HONG KONG BAR ASSOCIATION'S RESPONSE TO THE CONSULTATION DOCUMENT ON THE PROPOSALS TO IMPLEMENT ARTICLE 23 OF THE BASIC LAW

I. INTRODUCTION

1. On 22nd July 2002, the Hong Kong Bar Association published its Views on Legislation to be made under Article 23 of the Basic Law ("the Views"). On 24th September 2002, the HKSAR Government ("the Government") published a Consultation Document on "Proposals to Implement Article 23 of the Basic Law" ("the Consultation Document").

2. Article 23 of the Basic Law provides as follows: -

> "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

3. The Bar maintains its position that in most areas, the existing laws of the HKSAR including the Public Order Ordinance (Cap. 245), the Societies Ordinance (Cap. 151), the Emergency Regulations Ordinance (Cap. 241), the Crimes Ordinance (Cap. 200), the Official Secrets Ordinance (Cap. 521) and other common law offences are sufficient to prohibit the acts and activities listed in Article 23.

4. In its Views published on 22nd July 2002, the Bar set out three fundamental principles to be observed when laws are enacted to implement Article 23: -

   (1) Firstly, the Government should adopt a minimalist approach, namely, to legislate only when and where it is strictly necessary to do so in order to comply with the requirements of Article 23;

   (2) Secondly, the Government should seize upon the opportunity to review and make such changes to our existing laws so as to bring them in line with modern human rights standards while at the same time see to any laws made being consistent with

(a) Minimum standards contained in International Covenant on Civil and Political Rights ("ICCPR");

(b) Minimum standards contained in International Covenant on Economic Social and Cultural Rights ("ICESCR");

(c) Guarantees of fundamental rights of HKSAR residents under Articles 27 to 34 of the Basic Law; and

(d) Johannesburg Principles on National Security, Freedom of Expression and Access to Information ("the Johannesburg Principles").

(3) Thirdly, the drafting in the legislation must be unambiguous, drawn narrowly and with precision.

5. While the Bar appreciates that it is the duty of the HKSAR to enact domestic laws to prohibit the acts and activities listed in Article 23, the Bar does not agree to the legislative proposals as set out in the Consultation Document. In particular, the Bar takes the view that such proposals are not in compliance with the three fundamental principles repeated under paragraph 4 above.

6. While the Government says it has taken into account in framing the proposals contained in the Consultation Document the guiding principle that all offences encompassed by local legislation to implement Article 23 are as clearly and tightly defined as appropriate so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law, the Government has failed to adhere to such a principle. The proposed offences are not clearly and tightly defined so that it is impossible for the ordinary person to know whether he is committing an offence or not. The fact that various government officials have had to come out to make statements about what conduct will not be criminalized demonstrate the vagueness and uncertainties of the limits of the proposed offences. Of course, what government officials say means nothing. It is the wording of the legislation that is paramount and for the courts to interpret.

7. The Bar is of the view that it is difficult to have any meaningful discussion and consultation when the legislative proposals are described in the very broad terms used in the Consultation Document. It is impossible for the public to know precisely with what they are asked to agree or support in the absence of a text setting out the proposals in the form of draft legislation. The Bar deplores the Government's refusal to provide such

text in the form of a White Bill[1] and to undertake a second round of public consultation before drawing up the Blue Bill for first reading of such important legislation.

II. CONFUSING EXPRESSIONS: "PRCG" AND "STATE"

8. The Bar finds that the Consultation Document repeatedly refers to "the PRC Government" ("PRCG") and "State".

9. In footnote 18 at page 10 of the Consultation Document, the Government defines "PRCG" to "represent collectively the Central People's Government ("the CPG"), and other state organs established under the Constitution".

10. While Article 85 of the Constitution of the PRC defines the CPG to be the State Council, it did not define "other state organs". The Bar finds such a lack of precision to be problematic because that leaves a constituent element of many offences unclear and people will not know what are and are not infringing acts or activities.

11. Another expression that has been very liberally used in the Consultation Document is the expression "State". This expression is used in different contexts. For example, in paragraph 4.13 of the Consultation Document, it is used in contra-distinction with the expression "HKSAR" and would arguably be excluding the HKSAR from its meaning. At other places, however, "state" is used in contexts suggesting that the expression has included the HKSAR in its meaning.

12. The Bar notes that section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) defines "state" to include the Government of the HKSAR, to which definition the Bar objected in 1998 at its introduction on the ground that the PRC was a unitary state and that no one part of it could have a legal status that only the entire geographical and political

[1] An examination by the Bar of the Government Gazettes published between 1980 and 2002 shows that the Government published a total of 24 White Bills or drafted legislations for general information. They included the (1) Control of Obscene and Indecent Articles Bill (1986), (2) two Films Censorship Bills (1987), (3) the Hong Kong Bill of Rights Bill (1990) and (4) the Interception of Communication Bill (1997). The HKSAR Government published 3 White Bills between July 1997 and November 2002.

entity could enjoy. The Government should explain with particulars what it means by "state" at each of the places where that expression appears in the Consultation Document.

III. TREASON

13. Article 23 requires the HKSAR to enact laws on its own to prohibit any act of treason.

14. There currently exists legislation dealing with treason and various treasonable offences. This legislation is based on archaic laws first enacted during the 14th century in England. Our current law is based on the Treason Act 1795. It has not been brought up to date to reflect modern day society nor is it appropriate since the change of sovereignty.

The Government's proposals

15. The Government presumably intends to enact Article 23 legislation concerning treason by amending the Crimes Ordinance to create new offences and by repealing certain provisions though this is not made at all clear in the Consultation Document. The abolition of certain criminal offences is to be welcomed.

16. In essence, the Government's proposals are to create the following offences punishable by life imprisonment: -

(1) "levying war by joining forces with a foreigner with intent to
   (a) overthrow the PRCG or
   (b) compel the PRCG by force or constraint to change its policies or measures or
   (c) put any force or constraint upon the PRCG or
   (d) intimidate or overawe the PRCG
   ("the substantive offence", paragraph 2.8 and Annex 2[2])

(2) instigating a foreigner (defined as "armed forces which are under the direction and control of a foreign government or which are not based in the PRC") to invade the territory of the State (paragraph 2.9)

(3) assisting a public enemy at war or engaged in open hostilities with the PRC (paragraphs 2.10 – 2.11)

[2] All such references are to paragraphs and Annexes in the Consultation Document.

17. The Government also proposes to enact a statutory equivalent of the common law offence of "misprision of treason" punishable by 7 years' imprisonment and unlimited fine being the failure to report to the proper authorities within a reasonable time that another person has committed treason (paragraph 2.14 and Annex 2) but to abolish the common law offence of compounding treason (paragraph 2.15 and Annex 2).

18. In addition, the Government proposes to enact legislation dealing with all the inchoate offences of attempting, conspiring, aiding and abetting, counselling and procuring the commission of the substantive offence except incitement which will form the separate offence of sedition and these inchoate offences shall also be punishable by life imprisonment (paragraph 2.13, Annex 2).

19. Finally, the Government proposes to abolish the existing time limit on prosecutions, which requires that all prosecutions for these offences shall be commenced within 3 years of the offence (paragraph 9.5).

20. The offences are to apply to all persons who are voluntarily in the HKSAR and to all Permanent Residents outside HKSAR for their actions outside HKSAR (paragraphs 2.16 and 2.18).

Problems with Government's Proposals

21. The proposals depart fundamentally from the requirements of Article 23 by failing to define what are the prohibited acts. Nor has the Government adhered to the guiding principle referred to above. The proposals are not clearly or tightly defined to avoid uncertainty and the infringement of fundamental rights and freedoms.

22. By using the archaic language of the 14th Century, "levying war", the Government has avoided stating clearly what acts will be made criminal. As appears from paragraph 2.12 and footnote 17 on page 9, levying war is not confined to a situation where war is declared by or against the PRC and no use of military force need be involved. The lack of clarity is made worse as no means are specified except in the intents i.e. force or constraint. For instance, it is not clear whether someone who joins with a foreign government to call for the imposition of a trade embargo or the imposition of a quota or tariff on goods made in the PRC will commit the substantive offence.

23. The intents also reflect an age where the King could do no wrong and the very idea that the ordinary citizen should seek to change the sovereign's "policies" or "measures" was unthinkable. We no longer live in those times. The notion that a government should be made to change its policies or measures is no longer treasonable. On the contrary, it is perfectly normal and consonant with democratic principles. Therefore, the intent should not be considered criminal. It is the use of violence to achieve legitimate ends that should be criminalized.

24. The proposals reflect an age when war was widely used for different reasons as is evident from the specific intents. It is unclear whether the proposal is that only the "foreigner" need have the intent or whether the intent needs to be shared by the person who "levies war" by joining forces with the foreigner. The intents are much too widely drawn and would or could include any intent to make the PRCG comply with its international obligations under treaty or covenants including ones which apply to Hong Kong such as the ICCPR and the ICESCR. The intents are also confused with the means and sometimes with the intended effect. There is also a fundamental confusion between the scope of treason and the scope of subversion. It is unclear whether the definition of "foreigner" is intended to be the same for the substantive offence as for the offence of instigating a foreigner to invade the Country.

25. The offence of instigation of a foreigner to invade the country is simply creating an offence for the sake of creating an offence which is already amply covered by attempting, conspiring, counselling or procuring the commission of the substantive offence which will be punishable as treason and by sedition which will be inciting treason and by inciting secession which will be a separate offence. There is therefore absolutely no need for such an offence.

26. It is entirely unclear what acts of assistance will be criminalized under the offence of assisting a public enemy at war. Someone who is ignorant of the "armed conflicts to which sufficient publicity is given" could commit the offence. What is sufficient publicity? Ignorance of a fact should never be made the basis of a criminal offence. It must be a necessary ingredient that the person knows of the state of war and intends to assist the enemy. Moreover, it should not be left to the judgment of the individual whether the state of hostilities is such as to trigger the offence of treason. A

declaration of war is a classic Act of State.

27. So far as misprision of treason is concerned, experience has shown very great difficulties arising in the interpretation and operation of offences that criminalize the failure to report knowledge, belief or suspicion of an offence being committed by someone else. The result is often to criminalize the ignorant, the naïve and the trusting and even those who are under a professional and ethical obligation not to reveal confidences.

28. The proposal in effect creates a duty on the ordinary person to report treason. The more complicated the definition of treason, the more difficult it will be for the ordinary person to decide whether treason has or has not been committed. Looking at the current definition, can anyone say "hand on heart" that he could be certain of when and what he was required to report?

29. It is also illogical and unfair that the proposal is to enact legislation to embody the obsolete offence of misprision of treason but to repeal the offence of compounding treason. Is this because those who are already under a duty to prosecute (and initiate prosecutions) of treason need to be specially favoured? If treason is not considered to be so serious an offence to warrant enacting the common law offence of compounding treason for those who owe a duty to prosecute, it cannot be so serious as to warrant imposing a duty on ordinary members of the public to report treason and to criminalize a failure to do so.

30. The law is to apply to all HKSAR Permanent Residents wherever they may be living. No account is taken of the unique circumstances of Hong Kong and the fact that many who live overseas may have dual nationality or of the fact that many of those who live in HKSAR are not PRC nationals. No special allowance is made for those who owe dual allegiance despite the fact that treason is principally an offence applying to those who have a duty of allegiance to the state of which they are nationals.

31. The proposal to abolish the time limit for commencement of prosecutions is particularly objectionable. As the offence is concerned with those who are at war with the PRC, it should be speedily dealt with, not left to haunt people years after the hostilities have concluded.

The Bar's Recommendation

32. The offence of treason should be narrowly defined to specified acts of assisting the enemy where war has been declared by or on the PRC with the intent of assisting the enemy. Those specific acts should be confined to acts involving use of violence such as joining a military force with a foreign State, or provision of weapons to the foreign State knowing that the PRC is at war with that State and with the intent of assisting that enemy.

33. War should be confined to publicly declared war or state of hostilities. Assistance to nationals of an enemy state should not constitute an offence.

34. No other offences are necessary.

35. The common law offences of misprision of treason and compounding treason should be abolished.

36. The time limit for prosecutions should be retained and the punishments clearly stated to be maximum and not mandatory.

IV. SECESSION

37. The Consultation Document did not heed the call the Bar made in the Views that secessionist activities were sufficiently prohibited under the existing law and instead propose to create specific offences relating to secession attempts where they are undertaken by levying war, use of force, threat of force or other serious unlawful means (paragraph 3.6).

The Government's Proposals

38. There is at present no offence termed secession in the HKSAR. The Government proposes to create such law so as to make it an offence to:

(1) withdraw a part of the People's Republic of China from its sovereignty; or

(2) resist the Central People's Government in its exercise of sovereignty over a part of the People's Republic of China,

by levying war, or by force, threat of force, or other serious unlawful means (paragraph 3.6).

39. "Levying war" is defined as including a riot or insurrection involving a

considerable number of people for some general public purpose.

40. The Consultation Document defined "serious unlawful means" to mean criminal action involving: -

(1) serious violence against a person;

(2) serious damage to property;

(3) endangering of a person's life, other than that of the person committing the action;

(4) creation of a serious risk to the health or safety of the public or a section of the public;

(5) serious interference or serious disruption of an electronic system; or

(6) serious interference or serious disruption of an essential service, facility or system, (whether public or private) (paragraph 3.7).

41. The Consultation Document also considered that individuals or groups of individuals in Hong Kong should be prohibited from organizing and supporting secessionist activities in Mainland China (paragraph 3.8).

42. The specific inchoate and accomplice offences of attempting, aiding and abetting, counselling and procuring the commission of the substantive secession offence, and conspiring to commit the substantive offence are also proposed to be enacted in legislation (paragraph 3.9).

43. Further, the Consultation Document proposes to extend jurisdiction of secession offences not only to "all persons who are voluntarily in the HKSAR" but also to "[all] HKSAR permanent residents in respect of their actions outside the HKSAR and to "all [other] persons in respect of their actions outside the HKSAR" if such actions of these other persons have some form of linkage with the HKSAR (paragraphs 3.10 to 3.12).

<u>Problems with Government's Proposals</u>

44. The Bar maintains, as already expressed in the Views, that implementation of Article 23, which only requires the HKSAR to enact laws on its own <u>to prohibit acts of secession</u>, does not require the enactment of a distinct offence of secession. The Bar further stresses that the existing laws, particularly section 2 of the Crimes Ordinance, is sufficient, after suitable adaptation, to prohibit all acts of secession.

45. The Bar considers that the discussions in paragraphs 3.2 to 3.4 of the

Consultation Document are inadequate and partial. While the Consultation Document gave an acceptable definition of secession (by reference to Bartkus, ***The Dynamic of Secession***, Cambridge University Press, 1999), it immediately departed from that definition claiming that secession "involves the refusal of the part of a distinct, constituent community to recognize the sovereignty of the existing political authority, and to create a new independent state with its own geographical territory, thereby necessitating a change in internationally recognized boundaries" (paragraph 3.2). This superseding definition of secession appears to have been provided without any reference and any supporting authority and fails to address the right of self-determination of peoples, a fundamental right intimately associated with calls for autonomy, separation and secession in different parts of the world.

46. The Bar reminds the Government that the right of self-determination of peoples is the first right enshrined in both the ICCPR and the ICESCR. A people by virtue of that right may freely determine their political status and freely pursue their economic, social and cultural development.

47. Both the ICCPR and the ICESCR continue to apply to the HKSAR and all restrictions to the rights and freedoms enjoyed by Hong Kong residents must not contravene the provisions of both Covenants (Basic Law, Article 39). The Bar also reminds the Government that the PR C is a signatory of both the ICCPR and the ICESCR and that the PRC has ratified the ICESCR and is thus under an international obligation to guarantee to the peoples within its territories the right to self-determination.

48. Accordingly, the Bar finds the discussion in paragraphs 3.2 to 3.4 of the Consultation Document deficient in that it fails to recognize, at the very least, the possibility of a secessionist cause to be the legitimate exercise by a people of the right to self-determination and thus a legitimate political demand.

49. In so far as the Consultation Document relied on the judgment of the Supreme Court of Canada on the Quebec Secession Reference, it was being economical with its use of the judgment in not making reference to the part of the judgment that recognized the right of the government of Quebec to pursue secession following the indication of majority support of that cause and also the right to external self-determination that would give rise to a unilateral right to secede under certain specified circumstances

that did not, however, apply to the province of Quebec (161 DLR (4th) 385, 447-448).

50. The Bar thus regrets that the Consultation Document not only failed to respect the legitimacy of canvassing a secessionist cause in the ordinary political process, but also failed to recognize the necessity of only criminalizing acts of violence associated with the promotion of a secessionist cause, without outlawing the cause altogether. In other words, the Bar questions the creation of a crime of secession aimed not at any violent activities but rather at the political cause. Such a crime is a typical political crime. Its represents an outright refusal of the Government to address legitimate political demands of a distinct minority of the governed and has no place in a democratic society.

51. The Bar notes that paragraph 3.5 of the Consultation Document lists the laws of three countries in support of the claim that some jurisdictions have expressly outlawed secession. An examination by the Bar of the legislative provisions of these three jurisdictions reveals that such a claim is only partly correct.

52. The French Penal Code prescribes in Art 412-1 the offence of attack, which prohibits acts of violence likely to injure the integrity of the national territory, and makes no reference to the purpose of the attack. While Art 410-1 of the Code defines fundamental interests of the nation to include the integrity of its territory, the application of the defined term is in relation to offences of treason (when committed by French nationals and French military personnel) and of espionage (when committed by any other person) (Art 411-1). The offences of treason or espionage, namely Arts 411-2 to 411-12, are mostly concerned with activities serving the interests of a foreign power, a foreign enterprise or organization, or an enterprise or organization under foreign control and have nothing to do with the withdrawal of a constituent part of France from the French Republic to create a new sovereign state.

53. Section 81 of the German Penal Code, on the other hand, prescribes the offence of high treason against the federation, which prohibits the undertaking, with force or through threat of force, to undermine the continued existence of the Federal Republic of Germany (which is defined in section 92(1) to refer to the causing of the abolition of the Federal Republic, its freedom from foreign domination, the destruction of its

national unity, or the separation of one of its constituent territories). These provisions also make no mention of the creation of a new sovereign state, which the Bar believes to be a specific objective of secession.

54. The Pakistan Criminal Code punishes in section 121A, conspiracies to deprive Pakistan of the sovereignty of her territories or of any part thereof and in section 123A, condemnation of the creation of Pakistan or advocacy for the curtailment or abolition of the sovereignty of Pakistan in respect of all or any of the territories lying within its borders, with intent to endanger the sovereignty of Pakistan in respect of all or any of the territories lying within its borders. The Bar also notes in passing that as of August 2002 Pakistan was not a signatory to the ICCPR.

55. The Bar finds such laws neither necessary nor desirable in the light of the situation of the HKSAR and the guarantees of fundamental rights under the Basic Law to freedoms of expression and political participation. In any event, the conspiracies sought to be prohibited make no reference to the creation of a new sovereign state and are likely to involve the participation of a foreign power.

56. The Bar finds the alleged justification of countering secessionist activities, namely protection of the nation (paragraph 3.5), antiquated, authoritarian and confusing. Such views have no place in a democratic, cosmopolitan and increasingly globalized society.

57. The Bar now turns to the proposal in paragraph 3.6 of the Consultation Document on the offence of secession. In sum, the Bar is of the opinion that the terms of the proposed offence, as outlined in that paragraph, are overbroad, vague, imprecise and will result in the stifling of legitimate dissent. The terms of the proposed offence highlights the object of the prohibition as not the violent activities meant to effect the political cause (which are sufficiently dealt with by the existing law) but the political cause itself.

58. The Bar observes that in formulating an offence of secession, a clear demarcation must be made so as to distinguish the formulated offence from the offence of treason and the offence of subversion. The Bar regrets that the Consultation Document fails in achieving this disciplined approach to the problem.

59. The Bar also notes that the terms of the proposed offence of secession in paragraph 3.6 of the Consultation Document are considerably more extensive and imprecise than those formulated in the Crimes (Amendment) (No 2) Bill 1996. See paragraph 47 of the Views.

60. The Bar repeats its views that the expression "levying war" (as defined in footnote 17 at page 9) is too widely drawn (with the consequential effect of elevating riotous acts of a sizeable number of persons for a cause somehow related to public authority to treason) and should be confined in drafting to a state of war.

61. The Bar considers that the expression "threat of force" is capable of inhibiting expression, albeit offensive or in the nature of outbursts, of a secessionist cause and should be narrowed down, consistent with Principle 6 of the Johannesburg Principles, to situations where the claimed use of force is the direct and immediate result of the threat and also is, or is likely, to be imminent.

62. The Bar notes that the Consultation Document seeks to introduce the element of "serious unlawful means" into the offence of secession. The Bar also notes that this element owes its origin to the definition of "terrorist act" in the United Nations (Anti-terrorism Measures) Ordinance (Cap 575). The Bar, however, regrets that the Consultation Document fails to specify any exceptions to the description of "serious unlawful means" in paragraph 3.7. The suggestion of incorporating "adequate and effective safeguards" is insufficient for the public to understand and be assured of the proper scope of that element of offence.

63. It is not inconceivable for a peaceful protest against a proposed increase in railway fares to qualify as a "serious unlawful means" by virtue of the acts of some of the protestors blocking railway tracks (which are per se unlawful as infringement of railway by-laws), thus causing lengthy disruption to the railway system for hours with massive consequential economic loss.

64. The Government must properly address the likelihood of its proposals catching acts that are more properly described as nuisances or public order disruptions in any definition of "serious unlawful means". The Bar sees no additional protection capable of being afforded to the HKSAR or the Central Authorities by making such acts (which are already prohibited by

the criminal law, sometimes with heavy penalties) an element of another serious criminal and political offence. The Bar is of the view that, given the adequacy of existing laws to punish unlawful acts like the ones described in paragraph 3.7, it would be best for the Government to drop "serious unlawful means" as an element in the proposed offence of secession.

65. Paragraph 3.6 of the Consultation Document proposes two objects concerning secession. Both are problematic in the opinion of the Bar. The first, "withdrawing a part of the PRC from its sovereignty", suffers from lack of precision in that the direct use of the ambiguous concept of "sovereignty" gives rise to uncertainty about what form of withdrawal is to be prohibited. The uncertain nature of the provision is amplified since in recent scholarly discussion, sovereignty has been recognised as a concept capable of division and sharing. The Bar calls for more appropriate drafting language to more concisely explain the ultimate goal of withdrawal.

66. The second proposed object is "resisting the [Central People's Government] in its exercise of sovereignty over a part of China". The Bar considers that this limb should be deleted altogether. Resistance to exercise of sovereignty over a part of China has nothing to do with the acceptable definition of secession in paragraph 45 above. It is difficult, if not impossible, to place a limit to the variety of acts that fall within this expression. Many acts, some of which innocuous and none of which have any implication for creating a new state out a constituent part of the PRC, are capable of being taken by the authorities as resistance to exercise of sovereignty. For example, a protest against the proposed interpretation by the Standing Committee of the National People's Congress of provisions of the Basic Law on the motion of the CPG (i.e. the State Council) may be liable to be condemned as resistance to exercise of sovereignty of the CPG over the HKSAR. A protest against the resumption of land in the HKSAR by the HKSAR Government may also come under such a law because all land in the HKSAR is State Property under Article 7 of the Basic Law and managed by the HKSAR Government on behalf of the CPG.

67. The Bar is of the view that there should be a definition of "China" or "part of China" for a proposed secession offence. Such a definition must pay attention to areas (including territorial seas and exclusive economic zones) where the demarcation of the boundaries with neighboring states is

unsettled.

68. The Bar considers paragraph 3.8 of the Consultation Document to be excessive in its reasoning that organizations ought to be proscribed because its activities include acts prohibited as secession. Such reasoning extends beyond the requirements of Article 23 of the Basic Law and confuses activities (which are prohibited) with the bodies involved principally or incidentally in their carrying out.

69. The Bar considers that the proposals of the Consultation Document to extend by legislation the extra-territorial application of offences of secession to all actions by all HKSAR Permanent Residents outside Hong Kong and to certain actions having a link with Hong Kong by non-HKSAR Permanent Residents outside Hong Kong are questionable. The Bar considers that the Basic Law has not explicitly authorized the legislature of the HKSAR to make laws having extra-territorial effect and there is room for doubt as to the powers of the Legislative Council of the HKSAR in this regard. The Government should therefore explain the constitutional basis on which it relies to enact laws with extra-territorial effect. Further, the Bar considers that the punishing of persons who are not nationals of the PRC for acts done outside the HKSAR may be inconsistent with the state practice of PRC in respect of the extra-territorial effect of its criminal law, thus creating the possibility of an anomalous or even unconstitutional situation.

<u>The Bar's Recommendation</u>

70. The following changes should be effected, at the time of drafting, with respect to the definition of the offence of secession in paragraph 3.6 of the Consultation Document: -

(a) the expression "levying war" should be defined to refer only to a state of war or armed hostilities between states.

(b) the expression "threat of force" should be defined to be consistent with Principle 6 of the Johannesburg Principles so that it applies only to situations where the claimed use of force is the direct and immediate result of the threat and also is, or is likely, to be imminent.

(c) the reference to "serious unlawful means" should be deleted or alternatively defined so that only specific acts of violence or force posing a clear and present danger to the stability and security of the State not already constituting an offence under existing

criminal law will qualify.

(d) the expression "sovereignty" should be replaced by more suitable language.

(e) the clause "resisting the [Central People's Government] in its exercise of sovereignty over a part of China" should be deleted.

(f) there should be a definition for the expression "China".

71. There is no need to enact in legislation the specific inchoate and accomplice offences.

72. Any offence of secession should deal with the violent activities used to achieve a secessionist cause and not the cause itself.

73. The Government should not impose measures to prohibit an organization merely because it had supported certain secessionist activities.

74. The Government should explain its constitutional basis for legislating with extra-territorial effect.

V. SEDITION

75. Sedition is an offence that no longer exists in many countries. In those where it is still retained, it is no longer used. The Law Commission of the United Kingdom and the Law Reform Commission of Canada both recommended that seditious offences be abolished. In Australia, a recent study found that "there is almost agreement in the common law jurisdictions that sedition should be made obsolete". The law of sedition is anachronistic and an unjustified interference with freedom of expression and that abolition of sedition at both Commonwealth and State level is therefore to be preferred to any attempt to "modernise" the crime[3].

The Government's proposal

76. The Government acknowledged that the focus on offences in relation to sedition is on serious cases that endanger the security or stability of the State rather than isolated incidents of limited violence or disturbance of public order which are sufficiently protected by the existing laws of Hong Kong (paragraph 4.12).

[3] See Lamaher, "The Use and Abuse of Sedition" (1992) 14 Sydney LR 287 at 312.

77. The Government proposes to: -

(1) Codify incitement offences in the context of sedition (paragraph 4.13);

(2) Define sedition as "inciting others" to:

(a) commit the substantive offences of treason, secession or subversion; or

(b) cause violence or public disorder that seriously endangers the stability of the "state" or the HKSAR (paragraph 4.13)

(3) Create a separate offence of dealing with seditious publications (paragraph 4.17);

(4) Allow the offence of possession of seditious publication to remain (paragraph 4.18); and

(5) Increase the penalties for acts whether in or outside Hong Kong to 7 years imprisonment for incitement to violence and for seditious publication. Incitement to commit treason, secession and subversion is punishable with life imprisonment.

Problems with Government's Proposals

78. Consistent with the Government's acknowledgement that offences of sedition should focus on serious cases that endanger the security or stability of the state (paragraph 4.12), it is clearly unnecessary to extend the ambit of the offence to cover also the stability of the HKSAR. The public order of the HKSAR has been adequately dealt with by a number of offences in the existing laws of the HKSAR. In this connection, it is especially difficult to see how the mere possession of seditious publication would "endanger security or stability of the state".

79. Insofar as the Government proposes to include "inciting others to commit the substantive offence of treason, secession or subversion" under the offence of sedition, the Bar takes the view that it does not serve any useful purpose.

80. It is unclear as to why the Government intends to provide expressly for statutory offence of inchoate and accomplice acts when the acts of attempting to or conspiring with another to commit an offence are already covered by Part VIIA of the Crimes Ordinance (Cap. 200) and the acts of aiding and abetting, counselling and procuring the commission of an offence are already covered by s. 89 of the Criminal Procedure Ordinance

(Cap. 221).

81. A person who solicits or incites another to commit a crime, or attempt to commit a crime, already commits an indictable offence at common law. See: ***R. v. Gregory*** (1867) LR 1 CCR 77. A person may "incite" another to do an act by threat or pressure, as well as by persuasion. See: ***Race Relations Board v. Applin*** [1973] 1 QB 815 at 825 per Lord Denning.

82. The ordinary meaning of the word counsel is "advise" or "solicit". See ***Archbold 2002*** at paragraph 18-21.

83. In ***AG's Reference (No. 1 of 1975)*** [1975] QB 773, it was said at 779 that

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take."

84. Since the practical differences between "inciting" and "counselling and procuring" are so fine the Bar is of the view that it does not serve any useful purpose to create a separate offence.

85. Even if there is a good reason to enact in legislation the offence of inciting another to commit treason, secession or subversion, such an offence must, in the opinion of the Bar, conform with Principle 6 of the Johannesburg Principles and require that there be a direct and immediate relationship between the incitement and the imminent use of violence to commit the substantive offence.

86. The Bar also observes that the expression "seriously endangers the stability of the state or the HKSAR" is so ambiguous and imprecise that different or varying standards may apply not only as between the stability of the state and the stability of the HKSAR, but also at different times and circumstances, making it difficult for the ordinary citizen to predict with some certainty whether any given course of action would infringe the law.

87. Insofar as the Government proposes to make dealing with (paragraph 4.17) and possessing (paragraph 4.18) seditious publication offences, the Bar is of the view that such proposed offences are potentially restrictive of the freedom of thought. The keeping of a diary or putting down one's thoughts on paper and the keeping of such material will fall within the definition of the offence of possession of seditious publication. If one returns from Taiwan with publication advocating the cause of Taiwanese independence, he might be caught for importing a seditious publication. The Bar is of the view that such offences should not exist in this day and age.

88. Further, the ambit of the proposed offences under paragraph 4.17 of the Consultation Document is clearly too vague and too wide. In this regard, the Bar makes the following points: -

(1) The prosecution is apparently not required to prove the specific intent that the accused intended to cause another to commit the substantive offence of treason, secession or subversion.

(2) The notion of "reasonable suspicion" (which applies also to the offence of possession of seditious publication in paragraph 4.18) is fundamentally objectionable. Seditious intention must be attributed to a person. To reduce *mens rea* to reasonable suspicion is departing from current law where the intention is held by the person. This notion leads inevitably to imposing a duty on persons to read every part of what is to be printed, published, sold, offered for sale, distributed, displayed, reproduced, imported and exported at risk of prosecution if they do not.

(3) Moreover, it involves a value judgment and puts persons at risk if, objectively, the police or prosecutors consider that judgment to be wrong. Alternatively, in order to avoid that risk, they second-guess the police or prosecutors and become censors themselves in effect. That also departs fundamentally from the current law with its requirements of a "seditious intention".

89. The Bar also notes that the modes of dealing identified in paragraph 4.17 of the Consultation Document differs from the existing law under s 10(1) of the Crimes Ordinance in that the proposal in the Consultation Document included the additional mode of "export". The Government should explain its rationale for adding this mode of dealing.

90. The Bar considers that the proposals of the Consultation Document to extend by legislation the extra-territorial application of offences of sedition to all actions by all HKSAR Permanent Residents outside Hong Kong and to certain actions having a link with Hong Kong by non-HKSAR Permanent Residents outside Hong Kong are questionable. The Bar considers that the Basic Law has not explicitly authorized the legislature of the HKSAR to make laws having extra-territorial effect and there is room for doubt as to the powers of the Legislative Council of the HKSAR in this regard. The Government should therefore explain the constitutional basis on which it relies to enact laws with extra-territorial effect. Further, the Bar considers that the punishing of persons who are not nationals of the PRC for acts done outside the HKSAR may be inconsistent with the state practice of PRC in respect of the extra-territorial effect of its criminal law, thus creating the possibility of an anomalous or even unconstitutional situation.

<u>The Bar's Recommendations</u>

91. There is no useful purpose in creating a separate statutory offence of inciting another to commit treason, secession or subversion and calling that offence sedition. The position has been adequately dealt with under the common law and s 89 of the Criminal Procedure Ordinance. Even if there is a good reason for creating such a separate offence, such an offence must conform to Principle 6 of the Johannesburg Principles.

92. There is no good reason to create a new statutory offence of causing violence or public disorder that seriously endangers the stability of the HKSAR. The expression "seriously endangers the stability of the state or the HKSAR" is so ambiguous and imprecise that they have no place in any implementing legislation.

93. The Government should remove from the statute book all offences relating to seditious publication and not enact any new and similar offences.

94. The Government should remove all references to "reasonable suspicion" in the offences relating to seditious publication. Seditious intention must be specifically attributed to a person. To reduce it to reasonable suspicion is a departure from requirements of existing laws.

95. The Government should explain the reason for adding the mode of "export" in the proposed offence in relation to dealing with seditious

publication.

96. The Government should explain its constitutional basis for legislating with extra-territorial effect.

VI. SUBVERSION

97. Chapter 5 of the Consultation Document sets out the proposals of the Government to create an offence of subversion. The offence itself is not known to common law and the Bar is of the view that much of the proposed offence has already been covered by the offence of treason and secession. The Bar is also concerned with the constitutionality and vagueness of the proposed offence.

The Government's proposals

98. The Government proposes to:

(1) Create an offence of subversion to ensure that the HKSAR will not be used as a base for supporting subversive activities in or against the Mainland;

(2) Make it an offence of subversion to intimidate the PRC Government or overthrow the PRC Government or disestablish the basic system of the state as established by the Constitution, by levying war, use of force, threat of force, or other serious unlawful means. The basic system of the state includes the National People's Congress, the Central People's Government and other state organs;

(3) Create statutory offences of attempting, conspiring, aiding and abetting, and counseling and procuring the commission of the subversion offence;

(4) Apply the subversion offence to all persons who are voluntarily in the HKSAR and to extra-territorial conduct by HKSAR Permanent Residents and all other persons whose conduct has a link with the HKSAR either under the common law or the Criminal Jurisdiction Ordinance.

Problems with Government's Proposals

Constitutionality

99. Article 85 of the present Constitution of the PRC defines "Central People's Government" ("CPG") as the State Council of the PRC. It is therefore

clear that Article 23 requires the HKSAR to enact law to outlaw acts of subversion against the CPG i.e. the State Council of the PRC.

100. The term "government of a state" is sometimes defined in a broad sense to include all executive, legislature and the judiciary. In some states, the term "government" is narrowly defined to be the executive branch of the state only.

101. Before 1954, the PRC adopted the definition of the term "Government" in the broader sense to include all authorities of the country. However, in the 1954 Constitution, the term "Government" was redefined and restricted to the executive branch of the PRC and the CPG was thus defined. The State Council is the executive body of the highest organ of state power. It is the highest organ of state administration.

102. The Consultation Document proposes to make it an offence of subversion:-

(1) to intimidate the Government of the PRC; or

(2) to overthrow the Government of the PRC or disestablish the basic system of the state as established by the Constitution.

103. By seeking to protect Mainland establishment other than the State Council, the Proposals have gone beyond what is strictly required by Article 23 and are unnecessary.

Other Problems

104. A political offence should be narrowly and clearly defined in order not to undermine or encroach upon fundamental rights and freedoms that are protected in the Basic Law and that form the pillar of the success of Hong Kong.

105. The offence of subversion is vaguely defined. The concept of "intimidating the PRC Government" or "disestablishing the basic system of the state" is not known to our law. Nor are these concepts defined in the Consultation Document. The literal meaning of "intimidation" is "threat". Thus, under the Proposals, it will be an offence to threaten (intimidate) the Government by the threat of force!

106. The essence of subversion is to overthrow the Government by force or violence. The offence of subversion should be so defined and confined.

107. The Bar accepts that with the rapid development of technology, a serious threat to the country's security and stability might come from illegal acts employing non-violent means, such as electronic sabotage. If it is considered necessary to prohibit electronic sabotage that poses a clear and present danger to the stability and security of the country, the prohibited act should be clearly set out and be so confined. The scope of "disestablishing the basic system of the state" goes beyond the legitimate concern, and is a vague and sweeping concept.

108. The prohibited acts include "levying of war", "threat of force", and "other serious unlawful means". These are again very broad and imprecise concepts.

109. "Levying of war" is not limited to war in international law or internal armed conflicts, but includes "any foreseeable disturbance that is produced by a considerable number of persons, and is directed at some purpose which is of a general character. It is not essential that the offenders should be in military array or be armed with military weapons." (at page 9, footnote 17) A riot or serious social disturbance can fall within the meaning of "war".

110. A threat of force is prohibited. There is no requirement that the threat has to be real and imminent.

111. By definition, "unlawful means" are means against the law and are already prohibited under existing criminal law. It is said to refer to those acts listed under paragraph 3.7, most of which are already prohibited by criminal offences under existing law. Some of them attract very heavy penalties. It is difficult to see what additional protection to the community or the "state" there are by making these criminal acts an element of another serious criminal, albeit political, offence.

112. On the other hand, the danger that it may pose to freedom of expression, assembly and demonstrations is obvious. A protest in the form of sending emails *en masse* to a Government site (which is said to have caused serious disruption of an electronic system) or a public call to jam the long distance telephone calling system by massive and repeated internet phone calls in protest of the dramatic price increase by a national enterprise on telecommunications), or an industrial strike by postal or medical service

workers (which may be said to cause serious disruption of an essential service) could come within the meaning of "unlawful means" and can be punished by the offence of subversion if they "disestablish the basic system of the state".

113. While the Consultation Document states that "adequate and effective safeguards should be in place to protect the freedoms of demonstration and assembly" (footnote 47 at page 30, referring back to paragraph 3.7), nowhere in the Consultation Document have such "safeguards" been explained.

114. There is no requirement of any causal connection between the acts (levying war, use of force etc) and the consequences (overthrowing "the PRC Government" or "disestablishing the basic system of the state"). It is wrong in principle that someone can be found guilty of the offence by publicly proclaiming at Victoria Park that Taiwan should strengthen its military force to liberate the Mainland, even when it is obvious that such threat has no impact on the stability or the security of the Government at all.

115. Subversion is a serious offence and hence should be confined to acts the commission of which will pose a clear and present danger to "the stability and security of the Government".

116. It is alarming to learn that the reason for having the offence of subversion (and secession) is to ensure that the HKSAR will not be used as a base for supporting subversive activities in or against the Mainland.

117. It is important to ensure that lawful activities in Hong Kong, which may be unlawful or unacceptable in the Mainland, should not be prohibited or suppressed by the subversion offence through the back door. Suppose a HKSAR Permanent Resident in HKSAR provides moral and financial support to a Mainland organization that advocates for a peaceful change of the PRC Government by means that are considered unlawful under the PRC criminal law. Could that person be guilty of conspiring with persons outside Hong Kong to commit the subversion offence, as they conspire to adopt "serious unlawful means" to "intimidate the PRC Government", or could he be guilty of aiding and abetting the commission of the subversion offence by providing financial support?

118. Alternatively, if the Mainland organization is proscribed by the CPG on ground of national security due to activities which are considered unlawful under the PRC Criminal Code but lawful under the laws of HKSAR, the HKSAR Permanent Resident may be found guilty by reason of his affiliation with such organization. This is another reason why the proposal on proscription is objectionable.

119. Subversion offences or related inchoate offences should not be a means to suppress peaceful advocacy for a change of the PRC government or peaceful support for such change by any organization that adopts constitutionally approved means in the Mainland even if the organization is proscribed as unlawful in the Mainland or its activities are considered unlawful under PRC criminal law.

The Bar's Recommendations

120. The notion of "intimidating the PRC Government" should be abandoned, and the act of "disestablishing the basic system of the state" should be confined to those acts the commission of which pose a clear and present danger to the stability and security of "the PRC Government" and which are committed with intent to overthrow "the PRC Government".

121. The concept of "other serious unlawful means" is too vague. It should either be deleted or defined so that only specific acts of violence or force posing a clear and present danger to the stability and security of "the state" not already constituting an offence under existing criminal law will qualify.

122. It should be expressly stated what the "adequate and effective safeguards of guaranteed rights" are and how the guaranteed rights are safeguarded.

123. The expression "levying war" should be defined to include only a state of war.

124. It should be expressly provided that a threat of force has to be real and imminent for the purpose of subversion offence.

125. There should be clear causal connection between the prohibited acts and the consequences. No one shall be guilty of the offence of subversion unless what he does will cause a clear and present danger to the stability

and security of the government. It should be a requirement that the prosecution proves the existence of such clear and present danger.

126. Any method of advocating change in the PRC Government or the HKSAR that does not involve the use or threat of force as described above should not be considered subversion.

127. No one should be convicted of an offence of subversion or related inchoate offences solely by reason of affiliation with a Mainland organization that has been proscribed by the CPG on ground of national security.

VII. THEFT OF STATE SECRETS

128. The underlying basis for legislation for the theft of state secrets is that it should comply with the ICCPR and with all of the Johannesburg Principles. In particular,

(1) Principle 1.1 which requires that any restriction on the freedom to seek receive and impart information must be unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether one particular action is lawful.

(2) Principle 13 which provides that in all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

(3) Principle 15 which provides that no person may be punished on national security grounds for disclosure of information if (a) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (b) the public interest in knowing the information outweighs the harm from disclosure.

The Government's proposals

129. The Consultation Document acknowledges that the Official Secrets Ordinance currently protects state secrets (paragraph 6.1). The Consultation Document also states that the Government considers that "the existing provisions of the Official Secrets Ordinance already strike an appropriate and delicate balance between the need for open government and for protection of state secrets" (paragraph 6.14).

130. However, the Consultation Document goes on to say "Article 23 should

not be interpreted as implying that information other than state secrets needs no protection and goes on to propose 'refinements' to the existing laws" (paragraph 6.14). In particular, the Government proposes to retain the stipulations of the existing Official Secrets Ordinance, specifying that the targets of protection against the theft of state secrets should be:

(1) Where spying is concerned, information which is likely to be useful to an enemy, and whose obtaining or disclosure is for a purpose prejudicial to the safety or interests of the PRC or the HKSAR;

(2) Where unlawful disclosure is involved, information belonging to the following categories:

  (a) security and intelligence information;
  (b) defence information;
  (c) information relating to international relations;
  (d) information relating to relations between the Central Authorities of the PRC and the HKSAR; and
  (e) information relating to commission of offences and criminal investigations.

131. The implication is that the proposals in the Consultation Document are not necessary for the purpose of protecting state secrets under Article 23. The Government should be asked to confirm such of the Bar's understanding of paragraph 6.14. If it says that Article 23 necessarily requires some of the proposals, then it should identify them precisely.

<u>Problems with Government's Proposals</u>

HKSAR or HKSARG cannot be "the state"

132. The Consultation Document assumes that the HKSAR Government is "the State". Nothing in the Basic Law makes that constitutional assumption. The Bar repeats the point that equating the HKSAR or the HKSAR Government with "the State" is constitutionally dubious and obscures distinctions that can be properly made between the HKSAR and the rest of the PRC. Hong Kong could share state secrets in its capacity as a SAR of the PRC but it could not own state secrets to the exclusion of other parts of the PRC.

133. The definition of "State" in the Official Secrets Ordinance (Cap. 521) at least has the advantage of being a functional definition that is confined to

the Ordinance and does not equate the HKSARG with the Central People's Government. "State" is defined in that law as including "the government of a State and any organ of government": section 12(1). It seems more appropriate to describe the HKSARG as an "organ" of the central government rather than suggest it is central government's *alter ego*.

Relations with the Mainland

134. Paragraph 6.18 says that information relating to relations between the Central Authorities of the PRC and the HKSAR need to be protected. The rationale for this is that before 1997 relations between Hong Kong and the Central Authorities were protected under the rubric of "international relations": see s. 12(1) Official Secrets Ordinance.

135. The protection that used to be afforded "international relations" under section 12(1) was two-fold. First, there were covered relations between any State and the United Kingdom. Second, there were covered relations between Hong Kong and the UK and the external relations of Hong Kong, for which the UK had constitutional responsibility.

136. The Bar can understand that it can be argued that some kinds of relations (e.g. concerning defence) between the HKSAR and the Central Authorities might warrant protection as well as such external relations between the HKSAR and other foreign states that are permitted under Chapter VII Basic Law. The Bar however fails to understand the justification for such protection put forward by the Government.

137. There were completely different constitutional arrangements in place before 1997 when the Official Secrets Ordinance was drafted. Hong Kong was a Crown Colony that was governed by the Queen's representative, the Governor. It was not a part of the United Kingdom. It was a dependent territory and the UK was solely responsible for its relations with foreign states, which included in those days the Mainland.

138. Hong Kong is "an inalienable part" of the PRC: Article 1 of the Basic Law. The constitutional basis for protecting information relating to relations between the Central Authorities of the PRC and HKSAR must be Chapter II of the Basic Law. Comparisons with English constitutional arrangements for governing dependent territories are totally inappropriate. The former justification for protecting such information under the heading of "international relations" has disappeared with the change of sovereignty

over Hong Kong.

139. The Bar invites the Government to reconsider the justification for affording protection to information relating to relations between the Central Authorities of the PRC and HKSAR.

Disclosure of Information by Non-Confidants

140. Paragraph 6.22 proposes that there should be a new offence of making an unauthorized and damaging disclosure of protected information that was obtained, directly or indirectly, by unauthorized access to it. The proposal is described in terms of a "loophole" that needs to be "plugged".

141. The problem with this proposal is that it makes criminal the dissemination of information by someone who does not owe a duty of confidence to the Government.

142. The basis for the various criminal offences in Part III of the Official Secrets Ordinance is the duty of confidence arising from past or present employment. If there is, or was, no employment relationship, then there is, or was, no duty of confidence.

143. The Bar is of the view that it is wrong in principle to impose criminal liability for the disclosure of information where no private law duty of confidence necessarily exists. It is wrong to suggest that the problem is merely technical.

144. The Government is adequately protected by the civil law against third party disclosure. If a third party publishes information obtained from a government servant who has wrongfully communicated it, the common law imposes a duty of confidence on the party in possession of the information knowing it is subject to confidence. That duty is not absolute. The courts will refuse to protect an iniquity in the guise of upholding a confidence. See summary of the law in ***A-G v. Guardian Newspapers (No.2)*** [1990] 1 A.C. 109 per Lord Griffiths at 268B-269D.

145. The issue of third party publication of government secrets was well known to the drafters of the Official Secrets Act 1989 and yet no measures were taken to impose criminal liability for the same. We can assume that those who had carriage of the Official Secrets Bill in LegCo knew the legislative history of the 1989 Act. No attempt was made then to expand the scope of

the legislation.

146. The Bar invites the Government to say why there is a need now for this measure given the existence of a civil remedy and given the legislative history of the Ordinance.

147. The Consultation Document argues for a change in the definition of "a public servant or government contractor" at section 18(2) of the Official Secrets Ordinance, Cap. 521 (see paragraph 6.24). It says that the definition should be changed to include "former public servant or former government contractor". Comparisons are made to sections 14 to 17 of the Ordinance which cover former public servants or former government contractors. The proposed change is described as "technical" and as plugging "a loophole" that exists in the law. The comments of a Scottish judge in a 1989 case are relied on as providing indirect support for the proposal.

148. The effect of the proposal if implemented would be to make it a criminal offence for any person to disclose information relating to security and intelligence matters, defence and international relations if that person has obtained that information from a past or present public servants and government contractors. Past and present public servants and government contractors have a statutory lifelong duty to maintain confidences respecting such matters.

149. The Bar does not accept that such a reform can be described as "technical".

150. Public servants and government contractors owe a duty of confidence at common law under the terms of the contract of service or for services. Exceptionally, such as in the case of members of the intelligence services, the law of equity will make it a life-long obligation. If they breach it they may be civilly liable for damages. That sanction may not be sufficient to deter breaches and so criminal sanctions are imposed under sections 13-17 of the Official Secrets Ordinance.

151. When the public servant ceases public service, and the government contractor has performed his services, the common law duty of confidence may or may not be co-terminous with the statutory duty under sections 13-17. Section 18(2) as it is presently drafted imposes criminal liability on

a third party only where there has been a disclosure by a public servant or government contractor who is currently employed as such.

152. Disclosure under section 18(1) only makes a third party liable to prosecution if it occurs 'in the circumstances' mentioned in sub-section (2). These include the public servant or government contractor entrusting the information 'on terms requiring it to be held in confidence'.

153. This is a strong indication that the sub-section was meant only to apply to current public servants or current government contractors because it is difficult to see how a person who has left public service and may have been relieved from his private law duty of confidence can require a third party to hold that information in confidence. Similarly, the sub-section talks about the third party not having the 'lawful authority' of the former public servant or government contractor to make disclosure. It is difficult to see how a former public servant or government contractor has any authority to permit third parties to disclose information entrusted to him in government service.

154. Far from being a 'loophole', the Bar is of the opinion that the reference in the legislation only to serving public servants and government contractors has been deliberate. The White Paper published by the UK Government in 1988 was a detailed document that had been written in the light of the ***Spycatcher Case***, which concerned the very subject matter of section 13-18 of the Ordinance (see generally ***A-G v. Guardian Newspapers No.2*** [1990] 1 A.C. 109 covering the litigation between December 1987 and October 1988 and ***R v. Shayler*** [2002] 2 All ER 477 reviewing the 1988 White Paper).

155. It is difficult to imagine that the draftsman failed to appreciate the potential problem of a former public servant or government contractor making disclosures to third parties and those third parties making further disclosure. It is submitted that the policy was to leave disclosure in such circumstances to be addressed in the civil courts by the government seeking private law remedies, if available, against the third party.

156. Certainly, if it was a 'loophole' one would have expected it to have been remedied by an amendment to the Official Secrets Act 1989. No amendment has been made. One would also have expected the 'loophole' to have been spotted by government lawyers when the Official Secrets Bill

was in the drafting process or when it was presented to LegCo.

157. The case of ***Lord Advocate v. The Scotsman*** [1989] 3 WLR 358 referred to in paragraph 6.24 does not, in the Bar's view, support the argument that section 18(2) is sloppily drafted so that there is a 'loophole'. The case concerned the duty of confidence owed by a former Crown servant. Lord Jauncey's remarks about section 5 of the Official Secrets Act 1989 were made in passing because the Act had not come into force. More importantly, Lord Jauncey did not express any opinion on whether or not section 5 should apply to members of the security services whose service had terminated (372D-E).

158. The Bar invites the Government to review the legislative history of the Official Secrets Act 1989 and the Official Secrets Ordinance and say whether the limitation contained in section 18(2) was deliberate and represented legislative intent or an inadvertent drafting error.

Agents and Informants

159. Paragraph 6.25 proposes to amend the definition of 'government contractors' in section 12(2) of the Official Secrets Ordinance to include agents and informants that provide information to the police.

160. The statutory duty to maintain confidences in this part of the Official Secrets Ordinance is built upon the duty of confidentiality that arises under contract. As the Consultation Document acknowledges, many informants are unpaid.

161. It seems very odd to 'deem' agents and informants as working under a contract for services when they are not. Such a fiction is unpalatable as a foundation for criminal liability. If unpaid agents or informers do acquire information that they should not disclose in the public interest, then some other basis than a 'deeming' provision for fixing them with criminal liability seems desirable.

Public interest defence

162. The Consultation Document proposes new and further restrictions on the dissemination of official information. Those proposals are to be implemented through changes to the criminal law. That inevitably gives rise to a consideration of whether a defence should be available to a person charged with a relevant offence of disclosure in the public interest.

163. No such defence exists under statute or the common law. Neither is it necessarily provided by a constitutional right to freedom of expression. That was decided as recently as March this year in the case of ***Shayler***. The House of Lords held that the right of an ex-member of the security service to freedom of expression guaranteed under Article 10 of the European Convention on Human Rights did not prevail against a provision of the Official Secrets Act 1989 prohibiting the unauthorized disclosure of relevant information. The House of Lords instead sought to emphasise the importance of disclosure to lawful authorities (the Attorney General, Director of Public Prosecutions, the Prime Minister and other ministers and the police) of relevant information and the importance of judicial review of the decisions by those in authority refusing to authorize disclosure to third parties.

164. It is disappointing that the Consultation Document does not touch upon this topical issue. The ***Shayler*** case concerns disclosure by a former member of the security service and does not directly apply to the new and further restrictions on the dissemination of official information proposed by the Consultation Document. The basic premise in the ***Shayler*** case that a citizen under a democratic government can apply for lawful authorization in order to expose wrongs of the government simply is not relevant here under "One Country Two Systems". Not only is there no mechanism to apply for lawful authorization from Mainland government departments but local courts have no power over the Central Government. Furthermore, the judgment in ***Shayler*** has no relevance where we are enacting laws on our own. We are free to introduce a public interest defence and a defence excepting exposures of unlawful and unconstitutional wrongs since it is plainly right to do so.

<u>The Bar's Recommendations</u>

165. Unless the Government can show that the proposals in the Consultation Document are necessary for the purpose of protecting state secrets under Article 23, all it needs to do to meet the requirement to legislate in this regard is to undertake an extensive review of the Official Secrets Ordinance to bring provisions in line with particularly Principles 2, 6, 12, 15, 16 and 17 of the Johannesburg Principles.

166. The Bar does not support changes the Government is proposing by the Consultation Document to introduce to the Official Secrets Ordinance.

167. The Government should either drop the proposal to protect information relating to relations between the Central Authorities of the PRC and HKSAR or clearly define such protected information as covering only information the disclosure of which will lead to immediate threat to national security.

168. Any definition of "protected information" should exclude information that is already freely available in the public domain.

169. The Government should drop the proposed new offence of making an unauthorized and damaging disclosure of protected information that was obtained by unauthorized access to it.

170. The Government should drop the so-called technical amendment aimed at past public servants and government contractors and reconsider the legal basis for obliging unpaid agents and informants to observe the duty of confidentiality.

171. The Government should provide safeguards that will protect press reporting and, in particular, say whether it thinks a public interest defence is necessary or desirable.

VIII. FOREIGN POLITICAL ORGANIZATIONS

The Government's Proposals

172. The Government proposes to make it an offence to organize or support the activities of proscribed organizations, or to manage or to act as an office-bearer for these organizations. An organization that has a connection with a proscribed organization might also be declared as unlawful where necessary using standards of the ICCPR.

173. The Consultation Document proposes that an organization that endangers state security could be proscribed, but only where necessary applying standards of the ICCPR to protect national security, public safety and public order, and where one of the following circumstances exists:

(1) the objective, or one of the objectives, of the organization is to engage in any act of treason, secession, sedition, subversion, or spying; or

(2) the organization has committed or attempts to commit any act of treason, secession, sedition, subversion, or spying; or

(3) the organization is affiliated with a Mainland organization that has been proscribed in the Mainland by the Central Authorities in accordance with national law on the ground that it endangers national security.

174. While acknowledging that existing provisions of the Societies Ordinance, in particular those governing the definition of "foreign political organization" ("FPO") and "connections" are sufficient for the purpose of prohibiting FPO from participating in the political process in the HKSAR, the Consultation Document went on to say that 'for the purpose of protecting *national security*', separate provisions are needed to prevent such FPO from conducting political activities in the HKSAR or establishing ties with local political organizations that are harmful to '*national security* or *unity*': see paragraph 7.11 and 7.12.

Problems with Government's Proposals

General

175. The Bar is of the view that existing mechanism provided under the Societies Ordinance is sufficient to protect the HKSAR from the political activities of FPOs in Hong Kong which may damage national security. A case has not been made out to justify why new laws are needed.

176. Section 5D(1)(a) & (b) of the Societies Ordinance provides that:
"The Societies Officer may, after consultation with the Secretary for Security, cancel the registration or exemption from registration or a society or a branch:

(a) if he reasonably believes that the cancellation is necessary in the interest of *national security* or public safety, public order (order public) or the protection of the rights and freedoms of others; or

(b) if the society or the branch is a political body that has a connection with a *foreign political organization* or a political organization of Taiwan."

177. Further, section 8(1)(a) and (b) of the Societies Ordinance provides that:
"The Societies Officer may recommend to the Secretary for Security to make an order prohibiting the operation or continued operation of the

society or the branch:

(a) if he reasonably believes that the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of *national security* or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others; or

(b) if the society or the branch is a political body which has a connection with a *foreign political organization* or a political organization of Taiwan."

178. Article 23 of the Basic Law requires the HKSAR to enact law to prohibit the acts prescribed therein and to prohibit FPOs from conducting political activities in the HKSAR and to prohibit political organizations or bodies of the HKSAR from establishing ties with FPOs or bodies. Therefore, Article 23 is directed at acts and activities rather than the existence of organizations themselves. However, the Consultation Document makes no distinction between the acts of FPOs and the existence of FPOs. The Bar is of the view that a distinction should be drawn between 'political activities' of an organization and the 'non-political activities' of the organization and it is the former that should be prohibited in accordance with the requirements of Article 23. The 'non-political activities' of a FPO should not be subject to the scrutiny of the law.

179. Another problem with the Consultation Document is that the concept of 'national security' or 'unity' has not been adequately defined and leaves a lot of room for doubts. Unless and until the general public knows what constitute to 'national security', it is anticipated that most people, particularly those who by nature of their jobs may come into contact with FPOs e.g. journalists and reporters, will err on the side of caution and reduce their contacts to the minimum with what they fear as bodies which may one day be proscribed as FPO. This will have a direct adverse effect on freedoms so far enjoyed by the residents of the HKSAR, like freedoms of speech, expression and information.

180. The proposal of making it an offence to *'organise or support activities of a proscribed organization'* is in the Bar's view too widely defined. If the concept of "support" includes *'being a member of; providing financial assistance, other property or facilitation to; and carrying out the policies and directives of the proscribed organization'*, this will presumably include trivial and innocent acts like becoming a 'harmless' ordinary member or making a small donation to an organization which has been so

proscribed.

Proscription Mechanism

181. As a general observation, the Bar takes the view that the entire proscription mechanism centred too much power on one person in the executive branch of the government, namely the Secretary for Security. No sufficient 'checks and balances' have been put in place *prior to* an organization (a definition not confined to a FPO and without the need of an organization and structure) being proscribed by this one single individual in office. The provisions of the Societies Ordinance have sufficiently prohibited FPO in taking part in the political process of the HKSAR. It is questionable whether there is a need to give such further and sweeping power to an officer in the executive branch of the government to proscribe such an organization.

182. Further, we take the view that the concept of banning a local affiliated organisation, which has been proscribed in the Mainland by the Central Authorities on the ground that it endangers national security, is entirely outside the ambit of Article 23. It is clear that Article 23 only requires the HKSAR government to enact laws to prohibit ***acts*** mentioned therein. It does not give power to the HKSAR to prohibit a local organization that has affiliation with a Mainland organization. It cannot be said that a Mainland organisation is a FPO. Not can it be said that a local organization, which has affiliation with a Mainland organization, is covered by the wordings of Article 23.

183. We also are of the view that the power to ban a local organization affiliated with a Mainland organization, which has been proscribed in the Mainland by the Central Authorities, is against the concept of 'One Country, Two Systems'. Such power also violates freedom of association guaranteed by the Basic Law. The HKSAR government should be allowed to determine which are organizations that may pose a threat to 'national security'. It is not necessary for the Central Government to determine on our behalf. If the HKSAR is deemed to be competent to determine what are national threats in other contexts like treason, subversion and secession, then why in this particular area the HKSAR should 'defer' to the decision of the Central Government.

184. It is clear that the concept of 'national security' as understood and

practised by the Central Authorities are very different from that recognised in the HKSAR and in international standards. Mainland laws on national security are very wide. They include "stability" or "interest" of the government or state. Information relating to economic or health can be said to damage national security. The recent imprisonment of an AIDS activist is a case in point. Should one day the Mainland Authorities proscribe an organisation like the Falun Gong on national security grounds, and go further to notify the HKSAR that a HKSAR Falun Gong body being a cell of and affiliated with such a Mainland Organization has posed a threat to national security, it will be stretching one's imagination to expect the Secretary for Security to say that the HKSAR body should not be so proscribed in the HKSAR.

185. Therefore, the 'two-tier' test stated in paragraph 7.16 of the Consultation Document in our view offers a token measure of protection only. In practice, it is extremely unlikely that the Secretary for Security is going to invoke the wrath of the Central Authorities by declining to proscribe a local organisation that is affiliated with a Mainland organisation, which has already been so proscribed by the Mainland Authorities.

186. Once the different concepts of "national security" practised in the two systems have ceased to be kept apart by laws made as proposed under paragraphs 7.15 and 7.16, the appeal mechanism proposed under paragraph 7.18 is no consolation because the independent tribunal or the court must apply the laws as they find them and cannot cure the evils in the root legislation.

<u>The Bar's Recommendations</u>

187. The regime under the Societies Ordinance is sufficient to comply with Article 23 insofar as it requires HKSAR to enact laws to prohibit foreign political organizations or bodies from conducting political activities in HKSAR. The Government should drop completely the proposals contained in the Consultation Document for proscription of organizations, which are clearly outside the ambit of Article 23.

IX. INVESTIGATION POWERS & PROCEDURAL AND MISCELLANEOUS MATTERS

The Government's Proposals

Investigation Powers

188. The proposal in Chapter 8, Part II of the Consultation Document is to retain existing powers relating to search and seizure under sections 8 and 14 of the Crimes Ordinance (search and seizure of materials relating to incitement to disaffection and seditious publications on display) and section 11 of the Official Secrets Ordinance (search and seizure in relation to espionage offences).

189. These powers are exercisable on the authority of a judge (section 8 Crimes Ordinance), by a police officer (section 14 Crimes Ordinance) and a magistrate (section 11(1) Official Secrets Ordinance) except in cases of 'great emergency' where the interests of the state (PRC and/or HK) warrant necessary immediate action and then these powers can be exercised under the authority of a superintendent of police.

190. Part III of Chapter 8 proposes to extend these powers. It is suggested that there is need to confer an emergency entry, search and seizure power for some Article 23 offences when a superintendent reasonably believes that a relevant offence is being committed or has been committed, that immediate action is necessary to prevent the loss of evidence and that the investigation of the offence would be seriously prejudiced.

191. The 'selected' Article 23 offences are set out in Annex 1. For instance, dealing with a seditious publication and supporting a proscribed organization would each potentially engage these extraordinary powers. The justification for including the former is said to be that the offence might lead to the more serious offences of treason, secession and subversion. As for the other offence, the justification is said to be the potential threat to national security and territorial integrity.

192. The Consultation Document calls for an extraordinary financial investigation power to be created in respect of selected Article 23 offences (paragraph 8.6) to be used in times of 'exceptional emergency'.

193. At paragraph 8.7 of the Consultation Document is the proposal that selected Article 23 offences should be included in Schedule 1 of the Organized and Serious Crimes Ordinances (Cap. 455). The purpose is to make the definition of 'organized crime' in section 2 of the ordinance apply so as to enable the police and courts to have the benefits of the enhanced powers that ordinance confers on them.

Time limits for bringing prosecutions

194. The Government proposes to remove the current time limits for bringing prosecutions against treason or sedition (paragraph 9.5).

Problems with Government's Proposals

Investigation Powers

195. The power to enter private premises and search them without a warrant is currently reserved only in respect of the most serious offences under the Official Secrets Ordinance. It is based on section 9 of the Official Secrets Act 1911.

196. The Consultation Document says that a warrantless power of entry onto private premises exists at common law in order to stop a crime but that no common law power exists for the purpose of investigation and that *may well be a major weakness in the investigation of some of the more serious Article 23 offences* (paragraph 8.4).

197. The Bar believes that the starting point for any discussion about powers of entry and search is Article 29 Basic Law. It states that: *The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.*[4]

198. The burden of proving that a warrantless power of entry, search and

[4] Also relevant is Article 17 of the ICCPR, which is in similar terms. It applies to HK via Article 39 of the Basic Law. For a common lawyer's view on the subject of search and seizure powers in a non-constitutional context see Sir (Now Lord) Browne-Wilkinson's remarks in ***Marcel v. Commissioner of Police*** [1992] 1 All ER 72 at 86: '*Search and seizure under statutory powers constitute fundamental infringements of the individual's immunity from interference by the state with his property and privacy-fundamental human rights.*'

seizure is necessary (as opposed to being useful or convenient) lies on the Government.

199. The vagueness of the proposal, the tenuousness of some of the justifications in Annex 1, the fact that the proposed power is linked to an extraordinary power respecting exceptional offences (section 11(2) Official Secrets Ordinance) originating from an extraordinary English Act[5] coupled with the lack of any awareness of the basic constitutional principle referred to means that the Consultation Document fails even to make out a *prima facie* case for creating extraordinary powers of entry, search and seizure in this area.

200. The extraordinary financial investigation power proposed under paragraph 8.6 would have the effect of compelling disclosure to the police of financial information that is being held subject to a common law duty of confidence as a result of an executive decision.

201. Annex 1 contains details of the 'selected' offences. The power could be used in respect of a case of suspected subversion or a case of suspected secession. The justification is said to be the serious threat to national security and stability in the case of subversion and the threat to the territorial integrity of the country in the case of secession.

202. Whether an offence of secession or subversion will actually have the potential to give rise to such threats will depend on how tightly drawn the substantive offences are. If, for example, the secessionist threat arises from the use of 'other serious unlawful means' (paragraph 3.6) then the magnitude of that threat depends on the means used or planned to be used and that depends on pinning down what is meant by 'other serious unlawful means' (see paragraph 199 above and the observation about the 'tenuous' justifications contained in Annex 1).

203. The Bar feels that this proposal is not adequately explained in the Consultation Document. It impinges on another Basic Law right (Article 30: freedom and privacy of communication). It is necessary therefore to

[5] The Official Secrets Act 1911 was introduced into Parliament disingenuously as an anti-espionage measure by the Secretary of State for War and not as a measure that would affect the dissemination of official information at home which, if presented as such, would have been the responsibility of the Home Secretary. The bill was remarkable in that it was introduced and passed in a single afternoon.

explain in greater detail the circumstances in which this power could be used and the safeguards that the provision will contain against abuse by the executive[6].

Time limits for bringing prosecutions

204. It would be intolerable that a person be liable to be prosecuted for an offence of treason or sedition for things said or done 20 or 30 years after the event when the threat to the state had passed and a prosecution could be seen as an act of political vindictiveness.

205. The Bar opposes the abolition of time limits for bringing prosecutions for sedition and treason (paragraph 9.5). The Consultation Document rightly points out those statutory time limits for indictable offences are rare. These time limits therefore exist as an exception to the common law rule. There must have been good reason for the carving out of the exception.

206. The Bar suggests that the existence of time limits recognizes the plain fact that, at bottom, the offences of sedition and treason are political offences[7] and can only be exceptionally justified by reference to a present serious threat to the state.

<u>The Bar's Recommendations</u>

Investigation Powers

207. Government should drop all proposals for adding to the sufficient investigation powers that law enforcement agencies already enjoy.

Procedural and Miscellaneous Matters

208. All offences under Article 23 should be prosecuted within 6 months. Article 23 should not be a tool for persecution. In this regard, the Bar relies on the recent Privy Council decision in ***Dyer v Watson and another*** [2002] 3 WLR 1488 affirming the right of an accused to be prosecuted with all

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[6] For example, a safeguard against abuse might be a requirement that all 'emergency' powers of entry, search, seizure and financial investigation be reviewed and ratified within 24 hours by a judge.

[7] The political nature of the offence of treason was recognised as long ago as the 17^{ht} century. *'Treason doth never prosper, what's the reason? /For if it prosper, none dare call it treason.'*(John Harington; Epigrams (1618))

due expedition.

209. The consent of the Secretary for Justice for the prosecution of Article 23 offences should be retained (paragraph 9.6) and should not be delegable.

210. Given the fact that Article 23 offences are peculiar in that they protect primarily government and state interests, the Bar believes that there is a strong case for giving a person accused of such crimes the right to a trial by jury.

211. The Government should make clear that the punishments referred to in paragraphs 9.8-9.9 of the Consultation Document, when read with Annex 2, are maxima and not mandatory sentences.

X. THE TERRITORIAL AND PERSONAL APPLICATION OF ARTICLE 23 LEGISLATION

Legislative Competence

212. The Legislative Council enacts laws pursuant to Article 73(1) of the Basic Law. There are limits on the exercise of this power. The Article requires laws to be made 'in accordance with the provisions of this Law and legal procedures'. See also Article 2 of the Basic Law that authorizes the HKSAR to enjoy legislative power 'in accordance with the provisions of this Law'. Also Article 11 that prohibits the Legislative Council from enacting laws that contravene the Basic Law.

213. The Basic Law does not expressly confer on the HKSAR competence to make laws that have extra-territorial effect. Any such power must arise by implication in the Basic Law and it may, in any event, be limited by the context in which the power is sought to be used.

214. For instance, Chapter II of the Basic Law concerns relations between the Central Authorities and the HKSAR. Article 18(2) limits and defines the application of national laws. Mainland laws do not apply here save for those listed in Annex III. A constitutional implication arising from this Article might be that HKSAR laws do not, under the Basic Law, apply in the Mainland.

215. The Government should identify which provisions of the Basic Law that it

says confer on the HKSARG government power to legislate extra-territorially and say what, if any, limits there are on such power.

Extra-Territorial Application

216. Assuming that there is power to make laws that apply extra-territorially, the Bar is concerned that the HKSAR may use the power in a manner that is inconsistent with the limitations that may be implicit in the Basic Law.

217. One limitation that may be implied in the Basic Law is that the power to legislate extra-territorially cannot be exercised in a manner that is inconsistent with the current state practice of the PRC in relation to making extra-territorial laws that relate to the matters covered by Article 23.

218. It would be anomalous, and perhaps unconstitutional, if a person in a State other than the PRC was subject to the criminal law of the HKSAR for an Article 23 offence when he would not be subject to the criminal law of the PRC for a similar offence. The PRC is a unitary State and it is analogous for one part of that State to claim greater jurisdiction than that State itself can claim.

219. Article 23 type offences are dealt with in the PRC under the Criminal Code. Article 8 of the PRC Criminal Code stipulates that the Code may apply to foreigners who commit crimes against the PRC or against its citizens punishable with three years' imprisonment but the Code will not apply if the crime is not punishable as such according to the laws of that country.

220. A Hong Kong Permanent Resident with the nationality of another country may actively support his country in levying war against the PRC. Indeed, it may be his legal duty to do so. His actions would not amount to an offence under PRC law because they are lawful under the law of that other country. However, he would be guilty of the offence of treason under HKSAR law according to proposals in the Consultation Document.

221. The Government should say whether the extra-territorial application of the proposed Article 23 laws is, in its view, consistent with the extra-territorial application of comparable PRC laws. If there is an inconsistency, the Government should identify the differences and explain the constitutional basis for them.

Personal Application

222. Under PRC law, Articles 102-113 of the Criminal Code cover the acts and activities referred to in Article 23.

223. Article 102 covers treason (collusion with foreign states to harm sovereignty). Academic writers in the PRC are of the opinion that only PRC citizens can commit these offences. (Gao Minxuan & Zhao Binshi; ***Criminal Law in China***, Beijing University Press, 1998 pp. 258-259)

224. Article 112 covers another treason-like offence (supplying arms and ammunition during war-time). The same authors are of the opinion that only Chinese citizens can commit this offence as principals and that non-Chinese can only be liable as accomplices.

225. The Government should say whether it agrees with this view. If it agrees, it should say on what constitutional principle it relies to enact laws implementing Article 23 of the Basic Law which are wider in their application to persons than the similar laws in the Mainland and why it has proposed to do so.

XI. ARTICLE 23 AND RENDITION

226. Under the usual model for extradition of fugitive offenders, surrender is granted on satisfaction of, *inter alia*, the test of double criminality, that is, the criminal conduct alleged by the requesting state is also an offence in the requested state if it were there committed. Types of criminal conduct that satisfy the test of double criminality are subject to negotiation from time to time between the states concerned.

227. The Government has been negotiating with Mainland Authorities on a rendition agreement by which offenders will be rendered from HKSAR to the Mainland for trial. One of the safeguards the Bar has advocated is to strict application of the test of double criminality. With the test built into a rendition agreement, HKSAR can refuse to render offenders who are wanted in the Mainland for political offences including secession and subversion, as they are understood according to the scheme of things being practised in the Mainland.

228. In a typical extradition agreement between states, there would be provisions barring surrender where the offence for which surrender is sought is an offence of a political character. The same might not be true, however, for a rendition agreement between jurisdictions within the same country.

229. The Bar warns that if laws to be made in implementation of Article 23 are not drafted with sufficient precision, clarity and certainty for them to be distinguishable from national security laws practised in the Mainland, the test of double criminality can no longer protect those in HKSAR who are or will be accused of having offended Mainland national security laws.

XII. CONCLUSION

230. The Bar finds nothing in the Consultation Document to persuade it to modify its views expressed earlier on 22nd July 2002 that in most areas, the existing laws of the HKSAR are sufficient to prohibit the acts and activities listed in Article 23. What is at most required is the adaptation of certain existing provisions so that they answer to modern human rights standards and reflect the new constitutional order of the HKSAR as a result of the resumption of exercise of sovereignty by the PRC over HKSAR.

231. The Bar finds that in making proposals for implementing Article 23, the Consultation Document has not adopted a minimalist approach by doing only what is necessary. Indeed, proposals made in the chapters on Sedition, Subversion, Theft of State Secrets and Foreign Political Organizations have gone beyond the requirements of Article 23 to extents that are alarming. It is disingenuous for the Government to disguise such proposals as ones made in implementing Article 23.

232. The Bar expresses its serious concern that many of the proposals in the Consultation Document do not appear to be consistent with the minimum standards guaranteed under the ICCPR and ICESCR, the guarantees of fundamental rights under Chapter III of the Basic Law and the Johannesburg Principles. Proposals that are obviously restrictive of freedoms of expression and association are presented in the absence of safeguards and suitable exceptions and therefore frustrate any meaningful

enquiry in terms of proportionality.

233. The Bar also expresses its serious concern that many of the proposals in the Consultation Document are couched in loose language or apply ambiguous concepts. The Bar underlines the importance in drafting legislation implementing Article 23 in unambiguous, narrow and precise terms so as to avoid uncertainty and infringement of fundamental rights and freedoms. Legislative measures restricting rights and freedoms but lacking precision and predictability will have a chilling effect on people's exercise of such rights and freedoms and are liable to be condemned as failing the constitutional requirement of "prescribed by law". Many of the loose language and ambiguous concepts should be confined in meaning or specifically and exhaustively defined in the course of drafting.

234. The Bar notes the superficial analysis offered in the Consultation Document for some of its proposals and in particular those relating to proposed changes to the Official Secrets Ordinance, those seeking to apply the laws extra-territorially and those empowering the Secretary for Security to ban a local organization that is affiliated with an organization proscribed in the Mainland. The Bar calls on the Government to provide detailed analysis and justification for these proposals.

235. The Bar regrets that much of the concerns and anxieties expressed by the public during the consultation period are likely to have been due to the very broad and uncertain terms used in the Consultation Document. As it is the text of the legislation rather than the pronouncement of Government officials that counts, the Bar calls on the Government to release for the benefit of the public as soon as possible the text of any draft legislation it proposes to put before the Legislative Council. Such draft legislative text should be released in good time before its submission to the Legislative Council for enactment to enable and ensure adequate public discussion, feedback and appraisal.

236. If the Government's intention to consult the people of HKSAR before enactment of laws implementing Article 23 is no less than genuine, then it must undertake a second round of public consultation on the draft legislative text before it puts a Blue Bill to the Legislative Council for First Reading. The welfare of the HKSAR and the successful implementation of the "One Country, Two Systems" Concept demand nothing less.

The Hong Kong Bar Association
9th December 2002