

Dr Jennifer Collins–Written evidence (FDF0078)

- I. I am Associate Professor in Law at the University of Bristol and a Fellow of the Alan Turing Institute. I have active research interests in fraud and have published widely on the topic in leading Law journals. I am Principal Investigator on a UKRI/AHRC grant, 'Fraud During a Pandemic: Identifying and Appraising New Challenges for the Criminal Justice Response in England and Wales' and am currently writing a book on cutting-edge issues in fraud and fraud governance with Hart Publishing. Both projects investigate which principles should inform fraud criminalization and governance as we emerge from the Covid-19 pandemic, to meet the challenges of a digital age and a stretched criminal justice system.
- II. I welcome the Committee's focus on fraud. I wish to draw attention to three areas in my written evidence: public-private partnerships for the purposes of fraud prevention; Artificial Intelligence (AI) and Machine Learning (ML) technologies for the purposes of fraud prevention, and the offence of conspiracy to defraud.

Public-private Partnerships to Prevent Fraud

- III. The current *Economic Crime Plan* identifies partnerships as the future of fighting fraud in England and Wales, a position supported by the Joint Fraud Taskforce. Partnerships allow for sharing of data about fraud threats, held or accessible, between the private and public sectors.
- IV. Public-private partnerships are already widely used as means of preventing money laundering. There are obvious efficiency gains to be had. The private sector has good access to resources for surveillance, data collection and intelligence about suspicious transactions. There is particular enthusiasm to expand the role of public-private partnerships in preventing online fraud, because the private sector has access to information about how online platforms are being used. Bodies responsible for fraud prevention have highlighted untapped potential of partnerships in preventing fraud. For example, UK Finance has strongly argued for more collaboration via partnerships to tackle fraud, across public and private sector bodies and the removal of ['remaining barriers'](#).
- V. A lowering of the bar for information-sharing must be accompanied by scrutiny of the principles at stake. It is not the case that pressure to increase information-sharing between the private sector, tech industry and law enforcement is an unmitigated good. Increased powers to share reports of suspected fraud with law enforcement must be subject to proportionate threshold access to data. The exclusionary effects for individuals suspected of fraud must be considered. The Bank of England's [Artificial Intelligence Public-Private Forum's](#) year-long dialogue on AI innovation between public and private sectors was an important development for this reason.
- VI. **Recommendation:** Best practice requires that clarity be provided on how private-public partnerships will use feed information about suspected fraud into the criminal justice system (see *Economic Crime Plan*:

Statement of Progress (July 2019-February 2021) 5). Clear limits must be set on when suspected fraud is reported and why. Key to building a principled response is a fast-track review body which audits de-risking decisions in relation to fraud, as well as considering how information necessary for criminal investigations is handled. A fast-track review body would allow for forward-looking analysis of the incentive and disincentive structures in place in relation to new public-private partnerships specifically.

- VII. For further details on these recommendations, see J. Collins, 'Why Fraud Prevention is Relevant to Criminal Law Theorists' in A. Simester (ed.), *Modern Criminal Law* (Forthcoming, Hart 2022) [Copy on file with the author].

Artificial Intelligence and Machine Learning Technologies

- VIII. The relevance of AI and ML to fraud detection and prevention is set to grow on an upwards trajectory. Use of AI or ML models to prevent fraud must respect core principles (such as privacy, transparency and explainability) if the use of technological advances in this area is to be principled and robust. Particular challenges for building transparency and explainability should be noted in the fraud-prevention context. For example, too much transparency as to how fraud detection mechanisms work may be exploited by fraudsters, allowing circumvention of fraud-detection systems.
- IX. **Recommendation:** Advocate for testing of AI and ML systems to detect fraud for accuracy and against bias. The Ada Lovelace Institute has recently developed a proposal for a first [Algorithmic Impact Assessment](#) in a different context—healthcare. The aim is to promote good governance around application of algorithms to public sector data, enhancing outcomes for affected groups and to ensure the prevention of bias in process and outcomes. Similar impact assessments ought to be undertaken regarding the use of AI and ML technologies to prevent fraud.
- X. **Recommendation:** Fraud can be detected using several different ML approaches. Some systems use a combination of supervised and unsupervised learning to detect fraud. Literature on ML notes that unsupervised systems may be more difficult to explain. The ability to explain the AI used should be prioritised where unsupervised ML is used to prevent fraud. These systems pose a greater threat to the rule of law, insofar as their outputs can be unforeseen and therefore scrutiny of their outputs is necessary.
- XI. For further details on these recommendations, see J. Collins, 'Why Fraud Prevention is Relevant to Criminal Law Theorists' in A. Simester (ed.), *Modern Criminal Law* (Forthcoming, Hart 2022) [Copy on file with the author].

Conspiracy to Defraud

- XII. The common law offence of conspiracy to defraud has withstood robust criticisms of its breadth and its compliance with legal certainty. There is still reliance on this common law offence. This is the case despite the breadth of the general fraud offence found in section 1 of the Fraud Act 2006 and assurances that conspiracy to defraud's use would be reduced since the implementation of the Fraud Act 2006. It is still common to see claims about conspiracy to defraud's 'mopping up' value to prosecutors (most recently in the Ministry of Justice's [Post-legislative Assessment of the Fraud Act 2006](#) (June 2022)).
- XIII. The overwhelming view of practitioners in the 2022 review (above) is that conspiracy to defraud is an effective and essential tool in combating fraud. An 'interests of justice' argument is put forward. In complex cases—for example involving several different types of criminality; cross-jurisdictional cases; multiple victims; organised crime involvement--conspiracy to defraud allows an overall picture to be presented, avoiding dividing issues into several different trials. This argument has been repeated many times. It is an attempt to balance a 'usefulness' and 'overall picture' argument against the obvious rule of law defects of the offence, which gives rise to 'interests of justice' reasoning. In other words, the interests of justice 'can only be served by presenting to a court an overall picture' of a complex case, and the conspiracy to defraud offence allows for this.¹ This argument is problematic because it gives even weight to these competing interests despite the serious rule of law concerns which speak against the offence.
- XIV. **Recommendation:** That Committee's review of existing offences to target fraud ought to engage with a detailed literature which makes the point that legal certainty is not respected by the conspiracy to defraud offence. For example, the post-Fraud Act 2006 discussion of conspiracy to defraud which held the offence to be inconsistent with legal certainty, on which see the Joint Parliamentary Committee on Human Rights, *Fourteenth Report: Review of International Human Rights Instruments* (2006), HL.99, HC 264, para. 2.12; Law Commission (LC 276), *Fraud* (HMSO, 2002). *And the Law Commission* Law Commission (LC 276), *Fraud* (HMSO, 2002) para 1.6; Law Commission, Working Papers of 1974 (No.56) and 1988 (No.104); Law Commission (LC 228), *Conspiracy to Defraud* (HMSO, 1994). Detailed engagement with Article 7 ECHR and its jurisprudence is needed, given that this right continues to be protected in the proposed Bill of Rights Bill. For detailed argument, see J. Collins, '[Testing Conspiracy to Defraud's Resilience](#)' (2021) 11 Criminal Law Review 902-20.
- XV. In the absence of conspiracy to defraud being repealed or reformulated to better comply with rule of law requirements, when should the offence be charged? Principled prosecutorial discretion does not resolve rule of law deficiencies, but it is also a key part of the rule of law. The current position in England and Wales is that a decision to use conspiracy to defraud as the offence charged rather than Fraud Act 2006 offences is left

¹ Ministry of Justice, *Post-legislative assessment of the Fraud Act 2006* (HMSO, 2012), Cm.8372, para. 35; Attorney General's Office, "Use of the common law offence of conspiracy to defraud" (29 November 2012): <https://www.gov.uk/guidance/use-of-the-common-law-offence-of-conspiracy-to-defraud--6> para.12.

to prosecutorial discretion. The Attorney General's guidelines state that, where possible, the general fraud offence found in section 1 of the 2006 Act is to be used by prosecutors. The 'expectation' is that the common law offence will 'be used to a significantly lesser extent' post-Fraud Act 2006. The current guidelines ask prosecutors to consider whether the conduct could be prosecuted under statute, such as under the Fraud Act 2006 or the Criminal Law Act 1977. Statutory provisions should be used 'unless there is a good reason for doing otherwise'.² The guidance that a lawyer experienced in fraud cases should approve charges other than conspiracy to defraud is welcome, given the complexity of dishonesty offences drafted in inchoate mode.³

- XVI. **Recommendation:** It should be written into the guidelines that where an alternative full substantive offence could be charged, it should be. If another offence definition covers conduct also covered by conspiracy to defraud, the presumption should be that the statutory offence is preferred. This is to ensure that, so far as possible, judges are able to adjudicate on the true nature of the wrongful conduct. Conspiracy to defraud is significantly indeterminate in both its conduct and fault requirements. The principled approach is to funnel cases into alternative statutory offences to conspiracy to defraud. This funnelling should not be rebutted by an argument that it would be more straightforward and/or robust evidentially to pursue conspiracy to defraud charges.
- XVII. **Recommendation:** Prosecutors consider whether conduct can only be prosecuted as conspiracy to defraud (i.e. it is necessary to use the offence). Greater specificity is needed as to these exact circumstances. Currently the prosecutorial guidelines give a non-exhaustive list, including at least one scenario (allowing a bank account to be used by a third party in order to transfer funds) which could now be covered by the Fraud Act 2006 and/or the Serious Crime Act 2015. Examples in the guidance should be withdrawn from the guidance where they are no longer relevant post-implementation of the Fraud Act 2006.
- XVIII. **Recommendation:** The current guidelines state that prosecutors should consider 'whether the available statutory charges adequately reflect the gravity of the offence'. 'Gravity' is currently linked in the guidance to whether the conduct would more effectively be presented as conspiracy to defraud. This permits 'interests of justice' reasoning by more effectively providing an overall picture of fraudulent wrongdoing. To take account of rule-of-law principles, we need clearer guidance on what will furnish strong enough grounds of 'seriousness' for those cases where no other substantive offence exists. Consideration must be given to what harm has been risked and what harm intended as key in determining the seriousness of the conduct. Targeting the vulnerable is another criterion of seriousness.
- XIX. **Recommendation:** Conspiracy to defraud figures must be published, disaggregated from other charging data. When is the offence charged and what are the figures for successful prosecution? This ought to have been a key recommendation of the review of conspiracy to defraud in 2006.

² *Rimmington* [2005] UKHL 63 at [30].

³ Attorney General's Office, "Use of the common law offence of conspiracy to defraud" para.10.

This push for transparency respects rule of law ideals, including Article 7 ECHR's requirements of accessibility and foreseeability.

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