

The Law Reform Commission of Hong Kong Report on Codification: The Preliminary Offences of Incitement, Conspiracy and Attempt

(This summary is intended to give an outline of the report issued by the Law Reform Commission. While it includes the report's main recommendations, those wishing more detailed explanation should refer to the report itself. The references in this summary to paragraph numbers are to paragraphs in the report.)

The Background

The original reference

1. On 21 August 1989, a reference was made to the Law Reform Commission to consider codifying the general part of the criminal law.
2. In December 1991, a paper prepared by the Commission was circulated to consultees in the legal profession eliciting views on the general question of codification. The paper examined a report entitled *A Criminal Code for England and Wales* (the 'Draft Code Report') published by the English Law Commission in April 1989 which set out a draft criminal code (the 'draft Code').
3. The views of those consulted indicated strong support for codification as a goal. The expertise of the authors of the draft Code was acknowledged but the replies suggested that a more detailed examination of the draft Code should be pursued, possibly in conjunction with further consultation. Those consulted also argued that Hong Kong should follow closely developments of codification in England and Wales.

Codification of general part of criminal law rejected

4. After some discussion in March 1991, the Commission rejected the idea of codification of the general part of the criminal law. It was clear that an attempt at this stage to embark on large-scale codification would be considered premature by the profession. The preferred option was to await further developments in England and Wales. The benefits of retaining a connection with other common law jurisdictions made it difficult for Hong Kong to go it alone with a general code.

The revised reference – partial codification

5. The Commission decided instead to consider a partial codification of the preliminary offences of incitement, conspiracy and attempt.

Draft Report on the preliminary Offences

6. In the light of the Commission's decision on partial codification, a draft Report was prepared, entitled Codification of the preliminary offences of incitement, Conspiracy and Attempt (the 'Draft Report'). It was discussed at the Commission meetings in September and October 1991 and later circulated for general consultation.

Final Report on the Preliminary Offences

7. Based on the views expressed on the Draft Report on consultation, and further research by the Commission's secretariat, a final report was compiled and presented to the Commission for endorsement. The Final Report examined the preliminary offences of incitement, conspiracy and attempt in some detail and made various recommendations for their partial codification.

8. At its meeting on 22 September 1992, the Commission gave its general endorsement to the Final Report and the various recommendations it contained.

Contents of the Final Report

9. The Final Report is divided into 6 chapters:

Chapter 1 describes the background of the reference, and overview of the work done by the Commission and the consultation process.

Chapter 2 examines the offence of incitement. Clause 47 of the English draft Code (which deals with incitement) is discussed as a possible model for a mini-code for Hong Kong. Views of consultees are evaluated. The Commission's recommendations on partial codification of incitement are stated.

Chapter 3 deals with the offence of conspiracy. The English Criminal Law Act 1977 is examined as a possible model for a mini-code. Results of consultation are examined. Recommendations on partial codification of conspiracy are made.

Chapter 4 discusses the offence of attempt. The English Criminal Attempts Act 1981 is discussed as a possible model for a mini-code.

Results of consultation are examined. Recommendations on partial codification of attempt are made.

Chapter 5 sets out 3 options for reform. Option 1 makes no change to the present law. Option 2 adopts models based on the 1977 Act and the 1981 Act. Option 3, in addition to adopting models based on the 1977 Act and the 1981 Act, makes material alterations by incorporating Clause 47 of the draft Code.

Chapter 6 gives a summary of all the recommendations made.

Chapter 1 – Introduction and Overview

Adoption of a mini code

10. A criminal code consolidates existing statute law and incorporates into it the common law as laid down in judicial decisions. The code may be a complete body of law that replaces entirely the pre-existing law or it may be partial to the extent that certain pre-existing rules remain. (See para. 1.4)

11. This Final Report sets out the Commission's recommendations on the partial codification of the preliminary offences of incitement, conspiracy and attempt. **We recommend the adoption of a mini-code based on the English Criminal Law Act 1977, the Criminal Attempts Act 1981 and clause 47 of the English Law Commission's draft Code.** We term this a mini-code because it does not seek to codify the whole of the general part of the criminal law, but only the law relating to the preliminary offences. This recommendation follows the third option for reform set out in chapter 5 of the report.

English reform model preferred

12. In exploring models for reform, English sources were preferred because of the similarity between the common law of Hong Kong and that of England and the clear preference expressed in consultation for English models. (See para. 1.18)

Chapter 2 – Incitement

The offence of incitement (See paras. 2.2 to 2.4)

13. At common law, it is an offence to incite or solicit another to commit a crime. The common law in Hong Kong in this respect is essentially the same as that of England and Wales.

14. Incitement provides a means by which society may intervene before a criminal act is completed. It covers virtually every human means whereby one person seeks to influence another to commit a crime. It includes encouragement or persuasion as well as threatening acts or other types of pressures. The offence is completed whether or not the incitement succeeds in persuading another to commit or attempt to commit a crime. Incitement may be directed at an individual or the world at large, say through a newspaper advertisement.

Clause 47 of the draft Code

15. Clause 47 of the English draft Code deals with incitement. The clause provides a model for codification of the offence of incitement. **We recommend the adoption of the whole of Clause 47 of the draft Code in the proposed mini-code.** (See para. 2.42).

The “fault requirement (See para. 2.27)

16. Clause 47(1)(b) of the draft Code requires that the incitor should intend or believe that the incitee will commit the crime “with the fault required for the offence”. Whilst some consultees supported this fault requirement, others suggested that “intention” should be substituted for “fault” in clause 47(1)(b).

17. We reject this suggestion as we believe it would narrow incitement considerably. The suggestion would, for example, preclude a conviction for incitement to rape where the incitee is reckless as to the circumstances, that is to the victim’s consent. **We recommend that clause 47(1) be adopted in its entirety in its present form.**

The rule in R v Curr

18. The rule in *R v Curr* is not perpetuated in the draft Code. That rule required that, where a crime followed the incitement, the prosecution must prove that the incitee acted with the necessary mental element. Consultees on the whole supported the abolition of the rule. **We recommend that the rule in R v Curr should not be perpetuated in the mini-code.** (See para. 2.28)

Incitement to conspire

19. The draft Code restores the offence of incitement to conspire which was abolished by statute in England. Opinion was divided among those consulted as to whether this offence should be retained in Hong Kong.

20. **We recommend that the existing common law position in Hong Kong be retained and that the offence of incitement to conspire be retained in the proposed mini-code.** This offence is of importance in dealing with triad-related crimes such as long term conspiracies involving gambling, prostitution and drugs. (See paras. 2.30 and 2.31)

Defence of impossibility in incitement

21. Clause 50 of the draft Code removes the defence of impossibility in incitement cases. This approach was supported by those consulted. It removes the inconsistency that the defence of impossibility is removed for attempt and conspiracy, but not incitement. **We recommend that the defence of impossibility should be removed.** (See para. 2.35)

Chapter 3 – Conspiracy

The offence of conspiracy (See paras. 3.2 to 3.5)

22. Conspiracy at common law consists of an agreement by two or more persons to do an unlawful act, or to do a lawful by unlawful means.

23. Agreement to commit an offence is an instance of the crime of conspiracy. However, in addition, an agreement to effect an “unlawful” object, not itself an offence if carried out by a person alone, can amount to the crime of conspiracy. Thus, an agreement by two or more persons to commit certain torts can amount to the criminal offence of conspiracy.

24. Historically, the extension of the offence of conspiracy beyond agreements to effect criminal objectives appears to have been motivated by the fear that combinations of individuals with a common object are more dangerous than individuals carrying out similar activity alone.

English Criminal Law Act 1977

25. The English Criminal Law Act 1977 (the “1977 Act”) represents a partial codification of the law of criminal conspiracy. **We recommend the adoption of the 1977 Act subject to certain modifications.**

Conspiracies whose objectives are not criminal

26. At common law, certain conspiracies are criminal offences although their objectives are not criminal in nature.

They include: -

- (a) conspiracy to commit tortious acts. This category includes conspiracy to defraud and conspiracy to trespass (and forcible entry and detainer);
- (b) conspiracy to injure; and
- (c) conspiracy to corrupt public morals or outrage public decency.

27. the 1977 Act abolished the offences of common law conspiracy. However, the offences of conspiracy to defraud and conspiracy to corrupt public morals or outrage public decency were retained by section 5 of the 1977 Act.

Conspiracy to trespass and conspiracy to injure (See paras. 3.15 – 3.18)

28. Opinion was divided among those consulted as to whether the common law offences of conspiracy to trespass and conspiracy to injure should be abolished.

29. We have concluded on balance that it is unnecessary to retain these offences and **we recommend that the common law offences of conspiracy to commit tortious acts, conspiracy to trespass (and forcible entry and detainer) and conspiracy to injure should be abolished in the proposed mini-code.** (Para. 3.18)

30. Those who favoured the retention of conspiracy to trespass and conspiracy to injure thought that these offences might be useful in the fight against organised crime or threats and intimidation. They cited the example of interference with the construction industry and of triads taking preliminary action towards extortion.

31. However, as far as we are aware, conspiracy to trespass (and forcible entry and detainer) has never been used to deal with such situations. Moreover, the provisions of the Public Order Ordinance (Cap. 245), in particular sections 23 and 24, already provide the necessary enforcement arsenal for those situations.

32. Equally, conspiracy to injure is not directly relevant to combatting triad-related crimes. In conspiracy to injure, the “injury” is not physical injury or damage to property. It relates to activities in the context of industrial disputes which might damage an employer. It is now regarded as an outdated relic of an earlier period of industrial relations in England.

33. Conspiracy to injure had not been employed in England and Wales for many years before it was abolished in 1977. It has never been employed as an offence in Hong Kong. Organised threats and intimidation are already dealt with adequately by other charges such as conspiracy to blackmail or conspiracy to criminally intimidate.

Conspiracy to corrupt public morals or outrages public decency (See paras. 3.30 – 3.33)

34. Most consultees were of the view that the offences of conspiracy to corrupt public morals or to outrage public decency should be abolished.

35. A minority expressed reservations over the abolition of these offences. They argued that these offences were necessary to prevent vice advertisements, obscene videos and telephone conversations, etc.

36. We favoured their abolition because these two offences are of extreme and uncertain width. Their retention is out of place with the philosophy of a criminal law system that emphasises clarity and precision. They are too subjective and could evolve into a means of suppressing unpopular or religious beliefs.

37. Furthermore, these two offences have not been employed in Hong Kong, at least not in recent years. This suggests that they are not an essential weapon against vice activities. On the other hand, there are already existing statutory provisions dealing with public performances or display, such as section 148 of the Crimes Ordinance (Cap. 200) and section 12A(1) of the Summary Offences Ordinance (Cap. 228).

38. **We therefore recommend the abolition of the offence of corrupting public morals, whether it exists solely as a conspiracy or in respect of an individual acting alone. We also recommend the abolition of the offence of outraging public decency,**

Defence of impossibility in conspiracy

39. **We recommend the removal of the defence of impossibility in conspiracy.** In our view, persons conspiring to commit a crime are still a social danger although the factual context renders it impossible to complete the crime. Consultees on the whole supported the removal of the defence. (See para. 3.39)

No conspiracy with one's spouse

40. Consultees thought that the proposed mini-code should follow the 1977 Act in preserving the existing common law rule that a husband cannot in law conspire with his wife. This rule has the merit of maintaining the stability of marriage by avoiding interference with the confidential relationship of husband and wife. **We recommend that the rule that a person cannot conspire with his or her spouse should be preserved in the proposed mini-code.** (Para. 3.52)

No conspiracy with a young child or the intended victim

41. There was some criticism of the existing common law rule that a person cannot conspire with the intended victim of the conspiracy or with a child under the age of criminal responsibility. These exemptions were preserved by the 1977 Act.

42. The exclusion of liability in those two cases is, in our view, a sensible one. Given that a conspiracy always involves at least two criminal parties, it does not seem logical that one party should be held criminally liable whereas the other party is not liable because of young age or because he was the intended victim. **We therefore recommend that we should follow the 1977 Act in preserving the common law exemptions where the other party is a person under the age of criminal responsibility or is the intended victim of a crime.** (See para. 3.53)

Chapter 4 – Attempt

The offence of attempt (See paras. 4.2 – 4.18)

43. At common law, there are a variety of definitions of attempt which are not wholly consistent. Two different tests appeared from the judgements. The first was to be found in *R v Eagleton* (1855) 5 Dears CC516 and is sometimes known as the “last act” test. A later and more relaxed test appeared in *Davey v Lee* (1967) 51 Cr App R 303.

44. Under the *Eagleton* (or “last act”) test, acts remotely leading towards the commission of a crime are not considered as attempts to commit it, but acts immediately connected with the crime’s commission are.

45. Under the *Davey v Lee* test, an act is considered an attempt to commit a crime if it is a step towards the commission of the crime, not remotely connected with its if it is a step towards the commission of the crime, not remotely connected with its commission, and cannot be regarded as having any other purpose than the commission of the crime.

46. Suffice it to say that the modern authorities make it clear that there must be a proximate act of some kind in order to constitute an attempt to commit a crime. It is also clear that if an accused has done all he can do to commit a crime he will be guilty of attempt.

47. In England, the common law definitions were replaced by a statutory definition provided by the English Criminal Attempts Act 1981. The act defines attempt as an act done with intent to commit an offence and which is “more than merely preparatory” to the commission of the offence.

Criminal Attempts Act 1981

48. The English Criminal Attempts Act 1981 (the “1981 Act”) represents a partial codification of the law of criminal attempt. **We recommend the adoption of the 1981 act subject to certain modifications.**

Definition of attempt (See paras. 4.50 – 4.51)

49. The 1981 Act defines attempt as an act which is “more than merely preparatory” to the commission of the offence (section 1(1)). Some consultees felt the definition in the 1981 Act was vague and wished to see alternative definitions put up for consideration.

50. Despite the apparent lack of precision of the definition, the English Law Commission has proposed no significant change to the definition. Attempt is a difficult concept to describe and we are unable to identify any better alternative definition. **We recommend that the definition in section 1(1) of the 1981 Act be adopted.** It may be that in due course a clearer definition can be produced in the light of further research and development in England or other jurisdiction. There is no doubt, however, that the 1981 Act’s formulation represents a clear improvement on the existing law.

Recklessness as to mens rea (See paras. 4.52 – 4.56)

51. A consultee suggested that where the elements of an offence include specific circumstances, then recklessness as to the specific circumstances should be enough for both the mens rea of attempt and that of conspiracy.

52. The English Law Commission had found in favour of such a suggestion by proposing clause 49(2) in the draft Cod. We think there is much merit in this suggestion because the suggested principle would serve to protect potential victims against drunken and violent offenders.

53. The English Law Commission thought that if this principle were justified for the offence of attempt it would only be consistent that it should also apply to the offence of conspiracy. They therefore proposed clause 48(2) of the draft Code should incorporate the principle into the offence of conspiracy.

54. **we recommend that where the elements of an offence include specific circumstances, then recklessness as to the specific circumstances should be enough to constitute the mens rea of conspiracy or attempt. In this respect, we recommend that provisions along the line of clauses 48(2) and 49(2) of the draft Code be incorporated into the proposed mini-code.**

Defence of impossibility in attempt

55. Consultees on the whole agreed with the removal of the defence of impossibility. The defence leads to the acquittal of criminals who would otherwise be considered a danger to society. It also limits the role played by the police in certain undercover operations. **We would recommend that the defence of impossibility in attempt be abolished.** (See para. 4.57)

Application of attempt to summary offences (See paras. 4.58)

56. Under the 1981 Act, it is a crime to attempt to commit an indictable offence but there is no criminal liability to attempt to commit a summary offence (section 1(4)). In Hong Kong, it is a crime to attempt to commit any offence (section 81 of the Interpretation and General Clauses Ordinance, Cap. 1)

57. There is no compelling reason for precluding the offence of attempt from summary offences. The fact that an offence is of a summary nature does not necessarily mean it is not serious. **We would therefore recommend that in adapting the 1981 Act, section 1(4) of the Act should be modified to the effect that attempt should also apply to summary offences.**

58. The 1981 Act abolished the offences of attempting to conspire and attempting to aid and abet (sections 1(4)(a) and (b)). Whilst some consultees favoured the abolition of the offence of attempting to conspire, others preferred its retention. We are inclined towards retaining this offence. As we have recommended that incitement to conspire should be retained, a similar recommendation for attempting to conspire is necessary for the sake of consistency. On the other hand, we consider that attempting to aid and abet is too remote an offence to justify its retention.

59. **We would therefore recommend that the offence of attempting to conspire should be retained by not adopting section 1(4)(a) of the 1981 Act. We also recommend that the offence of attempting to aid and abet should be abolished** (as was done by section 1(4)(b) of the 1981 Act).

Chapter 5 – Options for Reform

60. Three options for reforming the law relating to the preliminary offences are discussed. Option 1 makes no change to the present law. Option 2 adopts models based on the 1977 Act and 1981 Act. Option 3, in addition to adopting models based on the 1977 Act and 1981 Act, makes material alterations by incorporating Clause 47 of the draft Code.

61. The first option is rejected as there was clear support from consultees for codification as an ultimate goal and for drawing upon English legislative precedents where suitable. (See para. 5.8)

62. The choice is between the second and the third options. The third option has the advantage of codifying all three related preliminary offences at one time. Consistency requires such an approach. There was clear support for the third option from the majority of the consultees. (See paras. 5.9, 5.10)

63. A minority of consultees advocated a mini-code based on the draft Code only. There are practical difficulties with this approach. It would not restore a source of precedent and could require time and numerous appeals before the law was fully understood by practitioners and the judiciary. We do not favour this option. (para. 5.10)

64. **We would accordingly recommend the adoption of the third option for reform.** (See para. 5.11)

Chapter 6 – Summary of Recommendations

65. All the recommendations on the partial codification of the preliminary offences of incitement, conspiracy and attempt are summaries in this chapter.

The Appendix

66. For ease of reference, the following are reproduced at the appendix of the final report: -

- (i) The English Law Commission draft Code clauses 47 to 52;
- (ii) Part I of the English Criminal Law Act 1977 (as amended) dealing with conspiracy; and
- (iii) Part I of the English Criminal Attempts Act 1981 (as amended) dealing with attempts.