Law Commission Consultation Paper No 183 on Conspiracy and Attempt – Comments on Conspiracy

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The aim here will be to deal principally with four issues raised by the conspiracy half of the paper. These will, it is hoped, raise 8 of the Commission's 14 proposals and answer 7 of its 9 questions.

1. Conditional conspiracies

Conditional conspiracies are at the heart of the issues raised by Parts 4 and 5 of the paper and discussion of them is really integral to the Law Commission's proposals 1-4 and questions 1-3.

Conditional Conspiracies: two 'analogous' problems under the current law?

The problem of conditional conspiracies currently arises in two different ways under the current law.

1. The 'Necessity Requirement'
First, s 1(a) of the 1977 Act, requires that the agreement *will necessarily* amount to or involve the commission of any offence(s) (the 'necessity requirement'). The question is obviously whether this 'necessity requirement' will be fulfilled if the conspirators form a conditional agreement to commit a crime only in certain circumstances. Different methods can be used to try to distinguish between different kinds of conditional agreements in order to establish whether the necessity requirement has been fulfilled in any given case.

The Smith, Hogan and Ormerod test for the necessity requirement is to ask the following question: if D1 and D2 had got what they wanted at the *end* of the chain of events, would it necessarily have involved them in a crime along the way? [1] In the famous example given by Donaldson LJ in *Reed* the answer is no; D1 and/or D2 could get from London to Edinburgh in a certain amount of time without necessarily speeding. However, as their book points out, this distinction will not work for several reasons. First, in the other well-known case of *O'Hadhmaill* it is possible to argue that because they had made agreements to cover both eventualities the defendants would still have got what they wanted if the ceasefire had held and they had thus not bombed the disco. On this basis they would only fail to get what they wanted if the ceasefire was abandoned but the disco was not bombed. Second, to take the Law Commission's example 5C of the burglars who agree to burgle V's house but murder her if she interrupts them, it would equally be possible to say that the defendants could get what they want without murdering, but it hardly seems attractive to suggest that this is not a conspiracy to murder.[2]

[1] Smith and Hogan, *Criminal Law* (11th ed, D. Ormerod) (Oxford, OUP 2005) at 371-2.
[2] Above n 1. As is pointed out in Smith and Hogan, the problem with this analysis is that as a result the burglars' agreement is arguably not a conspiracy to murder; 'shooting to kill would be incidental to the achievement of an objective which might be achieved without it. On a natural interpretation of the expression the agreement will not 'necessarily' involve murder.'The example was previously discussed by J C Smith, 'Conspiracy under the Criminal Law Act 1977' [1977] Crim LR 598. His conclusion was that this is only a conspiracy to

Another way of attempting to distinguish between different conditional conspiracies is to start at the *beginning* of the chain of events.[3] Section 1(1)(a) could thus be interpreted as asking whether, if one or more of the defendants went ahead and did what they have agreed to do, this would necessarily lead them to do something which as a matter of fact would amount to or involve a crime. On this basis the 'necessity requirement' is unquestionably part of the actus reus of conspiracy: the only actus reus necessary for a conspiracy is the reaching of an agreement and the necessity requirement is an objective limit on the kinds of agreement that will count for this purpose. [4] This conclusion seems to fit perfectly with the two cases in which the issue was perhaps most famously discussed.

It will be remembered that in *O'Hadhmaill*[5] there was an agreement to bomb a disco if the IRA ceasefire were to be abandoned. Were the bombing to take place there would be no problem with the defendants' mens rea. The question instead was whether the agreement would be carried out at all. This can be represented in the following diagram (relevant offences appear in **bold**):

O'Hadhmaill:

At least here, because the agreement is to produce a particular result and the crimes are themselves result crimes such as criminal damage and/or offences against the person, it is arguable that there is no way in which, looked at objectively, the agreement to produce that result (damage to the disco and/or people within it) could be brought about without *necessarily amounting to* the commission of a crime as required by s 1(1) CLA 1977.

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burgle. Glanville Williams, on the other hand, argued that this was a conspiracy to commit both crimes, though the example he was considering only involved wounding V (Williams, 'The New Statutory Offence of Conspiracy' [1977] New Law Journal 1164. Ormerod agrees with this conclusion, see D Ormerod 'Making sense of Mens Rea in Statutory Conspiracies' (2006) Current Legal Problems185 at 225-6.

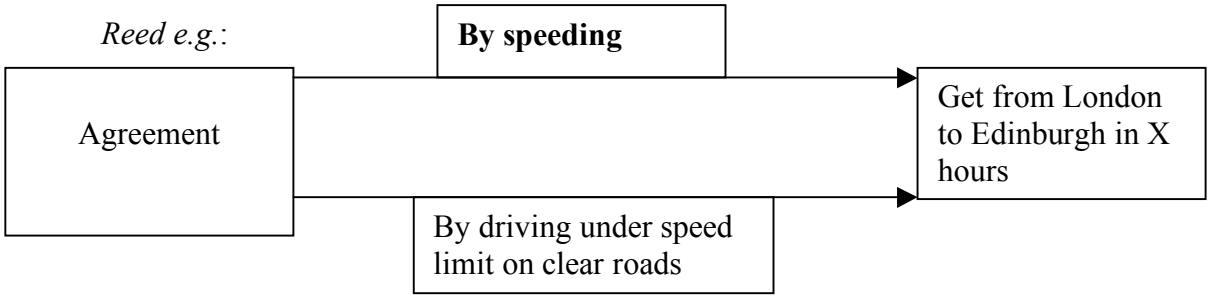
[3] Ibid. (The only slight difference between this and the distinction proposed above appears to be that on this analysis procuring suicide, as in *Reed* , is considered to be 'the object of the exercise' like causing the explosion in *O'Hadhmaill*).

[4] The issue of impossibility will be dealt with in further detail below. Of course for the agreement to amount to a crime when carried out the defendant(s) would have not only to carry out the requisite actus reus but also to do so with the relevant mens rea for the full offence. However, in the case of consequence crimes and behaviour crimes of the kind discussed here it is unlikely that these could be carried out without the defendant having the requisite mens rea for the full offence. It is therefore unlikely that in agreeing to carry out the full offence in certain circumstances the conditionality of the full offence would relate in any sense to the presence of mens rea rather than actus reus, and thus the 'necessity requirement' does seem to go to the actus reus of conspiracy rather than to the mens rea.

[5] [1996] Crim LR 509.

Conversely, in *Reed*[6], Donaldson LJ gave the famous example that an agreement to drive from London to Edinburgh in a certain amount of time would not amount to a conspiracy to break the speed limit if the journey could indeed be completed in that time without breaking the speed limit as long as the traffic turned out to be light.

This can be represented by the following diagram:



This time it appears as if the agreement need not be a conspiracy because of the divergence between its object and the form of the offence. This time the object, or result, is the arrival in Edinburgh within a certain amount of time. Since the offence in question is a behavioural one, not a result crime, there is no inherent and necessary match between the object of the agreement and the criminal offence. Again, there is no question that if the prohibited behaviour were to take place the defendant would do so with the necessary mens rea (if any). The question instead is whether, looked at objectively, the carrying out of the agreement and the arrival in Edinburgh within a certain amount of time will necessarily involve the commission of the actus reus of speeding. And since it is entirely possible that that object can be achieved through a wholly lawful route, Donaldson LJ was thus uncomfortable with suggesting that an agreement to get from London to Edinburgh within a certain amount of time 'will *necessarily* involve the commission of any offences' as required by s 1(1) CLA 1977.

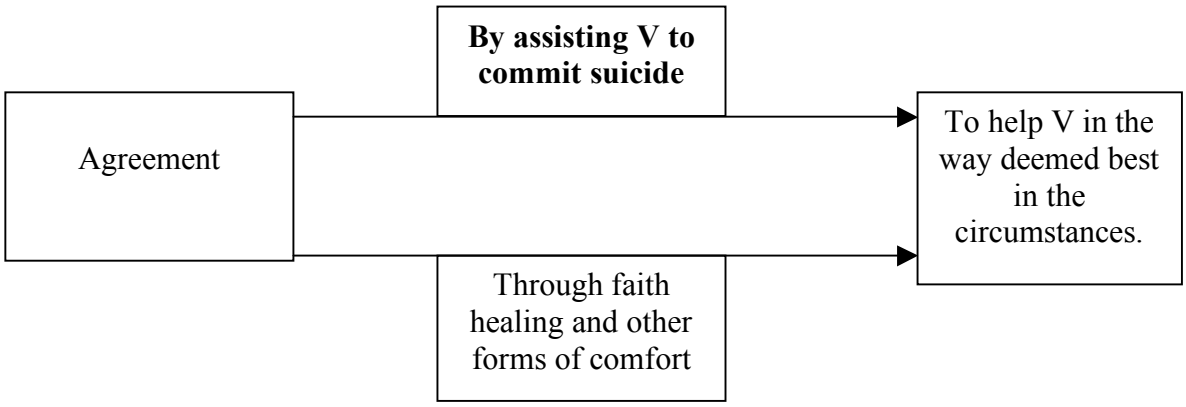
If this is so, then a distinction is being drawn on the basis of the actus reus element at issue in the full offence. Where the conditional element of the offence is a result and the offence in question is a result crime,[7] as in *O'Hadhmaill*, the 'necessity requirement' in s 1(1) is easily fulfilled. Where it is a behaviour crime, agreeing to bring about a particular *result* does not *necessarily* amount to the commission of a *behavioural* offence.

This in itself has the potential to be arbitrary unless we can find a convincing explanation for treating different forms of actus reus differently, but even if we can find such an explanation, there are four further problems with the 'necessity requirement'.

First, on the reasoning outlined here the example given by Donaldson LJ in *Reed* was not only obiter, the distinction it entails does not even fit with the decision on the facts

[6] [1982] Crim LR 819.
[7] Obviously, Criminal Damage is not wholly a result crime; it also requires that the property belong to another; a circumstance element. However, on the facts of *O'Hadhmaill* the circumstance of the property belonging to another was never in question; if property were to be damaged (result) it would inevitably be property belonging to another, but that prohibited result was conditional upon the abandonment of the ceasefire.

in that case. The reason is that it is perfectly possible to characterise the actual facts of *Reed* as follows:



Particularly because the offence in question, assisting or encouraging suicide, can be characterised as a behavioural offence, once it is set out like this it becomes very difficult to distinguish from the example given by Donaldson LJ. In neither case is the prohibited behaviour a *necessary* route to the agreed objective.

Second, the *O'Hadhmaill/Reed* distinction only applies when there is only one crime at issue. As soon as there are potentially two different crimes to deal with the distinction breaks down. Thus, just like the Smith and Hogan distinction outlined above, it cannot deal with the example of burglars who set out to commit burglary, having agreed that, if it is necessary to do so in order to complete the burglary or to escape, they will shoot to kill.[8] The example of the burglars can indeed be analysed in the same way as *O'Hadhmaill*, above:

There is no way an agreement to kill V can be achieved other than by killing V and so the set-up is the same as that in *O'Hadhmaill*. But because the killing of V is only the second crime in the scenario, the facts can, alternatively, be analysed as lining up with Donaldson LJ's example from *Reed*:[9]

[8] See also Law Com CP 183 example 5C, para 5.18.
[9] It is accepted that this is contrary to the Law Commission's argument at para 5.19.

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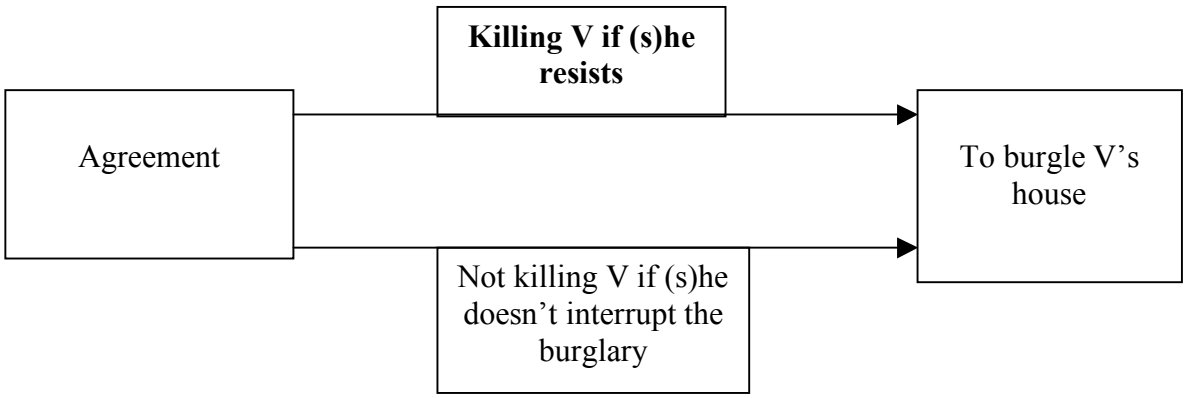
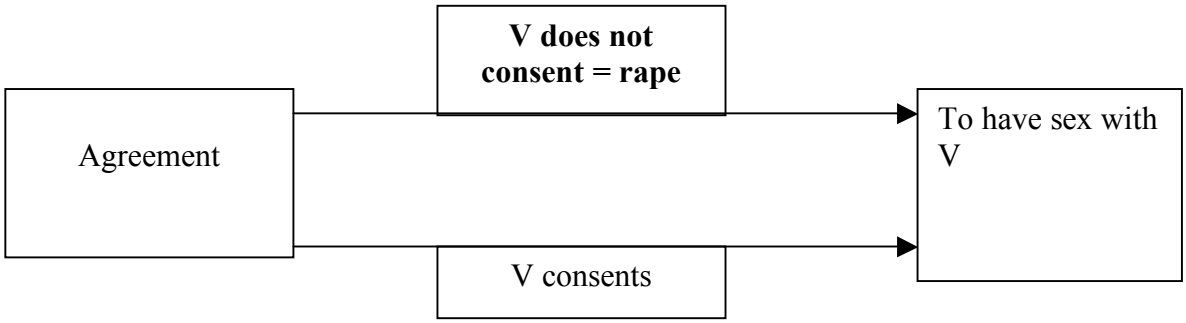


In other words, single consequence crimes[10] such as *O'Hadhmaill* can be distinguished from single behaviour crimes such as *Reed* itself or the London to Edinburgh example given in *Reed*, but even this distinction falls down as soon as the conditionally agreed-upon consequence crime is only one of two potential offences. The point is that whether you start at the beginning of the sequence as here, or the end of the sequence as in Smith and Hogan, in all these cases *O'Hadhmaill*, 5C, *Reed* and the London-Edinburgh example given in *Reed*, there are actually two agreements: 'if X we'll commit a crime' and 'if Y we won't'.

Third, and more generally, the relationship between the 'necessity issue' and the impossibility issue covered in s 1(1)(b) CLA 1977 initially appears to be slightly odd. If we start at the beginning of the sequence and capture agreements which will *necessarily* lead to the commission of crimes, it is difficult to see why we are concerned to capture agreements to do the impossible. And conversely, if we are so concerned to capture anyone who demonstrates a willingness to participate in criminal conduct and who thus poses a significant enough potential threat, it is difficult to see why we would want to insist upon the agreement *necessarily* amounting to or involving the commission of an offence. The answer must be that although both these issues in the first place relate to the objective nature of the actus reus of the offence, and thus to the content of the agreement that forms the actus reus of conspiracy, in fact what we are concerned about in both instances is the defendants' mens rea. Thus we are quite happy to capture those who believe that the full offence is possible and intend one or more of them to go through with it, even if in fact it isn't and they can't.[11] But we are slightly more concerned about capturing those who are considering a perfectly feasible actus reus but are not necessarily going to carry it out. In other words, it is not desirable to deal with the conditionality problem as an actus reus issue, and this realisation is one important feature of the Law Commission's paper. So, for example, in para 1.27 the Law Commission says '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'.

[10] Where the conditional element is a consequence.
[11] The Smith, Hogan and Ormerod technique appears initially to make more sense of the impossibility issue by asking whether if D(s) had succeeded in doing what they had ag*Reed* would that have necessarily involved a crime, but in fact this is simply to use the same technique as that advocated here; shifting the focus to the defendants' state of mind, rather than the actus reus.

This is closely connected to the fourth problem concerning the 'necessity issue'. Taking Baroness Hale's example of the men who agree to have intercourse with a woman whether or not she consents, because this is not a result crime, in principle this case seems to line up with *Reed* rather than *O'Hadhmaill*:



In other words, because the conditional issue (lack of consent) is not a result but a circumstance element, there is again no inherent match between the object of the agreement (sex with V) and the relevant offence (sex with V when V does not consent). The rape need not *necessarily* take place in order for the object of D1 and D2s agreement to be fulfilled and again we have two agreements: 'if V doesn't consent we'll commit rape' and 'if she does we won't'. Exempting such cases on the basis that they don't line up with *O'Hadhmaill* but with the example given in *Reed* would obviously have unfortunate practical consequences which, like the outcome on the facts of *Reed* itself, might lead us to question whether exceptions should ever be made. However, although conspiracies conditional upon the fulfilment of a particular circumstantial element can thus be dealt with alongside conspiracies based on behavioural or consequence elements,[12] all three raising the 'necessity requirement' under s 1(1) CLA 1977, there is a key reason why in practice the conditionality issue in relation to circumstance elements of offences does not tend to arise in this way.

2. S 1(2) CLA 1977

In practice, issues concerning the conditionality of circumstance elements may well arise instead as a result of the use of the words 'intend or know' in s 1(2) of the Criminal Law Act 1977. In other words, rather than going to the actus reus of conspiracy as it was argued that the 'necessity' requirement could, the conditionality issue here does indeed go to the mens rea of conspiracy under s 1(1)(2), as it was suggested above that all conditionality issues must. With consequence conspiracies such as *O'Hadhmaill* and behaviour conspiracies such as *Reed*, if the actus reus is carried out it will generally be done with the requisite mens rea, if any. The only question in those cases is thus whether it is 'necessarily' intended to carry the agreement out at all. This may also be true of an agreement such as that given in Law Commission's example 5G; an agreement to bring D3's lorry into the country with 'no questions asked' about the cargo. In such a case even the actus reus requirement

[12] As noted by the Law Commission, para 5.23.

of its being 'hot'[13] may turn out on the facts not to be fulfilled and thus there is no reason in principle why a 'necessity requirement' issue should not arise just as it does in relation to the other two kinds of offence elements. But the point is that it may well be pre-empted by an issue arising under s 1(1)(2) instead. And in a case where the property is already specifically identified[14] and is, objectively, 'hot', there is no problem with the actus reus of the full offence 'necessarily' taking place; it will. Indeed, where the full offence is one of strict liability or has a mens rea of recklessness there will equally be no problem with the mens rea of the full offence being fulfilled either, so that if the agreement is carried out the whole offence then will 'necessarily' take place. The point is that this mens rea will not, however, satisfy the s 1(1)(2) mens rea requirements imposed for the offence of conspiracy itself. Thus the majority of the House of Lords in *Saik* (Lords Nicholls, Steyn, Hope and Brown) all concluded that the appellant's conviction should be quashed on the basis that he had only suspected the money was the proceeds of crime and had not known that this was the case when he laundered it.

Baroness Hale, however, in the minority,[15] held that a defendant could be convicted of a statutory conspiracy to launder the proceeds of crime if he entered into an agreement to convert property in respect of which he had reasonable grounds to suspect and did in fact suspect but did not actually know was the proceeds of crime, *provided that* he intended to put the agreement into effect even if the property was in fact the proceeds of crime.[16] In other words, while the majority of the House of Lords interpreted the case as one of suspicion or recklessness, which would not be sufficient to satisfy a requirement of knowledge or belief, Baroness Hale interpreted the defendant's state of mind as potentially being one of conditional intent: he suspected that the money might be the proceeds of crime *and would have been prepared to go ahead had this turned out to be the case*.

A further way of describing the distinction between the opinions of the majority of the House of Lords in *Saik* and Baroness Hale is that the majority perceived the defendant's state of mind as being relatively passive at the time of the agreement (he foresaw the possibility that the money was 'hot') whereas Baroness Hale was concerned not only to ascertain his mens rea at the time of the agreement, but also to

[13] To use Lord Brown's shorthand in *Saik* [2006] UKHL 18, [2007] 1 AC 18 at 107. I am grateful to David Ormerod for pointing out that in fact it would not be enough in such circumstances to regard it as a 'conspiracy to import' because in fact s 170(2) CEMA 1979 would require agreements to import different goods to be treated differently.
[14] This is not to raise the problems of identification by the Crown for the purposes of the mens rea requirement, see further Ormerod comment on *Suchedina* [2007] Crim LR 301. The point is that if A and B form an agreement to, e.g., handle the contents 'of Fred's van when it arrives on Wednesday' it could be argued that this agreement will not 'necessarily' entail the commission of handling stolen goods if in the event it turns out that the goods are not stolen. The point is that such a discussion may in any case be pre-empted by or subsumed into discussion of whether A and B 'intended' that the goods would be stolen for the purposes of s 1(1)(2).
[15] And in line with the arguments used by K Campbell, 'Conditional Intention' [1982] 2 Legal Studies 77 and D Ormerod, above n 2, the help of which she acknowledged (above n 13 at [99]).
[16] Above n 13 at [98].

ascertain the defendant's precise attitude in the event that his suspicions should be proved correct. Now, it is true in *Saik* itself, as Lord Hope pointed out,[17] that in this particular case, as with many,[18] matters are not made easier by the fact that although the essence of a conspiracy is indeed that it is an inchoate offence looking to the future,[19] because it is the 'prosecutor's darling'[20] it is often used, as here, when the actions are in fact complete. Nevertheless, putting that to one side, what Baroness Hale's reasoning shows is that precisely the same conditionality problem can arise in two different ways under the current Act; either via the 'necessity issue' in s 1(1)(a) or as a question of mens rea under s 1(2). It was argued above that it is in general preferable to deal with the conditionality of conspiracies as a mens rea issue, but the question then is how precisely we should do this and what in particular should happen in a case such as *Saik*.

Conditional Conspiracies: two proposed solutions

It has already been noted that in response to these problems, the first important step taken by the Law Commission is to regard all conditionality issues as going to mens rea. The second, really vital, thing the Law Commission does is to divide the actus reus of different crimes up into their constituent elements of behaviour, consequences and circumstances. Far too infrequently the law does this and yet a failure to do so can often be the cause of confusion as it was above.[21] Having done this the Law Commission then proposes two different solutions to the conditionality problem.

The first is that although in terms of mens rea, a conspirator must be shown to have *intended* that the conduct element of the offence and (where relevant) the consequence element of the offence should respectively be engaged in or brought about',[22] in para 5.5 the Law Commission goes on to make clear 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'. So intent is required for consequence and behaviour elements of the offence, but an intent based on certain conditions will be enough to satisfy this.

In the case of circumstance elements of offences, however, the Law Commission's approach is different. Here it is proposed instead 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 by the substantive offence).'[23] This is a direct response to the decision of the House of Lords in *Saik*.[24] It was clear that according to

[17] Above n 13 at [41].
[18] For the procedural advantages of charging conspiracy see Law Com CP 183 para 2.20 and for further comment on this technique see Ormerod, above n 2 at 204 and 230.
[19] Lord Nicholls, above n 13 at [19].
[20] G Williams, 'The Added Conspiracy Count' [1977] NLJ 24.
[21] For a further example on this see in particular the law of intoxication and the comments of D Ormerod on *Brady* and *Heard* [2007] Crim LR 564 and 654 respectively.
[22] Law Com CP 183 Paragraph 4.4
[23] Law Com CP 183 para 4.113 proposal 3.
[24] Above n 13.

the judgments of the majority in that case, Saik, having only been suspicious as to the circumstances in which the money had been obtained, could not be convicted.

Conditional Conspiracies: Two causes and three solutions, but only one problem?

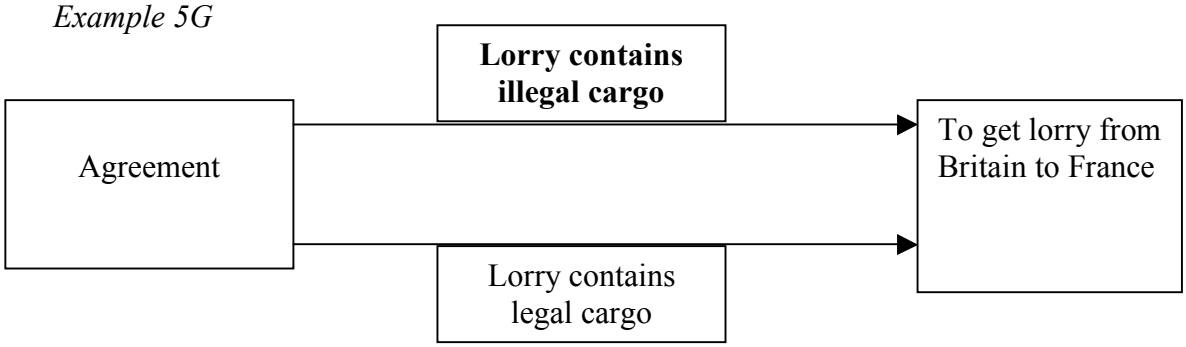
In proposing this solution to *Saik* the Law Commission therefore expressly rejects Baroness Hale's view that such cases are already conspiracies because they involve a conditional intention to commit an offence.[25] This is because, they believe, she wrongly equates cases such as Saik's with cases where there genuinely is both an unconditional intention to commit one offence and a conditional intention to commit another offence. The Law Commission's 5C and 5D provide examples of such cases, one of which is the same as the Smith and Hogan example considered above. In 5A D1 and D2 agree to burgle V's house and, if V resists, to murder V. In 5D D1 and D2 agree to beat V to find out information V has and, if V does not reveal it, to kill him. These are different, argues the Law Commission, from example 5G (considered above) in which 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'.

Now it is certainly true that in examples C and D, D1 and D2 had in any event firmly and unconditionally agreed on one criminal course of conduct. But the existence of that separate conspiracy cannot possibly be relevant to the legal status of their second, conditional agreement to kill V in each instance.[26] And as for the argument that their example 5G should not be regarded as a conditional conspiracy because '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', we need only put the example in diagrammatic form to point out that this is precisely the same argument as failed above to provide a sensible distinction between the London-Edinburgh example given in *Reed* and *O'Hadhmaill*:

[25] Law Com CP 183 para 5.24.

[26] It is true that, as seen above, the existence of two different proposed offences can look as if it makes a difference to the analysis, but this cannot provide the distinction drawn by the Law Commission for two reasons. First, as was seen above, far from distinguishing example 5G from example 5C of the burglary-murder, the existence of two crimes actually aligns the burglary murder with conditional conspiracies to carry out crimes involving a behaviour or circumstance element such as Baroness Hale's rape example, the London-Edinburgh example in *Reed* and so on. All these cases were the ones illustrated above with two arrows, one of which did not go via the commission of the relevant offence. The only distinction then was between all such cases and single result crime conditional conspiracies such as *O'Hadhmaill* where the object of the conspiracy and the results prohibited by the offence matched and thus the conspiracy had to be illustrated using only one arrow which led inevitably to the prohibited result offence. And secondly, precisely because it produced such odd distinctions, this whole analysis was in any case rejected for the undesirable implications it would have, such as excluding the facts of *Reed* itself and the burglary-murder example 5C from the scope of conditional conspiracy on the basis of the London-Edinburgh example in *Reed*.

Example 5G



In this case like the London-Edinburgh example it is perfectly possible to achieve the object or result without going via the unlawful circumstances because again, the crime in question is not a single result or consequence crime[27] and thus there is no inherent match between the crime and the object of the conspiracy. But it is clear from the further analysis conducted above that this is not a justifiable way to draw distinctions between different kinds of conditional agreement to commit crimes, precisely because the Law Commission's burglary-murder example 5C can be brought into this category too, alongside Baroness Hale's rape example and the facts of *Reed* itself. The point made above was that all these distinctions have undesirable implications and can be too easily manipulated to retain any inherent coherence.

More importantly, however, once it is recognised that in fact conditionality is always really a problem of mens rea, as the Law Commission seems correctly to have concluded, it is difficult to see why they continue to regard conditional conspiracies as raising two problems rather than one. So taking the 5C and 5D agreements to kill V 'if he resists' or 'if he does not reveal the information', are these agreements really in any way different from an agreement in which D1 and D2 agree to contravene Customs laws 'if we have to do so in order to get the lorry from Britain to France'?[28] Surely, as noted above, both situations ultimately boil down to the same conditionality problem: D1 and D2 have agreed that if X occurs they will commit a crime, and if Y occurs they will not.[29] Why then, might it be that the Law Commission is keen to continue dealing with conditional conspiracies in two different ways?

The answer, it is suggested, comes from a key practical issue put to one side during the theoretical discussion so far. Conspiracies based around different kinds of actus reus elements, behaviour, consequences and circumstances, tend to lead to different typical fact patterns and more importantly different sequences of events. For result crimes such as *O'Hadhmaill* or even the burglary/murder in example 5C the

[27] S 170(2) Customs and Excise Management Act 1979 is committed when the defendant is 'knowingly concerned in any fraudulent evasion or attempt at evasion'. 'Being concerned' is at least arguably a form of behaviour. It is not the evasion of liability per se that constitutes the offence.
[28] Even assuming for the moment, contrary to footnote 13, that this only entails one offence.
[29] Again, because s 170 CEMA 1979 incorporates different offences, in practice they will often have agreed that if X they will commit offence 1, if Y they will commit offence 2 etc and only one of their many agreements may involve them agreeing that no offence will be committed if the property is not 'hot'. Again, I am grateful to David Ormerod for pointing out the implications of s 170 CEMA 1979 in this respect.

agreement is essentially a decision to take a future decision in a particular way. Before the bomb is planted and detonated the terrorists will know that the ceasefire has been abandoned and that their condition has thus been fulfilled and at this stage they will take a further decision to go ahead with their plan as previously arranged.[30] The same will probably be true of the 5C burglar-murderers. If V does disturb them during the burglary they will then re-decide to kill V as planned. The same is also true of behaviour crimes such as those at issue in *Reed* and Donaldson LJ's example in that case. The procurers of suicide will take the final decision to assist encourage or otherwise produce suicide only when all other avenues have been exhausted and their condition has thus been fulfilled. The driver will presumably only choose to break the speed limit once it has become clear to him that he will not otherwise make it to Edinburgh in time. Of course, one of the reasons for having a crime of conspiracy is precisely because, as the Law Commission puts it, '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'.[31] And indeed if only one of the defendants is intended to carry the plan through to fruition the other defendant(s) is or are agreeing to leave that decision to someone else, believing that the principal actor will go ahead. It is for these reasons that we criminalise the initial agreement, even though at least one of the defendants will later go on to revisit it.[32] But it is nevertheless one of the elements of the offence that makes its paradigm form inchoate and unusual. Some examples of agreements where it is the circumstances that are conditional will also fit this pattern. So, for example, in Baroness Hale's rape example (Law Com example 4D) it is very likely that D1 and/or D2 will know whether V is consenting and thus get to re-make the decision to go ahead anyway. However, in some cases the parties never will get to remake the decision. They could, and often in fact do, get the whole way through the planned activity without knowing whether the relevant condition materialised or not. *Saik* and example 5G are exactly this kind of case. And on reflection it is obvious that this is far more likely to happen in the case of circumstance elements of offences than in relation to either of the other kinds of actus reus elements. By definition the conspirators in 5C, *O'Hadhmaill*, *Reed* and the London-Edinburgh example would not even start to bring about the planned consequences or engage in the planned behaviour until they were sure that the relevant condition had materialised, but it is much easier to handle money or cargo without knowing whether it is legal or not.[33]

Arguments against the proposed solution to conditional circumstance conspiracies

However, there are several reasons why, even if this is so, it should not be allowed to dictate the adoption of a different form of mens rea for conditional circumstance elements from that applicable to elements of consequence and behaviour.

[30] See further Ormerod, above n 2.
[31] Law Com CP 183 para 2.19.
[32] For further discussion of a possible defence of withdrawal after this point, see further below.
[33] In his article, Ormerod, above n 2 at 230 argues that 'there is a danger that the high-profile money laundering cases…will encourage dilution of mens rea requirements generally. It is the prosecutors' preference for conspiracy which presents the problem.'

First, although it is generally circumstance elements which fit this pattern, it need not always be so. *Jackson*[34] contains an example of another kind of offence (at least partially behavioural) fitting the pattern. Here the appellants were convicted of conspiracy to pervert the course of justice because they had agreed to shoot their co-defendant, W, in the leg so that if he were convicted of the burglary offence for which he was being tried, his sentence would be mitigated. Before the end of the burglary trial W was shot in the leg and permanently disabled. The point for our purposes is that, although the co-defendants were all charged with conspiracy to pervert the course of justice, the acts 'with a tendency to pervert the course of justice' had already been done by one or more of the conspirators. It is not clear from the report at precisely what time the conspirators in *Jackson* were arrested, but let us in any case consider a snapshot of the defendants after the shooting but before the outcome of the trial. At that point, just as in *Saik* and 5G the shooter had done everything required for the commission of the full offence[35] without knowing whether or not the relevant condition (W's conviction) would be fulfilled or not. The conclusion must be that if a special rule is needed it is not to deal with the circumstance elements of conspiracies but for situations like *Saik* and *Jackson* in which the full offence is committed and yet the offence of conspiracy is charged.[36]

This leads us to a second point. The danger with the current proposals is that the substantive cart is going before the inchoate horse.[37] The relationship between inchoate offences and offences of complicity is complex and interesting. In its first report on accomplice liability the Law Commission initially proposed that this should take an inchoate form. Not only was this rejected in its more recent report on the subject, but it seems that the law is in fact now travelling in the opposite direction. In support of the offence in principle the Law Commission cites the work of Professor Neal Katyal[38] concerning the economic and psychological benefits conspiracies can provide for criminal activities. However, on further reflection, some of these justifications appear to be extremely substantive; "the formation of a conspiracy, like the formation of a firm, permits specialisation of labour… and economies of scale. 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".[39] Obviously the dangerousness of criminal gangs when they do undertake particular enterprises is one of, if not the

[34] [1985] Crim LR 442.
[35] It does not matter whether or not the acts result in a perversion of the course of justice: the offence is committed when acts tending and intended to pervert a course of justice are done. The words "attempting to" should not appear in the charge. It is charged contrary to common law, not the Criminal Attempts Act 1981: *R v Williams* 92 Cr. App. R. 158 CA.
[36] Nor does this problem arise solely because the offence of conspiracy to pervert the course of justice as defined in footnote 35 above only requires acts to have a 'tendency to pervert the course of justice'. A similar, if unlikely, situation could arise where D1 and D2 agreed to and did, e.g. administer sugar to V not knowing whether she was a diabetic or not and therefore not knowing whether this would constitute an offence contrary to s 23 Offences Against the Person Act 1861 'administering a noxious substance so as thereby to endanger life'.
[37] See Ormerod, above n 33.
[38] N K Katyal, 'Conspiracy Theory' (2003) 112 Yale Law Journal 101.
[39] Law Com CP 183 para 2.15, citing the work of R Posner, 'An Economic Theory of the Criminal Law' (19850 Columbia Law Review 1193 at 1219.

principal reason why we need an offence which allows us to intervene and arrest them before they have got too far. But this traditional reasoning, backed up by the more recent evidence on intelligence-led policing is that conspiracy is about precisely that; intervening *before* a particular criminal harm takes place. On Professor Katyal's reasoning, on the other hand, one of the reasons we need a crime of conspiracy is that *when the crime does take place it will be bigger, better and more complex* than it could have been when undertaken by an individual. And although this sounds more like a justification for offences of complicity (multi-party involvement in actual crime) than one of conspiracy (agreements to commit crimes), it in fact fits perfectly with the tendency of prosecutors, noted above and identified by David Ormerod and Lords Hope and Brown in *Saik*,[40] to use the offence of conspiracy even when the substantive offence has taken place. On this basis it is not surprising that the Law Commission's proposed reforms for circumstance elements, those most frequently arising in this kind of context, are essentially based on the mens rea for the relevant offence as it is committed. Where a more stringent mens rea is required *during the commission of the full offence* the Law Commission recommend that this should be the mens rea for those circumstance elements in conspiracy. And where no stricter form of mens rea is required by the full offence, the proposed mens rea for conspiracy is recklessness, precisely a word one might use to describe a defendant's state of mind *during the commission of an offence*.

Does this matter? If the use of conspiracy for complete, substantive offences has procedural benefits for prosecutors why should we not just adopt the Law Commission's recklessness proposals for circumstance offences which make this easier? It may well be that we thus end up, like the current law, with two different solutions to the same problem, but why should this matter? If conditional intent and recklessness are the same, what, other than Occam's razor, is there against having both of them? Certainly, as Ormerod points out, at the time the 1977 Act was enacted 'Professors Smith and Williams clearly thought that reliance on a conditional intent approach would be a recklessness formula in disguise.'[41] And when the aim of s 1(2) was to eliminate recklessness from the definition of conspiracy that was problematic, but if recklessness is to become a legitimate part of conspiracy those objections vanish.

The answer is that recklessness and conditional intent are not the same, and the third objection to the proposals is that, as a result, adoption of recklessness as a mens rea element would have undesirably wide-ranging consequences. In his article, Ormerod argues that if 'D1 and D2 had said simply 'we will transfer monies' realizing that the money might be criminal, that would be a state of recklessness; they would not have declared what they would do if the prohibited circumstance materialized. If the circumstance did materialize, it would be necessary to return to them to confirm their plans. Where D1 and D2 have declared an 'even if' intention,[42] there would be no point in returning to them to clarify their state of mind, if the circumstance

[40] Lord Brown, above n 13 at [123], Lord Hope at [41]. D. Ormerod above n 18.
[41] D Ormerod, above n 2 at 225.
[42] The expression refers to the categories drawn up by Campbell, see below, text to note 58. An 'even if' intention is obviously one in which the defendant is happy to proceed 'even if' this entails the commission of an offence.

materialized: they have already declared it.'[43] Similarly it was noted above that while in *Saik* the majority of the House of Lords regarded the defendant's state of mind as one of suspicion which was insufficient to fulfil s 1(2) of the 1977 CLA, Baroness Hale, on the other hand, argued that his state of mind was sufficient to fulfil s 1 (2) provided that he also 'intended to put the agreement into effect even if the property was in fact the proceeds of crime'.[44] The difference, then, is that recklessness is a one-dimensional and static mens rea element, perfect for use in a completed current offence where the question is what D's state of mind was as the rest of that offence came about. Conditional intent, on the other hand, is a more dynamic or two-dimensional form. It tells us not only what D's mens rea is now, but also what it will be given different alternative versions of the future.

The difficulties associated with applying a static, one-dimensional mens rea element suitable for complete conspiracies to incomplete situations in place of a more dynamic, two-dimensional one suitable for the 'future-looking' inchoate form[45] becomes apparent when it is considered that the following scenario has the potential to become a (reckless) conspiracy to rape:

> A and B are students who fancy their fellow students C and D. A and B invite C and D round to their flat, with the intention of wining and dining C and D and trying to seduce C and D into sleeping with them. A and B are reasonably confident that their plan will work, but they do realise that C and D might not fall for them as intended. Were A and B's attempts at seducing C and D into fully consensual sex to be unsuccessful, A and B would be disappointed, but there is no suggestion that they would then force themselves on C and D in any way.

In more detail the Law Commission's proposed requirements for a conspiracy in this situation would be as follows:

> 4.4 Proposal 1: a conspiracy must involve an agreement by two or more persons to engage in the conduct element of an offence…
>
> 4.4 Proposal 2: A conspirator must be shown to have *intended* that the conduct element of the offence… should be engaged in or brought about
>
> 4.4 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).

[43] Above n 2 at 225.
[44] Above n 13 at [99].
[45] Paraphrasing Lord Nicholls, above n 13 at [19].

And in that regard the Law Commission has 'in mind the definition of recklessness given by Lord Bingham in *G*', [46] so that in more detail recklessness would mean that:

(i) 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.

(ii) in the circumstances known to D1 and to D2, it is unreasonable to (agree to) take the risk in question.[47]

Given that, as noted above, the Law Commission (it is submitted correctly) regard the conditionality issue as going to mens rea, it makes sense to start by examining whether A and B's mens rea in this scenario do indeed fulfil the proposed requirements listed here, and it is clear that they do. As the Law Commission puts it in paragraph 5.5, '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.' So it is plain that under the proposals A and B have a conditional intent to carry out one form of *the behavioural element* of the offence of rape. And as far as the circumstances of C and D's possible lack of consent is concerned, in the Law Commission's own words from paragraph 5.16, their provisional proposals make it 'clear that recklessness as to the circumstance elements of such offences (V's consent…) will suffice in the sense that it will satisfy the fault element of conspiracy'.

It is possible that the Law Commission envisages A and B avoiding liability here via the *G and R* requirement that not only must D 'at the time 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' but also 'that in the circumstances known to D1 and to D2, it is unreasonable to (agree to) take the risk in question.'[48]

This is not the place to discuss the general desirability or otherwise of considering elements of justifiability as issues of mens rea.[49] The point here can be made more narrowly; even if it is thought desirable to have such elements as part of mens rea when the actus reus of the full offence[50] has been brought about, it is not desirable, and it is even perhaps impossible to use recklessness in this form as the mens rea for the paradigm, future-looking form of conspiracy. Taking a static snapshot of their awareness of the possibility of those circumstances now and then asking whether or nor it *would be* unreasonable to agree to run the risk of those circumstances (it would) is wholly beside the point when A and B are agreeing precisely never to run such a risk. When recklessness is normally used the full actus reus has taken place and in those circumstances it at least makes sense to ask whether, when the defendant foresaw the risk, his or her decision to go on and take it was justifiable or not. But for A and B there are two different risks to be run which cannot be distinguished by using the static concept of recklessness. Of course it is justifiable for A and B to carry out

[46] [2003] UKHL 50, [2004] 1 AC 1034 at [41].
[47] Law Com CP 183 paras 4.114-5.
[48] Law Com CP 183 para 4.115.
[49] For example, it is not clear how the reasonableness of taking the risk being part of the mens rea of criminal damage, (the offence at issue in at issue in *G and R* (above n 46) should fit with the defence available under s 5 of the Criminal Damage Act 1971. A similar point can be made in relation to the Law Commission's own proposal for a defence of acting reasonably.
[50] Here the full offence is of course rape, but the argument actually applies more generally.

their agreement of having C and D over to dinner in order to establish whether C and D will consent to sex, but running that risk is not the relevant substantive offence. The question asked by the test of recklessness is whether it *would be* justifiable for A and B to carry on and have sex with C and D running the risk that C and D were not consenting, but that is not a risk A and B will ever run and of course it would not be justifiable for them to do so. The danger, then, is that recklessness simply does not have the dynamic or two-dimensional quality necessary for us to take into account the fact that their decision-making process will have two stages; one where they make the initial agreement and a second one where the circumstances are known and they decide *whether or not* they actually will put the agreement into effect. Both these stages are collapsed into the static snapshot of A and B's foresight at the time they make the agreement and we end up asking now whether A and B foresee the lack of consent rather than asking what A and B would do were they to discover later that V does not in fact consent.

It is significant in this context that the Law Commission draws comfort for its proposals on recklessness from the approach taken to the proposed inchoate complicity offences in the Serious Crime Bill.[51] Obviously the relationship between an inchoate offence of assisting and encouraging crime and the offence of conspiracy will be close. Indeed, it was in part to avoid the use of conspiracy in cases such as *Hollinshead*[52] that the new offences have been created, the current consultation paper cites *Anderson*[53] as another example of the overlap, and it is inevitable that in some fact situations it will not be obvious whether conspiracy or inchoate complicity is the correct charge. Similarly it is plain that there should not be any great diversion between conspiracy and attempt. Nevertheless, the two-stage aspect of conspiracies provides a key potential difference from complicity and attempts. In the case of an assistance or encouragement D2 relinquishes control of the situation once he has given his encouragement or his assistance to P. In this context it is entirely appropriate to use a single-snapshot form of mens rea because the question is indeed what D foresees will happen once P goes off with his assistance or encouragement. This situation is not so different from one in which D as a principal defendant makes his decision to throw a rock or start a fire and the question we ask is whether he foresaw harm to someone or something in doing so. Of course in conspiracy D1 may well also lose physical control of the situation if the agreement is that he will provide equipment for D2 to use later on, but the whole point is that by reaching agreement with D2, rather than simply encouraging him/her, D1 seeks to exert some influence over D2's actions even when D1 is not there. Conversely, in the case of attempts there is also only one relevant instant for the determination of mens rea but this time it is because D is still involved as the principal actor right up until the point when his attempt is thwarted. So this time the question is what D's state of mind was as (s)he was attempting the offence, but again there is no problem with using a form of mens rea from the full offence. Similarly it was noted above that the use of the single snapshot of recklessness is understandable in 'complete' conspiracies where the full actus reus of the crime has taken place and the defendants had a particular state of mind at the time. It is only future-looking inchoate conspiracies which contain two

[51] Now enacted as the Serious Crime Act 2007.
[52] [1985] 2 All ER 769
[53] [1986] AC 27

relevant moments and thus need a two-dimensional or dynamic form of mens rea to cope with them.

Finally, to return to the problem of A and B who invite C and D over for dinner, having stated that in precisely these sorts of circumstances 'recklessness as to the circumstance elements of such offences (V's consent…) will suffice in the sense that it will satisfy the fault element of conspiracy', oddly they continue in footnote 16, 'so long, of course, as there is also an agreement to perpetrate the conduct element of the offence'. But this is to beg an important question. In the abstract it is not clear whether A and B have agreed to perpetrate the conduct element of the offence, because they have only agreed to do so conditionally. The reason for the confusion is that although the conditionality problem currently has two sources, the 'necessity requirement' and s 1(2), and although the Law Commission propose two different solutions for it, these two pairs do not exactly match. Both the Law Commission's proposals, one to apply to conduct and consequence elements and one to apply to circumstance elements of the actus reus, go to the issue of mens rea. It was submitted above that this is entirely the correct approach, but nevertheless the result of this for A and B is unfortunate; we may have to regard their agreement as fulfilling proposal one. It is true that at para 1.32 the Law Commission does explain that 'it will need to be made clear that the 'necessity requirement' outlined above will relate only to the conduct and (where relevant) consequence elements of offences, not to circumstance elements. It is also true that, as shown above in diagrammatic form, this requirement could be used to argue that A and B should not be guilty of conspiracy to rape. However, it was also demonstrated above that any such distinction would also have the unfortunate practical result of preventing the burglary-murder example 5C and the facts of *Reed* from being conditional conspiracies, because the only kinds of conditional agreements which will 'necessarily' lead to the commission of a crime are conditional agreements to bring about single results captured by consequence crimes (such as *O'Hadhmaill*), and even those cannot necessarily be so regarded on Smith and Hogan's reasoning.[54]

<u>Conditional Conspiracies: proposed solutions</u>
This brings us to the third question asked by the Law Commission at 5.17: 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?

The answer to this specific question overall is probably[55] 'no'. There should probably be no circumstances *under which D1 and D2 believe they* ***will*** *carry out an agreed*

[54] See above n 1.
[55] The slight reservation in this answer is because in some cases it may be that a conspiracy to commit one offence is mutually exclusive of the agreement to commit another offence. For example, drug dealers A and B decide that they would be able to solve their shared problems by the elimination of either C or D but they decide that it is too risky and unnecessary to try to kill both. They will simply kill whichever of C and D makes it easier for them to do so first. Technically, the one thing A and B have agreed never to do here is to kill both C and D. Thus on the logic used in the rest of this analysis it would not make sense to charge them with two counts of conspiracy to murder. However, the circumstances in which such an agreement will be made seem likely to be relatively rare and difficult enough to distinguish from those which

*course of **criminal** conduct* which should not count as conspiracies. However, in raising and discussing this question the Law Com actually look at several slightly different issues and these require various different answers to be given.

1. genuineness of intent.
There must presumably be a point at which someone is quite prepared to agree to something ludicrous on the basis that it will never come to pass. 'If that happens we'll eat his hat' (presumably criminal damage or theft of the hat). That would simply be evidence of the kind Lord Nicholls discusses[56] which would 'cast doubt on the genuineness of a conspirator's expressed intention to do an unlawful act'.

2. Continuing negotiations
This seems to be slightly different from the Law Commission's example where two people agree to kill V tomorrow 'if it seems right then'. The point here is surely not that the intent is not genuine, just that they are in *Walker*[57] territory and are still negotiating about what would be 'right'. But both of these are different from the third scenario.

3. Agreements which will never entail the commission of an offence
As noted above in relation to the ABCD dinner scenario, in paragraphs 5.14-5.15 the Law Commission discusses a provision taken from the US 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'. The example given in the commentary on this section of the Code runs as follows 'it 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.'

As the Law Commission says (5.15) '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'. The proposal here is that instead of dealing with such cases using a mens rea of recklessness, which as shown above is too one-dimensional and static to cope properly with the dynamic, two-dimensional problem of conditionality, we should instead go back to using precisely the concept of conditional intent already proposed by the Law Commission in relation to actus reus elements of conduct and consequences.

To return to the Law Commisison's question 3, there are *no* circumstances under which D1 and D2 *believe they will* carry out an agreed course of *criminal* conduct which are of such a nature as to undermine the existence of any true intent to commit the offence, but that is not at all the same thing as asking whether there are any

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are agreements to commit one or both offences that it does not seem desirable to allow this to operate as an exception to the otherwise general rule that only an agreement never to commit an offence can exempt D1 and D2 from liability for conspiracy.
[56] Law Com CP 183 para 5.13.
[57] [1962] Crim LR 458.

situations in which D1 and D2 *effectively decide that they will never* carry out an agreed course of *criminal* conduct, which is what the citation from the US penal code is getting at. The danger of the Law Commission's proposal regarding recklessness is that, as demonstrated above, the US penal code defendants become liable for conspiracy too. An agreement *never* to commit an offence becomes a conspiracy to commit it.

The same would be true of the Law Commission's parallel example of an agreement between D1 and D2 to sell guns 'so long as they are not unlicensed'. If this truly is, as above, an agreement 'to sell guns if we can do so legally and if we cannot do so legally we will not sell them at all' then again it ought not to be considered a conspiracy to deal with unlicensed weapons. It is submitted that this is also what really concerns the Law Commission about their example 4H in which art dealers believe they have the expertise to recognise genuine items from fake ones "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". Here again this is an agreement *never* to commit the offence of dishonestly failing to disclose to another person information which they are under a legal duty to disclose intending to make a gain for themselves or to cause loss to another or to expose another to a risk of loss contrary to s 3 of the Fraud Act 2006 and so to regard it as a conspiracy to commit that offence would be equally ludicrous. The Law Commission agrees, but its solution to this case is to see it as one in which the running of the risk will be found to be justifiable. It was seen above, however, that that solution cannot work in all cases and even here it still collapses the two stages identified above into one. As with all other cases D1 and D2 actually make two relevant decisions. The first is to go into business as dealers of a certain artist's work. The second is to sell any given piece of art. And the likelihood of the risk materialising may be very different between those two points. It may well be that, looked at in the abstract at the beginning of their art dealing agreement, the risk that D1 and D2 will sell a fake as if it were genuine is fairly small. When balanced against the general economic and cultural desirability of their continuing their business the running of that risk is therefore wholly justifiable. In relation to any specific piece of art, on the other hand, that risk may be much higher and thus much less justifiably run. A dynamic approach such as that of Baroness Hale is not only more subtle and accurate, it is also potentially less likely to lead to the confusion between those two snapshots in the mind of the jury that the proposed test of recklessness has the potential to create.

Abandoning recklessness and returning to this two-dimensional or dynamic concept of conditional intent thus allows us to ask not only what D1 and D2s attitude is now, but also what it would be given different eventualities in the future. That will in turn allow us to distinguish, not between different kinds of conditional conspiracies *to commit an offence*, which cannot be done, but between conditional conspiracies to commit offences and *agreements which will never entail the commission of an offence*.

In his useful analysis of the issue of conditional intent, as Ormerod notes, Kenneth Campbell identifies three broad categories:[58]

[58] Above n 15 at 84-5, cited Ormerod above n 2 at 221.

1. The first concerns 'non-comprehensive conditional intentions' where the defendants' state of mind is declared only in relation to one possible eventuality. These can be put in the form 'we will do X if Y'. They are non-comprehensive because we do not know what will happen if Y does not occur.
2. The second concerns 'comprehensive conditional intentions'. These can be put in the form 'we will do X only if Y'. They are comprehensive because we know all the possible outcomes; what will happen if Y occurs (the defendants will do X) and what will occur if it does not (they will not do X).
3. Unconditional intentions, such as 'we will do X even if Y'. Such intentions are unconditional because although a particular eventuality, Y, is foreseen, this will not have any effect on the defendants' intention.

On the argument outlined here, however, the key distinction is in fact to be drawn *within* categories 1 and 2 between situations in which Y is criminal (1a and 2a) and those in which it is legal (1b and 2b). Beginning with category 2a, and an agreement to bomb a disco 'only if the ceasefire is abandoned', the question is a simple policy one; is the agreement to commit a crime only in certain circumstances an agreement to commit a crime? The Law Commission's answer is 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. 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'.'[59] Similarly, in *Saik* Lord Nicholls held that '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. In the nature of things, every agreement to do something in the future is hedged about with conditions, implicit if not explicit.' Campbell disputes this,[60] but even he concedes that 'if it is granted that there is no very strong reason for discriminating between an unconditional intention and a conditional intention whose condition is very likely to be satisfied; and if it is also granted that the likelihood of satisfaction of conditions is a continuous spectrum; then it seems that, if there are distinctions to be drawn, that should [not] be done by creating an arbitrary line in the substantive law'.[61] The point is that whether such intents are regarded as 'not truly conditional' any more than intent normally is, or whether, as seems preferable, we conclude that they are conditional but the law should make no exception for them on this basis, we arrive at the same conclusion for the same reasons. We do not want them to fall outside the reach of conspiracy because if an arrangement which otherwise would amount to an agreement but had in it some form of reservation, express or implied, could not amount to an agreement so as to found the crime of conspiracy, 'nobody would ever be convicted of conspiracy'.[62]

[59] Law Com 183 para 5.5
[60] Above n 58 at 89-90, arguing that 'suffering from a draught, only a paranoic would decide, not that he should close the window, but that he should close the window only if nothing unexpected happened before he reached it. '.
[61] Above n 58 at 96. He continues by explaining that it should be done instead 'by the standard means of dealing with cases which admit of indefinite variation of degree, namely prosecutorial and sentencing discretion'.
[62] Decision of the Court of Appeal in *Mills* [1963] Crim LR 181 at 183.

Once we have thus ascertained that the most limited 2a agreements 'to commit a crime *only if* Y' should be classified as criminal conspiracies it is then obvious that much less limited agreements under category 3 'to commit a crime *even if* Y' or 'to do X *even if* it is a crime' must count as conspiracies for the same reason, as must 1a agreements 'to commit a crime if Y'.

Slightly more difficult is the case of agreement 1a 'to do X if Y'. An example of this could be the agreement 'to handle the property if it is not hot' or 'to have sex with V if she consents'. However, on further analysis it appears that we (or in fact the jury) actually need to reallocate these cases into either category 2b or 3. In other words, we have to establish in each case what the comprehensive version of the agreement would have been. If the agreement is in fact 'to have sex with V if she consents, but actually also to have sex with her even if she doesn't' then it turns out to be an example of a category 3 agreement 'to have sex with V *even if* she doesn't consent'. Conversely, if it is in fact an agreement 'to have sex with V *only if* she consents' then it belongs in category 2b, the one category which should not count as a criminal conspiracy at all. And it is of course precisely this distinction that Baroness Hale sought to draw in *Saik*.[63]

Conditions likely to give rise to this innocent sort of 2b agreement will probably be one of three different types. First (unlike those at issue in *O'Hadhmaill*, *Reed* and the London-Edinburgh example in *Reed*) there are conditions which are themselves another element of the offence. Thus an agreement to have sex with V 'only if she consents' , as in the US Model Penal Code example is an agreement to carry out the conduct element of the offence of rape *only if* the circumstance element of lack of consent is not present. It was argued above that the Law Commission's recognition of different kinds of actus reus element is absolutely vital, and indeed it is. It was the absence of such an analysis in the past that has led to confusion over conditional conspiracies such as the London to Edinburgh example given in *Reed*, and the clarity given by the Law Commission on this front is extremely welcome. Nevertheless, it would be a mistake to carry the analysis through to the point where different elements of a composite actus reus are considered entirely independently of each other. It is this problem which allows the conditional intent to have sex with V to be added to the independent foresight that V may not consent so that a conspiracy to rape can be created which pulls itself up by its own bootstraps, whereas the solution proposed here would avoid that problem. Similarly, the Law Commission is right to single out circumstance-element offences as being special in this regard, since agreements very often will be conditional upon certain circumstances pertaining. After all, defendants will by definition have control over their behaviour and over at least the steps they can take to try to bring about certain consequences or not, whereas circumstances such as ownership or origins of property, consent of third parties, status of the political situation in Northern Ireland and so on will often be beyond their control and unknown at the time of the initial agreement. Nevertheless, as before we should be wary of drawing sharp lines that distinguish absolutely between different kinds of actus reus element because 2b agreements that will never entail offences need not

[63] Above n 13 at [99].

always take this form and indeed it is possible to think of two other kinds of condition likely to give rise to innocent conditional agreements.
The second kind of condition likely to lead to an innocent 2b conditional agreement is the existence of facts giving rise to a justificatory defence. For example, A and B may be kept hostage in their house and may agree to kill their attacker 'if there is nothing else we can do to escape or to stop him'. This too would be an agreement never to commit a homicide offence because were they to kill their attacker in accordance with their agreement they would have a defence of self-defence.

A third kind of condition that could also have this effect is the belief that the full offence is impossible. For example let us assume that flatmate A boasts to flatmates B and C that he has just bought some picnic wine glasses which are 100% shatterproof in all circumstances. Genuinely and absolutely believing him, B and C agree that they will surprise their fourth flatmate D, when he comes home, by hitting a glass with a hammer, only for it not to break. This surely cannot be regarded as a conspiracy to commit criminal damage because it is precisely the opposite of that. It is an agreement to do something *only because* there is no chance of any part of the prohibited result materialising. Indeed, acceptance that an agreement such as this is not a conspiracy because the defendants believe the full offence to be impossible[64] must surely be the logical corollary of criminalising conspiracies to commit offences which are, unbeknown to the conspirators, actually impossible.[65]

These are only three kinds of condition on which innocent agreements may depend and there may be others. The point is, as the American Model Penal Code puts it, that in each case 'the condition negatives the harm or evil sought to be prevented by the law defining the offence' and far from being conspiracies 'to carry out an agreed course of *criminal conduct*' they are instead agreements *never to carry out any form of criminal activity at all*.

Finally, it should be made clear that, contrary to the Law Commission's proposal at para 1.32, the 'necessity requirement' should be removed altogether from the actus reus of conspiracy. As has been demonstrated, it is not possible to accommodate such an issue in the actus reus if impossibility of the full crime is to be no defence. Our

[64] Of course more plausible examples might include legal impossibility rather than practical impossibility. For example, D1 and D2 agree to have sex with V whom they are sure has just had her 16th birthday. They believe the full offence contrary to s 9 of the Sexual Offences Act 2003 to be impossible because she is not underage. In fact her birthday is the following week and she is still 15. However, the example of the shatterproof glass was chosen here in order to illustrate the fact that the exception nevertheless extends beyond circumstances and extends beyond legal impossibility, otherwise it would be in danger of merging with the first kind of condition, those which are themselves an element of the full offence.
[65] Although this seems to run contrary to the case of *Anderson* [1986] AC 27 it should be noted first that he could possibly have been charged with conspiracy to commit criminal damage even if he did not think the whole plan to aid an escape from prison would work. And second it has been argued that *Anderson* was in any event wrongly decided and precisely the sort of case that should now either be covered by the new offences of inchoate assisting and encouraging or, on its facts where no assistance and encouragement was in fact provided, preferably nothing. For further detail of this discussion see Law Com Report No 300 on *Inchoate Liability for Assisting and Encouraging Crime* at paras.3.12-3.14.

concern with conditional conspiracies is one of mens rea only, and the Law Commission is right to recognise this. And once this has been established it is clear that there are better means of dealing with it.

The following answers are thus proposed to the Law Commission's first three questions:

Questions 1 and 2: recklessness should not be used at all, and nor should it be replaced by belief or the mens rea of the substantive offence. Instead conspirators must be shown to have intended the relevant elements of the actus reus, whether conduct, consequences or circumstances. However, in answer to question 3, while a conditional intent is in principle sufficient for this purpose in relation to any of the three kinds of actus reus element, it should not be regarded as sufficient where the condition in question is that the offence as a whole should not take place. The provisional proposals given in paragraph 4.4 should thus be reformed as follows:

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. ***An agreement shall be regarded as satisfying this requirement notwithstanding the fact that it is dependent upon the fulfilment of any given condition.***

(This means that conditional agreements count as far as the actus reus of conspiracy is concerned and the necessity requirement is finally abandoned)

Proposal 2: ***Subject to proposal 5 below,*** **a conspirator must be shown to have intended that** ***all the relevant elements of the offence should be respectively engaged in, occur, or brought about.***

(This removes the one-dimensional recklessness requirement for circumstance elements).

Proposal 3: ***Subject to proposal 5 below, an intent shall be regarded as fulfilling proposal 2 notwithstanding that it is dependent upon the fulfilment of any given condition other than a condition of the kind referred to in proposal 5 below.***

(This deals with cases in categories 1 and 2a where the intent is to carry out the relevant elements of the offence 'if Y' or even 'only if Y', provided that Y is not something which makes it legal).

Proposal 4*: Subject to proposal 5 below, an intent shall be regarded as fulfilling proposal 2 notwithstanding that one or more conditions are not yet known by the defendant to be satisfied, provided that that intent would remain the same even if those conditions were to be satisfied.*

(This deals with cases in category 3 cases where the intent is to carry out the relevant elements of the offence 'even if Y', as long as the activity will remain criminal 'if Y'. This could include cases to bomb a disco 'even if the ceasefire is not abandoned' which are extraneous to the offence itself, or conditions integral to the offence itself

such as an agreement to have sex with V 'even if she does not consent'. *Saik* could also fall under this heading.[66] The only cases it will not include are those dealt with under proposal 5 below. Given that the proposal applies where one or more conditions are not yet known *by the defendant* to be satisfied, it would be equally suitable for charging conspiracies where the condition has not yet actually been satisfied in fact (such as an agreement to have sex with V 'even if when we get there she does not consent') as well as those in which it has but the defendants do not know that it has, as in *Saik*. In other words, it would be suitable for charging both complete and incomplete conspiracies.

Proposal 5: ***An intent shall not be regarded as fulfilling proposal 2 where it is dependent upon a condition, fulfilment of which would negate the possibility of criminal liability for the relevant offence.***

(This is the key proposal which will rescue A and B in my example above from being convicted of conspiring to rape C and D. It would also rescue the antique dealers and other property handlers as long as their intent is to deal with property *only if* it is legal to do so, in other words, cases falling under 2b above.)

Finally, from the point of view of jury directions, it is worth noting that it is unlikely that any jury would have to cope with all 5 proposals at once. For example, a case such as *O'Hadhmaill* would simply require them to be directed on the basis of 1, 2, 3 and 5 that they needed to find intent and should not worry about either that intent or the agreement itself being conditional, as long as the condition would not make the agreement legal. A case such as *Saik* would simply require them to be directed on the basis of 1, 2, 4 and 5 that they should not worry about the agreement being conditional and that they should only convict Ds if the agreement was to go ahead even if this entailed illegality. An agreement to go ahead only if it would not be criminal to do so would not count. It does not seem likely that juries will be unable to distinguish on the basis of common sense between 'only if legal' and 'even if illegal' intents, especially if matters such as wilful blindness can be taken into account as evidence.

2. Exempt Conspirators

Sensibly the Law Commission's proposal 7[67] is that the spousal immunity rule should be abolished, but this leaves legally protected people, children under the age of criminal responsibility and those such as police informers who are not so much immune from criminal liability as lacking the mens rea or covered by the 'acting reasonably' defence. However, the Law Commission does not take a single approach to dealing with agreements with people in each of these categories. Agreements with children under the age of criminal responsibility and law enforcement agents who lack the mens rea of conspiracy are to be dealt with using the offence of attempt to conspire,[68] while conspiracies including the victim will still count as conspiracies but the victim him or herself will have a defence, analogous to the one under the new

[66] Setting to one side the fact that in some cases (but not under POCA) D must have this 'even if' conditional intent in relation to each of several different kinds of property.
[67] Ibid para 9.29.
[68] Law Com CP 183 para 7.50 and 7.51.

Serious Crime Act 2007.[69] In the case of the defence for the victim, the proposal is for the victim to have a defence "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; and (3) D is the person in respect of whom the offence encouraged or assisted was committed or would have been had it been committed."[70] Given requirement (1) it is not wholly clear whether the defence would apply, for example, to ordinary offences against the person, given that they were not enacted for 'the protection of a particular category of persons' but rather for the protection of people in general. However, from the point of view of consistency it is arguable that the defence should extend to such offences.

If a distinction is to be drawn between different categories of exempt conspirators, arguably it should instead be between agreements made with the victim or a child on the one hand and those made with the law enforcement agent on the other, simply because if the defendant makes an agreement with a child or the victim (s)he is much more likely to know that that is what (s)he is doing, whereas the whole point of an undercover law enforcement agent is that the defendant should not know that the complete conspiracy has not been formed. The Commission's reasoning in distinguishing between agreements with children and agreements with the victim is that '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. 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.' But it is not clear why this should be the case. It is possible that, empirically, children are less likely to go through with the agreed course of conduct, but without such evidence it seems at least equally possible that they will be more likely to do so in order to receive the approval of the defendant adult, precisely one of the reasons Katyal identifies for conspiracies being dangerous.[71] And although it is true that the child's intent cannot be classed as 'criminal' that does not stop it being in fact an intent to produce the relevant harm nonetheless. More persuasive is the Law Commission's reasoning at 10.36 that 'the essence of conspiracy is the meeting of two minds in an agreement to commit a criminal act'. Certainly it is arguable that an agreement between a child and an adult is not a meeting of criminal minds in the manner envisaged by the concept of conspiracy, but on that basis it could equally be argued that nor is the agreement between the defendant and the proposed victim of the offence, contrary to the arguments of the Law Commission at 10.12. Their argument is that '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'. But the question is not whether the victim has or can form criminal intent in general, the question is whether there has been a meeting of criminal minds in relation to the

[69] Paragraphs 10.23 and 8.24 respectively. At paragraphs 10.24 and 10.32 the Commission did, however, suggest that attempted conspiracy might be used for agreements with the victim too.
[70] Law Com CP 183 Para 10.16.
[71] Law Com CP 183 paras 2.14 and 2.16.

particular offence at the heart of the conspiracy, and it seems odd to regard this as having occurred when the defendant has made an agreement with someone whose involvement will not be criminal at all. Indeed, whereas a child will have intended to play a part in bringing about the relevant harm to another, albeit non-criminally, a victim will not have intended to play a part in bringing about harm to another at all. It therefore seems odd to deal with children in one way and the victims in another, and to propose that agreements with the victim should be regarded as conspiracies but those with children should not. In either case, the absence of a meeting of criminal minds should prevent a finding of conspiracy, and this also applies to law enforcement agents who lack the mens rea for the offence, as the Law Commission proposes,[72] as well as to anyone else who lacks the requisite criminal mind, such as the insane.

The only case in which it could be argued that a conspirator is personally immune but still has the requisite criminal mind for D to meet, arises where a law enforcement agent does intend the offence to take place (for reasons of verisimilitude and his or her own personal safety), but would have a defence of acting reasonably in the circumstances. As already noted, the Law Commission proposes to deal with these in the same way as victims, by regarding them as complete conspiracies while granting the agent a personal defence, and in this context the reasoning works. Nevertheless, it is arguable that it would be simpler just to have one rule across the board, rather than having to distinguish between different classes of law enforcement agents in this way. Just as it seems unfair for D2 to 'benefit unfairly from the arbitrariness of the current law'[73] it seems equally arbitrary to distinguish between different forms of liability for D2 on the same basis. The proposed solution for immune conspirators will be discussed further below in relation to attempted conspiracy.

Double Inchoate Liability

Assisting and Encouraging a Conspiracy

In Law Com 300 the Commission concluded that it should be possible to be liable for assisting and encouraging a conspiracy and in this paper the Commission continues to hold that view. Since then the Serious Crime Act 2007 has come into force, and so under s 44 it is now possible to be guilty of doing an act capable of assisting and encouraging a conspiracy intending to encourage or assist its commission.[74]

Several of the examples given by the Law Commission in support of this offence are very convincing, such as the person who makes available a room so that D1 and D2 can agree to kill an enemy common to all three of them (7A), and the two people who

[72] Law Com CP 183 para 7.50.
[73] Law Com CP 183 at para 8.23. The Law Commission is here referring to the fact that under the current law if the law enforcement agent intends to arrest D before the commission of the full offence there is no mens rea on the part of that agent and thus no meeting of criminal minds for the purposes of conspiracy. D will therefore not be liable.
[74] For the other two offences under the Serious Crime Act 2007, ss 45 and 46 there is a provision in s 49(4) which states that acts under those two sections shall be disregarded if they are capable of assisting or encouraging only one of the offences listed in Parts 1-3 of Schedule 3 (which includes conspiracies and attempts). There is, however, no similar provision in relation to s 44. On the argument proposed here there would have been.

make available internet chatrooms or websites to allow the formation of conspiracies for identity theft and child abuse (7C and 7D). Less convincing, as the Law Commission itself points out, is that of 7B in which D1 encourages D2 to attend a meeting of the local animal rights protesters intending that D2 should there agree to take part in a conspiracy to use criminal means of protest but not actually believing that this is what will happen. As the Commission puts it, '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.'[75] Given that this is the case it might be questioned whether, simplicity apart, it was wise to extend the whole of the new s 44 and 45 offences to conspiracy. Encouragement to commit a substantive offence and conspiracy to commit such an offence can both be justified along the lines suggested by Professor Katyal and outlined at the beginning of the Law Commission's report. However, where the defendant has managed neither of these it really does not appear that they should be added together to make a highly remote form of liability. A similar argument could be made in relation to inchoate acts of assistance for what is in itself an inchoate offence; the link to the full offence is just too remote.

Essentially the key difference between example 7B on the one hand and examples 7A, C, and D on the other, all of which appear to be more convincing, is that in 7A, C and D the defendant has actually provided some practical assistance to the conspiracy in the form of a room or a website, whereas 7B is an example of words leading to further words in the form of the conspiracy and it is this that may be thought to be too remote. Especially given that if D in example 7B had said anything at all in the way of encouraging P to take part in the criminal protests he could in any event be liable for inchoate or full secondary offences of encouraging the full offence. It might thus have been thought preferable to have an offence of something like 'facilitating a conspiracy' in which D must at the very least actually *have done* something *practically to assist* the conspiracy.[76] This could be as simple as providing two prospective conspirators with each others' contact details, or providing P in example 7B with the location of the animal rights meeting, but at least in such cases D would have actually done something rather than just speaking and thus the offence could be rendered marginally less remote from the commission of the full offence.

An alternative solution would have been to require D's inchoate assistance or encouragement of the conspiracy to have had a but-for impact on the causation of that conspiracy. Thus if it could be shown that in example 7B P would not have formed the conspiracy had it not been for D's encouragement this might be thought sufficiently proximate to the full offence to warrant liability. However, this might be thought to be less desirable for two reasons. First, even if were it not for D's encouragement P would not have gone to the meeting, her subsequent participation in the conspiracy is independent from him. This is because, more fundamentally, even if in fact we can say that but for D the conspirators would not have conspired, it was still

[75] Law Com 183 para 7.30.
[76] It is accepted that such a distinction runs contrary to the merging of encouragement and assistance described by the Law Commission in their report, LAW COM 300 *Inchoate Liability for Assisting and Encouraging Crime* paras 5.21-5.22.

their (entirely free) choice to do so and thus basing D's liability on some form of causation rather than on his or her independent provision of practical assistance might be thought more problematic. And in addition to this it may well be difficult to prove that the defendant did indeed have this kind of impact.

In any event, it would have been desirable for the form of secondary liability for conspiracy to be narrowed down from the proposal that any form of assistance or encouragement of a conspiracy is sufficient, even if not successful. Nevertheless, s 44 of the Serious Crime Act 2007 does now create one such form of liability. At the very least, then, it is proposed that the answer to both the Law Commission's Questions 7 and 8 should be 'yes'; at the very least there should be a defence available[77] and even more importantly the consent of the Director of Public Prosecutions should certainly be required for prosecutions involving double inchoate liability.

Attempting Conspiracy

In order to analyse whether there is ever a need for this offence it is worth considering a series of different situations separately.

Possible Conspiracies

As far as attempting conspiracy is concerned, the proximity issue is perhaps marginally less of a concern than it was in relation to assistance or encouragement of a conspiracy, but the question is really whether the concept of attempted conspiracy is apt to capture what it is that is at stake in the two examples given by the Law Commission as 7E and 7F. In 7E when the rival drug barons meet to see if they can find a means of eliminating their mutual enemy, it is actually likely that there will be a series of what under the new law would constitute encouragements to do acts capable of assisting or encouraging the commission of a crime contrary to s 44 of the newly-enacted Serious Crime Act 2007. For example, if D1 says to D2 'well couldn't you get your X to kill V when…?' then this amounts to an encouragement to D2 to encourage X to commit an offence.[78] Similarly, in example 7F D1 the career criminal seeking funding to buy and handle another load of stolen goods is actually encouraging D2 to assist that offence of handing. Again, either, as seems likely, this is an offence on its own terms[79] or it is not and should not be; it does not seem necessary for the offence of attempted conspiracy to be enacted to cover it. The most problematic situation is one in which D1 suggests to D2 that D1 should carry out a criminal course of conduct, but D2 does not agree and thinks that instead D2 should follow a different course of criminal conduct. Even if in such a case neither D1 nor D2 can be described as assisting or encouraging an offence by the other, nor does it seem very apt to describe them as attempting to conspire with each other. Connected to all this is the question of when the prospective conspirators will have done enough for their actions to constitute an attempt if such an offence were to exist. The whole point of a conspiracy is that it is an agreement, and the only way one can end up only attempting to commit what is otherwise a possible conspiracy is by talking without

[77] Specific comments on the defence of acting reasonably will be made below.
[78] The Accessories and Abettors Act 1861 is not listed under Schedule 3 of the Serious Crime Act 2007. It is therefore assumed that it is possible to be guilty of an offence under ss 44, 45 or 46 SCA 2007 by doing an act capable of encouraging or assisting an offence under the 1861 Act with the requisite mens rea for ss 44, 45 or 46 respectively.
[79] Ibid.

reaching agreement, as in *Walker*[80]. The danger is, then, that discussions and negotiations will become attempted conspiracies when they are really at most encouragements and sometimes not even that. At paragraph 2.4 the Law Commission outline Simester and Sullivan's arguments that in the light of the new inchoate offences of assisting and encouraging it is difficult to justify the retention of conspiracy at all.[81] As Simester and Sullivan point out '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'.[82] These arguments were not strong enough to lead to the abandonment of conspiracy itself, but with the offence of attempted conspiracy the proposal is to go one stage beyond even that to conversations which are not only *non-consummated* but are also *non-agreements* which do not amount to encouraging or assisting, where their arguments have much more weight. The absence of any agreement very largely removes Professor Katyal's concerns about loyalty and economic efficiency[83] and so the only remaining arguments in favour of such an offence are those based on Intelligence-Led Policing as identified by Professor Tilley.[84] It is true that in the example given above D1 and D2 have each shown some predisposition to committing an offence, so if the police are monitoring their conversation this may well suggest that D1 D2 and the targets of their proposed offences V1 and V2 should be watched more carefully and arrested if they go beyond their mere conversation in any way, but it is difficult to see that this should be sufficient to constitute an offence in itself.

Impossible Conspiracies

The one situation in which an attempted conspiracy might appear to be more apt is where D thinks he has succeeded in committing conspiracy but unbeknown to him the conspiracy was impossible. This, as the Law Commission notes,[85] is closely connected to the question of immunity from liability for conspiracy discussed above. It was suggested there that the same rule ought perhaps to apply to all forms of agreement with those immune from conspiracy, and that on this basis a system based on retaining conspiracy but with a personal defence for the immune conspirator did not seem particularly apt given the absence of a meeting of criminal minds in all but one of the situations discussed.[86] The alternative solution, proposed by the Law

[80] Above n 57.
[81] Citing A P Simester and G R Sullivan, *Criminal Law, Theory and Doctrine* (3rd ed 2007) p 304.
[82] Ibid.
[83] See above n 38.
[84] Law Com CP 183 Paras 2.7-2.8, citing N Tilley, 'Problem-Orientated Policing, Intelligence-Led Policing and the National Intelligence Model', Jill Dando Institute of Crime Science, www.jdi.ucl.ac/downloads/publications/crime_science_short_reports/problem_oriented_policing.pdf.
[85] Law Com 183 para 7.50.
[86] The exception was for law enforcement agents who have the requisite mens rea but also a defence of acting reasonably. However, it was suggested that for simplicity and to prevent arbitrariness of outcome such cases ought to be considered alongside all the others where

Commission for agreements with children, law enforcement agents without mens rea and possibly even victims, is that in these cases the defendant should be regarded as having attempted to conspire.[87]

The disadvantage of this approach is that if the defendant were, for example, to know the law and agree with a 9-year-old that the child should steal something precisely because the child would then be underage for criminal liability, it would be difficult to describe the defendant as having attempted to conspire. The defendant could have chosen someone to agree with precisely because that agreement could not be classified as a conspiracy. There cannot be many examples of attempts to commit things which the defendant knows to be impossible which still count as attempts, and indeed the conclusion is somewhat counter-intuitive. Those who know the law and agree with children under 10 thus appear to fall outside the boundaries of the proposed offence of attempting to conspire. The same would apply were this approach to be adopted in relation to agreements with the victim; if D knows (a) that he is forming the agreement with V and (b) that V is the victim and (c) that it cannot therefore in law be a conspiracy, it seems odd to describe D as attempting to conspire with V. And once those who know the law fall outside the definition, a distinction surely cannot be drawn between cases in which D knows the law and those in which (s)he does not. In part this is because D would always be able to claim that (s)he knew the law of conspiracy and indeed (s)he may well do so. But mainly it is because in any case it is hardly desirable. It can thus be concluded that if D knows who V is and knows the facts which in law disqualify V from being a conspirator, that ought to be sufficient to suggest that attempted conspiracy is not an apt offence to use.

However, it may in any case not be necessary to resort to such an offence in these cases since the enactment of the Serious Crime Act 2007. S 47 (2) of that Act provides that 'if it is alleged under s 44(1)(b) that a person (D) intended to encourage or assist the commission of an offence, it is sufficient to prove that he intended to encourage or assist the doing of an act which would amount to the commission of that offence.' S 47(5) then provides 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 – (a) if the offence is one requiring proof of fault, it must be proved that (iii) D's state of mind was such that, were he to do it, it would be done with that fault; and (b) (and 47(7)): if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that (i) D intended or believed that, were the act to be done, it would be done in those circumstances or with those consequences'. The explanatory notes indicate that these sections are to cover a situation like that at issue in *Cogan and Leak*[1976] QB 217**:** **'**For example, D (a woman) encourages P to penetrate V with his penis (rape) and believes that if 'P were to do so, it would be without V's consent. P reasonably believes that V does consent so does not have the mental element required for conviction of rape. Therefore, D's fault is determined under section 47(5)(a)(iii) in that if she were to commit the act, she

there cannot be a meeting of criminal minds because the agreement is made with the victim of the proposed offence, a child, a law enforcement agent without mens rea or, it was suggested, someone who is insane.

[87] Above ns 69 and 73 respectively.

would do it with the fault required.'[88] And indeed s 47(6) goes on to provide that 'for the purposes of subsection 5(a)(iii), D is to be assumed to be able to do the act in question.' What is not so clear is whether this combination of provisions will also work where the person encouraged is a minor or a victim. The first problem with their application is that it is not wholly clear what 'would amount to' in s 47(2) means in this situation, but if it could be taken to mean 'would amount to the commission of that offence if the proposed principal were capable of committing the full offence' then it seems likely that acts capable of assisting or encouraging both those who are underage and those who are victims could still be caught. It could then be argued that when D encourages a child to do an act which would amount to an offence were the child capable of committing the full offence, D is liable for the s 44 offence provided that D would have had the requisite fault for the offence under ss 47(5)(a)(iii) and (b). If I thus encouraged my 9 year old neighbour to steal something for me, as long as I would have had the mens rea for theft and as long as the act would have been theft if committed by an adult, it is therefore arguable that I am guilty of an offence contrary to s 44.

Cases involving encouragement of the victim are more difficult, because here by definition the defendant will be encouraging at most an act of assisting, rather than encouraging the principal offence itself. As noted above,[89] however, it does not seem impossible in principle that acts capable of encouraging or assisting the commission of an offence of assistance or encouragement can give rise to liability under s 44 and if this is the case then the reasoning involving s 47(2) and 47(a)(iii) and (b) would otherwise be the same as in relation to the encouragement of children, as long as the defendant does indeed have the mens rea required by those sections.

If, however, this interpretation of the new Act is not possible, it is suggested that a better approach would be to generalise the concept used in offences such as s 8 Sexual Offences Act 2003 and instead to have a generic inchoate offence such as 'doing an act capable of encouraging

(a) what would be an offence if committed by someone over the age of criminal responsibility or
(b) is already an offence but the person encouraged or assisted is the person in respect of whom the offence encouraged or assisted was committed or would have been had it been committed.'[90]

Such an offence would more accurately capture D's wrongdoing than would any offence based on agreement or attempted agreement in such circumstances.

The only circumstances in which attempted conspiracy does therefore seem to make sense is therefore where D either does not know who (s)he is conspiring with or does not know the facts which disqualify that person from being a conspirator. So if D contacted C via the internet, not knowing that C was in fact the 9-year-old child of the person D thought she was contacting to arrange the commission of an offence, or if

[88] S 159 of the explanatory notes.
[89] Note 78.
[90] The wording about protected classes has been omitted for reasons discussed above, text to note 70.

18-year-old D were to correspond by email with, as he supposed, his friend, X, in order to arrange for D to have sex with X's 12-year-old sister, V, only to discover that the emails had been sent by V herself because she wanted to have sex with D, it would be apt to describe D as attempting to conspire, just as it would if D were to contact L in person only to discover that L was in fact a law enforcement agent who either lacked the relevant mens rea or had a defence of acting reasonably. The question then is whether it is necessary or wise to enact such an offence simply to cover these situations. And surely the answer is the same as that given above; they are already covered by the 2007 Act. There is no defence of impossibility to the existing offences of assisting and encouraging crime,[91] so in many if not all cases D will in any case be liable for one of those offences, probably even if the offence D is assisting or encouraging is itself an offence of assisting or encouraging,[92] and even if D is mistaken about the identity of the person (s)he is encouraging.[93] In the light of this it does not appear that there is sufficient justification for an offence as wide as the proposed offence of attempting to conspire.

Defences

Finally the Law Commission proposes that, in line with the new inchoate offences in the Serious Crime Act, there should be a defence of acting reasonably which would, among other things, provide a defence for those involved in crime prevention. There are several arguments that can be made against this defence. The first is that it seems likely to entail the same problems as does the question of dishonesty in property offences.[94] It does not seem impossible that it would be possible to find one jury who sympathised with the secretary typing the letter for her boss, while another jury may be composed of people who would prefer to act as whistleblowers and would not contemplate doing such a thing. In other words, the real question will be whether in practice the defence is capable of fulfilling the requirements of Art 6 ECHR. A further potential problem is the defence's capacity to encourage arguments such as those at

[91] Serious Crime Act 2007 s 49(1).
[92] See above n 78.
[93] In paragraph 5.18 of their Report on *Inchoate Liability for Assisting and Encouraging Crime* LAW COM 300, the Law Commission make it clear that it does not matter if the identity of the person committing the offence is different from the one D envisaged. It therefore seems likely that where D makes an arrangement with the 9 year old child of the person he thought he was contacting D could in principle be liable for any of the offences under ss 44, 45 and 46. Again, impossibility is no defence to these offences so it does not matter when D is in fact contacting V.
[94] As is well known, the *Ghosh* [1982] 2 All ER 689 test provides that 'In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.' As is also well known, the trouble is that there is not always a universally shared concept of dishonesty 'by the standards of reasonable and honest people'. For example, while A might think it perfectly fine to photocopy one or two items on the copier at his place of work, or take home stationery from the stationery cupboard, B might find both those actions reprehensible. See further Gardner [1998] Crim LR and 35 Halpin [1996] Crim LR 283.

issue in *Altham*[95] and *Quayle*,[96] concerning possession of cannabis for medical purposes. It would have been much better had the proposed defence of crime or even harm prevention been adopted instead, and it might then have been possible to contemplate other potential defences such as withdrawal. A further point noted above is that on the Law Commission's proposals as they currently stand the defence may in any case be rendered irrelevant by arguments that the defendant was not reckless as to circumstances because the risk (s)he was taking was reasonable. However, were this recklessness proposal to be abandoned as suggested here this problem would no longer apply. In any case, however, whatever the arguments against the defence, the fact that it has now been enacted in s 50 of the 2007 Serious Crime Act in relation to the inchoate offences of assisting and encouraging must, I think, be the deciding factor. In other words, in answer to the Law Commission's question 9, the interests of simplicity and consistency are not outweighed by the need to maintain principle in just one area. As noted above, it is arguable that the offence of conspiracy is more remote from the full substantive offence than even inchoate offences of assisting and encouraging and thus if those, perhaps more serious offences have the reasonableness defence, so must the more remote offence of conspiracy.

Conclusion

Inevitably this paper has attempted to contribute to the process by pointing out some areas of slight concern in the current proposals and indications for possible alterations to them. However, this should not be allowed to detract from the fact that examination of conspiracy in general, and the problem of *Saik*, spousal immunity and conditional conspiracies in particular is very welcome, as is the Law Commission's detailed system of analysis by actus reus element.

[95] [2006] EWCA Crim 7; [2006] 1 W.L.R. 3287; [2006] 2 Cr. App. R. 8; [2006]
[96] [2005] EWCA Crim 1415; [2005] 1 W.L.R. 3642; [2006] 1 All E.R. 988; [2005] 2 Cr. App. R. 34