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**Paper for the House Committee Meeting
on 28 June 1996**

**Report of the Bills Committee
on the Crimes (Amendment) Bill 1995**

Purpose

This paper reports on the deliberations of the Bills Committee on the Crimes (Amendment) Bill 1995 and seeks the support of the House Committee for the Bill to resume Second Reading debate on 10 July 1996 subject to Committee Stage Amendments.

The Bill

2. The Bill seeks to codify the preliminary offences of conspiracy, attempt and incitement and the removal of the defence of impossibility for these preliminary offences.

The Bills Committee

3. At the House Committee meeting on 15 December 1995, Members agreed that a Bills Committee should be formed on the Crimes (Amendment) Bill 1995. The Bills Committee first met on 5 January 1996 and Hon Ambrose LAU was elected Chairman. Altogether, the Bills Committee held eight meetings, including seven with the Administration. The membership list of the Bills Committee is at Appendix 1. The Bills Committee received written submissions from the Hong Kong Bar Association and the Law Society of Hong Kong.

Deliberations of the Bills Committee

Policy of codification

4. In the first place, members considered whether or not they should support the principle of codification of the preliminary offences of conspiracy, attempt and incitement in Hong Kong. The Administration said that it was a fundamental principle that the laws relating to all criminal offences should be made accessible to members of the public. Both the English Law Commission and the Law Reform Commission of Hong Kong recommended the adoption of codification. In the United Kingdom, the offences of attempt and conspiracy had been codified in 1981 and 1977 respectively and the offence of incitement was in the form of a Draft Criminal Code. The Hong Kong Bar Association, the Law Society of Hong Kong and other parties had

been consulted and there were indications of support of codification of these offences in Hong Kong.

5. In order to satisfy themselves about the need and the effectiveness of codification, members studied court judgments, judicial comments and academic analysis relating to codification in the U.K.. Members also noted that codification could clarify legal principles. The Law Reform Commission of Hong Kong had suggested that in respect of the preliminary offence of conspiracy, the courts might be able to create new offences by filling the possible or perceived gaps in the criminal law if there were no codification, and in this connection, members studied examples of such new offences. After careful consideration, members agreed that they would support the principle of codification for the three preliminary offences, subject to further detailed study of the Bill.

Codification of the offence of conspiracy

6. Members noted that the provisions relating to the offence of conspiracy in the Bill were largely based on the provisions in Part I of the English Criminal Law Act 1977 (as amended), modified where necessary for local adaptations, except with regard to the two common law offences of conspiracy to corrupt public morals and conspiracy to outrage public decency.

7. The Administration said that the Law Reform Commission of Hong Kong favoured the abolition of the two offences of conspiracy to corrupt public morals and conspiracy to outrage public decency because they were "of extreme and uncertain width", "largely subjective" and of oppressive nature. The Hong Kong Bar Association and the Law Society of Hong Kong also supported their abolition. However, there were different opinions in England as to whether they should be abolished and in this regard the English Law Commission was undertaking a comprehensive review on the area of laws.

8. The committee studied whether the specific circumstances of the *Shaw* case (relating to the publication of a directory of prostitutes) would be covered if the offences were removed and in this connection, the Chairman expressed that there should be strong justifications to abolish such offences in Hong Kong. The Administration however took the view that there was no lacuna in existing legislation in Hong Kong and that existing provisions of the Control of Obscene and Indecent Articles Ordinance (Cap. 390) were sufficient to cover circumstances when indecent or obscene articles were published or particularly when they were distributed to a juvenile.

9. After deliberation, the majority members of the Bills Committee supported the abolition of these two offences for the following reasons: (a) it would be dangerous to retain these offences for public interest reasons in the light of their uncertain ambit and the lack of clear case law; (b) public morals would change from

time to time; and (c) there were existing statutory provisions to deal with vice activities.

10. Members then discussed the proposal for removing the defence of impossibility for the offence of conspiracy. Members supported the proposal. In this respect, they noted that the Hong Kong Bar Association and the Law Society of Hong Kong were supportive of the proposal as well.

11. Members then went through the Bill clause by clause for the offence of conspiracy, and unanimously agreed to support the proposed provisions as set out in the Bill.

Codification of the offence of attempt

12. Members noted that the Bill was largely modelled on the English Criminal Attempts Act 1981. One important departure was that the Bill included a definition of "an intention to commit an offence" (proposed section 159H(2)) and in this regard, the Bar Association of Hong Kong had raised two points, namely, that the element of "fault" had no place in the Criminal Law (and the expression should be replaced by "the same state of mind as is required for the offence or offences") and that a person could not "recklessly" attempt a criminal act.

13. The Administration explained that the definition of the offence of attempt in the Bill was recommended by the Law Reform Commission of Hong Kong after full consideration of relevant judicial decisions. The relevant provisions of the Bill were to achieve a balance between flexibility and certainty. The two tests for the offence of attempt in common law were referred to: (a) the last act test and (b) the proximity test. The Administration emphasized that the new definition as set out in the Bill required more than a preparatory act, which balanced the two tests.

14. Regarding the term "fault element", members took the view that it should not be included in the definition of the offence of attempt because it might create problems and confusion in operation. Also, it would defeat the purpose of following the English legislation case law if the proposed definition was different.

15. Members also discussed with the Administration the issue of whether "recklessness" as to a circumstance should suffice to constitute an attempt where it sufficed for the substantive offence. Members said that the inclusion of the term "recklessness" would mislead rather than clarify the definition. They pointed out that the English courts had no difficulty in interpreting the Criminal Attempts Act 1981 even when it did not have such term.

16. The Administration then sought clarification with the English Law Commission for the reason for insertion of the phrase "other than fault elements" in clause 49(2) of the Draft Criminal Code (equivalent to proposed section 159H(2) of

the Bill). However, the English Law Commission could not find the explanations in their record. The Administration then made an analysis regarding the operation of the clause in the context of proposed section 159H. They identified possible problems particularly regarding an offence requiring specific intent or knowledge. In the light of such findings, the Administration agreed to move Committee Stage Amendments to delete proposed section 159H(2) and to delete proposed sections 159G and 159J(4) as a consequence. Members noted that the deletions would remove references to "fault element" and "recklessness" in relation to the offence of attempt. The meeting noted that the Administration's proposed Committee Stage Amendments would bring the definition of the offence of attempt in line with the English Criminal Attempts Act 1981.

17. Members then discussed the proposal to remove the defence of impossibility for the offence of attempt. The majority members agreed with the provision as set out in proposed section 159H(3) of the Bill. One member, however, abstained from making a decision because he was considering whether the drafting formula should follow that as contained in proposed section 159M(2).

18. Members then went through the remaining part of the Bill relating to the offence of attempt clause by clause and noted that the clauses were largely modelled on the English Criminal Attempts Act 1981 with local adaptations where necessary.

19. Subject to the Committee Stage Amendments as mentioned in paragraph 16 above, members agreed with the provisions in the Bill relating to the offence of attempt.

Codification of the offence of incitement

20. Although members were supportive of the principle of codification of the offence of incitement, they noted that in England, the draft Criminal Code Bill which reinstated the existing law in respect of incitement, had not been enacted. The majority of members expressed concern that Hong Kong would be in a difficult position if it adopted the draft Code in advance of England where the enactment might experience a long delay or even be aborted. They felt strongly that the time was not ripe for Hong Kong to codify the offence of incitement. There were also queries regarding the desirability of the new codified formulation for incitement, as follows: (a) that it might be impractical to codify such a concept of uncertain width; (b) that after codification, the offence would lose the assistance of existing case law; (c) that the new definition of the offence of incitement, particularly the Chinese version, might lead to more confusion upon codification; and (d) the term "incite" was not defined even in the definition of the offence of incitement in proposed section 159M.

21. Hon Miriam LAU, however, held a different view. She said that she supported codification of the offence of incitement and she pointed out that the Law

Reform Commission had already balanced the arguments for and against the proposed codification before recommending the move.

22. After careful deliberation, the Administration conceded that they were unable to convince the Bills Committee that it was timely to include "incitement" in the codification exercise, although they believed that there were good reasons to do so. They therefore suggested that the Attorney General should move the necessary Committee Stage Amendments to remove the offence from the Bill. These Committee Stage Amendments would include: (a) deleting proposed sections 159M, 159N and 159O from the Bill and amending clauses 5 and 6 of the Bill. The Bills Committee studied and agreed to support these amendments. Hon Miriam LAU, however, registered her disappointment with the decision of the Administration to move such amendments.

23. Members then proceeded to consider whether the provision to remove the defence of impossibility for the offence of incitement should be retained in the Bill in order to be consistent with the offences of conspiracy and attempt, or whether it should be deleted and be reintroduced later together with the entire package for codification of the offence of incitement. Members considered that there would be more merit in dealing with the proposal later within the same package of codification of the offence of incitement rather than now on a piece-meal basis.

Committee Stage Amendments

24. A full set of the draft Committee Stage Amendments to be moved by the Administration on the proposals in respect of paragraphs 16 and 22 above is at Appendix II.

Recommendation

25. The Bills Committee recommends that the Bill should resume its Second Reading debate on 10 July 1996, subject to Committee Stage Amendments.

Advice Sought

26. Members are invited to support the recommendation of the Bills Committee at paragraph 25 above.

LegCo Secretariat
14 June 1996