THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

CODIFICATION: THE PRELIMINARY OFFENCES OF INCITEMENT, CONSPIRACY AND ATTEMPT

(TOPIC 26)

March 1994

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

CODIFICATION : THE PRELIMINARY OFFENCES OF INCITEMENT, CONSPIRACY AND ATTEMPT

CONTENTS

Chapter 1

Introduction and overview

Terms of reference

1.1 On 21 August 1989 the Law Reform Commission was asked:

> *"1. To examine the existing law and practice governing the general principles of the criminal law (including the preliminary offences of incitement, conspiracy and attempts to commit other offences), and to make recommendations where appropriate for reform.*
>
> *2. To consider codifying the general principles of the criminal law, incorporating any recommended reforms, and in so doing to have particular regard to whether all or any of the provisions contained in the draft Criminal Code Bill in Volume 2 of the Law Commission in England's report 'Criminal Law - A Criminal Code for England and Wales' should be adopted in Hong Kong with or without modification."*

1.2 This report is the final product of the reference. The subject matter of the report does not include all the general principles of the criminal law, as had originally been the intention, but is confined to the preliminary offences of incitement, conspiracy and attempt. The reasons for this limitation of the scope of the reference is explained in the remainder of this chapter. At its conclusion the report proposes a partial codification of these common law crimes. The proposed code is essentially a restatement of existing law but it incorporates a number of significant reforms.

An overview of the report

The general part of the criminal law

1.3 The laws that underlie the criminal justice system can be categorised in a number of ways. The usual categorisation distinguishes between the general principles of the criminal law and the law that deals with specific crimes. The general principles, or "general part" as they are sometimes known, are applicable to all offences in the criminal calendar. They include such matters as, for example, the principles that cover fault or defences that are available to all crimes. Traditionally, the preliminary offences of incitement, conspiracy and attempt are considered within the general part of the criminal law. This is because the principles that govern liability for incitement, or conspiracy, or attempt to commit one particular crime

are essentially the same for any other particular crime. In Hong Kong the laws that govern incitement, conspiracy and attempt are found in the common law. This report examines the common law with a view to producing accessible statutory substitutes which are more comprehensible and consistent. The process of replacing common law principles with a comprehensive set of statutory provisions is referred to as codification.

Codification

1.4 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 purports to replace entirely the pre-existing law or it may be partial to the extent that certain pre-existing rules remain. When it comes to be interpreted by the courts it is well established that the code is to be construed without any assumption that common law doctrines still apply. Resort is to be had to pre-existing law only where the code contains language of doubtful import or where it uses language which had previously acquired a technical meaning[1].

The evolution of the common law

1.5 As common law systems evolve they do so in a way that ultimately leads to codification. The criminal law dealing with specific crimes is essentially a number of mini-codes. The Theft Ordinance (Cap 210), for example, deals with crimes of dishonesty in relation to property and the Offences Against the Person Ordinance (Cap 212) deals with non-fatal injury to the person. In contrast, the general part is still predominantly case law.

1.6 A successful code would:

(a) increase accessibility in that it would no longer be necessary to consult a large body of case law;

(b) be more comprehensible to lawyers and non lawyers alike;

(c) eliminate inconsistencies in the common law; and

(d) be more certain in its operation.

There is no going back once codification takes place. Thus, historically, lawyers and legislators have been very cautious for fear of replacing workable common law with a deficient code. At the same time, it should be stressed that in common law jurisdictions a code has no higher status that any other criminal statute. It is enacted and repealed in exactly the same fashion. Indeed, one of the benefits of a code is ease of amendment. The code

---

1 *Bank of England v Vagliano Brothers* [1891] AC 107.

functions as a convenient tool for reference and a certain point of departure for developing new case law.

The Law Commission report: A Criminal Code for England and Wales

1.7 Several closely related jurisdictions have codified the criminal law[2]. Hong Kong, like England and Wales, continues to rely on the common law for the general part. In April 1989 the English Law Commission published a report, *A Criminal Code for England and Wales,* (henceforth referred to as the "Draft Code Report") which consists of a draft Code ("the draft Code") dealing with both the general principles and specific crimes together with a detailed commentary on the Code. This report represents 18 years of research and consultation, including the publication of a number of working papers and reports. It is acknowledged as a work of great scholarship. The report is still under consideration by the United Kingdom government. What stands in the way of its implementation is the very size of the subject matter covered and the considerable Parliamentary time its passage would demand.

1.8 The common law of England and Wales and that of Hong Kong are essentially the same[3]. Naturally, given the terms of the current reference, the Law Reform Commission Secretariat commenced their researches by examining the draft Code and commentary as a statement of the current law, and, where it embodied reform, as a source of options for consideration.

Our deliberations on codification of the general part

1.9 In December 1989, 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 the English Draft Code Report and made tentative recommendations as to how the general part of that report might be adopted in Hong Kong, with appropriate amendments. Those consulted in this exercise were:

- the Chairman of Hong Kong Bar Association;
- the President of Law Society of Hong Kong;
- the Registrar of the Supreme Court, representing the judiciary;
- the Dean of the Faculty of Law of Hong Kong University;
- the Head of the Department of Law of the City Polytechnic of Hong Kong;
- the Director of Public Prosecutions; and
- the Director of Legal Aid.

---

2 The Indian Penal Code has been in existence for more than 150 years. Canada has had a criminal code since 1893. The Australian States of Queensland, Western Australia and Tasmania have codes that are based on a model drawn up in Queensland in 1899. These codes have been periodically updated. New Zealand is presently considering codification.

3 This is illustrated in the Privy Council case *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank and others* [1987] HKLR 1041.

1.10 The response from those consulted indicated strong support for codification as a goal, and there was an acknowledgment that it could bring the benefits of greater accessibility, comprehensibility, consistency and certainty. The expertise of the authors of the draft Code was acknowledged. Most of the comments on the individual provisions in the Code were favourable. Nonetheless, two notes of caution emerged clearly from the replies:

(a) a more detailed examination of the language of the Code should be pursued, possibly with further consultation, and

(b) while it might be desirable for Hong Kong to codify the general provisions of the criminal law, Hong Kong should follow closely developments on the adoption of a similar code in England and Wales.

1.11 It become clear to us that, while the goal of codification was generally supported, an attempt at this stage to embark on large-scale codification of the general part of the criminal law would be regarded by the profession as premature. The preferred option was to await further developments in England and Wales. While acknowledging that benefits would flow from a code, particularly in enhanced accessibility, we therefore felt unable to recommend the adoption of a Hong Kong Code based on the model in the Law Commission's report. We doubted whether Hong Kong could go it alone with a code that, initially at least, would place considerable strain on the judicial system. We acknowledged the great benefits of retaining the connection with other common law jurisdictions as sources of precedent. This benefit would be lost if Hong Kong adopted its own code. We agreed that the question of a code for Hong Kong should await developments in England and Wales.

1.12 Returning to the first part of our terms of reference, we agreed that the law of attempt and conspiracy should be examined. In both areas the law of Hong Kong had been overtaken by statutory development in England and Wales. We also agreed that a consideration of incitement would complete the review of preliminary offences. Such a review would involve "catching-up" on legal developments in England and Wales, rather than moving ahead of that jurisdiction.

The Draft Report on the Preliminary Offences

1.13 In the light of our decision on codification, a Draft Report was prepared by the Secretariat, entitled *Codification of the Preliminary Offences of Incitement, Conspiracy and Attempt* (the "Draft Report"). It was discussed at the Commission meetings on 17 September and 15 October 1991. In October 1991, the Draft Report was conveyed to the same consultees whose views had been sought previously on the general question of codification (see para 1.09 *supra).* In addition, copies of the Draft Report were sent to the

Secretary of Security, and the Commissioners of Police and the Independent Commission against Corruption ("ICAC").

1.14 Substantive replies were received from:

- the Law Society of Hong Kong (Criminal Law and Procedure Committee);
- the Hong Kong Bar Association (Criminal Law Sub-committee);
- the Dean of the Faculty of Hong Kong University (Ms Janice Brabyn);
- the Law Department of the City Polytechnic;
- the Director of Legal Aid; and
- the Director of Public Prosecutions.

The results of consultation on the Draft Report

1.15 Taken overall, the result was clear support for the adoption of a mini-code for all three preliminary offences incorporating provisions based on those in the English Criminal Law Act 1977 ("the 1977 Act") (which deals with conspiracy), the Criminal Attempts Act 1981 ("the 1981 Act"), and the clause codifying the law of incitement (clause 47) recommended by the English Law Commission in their Draft Code Report. It is convenient to mention at this stage that our final recommendation in this report is entirely in line with these views. Our detailed reasoning for this conclusion is set out in Chapter 5.

The preliminary offences of incitement, conspiracy and attempt

1.16 The criminal law not only provides sanctions to punish the achievement of prohibited objectives, it also provides the means for society to intervene before such objectives are completed. Thus, the incitement of a crime or a conspiracy or an attempt to commit a criminal act are all punishable, provided, of course, that the accused has the necessary *mens rea* (guilty mind). Incitement, conspiracy and attempt are referred to as preliminary offences or as inchoate crimes. Whether the activity amounts to incitement, conspiracy or attempt (that is whether it amounts to the *actus reus,* or prohibited act) and the extent of the accompanying *mens rea* which must be proved, is determined by the common law.

Codification of the preliminary offences of incitement, conspiracy and attempt

1.17 The chapters that follow examine the partial codification of the criminal law of conspiracy and attempt that has been put in place in England and Wales. This was achieved by Part I of the Criminal Law Act 1977, for conspiracy, and by the Criminal Attempts Act 1981. In addition, the Draft Code's model for incitement is examined as the third element of what might be a comprehensive mini-code dealing with preliminary offences. Part I of the

1977 Act, the material parts the 1981 Act and clauses 47 to 52 of the Draft Code are reproduced in the Appendix to this report.

1.18 The English models are examined in preference to other Commonwealth sources for the following reasons:

(a) Hong Kong shares its common law with England and Wales;

(b) the English legislation replaced a body of English case law which formed the current Hong Kong authorities; and

(c) a clear preference was expressed in consultation for examining English models out of which Hong Kong legislation might be constructed.

1.19 The English legislation is, in many respects, a restatement of the existing common law. A significant reform introduced by the 1977 and 1981 Acts was the removal of what is described as the defence of impossibility. The defence was applicable to all three of the preliminary offences and still exists in Hong Kong's present law. Impossibility is discussed in some detail in each of the chapters that deal with incitement, conspiracy and attempt.

Chapter 2

Incitement

Introduction

2.1 The provisions in the Draft Code Report dealing with conspiracy and attempt[1], were derived from Part I of the 1977 Act (conspiracy) and the 1981 Act (attempts). This chapter examines the Draft Code's treatment of incitement as a model for possible reform in Hong Kong. The Draft Code's approach is consistent with, and may be adopted at the same time as, provisions derived from the current English legislation.

What is incitement?

2.2 It is an offence at common law to incite or solicit another to commit a crime. The definition of the *actus reus* and *mens rea* of incitement is found in case law. The law of Hong Kong is essentially the same as the law of England and Wales.

2.3 Incitement shares a common rationale with conspiracy and attempt in providing a means for society to intervene before a criminal act is completed. There is considerable overlap between the preliminary offences, particularly in circumstances where two or more individuals are involved in criminal activity. A future crime may exist only in the mind of one man until he incites another to commit that crime or they agree together to commit it. The offence of incitement also overlaps with secondary participation as the aider, abettor, counsellor or procurer of a crime committed by the principal offender[2]. However, an individual may only be convicted of secondary participation if the offence is actually committed. This is not necessary for the crime of incitement to be completed.

2.4 Incitement contemplates virtually every human means whereby one person seeks to influence another to the commission of a crime. It includes not only encouragement or persuasion, but can include a threatening act or other pressure[3]. The offence is complete whether or not the incitement

---

1 Clauses 48 to 52.

2 The Alders and Abettors Act 1861, section 8 has its Hong Kong counterpart in section 89 of the Criminal Procedure Ordinance (Cap 221).

3 In *Invicta Plastics Ltd v Claire* [1976] RTR 251 the English Court of Appeal cited with approval the following passage of Lord Denning MR in *Race Relations Board v Applin* [1973] QB 815, at 825: *"Mr Vinelott suggested that to 'incite' means to urge or spur on by advice, encouragement, and persuasion, and not otherwise. I do not think the word is so limited, at any rate in this context. A person may 'incite' another to do an act by threatening or by pressure, as well as by persuasion."*

persuades another to commit or attempt to commit the offence[4]. Incitement may be directed at an individual or at the world at large, as when a newspaper advertisement represents that an object's virtue is that it may be used to commit an offence[5]. Incitement requires that there be actual communication, though where such incitement fails (for example where a letter conveying the incitement is intercepted) then there is an attempt to incite[6].

2.5 The act incited must be an act which when done would be a crime by the person incited. Thus, in *R v Whitehouse*[7] it was held not to be an offence to incite a girl of fifteen to have incestuous sexual intercourse because the girl would not have committed an offence if the incitement had succeeded and she had submitted to intercourse. If intercourse had followed with the inciter, the girl would not have committed an offence, but the inciter would be guilty of incestuous sexual intercourse with a girl under sixteen. Incitement is subject to the rule in *Tyrrell's* case:[8] if a victim is incapable at law of being an abettor he is also incapable of inciting an offence against himself.

2.6 In *R v Curr*[9] the English Court of Appeal quashed the conviction of an individual who had been convicted of inciting women to commit offences under the Family Allowances Act 1945 because it had not been proved that the women had the guilty knowledge to constitute that offence. A similar difficulty will be encountered when the offence incited is not obviously criminal, such as a breach of a regulatory provision. In contrast, as was conceded by the defendant in *R* v *Curr,* if D persuades an innocent agent to complete a crime, D is guilty as a principal offender, irrespective of the lack of guilty knowledge of the agent.

2.7 The position as regards the *mens rea* for the offence of incitement is not wholly clear. Leading commentators suggest that the inciter must intend the consequences of the *actus reus* of the crime intended[10]. Thus, if A incites B to commit grievous bodily harm upon C he is not guilty of incitement to murder. However, if death results from B's action, then both will be guilty of murder, B as the principal and A as the counsellor and procurer. There is authority for the view that incitement requires an element of

---

4 *R v Higgins* (1801) 2 East 5.

5 *Invicta Plastics Ltd v Claire* [1976] RTR 251. This case was subsequently distinguished in *R v Jones and Ashford* (1985) 82 Cr App R 226: merely to manufacture or sell an item which has no function other than to commit a crime is not incitement.

6 *R v Banks* (1873) 12 Cox CC 393.

7 [1977] 65 Cr App R 33.

8 *R v Tyrell* [1894] 1 QB 710. Where an offence is in an Act passed for the purpose of protecting a particular class of individuals against themselves they cannot aid or abet, or incite others to commit such offences against themselves.

9 [1968] 2 QB 944. The decision might be regarded as authority for a requirement that the incitor must know or believe that the person he incites has the necessary *mens rea.* See Smith and Hogan, *Criminal Law* (7th Edition, 1992), at 265.

10 Smith and Hogan, *ibid,* at 268 suggest, that this is the case in the same way as it is with the offence of attempt.

persuasion or pressure upon the person incited[11], which is probably not necessary where counselling or procuring a completed crime is alleged[12].

2.8 One aspect of the inciter's *mens rea is* the extent to which he wishes to promote the necessary *mens rea* in the incitee's mind. As mentioned above, if the inciter procures the assistance of an innocent agent, the agent may be guilty as the principal offender. If the inciter intends that the incitee will act with the necessary criminal intent then he is clearly liable. It is also suggested that the inciter should be liable if he believes that his incitement will cause the incitee to act with the necessary guilty intent[13].

Incitement and the defence of impossibility

Inchoate offences and impossibility

2.9 If it is impossible to commit a crime then clearly no one can be convicted of that offence. As a corollary the common law provides a defence of impossibility for the inchoate offences of incitement, conspiracy and attempt. The nature and extent of this defence has been the subject of much academic debate and judicial controversy.

2.10 The defence of impossibility has nothing to do with the situation where an individual is mistaken in his understanding of the law and believes the activity he incites, conspires to commit, or attempts is a crime. For example, the fact that a person wrongly believes adultery to be a crime does not mean that his mistake will render him liable to conviction of any offence[14].

2.11 The defence of impossibility is not applicable to circumstances where the means to be employed to carry out a task are inadequate. For example, it is not a defence to a charge of incitement, conspiracy or attempt that the jemmy intended for use to open a safe is totally inadequate for the task.

2.12 The defence of impossibility at common law is limited to those circumstances where the individual has the necessary guilty mind for the offence of incitement, conspiracy or attempt, but, because of some fact of which he is ignorant or about which he is mistaken, the result he intends cannot be achieved, or if the result is achieved, it will not give rise to the crime he believed he would have committed. An example of the first situation is

---

11 See *R v Hendrickson and Tichner* [1977] Cr LR 356, and *R v James and Ashford* [1986] 82 Cr App R 226.

12 See Smith and Hogan, *op cit,* at page 268.

13 See Smith and Hogan, *op cit,* at 269. The authors also submit that if the incitor believed that the incitee had no knowledge then there would be no incitement. They illustrate their case with the example of an individual urging another to receive a stolen necklace. If the offeror does not believe the offeree will act with guilty intent he does not incite that person to handle stolen goods.

14 Thus, if a man, thinking it was an offence to smuggle currency into Hong Kong, incited others to carry out such an act, or conspired to do so, or attempted such activity, it would not be a crime. The principle does not appear to have been altered by the 1977 Act or the 1981 Act.

where A and B conspire to kill C, but, unbeknown to them, C is already dead[15]. An example of the second situation is where A and B attempt to handle goods they believe are stolen when in fact the goods are not[16].

2.13 It can be argued that the defence of impossibility does not serve the interests of justice. The individual who incites others to act in a criminal fashion, but under a mistaken belief, is probably as great a danger to society as one who does not have the benefit of the defence. Although it is not difficult to apply in simple fact situations, determining the existence of the defence presents problems where the facts are complex, as is illustrated in the next paragraph.

Incitement and impossibility

2.14 The case of *R v Fitzimaurice*[17] established that the defence of impossibility is available to a charge of incitement, but that the scope for such a defence may be quite limited. The facts of the case are unusual. A planned to collect a reward from a security firm by informing the police of the existence of a conspiracy aimed at robbing a security van. To give his story credence, he set up what appeared to be a conspiracy to rob by engaging other men with a fictitious aim of robbing a woman of wages near a factory in Bow in London. The appellant was the middleman who thought he was engaging men to rob the woman. After the appellant had recruited other robbers they were shown their fictitious target, a woman who had been set up by A. Subsequently, when the intending robbers returned to Bow to execute the robbery they were arrested by the police. Their convictions were quashed on appeal because the crime that they conspired to commit (to rob the woman in Bow of wages) was incapable of fulfilment. The appellant, who believed the plan was genuine, appealed against his conviction for incitement to rob a woman in Bow. His appeal was dismissed by the Court of Appeal. The correct approach to a defence of impossibility was to decide what sort of conduct was incited, attempted or the subject of a conspiracy. The evidence might establish incitement in general terms, whereas the subsequent agreement between the conspirators related to a specific crime. It could be logical for an inciter to be convicted where conspirators would be acquitted, as in this case, where the appellant had incited in general terms a robbery of a woman in Bow which was not of itself impossible.

---

15 Tle judgment in *R v Sirat* [1986] 83 Cr App Rep 41 considered such a hypothetical situation in application to incitement at page 43.

16 Such a situation occurred *Haughton v Smith* [1975] AC 476, where the defendants attempted to handle goods they thought were stolen when in fact they had been repossessed by the police as part of an undercover operation.

17 [1983] 1 QB 1083.

The law and practice in Hong Kong

Practice and procedure

2.15 It is an offence under the common law to incite any crime, whether it is a statutory crime or common law offence and whether it is a summary offence or one that may be dealt with on indictment. From a procedural point of view incitement causes few problems. All references in any Ordinance to powers or duties that might be exercised or become performable upon the conviction of an offence include a reference to incitement to commit that offence[18]. The maximum penalty for incitement is the same as that for the offence itself[19].

Incitement, inchoate offences and secondary participation

2.16 The offence of inciting to conspire exists in Hong Kong[20]. Incitement to attempt would probably not be a valid charge in most circumstances, because attempt is so proximate to the completed offence[21]. The offence of inciting to incite is apparently known to the common law[22]. It is likely that incitement to counsel or abet an offence is probably not a crime at common law[23].

Criticism of the present law

2.17 Incitement is an "unusual charge"[24]. It is seldom employed by the prosecutor. If the offence is completed then it is more convenient for the prosecution to charge conspiracy or the offence of counselling or procuring, relying on section 89 of the Criminal Procedure Ordinance (Cap 221). The *mens rea* for a secondary party (accessory) does not require the element of intent to persuade, neither does it require knowledge of the state of mind of the principal offender. For an offence of aiding and abetting or counselling or procuring a crime it is also not necessary to prove a full or detailed foreknowledge of the circumstances of the offence to which assistance is given[25].

2.18 It is the mental element that poses problems rather than the *actus reus.* It is undoubtedly sufficient if the inciter intends the incitee to act with the fault required. It may be sufficient if he believes the person incited

---

18 Section 82(1)(b)(IV) of the Interpretation and General Clauses Ordinance (Cap 1).

19 Section 90(2)(c) of the Interpretation and General Clauses Ordinance (Cap.1).

20 *Mak Sun-kwong and another v R* [1980] HKLR 466. The offence was abolished in England by section5(7*)* of Criminal Law Act 1977.

21 The authors of Smith and Hogan, *op cit,* at 267*,* argue that it might exist as an offence in certain unusual circumstances.

22 *R v Sirat* [1986] 83 Cr App R 41.

23 See Smith and Hogan, *op cit,* at 268.

24 *R v Harris* [1991] 1 HKLR 389, at 393*, per* Silke VP.

25 *Maxwell v DPP for Northern Ireland* [1978] 1 WLR 1350.

will act, if he acts at all, with the necessary intent. However, it is not clear what knowledge the inciter should have of the state of mind of the incitee, or whether the prosecution are required to prove that the act incited was carried out with the necessary *mens rea*[26].

2.19 As illustrated by the facts of *R v Fitzmaurice,* the defence of impossibility is not easily applied to offences of incitement. For example, it is arguable whether such a defence would be open to an individual who incited or attempted to incite an undercover police officer to commit an offence on the basis that the offence incited would never be undertaken and is thus impossible to commit[27]. A similar problem may exist with conspiracy charges (see para 3.37(e) below).

The Law Commission Draft Code: Preliminary offences - clauses 47 to 52

The overall approach

2.20 The authors of the Draft Code Report noted that incitement is traditionally regarded as part of the general part of the criminal law, as are the other preliminary offences of conspiracy and attempt to which incitement is closely related[28]. They believed that, as far as possible, there should be consistency of approach between these crimes, which share the common rationale of being concerned with the prevention of substantive offences[29]. The draft Code builds upon the earlier codification of the law of conspiracy[30] and attempt[31]. The overall approach taken to incitement in the draft Code is to incorporate a partial codification of the present law of incitement within that part of the code dealing with attempt and conspiracy[32]. The inchoate offences are grouped under a sub-heading, “Preliminary Offences”, and dealt with in clauses 47 to 52.

2.21 It should be noted that it would be possible to extract the provisions dealing with incitement from the code and incorporate them in separate legislation based on the earlier English legislation, rather than the refinements of that law proposed in the Draft Code Report.

2.22 Clause 47 of the draft Code reads:

---

26 *R v Curr* [1968] 2 QB 944. Whether this case states the correct test is open to argument. Certainly it is criticised in the Law Commission report, *A Criminal Code for England and Wales:* see paragraph 13.11.

27 The situation is similar to that in the leading case on attempting the impossible, *Haughton v Smith* [1975] AC 476. In that case police supervised the handling of "stolen goods" which were at all times in the lawful possession of the police officers, and for that reason were incapable of being stolen goods.

28 Paragraph 13.1 and 13.2.

29 Paragraph 13.3 of the Draft Code Report.

30 The Criminal Law Act 1977, Part I.

31 The Criminal Attempts Act 1981.

32 See paragraph 13.3 of the Draft Code Report.

"(1) A person is guilty of incitement to commit an offence or offences if -

(a) he incites another to do or cause to be done an act or acts which, if done, will involve the commission of the offence or offences by the other; and

(b) he intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.

(2) Subject to section 52(1), 'offence' in this section means any offence triable in England and Wales.

(3) Where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of incitement to commit that offence.

(4) A person may be convicted of incitement to commit an offence although the identity of the person incited is unknown.

(5) It is not an offence under this section, or under any enactment referred to in section 51, to incite another to procure, assist or encourage as an accessory the commission of an offence by a third person; but –

(a) a person may be guilty as an accessory to the incitement by another of a third person to commit an offence; and

(b) this subsection does not preclude a charge of incitement to incite (under this section or any other enactment), or of incitement to conspire (under section 48 or any other enactment), or of incitement to attempt (under section 49 or any other enactment), to commit an offence."

The authors of the draft Code did not favour any radical change in approach in relation to incitement and were persuaded that the use of the word "incite" should be retained[33]. The word "encourage" was rejected because it suggested a need to prove actual encouragement. It was pointed out that it was not necessary to found a charge of incitement to show that the person incited was in fact encouraged. The incitee may have no intention of acceding to the incitement, or he may have made up his mind to commit the offence without the need for encouragement by another. The authors concluded that the "familiar term" incite was preferred, which would have the advantage of preserving much of the old case law[34].

---

33 An approach based on a wide concept of facilitation was rejected, see paragraph 13.5 of the Draft Code Report.

34 Paragraph 13.6 of the Draft Code Report.

2.23 Clause 47(1)(a) sets out the nature of the conduct that the other must be incited to perform. He may be incited to do the acts personally or procure their performance by an innocent agent. The terms of paragraph (a) restate the common law principle that there is no liability for the incitement of a person who could not as a matter of law commit the offence[35]. Incitement may be to commit more than one offence[36].

2.24 As the authors of the draft Code acknowledge, the fault requirement is *"a matter of some complexity"*[37]. Since the word "incite" connotes an element of intention, the notion of inciting recklessly was regarded as odd and rejected. The draft Code sets out at clause 47(1)(b) the mental element required to constitute the offence of incitement. The inciter must intend the other person to commit the substantive offence. This is consistent with the approach adopted in relation to conspiracy and attempt[38].

2.25 More difficult is the fault element that links the inciter's state of mind with the state of mind of the incitee. It is clearly sufficient if the inciter intends the incitee to act with the fault required for the substantive offence. What is not settled is whether it is sufficient if he merely believes that the person incited will act, if he acts at all, with the fault required. The authors consider the example of incitement to rape: *"if D seeks to persuade E to have sexual intercourse with Mrs D, D believing that E knows that Mrs D does not consent to it, there seems to be a clear case of incitement to rape. It should not be necessary to prove that it was D's intention that E should have such knowledge"*[39]. On the basis of examples such as this, the authors of the draft Code thought that where an element of the substantive offence *"includes knowledge of or recklessness as to circumstances (such as the absence of consent), it would be more appropriate for the purposes of incitement to refer to the inciter's belief that such knowledge or recklessness exists rather than to his intention that it should"*[40].

2.26 Clause 47(1)(b) resolves for the purpose of the draft Code a long standing legal debate: whether incitement is appropriate to deal with the situation where the inciter does not intend that the person incited will act with the fault required, but nonetheless intends the external elements of the offence to occur[41]. It could be argued that incitement to commit the *actus*

---

35 For example, a person below the age of criminal responsibility or a victim in relation to an offence created for his or her protection. The authors of the draft Code treat incitement of children as an attempt to commit a crime through an innocent agent. See paragraph 13.7 of the Draft Code Report.

36 This restates common law principles. See paragraph 13.7 of the Draft Code Report, which cites *R v Most* (1881) 7 QBD 244, a case where a newspaper article incited readers to commit murders. In this sense incitement corresponds to conspiracy.

37 See paragraph 13.9 of the Draft Code Report.

38 See paragraph 13.9 of the Draft Code Report and section 1(1) of the Criminal Law Act 1977 (conspiracy) and section 1(1) of the Criminal Attempts Act 1981 (attempt).

39 See paragraph 13.9 of the Draft Code Report.

40 See paragraph 13.9 of the Draft Code Report.

41 It is settled law that if an "innocent" is used to commit the full offence then the "incitor" is guilty of aiding and abetting the offence: see *R v Bourne* (1952) 36 Cr App Rep 125. What appears to prevent this analogy being extended to the crime of incitement is the suggested requirement

reus should be sufficient. This argument is rejected by the draft Code Report. Its authors give the example of a person who incites a child under ten (who cannot be criminally liable) to steal. The report suggests that in these circumstances, assuming the requisite intent is present, an attempt will have been committed[42].

2.27 Of those who responded to our consultation paper, opinion was divided on the clause 47(1)(b) requirement that the inciter should hold a belief that the person incited will commit the crime with the fault required to constitute an offence. Some favoured this approach while others suggested that the word "intention" should be substituted for "fault" in clause 47(1)(b). This suggestion would, in our view, narrow incitement considerably. It would, for example, preclude a conviction for incitement to rape where the person incited was reckless as to whether or not the victim consented. The suggestion could also be interpreted as requiring the inciter to intend or believe that the incitee will act with intention or knowledge as to every aspect of the *actus reus* of the offence incited. This, as the authors of the draft Code point out, is too narrow an interpretation[43] . The common law is currently much wider: Smith and Hogan state that the inciter must know or believe the person incited will have the given *mens rea* for the offence, not an intention as to every aspect of the offence[44]. **We do not therefore favour amendment along these lines to clause 47(1)(b). We recommend instead that clause 47(1) should be adopted in its entirety in its present form.**

2.28 Clause 47(1)(b) has the effect of removing the consequences of *R v Curr*[45]. That case held that the prosecution must prove that the incitee has acted with the necessary mental element when a crime has followed the act of incitement. The illogicality of this rule was highlighted by the authors of the draft Code who pointed out that it is not necessary to prove that an offence has been committed or even intended by the person incited[46]. To refer to the incitee's *mens rea* for the offence is therefore irrelevant. **There was support for the draft Code's approach in this regard from those commenting on our consultation paper and we reiterate our view that clause 47(1) should be adopted unamended.**

2.29 The draft Code preserves in clause 47(2) the common law position that both indictable and summary offences can be incited. Incitement of a purely summary offence was thought to be a necessary deterrent to would-be promoters and organisers of large scale minor offences[47].

---

of a need to prove that the incitor knew or believed the incitee would act with the necessary guilty intent.

42 Paragraph 13.10 of the Draft Code Report. This assumes the encouragement is more than merely preparatory to the offence and that the accused can be shown to have the necessary intent.

43 Paragraph 13.9 of the Draft Code Report.

44 *op cit*, at 266. it is even argued that, at common law, incitement merely requires the proof of an intent in the incitor to cause the incited individual to commit the *actus reus* without reference to his intention.

45 [1968] 2 QB 944. See paragraph 13.11 of the Draft Code Report.

46 See paragraph 13.11 of the Draft Code Report.

47 Paragraph 13.12 of the Draft Code Report.

2.30 The authors of the draft Code recommend the restoration of incitement to conspire as an offence in England. They point out that the abolition of that offence by section 5(7) of the Criminal Law Act 1977*,* taken together with the effect of the decision in *R* v *Sirat* that incitement to incite *is* an offence[48], produced absurd results[49]. For example, if A incites B to agree with C to murder D there is no crime of incitement to conspire, but if A incites B to incite C to murder D there may be a crime.

2.31 Whilst some of those responding to our consultation paper supported the restoration of the offence of incitement to conspire, others recommended following the English legislation in abolishing this offence. Our Draft Report referred to the possible adverse implications of abolishing the offence of incitement to conspire in Hong Kong. Its importance in the context of triad crime relates to long term conspiracies, such as those involving gambling, prostitution and drugs. The English Law Commission recommended the reinstatement of this offence in England, primarily because it was thought illogical to do otherwise, taking into account the fact that incitement to incite is a crime known to the common law[50]. Making no recommendation to abolish "doubly inchoate" offences would preserve the existing common law of Hong Kong. Abolition, as suggested by some consultees, may require correction at some time in the future. It is a difficult choice: to preserve consistency and maintain principle, or to take a step to limit criminal liability for remote acts. **After due consideration, we recommend that the former course be followed and that the offence of incitement to conspire be retained in the codifying legislation.**

2.32 Clause 47(3) preserves the rule in *R* v *Tyrell*[51] which exempts from liability for incitement the victim of an offence who is a member of the class of persons the enactment is created to protect[52]. In *Tyrell,* it was held that a girl under 16 could not be guilty of aiding or abetting unlawful sexual intercourse with herself, or of inciting the commission of the offence[53].

2.33 Clause 47(4) embodies the established principle that liability for incitement will follow where the incitement is to the world at large through, for example, a newspaper advertisement[54].

2.34 Clause 47(5) provides that, under the Code, no offence of incitement to aid and abet will be available, but it will be possible to commit

---

48 (1986) 83 Cr App R 41.

49 See paragraph 13.13 of the Draft Code Report.

50 See paragraphs 13.13 and 13.16 of the Draft Code Report.

51 [1894] 1 QB 710.

52 The rule also applies to conspiracy under the draft Code.

53 Sexual intercourse with a girl under the age of 16 is an offence contrary to section 124 of the Crimes Ordinance (Cap 200). The protection for the girl is implied as a rule of statutory construction: it is not expressed in the terms of the ordinance.

54 See paragraph 13.18 of the Draft Code Report, which cites the well known case of *R v Most* (1881) 7 QBD 244.

the crime of being an accessory to an incitement by another[55]. The status of either offence at common law is unclear. How important the distinction would be in practice is questionable as the three offences of incitement to incite, conspire or attempt are all recognised as crimes under the draft Code.

2.35 The defence of impossibility to a charge of incitement is removed by clause 50. The same formula is adopted for all three preliminary offences. In England this would remove the present "absurdity" that attempt and conspiracy have had the defence abolished but it remains alive for incitement. The defence is also extinguished for statutory offences of incitement[56] . There was general support among those who responded to our Draft Report for the removal of the defence. **We agree that the defence of impossibility should be removed in relation to incitement. We recommend the adoption of a provision similar in terms to that of clause 50 of the draft Code.**

2.36 It was suggested to us, however, that whilst the defence of impossibility should be abolished, the defence of mistake of law (that certain activity is a crime when in fact it is not) should be retained by adding this defence to the terms of clause 50. The example was cited to us of an incitement to commit adultery, in the mistaken belief that adultery is a crime.

2.37 We think that it is unnecessary to add to clause 50 the defence of mistake. Clause 50 is concerned with removing the defence of impossibility from incitement. In other words, it is concerned with the situation where an individual incites another to commit an offence, in the belief or hope that it is possible for the actions necessary to constitute the completed offence to be carried out, where in fact it is impossible, but if the actions were carried out an offence would be constituted. Incitement to commit an act not amounting to a substantive criminal offence is a different matter. The adulterer who believes his act will be a crime commits no guilty act, regardless of his belief. Equally, it is not an offence for an individual to incite another to commit such an act. In our view, a defence of mistake of law is therefore unnecessary and we do not recommend that an express provision be made establishing this defence.

2.38 An interesting procedural change proposed in clause 51(2) of the draft Code is that there be no rule of exclusivity between preliminary offences under the code and existing statutory preliminary offences[57] . Overlap would be permitted between offences of incitement under the code and other offences of incitement specifically created within other criminal law statutes. The alternative to overlap is that one offence would be extinguished

---

55 The subject is considered in paragraph 13.19 of the Draft Code Report. The distinction appears to lie in the fact that liability for procuring an offence only arises on the completion of the offence. Until the crime is completed, there is no offence as an accessory and thus a suspended and uncertain status for the initial incitement.

56 For example, incitement to commit murder contrary to section 4 of the Offences Against the Person Act 1861, which has its counterpart in section 5 of the Offences Against the Person Ordinance (Cap 212).

57 This would repeal the rule of exclusivity set out section 5(6) of the Criminal Law Act 1977 and section 3 of the Criminal Attempts Act 1991.

to the extent that it was included in the other. This might prove difficult to determine, and be the basis of unmeritorious technical submissions.

Clause 47 of the draft Code: a model for Hong Kong?

2.39 The main advantage of following the draft Code and including incitement in any partial codification of the law of attempt and conspiracy is the achievement of consistency with the other preliminary offences. Intention is stressed as the principal fault element, and the defence of impossibility is removed, for all three crimes. Other advantages which would flow from such a change include:

(a) clarification of the extent of the *actus reus* of incitement and, in particular, the removal of the incongruous decision in *R v Curr.*[58]*;*

(b) clarification of the extent of the *mens rea.* of incitement and, in particular, the liability of an inciter who knows or believes that the incitee will act with the fault required; and

(c) the new provisions could be gathered in one amending Ordinance (perhaps a new Preliminary Offences Ordinance), or in one part of an existing Ordinance (for instance, a new part of the Criminal Procedure Ordinance (Cap 221)).

2.40 There are drawbacks:

(a) the provisions in the draft Code are untested[59]; and

(b) a new codified formulation for incitement would lose the assistance of existing case law and, unless and until enacted in England, future English precedent.

2.41 We note at this point that the Law Commission in England has recently published a consultation paper on "Assisting and Encouraging Crime" [60] which proposes a new offence of encouragement to replace incitement and the "counselling" element in aiding and abetting.

> *"The offence of encouragement should cover both cases where the defendant's acts are designed to instigate the commission of*

---

58 [1968] 2 QB 944. The case is referred to above in paragragh 2.6.

59 The draft of clause 47(1)(b) may be insufficient in that it does not make it clear that the incitor intends the incitee to carry out the crime. If a crowd encourage rioters to "kill the pigs" (the police) or burn a building, do they intend such acts to take place if they believe that no rioter would go that far? The incitor would probably acknowledge that if the rioters acted on the encouragement they would to do so with the necessary *mens rea.* This is a form of reckless incitement, but it is little different from inciting the world to kill an individual through a newspaper publication, which is contrary to the common law, and, (presumably) preserved by clause 47(4).

60 Consultation Paper No. 131 (September 1993).

the offence by the principal, and cases where those acts are simply designed to support or fortify him in a decision to commit the offence that he has already made".[61]

Whatever the merits of the Law Commission's proposal, it goes beyond the scope of our present exercise in examining the inchoate offence of incitement. The incitement element of the Law Commission's proposed new offence of encouragement's in any case essentially the same as that in the draft Code and we do not therefore think we need to revise our conclusion that the draft code's formulation is the model to follow.

2.42 As mentioned in chapter 1, there was clear support from consultees for a mini-code which incorporates clause 47 of the draft Code. **Having evaluated the arguments for and against the clause, and taking into consideration the results of consultation, we recommend the adoption of the whole of clause 47 of the draft code in the proposed mini-code.**

[61] *Ibid, Overview*, at paragraph 14.1.

Chapter 3

Conspiracy

Introduction

3.1 The purpose of this chapter is to describe the present law, to identify its deficiencies and to examine the Criminal Law Act 1977 in England as a possible model for reforming legislation in Hong Kong. As explained in chapter 1, Part I of the 1977 Act represents a partial codification of the common law of criminal conspiracy, incorporating several major reforms.

The definition and rationale of the common law of criminal conspiracy

An agreement to effect an unlawful purpose

3.2 Conspiracy at common law consists of an agreement between two or more persons to effect some unlawful purpose. It differs from the other inchoate offences in a number of ways. The most important difference lies in the nature of the objective. For incitement and attempt, the objective must itself be an offence. Conspiracy goes further. Agreement to commit an offence is, of course, one instance of the crime of conspiracy. However, in addition, an agreement to effect some "unlawful" object, which is not itself an offence if committed by one person, can amount to the crime of conspiracy. This is because of the wide meaning which has been given to "unlawful" in this context. The exact extent of these unlawful objects (other than crimes) is far from clear.

3.3 A person remains liable to be prosecuted for conspiracy even if the object of the agreement has been achieved. The extended meaning of "unlawful" leads to the result that as long as two or more persons combine they can, in certain circumstances, be punished for acts which would not be criminal if committed by one of them alone.

An unenlightening definition

3.4 The classic definition of conspiracy at common law was given by Willes J in *Mulcahy v R* as an *"agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means"*[1]. This has been recognised as being

[1] (1868) LR 3 HL 306, at 317.

both tautologous and unenlightening[2]. The uncertainty in the present law does not spring from this loose language. The nineteenth century judgment was attempting to describe well established but poorly delineated case law[3]. The term "unlawful" in the first limb extends beyond criminal activity to include certain tortious activity and it has never been clearly explained what "unlawful means" in the second limb comprehends[4].

The rationale for the extension of criminal conspiracy

3.5 Historically, the extension of the criminal sanction beyond agreements to effect criminal objectives appears to have been motivated by a fear that combinations of individuals with a common object in mind are more dangerous than individuals acting alone. Thus, certain torts are regarded as criminal if they were the object of an agreement between two or more individuals[5]. Furthermore, the judiciary has in the past employed conspiracy as a means of creating new crimes to counter what judges have regarded as dangerous activity in circumstances where the common law or statute was lacking[6].

Conspiracies recognised by the common law

Offences known to the common law and statutory offences

3.6 Conspiracy lies as a charge whether the offence is one at common law, such as conspiracy to murder, or created by statute, such as conspiracy to commit criminal damage, contrary to section 60(1) of the Crimes Ordinance (Cap 200). It is also well established that an agreement to commit a purely summary offence is a criminal conspiracy[7], even if it is an offence of strict liability.

3.7 It was suggested to us by one commentator on our Draft Report that the law of conspiracy should not apply to purely summary matters. We

---

2 The Law Commission's Report on Conspiracy and Criminal Law Reform discusses the problem at length: see, in particular, paragraphs 1.8 and 1.9.

3 A history of the development of the law of conspiracy and an explanation of leading nineteenth century judgments is given by Lord Hailsham LC in his judgment in *R v Kamara* [1974] AC 104, at 121 to131.

4 In *R v Kamara* [1974] AC 104, Lord Hailsharn LC appears to disagree with Lord Cross as to whether the "unlawful act" in the definition of Willes J meant purely criminal, rather than also including tortious activity: see pages 122 to 125, and contrast page 132.

5 "A combination without justification to insult, annoy, injure or impoverish another person is a criminal conspiracy": *Russell on Crime* (12th Edition) Volume 2, at 1490.

6 In *Shaw v DPP* [1962] AC 220 their Lordships expressed the view that there remained in the courts a residual power, where no statute had intervened to supersede the common law, to superintend those offences which were prejudicial to the public welfare. The judgment authoritatively established the offence of conspiracy to corrupt public morals.

7 See *R v Blamires Transport Services Ltd* [1964] 1 QB 278. The guilty mind that must accompany a conspiracy to commit an offence of strict liability requires full knowledge of the facts and circumstances that constitute the offence.

do not favour such an approach. It is not the law of England[8], nor of Hong Kong, and would represent a major change for Hong Kong. In Hong Kong professionally qualified magistrates are given far greater powers of imprisonment than their English lay counterparts. Our law takes account of this and a purely summary offence is a very different creature from its English counterpart which, generally speaking, is an offence carrying no more than six months imprisonment. **We accordingly recommend that the law of conspiracy should continue to apply to summary matters.**

Conspiracy, inchoate offences and secondary participation

3.8 To what extent a conspiracy can be charged when the object of the agreement is an inchoate offence or an offence of secondary participation is not entirely clear. It appears that it is an offence to conspire to incite, though conspiracy to attempt is inapt because attempt is so proximate to the completed crime[9]. There is doubt whether a charge of conspiracy to aid and abet an offence is known to the law[10]. As for conspiracy itself, the offence of incitement to conspire is probably known to the common law, as is attempting to conspire[11]and aiding and abetting a conspiracy[12].

Conspiracies whose objective would not otherwise be criminal

3.9 Conspiracies consisting of agreements whose objective would not otherwise be criminal may be categorised in as follows:

(a) conspiracies to commit tortious acts, including conspiracy to defraud and conspiracy to trespass;

(b) conspiracies to injure; and

(c) conspiracies relating to public morals and decency.

In the following paragraphs, we look at each of these categories of conspiracy in turn.

Conspiracy to commit a tortious act

3.10 Conspiracy to commit a tortious act gives rise to civil liability and may be the subject of civil remedies, such as damages or an injunction. In

---

8 See section 4(1) of the 1977 Act, which allows proceedings for conspiracy to commit a summary offence, but only with the consent of the Director of Public Prosecutions.

9 See the Law Commission's Report on Conspiracy and Criminal Law Reform, paragraph 1.44.

10 See the English Court of Appeal in *R v Hollinshead* [1985] 1 All ER 850, which is authority against the existence of such an offence, while *AG v Po Koon-tai* [1980] HKLR 492 is authority for the opposite proposition.

11 See Smith and Hogan, *op cit,* at 267.

12 See paragraph 13.24 of the Draft Code Report, which suggests that such an offence exists.

theory at least any intentional tortious act may be the object of a criminal conspiracy charge, though in practice only two torts have featured in the reports in recent times: conspiracy to defraud and conspiracy to trespass. Conspiracy to defraud is commonly employed as a means of charging commercial dishonesty. It is a potentially wide ranging offence. Trespass upon property has never been a criminal offence, but conspiracy to trespass has been employed as a charge in England.

3.11 In *R v Kamara* Lord Hailsham LC explained that:

> *"Trespass, or any other form of tort can, if intended, form the element of illegality necessary in conspiracy. But in my view, more is needed. Either (1) execution of the combination must invade the domain of the public, as, for instance, when the trespass involves the invasion of a building such as the embassy of a friendly country or a publicly owned building, or (of course) where it infringes the criminal law as by breaching the statutes of forcible entry and detainer, the Criminal Damage Act 1971, or the laws affecting criminal assaults to the person. Alternatively (2) a combination to trespass becomes indictable if the execution of the combination necessarily involves and is known and intended to involve the infliction on its victim of something more than purely nominal damage. This must necessarily be the case where the intention is to occupy the premises to the exclusion of the owner's right, either by expelling him altogether ... or otherwise effectively preventing him from enjoying his property*[13]

The offence was employed in that case against individuals who invaded an embassy and detained its staff. Conspiracy to trespass does not appear to have been employed as a charge in recent years in Hong Kong. The Public Order Ordinance (Cap 245) already contains offences that could be employed in circumstances similar to the conduct described in *R v Kamara*[14]

3.12 Despite the clarification and prescription of conspiracy to commit a tortious act by their Lordships in *Kamara's* case it still remains a very wide offence. The second alternative described by Lord Hailsham, taken at its widest, still permits many tortious acts to be prosecuted if committed jointly and accompanied by an intention to inflict *"more than purely nominal damage"*.

Conspiracy to injure

[13] [1974] AC 104, at page 130.

[14] See in particular, section 23, forcible entry, and section 24, forcible detainer of premises.

3.13 Criminal and civil liability for conspiracy to injure are regarded as being coextensive[15]. The tort and crime emerged in the context of industrial disputes. The law attempted to draw the line between combinations aimed at persuasion, which were permitted, and combinations aimed at coercion, which were not. A civil claim lay where combinations caused damage. In *Crofter Hand Woven Harris Tweed Co v Witch,* Viscount Simon LC said:

> *"… unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful"*[16].

3.14 The criminal counterpart has rarely been employed. In *R v Bunn,* Brett J examined the offence and said:

> *"... if you think that there was an agreement and combination between the defendants ... to interfere with the masters by molesting them, so as to control their will; and if you think that the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will, then I say that is an illegal conspiracy, for which these defendants are liable".*[17]

He went on to say that it would be an improper molestation if:

> *"... anything was done with an improper intent which you think was an unjustifiable annoyance and interference with the masters in the conduct of their business, and which in any business would be such annoyance and interference as would be likely to have a deterring effect upon masters of ordinary nerve"*[18].

3.15 Opinion was divided among those who commented on our Draft Report as to whether the common law offences of conspiracy to trespass and conspiracy to injure should be abolished. Those who were in favour of the retention of these offences thought that they might prove useful in the fight against organised crime or threats and intimidation. They cited the example of interference with construction on private properties and of triads taking preliminary action towards extortion.

3.16 On balance, however, we do not think it necessary to maintain these common law offences which were abolished in England by the Criminal

---

15 That view is advanced by the authors of the English Law Commission's Report on Conspiracy and Criminal Law Reform, at paragraph 5.19.

16 [1942] AC 435, at 466.

17 (1872) 12 COX CC 316, at 340.

18 (1872) 12 COX CC 316, at 348 to 349.

Law Act 1977. The common law offence of conspiracy to trespass (and forcible entry and detainer) has never been used to deal with the circumstances envisaged by its proponents. Moreover, we believe that the provisions of the Public Order Ordinance (Cap 245), in particular sections 23 and 24, already provide an adequate enforcement arsenal for the situations envisaged.

3.17 Conspiracy to injure is not in our view of direct relevance to the fight against triad-related criminal activities. 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. The offence had not been employed in England and Wales for many years before it was abolished in 1977. Although it exists as a common law offence in Hong Kong, it has, as far as researches can determine, never been employed as an offence in Hong Kong. What is more, we think that organised threats and intimidation are already dealt with adequately by other charges, such as conspiracy to blackmail or conspiracy to criminally intimidate.

3.18 **We therefore 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.**

Conspiracies relating to public morals and decency

3.19 It is not a simple task to describe briefly the conspiracies relating to public morals and decency. The leading modern authorities were in part an attempt to make sense of a mass of old authority. The same authorities also illustrate how the judicial role in lawmaking has changed. Describing the present law requires reference to three House of Lords decisions: *Shaw v DPP*[19]*, Knuller v DPP*[20]and *Withers v DPP*[21]*.*

3.20 In *Shaw's* case, the defendant published a directory of prostitutes giving their names, telephone numbers, prices and, by means of abbreviations, the perversions they were willing to indulge in. He was prosecuted and convicted, *inter alia,* of conspiracy to corrupt public morals[22] . The Court of Criminal Appeal upheld the conviction on the basis that there was a generic common law offence consisting of "conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual)"[23]. The House of Lords, by majority, affirmed his conviction on the

19 [1962] AC 220.
20 [1973] AC 435.
21 [1974] 3 WLR 751.
22 He also faced counts of publishing an obscene article contrary to section 2 of the Obscene Publications Act 1959 and living off the earnings of prostitution, contrary to section 30 of the Sexual Offences Act 1956. He was eventually convicted on these other counts and the convictions were upheld.
23 [1962] AC 220, at 233.

basis that *"a conspiracy to corrupt public morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury"*[24].

3.21 The House clearly took the view in *Shaw's* case that there remained in the court *"a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare"*[25]. The jury was the safeguard as the final arbiter determining whether the conduct in question amounted to a conspiracy to corrupt public morals[26].

3.22 In *Knuller's* case the defendants published a magazine which had a significant circulation among school children. In one part of that magazine was a column of advertisements headed "Males", containing advertisements which amounted to solicitation for homosexual purposes[27] The defendants were prosecuted with two counts of conspiracy: to corrupt public morals and to outrage public decency.

3.23 The defendants were convicted and their appeals to the Court of Appeal (Criminal Division) were dismissed. The House of Lords subsequently dismissed the defendants' appeal against conspiracy to corrupt public morals, but allowed the appeal on the other conspiracy on the basis of a misdirection at trial. Their Lordships explained the elements of both offences. They emphasised that "corrupt" and "outrage" were strong terms:

(a) *"the words 'corrupt public morals' suggest conduct which a jury might find to be destructive of the very fabric of society"*[28].

(b) *"'outraging public decency' goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people"*[29].

3.24 Their Lordships' speeches also suggested that there existed a generic common law offence of outraging public decency which could be committed independently of conspiracy[30]. The House of Lords left open the question whether conspiracy to corrupt public morals was a sub-class of a more general class of conspiracy to effect a public mischief as had been

---

24 [1962] AC 220, at 290 *(per* Lord Tucker).

25 [1962] AC 220, at 268 *(per* Viscount Simonds).

26 [1962] AC 220: see 269 *(per* Viscount Simonds), 289 *(per* Lord Tucker), 292 *(per* Lord Morris) and 294 *(per* Lord Hodson).

27 The 1967 Sexual Offences Act had legalised homosexual acts between consenting male adults in private. Lord Tucker had foreshadowed such a change in his speech in *Shaw,* when he said (at 285):
"Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury?"
A similar point was made by Viscount Simonds at page 268 of *Shaw.*

28 [1973] AC 435, at 491 (per Lord Simon).

29 [1973] AC 435, at 495 *(per* Lord Simon).

30 It is now clear that outraging public decency is an offence at common law, see *R v Gibson* [1991] 1 All ER 439. The Crown does not have to prove intention or recklessness on a charge of outraging public decency. What has to be shown is a deliberate act which is found by the jury to have outraged public decency.

suggested by Lord Tucker in *Shaw's* case, with whose speech the majority had agreed[31].

3.25 Their Lordships emphasised in the *Knuller* judgments that their earlier decision in *Shaw's* case was not to be taken as affirming or supporting the doctrine that they had a general or residual power either to create new offences or widen existing offences so as to make punishable conduct of a type that had not previously been subject to punishment.

3.26 In *DPP v Withers*[32] the appellants had been convicted of conspiracy to effect a public mischief on the basis of their activity as private investigators where they had obtained confidential financial information from banks, building societies and government authorities by falsely representing that they were acting in an official capacity. Their conviction was quashed by the House of Lords. Their Lordships made it clear that there was no "separate and distinct class of criminal conspiracy called conspiracy to effect a public mischief"[33].

3.27 It still remains open for the highest appellate courts to determine whether there exists, independently of conspiracy, a generic offence of corrupting public morals. Although the judiciary have emphasised that they have no residual power to create new offences, the width of the conspiracies to corrupt public morals and to outrage public decency (particularly the former) maintains much of that very power. In Hong Kong the jury trial, providing both the arbiter and the safeguard, is not necessarily available to those who might face such charges. The Attorney General alone makes the decision regarding the venue in which such offences would be tried[34]. It would be open to the prosecution to allege that certain activity, never before the subject of a charge, "corrupted public morals". Such a charge, brought before the District Court, would rely solely on the judge's interpretation and might fail to fully reflect the prevailing public sentiment. A body of law could develop without reference to the legislature or the test of public opinion.

3.28 The arguments for and against retaining the common law conspiracies are finely balanced. The main arguments for retaining the offences of conspiracy to outrage public decency and conspiracy to corrupt public words would appear to be as follows:

- a possible gap may exist in the criminal law. A recent instance of the employment of the offence of outraging public decency

---

31 [1962] AC 220, at 285. Lord Tucker did not disagree with the Court of Criminal Appeal's assertion that corrupting public morals existed as a generic offence independent of conspiracy.

32 [1974] 3 WLR 751

33 *Per* Viscount Dilhorne, at 759. Their Lordships did point out that the defendants might have been convicted of conspiracy to defraud on the basis that that offence contemplates deceiving a public official in the execution of his duty.

34 Because no penalty is specified for conspiracy to commit a civil wrong or to corrupt public morals or outrage public decency they are subject to the maxima in section 90(1) of the Interpretation and General Clauses Ordinance (Cap 1) of 7 years imprisonment and a fine. They may be dealt with in the District Court at the Attorney General's discretion. See section 88 of the Magistrates Ordinance (Cap 227), and Part III of the 2nd Schedule to that Ordinance.

involved the prosecution in England of individuals who sought to display earrings fashioned from freeze-dried human foetuses[35]. In relation to homosexuality, it may no longer be a crime for consenting adults to engage in homosexual conduct in private, but society probably requires a means of preventing the active encouragement of such behaviour, especially among the young;

- "outrage public decency" and "corrupt public morals" both imply seriously damaging conduct. These offences would be inappropriate for minor offences or even commonplace criminal activity. Such serious offences would merit prosecution in the High Court, where the jury would act both as arbiter of public standards of decency and moral behaviour and as a safeguard against abuse of the prosecution process.

- the abolition of these offences, encompassing sexual behaviour, morality and censorship, is beyond the proper scope of a review concerned primarily with examining the benefits of codifying the criminal law.

3.29 The main arguments against retaining the two common law conspiracies are:

- the crimes of conspiracy to outrage public decency and conspiracy to corrupt public morals are offences of great width and uncertain ambit. It is not possible to categorise any widely accepted standards of decency and morality. Furthermore, it is uncertain whether political and religious activity come within the consideration of standards of behaviour or morality.

- jury trial is not available as of right. The jury is the safeguard against the misuse of such charges.

- the offences do not appear to have been employed in recent years in Hong Kong, if at all. While not conclusive, that fact strongly suggests that the offences serve little purpose.

- such offences give too great a scope for judicial lawmaking.

- such serious offences, if they are needed at all, should be re-created in clear statutory terms, rather than existing in the form of inaccessible and contradictory precedents.

3.30 The majority of those who commented on our Draft Report were of the view that the offences of conspiracy to corrupt public morals or to outrage public decency should be abolished. A minority expressed reservations over the abolition of these offences. Their reservations were

[35] *R v Gibson* [1991] 1 All ER 439.

founded on the fact that the existing law was necessary to prevent vice advertisements, obscene videos and obscene telephone conversations, etc.

3.31 We are not convinced by the reasons of those arguing for the retention of these offences. In our view the most telling point is that neither of these offences appears to have been employed in Hong Kong, at least not in recent years. It seems difficult in the light of that to argue convincingly that the offences are an essential weapon in the fight against crime. Furthermore, there are already existing statutory provisions which deal with obscene 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). The lack of use of the offences of conspiracy to corrupt public morals or outrage public decency inclines us to the view that the existing statutory offences are already adequate to deal with vice activities.

3.32 **We 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.** It seems to us that such an offence is of extreme and uncertain width, and that it is out of place with the philosophy of a criminal law system that emphasises clarity and precision. Such an offence has not been employed in the past, nor does it seem likely that it will be needed in future. It is largely subjective and could evolve into a means of suppressing unpopular or religious beliefs.

3.33 **We also recommend the abolition of the offence of outraging public decency.** Again, its greatest failing is seen to be its imprecise nature. Public decency is incapable of objective definition. Standards of decency are not uniform in Hong Kong society and public attitudes are prone to change. We do not think that the retention of such an offence in the criminal calendar is either desirable or necessary.

Conspiracy and the general part of the criminal law

The mens rea and actus reus of conspiracy

3.34 The *actus reus* of conspiracy is the agreement itself. It is not necessary for any steps to be taken toward the completion of the objective, though, in practice, it is the taking of those steps which provides the evidence of the agreement. There is no defence of withdrawal from the conspiracy. Conspiracy is a continuing offence: it continues after agreement until it is discharged by completion of its performance or by abandonment or frustration of its objective[36].

3.35 For the offence of conspiracy, obviously, the *mens rea* is closely related to the *actus reus.* Each conspirator must agree that the object of the

[36] See *DPP v Doot* [1973] AC 807. When a conspiracy is already in being, others may join it and become co-conspirators.

conspiracy be pursued. Nothing less than full agreement will suffice. Mere negotiation is not sufficient[37]. However, conditional agreement, such as when two men agree to rob a bank messenger if he appears and there are no police present, is enough for liability[38]. It is not necessary for all the parties to have evinced their intention at one time, nor that they are aware of each others identity. What is essential is that each of the conspirators should entertain a common purpose in relation to the specific offence or offences which are the object of the conspiracy[39]. This is the same whether the conspiracy formed is a "wheel" or a "chain" conspiracy[40].

3.36 The exact description of the guilty mind required to be proved in each conspirator will depend on the crime itself. It is not possible to describe comprehensively what level of knowledge or intention will be required before the court finds a conspiracy proved, as offences vary greatly in their constituent elements. It appears that, as with the other inchoate offence of attempt, conspiracy requires proof of a higher degree of knowledge or intention than might be sufficient to establish liability if the offence was completed. For example, criminal damage may be committed intentionally or recklessly. Conspiracy to commit criminal damage, however, requires proof of an intention so to act and recklessness will not suffice[41].

3.37 Before the conspiracy comes into existence there must be at least two conspirators with the necessary *mens rea.* A new adherent must also have the necessary guilty mind in order to join an existing conspiracy. The common law provides a number of exceptions to this rule:

(a) A man or woman cannot conspire with a person who is his or her spouse at the time the agreement is made[42]. The rationale behind this rule is to avoid marital communications becoming the subject of investigation, with the resultant danger of undermining the institution of marriage. The origins of the rule also lie in the old notion of the unity of husband and wife: since they are deemed to be one person, they could not form an agreement.

(b) It does not appear to be possible to conspire with an individual, such as a child under 7 or a mentally retarded person, who does not have the capacity in law to commit the crime which is the object of the agreement[43].

---

37 See *R v Walker* [1962] Crim L R 458.

38 There is little authority on the subject. See Smith and Hogan, *op cit*, at 281 to 282.

39 *R v O'Brien* (1974) 59 Cr App R 222.

40 A "wheel" conspiracy is a conspiracy where one conspirator acts as the hub and agrees with each of the others. A "chain" conspiracy is where the agreement is formed successively between the additional conspirators.

41 This appears to flow from the House of Lords decision in *Churchill v Walton* [1967] 2 AC 224, when their Lordships considered the offence of conspiracy to commit an offence of strict liability. For the law of attempt, see R v *Mohan* [1975] 2 WLR 859.

42 *R v Mawji* [1957] AC 126. This does not prevent either of them from being prosecuted as accomplices if the crime is completed.

43 This is the view of the authors of the Law Commission Report on Conspiracy and Criminal Law Reform: see paragraph 1.51.

(c) It is doubtful whether an intended victim of a crime can conspire with another individual to commit that crime[44].

(d) It is possible for a corporation to be party to a conspiracy, provided that its controlling officers have the necessary guilty intention. On the other hand, if there is only one such officer he cannot conspire with the corporation[45].

Conspiracy and the defence of impossibility

3.38 It is well established that the defence of impossibility is available to a charge of conspiracy. In *DPP* v *Nock and Alsford*[46]*,the* defendants had agreed to produce cocaine by separating it from other substances in a powder they believed contained a mixture of cocaine and lignocaine. In fact, the powder contained only lignocaine and could not under any circumstances have produced cocaine. They were convicted of conspiracy to produce a controlled drug, contrary to section 4 of the Misuse of Drugs Act 1971. The English Court of Appeal upheld their conviction but it was quashed by the House of Lords. The House held that where two or more persons agree on a course of conduct with the object of committing a criminal offence, but unknown to them it is not possible to achieve this object by that course of conduct, they could not commit conspiracy. Lord Scarman said:

> *"This is a case not of an agreement to commit a crime capable of being committed in the way agreed upon, but frustrated by a supervening event making its completion impossible, which was the Crown's submission, but of an agreement upon a course of conduct which could not in any circumstances result in the statutory offence alleged, ie the offence of producing the controlled drug, cocaine."*[47]

It should be noted that their Lordships' judgments stressed the specific course of conduct that the defendants had agreed upon: that is, to obtain cocaine from a particular quantity of powder. If the defendants had agreed to a "conspiracy at large", that is an agreement in general terms to produce cocaine, then it seems clear that they would have been convicted despite their lack of success with one such unsuccessful attempt to produce cocaine. Lord Scarman explained it thus:

> *"... if two or more persons decide to go into business as cocaine producers, or, to take another example, as assassins for hire ... , the mere fact that in the course of performing their agreement*

---

44 There appears to be no authority for the existence of such conspiracies. Their existence is doubted by modern authors. See Smith and Hogan, *op cit*, at 298.

45 *R v McDonnell* [1966] 1 QB 233.

46 [1978] AC 979.

47 [1978] AC 979, at 998.

they attempt to produce cocaine from a raw material which could not possibly yield it or (in the second example), stab a corpse, believing it to be the body of a living man, would not avail them as a defence: for the performance of their general agreement would not be rendered impossible by such transient frustrations. But performance of the limited agreement proved in this case could not in any circumstances have involved the commission of the offence created by the statute."[48] .

3.39 Those who commented on our Draft Report generally supported the removal of the defence of impossibility in conspiracy. We, too, believe that this is the right approach. In our view, persons conspiring to commit a crime represent a potential social danger, even if the factual context renders the completion of the crime impossible. Furthermore, the defence of impossibility can frustrate enquiries or prosecutions in circumstances where the public need protection. The defence may also frustrate legitimate police tactics in the detection and prevention of crime. **We therefore recommend that the defence of impossibility to a charge of conspiracy be removed in the proposed mini-code.**

The law and practice in Hong Kong

Procedural considerations

Conviction of one only of two or more conspirators

3.40 It was the rule at common law that if two defendants were tried together for a conspiracy, where the particulars alleged that they conspired together and with no others, then the acquittal of one of them necessitated the acquittal of the other[49]. If one defendant had initially pleaded guilty he was directed to change his plea if the other was subsequently acquitted. The rule was based on the theory that it was repugnant for the record to reveal contradictory conclusions. The rule was recognised as being illogical because the conviction of either might depend on wholly different evidence, for example, one man may have confessed while the other had not. The rule did not apply to situations where the two men were tried separately[50].

3.41 Section 66A of the Criminal Procedure Ordinance (Cap 221) changed the rule at common law. A person is now no longer entitled to be acquitted of the offence of conspiracy by reason only that the only other person or persons with whom he is alleged to have entered into the conspiracy are, or have been, acquitted.

The penalty for conspiracy

---

48 [1978] AC 979, at 996.

49 *R v Plummer* [1902] 2 KB 339.

50 *DPP v Shannon* [1975] AC 717.

3.42 Where a person is convicted of a conspiracy to commit an offence the maximum penalty for which is provided by any Ordinance, then he shall be liable to be sentenced to that maximum penalty[51]. Conspiracy is an indictable offence. The maximum penalty for an indictable offence where no penalty is otherwise provided is up to 7 years imprisonment and a fine[52]: this will be the maximum penalty for conspiracy to commit civil wrongs, or to outrage public decency or corrupt public morals.

Criticism of the present law

3.43 There is no real challenge to the rationale for and the continued existence of the offence of conspiracy: it is as old as the common law and appears to be a feature of systems derived from the Anglo-Saxon tradition and those derived from Roman Law. There are aspects of the law, however, which remain imprecise. If accessibility, comprehensibility, certainty and consistency are qualities that Hong Kong seeks in its laws then the common law of conspiracy has a number of failings:

(a) the law can only be understood by referring to numerous decisions. Even then the degree of understanding is diminished by the lack of clarity of judicial descriptions of the extent of the crime of conspiracy. There is much in the judgments that is plainly contradictory;

(b) conspiracy at common law is very loosely defined. Such a serious offence carrying a potentially high penalty should be kept within clear bounds;

(c) the rationale that maintains the crime of conspiracy for agreements the object of which would be no crime if carried out by one man acting alone has not been sufficiently demonstrated;

(d) established common law conspiracies are capable of acting as catch-all offences because of their extreme and uncertain width;

(e) the defence of impossibility may be unjust and can frustrate enquiries or prosecutions in circumstances where the public require protection. As with incitement, the defence may frustrate legitimate police tactics. The Canadian Supreme Court held in *R v O'Brien*[53] that a man could not be convicted of conspiring

---

51 Section 90(2)(b) of the Interpretation and General Clauses Ordinance (Cap 1).

52 Section 90(1) of the Interpretation and General Clauses Ordinance (Cap 1).

53 (1954) 110 Can CC 1. An earlier Canadian authority was cited by the majority, *R v Kotyszyn* (1949) 95 Can CC 261, where the Canadian Court of Appeal held that an undercover police officer does not conspire, as he has no intention of undertaking the conspiracy. Nor could there be an attempt to conspire as there was no common design and the police officer had no intent to commit the substantive offence which was the subject of the alleged conspiracy. In *R v Dowling* (1848) 3 Cox CC 509 remarks by Erle J, at 516, suggest that English law is to the same effect.

with another person who had no intent that the plan be carried out, as there was no common design or agreement;

(f) the existing exceptions which preclude the charge of conspiracy at common law where the conspirators are man and wife might not reflect the equality of modern day relationships and the possibility of involvement of husband and wife in serious crimes.

The 1977 Criminal Law Act

The 76th Report of the Law Commission of England and Wales

3.44 In 1976 the Law Commission of England and Wales published a comprehensive review of the common law of conspiracy in its Report on Conspiracy and Criminal Law Reform. The Report drew upon more than ten years of research both by the Commission and the Criminal Law Revision Committee. This included the publication of several working papers. The most important recommendation made in the Report was that conspiracy should only be an offence if the object of the agreement was itself a criminal offence [54]. That recommendation, together with several other reforms suggested by the Law Commission, was incorporated into Part I of the 1977 Criminal Law Act.

3.45 Part I of the 1977 Act, as subsequently amended, is reproduced in the Appendix to our report. The provisions represent a partial codification of the law of criminal conspiracy. The Act does not embody all the Report's recommendations. As will be seen, the Act specifically preserved the offences of conspiracy to corrupt public morals and to outrage public decency. The Report had strongly criticised these two offences[55]. The offences were uncertain and left a wide discretion to the judiciary to create new crimes. The authors of the Report had recommended abolition of the two crimes, whether as substantive offences or as conspiracy charges[56].

The offence of conspiracy under the 1977 Act

3.46 A person is guilty of conspiracy to commit an offence or offences *"if [he] agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions ... will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement ..."*

---

54 See paragraph 7 of the Introduction to the Report.

55 See paragraphs 3.16 to 3.20 of the Report.

56 See paragraph 3.143 of the Report. The report recommended that the generic offences of corruption of public morals and outrage to public decency should he abolished, together with the specific common law offences of public exhibition of indecent acts and things, keeping a disorderly house, indecent exposure and obscene libel.

(section 1(1)(a)). Together with section 5(1), which abolishes the offence of conspiracy at common law, this achieves the elimination of conspiracies which have as their object anything other than substantive crimes[57]. There is thus no longer an offence of conspiracy to trespass in England[58]. The new form of statutory conspiracy recognises both common law and statutory offences as the objects.

3.47 The new statutory offence of conspiracy is no longer subject to the defence of impossibility. An individual is liable if he agrees with any person or persons that a course of conduct be pursued which, if the agreement is carried out in accordance with their intentions, would *"involve the commission of any offence of offences ... or would do so but for the existence of facts which render the commission of the offence or any of the offences impossible"* (section 1(1)(b))[59].

3.48 Section 1(2) puts into statutory form the decision of the House of Lords in *Churchill v Walton*[60]. Thus, even where proof of intention or knowledge are not necessary to ground liability for the substantive offence, a conspiracy charge requires proof of intention or knowledge of circumstances that shall or will exist at the time the conduct constituting the offence is to take place.

3.49 It was the policy of the Conspiracy and Protection of Property Act 1875 to relax the provisions of the law of conspiracy in favour of those engaged in trade disputes. In particular, section 3 of that Act limited the penalty for a conspiracy to commit, in contemplation of a trade dispute, an act punishable only on summary conviction to the penalty prescribed for that offence. Section 1(3) of the 1977 Act modified that policy, superseding section 3 of the 1875 Act, provided the summary offence is not punishable with imprisonment.

3.50 Section 1(4) follows the common law as laid down in the House of Lords decision in *Board of Trade v Owen*[61]. Thus, a conspiracy is not indictable unless the object is a crime which would itself be indictable in England. The exception in the sub-section in relation to murder takes account of section 4 of the Offences Against the Person Act 1861. This provides that it is an offence to conspire to murder any person wherever the crime is to be committed, even though the murder itself would not be indictable in England[62].

Exemptions from liability for conspiracy

---

57 But certain common law offences are preserved by section 5(2) and (3).

58 Furthermore, the offences of forcible entry and detainer were abolished (section 13(1)). Part II of the Act provides a number of offences relating to entering and remaining on property.

59 Section 1(1) was amended by section 5 of the 1981 Criminal Attempt Act to bring the law of conspiracy into line with that of attempt.

60 [1967] 2 AC 224.

61 [1957] AC 602.

62 This corresponds to section 5 of the Offences Against the Person Ordinance (Cap 212).

3.51 Section 2 sets out the common law exemptions in statutory form:

(a) the intended victim of the conspiracy cannot be guilty of conspiracy (section 2(1));

(b) a person cannot conspire with his spouse, a person under the age of criminal responsibility and the intended victim of a crime (section 2(2)).

The intended victim is not defined further. It will be a matter of fact and law in each given set of circumstances, (presumably) much as it was under the common law.

3.52 There was support among those we consulted for the retention of the existing common law rule that a husband and wife cannot in law conspire with one another. This rule has the merit of maintaining the stability of marriage by avoiding interference with the confidential relationship of husband and wife. **We therefore recommend that the rule that a person cannot conspire with his or her spouse should be preserved.**

3.53 One consultee thought it an unnecessary limitation of the scope of the general conspiracy offence to exclude liability for conspiracy where the other party is a child under the age of criminal responsibility, or the intended victim of a crime. The exclusion of liability in those two cases is, in our view, sensible although it might restrict the scope of the conspiracy offence. Given that a conspiracy always involves at least two criminal parties, it does not seem logical that the adult party should be held liable whilst the other party is not where he or she is a young child. Likewise, it seems illogical to hold one party to a conspiracy liable whereas the other party, who is the intended victim of the conspiracy is not liable. **We therefore recommend that we should follow the 1977 Act and retain the common law exemptions in the proposed mini-code where one party is a person under the age of criminal responsibility, or is the intended victim of a crime.**

Penalties for conspiracy

3.54 The effect of section 3 is to bring the possible penalty for conspiracy into line with the maximum penalty available in the case of the substantive offence. If the penalty for the offence is fixed or specified by law, the same term of imprisonment applies for conspiracy[63]. If the penalty for the offence is "at large", then the potential penalty for conspiracy will be imprisonment for life, as is the case with, for example, conspiracy to kidnap[64] If there is no term of imprisonment specified then the person convicted of a conspiracy shall be subject to an unlimited fine[65].

---

63 Sections 3(2)(a) and 3(3).

64 Section 3(2)(c).

65 Section 3(1)(b), but as a matter of principle, a fine should be within the defendant's capacity to pay.

Restrictions on the institution of proceedings for conspiracy

3.55 The prosecution of a conspiracy to commit what is a summary offence or offences requires the consent of the Director of Public Prosecutions (section 4(1)). Where the consent of the Attorney General had been required to institute proceedings for a summary offence, then to proceed for a conspiracy to commit that offence, or a conspiracy to commit two or more offences of which at least one is subject to a prohibition, the consent of the Director of Public Prosecutions is substituted (section 4(2)). Where the consent of the Director or any other person is required before proceedings can be instituted for a substantive offence which is not a summary offence, then similar consent is required to institute conspiracy proceedings (section 4(3)). Section 4(4) changes the rule at common law whereby a conspiracy charge was not subject to a time limit[66]. The time limit for bringing a charge applies to conspiracy as it would apply to the substantive offence.

Abolitions, savings etc

3.56 While section 3(1) abolishes the offence of conspiracy at common law, section 5(2) preserves the offence of conspiracy to defraud. The 1977 Act as originally drafted made offences under section 1 and conspiracy to defraud mutually exclusive. This proved unworkable as the typical conspiracy involving dishonesty, such as conspiracy to steal, would also be a conspiracy to defraud at common law. When this became clear in the House of Lords decision in *R v Ayres* [67] *statutory* amendment followed. The full width of conspiracy to defraud is preserved by allowing that offence to be charged even where the facts also give rise to an offence under section 1 of conspiracy to commit a crime[68].

3.57 The offences of conspiracy to corrupt public morals or outrage public decency are preserved by section 5(3). The drafting is intricate, but it appears to be based on the assumption that it is not possible to state with certainty whether substantive offences of corrupting public morals or outraging public decency exist. If they do not exist as substantive offences, then section 5(3) allows them to be charged as common law conspiracies. If they do exist as substantive crimes, then they must be charged as statutory conspiracies under section 1(1). Unfortunately, this is not without problems. For example, the *mens rea* for the statutory conspiracy may well differ from that for the common law offence.

---

66 This rule was only of importance for purely summary offences which were regulatory in nature. It allowed conspiracy charges long after the time limit of six months placed on the institution of a purely summary offence: for an example, see *R v Blamires Transport Services Ltd* [1964] 1 QB 278.

67 [1984] AC 447.

68 The amendment was put in place by section 12(2) of Criminal Justice Act 1987.

3.58 Incitement to commit the offence of conspiracy, whether the offence be under the Act, at common law or under another enactment, ceased to be an offence (section 5(7)). (The offence of incitement to conspire has been discussed in paragraph 2.30).

3.59 The rule in *R V Plummer*[69] abolished (sections 5(8) and (9)). Thus, the judge must consider all the circumstances of the case to determine whether the conviction of one conspirator is consistent with the acquittal of another. In practice, this does not make the task of the judge very much simpler[70].

The 1977 Criminal Law Act: a model for Hong Kong?

The 1977 Act and codification

3.60 The 1977 Act codifies the offence of conspiracy. Placing conspiracy in a statutory framework makes it easier to amend or modify the law. In England, Part I of the 1977 Act has already been the subject of two major changes, one removing the defence of impossibility[71] and the other restoring the full width of conspiracy to defraud[72]. Rendering the law into statutory form greatly enhances its accessibility, and could be expected to promote consistency and certainty in its application.

3.61 Using the 1977 Act as a model would keep Hong Kong abreast of developments in England and Wales. This ensures an additional source of judicial authority and maintains the usefulness of English texts as practitioners' tools in Hong Kong. On the other hand, it cannot be pretended that the 1977 Act is a perfect draft[73].

A statutory definition of conspiracy

3.62 In creating a statutory definition of what constitutes a conspiracy the 1977 Act gives a greater degree of clarity to the law. More importantly, the abolition of the common law offence of conspiracy removed a number of widely cast, poorly understood and little used crimes which carried heavy penalties. It is difficult to challenge the goal of confining conspiracy to objectives that are themselves criminal.

---

69 [1902] 2 KB 339. As mentioned above, the change has already been effected in Hong Kong by section 66A of the Criminal Procedure Ordinance (Cap 221).

70 See *R v Longman and Cribben* [1981] 72 Cr App R 121 where the English Court of Appeal gave guidance to judges for the conduct of trials involving allegations of conspiracy against two conspirators alleged to have been involved without the participation of any others.

71 Section 1(1) was amended by section 5 of the Criminal Attempts Act 1981.

72 Section 5(2) was amended by section 12 of the Criminal Justice Act.

73 The authors of Smith and Hogan describe it as *"an ill-drafted piece of legislation presenting numerous problems of interpretation"* (*op cit*, at 270).

3.63 If the 1977 Act is to be used as a model, this means adopting the Act's key features, some of which may be less than ideal. The House of Lords decision in *R v Anderson*[74] suggests that the courts may have problems with the meaning of section 1(1). In that case, the defendant was convicted of conspiring with others to effect the escape of one of them from prison. He had agreed to provide diamond wire to cut through the prison bars. His defence was that he never intended the plan to be put into effect and believed it could not succeed. His conviction was upheld. Lord Bridge, with whom the four other judges agreed, explained that section 1(1) had not altered the common law position on what must be agreed between conspirators. He made remarks that appear to suggest that it is not necessary for his conviction to show that a conspirator intended to carry out the agreement:

> *" ... I am clearly driven by consideration of the diversity of roles which parties may agree to play in criminal conspiracies to reject any construction of the statutory language which would require the prosecution to prove an intention on the part of each conspirator that the criminal offence or offences which will necessarily be committed by one or more of the conspirators if the agreed course of conduct is fully carried out should in fact be committed."*[75]

Furthermore, the *mens rea of* an offence under section 1(1) was established:

> *" if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required."*[76]

Both are novel propositions in the eyes of many commentators[77].

3.64 Sections 1(1) and (2) provide the core provisions, the definition of the *actus eus* and *mens rea.* A review of the remainder of the Act finds terms which may be adopted, modified or deleted:

(a) sections 1(1)(a) and 1(3) correspond to section 48 of the Trade Unions Ordinance (Cap 332), though section 1(3) of the 1977 Act may go further in exempting acts which would otherwise be crimes from punishment. The exemptions from liability to a charge of conspiracy given by section 48 are possibly narrowed by the effect of the Societies Ordinance (Cap 15l)[78]. Section 1(3)

---

74 [1986] AC 27.

75 [1986] AC 27, at 38.

76 [1986] AC 27, at 39.

77 See, for example, the comments of the authors of the Draft Code Report at paragraphs 13.24 and 13.25.

78 Section 48 provides:

> *"(1) An agreement or combination of 2 or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall*

could be deleted, or replaced with a provision expressly preserving section 48 of the Trade Unions Ordinance. This would permit the new legislation to fit into the existing procedural framework and avoid the need to revise Hong Kong's labour laws.

(b) section 1(4) is merely declaratory of existing Hong Kong law. The subsection follows the law as laid down in *Board of Trade v Owen*[79], where it was held that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime was one for which an indictment would lie in England[80];

(c) section 2 provides in statutory form the common law exemptions from liability[81]: a person cannot conspire with the intended victim of an offence, his spouse or a person under the age of criminal responsibility;

(d) section 3 is oddly drafted but its effect is reasonably clear. Conspiracy will carry the same maximum penalty as the substantive offence, unless the crime is purely summary, when a fine may be awarded, or where the penalty for the offence is fixed by law (eg death), when conspiracy carries a maximum penalty of imprisonment for life. Indictable offences without specified statutory maximum penalties carry life imprisonment as a maximum penalty for the substantive offence or for the

---

not be triable as a conspiracy if such act committed by one person would not be punishable as a crime.

(2) An act done in pursuance of an agreement or combination by 2 or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.

(3) Nothing in this section shall exempt from punishment any person guilty of a conspiracy for which a punishment is awarded by any enactment in force in Hong Kong.

(4) Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace or sedition or any offence against the State or the Sovereign.

(5) Where a person is convicted of any such agreement or combination as is referred to in subsection (1) to do or procure to be done any act that is punishable on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed 3 months, or such longer term, if any, as may have been prescribed by the law for the punishment of such act when committed by one person.

(6) Nothing in this section shall he construed in any way to limit or prejudice any of the provisions of the Societies Ordinance (Cap 151)."

79 [1957] AC 602.

80 A conspiracy in Hong Kong to commit a crime outside Hong Kong is not indictable in Hong Kong unless the contemplated crime is one for which an indictment would lie in the Territory. *Board of Trade v Owen* was recently cited with approval in *Somchai Liangsiriprasert v Government of the United States of America* [1990] 2 HKLR 612, which extended the courts' jurisdiction to conspiracies which take place outside the jurisdiction with intent to commit a crime inside the jurisdiction.

81 The authors of the Draft Code Report recommend the removal of all the exemptions: see paragraph 13.30 to 13.32.

conspiracy. This is broadly in line with the effect of section 90 of the Interpretation and General Clauses ordinance (Cap 1).

(e) section 4 reflects United Kingdom law and practice relating to supervision of prosecutions policy by the Director of Public Prosecutions and Attorney General. Hong Kong practice is different: for example, it is possible to deal with conspiracy in the magistrates' court and (normally) such an offence does not require a specific consent[82]. Nonetheless, the safeguards over the unusual offence of conspiracy to commit a purely summary offence in subsections (1) and (4) might be adopted;

(f) the motive for retention of the offence of conspiracy to defraud was that the subject was under consideration by the Law Commission as a separate topic. A similar position prevails in Hong Kong. Following a reference to the Law Reform Commission in March 1988, considerable work has been done, first by a sub-committee of the Commission and latterly by the Commission itself. It is anticipated that the Commission's final report will be published early in 1994;

(g) the preservation of the offence of conspiracy at common law as far as it relates to an agreement to engage in conduct which tends to corrupt public morals or outrage public decency caused considerable controversy[83]. The United Kingdom Government rejected the Law Commission's recommendation to abolish the two offences. It was thought that this recommendation raised more fundamental questions about the general law of obscenity than it had been the task of the Law Commission to examine in the context of its review of the law of conspiracy[84];

(h) unlike the other provisions of Part I of the Criminal Law Act 1977, the removal of the offence of incitement to conspire by section 5(7) was not based on a recommendation in the Law Commission's 1976 Report. It was instead based on a recommendation made by an earlier working party which had argued that to retain such an offence would take the law further back in the course of conduct to be penalised than was justified. The authors of the Law Commission's draft Code, after consultation, recommended the resurrection of this offence[85].

---

82 Reference in an Ordinance to an offence is deemed to include conspiracy to commit that offence: section 82(1) of the Interpretation and General Clauses Ordinance (Cap 1). Thus, if a magistrate is permitted to deal with an indictable offence he may deal with the conspiracy: see *R v Wong Chun-kit* Magistracy Appeal No. 157 of 1989.

83 See Hansard 14.12.76: Col 804. The Government announced that a committee would undertake a fundamental review of the law in the field of obscenity, indecency and censorship. The Law Commission's Draft Code Report, published in April 1989, subsequently noted that no work was then being undertaken to examine the two conspiracies (see paragraph 13.20).

84 Lord Gardiner, for example, referred to conspiracy to corrupt public morals as *"a great blot on our legal system"* (see Hansard, 14.12.76: Col 833).

85 See paragraphs 13.13 to 13.15 of the Draft Code Report.

Despite the abolition of incitement to conspire, the offence of incitement to incite survived in England (see *R v Sirat*[86]) . The circumstances of *Sirat's* case also demonstrate the need to retain the offence of incitement to conspire. In Hong Kong, the offence might be a useful tool against triad organised crime where individuals incite others to join an existing conspiracy[87] . (We have already recommended in chapter 2 that the offence of incitement to conspire should be retained.)

Summary

3.65 The principal achievement of the 1977 Act is the removal of many obscure crimes open to misunderstanding or possible abuse. It is noteworthy, however, that Parliament did not go all the way and strike out every common law conspiracy. Putting aside the question of conspiracy to defraud, it must be assumed that there was a fear that significant gap would exist without the offences of outraging public decency or corrupting public morals. This was central to their Lordships' reasoning in *Shaw v DPP*. Viscount Simonds and Lord Tucker were of the opinion that conspiracy to corrupt public morals should be available to deter those who might openly advocate or encourage homosexual practices, even if homosexual acts themselves might be decriminalised[88].

3.66 In 1983 this Commission's Report on Laws Governing Homosexual Conduct, while recommending decriminalisation of certain homosexual activity, also recommended the creation of an offence of indecent behaviour[89]. The principal recommendations were enacted in the Crimes (Amendment) Ordinance, No. 90 of 1991, though the proposal for a new offence of indecent behaviour was not included. Such an offence was thought necessary to protect members of the public against those individuals who would resort in public to sexually motivated behaviour which would be regarded as offensive by society. Since the publication of that report it has become clear that a substantive offence of outraging public decency exists at common law[90]. That offence may meet the needs identified by the authors of the Report, though outraging public decency suggests behaviour that goes well beyond merely offending members of the public. It should also be noted that relatively minor acts of indecency may be caught by the offence of

---

86 (1986) 83 Cr App R 42. It was alleged that A incited B to agree with C to wound D. This did not amount to incitement to wound D. It could have amounted to incitement to incite.

87 The law regards a triad society as a statutory form of criminal conspiracy: see *R v Liu Ping-tim* [1987] HKLR 38 and *AG v Chik Wai-lun* [1987] HKLR 41. To encourage others to join is akin to incitement to conspire. In the same vein, individuals who are invited to participate in existing conspiracies are incited to join. To remove the possibility of such a charge might limit the investigation and prosecution of organised crime at a time when such activity is causing concern.

88 [1962] AC 221, at 268 and 285.

89 Paragraph 11.23.

90 See *R v Gibson* [1991] 1 All ER 439. In this case the defendants were convicted of outraging public decency following the display of earrings manufactured from freeze dried human foetuses.

indecency in public, contrary to section 148 of the Crimes Ordinance (Cap 200), carrying a penalty of up to 6 months imprisonment.

3.67 We have noted already that there have been criticisms of the 1977 Act. We are satisfied, however, that its provisions represent an improvement in a number of ways on our present law in Hong Kong. **We accordingly recommend the adoption in the proposed mini-code of the provisions of the 1977 Act relating to conspiracy, subject to the other recommendations we have made earlier in this chapter.**

Chapter 4

Attempt

Introduction

4.1 The purpose of this chapter is to describe the present law, identify its deficiencies and examine the United Kingdom Criminal Attempts Act 1981 as a possible model for reforming legislation in Hong Kong. The 1981 Act represents a codification of the law of criminal attempt. As mentioned in chapter 1, the 1981 Act also removed the defence of impossibility from the law of criminal attempt and conspiracy[1].

The definition of, and rationale for, the crime of attempt at common law

4.2 Mere intention to commit a crime, however serious, has never been sufficient for liability at common law. Society only intervenes when an individual manifests that intention in active steps towards the commission of a particular crime. This may be by conspiring with another, or inciting another to commit that crime, or by the individual pursuing his preparation to such a degree that the law considers that he is guilty of an attempt to commit that crime. Whether an act is sufficient to amount to the *actus reus* (prohibited act) for an attempt and the *mens rea* (guilty mind) that must accompany such activity is at present determined by the common law.

4.3 The evolution of the common law demonstrates how difficult it has been to produce a simple definition for the conduct that will be sufficient for an attempt. The case law evolved as judges endeavoured:

(a) to fix the point at which the authorities may intervene to protect the public interest; and

(b) to provide a workable definition of attempt that would apply generally to all indictable offences.

4.4 The case law is described in some detail below. What has emerged from the judgments are a variety of definitions of attempt which are not wholly consistent. The law has set the point of intervention beyond merely preparatory acts. It is also clear that a person is liable for attempt if he has

[1] The defence remains for the common law conspiracies and for the crime of incitement, a situation which leading commentators have described as "absurd": see the Draft Code Report, paragraphs 13.50 and 13.51.

done all he can do to complete the crime he intends. The starting point for liability for attempt lies somewhere between preparatory acts and the final act that is within the accused's power before completion of the substantive offence.

4.5 In contrast with the difficulties that exist in defining the *actus reus,* the common law has evolved a reasonably clear definition of the mental element. The common law emphasises that an attempt is a purposive act. It requires the *"proof of specific intent, a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit"*[2]. A completed offence may normally be committed by intentional wrongdoing or reckless behaviour: liability for attempt will not follow from merely reckless behaviour.

The present law

The actus reus of attempt

4.6 The leading Hong Kong authority on what constitutes the *actus reus* of attempt is the decision of the Court of Appeal in *R v Chan Kwong and another*[3]*.* The appellants, two of the original three defendants, had persuaded Y to join them in a plan to cheat L. The trial judge found that in reality this was a scheme to cheat Y. As part of the scheme Y was taught a cheating method and asked to contribute a stake for the scheme. Y became suspicious and notified the police who thereafter monitored events. After Y had informed the first defendant that he had sufficient money they went together to his place of work to give effect to the plan. The police intervened. The first defendant was arrested *en route,* while the second and third defendants were arrested at L's workplace where gambling paraphernalia was found. The second and third defendants appealed against their conviction of an attempt to cheat at gambling. Two questions arose on appeal: what was the test of proximity for a charge of attempt, and, whether the acts were sufficiently proximate.

4.7 The judgment of the Court of Appeal was delivered by Yang VP. He noted that the common law had laid down what appeared to be two different tests. The first was to be found in *R v Eagleton*[4] and a later, more relaxed test, in *Davey v Lee*[5]*.*

4.8 The relevant portion of the judgment of Parke B in *Eagleton's* case is sometimes known as the "last act" test:

---

2 *R v Mohan* [1976] QB 1*, at* 11 (*per* James LJ). But see also *R v Lau Sai-wai* [1985] HKLR 423 in relation to attempts to commit offences of strict liability.

3 [1987] HKLR 756.

4 (1855) 5 Dears CC 516.

5 (1967) 51 Cr App R 303.

> *"The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account or producing the vouchers to the Board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt."* [6].

This contrasts with the judgment of Parker CJ in *Davey v Lee:*

> *"What amounts to an attempt has been described variously in the authorities, and for my part I prefer to adopt the definition given in Stephen's Digest of Criminal law (5th ed.) Art. 50: 'An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.' As a general statement, that seems to me to be right, though it does not help to define the point of time at which the series of acts begins. That, as Stephen said, depended upon the facts of each case. A helpful definition is given in paragraph 4104 in the current (36th) edition of Archbold's Criminal Pleading, etc, where it is stated: 'It is submitted that the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.' "* [7].

4.9 It seemed to the Court of Appeal in *R v Chan Kwong and another* that there was not a "last act" test as such and that the remarks of Parke B describing the significance of the last act should be regarded as an illustration of a principle similar to that enunciated in *Davey v Lee*[8]. Applying

---

6 (1855) 5 Dears CC 516, at 538.

7 (1967) 51 Cr App R 303, at 305 to 306.

8 Yang VP placed reliance on Lord Hailsham's analysis of the *actus reus* of attempt in *Haughton v Smith* [1973] All ER 1109, at 1114: "*The act relied on as constituting the attempt must not be an act merely preparatory to commit the completed offence, but must bear a relationship to the completion of the offence referred to in R v Eagleton as being 'proximate' to the completion of the offence and in Davey v Lee as being 'immediately and not merely remotely connected' with the completed offence*".

this test to the evidence, the Court of Appeal concluded that there was no evidence that either defendant had done enough to constitute an attempt.

4.10 The judgment in *R v Chan Kwong* and another cast doubt on the so-called "last act" test enunciated in *DPP v Stonehouse*[9] and whether this test applied in Hong Kong. In that case Lord Diplock had interpreted the test in Eagleton as requiring that the *"offender must have crossed the Rubicon and burned his boats"*[10].

4.11 While the House of Lords decision in *DPP v Stonehouse* perpetuates doubt over the proper interpretation to be placed on the *Eagleton* test, the case did clarify certain other matters. In that case, the defendant, having insured his life in England, faked his death by drowning for the benefit of his wife, who was innocent of his plans. He faked his death in the United States and disappeared. If he had not been discovered before his wife was paid by the insurers the full offence would have been that he dishonestly and by deception enabled his wife to obtain insurance monies by the false pretence that he had drowned[11]. In upholding his conviction for attempt the House of Lords made it clear that:

(a) an attempt may be complete even though an act remains to be carried out by an innocent agent, in this case a claim under an insurance policy;

(b) where a defendant outside the jurisdiction attempts to procure the commission of an offence within the jurisdiction there is an attempt, even though all of the defendant's acts are done abroad, if they have an effect within the jurisdiction. In this case the effect was communication of the presumed drowning through the media to the defendant's wife[12]; and

(c) it is for the judge to rule whether there is any evidence capable of constituting an attempt, but it is always a matter for the jury to say whether they accept it as amounting to an attempt[13].

4.12 The modern authorities make it clear that there must be an act not merely preparatory to committing the completed offence, whether that act is described as "proximate" *(Eagleton)* or as "immediately and not remotely

---

9 [1978] AC 55.

10 [1978] AC 55, at 68.

11 Contrary to section 15 of the Theft Act 1968. The offence has its counterpart in section 17 of the Theft Ordinance (Cap 210).

12 Smith and Hogan (*op cit,* at 316) query the relevance of the "effect" and wonder why the result should have been different if D had been rescued from the sea and confessed before any report of his death appeared in England. They refer to the obiter remarks in *Somchai Liangsiriprasert v United States Government* ((1991) 92 Cr. App. Rep. 77) that an attempt abroad to commit an offence in England is indictable even though no overt act has been done within the jurisdiction.

13 See *DPP v Stonehouse* [1978] AC 55, at 94, where Lord Keith said: *"in every case where a jury may be entitled to convict, the application of the law to the facts is a matter for the jury and not for the judge"*.

connected with the completed offence" *(Davey v Lee).* It is also clear that if an accused has done all he can do he will have attempted the crime[14]. A question remains whether this is a necessary or sufficient ingredient of attempt. If *Davey v Lee is* good law then it adds to the quality of proximity the requirement that the act be unequivocal.

4.13 The doubt that exists with the definition of the *actus reus* means that older authorities are of limited value. For example, in the case of *R v White*[15] it was held to be an attempt to murder to administer a small dose of poison, though the defendant may have contemplated further doses and further doses may have been necessary to kill. The administration of that dose was hardly the last act within the defendant's power. It is arguable that it was also not an unequivocal act.

4.14 Before leaving the subject of the *actus reus* it should be pointed out that there are nineteenth century authorities which suggest preparatory acts may be capable of amounting to attempt, or to an indictable act of preparation[16]. They must now be regarded as unreliable, though there exists one modern judgment in which old authorities have been applied[17].

The mens rea of criminal attempt

4.15 At common law the *mens rea* that must accompany the *actus reus* of attempt is an intention to commit the crime, even if the crime itself could be committed with a state of mind less than intention. Thus, while the *mens rea* for murder is an intention to kill or cause grievous bodily harm, for a charge of attempted murder nothing less than an intention to kill will suffice[18]. If a crime may be committed intentionally or recklessly, a charge of attempting to commit that crime will only succeed by proving "a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, whether the accused desired that consequence or not"[19]. At common law it is probably necessary to prove intention for attempt, even if the offence itself is one of strict liability[20].

---

14 It is difficult to see how a 'last act' theory could apply across the board as a necessary ingredient for certain offences, such as, for example, attempted rape. For this reason, and the consequence that too many persons might escape who were deserving of punishment, it was rejected as the basis for the test for attempt by the authors of the English Law Commission's report *Attempt, and impossibility in relation to attempt, conspiracy and incitement* (Report No. 102, 1980) (see paragraph 2.25.)

15 [1910] 2 KB 124.

16 For example, *R v Fuller and Robinson* (1816) Russ and Ry 308 and *Dugdale v R* (1852) 1 E & B 435.

17 In *R v Gurmit Singh* [1966] 2 QB 53, McNair J ruled that an indictment alleging that the defendant had unlawfully procured a rubber stamp bearing the words "Magistrate First Class Jullundur" with intent to use it to forge a document with intent to defraud was not an attempt, but was an indictable act of preparation.

18 *R v Whybrow* (1951) 35 Cr App Rep 141

19 *R v Mohan* [1976] QB 1, at page 11.

20 See *Gardner v Ackroyd* [1952] 2 QB 743.

4.16 While it is reasonably clear that intention must be proved with respect to the consequences of the crime attempted, the degree of knowledge that must be proved regarding the circumstances which may be an ingredient of a particular crime has not been fully established. In *R v Pigg*[21] the English Court of Appeal assumed that a man would be guilty of attempted rape if he tried to have sexual intercourse with a woman being reckless as to whether or not she had consented.

4.17 In Hong Kong, the *mens rea* for offences of attempt is not governed wholly by the common law. The position has been modified by section 81 of the Interpretation and General Clauses Ordinance (Cap 1). Section 81(1) provides as follows:

> *"A provision in any Ordinance which creates or results in the creation of an offence shall be deemed to include a provision that an attempt to commit such an act shall itself constitute an offence which may be dealt with and punished in like manner as if the offence had been committed."*

Section 81(3) further provides that:

> *"Nothing in this section shall affect any law relating to attempts to commit offences at common law."*

4.18 The interpretation placed on these two subsections by the Court of Appeal in *R v Lau Sai-wai*[22] is that "dealt with" in section 81(1) means more than a procedural facilitation to deal, for example, with the mode of trial. It embraced the disposal of the whole case in addition to punishment, which is expressly provided for. Further, section 81(3) pointed to a distinction between an attempt to commit a statutory offence and one at common law[23]. In the Court's view, on the basis of this analysis, where a statutory offence is one of strict liability no *mens rea* need be proved to establish the offence of attempting to commit that crime. This suggests that the *mens rea* for an attempt to commit a common law offence follows the common law requirement of specific intent, while an attempt to commit a statutory offence requires proof of the intention that would accompany the completed crime.

Attempt, impossibility and conditional intention

4.19 As explained in earlier chapters, criminal attempt is subject to the defence of impossibility. Considerable problems are associated with this defence as it relates to attempt, particularly when dealing with attempted theft.

---

21 [1982] 74 Cr App R 354.

22 [1985] HKLR 423.

23 The court's reasoning appears open to question. Every attempt to commit an offence is an offence at common law, whether the crime attempted is one under statute or at common law (see *Archbold* (40th Edition)(1979) at paragraph 4100). This view corresponds to the terms of the repeal of the common law in section 6 of the 1981 Act. Section 81(3) was intended to preserve common law concepts, not to distinguish between statutory and common law offences.

The law of attempt has proved troublesome when applied to an allegation involving an attempt to steal from an empty pocket, car or house. Associated with the defence of impossibility is a notion that a "conditional intention" is not sufficient where a thief examines goods, or the contents of a car, or explores a house, intending to steal anything he considers to be valuable. The following paragraphs examine the evolution of the defence of impossibility and the concept of conditional intention and the judicial attempts to limit their scope.

4.20 In the case of *R v Ring, Atkins and Jackson* [24] it was held that a man could be guilty of attempting to steal from an empty pocket. In this case the indictment alleged an attempt to steal from persons unknown. The prosecution evidence relied solely on police observation of the three accused going through the pockets of unknown victims. There was no direct evidence that there was anything in their victims' pockets. For more than eighty years this judgment was a source of guidance in allegations of attempting to steal.

4.21 In *R v Easom*[25] the defendant picked up a lady's handbag in a theatre and rummaged through the contents. He then put it back, having taken nothing. His conviction for stealing the handbag and its specified contents was quashed because there was no intention to permanently deprive the owner. Furthermore, it was implicit in the concept of attempt (which would have been a possible alternative verdict) that the person acting intends to carry out the act attempted, so the *mens rea* of attempt is essentially that of the completed crime. That being so, there could be no valid conviction of attempted theft on the basis of the indictment as specified in the absence of an intention permanently to deprive the owner[26].

4.22 In *Haughton V Smith*[27], police officers stopped a van and found it full of stolen meat. They took custody of the driver and the goods, which thus reverted to lawful custody and ceased to be stolen. Under the supervision of the police the van was allowed to proceed with a view to discovering the ultimate receivers. The van stopped in a service area where the defendant with others assisted in the distribution of the meat. Their Lordships upheld the Court of Appeal's decision to quash the defendant's conviction for handling stolen goods. Steps on the way to doing something which is thereafter done and which is not a crime could not be regarded as an attempt to commit a crime[28]. The decision in *Haughton v Smith* threw into doubt *Ring's* case because authorities that were overruled to establish the

---

24 [1892] 61 LJMC 116. Henceforth referred to as *Ring*.

25 [1971] 2 QB 315.

26 [1971] 2 QB 315, at 320, *per* Edmund Davies LJ, who gave the judgment of the Court of Appeal. The judgment appeared to advise that in such circumstances as *Easom's* a general intention to steal should be alleged after the fashion of *Ring's* case.

27 [1975] AC 476.

28 *"... I do not think that it is possible to convert a completed act of handling, which is not itself criminal because it was not the handling of stolen goods, into a criminal act by the simple device of alleging that it was an attempt to handle stolen goods on the ground that at the time of handling the accused falsely believed them still to be stolen"* (per Lord Hailsham, at 490).

principle in *Ring's* case were commented on in favourable terms in the course of their Lordships' judgments[29].

4.23 In *Partington v Williams*[30], the defendant took a wallet from a drawer at her employers and looked in it with the intention of stealing any money it might contain. It contained no money. She was convicted of attempting to steal, but the conviction was quashed by the English Divisional Court which applied the wide principles enunciated by their Lordships in Haughton v Smith.

4.24 In *R v Lee Shek*[31], the leading Hong Kong authority on the defence of impossibility, the Court of Appeal upheld the conviction of a pickpocket for attempting to steal. He had been observed by police to put his hands in the pockets of three men. There was no evidence at the trial that any of the victims' pockets did or did not contain anything capable of being stolen. The Court of Appeal were compelled to re-examine the Ring decision in the light of the decisions in *Haughton v Smith* and *Partington v Williams.* Neither the judgments of Huggins J A nor Pickering J A found it necessary to rule whether *Haughton v Smith* overruled *Ring.* The judgments distinguished between charges of attempt which alleged an intention to steal particular property and charges alleging a general intention to steal:

> *"In the present case the attempt was to steal from a person and could have been from any pocket or parcel or briefcase of that person. There is a distinction between trying to steal something specific from an identified, circumscribed place and trying to steal something or other, that is to say anything which may be found there, from the person of an individual and it may be - I put it no higher - that the former behaviour falls within the ambit of impossible attempts. But the latter behaviour, in my view, lies in the category of unsuccessful attempts*[32]*. "*

4.25 In R *v Husseyn*[33] the accused was observed with another attempting to enter a vehicle. They ran off when they were disturbed. Inside the vehicle was a holdall containing sub-aqua gear. Husseyn was charged with attempting to steal the sub-aqua gear. It was the judge's direction at trial that if the defendant intended to look into the holdall and take anything valuable he might find therein that was enough for a conviction for attempted theft. The Court of Appeal, relying on *Easom,* ruled that this was a misdirection[34].

---

29 See, for instance, Lord Hailsham at 495 and Viscount Dilhorne at 505.

30 (1975) 62 Cr App R 220.

31 [1976] HKLR 636.

32 [1976] HKLR 636, at 651, *per* Pickering JA. Huggins JA reached a similar conclusion at page 645.

33 (1978) 67 Cr App R 131.

34 (1978) 67 Cr App R 131, at page 132, where Lord Scarman cited with approval the following passage from the judgment of Edmond Davies J in *Easom* ([1971] 2 QB 315, at 319): *"In every case of theft the appropriation must be accompanied by the intention of permanently depriving the owner of his property. What may be loosely described as a 'conditional' appropriation will not do. If the appropriator has it in mind merely to deprive the owner of such of his property as,*

4.26 The Attorney General's References Nos. 1 and 2 of 1979[35] were an attempt by the English Court of Appeal to remedy the mischievous effects of the defence of "conditional intent". It was held that, under section 9(1)(a) of the Theft Act 1968[36], the offence of burglary was committed if a person entered a building as a trespasser with an intention to steal; that where a person was charged with burglary, it was no defence to show that he did not intend to steal any specific objects and, accordingly, the fact that the intention was conditional on finding money in the house did not entitle a person to be acquitted. The same principle and logic applied to burglary, theft or attempted theft. The Court of Appeal added that it may be undesirable in many cases to frame indictments by reference to the theft or attempted theft of specific objects. There was *"no reason in principle why ... a more imprecise method of criminal pleading should not be adopted, if the justice of the case requires it, as for example, attempting to steal some or all of the contents of a car, or some or all of the contents of a handbag"*[37] . Thus, the English Court of Appeal arrived at a similar conclusion to the Hong Kong Court of Appeal in *Lee Shek*[38]. This English decision has persuasive authority in Hong Kong.

The law and practice in Hong Kong

Procedural considerations

4.27 Attempted crimes fit neatly into the procedural framework. The two most important procedural provisions concerning attempt are sections 81 and 82 of the Interpretation and General Clauses Ordinances (Cap 1). Section 81 provides:

> *"(]) A provision in any Ordinance which creates or results in the creation of an offence shall be deemed to include a provision that an attempt to commit such an offence shall itself constitute an offence which may be dealt with and punished in like manner as if the offence had been committed.*
>
> *(2) Where a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.*
>
> *(3) Nothing in this section shall affect any law relating to attempts to commit offences at common law."*

Section 82 provides:

---

on examination, proves worth taking and then, finding that the booty is valueless to the appropriator, leaves it ready to hand to be repossessed by the owner, the appropriator has not stolen."

35 [1979] 3 WLR 577.

36 Its Hong Kong counterpart is section 11(1)(a) of the Theft Ordinance (Cap 210).

37 [1979] 3 WLR 577, at 590.

38 [1976] HKLR 637.

"(1) Where-

(a) any Ordinance confers a power or imposes a duty which is to be exercised or performed consequent upon a conviction of an offence or in relation to a person who is detained in custody for an offence; or

(b) a reference is otherwise made in any Ordinance to an offence, then that power or duty or that reference shall be deemed to be also exercisable or performable consequent upon a conviction of, or include a reference to, as the case may be -

(i) an attempt to commit that offence;
(ii) aiding, abetting, counselling or procuring that offence;
(iii) a conspiracy to commit that offence; and
(iv) an incitement to commit that offence.

(2) Subsection (1) shall apply to powers of imposing pecuniary penalties and of forfeiture, seizure and search, and to powers and discretions to cancel, suspend or refuse to issue any licence, permit or other authorization, but nothing in this section shall be deemed to authorize the imposition of any sentence of imprisonment otherwise than in default of payment of any pecuniary penalty which may be imposed by virtue of this section."

4.28 Sections 51(2) and (3) of the Criminal Procedure Ordinance provide that attempt is an alternative to a charge alleging the completed crime:

"(2) If on the trial of any information, charge or indictment for any offence other than treason it is proved that the accused is not guilty of that offence but the allegations in the information, charge or indictment amount to or include, whether expressly or by implication, an allegation of another offence falling within the jurisdiction of the court of trial, he may be found guilty of that other offence or of an offence of which he could be found guilty on an information, charge or indictment specifically charging that other offence.

(3) For the purposes of subsection (2) any allegation of an offence shall be taken as including an allegation of attempting to commit that offence; and where a person is charged with attempting to commit an offence or with any assault or other act preliminary to an offence but not with the completed offence, then he may be convicted of the offence charged notwithstanding that he is shown to be guilty of the completed offence."

Attempt, inchoate offences and secondary participation

4.29 The common law recognises the offences of attempting to incite[39] and attempting to conspire[40]. Because of the proximity of attempt to the completed crime the offences of inciting to attempt and conspiring to attempt are inapt. It appears that, where legislation penalises aiding and abetting particular conduct, charges of attempting to aid and abet may be brought[41]. In contrast, there is doubt whether there is a general offence of attempting to aid and abet at common law: it appears to be too remote a formulation [42] . On the other hand, a recent English authority suggests that aiding and abetting an attempt is an offence known to the common law[43].

Criticism of the present law

4.30 A prosecution will normally only be undertaken for an offence of attempt if the evidence is strong. The test in *Davey v Lee is* not a clear guide and the only certain rule is the "last act" test. If the crime alleged to have been attempted is a common law offence, then a specific intent will need to be shown. It is arguable whether a similar level of intention would be required for a statutory offence[44].

4.31 A number of criticisms can be levelled at the existing offence of attempt at common law:

(a) there are three, possibly four, theories for describing the acts that are capable of amounting to a crime. Though preparatory acts cannot amount to attempt, there is (possibly) a crime at common law of procuring materials with intent to commit a crime. It is not clear whether there is a material difference between the formulations describing proximity in *Eagleton* and *Davey v Lee.* The latter test also requires that the act be unequivocal. The "last act" test may be necessary rather than sufficient, if Lord Diplock's remarks in *R v Stonehouse* are taken at face value[45].

(b) In any event, the tests in *Eagleton* and *Davey v Lee* do not give that much assistance when applied to the facts. Consider the

---

39 Incitement appears to require communication. If communication fails, then an offence of attempting to incite will lie. See *R v Chelmsford Justices, ex parte Amos* [1973] Crim LR 437.

40 It clearly exists as a crime at common law in Hong Kong: see *Mak Sun-kwong and another v the Queen* [1980] HKLR 466.

41 See *R v Mcshane* (1978) 66 Cr App R 97 where a defendant's conviction was upheld for attempting to counsel or procure suicide, a statutory form of secondary participation (section 2(1) of the Suicide Act 1961*).*

42 See the Law Commission report, *Attempt, and impossiblility in relation to attempt, conspiracy and incitement,* at paragraph 2.123.

43 *R v Dunnington* [1984] QB3 472.

44 *R v Lau Sai-wai* [1985] HKLR 423 appears open to challenge.

45 [1978] AC 55, at 68: *"the offender must have crossed the Rubicon and burned his boats"*.

following. An assassin intends to shoot his victim. He obtains a rifle and ammunition. The victim is followed and his habits are noted. The assassin practices. Satisfied with his preparation, he decides to act and takes up a position in ambush. On seeing his target, he raises the rifle and sights the victim. His finger crooks the trigger. The assassin applies pressure and the gun fires, but he misses. All that can be said with certainty is that the last act of firing the rifle is capable of amounting to an attempt.

(c) A consequence of an unworkable test is that the authorities can only safely intervene when the crime is virtually at a stage of completion. Acquittals may occur in circumstances where the public might regard conduct as criminally blameworthy. The law may not correspond to the public's understanding of the word “attempt”.

(d) Inconsistent tests of uncertain application can lead to inconsistent verdicts in similar fact situations.

(e) The defence of impossibility available to an individual charged with attempt may give rise to injustice. The individual who acts in a mistaken belief as to the facts and takes substantial steps to the commission of what he believes to be a crime is as dangerous to society as the criminal who completes his plan successfully.

(f) Impossibility and the defence of conditional intent may bring the law into disrepute because they do not accord with public sentiment. The present cure, particularising an intention to steal anything of value as an intention “to steal all or any” of the contents of a house, car etc, is a procedural repair rather than a sound substantive solution[46].

(g) The Court of Appeal decision in *R v Lau Sai-wai*[47] is inconsistent with the common law philosophy which emphasises purpose in attempted crime by requiring a specific intention on the part of the actor.

The Criminal Attempts Act 1981

---

46 Smith and Hogan (*op cit,* at 290) do not see any logic in the Court of Appeal's solution in the Attorney General's references No. 1 and 2 of 1979 [1980] QB 180. A general intent to steal all or any of the contents must include the specified contents, though to specify such contents leads to an acquittal! Smith and Hogan refer to this as "an absurd and unworthy distinction".

47 [1985] HKLR 423.

4.32 In June 1980 the English Law Commission published its Report on Attempt, and impossibility in relation to attempt, conspiracy and incitement (hereafter referred to as "the Attempt Report"). It marked the conclusion of work first commenced in 1968. The work had involved extensive consultation, including the publication of a working paper[48] . The Attempt Report made numerous recommendations and included a draft Bill incorporating its proposals. The draft Bill formed the basis of the Criminal Attempts Act 1981[49]

Definition of attempt

4.33 Part I of the 1981 Act is reproduced in the Appendix at (xi). The offence of attempt at common law is abolished[50]. An act is capable of amounting to an attempt under the Act if it is *"more than merely preparatory to the commission of the offence"* (section 1(1))[51]. In their recommendations as to the *actus reus*[52]*,* the authors of the Attempt Report submitted that, in their view, there was no "magic formula" which could be produced to define precisely what constitutes an attempt. There was always bound to be a degree of uncertainty. Only a test based on proximity had produced acceptable results. This approach gave flexibility. Furthermore, where cases were dependant on fine differences of degree, it was appropriate for the question whether in a particular case conduct amounted to attempt to be left to the jury.

4.34 The Attempt Report's recommendation for the most appropriate form of words to define the *actus reus* was *"any act which goes so far towards the commission of the offence attempted as to be more than an act of mere preparation"*[53]. Preparatory acts incapable of amounting to attempt might include possession of implements for the purposes of crime intended or reconnoitring the place contemplated for the commission of the intended offence[54].

---

48 Working Paper Number 50, *Inchoate offences: conspiracy, attempt and incitement,* published in 1973.

49 The 1981 Act also abolished the loitering offences under section 4 the Vagrancy Act 1824 and replaced them with an offence (in section 9) of interfering with vehicles. Hong Kong's own loitering provisions were amended as a result of a Law Reform Commission report which resulted in the enactment of the Crimes (Amendment) (No 2) Ordinance in 1992.

50 Section 6(1) of the 1981 Act. The Act received Royal Assent on 27 July 1981 and came into force on 27 August 1981. The Act also removed the common law offence of procuring materials for crime (see *R v Gurmit Singh* [1966] 2 QB 53).

51 It appears that an omission may in certain rare circumstances amount to an attempt at common law: see Darling J's remarks in *R v Gibbons and Proctor* (1918) 13 Cr App Rep 134. Whether an omission is capable of amounting to an act within section 1(1) remains to be determined. In the Law Commission's draft Code, "act" includes omission where the offence intended is capable of being committed by an omission: Clause 49(3). See paragraph 13.46 in the Draft Code Report.

52 Paragraphs 2.45 to 2.49.

53 Paragraph 2.49.

54 Paragraph 2.46.

4.35 The formula suggested was designed to be wide enough to cover two varieties of case[55]:

(a) where a person has taken all steps towards the commission of a crime which he believes to be necessary, as when a person fires his gun at another and misses; and

(b) where a person has to take some further step to complete his crime, assuming that he has the necessary mental element to commit it. The example given is where the defendant has raised his gun to take aim but has not squeezed the trigger.

4.36 The recent English Court of Appeal decision in *R v Jones (Kenneth Henry)*[56] illustrates how the 1981 Act works in practice. The defendant had pointed a loaded shot-gun at another person, saying at the same time something like "you are not going to like this". His intended victim grabbed the end of the gun and after a struggle disarmed the defendant. The gun was recovered with the safety catch still on. The victim was unable to say if Jones had put his finger on the trigger. Jones was charged with attempted murder. At the close of the prosecution case a submission was made on the defendant's behalf. It was argued that he had to commit three further acts before the full offence could be completed: remove the safety catch; put his finger on the trigger; and pull the trigger. The submission failed and Jones was subsequently convicted. His counsel repeated the terms of his submission on appeal, in effect arguing the "last act" test. The appeal was dismissed. The Court of Appeal held that the 1981 Act was a codifying statute and the correct approach was to look first at the natural meaning of the statutory words and not to seek some previous test from earlier case law. A person did an act that was "more than merely preparatory" to the commission of the full offence without it being the last act within his power. When determining whether a charge of attempted murder should be withdrawn from the jury the trial judge had to decide whether there was evidence from which a reasonable jury, properly directed, could conclude that the acts were more than preparatory to the offence. In this case the matter had been quite properly left to the jury.

The mens rea for attempt

4.37 The *mens rea* required for an attempt under the act is an intention to commit the offence[57]. This follows the Law Commission's recommendation to give statutory force to the judgment in *R v Mohans*[58].

---

55 Paragraph 2.47 of the Attempt Report. The authors of the report came to the conclusion that it was undesirable to recommend anything more complex than a rationalisation of the common law.

56 [1990] 1 WLR 1057.

57 Section 1(1) of the 1981 Act.

58 [1976] QB 1. See the Attempt Report at paragraph 2.14.

4.38 Section 1(1) may well alter the law in regard to the attempt of an offence which has as an element of its *actus reus* some particular circumstance. One such example is rape. The offence requires that the victim be unwilling at the time of intercourse. In *R v Pigg*[59], a case on the common law, the Court of Appeal assumed that a conviction would follow despite the fact that an accused was merely reckless whether the woman resisted intercourse.

4.39 In *R v Khan and others*[60], the English Court of Appeal came to the same conclusion under the 1981 Act, though they did so by making a special case of the offence of rape:

> *"The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and in attempted rape and the mens rea is identical, namely, an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arises; the attempt relates to the physical activity; the mental state of the defendant is the same. A man does not recklessly have sexual intercourse, nor does he recklessly attempt it. Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in his state of mind when engaged in the activity of having or attempting to have sexual intercours"*[61].

4.40 Sections 1(2) and (3) remove the defence of impossibility. Section 1(3) is rather obscure [62]. It caused the House of Lords to fall into error in *Anderton v Ryan*[63] when their Lordships partially resurrected the defence of impossibility. They corrected themselves shortly thereafter in R *v Shivpuri*[64], overruling *Anderton v Ryan.*

4.41 Thus, if the facts of *Haughton v Smith* were to be repeated, there would be no defence to a charge of handling stolen goods. It is probable that the removal of the defence of impossibility will indirectly diminish the consequences of a conditional intention. The thief should be convicted on the basis of his intent to steal anything of value, even if the pocket, car or

---

59 [1982] 74 Cr App R 354.

60 [1990] 1 WLR 813.

61 [1990] 1 WLR 813, at 819 (*per* Russell LJ).

62 According of Smith and Hogan, (*op cit,* at 320) subsection (3) is designed to forestall the following argument:
(i) D believing goods to be stolen intends to handle certain goods;
(ii) the goods are not stolen;
(iii) thus, D does not intend to handle stolen goods.

63 [1985] 1 AC 560.

64 [1987] 1 AC 1.

building is completely bare. In *R v Easom*[65] the court posed the example of a dishonest postal sorter who picks up a pile of letters intending to steal any that are registered. He finds none of them are registered and replaces them. According to Edmund Davies J, he would have stolen nothing[66]. Under English law he would now be guilty of attempted theft of registered letters[67].

Offences that may be attempted

4.42 Section 1(4) makes it clear that, following the abolition of the common law crime of attempt, it will not be possible to attempt to conspire, or to attempt to aid and abet an offence[68], or to attempt offences under sections 4(1) and 5(1) of the Criminal Law Act[69]. The abolition of the offences of attempting to assist offenders followed the Law Commission's recommendations in a report relating to conduct tending to pervert the course of justice[70].

4.43 The common law apparently did not recognise as a crime an attempt to commit a purely summary offence. Section 1(4) makes it clear that the crime of attempt will remain confined to indictable offences. That does not prevent attempts to commit indictable offences being tried summarily[71]. The Attempt Report (paragraph 2.105) had recommended that attempts of summary offences be regarded as crimes. That an offence was purely summary did not mean it was not serious. There was no compelling reason for precluding the offence of attempt for every summary offence.

Application of procedural and other provisions

4.44 Section 2 deals with procedural matters. It follows closely the recommendations made in the Attempt Report, and clause 2 of the Law Commission's draft Attempts Bill appended to the Report[72] . The offence of attempt is treated in the same fashion as the completed offence.

Offences of attempt under other enactments

4.45 Section 3 ensures that the definition of attempt in section 1(1) and the removal of the defence of impossibility apply equally to the various

---

65 [1971] 2 QB 315.
66 [1971] 2 QB 315, at 319.
67 See Smith and Hogan, *op cit,* at 308.
68 Aiding and abetting an attempt is still an offence. See *R v Dunnington* [1984] 2 WLR 125.
69 These offences penalise individuals for assisting offenders or concealing offences. They have their counterparts in sections 90(1) and 91(1) of the Criminal Procedure Ordinance (Cap 221).
70 See paragraph 2.124 of the Attempt Report.
71 See section 4(1)(c) and 4(2). See paragraph 2.102 to 2.105 of the Attempt Report.
72 See paragraphs 2.101 to 2.119.

statutory attempt provisions contained in other enactments[73].

Trial and penalties

4.46 Section 4 deals with the penalties for offences of attempt. As would be expected, the maximum penalty for an attempt will correspond to that for the completed offence[74].

The Criminal Attempts Act 1981: a model for Hong Kong?

4.47 The fundamental advantage of the 1981 Act is that it is step towards the eventual codification of the criminal law. It makes the law more accessible.

4.48 The 1981 Act also makes the law more consistent in its operation. It is no longer possible for one court to apply a test of proximity based on *Davey v Lee* to require that the prosecution prove the defendant had done all he could do.

4.49 The definition of the *actus reus* in section 1 (1) of the Act would not significantly alter the present law, nor the way in which that law should be applied. Whether the acts alleged amount to an attempt will always be a question of fact for the jury. There would remain the risk of a perverse verdict, or unacceptable discrepancies between the verdicts of different juries in some circumstances:

(a) where it is clear that the defendant has done all in his power to commit the crime[75];

(b) the Act gives little assistance to the judge when he must direct the jury as to the degree of proximity that should constitute an attempt.

4.50 Some of those we consulted found the definition in the 1981 Act vague. One consultee wished to see alternative definitions put up for consideration. Two consultees suggested further consideration of this subject was required.

4.51 It is understandable that some consultees found the definition in the 1981 Act imprecise in its reference to an act which is "more than merely

---

73 For example, under the Wildlife and Countryside Act 1981 section 18(1) states that any person who attempts to commit an offence under the provisions of the Act shall be guilty of an offence and punishable in a like manner as for the said offence.

74 Section 4(1)(b) and (c). There is an exception for offences where the penalty is fixed by law in section 4(1)(a).

75 The Law Commission anticipated this objection and argued that the risk can be obviated by identifying the contested issue and by commenting on the evidence, if necessary in strong terms. See paragraph 2.51.

preparatory" to the commission of an offence (section 1(1)). Despite the apparent lack of precision of the definition, the English Law Commission has proposed no significant change to the definition.[76] Attempt is a difficult concept to encapsulate and we have been unable to identify any better alternative definition. **We believe that the definition in section 1(1) of the 1981 Act provides a workable solution and we recommend its adoption. We would not pretend that there may not be scope for improvement. 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 jurisdictions. There is no doubt in our minds, however, that the 1981 Act's formulation represents a clear improvement on the existing law.**

4.52 The *mens rea* required by the Act would not be exactly the same as that required by the common law. There would remain doubt in relation to offences where the defendant was reckless as to the circumstances that in part constitute the completed offence.

4.53 One of those who commented on our Draft report suggested that where the elements of an offence include specific circumstances, then recklessness as to those specific circumstances should be enough for both the *mens rea* of attempt and of conspiracy. We think there is much merit in this suggestion.

4.54 In the case of *R v Pigg*[77], a decision on the common law which was decided after the inception of Criminal Attempts Act 1981, a conviction for attempted rape was upheld on appeal on the basis that the accused was reckless as to whether or not the victim had consented to intercourse. This decision sparked off subsequent argument in England in favour of the principle that where recklessness as to circumstances suffices for the substantive offence, it should suffice for the statutory offence of attempt. The English Law Commission had found in favour of such an argument by proposing clause 49(2) in the draft Code.[78] The English Law Commission thought that this principle would meet the need to protect potential victims against drunken and violent offenders.

4.55 We share the view of the English Law Commission and think that recklessness should be sufficient *mens rea* to constitute an attempt where it suffices for the substantive offence. The English Law Commission went on to argue 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.[79] The Commission therefore proposed that clause 48(2) of the draft Code should incorporate this principle into the offence of conspiracy. On this point, we again agree with the English Law Commission.

---

76 See the Draft Code Report at paragraph 13.43. The only change of substance proposed by the English Law Commission is the use of the word "indictable" to indicate directly the type of offence to which section 1(1) of the 1981 Act applies.

77 [1982] 74 Cr App R 354

78 See discussions at paragraphs 13.44 and 13.45 of the Draft Code Report.

79 See paragraph 13.26 of the Draft Code Report.

4.56 **We recommend that where the elements of an offence include specific circumstances, then recklessness as to those specific circumstances should be enough for the offences 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.**

4.57 The passing of the defence of impossibility would be mourned by few practitioners in Hong Kong. As explained in earlier chapters, the practical objection to the defence is that it leads to the acquittal of individuals who would otherwise be considered a danger to society. From the point of view of the investigator, it limits the role that the police may play in certain undercover operations. In its interaction with the defence of conditional intent it leads to situations where the law may be brought into disrepute. The majority of those who commented on our draft report agreed with the removal of the defence of impossibility. **We accordingly recommend that the defence of impossibility in attempt be abolished.**

4.58 From a procedural point of view, the 1981 Act did not greatly alter the law in England. The only major difference between the law of Hong Kong and England and Wales is in relation to summary offences. In Hong Kong it is a crime to attempt to commit any offence[80]. It is our view that there is no compelling reason for precluding the offence of attempting any summary offence. The fact that an offence is of a summary nature does not necessarily mean that it is not serious. **We would therefore recommend that, in adapting the 1981 Act to the proposed mini-code, section 1(4) of the 1981 Act should be modified to the effect that the offence of attempt should also apply to summary offences.**

4.59 The Law Commission had second thoughts about the abolition of the offence of attempting to conspire and reintroduced it in the draft Code[81]. Attempting to aid and abet was thought too remote an offence to justify its retention[82]. The abolition of the offences of assisting offenders followed the Law Commission's recommendations in a report dealing with a code for offences relating to conduct perverting the course of justice[83]. There has been no corresponding exercise in Hong Kong.

4.60 Whilst some of those we consulted 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. The English Law Commission has cited a good example of such a charge: where D agrees

---

80 Section 81 of the Interpretation and General Clauses Ordinance (Cap 1).

81 See paragraph 13.48 of the Draft Code Report. This would be consistent with the resurrection of incitement to conspire.

82 See the Attempt Report, paragraph 2.123.

83 See paragraph 2.124 of the Attempt Report.

with E to commit an offence and E is a police informer who tries to prevent the offence from being committed, there is no completed conspiracy because E lacks the required intention. However, D has done all he can to conspire and does have the necessary intention. There is in such a case no reason why D should not be guilty of an attempt to conspire.[84]

4.61 **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 in the mini-code. As regards the offence of attempting to aid and abet, we agree with the English Law Commission that it is too remote an offence to justify its retention. We recommend the offence of attempting to aid and abet be abolished (as was done by section 1(4)(b) of the 1981 Act).**

[84] See paragraph 13.48 of the Draft Code Report.

Chapter 5

Options for reform

5.1 This chapter discusses the options for reform, employing those models examined in the preceding chapters. Broadly, the options are three:

(i) leave the present law unchanged;

(ii) adopt models based on the 1977 Act and 1981 Act, making only those alterations necessary to fit into the existing procedural framework; and

(iii) adopt models based on the 1977 Act and the 1981 Act, but, in addition, making appropriate material alterations. This might include incorporation of the codification of the law of incitement modelled on the provisions in the Law Commission's draft code.

5.2 The first option, to make no alteration, does not imply that the search for suitable legislation is abandoned, merely that the English models are rejected. The most cogent argument in favour of this option is that the present laws work tolerably well and change is not urgently required. Supporters of such an assessment would reject the English models as providing insufficient net benefit, taking into account the difficulties associated with their present drafts. Against this view is a clearly expressed inclination by practitioners and the judiciary to follow English models for reform where they offer overall improvement. The 1977 Act and 1981 Act have been shown to work and legislative amendments have already been made to improve their performance. Adopting the English models does not preclude further “fine tuning”. Partial codification of conspiracy and attempt would also serve to signify the importance that the Commission attaches to codification as an ultimate ideal.

5.3 The second option has the merit of certainty. Hong Kong would adopt a working package. The only major alterations to accommodate the existing procedural framework would be the maintenance of the provisions permitting summary trial for a conspiracy, and the continued existence of the crime of attempting to commit a summary offence, which could be also dealt with in the magistrates' court. The major benefits of the partial codification in Part I of the 1977 Act and the 1981 Act would be secured. These are:

(a) a definition of conspiracy that emphasises the requirement for a criminal objective to the agreement;

(b) the removal of the defence of impossibility in relation to the two commonly employed preliminary offences;

(c) a definition of attempt that achieves consistency and a new point of departure from which rational case law may develop; and

(d) English case law would regain its direct relevance.

5.4 The second option may be criticised in that:

(a) the related preliminary offence of incitement is omitted;

(b) the approach generates “absurdities”, such as the fact that the troublesome defence of impossibility is eliminated for conspiracy and attempt but is preserved for the offence of incitement; and

(c) though the potential width of crimes of conspiracy is cut back in the 1977 Act, the common law offences that remain, such as conspiracy to corrupt public morals, are dangerously vague.

5.5 The third option permits the adoption of a multiplicity of variations. Arranging the possible modifications in descending order of significance:

(a) partial codification of the law of incitement, based on clause 47 of the Law Commission's draft code. This would give coherence and consistency to a single package reforming the preliminary offences. While it is a leap in the dark, incitement is not commonly employed and, once encoded, it may be rapidly modified if it proves deficient;

(b) removal of the offences of corrupting public morals and outraging public decency.

(c) modification of the 1977 Act and 1981 Act to make it clear that, while intention is the principal fault element for both conspiracy and attempt, the *mens rea* required for a conspiracy or attempt to commit a crime whose elements include specific circumstances, is recklessness as to the ultimate existence of those circumstances. There is a model for such a modification in clause 48(2) and 49(2) of the draft Code;

(d) the preservation of the existing combination of preliminary crimes within the new statutory framework. Thus, incitement to conspire and attempting to conspire would not be expressly abolished as they were in section 5(7) of the 1977 Act;

(e) confirmation of the existing law relating to combinations of preliminary offences and offences of secondary participation. Thus, it would be an offence to aid and abet an incitement, but not to incite to aid and abet (see clause 47(4)). In the same vein, see clauses 48(7)and 49(6); and

(f) no rule requiring exclusivity. This would permit the existing statutory preliminary offences to overlap with the general preliminary offences. There is a model for such a provision in the draft Code at clause at 51(2).

5.6 Some of those we consulted thought that there should be no rule requiring exclusivity between existing statutory preliminary offences and any new preliminary offences created in the code. We agree that in any proposed codification of the preliminary offences, there should be no rule of exclusivity. To do otherwise, as the English Law Commission pointed out:

> *"... opens the way for unmeritorious technical submissions that the indictment charges or the evidence discloses a preliminary offence under another enactment and therefore that the defendant cannot be convicted of the relevant Code offence. The only virtue of exclusivity that we can discern is that it ensures that the penalties prescribed by Parliament for the offence under the other enactment are not exceeded by those for the equivalent Code offence"*[1]

5.7 **We agree with the English Law Commission's view and recommend that in the proposed mini-code there should be no rule of exclusivity and that provisions similar to clause 51(2) of the draft Code should be adopted.**

The best option?

5.8 We do not consider that leaving the law in its present state is a realistic option and we therefore reject the first of the three options outlined at paragraph 5.2. Instead, we see the solution as a choice between the second and third option. We believe that there is much to be said for having codification as an ultimate goal, a view clearly supported by those we consulted. We also believe that there are significant advantages in drawing upon English legislative precedents where they appear suitable to Hong Kong's circumstances. Again, that is a view which appears to have wide support within the legal profession. The benefits we see in enacting legislation based on the existing English models include:

- the abolition of the common law offences of conspiracy to commit a tortious act or to injure. These offences are imprecise and do not appear to have been needed in the past in Hong Kong, neither is their use in the future anticipated. It is contrary to principle to maintain offences for agreements whose objects would not be criminal if carried out by one person acting alone;

[1] See paragraph 13.54 of the Draft Code Report.

- the elimination of the defence of impossibility. The defence has worked injustice in the past, particularly in relation to the law of attempt. Furthermore, the defence is difficult to apply in complex fact situations;

- increased accessibility, comprehensibility and certainty of the law. The common law is unclear and riddled with inconsistencies. Encoding the offences of conspiracy and attempt would allow the law to be applied more consistently and rationally; and

- English models would restore a welcome source of precedent. The 1977 Act and the 1981 Act are not perfect, but they are working models which have been tried, tested, and, where necessary, modified.

5.9 The choice between the second and third options is not as easy to make. What draws us to the third option is our confidence in one of the benefits of codification: ease of amendment. If any aspect of the code is found to be deficient, it can be correct by amendment. We were impressed by the points made by the authors of the Law Commission's draft Code. However, we would not go so far as to modify the core features of the 1977 Act and the 1981 Act. We would, however, "add on" the clause 47 of the draft Code, dealing with incitement. We appreciate that this means adopting law which has not as yet been implemented in England and Wales. Nonetheless, it appears to us that the approach of the authors of the draft Code is basically sound. We believe that consistency requires that all three related preliminary offences be dealt with at one time. To encode the law of conspiracy and attempt and leave aside incitement would produce a decidedly odd result.

5.10 There was clear support for the third option for reform from the majority of those we consulted. A minority advocated a mini-code based on the English Law Commission's draft Code, arguing that the draft Code represents a unified package and avoids problems that have been encountered with the English Acts[2]. We would not pretend that the English provisions are not without difficulty but we think that there are practical difficulties with the draft Code. A principal advantage of adopting the English legislation, rather than the provisions of the draft Code, is that there is a ready-made body of precedent to which practitioners and the courts in Hong Kong can turn for guidance. To adopt the Code provisions would not restore a source of precedent and could require time for adequate case law to develop. We therefore reject the alternative of adopting in their entirety the provisions of the draft Code as they relate to inchoate offences.

---

[2] See in particular the House of Lords decision in *R v. Anderson* [1986] 1 AC 27. Their Lordships' reasoning, and their interpretation of the law of conspiracy following the 1977 Act, has been criticised by academics.

5.11 **Instead, we recommend the adoption of the third option for reform: the adoption of the provisions of the Criminal Law Act 1977 and Criminal Attempts Act 1981 (as necessarily amended) which relate to conspiracy and attempt, together with the provisions in clause 47 of the English Law Commission's draft Code, which deal with incitement.**

Chapter 6

Summary of recommendations

6.1 In this final chapter, we shall summarise the recommendations which we have made in relation to the codification of the preliminary offences of incitement, conspiracy and attempt.

General

6.2 We recommend the adoption of a mini-code for all three preliminary offences, incorporating provisions based on those in the English Criminal Law Act 1977, dealing with conspiracy, the English Criminal Attempts Act 1981, dealing with attempts, and clause 47 of the draft Code prepared by the English Law Commission in their Report, *A Criminal Code for England and Wales,* which deals with incitement *(paragraph 5.11).*

6.3 The defence of impossibility should be removed in relation to the offences of incitement, conspiracy and attempt *(paragraphs 2.35, 3.33 and 4.57).*

Incitement

6.4 In order to constitute an offence of incitement, the inciter should hold a belief that the person incited will commit the crime with the "fault" required for the substantive offence *(paragraph 2.27).*

6.5 The rule in *R v Curr* should not be perpetuated and it should not be necessary for the prosecution to prove that the person incited has acted with the necessary *mens rea* when a substantive crime follows the incitement *(paragraph 2.28).*

6.6 The offence of incitement to conspire should be retained *(paragraph 2.31).* We recommend the adoption of the whole of clause 47 of the draft Code in the proposed mini-code *(paragraph 2.42).*

Conspiracy

6.7 The law of conspiracy should continue to apply to summary matters *(paragraph 3.7).*

6.8 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 *(paragraph 3.18).*

6.9 The common law rule that a person cannot conspire with his or her spouse should be preserved *(paragraph 3.46).*

6.10 For the offence of conspiracy, 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 should be retained *(paragraph 3.50).*

6.11 The offence of corrupting public morals, whether it exists solely as a conspiracy or in respect of an individual acting alone, should be abolished *(paragraph 3.31).* We also recommend the abolition of the offence of outraging public decency *(paragraph 3.32).*

6.12 We accordingly recommend the adoption in the proposed mini-code of the provisions of the 1977 Act relating to conspiracy, subject to the other recommendations we have made earlier Chapter 3 *(paragraph 3.66).*

Attempts

6.13 The definition of attempt in the English Criminal Attempts Act 1981 should be adopted in the interim pending further research and future development in this area of the law *(paragraph 4.51).*

6.14 Where the elements of an offence include specific circumstances, then recklessness as to the specific circumstances should be enough for the offence of conspiracy or attempt. In this respect, some provisions along the lines of clauses 48(2) and 49(2) of the English Law Commission draft Code should be incorporated into the proposed mini-code *(paragraph 4.56).*

6.15 In adapting the English Criminal Attempts Act 1981 to the proposed mini-code, section 1(4) of the Act should be modified to the effect that the offence of attempt should also apply to summary offences *(paragraph 4.58).*

6.16 The offence of attempt to conspire should be retained by *not* adopting section 1(4)(a) of the 1981 Act in the mini-code *(paragraph 4.61).*

6.17 The offence of attempting to aid and abet should be abolished (as was done by section 1(4)(b) of the 1981 Act) *(paragraph 4.61).*

6.18 In the proposed mini-code, there should be no rule of exclusivity. A provision similar to clause 51(2) of the draft Code should therefore be adopted *(paragraph 5.7).*

Appendix I

Clauses 47 to 52 of the English Law Commission Draft Code

Preliminary offences

Incitement to commit an offence

47. (1) A person is guilty of incitement to commit an offence or offences if –

(a) he incites another to do or cause to be done an act or acts which, if done, will involve the commission of the offence or offences by the other; and

(b) he intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.

(2) Subject to section 52(1), "offence" in this section means any offence triable in England and Wales.

(3) Where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of incitement to commit that offence.

(4) A person may be convicted of incitement to commit an offence although the identity of the person incited is unknown.

(5) It is not an offence under this section, or under any enactment referred to in section 51, to incite another to procure, assist or encourage as an accessory the commission of an offence by a third person; but

(a) a person may be guilty as an accessory to the incitement by another of a third person to commit an offence; and

(b) this subsection does not preclude a charge of incitement to incite (under this section or any other enactment), or of incitement to conspire (under section 48 or any other enactment), or of incitement to attempt (under section 49 or any other enactment), to commit an offence.

Conspiracy to commit an offence

48. (1) A person is guilty of conspiracy to commit an offence or offences if –

(a) he agrees with another or others that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement; and

(b) he and at least one other party to the agreement intend that the offence or offences shall be committed.

(2) For the purposes of subsection (1) an intention that an offence shall be committed is an intention with respect to all the elements of the offence (other than fault elements), except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.

(3) Subject to section 52, “offence” in this section means any offence triable in England and Wales; and

(a) it extends to an offence of murder which would not be so triable; but

(b) it does not include a summary offence, not punishable with imprisonment, constituted by an act or acts agreed to be done in contemplation of a trade dispute.

(4) Where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of conspiracy to commit that offence.

(5) A conspiracy continues until the agreed act or acts is or are done, or until all or all save one of the parties to the agreement have abandoned the intention that such act or acts shall be done.

(6) A person may become a party to a continuing conspiracy by joining the agreement constituting the offence.

(7) It is not an offence under this section, or under any enactment referred to in section 51, to agree to procure, assist or encourage as an accessory the commission of an offence by a person who is not a party to such an agreement; but -

(a) a person may be guilty as an accessory to a conspiracy by others; and

(b) this subsection does not preclude a charge of conspiracy to incite (under section 47 or any other enactment) to commit an offence.

(8) A person may be convicted of conspiracy to commit an offence although –

(a) no other person has been or is charged with such conspiracy;

(b) the identity of any other party to the agreement is unknown;

(c) any other party appearing from the indictment to have been a party to the agreement has been or is acquitted of such conspiracy, unless in all the circumstances his conviction is inconsistent with the acquittal of the other; or

(d) the only other party to the agreement cannot be convicted of such conspiracy (for example, because he was acting under duress by threats (section 42), or he was a child under ten years of age (section 32(1)) or he is immune from prosecution).

Attempt to commit an offence

49. (1) A person who, intending to commit an indictable offence, does an act that is more than merely preparatory to the commission of the offence is guilty of attempt to commit the offence.

(2) For the purposes of subsection (1), an intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.

(3) "Act" in this section includes an omission only where the offence intended is capable of being committed by an omission.

(4) Where there is evidence to support a finding that an act was more than merely preparatory to the commission of the offence intended, the question whether that act was more than merely preparatory is a question of act.

(5) Subject to section 52(1), this section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than an offence under section 4(1) (assisting offenders) or 5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the Criminal Law Act 1967.

(6) It is not an offence under this section, or under any enactment referred to in section 51, to attempt to procure, assist or encourage as an accessory the commission of an offence by another; but -

(a) a person may be guilty as an accessory to an attempt by another to commit an offence; and

(b) this subsection does not preclude a charge of attempt to incite (under section 47 or any other enactment), or of attempt to conspire (under section 48 or any other enactment), to commit an offence.

Impossibility and preliminary offences

50. (1) A person may be guilty of incitement, conspiracy or attempt to commit an offence although the commission of the offence is impossible, if it would be possible in the circumstances which he believes or hopes exist or will exist at the relevant time.

(2) Subsection (1) applies –

(a) to offences under sections 47, 48 and 49;

(b) to any offence referred to in section 51(1).

(3) Subsection (1) does not render a person guilty of incitement, conspiracy or attempt to commit an offence of which he is not guilty because circumstances exist which, under section 45 or any other provision of this or any other Act, justify or excuse the act he does.

Preliminary offences under other enactments

51. (1) Sections 47 to 49 apply in determining whether a person is guilty of an offence, created by an enactment other than those sections, of incitement, conspiracy or attempt to commit a specified offence, with, in the case of an attempt, the substitution in section 49 of a reference to the specified offence for the words “an indictable offence”.

(2) Conviction of an offence -

(a) under section 47, 48 or 49; or

(b) under another enactment referred to in subsection (1),

is not precluded by the fact that the conduct in question constitutes an offence both under section 47, 48 or 49 and under that other enactment.

Jurisdiction and preliminary offences

52. (1) A person may be guilty of incitement, conspiracy or attempt to commit an offence specified in subsection (3) although the act incited, agreed upon or attempted is intended to be done outside the ordinary limits of

criminal jurisdiction, provided that that act, if done within those limits, would constitute such an offence.

(2) A person may be guilty of incitement, conspiracy or attempt to commit an offence specified in subsection (3) although the incitement, conspiracy or attempt occurs outside the ordinary limits of criminal jurisdiction, provided that the act incited, agreed upon or attempted is intended to be done within those limits and, if so done, would constitute such an offence.

(3) The offences referred to in subsections (1) and (2) are murder (section 54), manslaughter (section 55), intentional serious personal harm (section 70), causing an explosion likely to endanger life or property (section 2 of the Explosive Substances Act 1883) and kidnapping (section 81).

(4) A person may be guilty of conspiracy to commit an offence although the agreement is made outside the ordinary limits of criminal jurisdiction, if -

(a) the offence is to be committed within those limits; and

(b) while the agreement continues an act in pursuance of it is done within those limits; and entering within those limits for any purpose connected with the agreement is an act in pursuance of it.

Appendix II

Part I of the English Criminal Law Act 1977 (as amended), dealing with conspiracy

The offence of conspiracy

1. [(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either -

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.]

(2) Where 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 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.

(3) Where in pursuance of any agreement the acts in question in relation to any offence are to be done in contemplation or furtherance of a trade dispute (within the meaning of the Trade Union and Labour Relations Act 1974) that offence shall be disregarded for the purposes of subsection (1) above provided that it is a summary offence which is not punishable with imprisonment.

(4) In this Part of this Act "offence" means an offence triable in England and Wales, except that it includes murder notwithstanding that the murder in question would not be so triable if committed in accordance with the intentions of the parties to the agreement.

Exemptions from liability for conspiracy

2. (1) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence if he is an intended victim of that offence.

(2) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say -

(a) his spouse;

(b) a person under the age of criminal responsibility; and

(c) an intended victim of that offence or of each of those offences.

(3) A person is under the age of criminal responsibility for the purposes of subsection (2)(b) above so long as it is conclusively presumed, by virtue of section 50 of the Children and Young Persons Act 1933, that he cannot be guilty of any offence.

Penalties for conspiracy

3. (1) A person guilty by virtue of section 1 above of conspiracy to commit any offence or offences shall be liable on conviction on indictment -

(a) in a case falling within subsection (2) or (3) below, to imprisonment for a term related in accordance with that subsection to the gravity of the offence or offences in question (referred to below in this section as the relevant offence or offences); and

(b) in any other case, to a fine.

Paragraph (b) above shall not be taken as prejudicing the application of section 30(1) of the Powers of Criminal Courts Act 1973 (general power of court to fine offender convicted on indictment) in a case falling within subsection (2) or (3) below.

(2) Where the relevant offence or any of the relevant offences is an offence of any of the following descriptions, that is to say -

(a) murder, or any other offence the sentence for which is fixed by law;

(b) an offence for which a sentence extending to imprisonment for life is provided; or

(c) an indictable offence punishable with imprisonment for which no maximum term of imprisonment is provided,

the person convicted shall be liable to imprisonment for life.

(3) Where in a case other than one to which subsection (2) above applies the relevant offence or any of the relevant offences is punishable with imprisonment, the person convicted shall be liable to imprisonment for a term not exceeding the maximum term provided for that offence or (where more than one such offence is in question) for any one of those offences (taking the longer or the longest term as the limit for the purposes of this section where the terms provided differ).

In the case of an offence triable either way the references above in this subsection to the maximum term provided for that offence are references to the maximum term so provided on conviction on indictment.

Restrictions on the institution of proceedings for conspiracy

4. (1) Subject to subsection (2) below proceedings under section 1 above for conspiracy to commit any offence or offences shall not be instituted against any person except by or with the consent of the Director of Public Prosecutions if the offence or (as the case may be) each of the offences in question is a summary offence.

(2) In relation to the institution of proceedings under section 1 above for conspiracy to commit -

(a) an offence which is subject to a prohibition by or under any enactment on the institution of proceedings otherwise than by, or on behalf or with the consent of, the Attorney General, or

(b) two or more offences of which at least one is subject to such a prohibition,

subsection (1) above shall have effect with the substitution of a reference to the Attorney General for the reference to the Director of Public Prosecutions.

(3) Any prohibition by or under any enactment on the institution of proceedings for any offence which is not a summary offence otherwise than by, or on behalf or with the consent of, the Director of Public Prosecutions or any other person shall apply also in relation to proceedings under section 1 above for conspiracy to commit that offence.

(4) Where -

(a) an offence has been committed in pursuance of any agreement; and

(b) proceedings may not be instituted for that offence because any time limit applicable to the institution of any such proceedings has expired,

proceedings under section 1 above for conspiracy to commit that offence shall not be instituted against any person on the basis of that agreement.

Abolitions, savings, transitional provisions, consequential amendment and repeals

5. (1) Subject to the following provisions of this section, the offence of conspiracy at common law is hereby abolished.

(2) Subsection (1) above shall not affect the offence of conspiracy at common law so far as relates to conspiracy to defraud ...

(3) Subsection (1) above shall not affect the offence of conspiracy at common law if and in so far as it may be committed by entering into an agreement to engage in conduct which -

(a) tends to corrupt public morals or outrages public decency; but

(b) would not amount to or involve the commission of an offence if carried out by a single person otherwise than in pursuance of an agreement.

(4) Subsection (1) above shall not affect –

(a) any proceedings commenced before the time when this Part of this Act comes into force;

(b) any proceedings commenced after that time against a person charged with the same conspiracy as that charged in any proceedings commenced before that time; or

(c) any proceedings commenced after that time in respect of a trespass committed before that time;

but a person convicted of conspiracy to trespass in any proceedings brought by virtue of paragraph (c) above shall not in respect of that conviction be liable to imprisonment for a term exceeding six months.

(5) Sections 1 and 2 above shall apply to things done before as well as to things done after the time when this Part of this Act comes into force, but in the application of section 3 above to a case where the agreement in question was entered into before that time -

(a) subsection (2) shall be read without the reference to murder in paragraph (a); and

(b) any murder intended under the agreement shall be treated as an offence for which a maximum term of imprisonment of ten years is provided.

(6) The rules laid down by sections 1 and 2 above shall apply for determining whether a person is guilty of an offence of conspiracy under any enactment other than section 1 above, but conduct which is an offence under any such other enactment shall not also be an offence under section 1 above.

(7) Incitement ... to commit the offence of conspiracy (whether the conspiracy incited ... would be an offence at common law or under section 1 above or any other enactment) shall cease to be offences.

(8) The fact that the person or persons who, so far as appears from the indictment on which any person has been convicted of conspiracy, were the only other parties to the agreement on which his conviction was based have been acquitted of conspiracy by reference to that agreement (whether after being tried with the person convicted or separately) shall not be a ground for quashing his conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons in question.

(9) Any rule of law or practice inconsistent with the provisions of subsection (8) above is hereby abolished.

(10), (11) ...

Appendix III

Part I of the English Criminal Attempts Act 1981 (as amended), dealing with Attempts

Attempt

Attempting to commit an offence

1. (1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where –

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

(4) This section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than -

(a) conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment);

(b) aiding, abetting, counselling, procuring or suborning the commission of an offence;

(c) offences under section 4(1) (assisting offenders) or 5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the Criminal Law Act 1967.

Application of procedural and other provisions to offences under s.1

2. (1) Any provision to which this section applies shall have effect with respect to an offence under section 1 above of attempting to commit an offence as it has effect with respect to the offence attempted.

(2) This section applies to provisions of any of the following descriptions made by or under any enactment (whenever passed) -

(a) provisions whereby proceedings may not be instituted or carried on otherwise than by, or on behalf or with the consent of, any person (including any provisions which also make other exceptions to the prohibition);

(b) provisions conferring power to institute proceedings;

(c) provisions as to the venue of proceedings;

(d) provisions whereby proceedings may not be instituted after the expiration of a time limit;

(e) provisions conferring a power of arrest or search;

(f) provisions conferring a power of seizure and detention of property;

(g) provisions whereby a person may not be convicted or committed for trial on the uncorroborated evidence of one witness (including any provision requiring the evidence of not less than two credible witnesses);

(h) provisions conferring a power of forfeiture, including any power to deal with anything liable to be forfeited;

(i) provisions whereby, if an offence committed by a body corporate is proved to have been committed with the consent or connivance of another person, that person also is guilty of the offence.

Specific offences of attempt

Offences of attempt under other enactments

3. (1) Subsections (2) to (5) below shall have effect, subject to subsection (6) below and to any inconsistent provision in any other enactment, for the purpose of determining whether a person is guilty of an attempt under a special statutory provision.

(2) For the purposes of this Act an attempt under a special statutory provision is an offence which -

(a) is created by an enactment other than section 1 above, including an enactment passed after this Act; and

(b) is expressed as an offence of attempting to commit another offence (in this section referred to as “the relevant full offence”).

(3) A person is guilty of an attempt under a special statutory provision if, with intent to commit the relevant full offence, he does an act which is more than merely preparatory to the commission of that offence.

(4) A person may be guilty of an attempt under a special statutory provision even though the facts are such that the commission of the relevant full offence is impossible.

(5) In any case where -

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit the relevant full offence; but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (3) above, he shall be regarded as having had an intent to commit that offence.

(6) Subsections (2) to (5) above shall not have effect in relation to an act done before the commencement of this Act.

Trial etc of offences of attempt

Trial and penalties

4. (1) A person guilty by virtue of section 1 above of attempting to commit an offence shall -

(a) if the offence attempted is murder or any other offence the sentence for which is fixed by law, be liable on conviction on indictment to imprisonment for life; and

(b) if the offence attempted is indictable but does not fall within paragraph (a) above, be liable on conviction on indictment to any penalty to which he would have been liable on conviction on indictment of that offence; and

(c) if the offence attempted is triable either way, be liable on summary conviction to any penalty to which he would have been liable on summary conviction of that offence.

(2) In any case in which a court may proceed to summary trial of an information charging a person with an offence and an information charging him with an offence under section 1 above of attempting to commit it or an attempt under a special statutory provision, the court may, without his consent, try the informations together.

(3) Where, in proceedings against a person for an offence under section 1 above, there is evidence sufficient in law to support a finding that he did not act falling within subsection (1) of that section, the question whether or not his act fell within that subsection is a question of fact.

(4) Where, in proceedings against a person for an attempt under a special statutory provision, there is evidence sufficient in law to support a finding that he did an act falling within subsection (3) of section 3 above, the question whether or not his act fell within that subsection is a question of fact.

(5) Subsection (1) above shall have effect -

(a) subject to section 37 of an Schedule 2 to the Sexual Offences Act 1956 (mode of trial of and penalties for attempts to commit certain offences under that Act); and

(b) notwithstanding anything -

(i) in section 32(1) (no limit to fine on conviction on indictment) of the Criminal Law Act 1977; or

(ii) in section 31(1) and (2) (maximum of six months' imprisonment on summary conviction unless express provision made to the contrary) of the Magistrates' Courts Act 1980.

5. ....

Supplementary

Effect of Part I on common law

6. (1) The offence of attempt at common law and any offence at common law of procuring materials for crime are hereby abolished for all purposes not relating to acts done before the commencement of this Act.

(2) Except as regards offences committed before the commencement of this Act, references in any enactment passed before this Act which fall to be construed as references to the offence of attempt at common law shall be construed as references to the offence under section 1 above.

Amendments consequential on Part I

7. (1) ...

(2) In paragraph 3(1) of Part II of Schedule 6 to the Firearms Act 1968, the reference to an offence triable either way listed in Schedule 1 to the Magistrates' Courts Act 1980 includes a reference to an offence under section 1 above of attempting to commit the offence so listed.

(3) In section 12(1)(a) of the Misuse of Drugs Act 1971 the reference to an offence under that Act includes a reference to an offence under section 1 above of attempting to commit such an offence.