THE LAW REFORM COMMISSION OF HONG KONG

CONSULTATIVE REPORT

CONSULTATIVE REPORT ON CODIFICATION OF THE GENERAL PART OF THE CRIMINAL LAW IN HONG KONG

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PART I

Background

In August 1989 the Acting Chief Justice and the Attorney General referred to the Law Reform Commission for consideration the question of codification of the criminal law in Hong Kong. Specifically, the terms of reference were -

> *" 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."*

2. A criminal code consolidates existing statute law and incorporates into it the common law as laid down by judicial decisions. The idea of codification is not, of course, new. Indeed most jurisdictions, both common law and civil, have codes of criminal law and the adoption of a code in England and Wales has been the subject of deliberation for more than a hundred years.

3. Several attempts at codification were made during the 19th Century. In 1878, the work of James Fitzjames Stephen culminated in the introduction into Parliament of the Criminal Code (Indictable Offences) Bill. The Bill however reflected Stephen's desire for reform of the law rather than simple restatement of existing principles. The Bill proposed abolition of the distinction between felonies and misdemeanors, abandonment of malice aforethought, redefinition of duress as mitigation and the abolition of the year and a day rule.

4. In 1879 the draft Code together with the report of a Royal Commission to which the Code was referred, was issued as a Blue Book but too late for consideration in the Session of that year. In 1880 there was a change in Ministry and the draft Code lapsed. In 1882, however, the part of the Code which related to Procedure was announced in the Queen's Speech as a Government measure, but consideration of it was postponed and, as it turned out, never resumed.

5. Within the Commonwealth, the development of criminal codes

has been influenced mainly by Thomas Babington Macauley's Indian Penal Criminal Procedure Code[1], Sir Robert Wrights' Criminal Procedure Code[2], Stephen's Criminal Procedure Code and a model draft code of criminal procedure prepared in the 1920s for the Colonial Office by, it is believed, the then Attorney General of Kenya.

6. The earliest examples of codifications in England are those effected by the Bills of Exchange Act 1882, the Partnership Act, 1890, the Sale of Goods Act, 1893 and the Marine Insurance Act, 1906. More recently, certain areas of the common law have been restated and modified by the Criminal Damage Act 1971, the Criminal Law Act 1977 (notably conspiracy) and the Criminal Attempts Act 1981. In Hong Kong an attempt to codify the criminal law in the late 1960s which appeared to begin as more an exercise in law reform than restatement of existing law resulted in the passage of the Crimes Ordinance 1971 Chapter 200. Unlike England, however, Hong Kong continues to rely on the common law for offences such as conspiracy and attempts in relation to which current English judicial decisions are now barely relevant. As a result, Hong Kong law in these areas is now travelling on its own divergent and uncharted course.

7. The most recent developments in England followed the establishment in 1981 of a criminal code team comprising a number of distinguished academic lawyers under the chairmanship of Professor J C Smith, CBE, QC. The report of the team[3], which was published in 1985, included a draft criminal code bill setting out in codified form the general principles of criminal liability and a number of substantive offences. That report was subjected to scrutiny by a number of groups of eminent lawyers throughout England and Wales, each headed by a circuit judge. The responses of those groups together with the results of the considerable public debate which followed the publication of the report indicated substantial support for the principle of codification. This, in turn, led to the publication in April 1989 of the report of the Law Commission "*Criminal Law - A Criminal Code for England and Wales*"[4] which set out a revised and expanded Criminal Code Bill. It is the suitability of this Bill for adoption in Hong Kong upon which we have been asked to make recommendations.

Our Approach

8. We have taken the view that our terms of reference invite us to consider two basic questions. Firstly, whether codification of the law will result in a substantial improvement in the accessibility, comprehensibility, consistency and certainty of the law in Hong Kong. Secondly, if the answer to the first question is in the affirmative, to what extent the Criminal Code Bill in Volume 2

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1 See Sanford H Kadish – "Codifiers of the Criminal Law" (1978) Columbia Law Review 1098. See also C Annadurai Aiyar, *A commentary on the Code of Criminal Procedure (1905)*, Vol 1, pp vii to xii. See also, Gledhill, *Pakistan, The Development of its Laws and Constitutions*, pp 158 and 159 and Gledhill, *The Republic of India, The Development of its Laws and Constitutions*, p. 229.

2 Command Paper C. 1893 of 1877. See also Martin L. Friendland - *A century of criminal justice*.

3 Law Corn No. 143.

4 Law Com No. 177.

of the Law Commission's report "*Criminal Law - A Criminal Code for England and Wales*" is suitable for adoption in Hong Kong.

9. In reaching our conclusions on each of these questions we have been conscious of the fact that the subject has been considered in England over a number of years by many eminent and distinguished lawyers and that there has been wide consultation with members of the legal profession at a practical working level (the "scrutiny groups") before publication of the Law Commission Report.

10. There is little to be achieved by attempting to improve or expand upon the arguments for and against codification as they have been debated in England. They are succinctly set out in Part 2 of the Law Commission Report at pages 5 to 11 and are equally applicable to Hong Kong.

11. The position of Hong Kong, however, does need to be specifically addressed in a number of respects.

The Hong Kong Perspective

12. Hong Kong criminal law is to be found in a wide variety of ordinances, a number of UK Statutes which have been extended to Hong Kong, many thousands of cases reflecting judicial decisions both here and in England and in several ancient commentaries. The vast majority of criminal offences in Hong Kong are set out in over 200 ordinances containing offence-creating provisions.

13. An illustration of the difficulties arising from the present scattered mix of statute and case law is provided by, but by no means limited to, the law of homicide. The uncertainty as to the fault requirement for murder is well known to every practising criminal lawyer, has exercised the minds of the appellate courts for generations and must be well beyond the comprehension of the ordinary man in Hong Kong. Many non-lawyers would find it surprising that one of the most serious offences known to law is not, in fact, a statutory offence and is substantially but not entirely governed by the common law. The offence itself is contrary to common law but it would be impossible to consider the consequences of an indictment for murder without reference to a large number of relevant legislative provisions in several different ordinances. One aspect which would need to be considered for example is the question of what alternative verdicts are available.

14. In Hong Kong alternative verdicts for murder are specifically provided for in section 8A of the Offences Against the Person Ordinance (Cap 212). A person who is found not guilty of murder may be convicted of any offence of which he may be found guilty under any ordinance specifically so providing or under section 51(2) or section 90(2) of the Criminal Procedure Ordinance. Section 8A also provides that he may be convicted of an attempt to commit any other offence of which he may be found guilty. This section is modelled on section 6 (2) of the Criminal Law Act 1967 which also makes

available an alternative verdict of manslaughter. Other alternative verdicts for murder are provided for in section 3(3) of the Homicide Ordinance (Cap 339) and section 33(B)(2) of the Offences a
gainst the Persons Ordinance (Cap 212). Further, section 89 of the Criminal Procedure Ordinance might need to be considered in the context of accessories but that section cannot be considered in isolation from the myriad of common law decisions on the subject. A formidable task for a lawyer, a virtual impossibility for the man on the Shaukiwan tram who would have to come to terms not only with the complexity of the law but also the language in which it is expressed.

15. Although, in reality, very few common law offences remain, those which do exist are generally ill defined, conceptually confused and bewildering to practitioners and laymen alike. Examples include conspiracy and attempts (now statutory offences in England), incitement and the principles of secondary participation in inchoate offences by way of aiding, abetting, counselling or procuring the commission of such offences.

16. The general principles of criminal liability can be equally obscure with fault terms such as recklessness (which has several distinct meanings depending on the offence charged) lacking any consistent definition or application[5].

17. The effect of intoxication has been the subject of many judicial decisions both in Hong Kong and England and the current state of the law is particularly complex. Similarly, the area of general defences, in particular duress, is in need of rationalisation. Authorities are far from consistent, for example, on the question of whether a subjective or objective test should be applied in determining the liability of a defendant who was mistaken as to the circumstances in which he acted or acted because of the "reasonable" belief in the circumstances of a threat. The application of a subjective test is in line with recent developments in the law of mistake[6] whereas, in the context of duress, the Court of Appeal in *R v Graham*[7] held that an objective test should be applied to determine whether the defendant's response to the threat was one which would have been expected of a "*sober person of reasonable firmness sharing the defendants characteristics"*.

18. The anomalies and in some cases absurdities which exist in our criminal law can be well illustrated by the case of a person who is charged with damaging the property of another by injuring a dog by which he has been attacked. If he was defending his property, the test of reasonableness is subjective. If he was defending his person the test is objective i.e. whether his actions were, in fact, reasonable rather than simply whether he believed them to be reasonable. The result is that he has a better chance of acquittal if he says he was defending his trousers than if he says he was defending his leg[8].

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5 See Ian Dennis – "The Case for Codification", (1986) 50 Journal of Criminal Law, pages 161 to 170.

6 *R v Williams* (1983) 78 C A R 76.

7 [1982] 1 WLR 294.

8 See "Codifying the Criminal Law" by Professor J C Smith, [1984] Statute Law Review 17.

19. It is in areas such as these that a concise statement of law in language which is easily understandable would settle the uncertainties and anomalies which currently exist. Codification by way of restatement and rationalisation of the criminal law would, we believe, go a long way towards providing far greater comprehensibility, consistency and certainty than we now have. Accessibility would also be greatly improved by the inclusion of all major offences and the general principles of criminal law in a single piece of legislation which could, with comparative ease, be translated into Chinese.

20. Hong Kong has traditionally looked to English law for its development. Appeals lie from the Court of Appeal in Hong Kong to the Judicial Committee of the Privy Council. Except in so far as they may be distinguished on their facts, decisions of the Court of Appeal and House of Lords in England are generally followed in Hong Kong.

21. In recent years, however, some areas of our law have been left to develop independently of English Law. The law of conspiracy and attempt, for example, which are now statutory offences in England, are determined according to common law principles in Hong Kong. Codification of these areas of the law would bring us back in line with the developments in England.

22. In England the distinction between felony and misdemeanour was abolished by Section 1 of the Criminal Law Act 1967. In Hong Kong a somewhat anomalous situation exists in that although the distinction has not been formally abolished many of the principal differences have been removed by legislation. Section 89 of the Interpretation and General Clauses Ordinance (Cap 1) effectively abolishes the distinction for the purpose of determining the mode of trial of offences. Section 91(5) of the Criminal Procedure Ordinance (Chapter 221) abolishes the offence of misprision of a felony and the same section provides for the offence of concealing offences. Although section 90 of the same Ordinance provides for the offence of assisting offenders, there is no provision for the abolition of the offence of being an accessory after the fact to felony. In *Ly Cam Sang*[9] it was held that the offence continues to exist in Hong Kong. The result in that case was that it became incumbent upon the trial judge to (a) direct the jury what was in law an accessory after the fact, (b) direct the jury that whether a witness was or was not such an accessory was a question of fact for them, (c) direct them that if they did so find, he was in law an accomplice, and (d) if they did so find, give them the proper warning as to corroboration.

23. This is an archaic area of the law which needs to be rationalised. We understand that consideration is currently being given to the abolition of the distinction between felony and misdemeanour and we support any steps which may be taken to this end.

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[9] Cr App No. 751 of 1982.

Conclusion and recommendations

24. Much of our law is already codified. Offences such as treason, perjury, criminal damage and sexual offences are set out in the Crimes Ordinance (Chapter 200) and could conveniently be included in any criminal code. General defences, a number of criminal offences and the general principles of criminal liability depend to a large extent on the common law.

25. It would, in our view, be illogical, in the light of the proposals to codify the criminal law in England, for Hong Kong to remain one of the few jurisdictions in the world to continue to depend on judge made law for its continued development. While the rest of the world moves forward we would continue to grapple, alone, with many of the obscure, anomalous and bewildering aspects of the common law. We are convinced that sooner or later codification of the law in Hong Kong will be recognised as inevitable. We believe that the time is now right to take that step and we so recommend. We believe that the result will be a substantial improvement in the accessibility, comprehensibility, consistency and certainty of the law to be perpetuated in Hong Kong.

26. The code team in England considered their primary purpose to be one of restatement rather than reform. However, some items of reform were included in order to eliminate inconsistencies and inexplicable rules and fill gaps in the law so as to produce as comprehensive a statement of the law as possible[10]. We agree with this philosophy and it is an approach which we would recommend for Hong Kong. In some areas, however, the code team went somewhat further and incorporated into the draft code recommendations for reform made by various public bodies established to review the law in particular areas. The recommendations of the Butler Committee on Mentally Abnormal Offenders is an example. We do not consider that in Hong Kong we should undertake such substantial reform of the law without public consultation and we have not, therefore, recommended adopting the code in such areas.

27. For the purposes of consultation we have decided that the best approach is to make recommendations on the suitability for adoption in Hong Kong of each clause in the draft code. In recognition of the work done in England by such eminent lawyers as Professor JC Smith and his team we have not attempted to re-examine afresh the principles set out in the many reports and working papers which have been published by the Law Commission over the years and which have led to the current draft. Where they have been accepted in England and where the law is the same in Hong Kong we see no reason to depart from them. Having recommended the adoption of a criminal code in Hong Kong we have, therefore, proceeded on the premise that the draft code should be adopted in Hong Kong unless in relation to specific clauses there appears to be good reason to the contrary.

28. Part II of this report sets out our recommendations on each clause

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10 See "Codifying the Crime Law" by Professor J C Smith, [1984] Statute Law Review 17

of Part 1 of the draft Code and should be read with the commentary on the Draft Criminal Code Bill in Volume 2 of the Law Commission Report. Our terms of reference preclude consideration of the specific offences set out in Part II of that Code at this stage. We expect that in due course we shall be asked to consider and make recommendations upon codification of specific offences.

PART II

Comments on the draft criminal code bill

Clause 1: Short title, commencement and extent

Subject to the exclusion of subsection (3), the substitution of "Ordinance" for "Act" in subsection (1) and the inclusion of an appropriate commencement date in Subsection (2), it is recommended that this clause be adopted.

Clause 2: Application of the act and other penal legislation

2. This clause accords with the presumption against retrospective legislation but enables certain procedural and evidential provisions in the Code to be applied in proceedings arising from offences committed before the Code comes into effect. Pre-code offences, as defined in clause 6, are to be unaffected by the Code. The clause is recommended for adoption.

Clause 3: Creation of offences

3. This clause is consistent with the objective of codification and accords with the view expressed in *Knuller v DPP*[1] that the courts no longer have power to create new offences. It is recommended for adoption.

Clause 4: Effect on common law

4. This clause makes necessary provision for abolition and replacement of specified common law offences and the abrogation of common law rules which are inconsistent with the Code. Provision is made for references to replaced offences and rules in existing legislation to be references to offences and rules in the Code. Other common law rules and the powers of the courts in relation to them are to be preserved. As we are currently considering only Part I (General Principles) subsection (1) and (3) are unnecessary at this stage. We recommend that subsections (2) and (4) be adopted.

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1 [1973] AC 435.

Clause 5: Amendments and repeals

5. Provision will need to be made for Schedules setting out amendments to existing legislation and ordinances to be repealed as a result of the Code. It is recommended that such Schedules be included in the Bill.

Clause 6: General interpretation

6. Some definitions in this clause are not relevant to Hong Kong, e.g. "offence triable either way", others will need to be considered in the context of codification of specific offences e.g. "assault". With necessary modification, however, the adoption of an interpretation provision along similar lines is recommended.

Clause 7: Prosecution punishment and miscellaneous matters

7. This clause makes provision for a Schedule setting out each offence in the Code, its mode of trial, punishment, any restriction on the institution of proceedings, available alternative verdicts and any ancillary or miscellaneous matters. It is a convenient approach which can be considered in due course with codification of specific offences.

Clause 8: Alternative verdicts

8. This clause closely resembles existing Hong Kong legislation in relation to alternative verdicts.

9. Subsection (1)(b), which concerns "included offences", differs from section 51(2) Criminal Procedure Ordinance (Cap 221) in that the latter is not limited in its application to indictable offences, makes no provision for murder and expresses in different language the requirement for an acquittal of the actual charge preferred[2].

10. Subsection (1)(c) permits a court to find a person guilty of an attempt to commit the offence with which he has been charged or of any alternative offence. This accords with sections 51(2) and 51(3) of the Criminal Procedure Ordinance. The subsection is limited in its application to offences charged on indictment.

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[2] In Hong Kong alternative verdicts for murder are specifically provided for in section 8A of the Offences Against the Person Ordinance (Cap 212). A person who is found not guilty of murder may be convicted of any offence of which he may be found guilty under any ordinance specifically so providing or under section 51(2) or section 90(2) of the Criminal Procedure Ordinance. Section 8A also provides that he may be convicted of an attempt to commit any other offence of which he may be found guilty. This section is modelled on section 6(2) of the Criminal Law Act 1967 which also makes available an alternative verdict of manslaughter. Other alternative verdicts for murder are provided for in section 3(3) of the Homicide Ordinance (Cap 339) (manslaughter) and section 33(B)(2) of the Offences against the Persons Ordinance (Cap 212) (aiding and abetting the suicide of another).

11. Subsection (1)(d) provides for conviction of assisting an offender guilty of the offence charged. It accords with the provisions of section 90(2) of the Criminal Procedure Ordinance except in so far as the subsection in the Code is limited in its application to offences charged on indictment and refers to the definition of "arrestable offence" in the Police and Criminal Evidence Act 1984. Section 4(1) of the Criminal Law Act 1967, to which the subsection refers, is cast in the same terms as section 90(1) of the Criminal Procedure Ordinance.

12. It was held in *R v Saunders*[3] that as a judge had judicial discretion to discharge a jury from giving a verdict if they were unable to agree, he was entitled to discharge them from giving a verdict of murder where they were agreed on a verdict of manslaughter and that such a verdict was entirely proper. Subsection (2) applies subsection (1) to such a case.

13. Subsection (3) makes it clear that, each count in an indictment is an "indictment" for the purposes of subsection (1).

14. In England magistrates have no power to convict of an alternative offence. Subsection (4) provides them with limited power to do so in respect of certain offences against the person. In Hong Kong no distinction is drawn between offences tried summarily or on indictment for the purposes of conviction of alternative offences under sections 51(1) and 51(2) of the Criminal Procedure Ordinance. Magistrates in Hong Kong are also provided with additional powers under section 27 of the Magistrates Ordinance (Cap 227) which prescribes the circumstances under which a magistrate shall amend a complaint or substitute another offence for the offence charged.

15. It is clearly desirable that where substantive offences are codified, the alternative offences of which a person may be convicted be clearly set out. Subsection (1) makes such provision.

Recommendation:

16. It is recommended that –

a) clause 8(1)(a) be adopted but without being limited in its application to offences tried on indictment,

b) clause 8(1)(b) be adopted but without being limited in its application to offences tried on indictment.

(i) It was clearly intended in England that the only alternative verdicts which should be available for murder were those specified in section 6(2) of the Criminal Law Act 1967 and those now set out in Schedule 1 of the Code. By exclusion of murder from the exception in section 51(2) of the

[3] [1988] AC 148.

Criminal Procedure Ordinance (Cap 221) a person found not guilty of murder in Hong Kong may be found guilty of any other offence if the evidence so justifies.

In the absence of any reason for this departure from the English provision it is recommended that all available alternative verdicts for murder be specified in the Code and that, for the purposes of subsection (1) (d) murder, in the same way as treason, be excepted.

(ii) For the avoidance of any doubt which the wording of section 51(2) might create it is recommended that the reference to it being "proved" that the accused is not guilty of the offence charged be replaced with reference to a finding of not guilty.

c) clause 8(1)(c) be adopted but without being limited in its application to offences tried on indictment.

d) clause 8(1)(d) be adopted but without being limited in its application to offences tried on indictment and without reference to the Police and Criminal Evidence Act[4].

e) clause 8(2) be adopted.

f) clause 8(3) be adopted.

g) clause 8(4) be not adopted.

h) Section 51(2) and 90(2) of the Criminal Procedure Ordinance (Cap 221), be repealed.

(i) Specific reference to a magistrate's power under section 27 of the Magistrates Ordinance (Cap 227) be made in the Code.

Clause 9: Conviction of preliminary offence when ulterior offence completed.

17. This clause restates the common law in relation to attempt; specifically, that a person who is charged with attempt may be convicted of that offence notwithstanding the fact that the evidence shows that he committed the full offence[5]. It is based upon section 6(4) of the Criminal Law Act 1967 on which section 51(3) of the Criminal Procedure Ordinance (Cap 221) is

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4 Arrestable offence is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) as an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced for a term exceeding 12 months, and an attempt to commit any such offence. This differs from England where the relevant period of imprisonment under section 2 of the Criminal Law Act 1967 is 5 years.

5 *Webley v Buxton* [1977] QB 481.

modelled. The position at common law in relation to incitement and conspiracy to commit an offence is the same as attempt[6] and clause 9 is drafted accordingly.

18. The discretion of the Court to discharge the jury in subsection (2) is referred to in section 6(4) of the Criminal Law Act 1967 but was excluded from section 51(3) of the Criminal Procedure Ordinance. The power is within the inherent jurisdiction of the court and, for the sake of completeness, should be set out in the legislation.

19. It is recommended that the clause be adopted and that section 51(3) of the Criminal Procedure Ordinance be repealed.

Clause 10: Act constituting two or more offences

20. This clause effectively restates the common the law and accords with section 83 of Interpretation and General Clauses Ordinance (Cap 1). It is recommended that it be adopted and that section 83 of the Interpretation and General Clauses Ordinance be repealed.

Clause 11: Double jeopardy

21. This clause restates the fundamental common law principle that a person may not be tried for a crime in respect of which he has previously been acquitted or convicted or in respect of which he could in some previous indictment or information have been lawfully convicted. It replaces the special pleas in bar of Autrefois Acquit and Autrefois Convict as provided for in section 31 of the Criminal Procedure Ordinance and the rules associated with those pleas.

22. It should be noted that the enactments referred to in subsection (1) (e) apply to Hong Kong. The Visiting Forces Act 1952 was applied to Hong Kong by S.I. 1954 No. 636.

23. It is recommended that this clause be adopted subject to amendment of subsection 4(a) and substitution of the words “section 51(4) of the Criminal Procedure Ordinance (Cap 221)” for the words “section 6(5) of the Criminal Law Act 1967” in subsection (6)(b). As a consequence, section 31(1) of the Criminal Procedure Ordinance should be repealed.

Clause 12: Multiple convictions

24. Section10(2) (c) of the Magistrates Ordinance (Cap 227) enables a person to be tried for more than one offence on the same occasion where a single act or series of acts is of such a nature that it is doubtful which of several

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6 *Russell on Crime* 12th ed., (1964), 193 – 195.

offences the facts which can be proved will constitute. In such circumstances it would be wrong to convict of two offences arising out of the same act if one of them was a lesser form of the other[7].

25. It is recommended that this clause be adopted.

Clause 13: Proof

26. Subsections (1) and (2) state the present position at common law[8] and subsections (3) and (6) preserve the exceptions which apply at common law[9].

27. Subsection (5) is intended to apply in cases where there is a special defence of the type set out in section 100 of the Food Act 1984. The section enables a person to establish by way of defence that another person is guilty of the offence. There is no equivalent provision in Hong Kong.

28. It is recommended that the clause, with the exception of subsection (5), be adopted and that the reference to section 101 of the Magistrates Court Act 1980 in subsection (6) be substituted by a reference to section 94A Criminal Procedure Ordinance (Cap 221) which makes similar provision for negative averments.

Clause 14: Proof or disproof of states of mind

29. This clause is a restatement of the principle set out in section 8 of the Criminal Justice Act 1967. The Hong Kong equivalent of section 8 is section 65A of the Criminal Procedure Ordinance (Cap 221).

30. Although repeal of section 8 is not specifically referred to, it is inconceivable that section 8 will remain once clause 14 is enacted. It is recommended that this clause be adopted and that section 65A, which was enacted following the decision in *DPP v Smith*[10], be repealed.

Clause 15: Use of "act"

31. This clause adopts the word "act:" as a convenient term to refer both to the *actus reus* of the common law and to its constituent elements. Although not essential, the clause was considered to be useful for the avoidance of doubt and is recommended for adoption in Hong Kong.

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7 *R v Haddock* The Times Feb 5; [1976] Crim LR 374.
8 *Woolmington v DPP* [1935] AC 462.
9 *Coughlan & Young* (1976) 63 Cr App R 33;
Cross on Evidence 6th ed, (1985), pp 162- 163.
10 [1961] AC 290.

Clause 16: Offences of omission and situational offences

32. This clause is cast in somewhat wider terms than the definition of "act" in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) and makes it clear that the term includes, for example, being in possession of something it is an offence to possess. It is a convenient interpretation clause which accords with the position currently existing in Hong Kong (i.e. an "act" may include an omission) and is recommended for adoption.

Clause 17: Causation

33. This clause effectively restates the common law as it currently applies in Hong Kong. Such a provision will have the effect of clearly stating in legislation the existing law and, subject to consideration in due course of clause 26(1) (c), it is recommended for adoption.

Clause 18: Fault terms

34. In their report on the Mental Element in Crime [11] the Law Commission highlighted the uncertainty which can arise as to the mental element (if any) in particular offences. By way of example –

(a) there is no general agreement as to the precise meaning of the words used in legislation to denote a mental element and there is usually no legislative guidance as to their meaning;

(b) there has been uncertainty as to whether a requirement of a mental state, which is provided for in an enactment, applies to all or only some of the requirements of the offence[12].

35. The clause resolves this uncertainty by defining three terms ("knowledge", "intention" and "recklessness") used in a number of offences in Part II of the Code. The definitions are provided only for the purposes of offences defined in the Code and subsequent legislation. Pre-code offences as defined in clause 6 will be unaffected and existing principles will continue to be applied to them.

36. The definitions conveniently distinguish between intention as to a circumstance and intention as to a result. Subsection (a) accords with existing criminal law by providing for a person who deliberately fails to take steps which would confirm a fact which he believes exists.

37. Subsection (b) reflects current judicial thinking on the meaning of "intention" as applied both in England and Hong Kong[13]. The definition of

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11 (1978) Law Com No. 89.

12 *Horton v Gwynne* [1921] 2 KB 661; *Cotterill v Penn* [1936] 1 KB 53.

13 *Hyam v DPP* [1975] AC 55;

"reckless" in subsection (c), however, is more narrowly defined than in the decision in *Caldwell* (reckless driving)[14] but accords with recent decisions in relation to rape[15]. The narrower definition, which makes conscious risk taking the minimum fault element, accords with prevailing views prior to *Caldwell* and avoids the difficulties encountered by the courts in applying the Caldwell definition which effectively describes two different types of fault.

38. It is recommended that this clause be adopted.

Clause 19: Degrees of fault

39. This clause reflects the position in relation to alternative verdicts, double jeopardy and multiple convictions and makes proof of recklessness sufficient to establish knowledge or intention. It is recommended that it be adopted.

Clause 20: General requirement of fault

40. The Law Commission, in their *Report on the Mental Element in Crime*[16], identified as an area of the criminal law in which uncertainty exists offences which appear to require no mental element on the part of the defendant. The question raised was whether the courts should read a requirement of a mental state into such offences and, if so, what the legislature intended the nature of that requirement to be. [It was not until 1975 that it became clear that an offence of assault occasioning actual bodily harm could be committed not only intentionally but recklessly.]

41. At common law there is a general presumption that some mental element must be established for common law offences. Generally courts also tend to approach statutory offences in this way on the assumption that this accords with the unstated intention of the legislature[17]. Such a presumption may, however, be displaced where strict liability appears to have been intended by the legislature[18], in the light of contemporary social conditions[19] and public safety[20] or the penalty imposed[21].

42. The uncertainty which has arisen as a result of the absence of a consistent rule of interpretation is clearly undesirable. The remedy provided by clause 20 is to make recklessness an ingredient of every offence unless

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*Maloney [*1985] AC 905;
CHAN Wing-siu & Others v R [1982] HKLR 280 (CA).

14 [1982] AC 341.

15 *Satnam & Kewal* (1983) 78 Cr App R 149.

16 Law Corn No. 89.

17 But see *Sherras v de Rutzen* [1895] 1 QB 921 where a conviction was quashed notwithstanding the fact that another offence in the same section of the Act required knowledge.

18 *R v St Margarets Trust Ltd v others* [1985] 1 WLR;
Yeandel & Another v Fisher [1966] 1 QB.

19 *Warner v Metropolitan Police Commissioner* [1969] 2 AC.

20 *Gammon (Hong Kong) Ltd v Attorney General* [1984] 3 WLR 437.

21 *Sherras v de Rutzen* [1895] 1 QB.

otherwise provided.

43. The proposal to include this clause was well supported in consultation in England and would be equally appropriate in Hong Kong. It is, therefore, recommended that this clause be adopted.

Clause 21: Lqnorance or mistake of law

44. This clause effectively restates the common law[22] and should be adopted.

Clause 22: Intoxication

The position at common law

45. Although intoxication is not of itself a defence, involuntary intoxication may be relied upon to establish the absence of the required fault element for an offence so as to show that a person is not guilty of the offence charged.

46. Voluntary intoxication may amount to a defence where it results in insanity under the McNaghten rules but generally not otherwise, even where it negatives the mental element required for the offence.

47. *In DPP v Majewski* [23] the House of Lords confirmed the rule at common law, that while evidence of self induced intoxication can negative a crime requiring "specific" intent, it cannot negative one requiring a "basic intent"[24]. It is now generally accepted that any offence which may be committed by recklessness will be held an offence of "basic" and not "specific" intent[25]. In such cases a person may be convicted notwithstanding that the prosecution has not proved any intention or foresight and intoxication will generally not be a defence[26].

48. The decision in *Majewski*, which is now the settled position at common law, has been the subject of criticism as, without any statutory authority, a person may be liable to conviction for an offence notwithstanding that he does not have the necessary fault element for the offence by reason of intoxication[27]. A further and perhaps more important criticism is that it is not

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22 *See DPP v Morgan* [1976] AC 182.

23 [1977] AC 443.

24 A definition of *mens rea* would include *"intention or recklessness with respect to all those circumstances and consequences of the accused's act (or the state of affairs) which constitute the actus reus of the crime in question"*. Smith & Hogan Criminal Law 5th ed at p. 59. See also *DPP v Morgan* [1975] 2 ALL ER 347 at 363 per Lord Simon - "*By 'crimes of basic intent' I mean those crimes whose definition expresses (or, more often implies) a mens rea which does not go beyond the actus reus.*"

25 See *Smith & Hogan Criminal Law* 5th ed at p.193.

26 *Chiu Tat-shing, Dennis v R* (Crim App 238/84 CA).

27 By way of example section 60(1) Crimes Ordinance (Cap 200) provides that an offence is committed by a person who, intentionally or recklessly, destroys or damages property belonging

always clear what crimes are crimes of "basic" and "specific" intent[28]. Rape is an example of an offence over which there have been differences of judicial opinion[29].

49. A further anomaly has arisen in that it has been held that the Majewski rule is inapplicable where legislation expressly provides that a particular belief shall be a defence to a charge. If a person held that belief, he is not guilty, even though it arose from a drunken mistake that he would not have made when sober[30]. The anomalous result is that where a person did not intend any damage to property he may be held liable because he was drunk; but where he did intend damage to property but thought the owner would consent he is not liable, however drunk he may have been. This rule, however, cannot have any application to common law defences, such as self defence where an unreasonable mistake of fact even by a sober person is no answer.[31]

The code

50. Clause 22 reflects the general position at common law and is designed to settle the uncertainties which currently exist.

51. Subsection 1 makes it clear that voluntary intoxication is not of itself a defence to a charge which requires proof of a fault element of recklessness. This provision makes it unnecessary to further consider whether or not an offence is an offence of basic intent for this purpose. Subsection 1(b) resolves the anomaly set out in paragraph (49) above and accords with the non application of the principle in common law defences.

52. Subsection (2) makes similar provision but with an objective test for offences involving a fault element of failure to comply with a standard of care and offences which require no fault.

53. Subsection (3) states the law as it currently applies.

54. Subsection (4)(a) makes murder an exception from subsection (1) in order to ensure that, in the light of clause 55(b), evidence of self intoxication

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to another. In *R v Caldwell* [(1981) 1 All ER 961] it was held that where, in such a charge, recklessness was alleged, evidence of self intoxication was irrelevant.

28 The decisions of the courts indicate that the following are crimes requiring specific intent:- murder, wounding or causing grievous bodily harm with intent, theft, robbery (as a corollary of theft), burglary with intent to steal, handling stolen goods, endeavouring to obtain money on a forged cheque, causing criminal damage contrary to s. 1(2) or (2) of the Crimes Ordinance (Cap 200) where only intention to cause damage or in the case of s. 1(2), only intention to endanger life, is alleged, an attempt to commit any offence, and possibly the aiding and abetting of any offence.
The following are crimes not requiring a specific intent manslaughter (apparently in all its forms): rape, maliciously wounding or inflicting grievous bodily harm; assault occasioning actual bodily harm; assault on a constable in the execution of his duty; indecent assault; common assault; taking a conveyance without the consent of the owner and criminal damage where intention or recklessness, or only recklessness, is alleged.
See *Smith & Hogan Criminal Law* 5th ed at pp 192 to 201.

29 Majewski per Lords Simon & Russell in *Leary v R* (1977) 74 D.L.R. (3d) 103.

30 *Jaggard v Dickson* [1981] QB 527, [1980] 3 All ER 716.

31 *Lanvin v Albert* [1982] AC 546, [1981] 1 ALL ER 628, 72 Cr App Rep 178.

negativing *mens rea* continues to be a defence to murder. It effectively maintains the present law.

55. Subsection (4)(b) enables a "mental disorder verdict" under clause 36 to be made with much wider powers of disposal than the courts can currently exercise following a finding of insanity. The only alternative, at present, to an insanity verdict in circumstances where the defendant's unawareness is due partly to mental disorder and partly to intoxication appears to be an acquittal[32].

56. Sub sections 5 and 6 reflect the present position at common law. Subsection 7 quite properly relieves the prosecution of the burden of proving that the intoxication was voluntary.

Recommendation

57. This is an area of the common law which has become increasingly, and perhaps unnecessarily, complex as it has developed. The anomalies and uncertainties which currently exist are such that a clear statement of the law is now needed. Clause 22 provides such a statement. It is recommended that it be adopted with the exception of subsection 4 which relates to the specific offence of murder in Part II of the Code and to "mental disorder verdicts" under clause 36 referred to later.

Clause 23: Supervening fault

58. This clause which applies to result crimes[33], reflects the position at common law. It is recommended that it be adopted.

Clause 24: Transferred fault and defences

59. This clause restates the well established principle that if a person by mistake causes injury to a person or property other than the person or property which he intended to injure or damage he is guilty of an offence to the same extent as if he had achieved his object.

60. It is recommended that this clause be adopted.

Clause 25: Parties to offences

61. This clause restates the existing law and is consistent with section

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32 *R v Burns* (1973) 58 Cr App R 364.

33 Some crimes require evidence that certain conduct had a particular result (e.g. arson); Others, e.g. perjury, do not. It is suggested that in "result crimes" the law is interested only in the result and not the conduct bringing about the result (See *Smith & Hogan* 5th ed p.31).

89 of Criminal Procedure Ordinance (Cap 221). It is recommended that it be adopted.

Clause 26: Principals

62. Subsection (1)(a) and (1)(b) restate the existing law. Subsection (1)(c) makes provision for offences committed through innocent agents. The question of whether it is appropriate for persons acting through innocent agents to be guilty as principals in all cases is considered in paragraphs 9.11 of the Report. We support the proposal and arguments in favour of it as set out in paragraph 9.12. Subsection (2) reflects existing law. Notwithstanding the possible uncertainty arising out of subsection (1)(c)[34], the clause is consistent with common law principles and is recommended for adoption in Hong Kong.

Clause 27: Accessories

63. Subsections (1) to (5) reflect existing common law principles which are discussed in paragraphs 9.17 to 9.31 of the report.

64. The exceptions provided for in subsection (6) are discussed in paragraphs 9.32 to 9.36 of the report and do not call for additional comment.

65. Subsection (7) restates the principle established in *R v Tyrrell*[35] and which is not confined to the field of sexual offences[36]. Notwithstanding the anomalies which can arise as a result of the rule[37], it is now regarded as settled law[38] and, as such, has been properly included in the clause.

66. Subsection (8) reflects recent judicial authority on the liability of a person who withdraws from participation in an offence.

67. The clause, which is broadly consistent with section 89 of the Criminal Procedure Ordinance (Cap 221), is suitable for adoption in Hong Kong.

Clause 28: Parties - Procedural provisions

68. This clause accords with section 89 of the Criminal Procedure Ordinance (Cap 221) and effectively restates the existing law. It is recommended that clauses 25 to 27 replace section 89 of the Criminal Procedure Ordinance and that the latter be repealed.

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34 See paragraph 9.15 of the Report.

35 [1894] 1 QB 710.

36 See *Grace Rymer Investments Ltd v Waite* [1958] 2 ALL ER 777 where it was held that the rule may be applied to a tenant in respect of criminal legislation passed to protect tenants.

37 Paragraph 9.39 Report.

38 See *Smith & Hogan* 5th ed page 144 and 145.

Clause 29: Vicarious liability

69. This clause reflects existing law. Subsection (2) resolves the question of whether the principle should be applied to offences requiring knowledge by following the decision in *Vane v Yiannopoullos*[39]. Specific provision is made that such knowledge may only be attributed to another if legislation so provides.

70. The application of the clause is, justifiably, limited to pre-Code offences. The clause is suitable for adoption in Hong Kong.

Clause 30: Corporations

71. Subsection (1) restates the existing liability of corporations for offences of strict liability.

72. In *Bolton (Engineering) Co v Graham*[40] Lord Denning MR said: *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are more servants and agents who are nothing more than hands to do the works and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such."*

73. In the leading case of *Tesco Supermarkets Ltd v Nattrass*[41] Lord Denning referred to attempts which had been made to apply this dictum to all servants of the company whose work is brain work, or who exercise some managerial discretion under this direction of superior officers of the company. He added "*I do not think that Lord Denning intended to refer to them. He only referred to those who represent the directing mind and will of the company and control what it does. I think that is right..... The board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in this place so that within the scope of the delegation he can act as the company. It is not always easy to draw the line, but there are cases in which the line must be drawn."*

74. Subsection (2) restates this principle by requiring the fault element of an offence to be attributable to a "controlling officer" as defined in subsection (3). That subsection is designed to cover those persons who are in control of the operations of the company and properly includes persons who may not have been validly appointed[42].

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39 [1967] AC 486.
40 [1957] 1 QB 159, 172.
41 [1972] AC 153 at 170.
42 See para 10.7 Report. See also Theft Ordinance (Cap 210) which adopts a similar definition for

75. Subsection (3)(c) reflects the existing law.

76. Subsection (4) identifies circumstances under which a controlling officer can be said to be "concerned in the offence" under subsection (2). Subsection (5) explains the expression "fails to prevent the acts specified in the offence" in subsection (4).

77. *Moore v I Bresler*[43] provides authority for the proposition that a corporation may be liable for the act of its servant even though that act was done in fraud of the corporation itself. That proposition has been the subject of wide criticism and there is now general agreement that the decision is unlikely to be followed. Subsection (6) reflects current thinking on the point.

78. The defence set out in subsection 8(a) accords with the decision in *Tesco*. The second limb of that defence is necessary to deal with a situation where there is no controlling officer involved.

79. Subsection 8(b) is a necessary provision to cover a situation where, in order to establish a defence, the defendant corporation must prove the absence of knowledge or intent. It accords with the decision in *Tesco* and is necessary where a corporation is required to establish a defence involving compliance with a standard of conduct.

80. The clause largely reflects existing law. In paragraph 10.2 and 10.3 of the Report it is explained that the relatively undeveloped state of the law on the subject has made it necessary to fill in the gaps in the law which exist because of the absence of any authority. The clause has been widely accepted in consultation in England and, with the exception of subsection 30(3)(b) (which has no application in Hong Kong), is recommended for adoption.

Clause 31: Liability of officer of corporation

81. Section 84 of the Interpretation and General Clauses Ordinance (Cap 1) makes general provision for the liability of directors and officers concerned in the management of a company where it is proved that the offence was committed with the consent or connivance of such persons or persons purporting to act as such.

82. Although drafted in somewhat different language, clause 31 has a similar effect to section 84. Additional provision is made in subsection 1(b) for liability of a corporate officer to whose neglect an offence is attributable. The clause is suitable for Hong Kong and should be adopted.

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the purposes of section 20(1).

43 [1944] 2 ALL ER 515.

Clause 32: Children

83. Section 3 of the Juvenile Offenders Ordinance (Cap 226) provides that it shall be conclusively presumed that no child under the age of 7 years can be guilty of an offence.

84. This reflects the position as it was in England until the relevant age was raised from 7 to 8 and then to 10 by the Children and Young Persons Act 1963.

85. At common law a child under the age of 14 can be convicted only if it is proved that he committed the offence with a "mischievous discretion"[44].

86. Clause 32(1) restates the law as it exists in England. Subsection (2) reflects the decision in *McC v Runeckles* [45] that the presence of "mischievous discretion" can be established by proving that the child knew that what he was doing was "seriously wrong".

87. We had considered recommending that the age of criminal responsibility in Hong Kong be raised to 10 in order to accord with the established position in England. We have decided not to do so, however, for two reasons. Firstly, it is not necessary to do so for the purpose of this exercise which is primarily concerned with codification of the existing law. Secondly, it amount to a significant reform of the existing law without the benefit of any public debate or consultation.

88. We recommend, therefore, that clause 32 be adopted in Hong Kong but that subsection (1) should specify the age of 7 rather than 10. We further recommend that the appropriateness of the current age of criminal responsibility in Hong Kong should be separately considered.

Clause 33: Automatism and physical incapacity

89. This clause departs from the decision in *Broome v Perkins* [46] but accords with other decisions on the subject. This is explained in paragraph 11.4 of the Report and for the reasons set out in that paragraph we support the inclusion of subsection (1)(a)(ii) which will cover circumstances where there is a loss of control arising otherwise than from a reflex, spasm or convulsion.

90. It is recommended that this clause be adopted.

Clauses 34-40: Mental disorder

91. In Hong Kong, sections 74 to 76A of the Criminal Procedure

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44 *Hale's History of the Pleas of the Crown* 1778 Vol 1 page 630.
45 [1984] Crim LR 499.
46 [1987] 85 Cr App R 321.

Ordinance set out the law on arraignment and trial of insane persons. These provisions have to be read in conjunction with the M'Naughten Rules[47] which provide for the extent to which mental disorder may constitute a defence to a change. The law in Hong Kong reflects the position in England where the Trial of Lunatics Act 1883 and the Criminal Procedure (Insanity) Act 1964 apply.

92. The Committee on Mentally Abnormal Offences[48] ("the Butler Committee") examined, inter alia, the problems of present treatment arrangements, disability in relation to the trial, the courts powers of disposal, provision for mentally disordered juveniles and young adult offenders, the special verdict and diminished responsibility and infanticide. The report of the Butler Committee made a number of recommendations for substantial reform of the law in this area.

93. Clauses 34 to 40 give effect to some of those recommendations with modifications. The defence of "insanity" is replaced by new provisions which attempt to define various categories of mental disorder and it is proposed that the courts be provided with new and wider powers of disposal of such cases. Some of the recommendations of the Butler Committee have not been adopted.

94. We had considered recommending that the procedural aspects relating to disability as set out in the code be adopted in Hong Kong. We are persuaded, however, that replacement of the M'Naughten Rules and the creation of new provisions dealing with the effect of a mental disorder verdict and disposal amount to a substantial reform of the law and should not be undertaken without detailed consideration and public consultation.

95. Clauses 35 to 40 deal with an area of the law which is quite separate and distinct from those provided for elsewhere in the Code. The exclusion of these clauses will not, therefore, have any substantial bearing on the question of whether the remainder of the Code should or should not be adopted in Hong Kong. As such we propose making no recommendation save that the whole question of mental disorder in relation to the commission of offences, trial disposal and treatment of offenders be separately considered by the Law Reform Commission.

Clause 41: Belief in circumstances affording a defence

96. In *Beckford v The Queen*[49] it was held that if the defendant honestly believed the circumstances to be such as would, if true, justify his use of force to defend himself or another from attack and the force used was no more than was reasonable to resist the attack, he was entitled to be acquitted of murder, since the intent to act unlawfully would be negatived by his belief, however mistaken or unreasonable that belief may have been. The

47 (1843) 10 C1 & F 200; 8 ER 718.
48 Report (1975), Cmnd 6244.
49 [1988] AC 130.

reasonableness of the alleged belief was material, however, in deciding whether the defendant had a genuine belief.

97. In *Gladstone v Williams* [50] it was held that if the appellant might have been labouring under a mistake as to the facts he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not.

98. This clause restates these principles and, as stated in the Report, properly places the burden of proof of the belief in a defence where it lies in relation to the defence itself. It is recommended that this clause be adopted.

Clause 42: Duress of threats

99. At common law duress may be a defence to any crime, except murder as a principal in the first degree and possibly some forms of treason[51]. Clause 42 departs from the current law in a number of respects.

100. In *R v Graham*[52] the court of Appeal held that the proper test to be applied was in essence both subjective and objective[53]. The defendant must have been impelled to act as he did because of a reasonable belief in the existence of the threat. His belief must have amounted to good cause for his fear; and his response must be one which might be expected of a "sober person of reasonable firmness". The effect of clause 42 is to bring the defence of duress into line with that of mistake (clause 41) and to apply a subjective test so that a defendant is judged on the basis of what he actually believed and what he actually feared. The question of reasonableness will remain relevant in determining whether the defendant's belief was, in all the circumstances, genuinely held.

101. It is well established at common law that duress cannot be a defence to a charge of murder[54]. In their *Report on Defences of General Application*[55], the Law Commission observed.

> *"Once … it is accepted that the underlying analysis of duress is that it takes account of the infirmity of human nature, and recognises that ordinary people cannot be compelled by the fear of a criminal sanction when by duress they are deprived of their proper judgement, it would not seem appropriate to apply such a demanding moral judgement to the defence."*

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50 [1984] 78 Cr App R 276.

51 DPP for *NI v Lynch* [1975] 1 ALL ER 913.
See also Smith & Hogan 5th pp 210 to 217.

52 [1982] 1 WLR 294.

53 Affirmed in *R v Howe, Bannister, Burke & Clarkson* (1987) A.C. 417.

54 *DPP for NI v Lynch* [1975] 1 ALL ER 913;
Abbott v R [1976] 3 WLR 462;
R v Howe [1987] AC 417; see also *Smith & Hogan* 5th ed at page 210.

55 Law Com No. 83 para 2.42.

Although the Law Commission recommended that the defence of duress be extended to murder, it is excluded by subsection (2) in order to reflect the decision in Howe.

102. Subsection (6) implements the Law Commission's recommendation that the common law defence of coercion of a wife by her husband be abolished[56]. The Commission considered that a wife who commits an offence under pressure from her husband should be able to avoid liability on that account only if she can bring herself within the limits of the general defence of duress. In Hong Kong the relevant statutory provision is contained in section 100 of the Criminal Procedure Ordinance (Cap 221).

103. It is recommended that this clause be adopted and that subsection (2), which effectively restates the existing law, be included. It is further recommended that section 100 of the Criminal Procedure Ordinance be repealed.

Clause 43: Duress of circumstances

104. This clause provides for situations analogous to duress by threats but arising from the circumstances in which a person may find himself. It follows the same principles as clause 42 and takes account, in subsection 3(b), of other defences in the Code. It is recommended for adoption.

Clause 44: Use of force in public or private defence

105. Section 64(1) of the Crimes Ordinance (Cap 200) should be considered in due course in the light of the proposals in paragraph 17.10 of the Report[57]. For the purpose of consideration of clause 44 it is assumed that Section 64(1) will be replaced by a more suitable provision in Part II of the Code.

106. Clause 44 resolves the anomaly which arises as a result of different tests being applied depending on whether a person acts in defence of his property or person[58].

107. Subsection (1)(a) of clause 44 reproduces the effect of section 101A of the Criminal Procedure Ordinance but provides a defence where the arrester uses such force as is immediately necessary and reasonable in the circumstances which he "believes to exist". This is consistent with section 64(3) of the Crimes Ordinance which provides that for the purposes of subsection (2) of that section it is immaterial whether a belief is justified or not if it is honestly held.

108. Subsection 1(b) reflects existing common law[59]. Subsection 1(c)

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56 Law Com No. 83 para 3.9.
57 see clause 185.
58 see paragraph 12.25 of the Report.
59 *R v Howell* [1982] QB 416.

accords with the decisions in *Gladstone Williams*[60] and *Beckford v The Queen*[61] and section 8 of the Offences against the Persons Ordinance (Cap 212). Subsection 1(d), (e) and (f) restate the common law[62].

109. Subsection 2 enables force to be used against property and the issue of a threat and allows detention of a person without force to come within the ambit of the defence under subsection (1).

110. Subsection (5) accords with section 64(2) (b) of the Crimes Ordinance (Cap 200) in the context of criminal damage and applies the principle in that provision to the use of force by way of defence generally.

111. Subsection (6) ensures that the defence is not available where a person deliberately causes another to do an unlawful act in order to use force himself. But a distinction is drawn where a person, acting lawfully, finds himself in a situation where he has to use force, even though he knew such a situation could arise.

112. Subsections (7) and (8) restate existing law[63].

113. Subsection (9) ensures that other defences are preserved.

114. Clause 45 substantially reflects existing law and is recommended for adoption in Hong Kong to replace section 101A of the Criminal Procedure Ordinance.

Clause 45: Acts justified or excused by law

115. Subject to the omission of subsection (b), which has no relevance to Hong Kong, it is recommended that the clause be adopted.

Clause 46: Non publication of statutory instrument

116. This clause is not relevant in Hong Kong.

Clause 47: Incitement

117. This clause restates the existing law but departs from the much criticised decision in *R v Curr*[64] by making express provision that the fault element required is an intent or belief that the person incited, if he acts as incited, will do so with the fault required for the offence. Provision is also made,

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60 [1983] 78 Cr App R 276.
61 *Beckford v The Queen* [1988] AC 130 pc.
62 see *Russell on Crime* 12th ed pp 680-683.
63 *R v Bird* [1985] 1 WLR 816 [1985] 2 ALL ER 513.
- R v Cousins [1982] QB 526.
64 [1968] 2 QB 944.

following the decision in *Tyrrell* [65], protecting a victim from prosecution for incitement to commit an offence upon himself if he is a member of a class of persons which the offence is designed to protect.

118. As aiding and abetting is not itself a substantive offence, incitement to aid, abet, counsel and procure the commission of an offence by a third person is not an offence known to the law[66]. This rule is restated in subsection (5) which also makes statutory provision for what is probably existing law; namely that a person may aid, abet, counsel or procure another to incite a third person to commit an offence. For avoidance of doubt, subsection 5(b) expressly provides that a charge of incitement to incite, incitement to conspire or incitement to attempt is not precluded.

119. Clause 47 does not depart materially from what is generally understood to be the existing law. Although the fault element does not accord with the decision in *R v Curr*, it is submitted that the criticism of the decision is justified and that commission of the offence of incitement should not depend upon intention of the person incited.

120. It is recommended that clause 47 be adopted subject to the substitution of “Hong Kong” for “England and wales” in subsection (2).

Clause 48: Conspiracy

121. In March 1976 the Law Commission in England published a report which examined in detail the common law offence of conspiracy and made a number of recommendations with a view to the creation of a statutory offence. The Criminal Law Act 1977 Part I gave effect to many of the recommendations but did not enact the recommendations relating to conspiracy to defraud, conspiracy to corrupt public morals and conspiracy to outrage public decency which remain offences at common law. The UK legislation has now been subjected to further detailed scrutiny and refinement by the Law Commission.

122. Throughout the development of the common law the definition of the offence of conspiracy has remained vague. It has been said that criminal conspiracy consists in an unlawful combination of two or more persons, to do that which is contrary to law, to cause a public mischief[67], or to do that which is wrongful and harmful towards another person[68], or to do a lawful act by unlawful means[69].

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65 [1894] 1 QB 710.

66 *Bodin v Bodin* [1979] CRIM LR 176;
Smith & Hogan 5th ed, p 255.

67 *R v Brailsford* [1905] 2 KB 730, 745;
R v Boulton (1871) 12 Cox 87;
R v Bassey (1931) 22 Cr App R 160.

68 *Quinn v Leather* [1901] AC 495, 528. In *R v Vincent* (1839) 9 C & P 91 conspiracy was defined as "a crime which consists either in a combination and agreement by persons to do some illegal act, at a combination and agreement to effect a legal purpose by illegal means."

69 See *R v Meyrick* (1928) 21 Cr App R 94 at p. 99

123. The generally accepted definition of conspiracy as stated in *Mulcany v R*[70] is *that "a conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means ..."* In England, the Law Commission noted that the lack of a clear definition of those "unlawful" aims which may make an agreement an unlawful conspiracy is one of the major criticisms of the law of conspiracy.

124. The Commission in accepting the argument that the offence of conspiracy to do an unlawful, though not criminal act ought to have no place in a modern system of law, recommended that the crime of conspiracy should be limited to agreements to commit criminal offences and that the law should require full intention by the parties to the agreement before a conspiracy can be established[71].

125. The Criminal Law Act 1977 was enacted to give effect to these recommendations which are restated in subsection (1) of clause 48.

126. Although there is no direct authority as to whether recklessness suffices for a change of conspiracy to commit an offence which requires recklessness, it is clear that the defendant must agree that an offence shall be committed[72]. In *R v Pigg*[73] it was held that recklessness as to whether a woman consented to intercourse was sufficient for a charge of attempted rape. Subsection 2 applies this principle to the offence of conspiracy.

127. Subsection (3) defines "offence" for the purposes of clause 48. Subsection (4) applies the same rule to conspiracy as that stated in clauses 27(7) and 47(3). Subsection (5) restates the principle decided in *DPP v Doot* [74] as it is likely to be applied in Hong Kong and subsection (6) sets out the corollary to that principle.

128. The opening four lines of subsection (7) state the position as it is believed to exist in England following *R* v *Hollinshead*[75]. This departs, however, from the position in Hong Kong where it was held in *Po Koon-Tai* [76] that there may be a common law conspiracy to aid and abet a criminal offence. In that case the defendants agreed to land in Hong Kong refugees whom they had picked up at sea. The refugees were not alleged to be parties to the conspiracy but they committed the principal offence by landing in Hong Kong without permission. It was held that the appellants were properly convicted of

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70 (1868) LR 3 H L 306
In *Po Koon-tai & others* (1980) HKLR 492 it was held that the common law definition of conspiracy applies in Hong Kong and that conspiracy is an indictable offence consisting in the agreement of two or more persons to do an unlawful act by unlawful means. The objectionable matter which is struck at is the agreement and that agreement need be no more than to do on unlawful act. The agreement is made to precipitate conduct and if the conduct intended is designed to lead to the commission of an unlawful act then, at common law, it is a punishable agreement.

71 See *Report on Conspiracy and Criminal Law Reform* (Law Com No. 76) pages 5 to 18.

72 See *Churchill v Walton* [1967] 2 AC 224 .

73 [1982) 1 WLR 726.

74 [1973] AC 807.

75 [1973] AC 975 at 985-6 (CA).

76 [1980] HKLR 492.

conspiracy to aid and abet the contravention of section 38(1) (a) of Cap 115.

129. *Po Koon-tai* in the only known case of a charge of conspiracy to aid and abet and does not accord with the widely held view that such an offence is not known to the common law. That view is based on the argument that conspiracy, incitement and attempt are closely related at common law and generally governed by the same principles. In the cases of incitement and attempt the charge must allege an incitement or attempt to commit a crime. As aiding and abetting is not a crime, but a mode of participation in a crime, a charge of incitement or attempt to aid and abet cannot be preferred at common law. It is argued that the same principle should properly be applied to conspiracy[77].

130. A consultation exercise is currently underway in England on the question of whether conspiracy to aid and abet should be made a statutory offence. The opening four lines of subsection 7 have been included pending the outcome of that consultation. We consider that, in order to ensure consistency with clauses 47 and 49, *Po Koon-tai* should be regarded as an exceptional case and should not be relied upon for the purpose of codification of existing law.

131. Subsection 7(a) and 7(b) restate the common law as it applies in Hong Kong.

132. Subsection (8)(c) accords with section 66A of the Criminal Procedure Ordinance (Cap 221) and the remainder of subsection 8 effectively restates existing law.

133. It is recommended that the clause be adopted and that section 66A of the Criminal Procedure Ordinance which is effectively restated in subsection 8(c) be repealed.

Clause 49: Attempt to commit an offence

134. At common law, every attempt to commit an offence is an offence whether the crime attempted is one by statute or at common law[78]. Although this principle has been adopted in section 81 of the Interpretation and General Clause Ordinance (Cap 1) the law of attempt in Hong Kong remains primarily a matter of common law.

135. In England, the common law offence of attempt was abolished by the Criminal Attempts Act 1981 which implemented many of the recommendations contained in the Law Commission *Report on Attempt*[79].

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77 For a more detailed examination of the subject see *Essays in Memory of Sir Rupert Cross – Crime, Proof and Punishment* at page 35.

78 *R v Hensler,* 11 Cox 570, CCR;
R v Ransford, 13 Cox 9, CCr;
R v Butler , 6 C & P 368.

79 Law Com No. 102.

136. Clause 49 essentially restates the law as it exists in England and does not amount to any real departure from the common law as it currently applies in Hong Kong. The amendments which are proposed to the Criminal Attempts Act in relation to recklessness as to circumstance (subsection (2)) in the light of *R v Pigg*[80], incitement to conspire and attempted conspiracy (see paragraph 13.48 of the Report) will bring the law in England in line with that which we believe would be applied in Hong Kong.

137. Section 90(1) and 91(1) of the Criminal Procedure Ordinance (Cap 221) are the Hong Kong equivalent to sections 4(1) and 5(1) of the Criminal Law Act 1961 and subsection 5 of the clause should be amended accordingly. Subject to this amendment it is recommended that clause 49 be adopted in Hong Kong and that section 81 Interpretation and General Clauses Ordinance be repealed.

Clause 50: Impossibility and preliminary offences

138. The vexed question of whether a person should be liable for attempting to commit an offence which cannot, in fact, be committed has been the subject of debate and varying judicial authority throughout the development of the common law. Judges have repeatedly addressed their minds to the various philosophical and logical arguments and commentators have expressed a divers range of views on the subject.

139. The position in Hong Kong appears to be governed by the decision in *Haughton v Smith* [81] where it was held that a person could only be convicted of an attempt to commit an offence in circumstances where the steps taken by him in order to commit the offence, if successfully accomplished, would have resulted in the commission of that offence. A person who carried out certain acts in the erroneous belief that those acts constituted an offence could not be convicted of an attempt to commit that offence because he had taken no steps towards the commission of an offence. Thus, where goods which the accused handled were not stolen goods (although he believed them to be stolen goods) he could not be convicted of attempting to commit the offence of handling stolen goods.

140. The effect of that decision was limited to some extent by *Lee Shek* (1976] HKLR 636 where the appellant was seen by police to put his hand in another person's pocket and was charged with attempting to steal. There was no evidence that the pocket contained anything capable of being stolen. It was held that since the charge did not specify any property in respect of the attempt to steal the appellant was properly convicted of the offence charged.

141. This rationale appears also in the context of conspiracy in the decision by the House of Lords in *DPP v Nock & Alsford*[82]. The appellant had

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80 [1982] 1 WLR 762.
81 [1973] 3 ALL ER 1009.
82 [1978] AC 979.

been charged with conspiracy to produce a controlled drug, cocaine, contrary to section 4 of the Misuse of Drugs Act 1971. The appellant had agreed to obtain cocaine from a certain quantity of powder which, contrary to his belief, contained no cocaine and could not possibly produce cocaine. It was held that since the agreement was to pursue a course of conduct which could not have resulted in the offence as specifically alleged (the production of cocaine), there was no actionable conspiracy. The appeal was allowed.

142. In England, the decision in *Haughton v Smith* was reversed by the Criminal Attempts Act 1981, section 1. However, in *Anderton v Ryan*[83] the House of Lords held that notwithstanding the wording of section 1 of the Act a woman was not guilty of attempting to handle stolen goods when she purchased property believing it to be stolen when in fact it was not. This decision was re-examined and overruled by the House of Lords in *R v Shivpuri* (1986] 2 ALL E R 334. In that case S was arrested in possession of a suit case which he erroneously believed contained prohibited drugs. His conviction for attempting to commit an offence of being knowingly concerned in dealing with and harbouring prohibited drugs was upheld by the House of Lords on the basis that he intended to commit the offence and did an act which was more than merely preparatory to the commission of the intended offence.

143. Clause 50 codifies the law as it currently exists in England in relation to attempts under the Criminal Attempts Act 1981 and conspiracy under the Criminal Law Act 1977 and extends it to the preliminary offence of incitement.

144. In the absence of convincing arguments to the contrary, we consider that this area of the law in Hong Kong should be brought into line with the legislation and judicial developments in England. We therefore recommend that the clause be adopted.

Clause 51: Preliminary offences under other enactments

145. This clause would apply in Hong Kong to an offence such as that provided for in section 13 of the Offences against the Persons Ordinance Cap 212. It is a necessary provision and recommended for adoption.

Clause 52: Jurisdiction and preliminary offences

146. There is no jurisdiction at common law to prefer an indictment alleging a conspiracy to commit a crime abroad unless the contemplated crime is one for which an indictment would lie in Hong Kong[84]. This clause extends the courts jurisdiction in respect of specified preliminary offences and accords with the recommendations of the Law Commission in England[85] that it should be an offence to incite a person, or conspire with another, or attempt, within the

83 [1985] AC 567.
84 See *R v Liu Po Shing & Leung Chung-man*, HK Crim App No. 520 of 1984.
85 (1980), Cmnd, 7844, para 303.

jurisdiction, to commit an act abroad, which if committed within the jurisdiction would amount to one of the offences specified in subsection (3).

147. We consider that, as a matter of general principle, such a provision is justified in the case of offences which, by their very nature, amount to the most serious of offences against the person and recommend that such a provision be adopted. The offences to be included should appropriately be considered at the same time as specific offences under Part II.