SUMMARY OF THE BAR'S RECOMMENDATIONS

General

1. The Bar maintains its position stated earlier in July 2002 that in most areas, the existing laws of the HKSAR are sufficient to prohibit the acts and activities listed in Article 23 of the Basic Law.

2. The Bar does not agree with the legislative proposals set out in the Consultation Document. In particular, the Bar considers that the proposals fail to comply with the following three fundamental principles:
   (1) That only those laws which are strictly necessary for compliance with the requirements of Article 23 are to be enacted, namely a minimalist approach;
   (2) That the laws enacted to implement Article 23 must be consistent with the minimum standards contained in the ICCPR and ICESCR, the guarantees of fundamental rights in Chapter III of the Basic Law, and the Johannesburg Principles;
   (3) That the drafting in the legislation must be unambiguous, drawn narrowly and with precision.

3. The Bar deplores the Government's refusal to provide the public with draft legislative text to enable meaningful discussion to be taken of the legislative proposals. The Bar calls for the publication by the Government of such draft legislation at the earliest opportunity and in any event a reasonable time before the submission of a Bill to the Legislative Council for enactment.

Treason

4. The legislative proposals in the Consultation Document regarding treason are based upon feudal notions of treason and are couched in archaic and unclear language. They are not clearly and tightly defined to avoid uncertainty and the infringement of constitutional guarantees of fundamental rights and freedoms.

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

6. "War" in this connection should be confined to publicly declared war or state of hostilities. Assistance to nationals of an enemy state should not constitute an offence.

7. No other offences are necessary to prohibit treasonous acts.

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

Secession

9. The Consultation Document is deficient in its reasoning regarding the prohibition of secession since it fails to recognize the possibility of a secessionist cause being a legitimate political demand in the form of an exercise by a people of the right to self-determination, which is guaranteed under both the ICCPR and the ICESCR.

10. The legislative proposals in the Consultation Document regarding secession are overbroad, vague, imprecise and will result in the stifling of legitimate dissent. They focus not on the prohibition of violent activities meant to effect a political cause but the political cause itself.

11. 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".

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

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

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

Sedition

15. 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.

16. 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.

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

18. 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.

Subversion

19. 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".

20. 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.

21. In the latter case, it should be expressly stated what the "adequate and effective safeguards of guaranteed rights" are and how the guaranteed rights are safeguarded.

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

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

24. 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.

25. 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.

26. 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.

Theft of State Secret

27. 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.

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

29. 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.

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

31. 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.

32. 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 duty of confidentiality.

33. 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.

Foreign Political Organizations

34. 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.

Investigatory Powers and Procedural and Miscellaneous Matters

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

36. All offences under Article 23 should be prosecuted within 6 months.

37. The Bar believes that persons accused of offences enacted to implement Article 23 should have the right to a trial by jury.

38. 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.

Territorial and Personal Application

39. The Bar calls on the Government to explain the constitutional basis for seeking to enact legislation with extraterritorial effect when it proposes to implement Article 23 of the Basic Law. There is considerable

doubt as to the constitutional competence of the Legislative Council to enact laws with extra-territorial effect.

40. The Bar calls on the Government to examine the state practice of the PRC in making extra-territorial laws in respect of matters listed in Article 23 of the Basic Law, as contained in Article 8 of the Criminal Code of the PRC, and to justify the constitutional basis of proposing in the Consultation Document to impose extra-territorial criminal liability over non-Chinese nationals more onerous than that prescribed under the Criminal Code of the PRC.

41. The proposals in the Consultation Document in seeking to apply the proposed offences of treason, secession, sedition and subversion to all HKSAR permanent residents wherever they are fail to take into account the unique circumstances of Hong Kong, particularly the fact that many permanent residents of the HKSAR are not PRC nationals or have dual nationality. No account is taken of the notion that some of the proposed offences, such as treason, may only be committed by nationals. The Government should also justify why it seeks to enact laws to implement Article 23 of the Basic Law that are more extensive in terms of personal application than the corresponding provisions of the Criminal Code of the PRC.

Article 23 and Rendition

42. 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.

Hong Kong Bar Association
9 December 2002