SUBMISSIONS ON BEHALF OF THE BAR OF ENGLAND AND WALES

AMENDMENTS TO THE HONG KONG CRIMES ORDINANCE: TREASON, SECESSION, SUBVERSION AND SEDITION

1. We have studied the relevant provisions of The Bill and have compared them inter alia with the relevant parts of the Consultation Document "Proposals to implement Article 23 of the Basic Law" published in September 2002 ("Proposals").

2. The Bill contains a number of very sensible amendments to the original Proposals. In particular we welcome the abolition of the common law offence of misprision of treason; the confining of the offence of treason to Chinese nationals; the abolition of the offence of possessing seditious publications; the deletion from the definitions of subversion and secession of references to the "threat of force" and, in the definition of secession, the deletion of the phrase "resisting the exercise of sovereignty".

3. However we have two major concerns. First, whilst we of course recognise the need for an offence of treason, we question whether there is any need for offences of secession, subversion and sedition. Secondly, we are concerned at the breadth and vagueness of the terminology used in the sections of the Bill, which define these 4 offences. Article 23 obliges the HKSAR to enact laws to prohibit" any act of treason, secession, sedition, subversion against the Central People's Government…." In our view it does not follow that separate offences proscribing each of these four activities must be created, provided that the law of Hong Kong makes adequate and well defined provision to criminalise the activities themselves. It is also our view that the legislation should clearly specify the acts, which are made criminal, whatever name is attached to them. But we respectfully submit that in most cases the acts which are to constitute offences are insufficiently defined in the Bill. Moreover, we are concerned that, save in the case of treason and handling seditious publications, no mental element is specified in any of the draft provisions.

4. It seems that, particularly in the case of treason, much of that terminology in the Bill derives directly from archaic provisions of English law and in particular from treason legislation enacted some centuries ago. That English legislation was in turn source of much of the terminology in the relevant sections of The Crimes Ordinance, which was consolidated in 1972. Those who drafted the Bill have sought to retain some of the old terminology. No doubt this was done in the interests of continuity and in an attempt to modernise the Crimes Ordinance, but without making more conceptual changes than were strictly necessary.

5. However the difficulty is that the preserved terminology is ill suited to the conditions and problems of a modern society. Much of it, like the English law of treason from which it derived, was geared to the protection of a single individual, namely the sovereign.

Treason

6. The English law of treason is a curious amalgam of statute and common law spanning the 14th to the mid 20th centuries. We do not propose to undertake an exhaustive review, but only to draw attention to a few matters relevant to the matter at hand. In the citations at paras. 9 - 10 we have highlighted certain words and phrases, which have either been repeated in the Bill or appear to have influenced it's drafting.

7. High Treason is defined by The Treason Act 1351 in its Declaration of Treasons

> "Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth; that is to say, when a man doth compass or imagine the death of our lord the King, or of our lady his Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried or the wife of the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be provably ["provalement"] attainted of open deed by the people of their condition ... and if a man slea [sic] the chancellor, treasurer, or the King's justices of the one bench, or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. And it is to be

> understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the King, and his royal majesty. ..."

8. We note that this is by far the oldest criminal statute still in force in the UK. Its emphasis on the person of the sovereign is reflected in later Acts.

9. Section 1, Treason Act 1795 made it an offence "within the realm or without...to devise **constraint** of the person of our sovereign, his heirs or successors". It was also treason to take any action which would "**overthrow** (or tend to overthrow) the laws, government and happy constitution" of the United Kingdom.

10. Sections 3, 6 and 7 of The Treason Felony Act 1848 provide

> "If any person whatsoever shall, within the United Kingdom or without, compass, imagine, invent, devise or intend to deprive or depose our most gracious Lady the Queen, ... from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, ... within any part of the United Kingdom, in order by **force** of **constraint** to **compel Her ... to change Her ... measures or counsels,** or in order to put any **force** or **constraint** upon, or **in order to intimidate or overawe both houses or either house of parliament,** or to move or stir any foreigner or stranger with **force** to invade the United, any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, ... and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, ... or by any overt act or deed, every person so offending ... shall be liable ... to be imprisoned for the term of his or her natural life. ..."

11. As far as we are aware there has not been a prosecution for treason in England since the cases immediately after the Second World War. The last prosecution for treason felony was the case of *Meany* in 1867 (see Archbold 2003 at chapter 25 para. 35). Indeed the 2003 edition of Archbold contains no precedent for an indictment under the 1875 Act. We do not think it likely that will ever be another prosecution under that Act. Recently the editor of the Guardian has been given leave to argue that, since on one view the 1848 Act makes it an offence to publish articles suggesting that the UK should become a republic, it is incompatible with the Human Rights Act. The case is pending before the House of Lords [1]

[1] Rusbridger and Toynbee v HM Attorney – General and the Director of Public Prosecutions (2002) ECWA Civ 397. For subscribers to Lawtel search under "treason"

12. The fact that there have been no recent prosecutions probably explains the survival of these archaic provisions [2]. We believe that if the law of treason and treason felony were to be codified by a new statute it would be very different. The emphasis would probably be on providing substantial assistance to the enemy in time of war and seeking to overthrow the government rather than on an attack or a threat directed against a particular individual or group. Offences against the sovereign would no longer be a form of treason, for precisely the reasons identified in the Proposals at paragraph 2.6 [3]. Moreover we cannot imagine that intimidating or overawing Parliament would remain an element of any offence of treason. Indeed we believe that a 21st Century prosecution for an offence of treason based on such notions as "compelling", "intimidating", "force" or "constraint" would be open to challenge under the Human Rights Act on the basis that the ancient statutory language was too vague and imprecise.

13. But ironically, due to England's long history as a colonial power, our outdated law of treason still has a considerable influence. There are a number of countries where comparatively recent legislation embodies the concepts and even the wording of English law. The current Hong Kong legislation is a case in point. The Crimes Ordinance (as consolidated in 1972) provides in subsection (1) that a person commits treason if he

> (a) kills, wounds or causes bodily harm to her Majesty, or imprisons or restrains her;
>
> (b) forms an intention to do any such act as is mentioned in paragraph (a) and manifests such intention by any overt act:
>
> (c) levies war against Her Majesty
>
> (i) with the intent to depose Her Majesty ……
>
> (ii) in order by force or constraint to compel Her Majesty to change her measures or counsel, or in order to put any force or constraint upon, or to intimidate or overawe Parliament or the legislature of any British territory

[2] Proposals for reform and codification made by in 1977 by the Law Commission have never been enacted

[3] "…equating attacks against the head of state as treason of the highest order is no longer appropriate under our country's present-day constitutional order"

(d) Instigates any foreigner with force to invade the United Kingdom or any British territory;

(e) assists by any means whatsoever any public enemy at war with Her Majesty; or

(f) conspires with any other person to do anything mentioned in paragraph (a) or (c)

14. Section 2 of the Bill defines Treason:

(1) "A Chinese national commits treason if he

(a) with intent to-

(i) overthrow the Central People's Government;

(ii) intimidate the Central People's Government; or

(iii) compel the Central People's Government to change its policies or measures,

joins or is a part of foreign armed forces at war with the People's Republic of China;

(b) instigates foreign armed forces to invade the People's Republic of China with force; or

(c) assists any public enemy at war with the People's Republic of China by doing any act with intent to prejudice the position of the People's Republic of China in the war.

(2) A Chinese national who commits treason is guilty of an offence and is liable on conviction on indictment to imprisonment for life.

(3) Subsections (1) and (2) apply also to any Chinese national who is a Hong Kong permanent resident in relation to any act referred to in subsection (1) done by him outside Hong Kong.

(4) For the purposes of this section-

(a) "foreign armed forces" means-

(i) armed forces of a foreign country;

(ii) armed forces which are under the direction or control of the government of a foreign country; or

(iii) armed forces which are, not based in, and are not

armed forces of, the People's Republic of China;

(b) "public enemy at war with the People's Republic of China" . means-

(i) the government of a foreign country at war with the People's Republic of China; or '

(ii) foreign armed forces at war with the People's Republic of China;

(c) a state of war exists when-

(i) open armed conflict between armed forces is occurring;

(ii) war has been publicly declared,
and "at war" is to be construed accordingly.

15. We submit that the offence is too widely and vaguely defined and that the Bill does not specify with sufficient clarity the conduct which could constitute treason.

16. **Section 2(1)(a).** We agree that an intention to overthrow the Central People's Government ("CPG") might be an appropriate mens rea although we are concerned that the CPG is not defined. We have difficulty in understanding the concept of "intimidating" a government. The wording is derived, as we have pointed out, from the English legislation (the 1848 Act). There it was used in relation to the English Parliament, which was at least an identifiable body of persons. But as far as we are aware it is not proposed to define the membership of the CPG. Would it be sufficient if the accused intended to intimidate a senior government official? Or must his object be to intimidate ministers and, if so, how many? More fundamentally we do not think that under modern conditions a mere intention to frighten can ever be a sufficient intent for the serious offence of treason. This would remain our view, even if the term "Central People's Government" were to be understood as meaning the State Council, as in Article 85 of the Constitution of the PRC.

17. Again, in the phrase "compel the CPG to change its policies or measures", is derived from the old English precedents and is inappropriate to modern democracy. The phraseology is vague:

what is the difference between "policies" and "measures"? [4] It should not be enough that the accused joined an army attacking the PRC simply in order to force a change of mind amongst the members of the CPG as to what action they should take in a particular sphere.

18. **Section 2(1)(b).** The phrase "instigates foreign armed forces to invade…" is based upon similar wording in the Ordinance. It is unclear what is meant by "instigates". Is verbal encouragement enough? Is some action required to constitute instigation and, if so, what? Does it suffice that the accused was one of a number of people who acted in various ways to bring about the invasions? Or must he be the sole instigator? There is also the problem that incitement to treason will now constitute the offence of sedition (see below). It is difficult to see a difference between incitement and instigation. Presumably inciting another to instigate an invasion would be a basis for sedition. This would mean that, if A encourages B to recruit soldiers to fight the PRC, A could be liable to life imprisonment even if B did nothing.

19. **Section 2(1)(c).** Assisting a public enemy is clearly based on the Ordinance which criminalised assisting the enemy "by any means whatever". The Bill proposes the phrase "any act with intent to prejudice the position of the PRC in the war". It seems to us that this goes much too far. As we understand it, a Chinese doctor who treated wounded enemy soldiers would fall within this provision and, if he could be said to have an intent to intimidate or compel the CPG, he would be at risk of conviction for treason. We suggest that if this provision is to be retained, "assistance" should be defined so as to exclude humanitarian activities, commerce, advocacy of a cause or the mere expression of views, whether verbally or in writing. We notice that in the Explanatory Notes to the Bill it is said that "humanitarian assistance to ordinary people will not constitute "assisting public enemy". We are not clear what is meant by "ordinary people". The implication may well be that a Hong Kong doctor treating (say) a soldier or civil servant of the enemy might be prosecuted as a traitor. This reinforces our view that the law should be defined so as to exclude any humanitarian assistance from the offence. Those who provide such assistance

[4] In the Ordinance the equivalent phrase "measures or counsels" was equally vague.

should not have to make difficult judgment calls as to whether the exercise of their skills would lead to prosecution.

Subversion

20. Section 2A provides that

(1) A person commits subversion if he

> "(a) disestablishes the basic system of the People's Republic of China as established by the Constitution of the People's; Republic of China;
>
> (b) overthrows the Central People's Government; or
>
> (c) intimidates the Central People's Government,

by using force or **serious** criminal means that endangers the stability of the People's Republic of China or by engaging in war.

(2) A person who commits subversion is guilty of an offence and is -. liable on conviction on indictment to imprisonment for life.

(3) Subsections (1) and (2) apply also to any Hong Kong permanent resident in relation to any act referred to in subsection (1) done by him outside Hong Kong.

(4) For the purposes of this section-

> (a) the expression "engaging in war" is to be construed by reference to the meaning of the expression "at war" in section 2(4)(c); ,
>
> (b) "**serious** criminal means" means any act which-
>
> (i) endangers the life of a person other than the person who does the act;
>
> (ii) causes **serious** injury to a person other than the person who does the act;
>
> (iii) **seriously** endangers the health or safety of the public or basic system of the People's Republic of China as established by the Constitution of the People's Republic of China
>
> (iv) causes **serious** damage to property; or
>
> (v) **seriously** interferes with or disrupts an electronic system or an essential service, facility or system (whether public or private),

and-

(vi) is done in Hong Kong and is an offence under the law of Hong Kong; or

(vii) (A) is done in any place outside Hong Kong;

(B) is an offence under the law of that place; and

(C) would, if done in Hong Kong, be an offence under the law of Hong Kong.

21. **"Disestablishes" and "Intimidates".** We have already commented on the concept of "intimidating" the CPG. The phraseology of section 2a(1)(A) seems to us exceptionally vague and unclear. There could surely be room for substantial difference of view as to what is meant by the phrase "basic system of the People's Republic of China as established by the Constitution of the People's Republic of China". Even if that phrase can be given a clear and unambiguous meaning, the forbidden act "disestablishes" is very vague and ambiguous. To take just 2 examples would either putting a power station out of action or changing the education system in a particular part of China constitute that forbidden activity? Again it is envisaged that just one person could commit the offence. But we have difficulty in imagining any activity by a single individual so radical and far-reaching in its effects as to disestablish the basic system of a country as large and powerful as China.

22. **"Force or Serious Criminal Means".** We have 3 criticisms to make of this phrase. First "serious criminal means" do not necessarily connote an activity on a large scale or affecting a large number of actual or potential victims. Indeed it seems clear that merely endangering the life of, or seriously injuring a single person, or even seriously damaging his property could constitute "serious criminal means". This in our view is far too low a threshold for an offence against the security of the state.

23. Secondly the language is tautologous. The word "serious" is used both as part of the definition of the means which are to be criminal and in the definitions of the specific examples of those means. The words which we have quoted in bold type demonstrate this point.

24. Thirdly the word "force" is not qualified by the word "serious". Hence "force" could well be construed as some violent activity even less significant or dangerous than "serious criminal means".

25. We believe that the activities to be covered by the proposed offence are likely to constitute specific offences under existing Hong Kong law. We note that, in any event, "serious criminal means" require the commission of a substantive criminal offence. Thus all of the activities caught by section 2A could be prosecuted under existing law. We submit that, if an offence of subversion is considered necessary, the forbidden activities should be much more closely defined. If the term "serious criminal means" is to be retained, it should be defined so as to exclude peaceful demonstrations, advocacy of a cause or the mere expression of views, whether verbally or in writing. It is important to ensure that activities, which are lawful in Hong Kong, should not be criminalised merely because they might be unlawful or unacceptable on the mainland.

26. **The required intention** We cannot discern what this may be. Obviously the activities described in subsection (1) could only be committed deliberately. But beyond that no mental element is prescribed. Of course there will be a mental element of some kind involved in at least some of the activities constituting "serious criminal means" but the nature of that element will vary with the offence. We suggest that as in the case of treason an offence of such seriousness should be an offence of specific intent. For example, if overthrowing the CPG is to be a species of subversion, then nothing less than an intention to overthrow it should suffice.

Secesssion

27. Section 2B provides

> (1) A person commits secession if he withdraws any part of the People's Republic of China from its sovereignty by-
>
> (a) using force or serious criminal means that seriously endangers the territorial integrity of the People's Republic of China; or
>
> (b) engaging in war.
>
> (2)A person who commits secession is guilty of an offence and is liable on conviction on indictment to imprisonment for life.

(3)Subsections (1) and (2) apply also to any Hong Kong permanent resident in relation to any act referred to in subsection(1) done by him outside Hong Kong

(4)For the purposes of this section –

(a) the expression "engaging in war" is to be construed by reference to the meaning of the expression "at war" in section 2(4)(c);

(b) "serious criminal means" has the same meaning as in section 2A(4)(b).

28. **"Withdraws any part of the People's Republic of China from its sovereignty". W**e find this phrase particularly confusing. "Sovereignty" is a juridical concept. "Withdraws" connotes a physical action. The territory of a state might be physically divided without in any way affecting its sovereignty, whether under international or domestic law. This combination of 2 entirely different types of concept, juridical and physical, renders it impossible to predict what kind of activities would fall foul of the new law. On the one hand, if a province of China were to declare independence and to set up separate organs of government, then those responsible might well commit acts of secession as the term is usually understood; but they would not be guilty of the new offence since the juridical sovereignty of the PRC would not be affected. On the other, it is not at all clear what kinds of activity short of this would constitute a "withdrawal". Would a mere declaration of independence suffice? Moreover, as in the case of subversion, we have great difficulty in envisaging how one person could ever commit the proposed offence.

29. **"Using force or serious criminal means that seriously endangers the territorial integrity of the People's Republic of China".** We have already expressed our reservations both as to the phrase "force or serious criminal means" and the tautology of the repeated use of the term "serious". There is a further point about the words "seriously endangers the territorial integrity of the People's Republic of China". It is not clear what they are intended to add. If there has in fact been an effective secession in the sense of a declaration of independence followed by positive action to establish a separate government in a particular province, then that of itself would threaten the territorial integrity of the PRC. On the other hand if there has been no effective secession then how could territorial integrity be threatened – unless of course the new

offence is intended to cover those who merely promote a secessionist cause.

30. This brings us to another concern. Although the international covenants recognise the right of self-determination of peoples, the Bill does not expressly recognise that a demand for secession might constitute a legitimate exercise of this right. Such legitimate demands might well be said to "threaten the territorial integrity" of the PRC. Hence, if A expresses such a demand at a demonstration in which force is used by B, A could be prosecuted as the offence of secession. We consider that this goes too far in limiting freedom of expression.

31. **The required intention N**o mental element is specified. We have the same concerns as in the case of subversion. Again we would submit that a specific intent should be required.

32. Again we question the need for an offence of secession. As in the case of subversion it appears that all of the activities that could be prosecuted as subversion would constitute other offences either of violence damaging property or (in the case of "engaging in war") treason. The English experience may be instructive. For many decades we experienced serious secessionist violence at the hands of the IRA and other Irish Republican groups. Their aim was to use terror to force the Westminster government to allow Northern Ireland to secede from the United Kingdom. There were numerous trials of some of the alleged perpetrators. They were prosecuted for a number of different offences including murder, offences under the Explosives Acts, conspiracy and offences under anti – terrorist legislation. To our knowledge, nobody has ever suggested that English law required an offence of secession. It would have served no purpose since it would merely have provided yet another offence with which alleged republican terrorists could be charged.

Sedition

33. In the majority of Common Law jurisdictions the offence of sedition has become virtually a dead letter. In England The Law Commission and, in Canada, the Law Reform Commission have recommended its abolition. It is widely acknowledged to be an anachronistic political offence which has a chilling effect upon human rights, notably those of freedom of conscience and expression. In those jurisdictions where it is still an offence its

scope is very narrow. As far as we are aware the last English public prosecution for sedition was that of *Caunt* in 1947 [5]. An attempt in 1991 to bring a private prosecution for seditious libel against Salman Rushdie the author of the Satanic Verses failed. [6] We believe that today a prosecution for sedition in England would be likely to fall foul of the Human Rights Act.

34. The Bill proposes 2 substantially modified versions of the traditional model of Sedition as follows. Section 2D provides that inciting treason, subversion or secession is an offence only under section 9A.

35. Section 9A provides:

> (I) A person commits sedition if, subject to section 9D, he-
>
> > (a) incites others to commit an offence under section 2 (treason), 2A (subversion) or 2B (secession); or
> >
> > (b) incites others to engage, in Hong Kong or elsewhere, in violent public disorder that would seriously endanger the stability of the People's Republic of China.
>
> (2) A person who-
>
> > (a) commits sedition by doing an act referred to in subsection (l) (a) is guilty of an offence and is liable on conviction on indictment to imprisonment for life;
> >
> > (b) commits sedition by doing an act referred to in subsection (l) (b) is guilty of an offence and is liable on conviction on indictment to a fine and to imprisonment for 7 years.

36. Section 9B provides that inciting others to commit an offence under section 9A (sedition) is not an offence. Section 9D defines certain "prescribed acts". Those acts include showing that the CPG or the government of Hong Kong has been misled or mistaken in any of its measures and pointing out errors or defects of government, law or the administration of justice. Section 9D in effect provides that a person is not to be regarded as inciting others

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[5] (1947) 64 LQR 203

[6] *R v Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1991] 1 Q.B. 429.

to commit any offence under section 9A merely because he does one of the prescribed acts or under section 9C, merely because his sole intention is to do a prescribed act. As we understand it, the intention in enacting section 9D is to preserve defences to a charge of sedition which were recognised by the common law and which were codified in section 9 of the Ordinance.

37. Section 9C creates the offence of handling seditious publications:

> (1) In this section, "seditious publication" means a publication that is likely to cause the commission of an offence under section 2 (treason), 2A (subversion) or 2B (secession).
>
> (2) Subject to section 9D a person who –
>
> (a) publishes sells, offers for sale, distributes or displays any seditious publication:
>
> (b) prints or reproduces any seditious publication; or
>
> (c) imports or exports any seditious publication
>
> with intent to incite others, by means of the publication, to commit an offence under section 2 (treason) 2A (subversion) or 2B (secession) shall be guilty of an offence and is liable on conviction on indictment to a fine of $500,000 and to imprisonment for 7 years

38. **Sedition insufficiently defined** We recognise that the drafts in the bill of these offences have been significantly modified and that a proposed offence of possessing seditious publications is no longer to be enacted. Nonetheless we consider that the draft offences are insufficiently defined both as to actions and (in the case of section 9A) intentions. We believe that any offence which restricts freedom of expression must be very closely defined. Principle 6 of The Johannesburg Principles provides in relation to any expression which is made an offence against the State that it must be intended to incite imminent violence; that it must be likely to incite such violence and there must be a direct and immediate connection between the expression and the likelihood or the occurrence of such violence. We consider that none of the proposed offences measures up to this standard.

39. **Sedition: Incitement and inchoate offences.** The inchoate offences are conspiracy, attempt and incitement. The accomplice offences (otherwise called modes of participation) are aiding and

abetting and counselling and procuring. As we understand it, attempt and conspiracy are already covered by Part VIIA of the Crimes Ordinance (Cap. 2000) and aiding and abetting counselling and procuring by s89 of the Criminal Procedure Ordinance (Cap. 221). Incitement remains a common law offence [7]. The Proposals contained, at para. 2.13, 3.9 and 5.7 a statement of intent to codify the law relating to inchoate and accomplice offences so far as they related to treason secession and subversion (for convenience we shall refer to these as "the principal offences").

40. But the Bill does not contain such a code. Instead sections 9A and 9C create a number of offences of incitement. We have a number of concerns. First we question the need for a specific offence of incitement whether under section 9A or 9C. Incitement is very similar in scope to "counselling and procuring". Indeed we find it difficult to conceive of an offence of incitement which could not equally well be charged as counselling and procuring.

41. Secondly, the very vagueness of definition of all 3 principal offences makes it the more difficult to define the scope of any inchoate or accomplice offence relating to any of them. Take conspiracy to commit subversion as an example. The essence of the offence of conspiracy is the agreement to commit a crime. Suppose 3 people agree in Hong Kong unlawfully to disrupt the electricity supply of mainland China. This on the face of it would be a conspiracy to interfere with an essential service under section 2A(4)(v). But would the mere intention to disrupt be enough to render all 3 guilty of conspiracy to subvert? Would it be necessary to prove an additional intention to disestablish the basic system of the PRC or to overthrow or intimidate the CPG and/or seriously to endanger the stability of the PRC? Similar arguments would apply to a charge of incitement to subvert. Our point is that uncertainty in the definition of the principal offences creates uncertainty as to the scope of any inchoate and accomplice offences.

42. Our third concern is the converse of the second. Lack of definition of an inchoate offence creates an uncertainty as to the scope of the principal offences. "Incitement" is not defined. It is unclear whether the scope of incitement for the purposes of the new legislation will be broader, narrower or the same as that of the

[7] A person may "incite" another by persuasion, thereat of pressure see *Race Relations Board v Applin* [1973] 1 QB 815 at 825 per Lord Denning

common law offence. This problem is exacerbated insofar as certain elements of some of the principal offences are similar to those of inchoate or accomplice offences. We have already commented on the similarity between "instigating" in section 2(1)(b) and incitement. Again instigating is very similar to counselling and procuring which, both in English and Hong Kong law, is an accomplice offence. The question arises where does a principal offence end and incitement (or any other inchoate of accomplice offence) begin? The Bill does not provide a clear answer.

43. **Section 9A(2) "violent public disorder that would seriously endanger the stability of the PRC".** This is a triply vague and uncertain phrase. There is bound to be disagreement as to the meaning of "violent public disorder"; as to the meaning the phrase "stability of the PRC" and as to whether a given degree of disorder would endanger that stability. Again, we question the need for this offence since the conduct that it seeks to punish would surely constitute one or more offences under existing law.

44. **Intention.** Section 9A does not expressly require any intent to incite. Of course an element of specific intention is implicit in the very concept of inciting, but there could be argument as to precisely what that element should be. We note that in the Explanatory Notes to the Bill it is suggested that nobody could be convicted of incitement unless he had "the intention that others, after being incited by him, commit the crime". But this in itself is ambiguous particularly in the case of offences under section 9A(1)(b). Is "the crime" merely violent disorder" or is it violent disorder that would seriously endanger the stability of the PRC"? In other words must there be a specific intention to endanger that stability?

45. We submit that in principle the answer must be in the affirmative, since otherwise a person might be committed of an aggravated offence even though he did not intend the aggravating element. We note that section 9C does require a specific intent (to incite others to commit others, by means of the publication to commit an offence of treason etc.)

46. **The time limits** We note that the Ordinance contains time limits for prosecution in 2 cases namely 3 years from the date of commission of the offence in the case of treason and 6 months in

the case of sedition. These are to be abolished. We do not know the reason: the Proposals do not discuss these amendments. We believe that all acts deserving of prosecution as treason or sedition would be likely to come to light within the existing time limits. We therefore respectfully submit that they should be retained. Consideration should be given to time limits for any offence of subversion or secession that it is to be enacted.