

**Hong Kong Bar Association's Views on the
National Security (Legislative Provisions) Bill 2003**

Introduction

- 1) The Hong Kong Bar Association has already expressed its concerns on the form and content of legislation needed to implement the constitutional obligation under Article 23 Basic Law.
- 2) It first spoke on the subject in July 2002 when it published 'Views on the Legislation to be made under Article 23 Basic Law' and then again last December when it published the document entitled 'Response to the Consultation Document on the Proposals to Implement Article 23 of the Basic Law' ("the Response").
- 3) The Bar's position in those papers can be summarized as follows: the Government's proposals to enact laws to implement the constitutional obligation under Article 23 went too far and some of them were arguably unconstitutional.
- 4) The proposals went too far because a minimalist approach was called for in keeping with human rights instruments and generally accepted principles relating to the drafting of national security laws in the 21st century, in particular the Johannesburg Principles.
- 5) Some of the proposals were arguably unconstitutional because they appeared to conflict with articles of the Basic Law governing the kind of laws that the Legislative Council could enact as well as their actual content.
- 6) The Bar's comments were tentative and subject to a certain number of qualifications. That was because they were directed at Government proposals and not to a form of legislative text such as might be found in a White Bill. The Bar regrets the decision of the Government not to publish a White Bill.
- 7) The National Security (Legislative Provisions) Bill 2003 ("the Bill") was published in February 2003. It is the Government's settled view on the subject in the form of a bill to be put before Legco which it would wish to see enacted as one of the Laws of Hong Kong.
- 8) The Bar is pleased to note that many of its criticisms seem to have been taken on board because some of the proposals put forward in the Government's Consultation Document which encroached on existing rights and freedoms without apparent good reason have been abandoned.

- 9) Notwithstanding all of this, the Bar is of the view that the Bill is flawed and should be amended before it is enacted.

Method

- 10) The Bar's comments on the Bill appear below. They fall into 3 categories: Constitutional, Legal Policy and Drafting.
- 11) The constitutional comments on the Bill relate to those parts of the Bill which the Bar feels are either not required by the mandate in Article 23 or are arguably inconsistent with other provisions of the Basic Law.
- 12) The legal policy comments on the Bill relate to the means chosen to implement the government policy behind the Bill. The Government has a range of legislative options open to it in implementing policy and is constrained only by the requirements of the Basic Law. The Bar suggests alternative means to implement the policy behind the decision to enact laws for Article 23 which are, in its view, less destructive of rights.
- 13) Drafting comments are made where the Bar believes that the text of the proposed legislation is problematic and will present difficulties to those who have to interpret the law.
- 14) The comment follows the outline of the Bill which is in 5 parts. The individual clauses of the Bill will not be referred to as such except in relation to Part 1 and Part 5 because the Bill is an amendment bill which means that sections of existing ordinances are being replaced or added to. Instead references will be made to section numbers in the affected ordinances as if the Bill had been enacted. The views contained in this document are by no means exhaustive or covering all issues that might arise.

Part 1: Preliminaries

- 15) Clause 1 of the Bill says 'This Ordinance may be cited as the National Security (Legislative Provisions) Ordinance'.
- 16) The Long Title to the Bill is: *A Bill to Amend the Crimes Ordinance, the Official Secrets Ordinance and the Societies Ordinance pursuant to the obligation imposed by Article 23 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and to provide for related, incidental and consequential amendments.*
- 17) The Bar is of the view that the Long Title is misleading. Only some of the provisions of the Bill are required by Article 23 Basic Law.

18) The amendments to the Official Secrets Ordinance are extensions of existing restrictions on the publication of government secrets. They are not required by Article 23 Basic Law. The Government has admitted this (see paragraph 6.14 of the Consultation Document).

19) Indeed the adequacy of the Official Secrets Ordinance as a means of discharging the constitutional obligation under Article 23 Basic Law was discussed in The Legislative Council (“Legco”) shortly before the resumption of sovereignty in 1997. The then Secretary for Security told Legco that the Official Secrets Ordinance, then a bill, had been agreed to by the Chinese side in the Joint Liaison Group after detailed discussions. He referred to Article 23. He said:

This is a particularly important consideration when we bear in mind that the Bill encompasses that part of the provisions in Article 23 of the Basic Law, that the Hong Kong Special Administrative Region (SAR) shall enact laws on its own to prohibit, inter alia, the theft of state secrets. The Bill as it stands will require minimal adaptation in order for the SAR to fulfil this requirement, thus providing the continuity that we all desire.

(HK Hansard, 4 June 1997, page 114)

20) The reference to ‘minimal adaptation’ makes it clear that what the Secretary for Security had in mind were changes made necessary because of the resumption of sovereignty. Such changes would include deleting references to the Crown and the United Kingdom and replacing them with references to the relevant institutions under the Basic Law and to the PRC. ‘Minimal adaptation’ did not mean extending the scope of the ordinance.

21) Likewise the amendments to the Societies Ordinance provide a new scheme for proscribing local organizations that are a threat to national security and for connected offences. These new measures are in addition to an existing proscription mechanism in the Societies Ordinance but offences concerning membership of proscribed organization differ in being predicated on an act of proscription in the Mainland. The new offences are not required by Article 23 of the Basic Law which targets foreign political organizations and the establishment of ties with them.

22) Further, the Bar is also of the view that only some of the amendments to the Crimes Ordinance are required by Article 23. There was a strong case anyway for repealing the old treason laws because of their antiquity as there was for refining the sedition laws. The position is arguable as regards the offences of subversion and secession. The Bar is of the view that existing national security and public order offences covered much of the ground

covered by these new offences and a case could be made for saying that the existing laws with minor modifications were sufficient.

- 23) The Bar is of the opinion therefore that both the short and long titles to the Bill are misleading. Inasmuch as reading both one has the impression that Article 23 requires all the measures contained in the Bill (other than the enforcement provisions and repeals and consequential amendments) to be enacted as a matter of constitutional obligation to have new laws concerning 'national security' those words appear nowhere in Article 23 and, as is evident, most of the amendments are not in fact required by Article 23.
- 24) This gives rise to a drafting point of criticism that the Bar feels can be made. If the Government acknowledges that it is not entirely accurate to imply that all the amendments were done pursuant to the constitutional obligation under Article 23 then the long title should be amended to identify those amendments which were necessary to fulfil that obligation.
- 25) Accuracy is important in any Government communication. It is even more important in a legislative text. This is not a pedantic point because the long title of an enactment can sometimes be used as an aid to interpretation: see *Bennion Statutory Interpretation* (4th), Section 245 at pages 620 - 623.

Part 2: Amendments to the Crimes Ordinance

Extra-territoriality

- 26) Many of the new offences have extra-territorial effect. An example is the proposed section 2 of the Crimes Ordinance. It creates the offence of treason but limits it to Chinese nationals. Sub-section (3) makes it clear that the offence can be committed outside Hong Kong by Chinese nationals who are also permanent residents. The implication is that Chinese nationals, whether permanent residents or not, can commit the offence in Hong Kong and Hong Kong claims extra-territorial jurisdiction in respect of acts constituting the offence over permanent residents who are also Chinese nationals.
- 27) In its Response, the Bar invited the Government to identify that part or those parts of the Basic Law that authorizes the HKSARG to make laws having extra-territorial effect. It pointed out that if such a power existed it probably had limits arising from the fact that the HKSAR is only a part of a sovereign state and that it probably could not make laws having extra-territorial effect that were inconsistent with comparable Mainland laws.

- 28) The Government has not identified the source of the power to legislate extra-territorially. It has not said whether the proposed law goes further than the comparable Mainland laws in its extra-territorial effect. It would be odd if the HKSAR claimed a more extensive jurisdiction than did the Mainland in the application of laws meant to safeguard the national security of the entire PRC. It could even be unconstitutional for the HKSARG to claim jurisdiction over national security offences where the Mainland did not. The Bar has made this point in the Response.
- 29) The Bar feels that the Government should make clear whether the extra-territorial provisions of the Bill apply in the Mainland or whether, as a matter of constitutional implication, the relevant Mainland law only applies. Could, for example, a Chinese national who is a Hong Kong Special Administrative Region (“HKSAR”) permanent resident who commits a treasonous offence under the proposed section 2 Crimes Ordinance be liable to be punished under both Mainland law and the law of the HKSAR.
- 30) These are important constitutional points. They may have a bearing on any rendition agreement with the Mainland. They should be answered before the Bill becomes law.

The New Offence of Treason

- 31) The proposed new offence of treason [section 2 Crimes Ordinance] can only be committed by Chinese nationals in Hong Kong and by Chinese nationals who are permanent residents outside Hong Kong. Chinese nationality is determined by the Chinese Nationality law.
- 32) The limitation period for the offence (3 years after the offence was committed) is to be abolished. See Part V Bill ‘Other Amendments’.
- 33) Section 2(1)(a) makes it treason to join or be a part of foreign armed forces at war with the PRC with intent to (i) overthrow the CPG; (ii) intimidate the CPG or (iii) compel the CPG to change its policies or measures.
- 34) The Bar would ask the Government to provide illustrations as to what kind of ‘intent’ would be sufficient to constitute as an intent to intimidate the CPG.
- 35) The Bar feels that the Government should make it clear that the offence of treason requires a specific intent. This is in order to clarify the position of a person who gives humanitarian aid to an enemy at war with the PRC with the intent of assisting the enemy but not necessarily with the intention to prejudice the position of the PRC, though that may also be the effect. See the proposed section 2(1) (c). The offence under that sub-paragraph should only be committed when a person does a specific act with the intention of

assisting and with the intention that the PRC should be prejudiced. This will make clear that acts of humanitarian assistance to the enemy will not be caught.

- 36) There appears to be a problem with the ‘joining or is a part of’ requirement in the proposed section 2(1)(a). Some countries, the U.S.A. and France being just two of them, accept non-citizens to be soldiers in their armies. It is one thing to volunteer to fight for an enemy of the country of your nationality with the objective of overthrowing the government. It is quite another thing to join a foreign army before war with the country of your nationality is declared. Even if you do not, literally, bear arms against the country of your nationality because of the security problem caused by your nationality, you would still be part of an army whose collective intent is to do the prescribed acts as part of its national duty until discharged.
- 37) The problem is made worse by the removal of the limitation period. A Chinese national in the army of his adopted country may find himself embarrassed by that country’s war with the PRC and his accidental and unintentional involvement with it. The war ends in, say, 6 months but he is at risk of prosecution should he return to Hong Kong in 10 or 20 years time when the PRC’s relations with the foreign country have been mended.
- 38) This example serves to emphasise that limitation periods for such a serious offence is not incompatible with public policy. Treason is a political crime. If the attempt fails then the offenders can expect to be punished while the offence is still fresh. If the offence is allowed to go stale then there may be embarrassment later on when a ‘traitor’ returns to Hong Kong and is seen to be absolutely no threat to the PRC but is still liable to prosecution under the law. The Bar cannot ignore the danger of the Government in using the threat of such prosecution as a political tool in future.
- 39) The Bar repeats its call made in the Response for the Government to explain why it has removed this limitation period which dates from the U.K. Treason Act 1695 (section 5) and is still in force in that country. It is no answer to say that treason is a very serious offence. It has always been a very serious offence. It used to be punishable with the death penalty and forfeiture of all property. It remains a very serious offence under the Bill. The Government must explain what and why circumstances have changed so that the ancient protection afforded by the time limit is now no longer necessary.
- 40) The new offence can only be committed when a state of war exists and a state of war exists when there is open armed conflict between armed forces or war has been publicly declared: see proposed new section 2(4)(c). The Bar is of the view that this limitation on the scope of the offence is a reasonable one.

The New Offence of Subversion

- 41) The proposed new section 2A(1) defines the new offence of subversion. It can be committed by (i) disestablishing 'the basic system' of the PRC as established in the PRC Constitution; (ii) overthrowing the CPG and; (iii) intimidating the CPG.
- 42) The Bar feels that the Government needs to make clear whether these are crimes of intent so that not merely must the prosecution prove that any one of the results in sub-paragraphs 2A(1)(a)-(c) occurred but it must prove that that particular result is intended.
- 43) Assuming that intention is required, it must be accompanied by either the use of force or serious criminal means that seriously endanger the stability of the PRC or by engaging in war. The maximum sentence is life imprisonment.
- 44) The terms 'engaging in war' and 'serious criminal means' are defined in the proposed new section 2A(4). 'Engaging in war' is to be construed by reference to that term as it appears in the proposed new section 2 ('treason'). 'Serious criminal means' means any act which (i) endangers the life of a person other than the person who does the act; (ii) causes serious injury to a person other than the person who does the act; (iii) seriously endangers the health or safety of the public; (iv) causes serious damage to property and (v) seriously disrupts an electronic system or essential service, facility or system.
- 45) The new offence can be committed outside Hong Kong so long as the acts done would amount to a criminal offence in that country and would amount to a criminal offence under the law of Hong Kong (not merely an offence in Hong Kong): see proposed new section 2A(4)(b)(vii). If committed in Hong Kong, 'serious criminal means' must constitute an offence under the law of Hong Kong: see proposed section 2A (4)(b) (vi).
- 46) The offence is not limited in its intra-territorial application to Chinese nationals or permanent residents but is limited to permanent residents in its extra-territorial application: see proposed section 2A(3) Crimes Ordinance.
- 47) There is no definition of 'force' in the proposed new offence. This is undesirable. It should be either defined, like the two other terms used, or left out. As it stands there is an implication that 'force' is something other than 'engaging in war' or 'serious criminal means' and need not be an offence under the law of Hong Kong.
- 48) Acts of disestablishment are criminalized under the new section 2A(1)(a). The word 'disestablish' means to deprive or downgrade and is usually used

to describe some formal process that seeks to change the status of some privileged institution. (The classic example is the nineteenth century legal campaign to ‘disestablish’ the Church of England to remove its privileged status in the constitution of the U.K.) ‘Disestablishment’ of the ‘basic system’ in the proposed section 2A(1)(a) means, presumably, the socialist system mentioned in Article 1 of the PRC Constitution.

- 49) The Bar poses the question how the concept of ‘disestablishment’ can be reconciled with the prescribed acts in the offence of sedition. The proposed section 9D states that certain ‘prescribed acts’ are not to be regarded as incitement to commit an offence under section 2 (treason), 2A (subversion) or 2B (secession). Amongst these are ‘pointing out errors or defects in the...constitution of’ the PRC: see proposed section 9D (3) (b). A simple statement that Article 1 of the PRC Constitution should be amended to delete reference to the ‘socialist system’ would be disestablishmentarian in nature but not be seditious because it is a ‘prescribed act’.
- 50) The Bar thinks that the Government should be pressed to explain what kind of acts would amount to disestablishment bearing in mind that it is but one ingredient of the offence and in order for an offence to be committed there must also be some hostile act such as the use of force or serious criminal means. Would a forceful, but non-violent, call for constitutional reform amount to ‘disestablishment’? Or what about a call for change with the rider that ‘violent overthrow’ of the system should be a last resort? Would that amount the new offence of sedition?
- 51) The Bar finds the concept of ‘overthrowing’ the CPG in the proposed section 2A(1)(b) easier to understand but wonder how a person can ‘intimidate’ the CPG in the proposed section 2A(1)(c). The word has been used in criminal statutes. In the U.K. Conspiracy and Protection of Property Act 1875 the word intimidates has been held to mean ‘putting people in fear by acts or threats of violence or force’ (*R v. Jones (John)*; *R v. Tomlinson*; *R v Warren* 59 Cr. App. Reports 120) but that was in the context of an enactment meant to protect private property. The Bar questions how and under what circumstances the CPG can be intimidated.
- 52) The Bar again feels that the Government should be pressed to provide examples of situations where the PRC might reasonably feel ‘intimidated’.
- 53) There will be few prosecutions for the substantive offence of subversion. There will instead, as it is in the nature of political offences everywhere, be prosecutions for attempts and other inchoate offences. The Bar feels that it is instructive to consider what kinds of acts would be caught by the new offence. The Government should be asked to say whether the following acts would be prosecuted under the new law:

- (a) A person calls for the amendment of Article 1 of the PRC Constitution by deleting the reference to the socialist system as the ‘basic system’ in the Constitution and spreads his message by a mass e-mail campaign that disrupts the ordinary working of the HKG Information website.
- (b) A person calls for the overthrow of the CPG by painting slogans with that message on Government property and causes criminal damage to property amounting to HK\$ 1,000,000.
- (c) A person kidnaps an SCNPC delegate and threatens to kill or maim him unless the CPG pays him a ransom of HK\$10,000,000.

54) The above examples are in fact all covered by the existing criminal law. The only difference is that in the first two offences are that there is a political element and in the third, the victim just happens to be connected with the CPG.

The New Offence of Sedition

- 55) Sedition is defined as incitement to commit the new statutory offences of treason, subversion or secession or as incitement to others to engage in Hong Kong or elsewhere in violent public disorder that would seriously endanger the stability of the PRC: see proposed section 9A(1) Crimes Ordinance. The offence of sedition based on the offences of treason, subversion and secession (section 9A (1)(a)) is punishable with a maximum term of life imprisonment. The other form of sedition (section 9A(1)(b)) is punishable with a maximum of 7 years imprisonment: see new section 9A(2).
- 56) The new section 9B makes it clear that inciting a person to commit an offence under section 9A is not an offence. In other words if A urges B to exhort C to commit an act of treason it is not a criminal offence.
- 57) The new offence is a departure from the old common law based offence which criminalised political speech but which required a court to consider whether the words spoken or printed would in fact have had the tendency to promote disaffection and provoke others to violence (*Boucher v. R* [1951] 2 D.L.R. 369).
- 58) The new offence appears to criminalise an intention, and only an intention, which is not necessarily manifested in the public domain.
- 59) The Bar notes that the offence, although borrowing the term ‘incitement’ from the common law, is not a common law offence. The Bar feels that the Government should explain how much, if at all, the new offence takes from,

or depends upon, the common law and how the new offence relates with the relevant statutory provisions respecting inchoate offences.

- 60) For example, is it possible to conspire to commit the offence of sedition under section 159A Crimes Ordinance when an ingredient of the substantive offence is itself an inchoate crime? Likewise with the offence of attempt contrary to section 159G of the Crimes Ordinance.
- 61) The Bar cannot understand the legal policy behind the proposed section 9A(1)(b) which makes it an offence for a person, not necessarily a Chinese national or a permanent resident, to incite others to engage in violent public disorder endangering the stability of the PRC.
- 62) Hong Kong does not usually claim jurisdiction over the acts of foreigners that are committed in their own countries unless their acts are in some way directed against Hong Kong and the consequences are intended to be felt in Hong Kong. When it does claim jurisdiction it does so on the basis of its territorial jurisdiction being infringed. See *A-G v. Yeung Sun Shum* [1987] 2 HKC 92. Also *Somchai Liangsiriprasert v. Government of the U.S.A.* [1991] 1 A.C. 225 and *R v. Sansom* [1991] 2 Q.B. 130.
- 63) This offence goes further. It expressly claims an extra-territorial jurisdiction ('or elsewhere') and is not predicated on an act that, if performed, will necessarily have repercussions only in Hong Kong. It seems that the claim extra-territorial jurisdiction is made because of a potential threat to the entire PRC by the act of incitement.
- 64) It seems to the Bar that there might be constitutional problems with this offence. It may be that the Mainland does not claim jurisdiction in similar circumstances. If the Mainland sees no need to criminalize such conduct, then Hong Kong should not attempt to lest it fall foul of the implied limitations on making laws in the Basic Law. (The Bar has made clear in the Response that it does not consider the express restrictions on law-making powers of the HKSAR contained in the Basic Law as being the only ones.)
- 65) Finally, how does a court deal with this offence? By definition, no violent public disorder seriously endangering the PRC need have occurred. How is a court to decide whether words spoken or printed were intended to incite serious public disorder (whether within or outside the PRC) that would in fact seriously endanger the stability of the PRC.

The New Offence of Handling Seditious Publications

- 66) The Bar believes that there are drafting problems with the definition of ‘seditious publication’ in the proposed section 9C Crimes Ordinance which is ‘a publication that is likely to cause the commission of an offence under section 2 (treason), 2A (subversion) or 2B (secession).
- 67) The Bar does not see how a thing can be said to be *likely* to cause someone with free will to commit a criminal offence. A publication may have the capacity to *influence* a person to do an illegal or immoral act and the publisher may have intended that result. However, the respect for the autonomy of human beings is such that the law does not generally recognise things as having any decisive influence over conduct. See *A-G v. Able* [1984] Q.B. 795 where a declaration was refused the English Attorney General who had wanted one to the effect that distributing a booklet that advised on methods of suicide amounted to aiding and abetting a suicide which was a criminal offence. It was accepted that the supply of the booklet might be an offence in one case but not in another. It all depended on the intention of the supplier of the booklet in the particular case and not only on the contents of the booklet.
- 68) An edition of *Mein Kampf* has to be read by a susceptible reader before it can be said to have influenced or led to anti-Semitic conduct by him, but it can never be said that the book made it *likely* that he would commit anti-Semitic acts.
- 69) The Bar believes there will be difficulties in prosecuting this offence as drafted. We do not see how the prosecution can prove in any particular case that the printed word was *likely* to result in someone committing a criminal offence as opposed to it being published with the object of *influencing* someone to behave in a particular way. It appears to the Bar that if a person writes a book or pamphlet with the intention of persuading or encouraging the reader to commit a crime then the right thing to do is to charge the author with incitement to commit the particular offence: see *R v. Marlow* [1997] Crim LR 897.
- 70) The offence of handling seditious publications under the proposed section 9C Crimes Ordinance seems to be an unnecessary offence. The ingredients of the offence of are: (i) handling seditious publications; (ii) with intent to incite others; (iii) to commit treason, subversion or secession as defined in section 9A(1)(a). The ingredients of the ‘parent’ offence are (i) inciting others to commit treason, subversion or secession [section 9A(1)(a)] or (ii) inciting others to engage in violent public disorder that endangers the stability of the PRC [section 9A(1)(b)].
- 71) It seems to the Bar that the essence of the ‘handling’ offence is sedition by the printed word. It is therefore difficult to understand why this offence has been carved out of the new offences in the new section 9A(1)(a) and why

the penalty is only 7 years imprisonment when the underlying conduct amounts to the more serious offence carrying life imprisonment.

- 72) The Government has perhaps been influenced by the fact that there is a discrete offence of 'handling' seditious material at section 10(1)(c) Crimes Ordinance but that offence was but one way of committing of sedition under section 10(1). The new offence of sedition at section 9A(1)(a) however proceeds on a different legal basis and the offence lies not in the actual words used but the ulterior intention in using them.
- 73) The Bar feels that the Government should be pressed to explain the need for this new offence. If it is thought to be necessary for preventative reasons, the Bar suggests that the common law offence of incitement is an alternative.
- 74) The Bar fails to see the reason for removing the limitation period of 6 months for bringing a prosecution for sedition that is in place under section 11 of the Crimes Ordinance.
- 75) The essence of the offence of sedition, whether as it is now or as is proposed, is inflammatory political speech and publication. Whether that speech, whether spoken or published, creates a real danger to the public peace depends very much on conditions and circumstances prevailing. If it presents a real danger then the offence should be prosecuted expeditiously and vigorously. It should not be left to grow stale. A statement may be seditious one year but in the next that part of the statement representing a call for change may represent settled Government policy.
- 76) For example, it is sedition to incite a person to an act of subversion to disestablish the basic system of the PRC by using force. The policy of having a socialist system enshrined in Article 1 of the PRC Constitution may change with an amendment to the constitution so that there is, in effect, a constitutional act of disestablishmentarianism. A prosecution for sedition carrying a potential life sentence after the Constitution has been amended may seem a harsh measure if it is pursued simply because the accused called for the use of force to bring about the change.
- 77) The Bar calls for the Government to explain why it is restoring the common law in regard to the abolition of statutory time limits for this offence. There was clearly a good legal policy reason to have time limits in respect of the offences of both treason and sedition. The Bar has suggested that the political nature of the offences was recognised as being good reason to provide for periods of limitation. The Government should say why that is now not a good reason for having time limits.

The New Offence of Secession

- 78) The proposed new offence of secession (section 2B) makes it a crime punishable with life imprisonment to withdraw any part of the PRC from its sovereignty by using force or serious criminal means or by engaging in war that seriously endanger the territorial integrity of the PRC.
- 79) The expressions ‘engaging in war’ and ‘serious criminal means’ have the same meaning as those terms are used in the proposed section 2 (treason) and section 2A (subversion). Our earlier comments on those provisions apply.
- 80) We feel that the test of the reasonableness of the proposed new offence lies not so much in considering the substantive offences but in looking at factual situations that might form the basis for a charge of attempt or other inchoate offence.
- 81) For example, if a person daubs graffiti on a conspicuous Government property that calls for the restoration or establishment of Tibetan independence and causes ‘serious damage to property’ within the meaning of the sub-section the ingredients of the offence are made out subject only to proof of serious endangerment to the territorial integrity of the PRC. The Bar asks what kind of proof of ‘serious endangerment’ is required to ground a prosecution.

The ‘Pannick’ Clause

- 82) An unusual feature of the Bill is that the amended parts of the three main ordinances are subject to a clause that expressly subordinates them to Article 39 Basic Law. An example is the proposed section 18A of the Crimes Ordinance.
- 83) The clause derives from certain advice the Government received last year from David Pannick Q.C. about ensuring that any interpretation of the new laws would ensure that effect given to Article 39 Basic Law and no other article of the Basic Law would detract from that article’s central role in interpretation.
- 84) We think that the ‘Pannick’ clause is unnecessary. Article 23 Basic Law makes clear that the laws required are HKSAR laws and not some other laws. As such they must be compatible with, not only Article 39 Basic Law but all of the Basic Law: see Article 11(2).
- 85) A constitutional challenge to a law under the Basic Law requires a court to take into account other relevant provisions of the Basic Law as well: see *Ng Ka Ling v. Director of Immigration* [1999] 1 HKC 291 at 325F-326H. A

challenge might be made to the new section 8E of the Societies Ordinance or the subsidiary legislation made under it which enables rules of court to be made excluding a party to the proceedings from the court would naturally encompass Article 39 because it incorporates Article 14 ICCPR (fair trial) but it would also take on board Article 35 Basic Law (access to a court) as well.

- 86) To the extent that the ‘Pannick’ clause may suggest that of all the Basic Law only Article 39 is relevant when construing the provisions of the Bill it is unconstitutional. The Bar considers that at least those rights in Chapter III and the right of presumption of innocence under Article 87 of the Basic Law are relevant.
- 87) No properly informed court is likely to construe the ‘Pannick’ clause in the way we suggest that it can be construed. Such a construction would be held by an appeal court as to be unconstitutional.
- 88) If the Government feels that this clause is necessary then it should use the tried and tested formula of an ‘avoidance of doubt’ clause such as is used in section 64 of the recent Village Representative Election Ordinance, Cap. 576.

Enforcement Provisions

Warrantless Search

- 89) The new section 18B Crimes Ordinance creates a power to enter and search premises under the authority of a direction given by a senior police officer for evidence concerned with the offences of treason, subversion, secession, sedition and handling seditious publications.
- 90) The Bar does not think that warrantless search and seizure powers are unconstitutional in themselves. There are a number of cases in the Strasbourg jurisprudence which clearly countenance the existence of such special powers as being compatible with Article 8 ECHR. The question is whether these powers applied to these offences in the circumstances contemplated are consistent with Articles 29 and 39 Basic Law which seem to call for some substantive and procedural safeguards.
- 91) The Bar feels that a case may possibly be made out for an emergency warrantless power in connection with the new offences of treason, subversion and secession because the offences are predicated on activities which *are* in fact very serious threats to the safety and security of the state. But then again many other offences are very serious and yet do not entitle search and seizure under a police authority. The Bar would like to see the

Government make out a really convincing case for this new power before it is enacted.

- 92) The Bar is not convinced of the case for sedition and handling seditious materials. The essence of these offences is doing an act which, depending on the susceptibility of the target, *may* result the commission of treason, subversion and secession. It is difficult to conceive of a factual situation where if there is an imminent risk of a person being incited to do a treasonable or subversive act there is not, in fact and law, a case for the incited being charged with treason or subversion.
- 93) The Bar feels that the new section 18B can be tightened to make the issue of an order authorizing a search under executive authority a truly exceptional event and that it goes no further than necessary.
- 94) The additional safeguards the Bar would recommend are:
- (a) Explicit recognition of the fact that ‘immediate action’ [sub-section (1)(c)] under the section is required because the situation is urgent and obtaining a judicial warrant is reasonably thought to be impracticable.
 - (b) The order has to be in writing. Preferably, a statutory pro-forma has to be followed. (See for example the pro-forma that magistrates must follow when issuing a warrant for the purpose of mutual legal assistance contained in Schedule 1, Form 4 Mutual Legal Assistance in Criminal Matters Regulation, Cap 525.)
 - (c) A requirement to show and/or leave a copy of the order with the person affected that shows who issued it.
 - (d) That the seizure power be exercised on the basis of a belief on reasonable grounds rather than on whether anything ‘appears’ to the police officer to be evidence.
 - (e) That the senior police officer who issues the order should not have any operational responsibilities for the investigation.

Consent

- 95) Offences under Parts I and Part II need the consent of the Secretary for Justice before there can be a prosecution.
- 96) The Bar would wish to be assured that the Secretary for Justice will not delegate the consent power under section 7 Legal Officers Ordinance, Cap. 87 or, better still, an amendment disapplying that ordinance for the purposes of consent to the relevant offences.

Trial by Jury

- 97) The Bar supports making the new offences trial by jury and giving the option for trial by jury in the cases that do not carry life imprisonment.

Amendments to Official Secrets Ordinance

- 98) The amendments to the Official Secrets Ordinance are not mandated by Article 23. The Government has admitted as much. See above.
- 99) Our approach to these amendments has been to question the policy behind them.
- 100) The new offence [section 16A Official Secrets Ordinance] of disclosing information related to Hong Kong affairs which are within the responsibility of the Central Authorities creates a wholly new category of protected information.
- 101) The rationale for the new offence appears to be that this kind of information was protected formerly under the rubric 'international relations' and that this should continue.
- 102) The Bar has pointed out in the Response that the situation before 1997 was entirely different and of no relevance whatsoever to the situation today. It does not propose to repeat the points made there save to say that the constitutional arrangements then in place inevitably made relations with the CPG 'international relations'. The Bar pointed this out and invited the Government to come up with a different rationale for protecting such information but it has not done so.
- 103) The fact that a prosecution will only take place if disclosure is shown to have been a 'damaging disclosure' is not relevant to the question why such information should be protected in the first place.
- 104) The Government has limited the scope of the protected information to 'information related to HK affairs within the responsibility of the Central Authorities'.
- 105) The Bar notes that under the Basic Law the following might reasonably be described as 'HK affairs' within the responsibility of the Central Authorities:
- (a) Foreign Affairs Basic Law 13
 - (b) Defence Basic Law 14
 - (c) The Appointment of the CE and principal officials Basic Law 15
 - (d) The Reporting of laws Basic Law 17
 - (e) The Addition of National Laws to Annex III Basic Law 18
 - (f) The obtaining of relevant certificates concerning defence and acts of state Basic Law 19
 - (g) The grant of extra powers to the HKSAR Basic Law 20
 - (h) The election participation process for the NPC Basic Law 21

- (i) The establishment of Mainland departments and offices in the HKSAR and entry of individuals from the Mainland Basic Law 22
- (j) The implementation of relevant directives by the CE Basic Law 48(8)
- (k) The conduct of authorized external affairs Basic Law 48(9)
- (l) The conduct of external affairs Basic Law 62(3)
- (m) Making arrangements with foreign states for reciprocal juridical assistance Basic Law 96
- (n) The keeping of a shipping register Basic Law 125
- (o) Access to HK by foreign warships Basic Law 126
- (p) Access to HK by foreign state aircraft Basic Law 129
- (q) The negotiation of air service agreements Basic Law 131-134.
- (r) Continued participation in international agreements and international organizations Basic Law 152-153
- (s) Visa abolition agreements with foreign states Basic Law 155
- (t) Establishment of consulates in HK Basic Law 157
- (u) The interpretation process after reference Basic Law 158
- (v) Amendment to the Basic Law 159

- 106) This list is not meant to be exhaustive or authoritative. It is for the Government to say what areas will be covered by the new provision. Some of these areas are undoubtedly covered by existing provisions of the Official Secrets Ordinance that restrict the publication of information relating to defence (section 15) and international relations (section 16).
- 107) The Bar considers that there is a strong case for asking the Government to define these areas with some precision in the Bill. It is not as if they are mutable. They are in the Basic Law. Such a course will have the advantage of avoiding some of the confusion that arose in the Right of Abode litigation about what exactly were Mainland responsibilities under the Basic Law.
- 108) The Government has asserted that the new restrictions will definitely not affect the free flow of economic and commercial information.
- 109) The Bar feels that some commercial and economic information will be caught by the new provision. The negotiation of air service agreements gives rise to information which has both economic and commercial significance. Any change in the Mainland policy on migration to HK is arguably of economic significance.
- 110) Apart from these categories of information, the Bar considers that information of political significance will be caught. The appointment of the Chief Executive and his principal officials is an obvious example. So is the amendment process to the Basic Law. Further, information of “constitutional importance” may also be classified as official secrets via HK affairs within responsibilities of the CPG or Central Authorities, such as

opinions of members of the Basic Law Committee on a proposed interpretation of a provision of the Basic Law.

- 111) The Government ought to be pressed to say why this information needs protecting in a unitary state. It should give examples of 'damaging disclosure' to make out its case for the new restriction.
- 112) The other new offence is the offence of using protected information acquired as a result of illegal access. The offence is an amendment to the existing section 18 Official Secrets Ordinance.
- 113) The offence is committed when protected information is acquired by means of illegal access (which is defined by the proposed section 18(5A) as acquisition through specified criminal means.) There is no need to prove that disclosure came about as a result of the actions of a public servant or government contractor.
- 114) The offence is described as plugging an obvious 'loophole'.
- 115) The Bar has said in its Response that it very much doubts that this is a 'loophole'. The same 'loophole' has existed, and still exists, in the UK Official Secrets Act 1989 and has not been 'plugged' in all that time.
- 116) The Bar is of the view that there is simply no need for this offence. If protected information comes into the public domain as a result of a criminal act then public policy is served by prosecuting the offender (if he can be found) and, if necessary, seeking an injunction to restore the information to the Government and restraining further publication.
- 117) In a civil suit the Government would have the burden of proving that there is a sufficient public interest requiring the information to be protected from disclosure which is similar to the task it would have to assume in criminal proceedings in proving that there was a 'damaging' disclosure. See *A-G v. Guardian Newspapers (No.2)* [1990] 1 A.C. 109 per Lord Griffiths at 268B-269D for the general principles involved in actions for breach of confidence. See also the essay 'Confidentiality' by Lord Scott in *'Freedom of Expression and Freedom of Information'* Collected Essays in Honour of Sir David Williams (OUP) 2000 explaining the differences of approach of the courts to cases involving government claims to confidentiality.
- 118) The Bar is of the view that the proposed new offence would inhibit the free flow of information about Government affairs because reporters would always have to treat information obtained anonymously as information that could have been obtained in one of the four prescribed illegal methods. The chances of a prosecution may be remote but a prudent reporter would not

discount them and may prefer not to report a story than risk a criminal investigation into how he came by the information.

- 119) The Bar feels that it is wrong to equate information held by Government with private property so that 'handling' it by a third party becomes a criminal offence unless the information is in the form of a thing (a file or document) susceptible to the ordinary criminal law of theft.
- 120) People have a constitutional right to information that is variously protected by Articles 27, 30, 34 and 39 Basic Law and any limitations on that right should be only those that are necessary and proportionate. In general it is difficult to justify any denial of the right to any information which is already in the public domain. We feel that the existing Official Secrets Ordinance, taken together with the availability of civil action to restrain breaches of confidence, already provide more restrictions than are necessary to protect government information.
- 121) On a practical level, we feel that the proposed new offence could be abused by Government. If information embarrassing to it was leaked or thought to be leaked it could state that it believed the information had been 'lost' as a result of an prescribed act and that news editors were at risk of criminal prosecution for publishing the information even though they did not know for sure how the information came into the public domain. Ethically, news reporters are not to disclose any source of information, even in the pain of punishment. Would it be right for the Government to make use of such an offence to 'force' a news reporter to disclose his source.
- 122) An additional new measure is the expansion of the scope of the offence at section 18 of disclosing without lawful authority protected information that has come into a person's possession as a result of a disclosure without lawful authority by a public servant or government contractor. The amendment extends the provision to disclosing protected information that has originated not merely from an unauthorized disclosure by a public servant or government contractor but from an unauthorized disclosure by a former public servant or former government contractor.
- 123) The Government has described this as a 'technical' amendment to the Official Secrets Ordinance.
- 124) The Bar questions whether this is really a 'technical' amendment. The existing provision was copied from section 5 of the Official Secrets Act 1989 which has not been amended since its enactment notwithstanding the fact that it has been used on more occasions than the ordinance has been used in Hong Kong.

- 125) The Bar can see the logic in not criminalizing unauthorized disclosure when the source is a former public servant or government contractor. A former public servant may offer his memoirs for publication to a publisher with the assurance that the information in them is authorized inasmuch as that information relates to protected information. The memoirs are then published and it turns out that the information was in fact subject to the provisions in the Official Secrets Ordinance prohibiting disclosure and no authority for disclosure was ever given.
- 126) The public interest is arguably better served by the Government seeking to restrain the publication of the memoirs in the civil courts rather than deploying the full force of the criminal law in prosecuting the publisher who has been misled by the former public servant.

Proscription and Related Criminal Offences


- 127) The Bill amends the Societies Ordinance Cap. 151 to enable the Secretary for Security to proscribe any local organization if he reasonably believes proscription is necessary in the interests of national security and is a proportionate measure: see proposed new section 8A (1). An appeal to the CFI is available against such an order under the proposed section 8D.
- 128) The Bar has said before that proscription of local bodies is not required by Article 23 which requires proscriptive laws to be in place only for foreign political organizations or for local organizations that have ties to foreign political organizations.
- 129) There are already measures for banning some groups on the grounds of national security already exist under Societies Ordinance and the United Nations (Anti-Terrorism Measures) Ordinance which, in the Bar's view, goes far beyond what is required by Article 23.
- 130) In the Bar's view, the Societies Ordinance could (not should) have been amended to extend its reach to organizations not included in the proscription scheme under its existing provisions. That would not have removed our objections to the proposals as an extension of the existing regime but it would at least not have involved the Bar in a debate about a wholly new proscription mechanism.
- 131) The existing measures do not depend on prior action in the Mainland. The Bar sees no justification for the link to a state of affairs in the Mainland. The Secretary for Security is supposed to exercise an independent judgment on facts related to national security and, that being the case, we do not see the legal policy justification for the condition precedent to appropriate action being an act done in the Mainland.

- 132) The Bar is strongly of the view that the measure dilutes the principle ‘one country, two systems’ that underpins the Basic Law and, specifically, may be inconsistent with Article 4 Basic Law which obliges the HKSAR to safeguard the rights and freedoms of the residents of the region in accordance with the BASIC LAW.
- 133) Only certain local organizations are liable to be proscribed: see the proposed section 8A(2) which identifies three types:
- a. Organizations whose objectives include engaging in treason, subversion, secession or sedition or to commit the offence of spying.
 - b. Organizations that have committed or attempted to commit any of the matters at (a).
 - c. Organizations subordinate to a mainland organization that has been prohibited there on the ground of protecting the security of the PRC by means of an open decree under the law of the PRC.
- 134) The term ‘local organization’ is defined in the proposed section 8A (5) (f) as either a society within the meaning of the Ordinance or as a body named in the Schedule to the Ordinance. This definition picks up limited companies, unincorporated trusts and credit unions, to name but a few organizations that would not ordinarily come within the Societies Ordinance scheme of control.
- 135) Proof of banning a mainland organization is by means of a certificate which shall be ‘conclusive’ evidence of the same: section 8(3).
- 136) The Bar feels that there is no need for the certificate to be conclusive. The banning of an organization in the Mainland is an act having legal consequences in the Mainland and, as such, can be proved in the ordinary way that foreign legal acts are proved in our courts (the Mainland being having a ‘foreign’ set of laws for present purposes).
- 137) The Bar understands that a certificate from the Mainland may suffice for an administrative decision under the proposed section 8A Societies Ordinance when practical exigencies may be pleaded but the Secretary for Security should be required to prove the relevant act of proscription on the Mainland on any appeal as a fact in the ordinary way.
- 138) The test of subordination is whether the local organization is financially dependent on the mainland body or whether it is under direct or indirect control of the mainland body or whether its policies are determined by the mainland group: see proposed section 8A(5)(h) Societies Ordinance. It seems to us that may involve the Secretary of Security in complex and difficult fact finding.

- 139) We feel that the problems associated with the new proscription mechanism will be illustrated on appeal under the proposed section 8D Societies Ordinance.
- 140) We note that an appeal lies to the CFI. That means that there can be no judicial review of the Secretary for Security's decision except in exceptional circumstances: see *R (on the application of Kurdistan Workers Party & Ors) v. Secretary of State for the Home Department* [2002] EWHC 644 where the right of appeal to a special tribunal dealing with proscription issues was held to exclude judicial review.
- 141) Nor will judicial review be available at the appeal stage because the CFI does not review itself.
- 142) The Bar thinks it right that there should be a statutory appeal to the CFI from such a decision. It believes that such an appeal would be a 'civil cause or matter' for the purpose of section 13(1)(a) High Court Ordinance, Cap. 4 and an appeal would lie to the Court of Appeal in the ordinary way. It would like the Government to confirm its view.
- 143) Conferring a right of appeal to the CFI directly engages Article 35 BASIC LAW. It guarantees the right of access to the courts and includes the right to choose a lawyer for 'the timely protection of their lawful rights and interests or for representation in the courts'. This article is relevant to the rule-making power at the proposed section 8E(3) Societies Ordinance includes the power to make rules excluding the appellant and his lawyer from the proceedings. At sub-section (4) there is a power to appoint a legal representative to represent the interests of the excluded appellant.
- 144) The Bar believes rules made pursuant to such a power that excluded the appellant and his lawyer from attending the hearing of the appeal would be unconstitutional as being inconsistent with Article 35 Basic Law.
- 145) The Bar has noted that there are precedents for such procedures in special tribunals in Canada and the UK dealing with immigration and national security issues. The Government has been at pains to point them out suggesting that if they are constitutionally acceptable in those countries then similar legislation should pass muster here.
- 146) The Bar suggests that the situations in Canada and the UK may be different and the existence of similar laws is no sure guide to the constitutionality of a law in HK that excludes from court proceedings both a party to those proceedings and his lawyer.
- 147) The constitutionality of UK law is measured by reference to the ECHR by way of the Human Rights Act 1998. The relevant article of the ECHR is

Article 6. It provides for a fair trial in both criminal and civil proceedings. The right to a lawyer and the right to examine witnesses is guaranteed in criminal cases (Article 6(3) (c) and (d)) but not in other cases (Article 6(1)). It has been said that the rights in a criminal case are 'absolute' and if they are not secured in any one case there is a violation: see Clayton & Tomlinson 'The Law of Human Rights' (OUP) at 11.183 and 11.206.

- 148) In Canada there is no general constitutional right to be present at a hearing or to have legal representation. Those rights are only guaranteed in criminal and penal matters: see section 11 Canadian Charter of Rights and Freedoms.
- 149) Hong Kong is different. Article 35 Basic Law applies to both civil and criminal proceedings.
- 150) The Bar believes it to be highly arguable that Article 35 rights are not capable of abridgement in the way that many other rights are, including rights under the ICCPR which is brought in by Article 39 Basic Law. Doubtless there are inherent practical limitations on the rights (choice of lawyer is predicated on availability and affordability) and rights of access may be subject to procedural limitations that do not in themselves destroy the right (leave requirements, court fees, limitation periods, security for costs etc.) but preserve the essence. It is difficult to think of a limitation that takes away the right in question that is still a limitation and not a violation.
- 151) The Court of Final Appeal has indicated that some BASIC LAW rights may be qualified by procedural requirements but the essence of the right cannot be extinguished by the requirement. In *Gurung Kesh Bahadur v Director of Immigration* [2002] 2 HKLRD 775, the CFA held that a Hong Kong resident's right to travel under Article 31 BASIC LAW could not be limited by a requirement that when he returned to HK he had to ask permission to enter again. The requirement of leave to enter on return was not a mere procedural requirement, such as a requirement to show a document establishing the traveller's identity might be, but a requirement that negated the right in question.
- 152) We consider that the reasoning in *Bahadur* is applicable. If you have a right of access to the courts and a right to a lawyer to represent you then we do not see how those rights can be enjoyed when sitting outside the court in the company of one's lawyer of choice and having a nominated lawyer to represent your interests.
- 153) If the Government wants additional powers to proscribe organizations on the grounds of national security it must devise court procedures which enable the person affected and his lawyer to have access to all the materials relied on to support the administrative act of proscription.

- 154) The Bar notes that if the proscribed party and its lawyer are entitled full access to the court in accordance with Article 35 that would not affect the common law rules governing public interest immunity or the ability of the court to sit *in camera* as and when it is necessary to do so. The government lawyers supporting the proscription would not be bound to disclose sensitive material at an appeal hearing but, on the other hand, they could not ask the court to look at and act on such material and, at the same time, exclude the affected party and its lawyer.
- 155) If the Government wishes to have rules in place that limit access to a court the Bar feels that the rules should be in primary legislation. The Bar considers that it is invidious to have the Chief Justice responsible for the task. Were such rules to be made they would almost certainly be subject to a constitutional challenge in an appeal. The Chief Justice should not be disqualified from adjudicating upon such a challenge by reason of his authorship of the same.
- 156) The Bar is aware that in the UK the Lord Chancellor has made rules limiting access to a tribunal with similar powers. However, the Lord Chancellor is a legislator and minister as well as a judge. His post carries with it some political accountability to the executive and legislature.
- 157) The Chief Justice is not a minister and is not a legislator. He is not politically accountable. Chapter IV of the Basic Law has been carefully crafted to ensure that there is no admixture of powers or roles. The Chief Justice should have a free hand in making rules for the proposed statutory appeal or they should be made in the ordinary way by the Rules Committee (section 55 High Court Ordinance) or else the Government should regulate by way of primary legislation and leave the way clear for a constitutional challenges to it, or decisions made under it, that do not involve the Chief Justice. 

Dated this the 11th day of April 2003.

The Hong Kong Bar Association