opportunity is always there for such a decision. But the basis of the criminal courts system is to rely on the integrity of the jury. We pose the question, why should we be afraid of a perverse verdict in the case of attempts yet prepared to allow a jury to decide very much more serious issues? These two arguments, in our opinion provide no good reason to depart from the usual situation that it is for the jury to decide whether the facts are proved and whether they in fact find that they amount to criminal preparation rather than being "merely preparatory" or one of the "last acts" so as to amount to an attempt.

79. On balance we prefer to leave the situation as to the role of the jury as it is. It would mark a departure from the norm that all issues are left for the jury to consider. We doubt that the change is justified by the anxieties expressed

80. 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.

81. We doubt the general need for such an offence. There are specific offences in respect of which an offence of attempt should be available. Such a case is an attempt to take a conveyance without authority. We consider they could be specifically enacted rather than to provide an overall offence of attempt in relation to summary offences.

82. Attempts Question 4: We ask whether the consent of the Director of Public Prosecutions should be required for prosecutions in relation to summary offences.

83. We express the same comments here as we did in reply to Conspiracy Question 4

HH Judge David Swift
Chairman
Criminal Sub Committee
Council of HM Circuit Judges
(With acknowledgement to HH Judge Atherton)
14th February 2008