

## Summary: Intervention & Options

<b>Department /Agency:</b> <b>Law Commission</b>	<b>Title:</b> <b>Impact Assessment of Conspiracy and Attempts Report</b>	
<b>Stage:</b> Report	<b>Version:</b>	<b>Date:</b> 12 November 2009
<b>Related Publications:</b> Conspiracy and Attempts (2009) Law Com No 318, Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183		

### Available to view or download at:

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### What is the problem under consideration? Why is government intervention necessary?

The problems under consideration relate to the current law on conspiracy and attempts:

1. Inconsistency with certain overlapping provisions on assisting and encouraging crime under the Serious Crime Act 2007.
2. The scope of the offences is unsatisfactory: too wide in some respects, too narrow in others.
3. Certain aspects of the law lack clarity.

The Criminal Law Act 1977 and the Criminal Attempts Act 1981 need amendment to resolve these.

### What are the policy objectives and the intended effects?

1. To update the law and achieve consistency between the offences of conspiracy and attempts and with the offences of assisting and encouraging crime (under the Serious Crime Act 2007).
2. To ensure that the scope of these offences (including exemptions and defences) is neither over- nor under- inclusive.
3. To clarify certain provisions under the current law.

The effect will be to make the law fairer, more consistent and more effective.

### What policy options have been considered? Please justify any preferred option.

Option 1: Do nothing

Option 2: Amend the existing statutory provisions, addressing specific issues within each offence. This is the preferred option because amendment would be sufficient to remedy the problems identified.

Option 3: Repeal the existing statutory offences and create new offences of conspiracy and attempts. For example the current law on attempt could be replaced with two new statutory offences - one relating to preparatory acts and one to the final acts carried out before the commission of the offence.

### When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

### **Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister:

..... Date:

## Summary: Analysis & Evidence

Policy Option: 2

Description: Amend existing statutory provisions

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' It is not anticipated that there will be any significant increase in prosecutions (with associated defence/Legal Aid and court costs ) nor in the prison population. There may be a small initial (non-recurring) spike in appeals.	
	<b>One-off</b> (Transition)	<b>Yrs</b>		
	£ <b>Negligible</b>			
	<b>Average Annual Cost</b> (excluding one-off)			
	£ <b>Negligible</b>		<b>Total Cost (PV)</b>	£ <b>Negligible</b>
Other <b>key non-monetised costs</b> by 'main affected groups'				

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Clearer, more consistent law will be less likely to be subject to legal challenge thereby resulting in savings in court, prosecution and defence costs.	
	<b>One-off</b>	<b>Yrs</b>		
	£			
	<b>Average Annual Benefit</b> (excluding one-off)			
	£		<b>Total Benefit (PV)</b>	£
Other <b>key non-monetised benefits</b> by 'main affected groups'				
This option would create consistency with overlapping provisions on assisting and encouraging crime, make the scope of criminal liability more appropriate, improve clarity and certainty and increase public confidence.				

### Key Assumptions/Sensitivities/Risks

Key Assumption: That there will be no significant overall increase in prosecutions nor in demand for prison places. Risk (low likelihood): That our recommended amendments result in a greater number of appeals than anticipated.

Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> £	<b>NET BENEFIT (NPV Best estimate)</b> £
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What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?				
Which organisation(s) will enforce the policy?	Courts			
What is the total annual cost of enforcement for these organisations?	£ Negligible			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	Not applicable			
What is the value of the proposed offsetting measure per year?	£ Not applicable			
What is the value of changes in greenhouse gas emissions?	£ Not applicable			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A	N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)			(Increase - Decrease)	
Increase of £	Decrease of £	<b>Net Impact</b>	£ None anticipated	

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Summary: Analysis & Evidence

**Policy Option: 3**

**Description: Repeal the existing statutory provisions and create offences**

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups'
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	<b>£ Negligible</b>		The creation of new offences would create uncertainty and a greater risk of increased litigation with associated costs for the prosecution, defence/Legal Aid and courts.
	<b>Average Annual Cost</b> (excluding one-off)		
<b>£ Negligible</b>		<b>Total Cost (PV)</b>	<b>£</b>
<p>Other <b>key non-monetised costs</b> by 'main affected groups'</p> <p>The new scheme proposed for attempts was criticised on the ground that there was a risk that the provisions would be misinterpreted and create either too wide or too narrow a basis for liability. Interfering with the existing law more than strictly necessary may undermine public confidence.</p>			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups'
	<b>One-off</b>	<b>Yrs</b>	
	<b>£</b>		In the long term this option has the potential to increase certainty in the law and result in the savings listed under option 2 above. However in the shorter term, and perhaps beyond, there would be a significant risk of reducing certainty and increasing costs.
	<b>Average Annual Benefit</b> (excluding one-off)		
<b>£</b>		<b>Total Benefit (PV)</b>	<b>£</b>
<p>Other <b>key non-monetised benefits</b> by 'main affected groups'</p> <p>There is the potential for consistency with overlapping provisions on assisting and encouraging crime, appropriate scope of criminal liability, greater clarity and certainty, increased public confidence subject to the potential costs under "key monetised costs" above.</p>			

### Key Assumptions/Sensitivities/Risks

Key assumption: that the new offences would create uncertainty and result in increased litigation (and associated costs) and a loss of public confidence. While this option might resolve problems with the law in the long term this is less certain than with option 2 and the risk of significant cost is greater.

Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> £	<b>NET BENEFIT (NPV Best estimate)</b> £
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What is the geographic coverage of the policy/option?		England and Wales	
On what date will the policy be implemented?			
Which organisation(s) will enforce the policy?		Courts	
What is the total annual cost of enforcement for these organisations?		£ Negligible	
Does enforcement comply with Hampton principles?		Yes	
Will implementation go beyond minimum EU requirements?		Not applicable	
What is the value of the proposed offsetting measure per year?		£ Not applicable	
What is the value of changes in greenhouse gas emissions?		£ Not applicable	
Will the proposal have a significant impact on competition?		No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium    Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A    N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)	
Increase of    £	Decrease of    £	<b>Net Impact</b>	£ None anticipated

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

### PROBLEMS UNDER CONSIDERATION

#### Conspiracy

The statutory offence of conspiracy is contained in the Criminal Law Act 1977, which makes it an offence for two or more people to form an agreement to commit an offence. The offence is committed when the agreement is made and consequently there is no need for the planned offence to be carried out or attempted.

(1) The limitations of the current law in relation to the fault element of conspiracy were highlighted by the House of Lords decision in the case of *Saik* [2006] UKHL 18; [2007] 1 A.C. 18, which related to a conspiracy to commit a money laundering offence. The case involved interpretation of section 1(2) of the Criminal Law Act 1977, which states that:

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

The House of Lords held that this required the defendant to have knowledge as to the circumstance element of the offence (in this case, that the money represented the proceeds of crime). This means that whereas money laundering can be committed where the offender has only reasonable grounds to suspect the existence of the circumstance element (the money being proceeds of crime), in order to establish a conspiracy to commit that offence the prosecution would have to prove knowledge. This is not satisfactory because it leaves certain blameworthy conduct outside the scope of the offence.

(2) Section 2 of the Criminal Law Act 1977 provides for exemptions from liability for spouses or civil partners who conspire together but with no one else and for a person who conspires with the intended victim of the planned offence. These should be abolished: the first is an anachronism, the second is illogical and they both have the effect of exempting individuals who have engaged in blameworthy conduct from the scope of criminal liability.

(3) The exemption applying to the intended victim of the offence needs reform to clarify to whom it applies and to make it consistent with the exemption for victims under the assisting and encouraging provisions of the Serious Crime Act 2007.

(4) Section 4(1) of the Serious Crime Act 2007 provides that before a prosecution can be brought against a person for conspiracy to commit a summary offence the consent of the Director of Public Prosecutions must be obtained. This requirement is unnecessary, particularly since the introduction of the statutory charging regime under the Criminal Justice Act 2003.

(5) Since the offence of conspiracy is committed by forming an agreement to commit some other offence in the future it is more likely than many other offences to include an overseas

element. For example, the agreement may be formed overseas to commit an offence in England and Wales such as importing illegal drugs, or conversely an agreement may be formed in England and Wales to commit an offence overseas. The existing law on extra-territorial jurisdiction over conspiracies is complex and spread between a number of statutes and the common law. This makes their application less straightforward than it should be. Codification of the existing law would resolve this. In addition new provisions on extra-territorial jurisdiction were also created in respect of the offences of assisting and encouraging crime under the Serious Crime Act 2007. Since there is a significant overlap between the offences of assisting and encouraging and conspiracy it is desirable that the same rules on extra-territorial jurisdiction should apply to both to the extent possible within the context of codifying the existing law.

(6) There is currently no defence to a charge of conspiracy where a person has entered into a conspiracy to prevent crime or protect national security or on other public interest grounds. The creation of such a defence would be consistent with the reasonableness defence applicable to the offence of assisting or encouraging crime under the Serious Crime Act 2007. Since there is a significant overlap between the offences of assisting and encouraging and conspiracy it is desirable that the same defence would be available in respect of both.

### Attempts

The Criminal Attempts Act 1981 makes it an offence if a person “with intent to commit an offence ... does an act which is more than merely preparatory to the commission of the offence”.

(1) The current law does not satisfactorily provide for the situation where a person carries out an act more than merely preparatory to the commission of the offence intending only to commit that offence if certain conditions are fulfilled (in other words with conditional intent). To this extent the offence is under-inclusive and potentially omits certain blameworthy conduct from its scope.

(2) Where a person does an act more than merely preparatory to the commission of an offence that includes a circumstance element but no fault requirement or mere negligence as to those circumstances the current law is uncertain as to what fault element has to be proved for attempt. On one interpretation of the current law no fault element might have to be proved as to circumstances. This is unfair since attempt is a crime requiring intention and therefore criminal liability should depend upon proof of at least recklessness as to these circumstances. To this extent the current law is over inclusive and creates criminal liability where a person neither knows nor is reckless as to circumstances that make up an element of the substantive offence. (Under the current law where the substantive offence does include a fault element as to circumstances this also has to be proved in respect of the attempt and we recommend no change on this, although for clarity's sake we recommend this is set out in statute.)

(3) Section 1(1) of the Criminal Attempts Act 1981 specifies that liability for attempt depends on the performance of an act; consequently attempts carried out by way of omission fall outside the scope of the offence. However where, in contravention of a duty, a person attempts to kill someone by way of omission, for example by intentionally starving them, this should fall within the scope of the offence of attempted murder.

## **RATIONALE FOR GOVERNMENT INTERVENTION**

It is in the public interest that the law on conspiracy and attempts should work properly: the scope of the offences should take in all sufficiently blameworthy conduct, there should be provision for defences and exemptions from liability where this is fair and there should be consistency with provisions under the Serious Crime Act 2007 on assisting and encouraging crime.

Currently the prosecution is required to work around the shortcomings in the law to ensure that wrongful conduct is prosecuted. This is undesirable since it means that the application of the law is less straightforward than it should be.

In order to address these issues and implement our proposals for reform, it is necessary to amend the provisions of the Criminal Law Act 1977 and the Criminal Attempts Act 1981. Government intervention is required to achieve this.

## **POLICY OBJECTIVES**

1. To update the law and achieve consistency between the offences of inchoate liability and in particular with the offences of assisting and encouraging crime (under the Serious Crime Act 2007).
2. To ensure that blameworthy conduct falls within the scope of these offences and that non-blameworthy conduct falls outside it.
3. To clarify the existing law and provide for greater legal certainty.

## **SCALE AND CONTEXT**

### General comments

Although amendments to the law on conspiracy and attempts have the potential for wide application (since conspiracy can be committed in relation to most offences and attempt in relation to most indictable offences), our proposals will impact on only a small number of cases according to, for example, the fault element of the substantive offence to which they relate, or the identity of the defendant.

Data on the number of prosecutions brought each year in respect of conspiracies and attempts are unavailable because the current practice is to record these prosecutions as though they were brought in respect of the substantive offence to which they relate. This means, for example, that a conspiracy to commit a theft will be recorded as a theft rather than a conspiracy.

Given that the number of prosecutions brought (specifically) for conspiracy and attempts is not recorded it is not surprising that data on the number of cases in which the problems we identify arise and prevent or hinder a fair prosecution is unavailable. Given the lack of available data and because it is the prosecution who are primarily affected by the shortcomings in the law as it stands we have sought evidence from a range of practitioners in different prosecution agencies and the conclusions we tentatively draw are based on this.

Prosecutors have developed a range of strategies to deal with many of problems in these areas of the law. For example, they might charge the substantive offence in preference to conspiracy where the substantive offence has no fault requirement in respect of a circumstance element or has a fault element as to circumstances other than knowledge, or in the case of an attempt involving conditional intent, employ drafting strategies to work around the limitations in the law. However these strategies cannot provide a solution in every case. For example it would be impossible to charge a substantive offence instead of conspiracy where no substantive offence has been committed.

## Conspiracy

The main reform proposed in our report is the change to the fault requirement as to circumstances in conspiracy. Our work in this area was requested following the House of Lords decision in *Saik*. This decision highlighted that the law placed a higher burden on the prosecution in respect of conspiracies, as compared with the substantive offence, where the substantive offence could be committed with no fault requirement as to circumstances or one requiring proof of fault other than knowledge. *Saik* concerned a conspiracy to commit a money laundering offence. It might be expected that following this decision the number of prosecutions brought in respect of conspiracy to commit a money laundering offence might have reduced. Although the figures for prosecutions brought for conspiracy are not available, data on the total number of money laundering prosecutions (including conspiracies) show a rise in overall prosecutions following *Saik*. In the year 2005-2006 (immediately before the *Saik* judgment) there were 1,467 prosecutions brought by the Crown Prosecution Service for money laundering offences under the Proceeds of Crime Act 2002 (which substantive offences require proof only of suspicion). However in the following year (2006-2007) the total number of prosecutions had risen to 2,610 and in 2007-2008 to 3,811. Of course we cannot know how many cases, within these totals, related to conspiracies but we can say that following *Saik* there was no overall reduction in the number of money laundering prosecutions. Anecdotal evidence would suggest that the reason for this is that prosecutors have tended to charge a substantive offence, rather than conspiracy, to avoid the difficulty highlighted by this case, in particular the offence of entering into or being concerned in an arrangement to launder money under section 328 of the Proceeds of Crime Act 2002.

Unlike money laundering, immigration crime offences (which also tend to be committed by way of conspiracy and have a fault element as to circumstances of other than knowledge) did show a small decrease following the *Saik* decision. There were 281 prosecutions brought by the Crown Prosecution Service for relevant offences under sections 25 – 25B of the Immigration Act 1971 in 2005-2006. Following the decision in *Saik* that number dropped to 228 in both 2006-2007 and 2007-2008. The total increased slightly in 2008-2009 to 263. Given the small number of cases involved, and the fact that we do not know how many of these prosecutions related to conspiracies, it would be inappropriate to attribute the decrease in cases to the *Saik* decision, since many other factors, and in particular detection rates, are relevant. Nonetheless the prosecution figures in these areas show there was no dramatic decrease in prosecutions for these offences following *Saik* which would tend to suggest that either prosecutors were able to prove knowledge or successfully bypassed this requirement by charging a substantive offence instead. This conclusion would also be supported by the prosecutors we spoke to.

The exemptions from criminal liability relating to conspiracy are limited to very specific groups and as such the question of their application arises infrequently. Further, even in cases where they do apply the exemption only prevents criminal liability in respect of conspiracy; it cannot prevent a prosecution in respect of any other offence that has been committed by the individuals concerned. Spouses or civil partners who conspire together or individuals who conspire with the intended victim of the planned offence may be charged instead with substantive offences. Our recommendation to abolish the spousal/civil partner exemption and that relating to a person who conspires with the victim of the crime would therefore have little impact as regards the overall number of prosecutions.

The exemption from liability for those who conspire to commit offences in respect of which they will be the victim is to remain under our recommendation but will be amended to make it clearer to whom the exemption applies. Inevitably the number of cases where the intended victim of a crime is a conspirator is very small. The number of these that will be affected by our refinement of the law with the result that the exemption will no longer apply is believed to be a very small subset of these.

Our proposed reasonableness defence is intended to apply only in limited circumstances. It is unlikely to have widespread application, since its terms are relatively narrow. In addition one of

the main groups of people who would benefit from it, that is undercover operatives and informants authorised under the Regulation of Investigatory Powers Act 2000, may already enjoy protection from prosecution by virtue of section 27(3) of that Act and paragraph 2.10 of the Covert Human Intelligence Sources Code of Practice which provides that such an authorisation may, in a very limited range of circumstances “render lawful conduct which would otherwise be criminal”.

Our recommendations regarding extra-territorial jurisdiction reflect the provisions on extra-territorial jurisdiction on assisting and encouraging crime under the Serious Crime Act 2007. It is not anticipated that they will result in any significant increase in prosecutions, since the existing law already provides for extra-territorial jurisdiction to be exercised in respect of conspiracy in a variety of circumstances and because the overlap between the offences means that many conspiracies could be charged under the Serious Crime Act 2007 to take advantage of those provisions where this was considered desirable.

### Attempt

Our recommendations on attempt relate to an even more limited group of cases than those on conspiracy since they relate to specific circumstances: (1) where the offender had conditional intent, (2) where the substantive offence includes a circumstance element but no fault element relating to it and (3) attempted murder by omission.

We recommend a change to the law affecting the small sub-category of attempts cases where the defendant had intended to commit the full offence only if certain conditions were met. Prosecutors currently employ drafting strategies to work around the limitations on conditional intent under the current law. Our proposal would mean that these strategies would no longer be necessary. This proposal would only result in any additional prosecutions in cases where the drafting strategies are currently ineffective. We understand that this would be very few.

In respect of an attempt to carry out an offence with a circumstance element but no fault requirement or one of mere negligence as to those circumstances we recommend that it must be proved that the defendant was reckless as to those circumstances. Our proposal clearly only applies to attempts committed in respect of this type of offence and the practical effect of this would be felt only in prosecutions where recklessness could not be proved. Anecdotal evidence suggests that the number of prosecutions for attempt brought in respect of substantive offences of this type currently undertaken where there would be difficulty in proving recklessness as to the circumstance element of the substantive offence would be extremely small.

Our recommendation to allow the offence of attempted murder to be committed by way of omission will inevitably lead to very few prosecutions since it relates to a scenario that is relatively rare. In many cases such conduct could be prosecuted as some other offence (for example child neglect) under the current law and in such a case the effect of our recommendation would be simply to enable the seriousness of the conduct to be reflected in the charge. However, in the very small number of cases where such conduct would fall outside the scope of a substantive offence of sufficient seriousness the implementation of this recommendation will have significant impact.

## **POLICY OPTIONS**

The following three policy options have been identified:

### Option 1: Do nothing

Leave the current law as it stands. This would mean that the problems identified in the current law, outlined above under the heading ‘Problems under Consideration’, would remain.



### Option 2: Amend the existing statutory provisions

A second option, which could be regarded as moderate law reform, would be to amend the existing statutory provisions in order to target those problems identified under the current law. Our proposals to update and amend the law on conspiracy were met with majority approval during our consultation process:

- To change the fault element of conspiracy where the substantive offence has no fault element as to circumstances or one requiring proof of fault other than intention or knowledge so that, where the substantive offence has no fault element as to circumstances or mere negligence (or its equivalent), recklessness must be proved in respect of the conspiracy. In all other cases the fault element as to circumstances in the substantive offence must be proved in respect of the conspiracy.
- To remove the requirement for the consent of the Director of Public Prosecutions for a prosecution of conspiracy to commit a summary offence.
- To remove the exemption applying where spouses and civil partners who conspire with each other (but no one else) and to a person who conspires with the victim of the planned crime.
- To update the exemption applying to the victim who enters into a conspiracy so that it applies only in respect of a person whom the substantive offence was designed to protect.
- To introduce a defence to a charge of conspiracy where a person has acted reasonably on public interest grounds.
- To codify the existing law on the courts' extra-territorial jurisdiction over conspiracies and, to the extent compatible with this, to make the law on jurisdiction consistent with the provisions on assisting and encouraging crime.
- To allow for conditional intent in the offence of attempt
- To introduce, in respect of attempt, a fault element as to circumstances of recklessness where the substantive offence has a circumstance element but no corresponding fault element or one of mere negligence.
- To extend the scope of the law of attempt to include attempted murder by omission in breach of duty.

### Option 3: Repeal existing provisions and create new statutory offences

Policy option 3 would involve replacing attempts with two new offences - a newly defined offence of attempt and a new offence of criminal preparation. It was not intended that these offences would increase the scope of criminal liability but that they would better reflect the position under existing law.

The majority of consultees who responded to our consultation paper disagreed with the proposal of creating two new offences in place of the current offence of attempt. Those against the proposals included the Council of Circuit Judges, the Criminal Bar Association and the Crown Prosecution Service. This policy option was objected to on the grounds that: (1) having two separate offences would create unnecessary jurisprudence establishing the boundary between the two; (2) the new offence of "attempt" would then be too narrow; (3) there would be a temptation to charge the lesser "criminal preparation" offence where it was easier to do so; (4) the use of the wording "criminal preparation" could lead to the courts interpreting the offence too widely; and (5) the prosecution would simply charge the two offences in the alternative.

In the absence of support amongst our consultees, and considering the cost involved, option three could not be justified in relation to attempts.

Regarding conspiracy, policy option 3, full scale reform, was never considered necessary. It is possible to remedy the specific problems identified under the current law through amendments

to the primary legislation. A repeal of the existing offence and creation of a new one is unnecessary to achieve our policy objectives and would incur unnecessary additional cost.

## **CONSULTATION**

Prior to writing the report on Conspiracy and Attempts we published a consultation paper on the project. The consultation was held between 10 October 2007 and the 13 February 2008. We received 21 written responses to the consultation paper. These responses came from academics, practitioners, the judiciary and police and prosecution organisations.

We also held a seminar on 'Criminal Conspiracy and Criminal Attempts' on 15 November 2007. The seminar was attended by 17 practitioners. In addition the proposals were discussed with the advisory group in a meeting on 4 March 2008.

The responses we received on consultation have informed our recommendations.

## **OPTION APPRAISAL**

### **Option 1: Do nothing**

#### Costs

There is an ongoing cost of doing nothing to address the law in these areas.

The reliance on strategies to bypass problems under the current law is undesirable since it means that the law and its application is more complicated and less transparent than it should be. In addition these strategies cannot resolve the difficulties in every case. This leaves the possibility that in a small number of cases blameworthy conduct could not be prosecuted with obvious negative consequences. Both of these shortcomings carry the risk of reduced public confidence.

Two of our recommendations aim specifically to clarify uncertain areas under the current law: (1) the fault requirement as to circumstances in attempt where the substantive offence contains a circumstance element but no fault requirement or one of mere negligence in respect of it, and (2) the exemption from liability for the intended victim of a conspiracy. Any unnecessary complication in the law has the potential to lead to longer trials and more appeals. This is a considerable cost given that a day's sitting in the Crown Court costs HM Courts Service £5690, with the prosecution and defence costs to be added on top. HM Courts Service assesses its costs of a day's hearing at the Court of Appeal as £14,415 and again the cost for the appellant and respondent would need to be added on top.

In some respects the offences of conspiracy and attempts are currently over-inclusive, resulting in criminal liability being incurred when this is unfair and contrary to the public interest, for example, the absence of a reasonableness defence, which leaves a person vulnerable to prosecution when they have acted reasonably in the public interest, and the absence of a fault requirement as to circumstance in attempt. The likelihood of harm flowing from these problems is small, in fact, because (1) certain people entering into conspiracies on public interest grounds may already enjoy protection from criminal liability under the Regulation of Investigatory Powers Act 2000 and (2) it is understood that there are few cases of attempt currently prosecuted where a requirement to prove recklessness as to circumstances could not be met. Nonetheless the existence of these small risks has obvious implications for public confidence.

Another important factor is that at present there are inconsistencies between the law on conspiracy and on assisting and encouraging crime in respect of extra-territorial jurisdiction, the liability of victims and the availability of a reasonableness defence. Since there is overlap in the scope of these offences inconsistency between them may result in a bias in charging practice, for example conduct that could be charged as either assisting and encouraging or conspiracy might be charged as assisting and encouraging simply to take advantage of the lesser fault

requirement as to circumstances and of the provisions on extra-territorial jurisdiction. Again any distortion along these lines may result in a loss of public confidence.

## Benefits

The benefit of doing nothing is the avoidance of any immediate implementation costs.

## **Option 2: Amend the existing statutory provisions**

### Costs

The most significant cost likely to be incurred as a result of the implementation of these recommendations will be associated with any overall increase in the number of prosecutions or in court time. However as we explain in the section headed “Scale and context” above we anticipate that there is unlikely to be any significant overall increase in prosecutions as a result of the implementation of our recommendations. This is because the prosecution currently adopts a number of strategies to work around the current shortcomings in the law. It is only in respect of the rare cases where these strategies cannot successfully be employed that our proposals will enable prosecutions to be brought that are currently impossible. Any additional cases prosecuted or any trial made longer as a result of our recommendations would result in additional costs relating to prosecution and defence work on the case and court time. A day’s sitting in the Crown Court costs HM Courts Service £5690, with prosecution and defence costs to be added on top.

We anticipate that some of the recommended amendments, and in particular the scope of the new defence of reasonableness might be the subject of a small spike in appeals (as followed the coming into force of the Criminal Evidence Witness Anonymity Act 2008). However by the time our recommendations come into force it is anticipated that the most contentious of our recommendations that mirror those in the Serious Crime Act 2007 will have already been the subject of appeal. Any costs that do arise in this context will be non-recurrent: once a disputed point has been settled the potential for appeal (and the costs associated with it) falls away. HMCS assesses its costs of a day’s hearing at the Court of Appeal as £14,415, with the cost for the appellant and respondent to be added on top.

There will be very minimal costs associated with publicising the changes to the law in this area. For the judiciary this would probably be achieved by inclusion in the monthly electronic newsletter circulated by the Judicial Studies Board, and by similar means within the prosecuting authorities and criminal defence services. There will also be inevitable cost flowing from drafting the Bill and parliamentary time.

### Benefits

As a result of our recommendations the law will be fairer and the extent of criminal liability more appropriate. The scope of conspiracy will be extended to take in blameworthy conduct currently omitted, while the scope of attempts will be slightly narrowed so that an additional fault element as to circumstances will be required where this is currently not the case. A new offence of attempted murder by omission will be created. Removing exemptions from criminal liability for spouses/civil partners who conspire together and for those who conspire with the intended victims of the planned offence will mean that the law will better reflect common sense expectations of the types of wrongful conduct that should attract criminal liability. Conversely the introduction of the reasonableness defence will provide a defence for those who reasonably enter into a conspiracy on public interest grounds. There are strong public confidence benefits from the law setting criminal liability at the appropriate level.

In respect of the fault requirement as to circumstances in attempt and the victim exemption in conspiracy the law will be clarified, reducing the risk of extended legal argument on these points at trial and the cost associated with it (see under “Costs” above).

Application of the law will be simplified and more comprehensible to the lay person. The complicated and scattered law on extra-territorial jurisdiction over conspiracies will be brought together and codified. By making express provision for conditional intention in attempts and for the fault element in conspiracies formed in respect of substantive offences with a no fault requirement as to circumstances or one less than knowledge, prosecutors will be able to prosecute this wrong-doing without resorting to drafting strategies or alternative charges. In short the law will do what a lay person would reasonably expect it to do.

The law will be consistent so that the overlapping offences of conspiracy and assisting and encouraging crime under the Serious Crime Act 2007 are subject to the same provisions on exemption from liability for victims and on the reasonableness defence and to extent compatible with the existing law extra-territorial jurisdiction. Similarly our recommended provisions on the fault element as to circumstances are consistent as between attempt and conspiracy. This means that the decision on which inchoate offence to charge will be more straightforward and limited to which offence best fits the facts of the case rather than influenced by the different advantages conferred by each offence.

The removal of the requirement for the Director of Public Prosecution's consent to be given in order to bring a prosecution in respect of a conspiracy to commit a summary only offence removes a small administrative burden from prosecutors and may result in very minimal savings.

### **Option 3: Repeal existing provisions and create new statutory offences**

#### **Costs**

There would be minimal costs associated with publicising changes in the law (see under "Option 2: Amend the existing statutory provisions" above).

There was widespread opposition to this proposal on consultation from, amongst others, the Council of Circuit Judges, the Criminal Bar Association and the Crown Prosecution Service. The main objections centred on the uncertainty that creation of the new offences would introduce, the risk that the new offences would be misinterpreted and create too wide or too narrow a basis for liability, the cost of appeals to establish the scope of the new offences and the boundary between them and the fact that no real benefit was seen to be achieved by changing the law in this way. This negative reaction from key representatives of the judiciary, prosecution and defence indicated that there was a risk of widespread opposition to this option from those who would be applying the new provisions and, possibly, from the public at large.

Since option 3 involves the introduction of a more radical reform there is a greater risk that there will be increased legal argument, longer trials and more appeals as a result of this proposal, not least because of the opposition to it from those who will be applying it. The cost of a day's hearing at the Crown Court is £5690 and a day's hearing at the Court of Appeal costs HM Courts Service £14,415 with the parties' costs to be added on top.

#### **Benefits**

The benefit of wide scale reform under option 3 would be that it provides the opportunity to address all the current problems in the law of conspiracy and attempts. It would also provide an opportunity to achieve consistency between the inchoate offences of conspiracy and attempts and the newer offences of assisting and encouraging crime.

However, as stated above, we believe that this benefit can also be achieved through the more modest reform under option 2.

### **Cost/benefit analysis summary**

Option 2 would provide necessary amendment and updating of the law at a proportionate cost.

## KEY ASSUMPTIONS/RISKS

### Key assumption

Since prosecutors are largely successful in working around the problems presented by the limitations under the current law it is not anticipated that there will be any significant overall increase in prosecutions.

It is assumed that once the difficulties under the current law are resolved prosecutors will abandon the strategies they currently employ to avoid the problems under the existing law and adopt a more straightforward approach to applying the law.

Where a prosecutor chooses to charge conspiracy rather than a substantive offence as a result of our recommendation it is anticipated that there will be no significant rise in the number of convictions or acquittals.

Since the maximum custodial penalty applicable to conspiracy is the same as that applicable to the substantive offence in respect of which it was formed and because the circumstances surrounding the offence will be the same whether conspiracy or the substantive offence is charged, it is not anticipated that there will be any significant increase in the number of custodial penalties or their length as a result of our proposals.

It is assumed that our recommendations will be enacted and applied in accordance with our report.

### Risks

In the absence of any data on the number of prosecutions or convictions for conspiracy and attempts each year, and crucially the number of cases in which the current law causes difficulty, we have had to draw on anecdotal evidence from practitioners to anticipate the likely scale of the impact of our proposals.

There is therefore a risk that there are gaps in our knowledge and that as a result we may have underestimated how many additional prosecutions may be brought as a result of our recommendations. We have endeavoured to minimise this risk by speaking to prosecutors involved in different types of work in different agencies.

There is a risk that the provisions implementing our recommendations on the reasonableness defence are interpreted too broadly by the courts. There is also the risk that too many defendants will claim the defence, possibly resulting in more lengthy trials and more appeals. However other offences currently include reasonableness defences and this has not given rise to these problems: it is therefore anticipated that the likelihood of this risk materialising is small.

Although costs on appeal are generally non recurrent, different aspects of, for example, the reasonableness defence, might be the subject of separate appeals. It is expected that this risk will be minimised by the Court of Appeal taking a strong line in order to keep the scope of the defence narrow.

## **SPECIFIC IMPACT TESTS**

Legal Aid: It is anticipated that the recommendations might have the potential to generate a very small additional number of prosecutions, and a small spike in appeals, which would have a knock-on cost to Legal Aid. This is expected to be minimal.

Human rights: It is not considered that the recommendations outlined have any human rights impact.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No