Comments on the Public Consultation Document titled "Safeguarding National Security: Basic Law Article 23 Legislation" published by the Security Bureau, The Government of the Hong Kong Special Administrative Region, in 1.2024

Hong Kong Bar Association

28 February 2024

Index

Frequently Used Terms

The following frequently used terms are abbreviated as follows throughout these Comments:-

The Government of the HKSAR	the **Administration** or **HKSARG**
The Hong Kong Bar Association	the **Bar**
Basic Law	**BL**
The Hong Kong Bill of Rights as set out in Part II to the Bill of Rights Ordinance (Cap.383)	**BOR**
Criminal Code of Australia (as found in the Schedule to Criminal Code Act 1995) as amended and in force on 5 February 2024	**CCA (Aust)**
Crimes Ordinance (Cap.200) of HKSAR	**CO**
Public Consultation Document titled "Safeguarding National Security: Basic Law Article 23 Legislation" published by the Security Bureau, The Government of the Hong Kong Special Administrative Region, in 1.2024	**CP**
Proposals to Implement Article 23 of the Basic Law: Consultation Document, issued by the Security Bureau, in 2002	**2002 CP**

The Central People's Government of the People's Republic of China	the **CPG**
UK Civil Procedure Rules	**CPR**
The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region	**HKNSL**
Hong Kong Special Administrative Region	the **HKSAR**
International Covenant on Civil and Political Rights	**ICCPR**
National Security Act 2023 of the UK	**NSA (UK)**
The People's Republic of China	**PRC**
Mainland Chinese Law	**PRC Law**
Secretary for Justice	**SJ**
United Kingdom of Great Britain and Northern Ireland	**UK**
United States of America	**US**

Preface

Article 23 of the BL imposes an important constitutional obligation on the HKSAR to enact on its own laws prohibiting various acts widely recognised as major threats to national security.

As one of the two legal professional bodies in Hong Kong, the Bar has the important duty to provide constructive feedback on the legislative proposals contained in the CP. It does so with the collective experience of its members, and with a view to providing useful comments to aid the effective understanding and formulation of laws under Article 23.

In expressing our views in this position paper, we are fully conscious of the duties under Article 6 of the HKNSL to safeguard the sovereignty, unification and territorial integrity of the PRC. It is beyond doubt that, as with any sovereign territory, national security is of fundamental and critical importance to Hong Kong and the nation.

The HKNSL emphasises and makes plain under Articles 4 and 5 that, in safeguarding national security, human rights shall be respected and safeguarded, and the principle of the rule of law shall be adhered to. Accordingly, on well-established principles of constitutional coherence, legislation under Article 23 must be consistent with other constitutionally protected rights such as those under the BL and ICCPR.

We believe it is of vital importance - not only to the rule of law and the administration of justice - but also to the overall long-term best interests of the HKSAR and indeed the nation, and the constitutional duty under BL 109 of maintaining Hong Kong's status as an international finance centre, that a proper and careful balance be struck between the imperatives of national security and the constitutional guarantees of human rights and the rule of law. The imperatives of protecting national security and fundamental rights in Hong Kong can and should be understood and pursued as

complementary parts of a single constitutional vision – that of a flourishing "One Country, Two Systems".

Like the CP, our paper contains numerous references to legislation and case law from other jurisdictions. Although the national security arrangements in other jurisdictions are well worthy of consideration as points of reference and comparison, we acknowledge that care must be taken to avoid comparing individual aspects of any given overseas regime in isolation from their particular context, that the circumstances of each jurisdiction will be unique, and that what is effective and appropriate for the HKSAR will ultimately depend on our own individual circumstances.

Dated 28 February 2024

Hong Kong Bar Association

COMMENTS ON CP 1 AND 2 - CONSTITUTIONAL DUTY TO SAFEGUARD NATIONAL SECURITY & ADDRESSING NATIONAL SECURITY RISKS AND IMPROVING THE REGIME FOR SAFEGUARDING NATIONAL SECURITY

A. Introduction - The Concept of National Security

1. Chapter 1 of the CP explains the concept of the holistic view of national security and the constitutional duty of the HKSAR to safeguard national security. The Bar notes that "*national security*" is not a concept expressly defined in the BL nor the HKNSL. It is therefore useful to begin with an understanding of the term by separately examining its two subcomponents, "*national*" and "*security*".

2. It goes without saying that the term "*national*" must be understood as encompassing the PRC as a whole including the HKSAR. This follows from the fact that the HKSAR is an inalienable part of the PRC (BL 1).

3. Turning to "*security*" in the context of national security, there does not appear to be any widely accepted definition of national security in the legal context within common law jurisdictions. It has been said that national security is a protean concept, designed to encompass the many varied and unpredictable ways in which the security of the nation may best be promoted: see ***Secretary of State for the Home Department v Rehman*** (CA) [2003] 1 AC 153, §35 *per* Lord Woolf MR.

4. In accordance with this interpretation, the European Court of Human Rights has held that it is not necessary for a state to enact legislation which carries a comprehensive definition of national security interests, as "*[t]hreats*

to national security vary in character and time and are therefore difficult to define in advance": see e.g. ***Lupsa v Romania*** (2008) 46 EHRR 36, §37.

5. There is support for the view that the concept of national security encompasses - at the very least - matters which give rise to the risk of danger to the nation's territory, people, constitutional systems and diplomatic relations: see ***Secretary of State for the Home Department v Rehman*** (HL), §§16-17.

6. On the basis that national security is a broad concept which encompasses matters affecting the territory, people, constitutional systems and diplomatic relations[1] not only of the HKSAR itself but also the PRC, it makes legal and practical sense to adopt a definition of national security which is consistent with that used in PRC Law, as suggested in CP§1.5, which the Bar supports.

B. Legislative Considerations

Balancing the need to safeguard national security and the need to prevent unnecessary restriction of fundamental rights and freedoms

7. As mentioned above, the proposed legislation must comply with the BL, the BOR and the fundamental principle of the rule of law.

8. Given the varied and unpredictable ways in which threats to national security may emerge, it may be more conducive to achieving the objects of the proposed legislation for it to be drafted in terms which allow the

[1] In the sense of dealing with overseas bodies or other supranational bodies as a Special Administrative Region as provided for under the BL rather than in the conventional sense of diplomatic relations between states.

authorities to properly respond with sufficient flexibility to a broad range of factual scenarios.

9. On the other hand, there is a countervailing need for the proposed legislation to be drafted in sufficiently prescriptive terms, as the greater the uncertainty surrounding the practical impact of a statute, the more likely it is to have a chilling effect on lawful conduct: see ***R (Laporte) v Chief Constable of Gloucestershire Constabulary*** [2007] 2 AC 105, §141.

Developing appropriate procedural mechanisms and safeguards

10. Proceedings involving legislation to safeguard national security often raise difficult procedural issues by reason of the confidentiality and/or sensitivity of the subject matter. There may be concerns as to whether hearings in public would result in divulgence of confidential or sensitive information such as state secrets or otherwise be detrimental to national security.

11. Concerns may even arise from the disclosure of evidence to the defendant, as the evidence in the proceedings may also involve confidential and/or sensitive information which cannot, without endangering national security, be disclosed to individuals who are accused of constituting threats to national security.

12. Such concerns may result in a tension between the objective of safeguarding national security on the one hand and the principles of open justice (and possibly even natural justice) on the other hand.

13. CP§9.16 states that *"as far as the procedural matters of cases concerning offence endangering national security are concerned, the provisions under the local laws*

should be convergent with the relevant requirements of the HKNSL, and should be improved as appropriate in order to meet the said requirements." The Bar would welcome clearer guidance in the proposed legislation as to how these procedural issues can be addressed.

14. One possible option is to adopt a procedure akin to that under HKNSL 47 whenever confidential and/or sensitive information is involved. Under that procedure, the court shall obtain a certificate from the Chief Executive on the issue in question, which shall be binding on the courts. Effectively, this would cause the relevant issue (which would otherwise require disclosure or consideration of the confidential and/or sensitive information) to become non-justiciable.

15. However, a potential concern to this procedural option is that in many cases, it would allow the executive to unilaterally determine, without any effective judicial oversight, whether or not the defendant is guilty of the crime. For example, in cases involving the proposed offence of unlawfully acquiring state secrets, the only disputed issue might be whether the information in question is a state secret. In that particular scenario, if this were to be certified by the Chief Executive without effective judicial oversight, the guilt of the defendant might be said to have been effectively determined solely by the Chief Executive. This may give rise to concerns as to the proposed legislation's compatibility with *inter alia* the right to a fair trial under BL 87 and BOR 10 and 11.

16. Another option adopted in some common law jurisdictions such as Australia, Canada and the UK is to introduce *"closed material procedures"* whereby parts of the proceedings are conducted in private and in the absence of the accused, so as to avoid the divulgence of confidential and/or

sensitive information. The defendant is generally represented in such proceedings by a special advocate who will have access to the confidential and/or sensitive matter, but cannot disclose the same to the defendant: see e.g. UK Civil Procedure Rules Part 82; ***Al-Rawi v Security Service*** [2012] 1 AC 531.

COMMENTS ON CP 3 - TREASON AND RELATED ACTS

A. Introduction

17. Chapter 3 of the CP concerns the following "*treason*" and related offences which are proposed to be incorporated into the proposed legislation:

17.1. the offence of "*treason*";

17.2. the offence of "*misprision of treason*" under the common law;

17.3. "*treasonable offences*"; and

17.4. the offence of "*unlawful drilling*".

18. The proposed offences are found under the existing laws of Hong Kong, such as the CO (*treason, treasonable offence, unlawful drilling*) and the common law (*misprision of treason*). The CP proposes that the existing offences be amended and the common law offence be codified.

19. In general, the offence of "*treason*" is rooted on the idea of betrayal.[2] Treason is a serious offence and is "*distinct from disagreeing with the Government or dissenting from majority opinion or failing to be a good citizen*".[3] Accordingly, criminalization of treason is justified to "*reinforce the duty of non-betrayal, both to signal clearly that society views treachery as a distinct assault on the whole and to punish those who breach the duty, thereby helping deter those who might otherwise consider breaching it*".[4]

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[2] *Aiding the enemy: How and why to restore the law of treason, Policy Exchange, 2018,* p.5; Fu Hualing, Carole J. Petersen and Simon N.M. Young, National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny, p.154.
[3] *Aiding the enemy* (n 2), p.5.
[4] Ibid.

B. Offence of "treason"

20. Under the existing s.2(2) of the CO, any person who commits "*treason*" shall be liable on conviction to imprisonment for life.

21. The table below is a comparison of the acts constituting "*treason*" under the existing s.2 of the CO and the proposed new offences under the CP in relation to the offence of "*treason*":

Existing offence under s.2 of the CO	Proposed new offence under the CP
(a) Killing, wounding or causing bodily harm to Her Majesty, or imprisoning or restraining Her	N/A
(b) Forming an intention to do any such act as is mentioned in paragraph (a) and manifesting such intention by an overt act	N/A
(c) Levying war against Her Majesty	(c) Levying war against China
(d) Instigating any foreigner with force to invade the United Kingdom or any British territory	(d) Instigating a foreign country to invade China with force
(e) Assisting by any means whatever any public enemy at war with Her Majesty	(a) Joining an external armed force that is at war with China
	(b) With intent to prejudice the situation of China in a war, assisting an enemy at war with China in a war
(f) Conspiring with any other person to do anything mentioned in paragraphs (a) or (c).	N/A

N/A	(e) With intent to endanger the sovereignty, unity or territorial integrity of China, using force or threatening to use force.

22. The Bar notes that most of the acts targeted by the offences proposed in the CP are substantially similar to those under s.2 of the CO. It is also noted that any references made to "*Her Majesty*" (or to similar names, terms or expressions) under s.2 of the CO have all along been construed as references to the CPG or other competent authorities of the PRC.[5]

23. The targeted act which does not have a counterpart in the existing CO would be the one proposed under CP§3.3(e), namely, "*with intent to endanger the sovereignty, unity or territorial integrity of China, using force or threatening to use force*".

Comparison with foreign jurisdictions

24. Under the UK Treason Act 1351, the heads of treason may be summarised as follows[6]:

24.1. compassing or imagining the death of the Sovereign, his Queen or his eldest son and heir;

24.2. violating the Sovereign's wife, or his eldest daughter unmarried or the wife of his eldest son and heir;

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[5] Section 6, the Hong Kong Reunification Ordinance added Schedule 8 of the Interpretation and General Clauses Ordinance (Cap. 1) ("**IGCO**").
[6] UK Law Commission, Working Paper No. 72, Codification of the Criminal Law Treason, Sedition and Allied Offence, §13.

24.3. levying war against the Sovereign in his realm;

24.4. being adherent to the Sovereign's enemies in his realm;

24.5. killing the Chancellor, Treasurer or the Sovereign's Justices, in their places doing their offices.

25. In the US, treason is committed under §2381 of the United States Code (Title 18 Ch. 115 Treason, Sedition, and Subversive Activities) when a person:

"owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere".

26. Under s.80.1 of the CCA (Aust), a person commits treason if the person:

"(a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister;

(b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or

(c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or

(d) levies war, or does any act preparatory to levying war, against the Commonwealth; or

(e) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth."

27. In Canada, under section 46 of the Criminal Code, there are offences of *"high treason"* and *"treason"*.

27.1. *"High treason"* is committed where one:

> *"(a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;*
>
> *(b) levies war against Canada or does any act preparatory thereto; or*
>
> *(c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are."*

27.2. *"Treason"* is committed where one:

> *"(a) uses force or violence for the purpose of overthrowing the government of Canada or a province;*
>
> *(b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;*
>
> *(c) conspires with any person to commit high treason or to do anything mentioned in paragraph (a);*
>
> *(d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or*

(e) *conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act."*

28. Under section 73 of the Crimes Act 1961 of New Zealand, treason is committed when one:

> *"(a) kills or wounds or does grievous bodily harm to the Sovereign, or imprisons or restrains her or him; or*
> *(b) levies war against New Zealand; or*
> *(c) assists an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country; or*
> *(d) incites or assists any person with force to invade New Zealand; or*
> *(e) uses force for the purpose of overthrowing the Government of New Zealand; or*
> *(f) conspires with any person to do anything mentioned in this section."*

29. In Singapore, the following offences fall under *"Offences against the State"* under the Penal Code 1871:

> *"121. Whoever wages war against the Government, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or with imprisonment for life.*
> *121A. Whoever plans the death of or hurt to or unlawful imprisonment or restraint of the President, shall be punished with imprisonment*

for life or for a term which may extend to 20 years and shall, if he is not sentenced to imprisonment for life, also be liable to fine.

121B. Whoever plans the unlawful deprivation or deposition of the President from the sovereignty of Singapore, or the overawing by criminal force of the Government, shall be punished with imprisonment for life or for a term which may extend to 20 years and shall, if he is not sentenced to imprisonment for life, also be liable to fine.

121C. Whoever abets the commission of any of the offences punishable by section 121A or 121B shall be punished with the punishment provided for those offences."

Analysis

30. Broadly speaking, the offences proposed in CP§3.3(a)-(d) are consistent with the offence of treason under other national legislations. However, the ambit of the term *"levying war"* in CP§3.3(c) may benefit from further consideration.

31. It is noted that the term *"levying war"* is not interpreted strictly, see **Archbold Hong Kong 2024,** §26-9:

> *"In order to constitute a levying of war, the number of persons assembled is not material; three or four will constitute it as fully as a thousand: 3 Co Inst 9. Nor is it necessary that they should be armed with military weapons, with colours flying, etc, although it is usually so stated in the indictment: Fost 208; and see R v Dammaree and Purchase (1710) Fost 214; 15 St Tr 521 at pp 606 and 645. Nor is actual fighting necessary to constitute a levying of war: Fost 218; 1 Hale 144; enlisting and marching are sufficient,*

without coming to battle: R v Vaughan (1696) 13 St Tr 485. But there must be force accompanying the insurrection, and it must be for an object of a general nature: R v Frost (1839) 9 C & P 129. As to levying war by use of dangerous explosives, see R v Deasy (1848) 15 Cox 334 (see also R v Gallagher (1883) 15 Cox 291 (Ir))."

32. In the 2002 CP, the meaning of "*levying war*" was stated as follows: "*No definition is given of 'levying war'. However, at common law, 'levying war' has been held to include a riot or insurrection involving a considerable number of people for some general public purpose, but does not include a rising for a limited, local or private purpose*".[7]

32.1. The abovementioned definition was likely adopted from the UK Law Commission Working Paper No.72 (Codification of the Criminal Law – Treason, Sedition and Allied Offences), whereby the definition of "*levying war*" was: "*'War', here, is not limited to the true 'war' of international law, but will include any foreseeable disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a 'general' character, e.g. to release the prisoners in all the gaols. It is not essential that the offenders should be in military array or be armed with military weapons. It is quite sufficient if there be assembled a large body of men who intend to debar the government from the free exercise of its lawful powers and are ready to resist with violence any opposition*".[8] (emphasis added)

32.2. The relatively wide definition of "*levying war*" led to some public concerns during the 2002 consultation. As a result, the reference to

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[7] 2002 CP, §2.7.

[8] §19 of the Working Paper, citing *Kenny's Outlines of Criminal Law* (19th Ed, 1966), p.398.

"*levying war*" was removed and instead, a "***state of war***" was defined more narrowly as "*opened arm conflict between armed forces*".[9]

32.3. Authors, D.W. Choy and Richard Cullen noted that this amendment was "*crucial*", "*for it effectively restricted the proposed treason law to be applied in a time of real war. It could not be used to punish local riots or insurrections as treason.*"[10]

33. Similarly, during the 2002 consultation period, Professor Albert Chen noted[11] that the interpretation "*levying war*" under old English law would include the following: "*if a considerable number of persons assemble together and create a disturbance directed at the release of the prisoners in all the jails, this might already be an act of 'levying war'*". Accordingly, Professor Chen questioned the applicability of using this old English law interpretation in the then proposed Article 23 legislation and proposed to limit the definition of "war":

> "*However, it is doubtful whether such pre-19th century English conception of treason should still be applicable today. I would therefore suggest that in the implementing legislation for BL 23, there should be an express provision to the effect that for the purpose of the offences of treason, secession and subversion,* ***'war' shall not include a riot or disturbance of a local nature that does not amount to an armed rebellion*** *--- such a riot or disturbance is already adequately covered by the existing criminal law other than the law of treason.*"[12] (emphasis added)

34. As such, thought should be given as to whether, when using the term "*levying war*", the word "*war*" should be similarly restricted to exclude a riot

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[9] Fu Hualing, Carole J. Petersen and Simon N.M. Young, National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny, p.170.
[10] Ibid.
[11] *Treason, Secession, Subversion, Sedition and Proscribed Organizations: Submission to Legco on the Consultation Document* (LC Paper No. CB(2)413/02-03(01)).
[12] Ibid, p.3.

or disturbance of a local nature that does not amount to an armed rebellion. In addition, a riot or disturbance of a local nature would potentially be caught by the offence proposed under CP§3.3(e)[13] and/or CP§4.9(c).[14]

35. Considerations should also be given that it be made clear that for the offence of "*levying war*" to be made out, it is necessary for there to be proof of an actual war (in the restricted sense above) levied and not merely a conspiracy to levy it: **Archbold Hong Kong 2024,** §26-12.

C. Offence of "misprision of treason" under the common law

36. CP§3.6 proposes that the common law offence of "*misprision of treason*" should be codified, covering the following circumstances.

> *"If a person knows that another person has committed, is committing or is about to commit the offence of 'treason', the person must disclose the commission of offence to a police officer as soon as reasonably practicable, unless the commission of offence has been in the public domain, otherwise the person commits an offence."* (emphasis added)

37. Accordingly, a person would only have committed this offence if they had actual knowledge (i.e., reasonable belief is insufficient) that someone committed, is committing or is about to commit treason, unless this knowledge has been in the public domain.

Comparison with foreign jurisdictions

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[13] "*with intent to endanger the sovereignty, unity or territorial integrity of China, using force or threatening to use force.*"

[14] "*with intent to endanger the sovereignty, unity or territorial integrity of the People's Republic of China or the public safety of the HKSAR as a whole (or being reckless as to whether the above would be endangered), doing violent act in the HKSAR.*"

38. Below are the offences of "*misprision of treason*" in foreign legislation cited in the CP:

38.1. Section 2382 of Chapter 115 of Title 18 of the United States Code:

> *"Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be fined under this title or imprisoned not more than seven years, or both."*

38.2. Section 80.1(2)(b) of the CCA (Aust):

> *"(2) A person commits an offence if the person:*
> ...
> *(b) knowing that another person intends to commit an offence against this Subdivision (other than this subsection), does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence.*

38.3. Section 76(b) of the Crimes Act 1961 of New Zealand:

> *"Every one is liable to imprisonment for a term not exceeding 7 years who…*
>
> *(b) knowing that a person is about to commit treason, fails without reasonable excuse to inform a constable as soon as possible or to use other reasonable efforts to prevent its commission."*

38.4. Section 50(1)(b) of the Criminal Code of Canada:

> *"(1) Every one commits an offence who…*
>
> *(b) knowing that a person is about to commit high treason or treason does not, with all reasonable dispatch, inform*

a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing high treason or treason."

38.5. Section 121D of the Penal Code 1871 of Singapore:

"Whoever knowing or having reason to believe that any offence punishable under section 121, 121A, 121B or 121C has been committed intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both."

Analysis

39. Consistent with other jurisdictions, the offence of "*misprision of treason*" proposed under the CP contains the similar element of a duty to inform/disclose any knowledge of commission or potential commission of "*treason*" to the police.

40. In comparison, the duty imposed under the CP offence is relatively less onerous than certain foreign legislation, such as Australia, Canada and New Zealand where the additional element of making "*reasonable efforts to prevent*" the commission of the offence is imposed.

41. Further, other legislation codifying the offence does not appear to have the carve out "*unless the commission of offence has been in the public domain, otherwise the person commits an offence*" found in the offence proposed at CP§3.6. The Bar is in principle supportive of such a carve out as it accords with practicality and common sense, and would also narrow the scope of the recommended offence.

42. Further, CP §3.7 notes that where information about the commission of the offence of "*treason*" is protected by legal professional privilege, no

disclosure by the lawyer is required. We believe this exception is indeed essential and support its inclusion.

D. "Treasonable offences"

43. The CP proposes for "*treasonable offences*" to be retained under the existing s.3 of the CO and to be amended to be in line with the offence of "*treason*" as follows, at CP§3.9:

> *"If a person intends to commit the offence of 'treason', and publicly manifests such intention."*

44. The offence, like treason, would only apply to Chinese citizens.

45. Under s.3 of the CO, the offence is formulated as follows:

> *"(1) Any person who forms an intention to effect any of the following purposes, that is to say –*
>
> *(a) to depose Her Majesty from the style, honour and royal name of the Crown of the United Kingdom or of any other of Her Majesty's dominions;*
> *(b) to levy war against Her Majesty within the United Kingdom or any British territory in order by force or constraint to compel Her Majesty to change Her measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, Parliament or the legislature of any British territory; or*
> *(c) to instigate any foreigner with force to invade the United Kingdom or any British territory,*
>
> *and manifests such intention by an overt act or by publishing any printing or writing, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life."*

Comparison with foreign jurisdictions

46. The CP notes that similar offences exist in Canada. Section 46(2)(d)-(e) of the Criminal Code of Canada provides that:

> *"Every one commits treason who, in Canada,...*
>
> *(d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or*
> *(e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act."*

47. Under section 3 of the UK Treason Felony Act 1848, an offence is committed 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 or 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 Kingdom or 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 guilty of felony, and being convicted thereof shall be liable...to be transported beyond the seas for the term or his or her natural life..."*

Analysis

48. The amendments to "*treasonable offences*" proposed under the CP are generally not controversial and are broadly in line with similar offences which exist in foreign jurisdictions.

49. It is noted that for practical purposes, "*treasonable offences*" are often charged as a lesser alternative to the offence of "*treason*" whereby the evidential burden is lower and the prosecution can prove their case more easily.[15]

50. It is further noted that in the 2002 CP, it was proposed that "*treasonable offences*" under s.3 of the CO should no longer be retained and instead be replaced with "*statutory offences for inchoate and accomplice acts, i.e. attempting, conspiring, aiding and abetting, counselling and procuring the commission of the substantive treason offences*".[16]

51. However, under the CP, the purpose of "*treasonable offences*" is not to catch inchoate acts but rather focuses on preventing manifestations of intentions to commit treason to "*effectively prevent others from following such acts, which may pose serious risks to national security*" (CP§3.8). This is in line with the purpose of the original s.3 of the CO.

E. Offence of "unlawful drilling"

52. The offence of "*unlawful drilling*" is proposed under CP§3.11 to specifically target persons who endanger national security by receiving or participating in training in the use of arms or the practice of military exercises or

[15] National Security and Fundamental Freedoms (n 4), p.164.
[16] 2002 CP, §2.13.

evolutions involving external forces, or providing the same in collaboration with external forces:

> *"Without the permission of the Secretary for Security or the Commissioner of Police –*
>
> *(a) providing specified drilling (including training or drilling in the use of arms, practice of military exercises, or practice of evolutions) to any other person;*
> *(b) receiving specified drilling;*
> *(c) receiving or participating in specified drilling planned or otherwise led by external forces; or*
> *(d) providing specified drilling in collaboration with external forces."*

53. The CP further proposes to introduce the following exceptions to the offence under the existing s.18 of the CO such that the following persons will not fall foul of the offence:

53.1. public officers;

53.2. non-Chinese citizens with foreign nationality to serve in an armed force of or perform military service in a government of that foreign country; or

53.3. persons who participate in drills in which the PRC is participating or which are conducted under the law of the HKSAR.

Comparison with foreign jurisdictions

54. In Australia under section 83.3 of the CCA (Aust), it is provided that a person commits an offence if:

> *"(a) the person provides, receives, or participates in, training; and*

(b) the training involves using arms or practising military exercises, movements or evolutions;

(c) any of the following circumstances exists:

(i) the training is provided on behalf of a foreign government principal within the meaning of Part 5.2 (see section 90.3) or a foreign political organisation within the meaning of that Part (see section 90.1);

(ii) the training is directed, funded or supervised by a foreign government principal or foreign political organisation, or a person acting on behalf of a foreign government principal or foreign political organisation."

Analysis

55. The proposed offence of *"unlawful drilling"* under the CP is generally consistent with its foreign counterparts.

56. It is noted that the Australian legislation provides for a further defence whereby a person engaged in *"drilling"* for the purpose of providing humanitarian assistance would be exempted.[17]

57. The proposal for the offence of *"unlawful drilling"* does not specify when drilling is unlawful and merely prohibits drilling *"without permission"*. Nevertheless, this does not seem to be problematic whereby if there are needs for drilling, seeking permission from the Commissioner of Police would resolve the matter.

[17] Section 83.3(4A) of the CCA (Aust).

COMMENTS ON CP 4 - INSURRECTION, INCITEMENT TO MUTINY AND DISAFFECTION, AND ACTS WITH SEDITIOUS INTENTION

A. Introduction

58. Chapter 4 of the CP concerns incitement to mutiny and disaffection, acts with seditious intention, and insurrection, namely:

58.1. to retain and amend the existing offence for "*incitement to mutiny*";

58.2. to retain and amend the existing offence for "*incitement to disaffection*";

58.3. to retain and amend the existing offence for "*acts with seditious intention*"; and

58.4. to enact a new offence of "*insurrection*".

59. The Bar's responses to these proposals are set out in turn below.

B. Incitement to mutiny

60. The offence of incitement to mutiny currently exists in s.6 of the CO:

> "*Any person who knowingly attempts –*
>
> *(a) to seduce any member of the Chinese People's Liberation Army from his duty and allegiance to the People's Republic of China; or*
> *(b) to incite any such person –*
>
> *(i) to commit an act of mutiny or any traitorous or mutinous act; or*
> *(ii) to make or endeavour to make a mutinous assembly,*
>
> *shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.*"

61. The Incitement to Mutiny Act 1797, on which s.6 of the CO is based, was repealed in the UK in 1998.[18] However, similar offences still exist in other jurisdictions, including Australia under the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 ("**2018 NS Act (Aus)**").

62. CP§4.4 proposes to retain the offence and:

62.1. amend the categories of persons the target of incitement to bring it in line with the definition of "*armed forces*" (being the concept used in the Constitution) so that it covers not only members of the Chinese People's Liberation Army ("**PLA**") but also members of the Chinese People's Armed Police Force and the Militia (they, together with the PLA, are defined as "*armed forces*" under the Law of the People's Republic of China on National Defence); and

62.2. define "*mutiny*" to target the following acts:

"Knowingly inciting a member of a Chinese armed force –

(a) to abandon the duties and to abandon the allegiance to China; or

(b) to participate in a mutiny."

63. On the proposal to align the coverage of the offence with the Law of the People's Republic of China on National Defence, the Bar considers that to be consistent with the spirit of the offence and supports it.

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[18] Incitement to Mutiny Act 1797; repealed by Statute Law (Repeals) Act 1998, Schedule 1, Part 1, Group 2.

64. As to the proposal to clearly define or identify the acts "*mutiny*" is intended to target, in general the Bar supports efforts to provide greater clarity (and hence legal certainty) to the offence. The Bar has the following observations.

65. First, it appears that the intention of the proposal is to identify the types of acts that the "*incitement to mutiny*" offence targets, as opposed to providing a definition of "*mutiny*". It must be recognised that there are pros and cons in either having a statutory definition or one which is left to be developed by the Court and guided by other common law precedents. The proposed approach leaves open the scope for the common law to operate and provide meaning to "*mutiny*", which allows for flexibility and adaptability with changing circumstances.

65.1. By way of example, in ***R v Grant*** [1957] 1 WLR 906 it was held that the 'modern' idea of mutiny is that it is a collective offence, of collective insubordination, collective defiance or disregard of authority or refusal to obey authority.[19] Whether this meaning (or any other meaning one finds from the case law) will apply in any given case is ultimately a matter of statutory interpretation; however the availability of such meanings from the common law has utility and can provide assistance to the exercise that the prosecution and the courts will have to engage in.

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[19] This was adopted and given further particularity in Australia in s.83.1(2) of the CCA (Aust) (inserted by the 2018 NS Act (Aus))), which defines mutiny as:

"A mutiny is a combination between persons who are, or at least 2 of whom are, members of the Australian Defence Force:
(a) to overthrow lawful authority in the Australian Defence Force or in a force of another country that is acting in cooperation with the Australian Defence Force; or
(b) to resist such lawful authority in such a manner as to substantially prejudice the operational efficiency of the Australian Defence Force or of, or of a part of, a force of another country that is acting in cooperation with the Australian Defence Force."

65.2. On the other hand, having a statutory definition, whilst it may provide for less flexibility, may be said to compensate this by offering for more certainty in the law.

66. Second, at present it is not clear from the proposal whether the types of acts identified that mutiny is intended to target are exhaustive, or merely inclusive. Each has its own advantages: an exhaustive definition would further enhance legal certainty; whereas an inclusive definition would provide flexibility in case there are future developments not presently contemplated which, as circumstances develop, would require restriction. The Bar would invite the Administration to clarify the same.

67. Third, we note that the SJ's consent is required for prosecution under the existing offence of "*incitement to disaffection*" in s.7(6) of the CO. That offence, under the limb in s.7(1A) of the CO, overlaps with the existing offence of "*incitement to mutiny*" under the limb in s.6(a) of the CO. As such, we consider that there should be consistency between the two, and the SJ's consent should also be required for prosecution of the offence of "*incitement to mutiny*". This would also provide an important additional safeguard.

68. That the consent of the SJ is required is not uncommon; indeed it has been part of our existing law on "*incitement to disaffection*". As another example, in Australia, s.83.5 of its CCA (Aust) provides that the consent of the Attorney-General is required to prosecute the offence of advocating mutiny.

69. An interesting feature of the aforesaid Australia legislation is that it mandates the Attorney-General, when deciding whether to give consent, to consider whether the "*good faith defence*" may apply.[20]

69.1. A "*good faith defence*" exists in Australia for various national security offences (including the offence of advocating mutiny) and is set out in s.80.3 of the CCA (Aust) (inserted by the 2018 NS Act (Aus)) as follows:

'80.3 Defence for acts done in good faith

(1) Subdivisions B [treason etc] and C [urging violence etc, advocating terrorism, and advocating genocide], and sections 83.1 [advocating mutiny] and 83.4 [interference], do not apply to a person who:

(a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:

(i) the Sovereign;
(ii) the Governor-General;
(iii) the Governor of a State;
(iv) the Administrator of a Territory;
(v) an adviser of any of the above;
(vi) a person responsible for the government of another country; or

(b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:

(i) the Government of the Commonwealth, a State or a Territory.
(ii) the Constitution;

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[20] Section 83.5(4)(b), CCA (Aust).

(iii) legislation of the Commonwealth, a State, a Territory or another country;

(iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or

(c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or

(d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters;

(e) does anything in good faith in connection with an industrial dispute or an industrial matter; or

(f) publishes in good faith a report or commentary about a matter of public interest.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

(2) In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:

(a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or

(b) with the intention of assisting a party:

(i) engaged in armed conflict involving the Commonwealth or the Australian Defence Force; and

(ii) declared in a Proclamation made under section 80.1AB to be an enemy engaged in armed conflict involving the Commonwealth or the Australian Defence Force; or

(c) with the intention of causing violence or creating public disorder or a public disturbance.

(3) Without limiting subsection (2), in considering a defence under subsection (1) in respect of an offence against Subdivision C, the Court may have regard to any relevant matter, including whether the acts were done:

(a) in the development, performance, exhibition or distribution of an artistic work; or
(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
(c) in the dissemination of news or current affairs.'

69.2. The reason for Australia extending this defence in 2018 to the then newly introduced offence of advocating mutiny in s.83.1 was that it was considered to have struck a balance between freedom of expression and unwanted encouragement of mutiny: §§98-99 of the *Supplemental Explanatory Memorandum* to the bill for the 2018 NS Act (Aus). [21] The Parliamentary Joint Committee on Intelligence and Security report[22] noted that the basis of the extension as referred to in the *Supplemental Explanatory Memorandum* recorded concerns that the offence of advocating mutiny could "*potentially capture citizens offering peaceful protest against Australian military action*" and that the Law Council of Australia was of the view that "*the breadth of the provision may not be compatible with the right to freedom of opinion and expression*" (§§9.51-9.52). The report therefore recommended at §§9.101-9.103 the

[21] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6022_ems_c0670f8e-b255-487c-aa0a-df608c6db06a/upload_pdf/676941.pdf;fileType=application%2Fpdf

[22] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (2018).

extension of this defence to the offence of advocating mutiny, which recommendation was adopted into law.

69.3. As can be seen from the Australian explanatory memorandum and report, ultimately it is a matter of striking a balance between different considerations - national security and freedom of speech; and the prevailing circumstances of each jurisdiction obviously differ, which would inform where the appropriate balance should be drawn in a given jurisdiction. For example, the US does not appear to have a defence of similar nature to its offence against activities affecting armed forces generally.[23]

69.4. In this regard, it is of note that something very similar to the Australian "*good faith defence*" already exists in our law, under the offences relating to seditious intention in s.9(2) of the CO, which the Administration proposes to retain (in slightly modified form), indicating that it is rightly accepted that the Administration also considers a defence of this nature as striking an appropriate balance in the particular circumstances of Hong Kong. As such, there is something to be said for considering whether the defence in s.9(2) of the CO in its proposed modified form should also be available to the offence of "*incitement to mutiny*", and also "*incitement to disaffection*" (see below).

C. Incitement to disaffection

70. The offence of "*incitement to disaffection*" currently exists in s.7 of the CO. Much of s.7 of the CO was based on the Incitement to Disaffection Act 1934

[23] 18 US Code, §2387.

in the UK , and similar offences continue to exist in jurisdictions such as Canada, Victoria (Australia) and Singapore. The CP proposes to retain this offence, which the Bar in principle supports.

71. The existing s.7 of the CO has essentially 3 limbs:

71.1. knowingly seduce members of the Police Force, Auxiliary Police Force, Government Flying Service and PLA from their respective duty or allegiance (s.7(1) & (1A))[24];

71.2. assisting a deserter in the aforesaid categories in deserting, or concealing (or assisting in concealing) such deserter, or assisting the rescue of such deserter from custody (s.7(2))[25]; and

71.3. possessing documents with intent to commit or to aid, abet, counsel or procure the commission of an offence in ss.7(1)-(1A) of the CO (s.7(3))[26].

72. The proposals in the CP are three-fold:

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[24] "*(1) Any person who knowingly attempts to seduce –*
[repealed]
(ba) any member of the Government Flying Service;
(c) any police officer; or
(d) any member of the Hong Kong Auxiliary Police Force,
from his duty or allegiance to Her Majesty shall be guilty of an offence.
(1A) Any person who knowingly attempts to seduce any member of the Chinese People's Liberation Army from his duty or allegiance to the People's Republic of China is guilty of an offence."

[25] "*(2) Any person who –*
(a) knowing that any member or officer mentioned in subsection (1) or (1A) is about to desert or absent himself without leave, assists him in so doing; or
(b) knowing such member or officer to be a deserter or absentee without leave, conceals him or assists him in concealing himself or assists in his rescue from custody,
shall be guilty of an offence."

[26] "*(3) Any person who, with intent to commit or to aid, abet, counsel or procure the commission of an offence under subsection (1) or (1A), has in his possession any document of such a nature that the dissemination of copies thereof among the members or officers mentioned in subsection (1) or (1A) would constitute such an offence, shall be guilty of an offence."*

72.1. First, CP§4.5 proposes to expand the categories of persons covered by the offence, so that in addition to members of the police, the Government Flying Service and the PLA, it would also cover:

72.1.1. *"a public officer"* - the acts directed against are similar to the existing law who *"uphold the Basic Law and bear allegiance to the HKSAR"* which is defined in s.3AA of the IGCO[27], introduced at the same time as the HKNSL; and

72.1.2. members of the offices of the CPG in the HKSAR.

72.2. Second, since the existing *"assisting deserter"* limb of the offence only covers, vis-à-vis Mainland personnel, members of the PLA, consistent with the approach to the *"incitement to mutiny"* offence, CP§4.6 proposes to align with the Law of the People's Republic of China on National Defence by adding the category of *"member of the Chinese armed force"* to the *"assisting deserter"* limb by way of a separate offence:

> *"(a) knowing that a member of a Chinese armed force is about to abandon the duties or absent himself without leave, assisting the member in so doing; or*
>
> *(b) knowing that a member of a Chinese armed force has abandoned the duties or has absented himself without leave, concealing the member, or assisting the member in concealing himself or escaping from lawful custody."*

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[27] The s.3AA definition includes, for instance, upholding the BL and bearing allegiance to the HKSAR by being *"loyal to, and safeguards the interests of, the* [HKSAR]", not upholding the BL and bearing allegiance to the HKSAR if one *"commits acts that undermine or have a tendency to undermine the overall interests of the* [HKSAR]" (s.3AA(1)(f) and (3)(g)).

72.3. Third, CP§4.7 proposes to extend the "*document possession*" limb to the offence of "*incitement to mutiny*" as well:

> *"A person with intent to commit the offence of "incitement to mutiny" or the offence of "incitement to disaffection" possessing a document or article of the following nature:*
>
> > *a document or article, if distributed to a relevant officer (namely a member of a Chinese armed force, a public officer or a member of a CPG office in Hong Kong), would constitute the offence of "incitement to mutiny" or the offence of "incitement to disaffection"."*

73. As mentioned above, many other jurisdictions have incitement to disaffection or desertion offences for police officers and/or armed forces. Therefore the Bar in general supports the retention of this offence. Further:

73.1. With respect to expanding the categories of persons covered to members of the offices of the CPG in Hong Kong, although their roles and functions may not overlap directly or substantially with those of armed forces and law enforcement officers, given the CPG is responsible for foreign affairs, defence and diplomacy as prescribed under BL 13, 14 and 157, the Bar considers that the expansion of categories to cover members of CPG offices in Hong Kong can be justified.

73.2. The proposed alignment in the "*assisting deserter*" limb of PLA with "*Chinese armed force*" is, as with the case of the "*incitement to mutiny*" offence, acceptable and supported by the Bar.

73.3. As to extending the "*document possession*" limb to the "*incitement to mutiny*" offence, such a restriction is not uncommon in the context of

mutiny (for example, it exists in 18 US Code §2387), and the rationale applies equally to the "*incitement to disaffection*" offence as the "*incitement to mutiny*" offence. Accordingly, the Bar also considers such extension to be justified.

74. The Bar also notes that under the existing law, the SJ's consent is required to prosecute under s.7(6) of the CO, and there is no suggestion in the CP that this requirement would not be retained. The Bar welcomes this.

75. The Bar, however, has reservations on the proposed extension of the categories of persons covered to "*public officers*" (公職人員) (which would result in all three limbs being applicable to them), since this phrase is potentially of very wide coverage and (i) would create uncertainty; and (ii) the rationale that justifies this offence may not be applicable to all types of public officers.

75.1. The Bar observes that this type of offence has historically been concerned with the armed forces and members of the disciplined services, because of their role in defence, national security and maintenance of public order which requires that their loyalty to the state be protected. Indeed, the language of "*deserter*" (in the second limb) is grounded in military roots.

75.2. The Bar also observes that there are examples where the categories have been expanded, for instance in the Victoria Police Act 2013 to "*protective services officers*" appointed by the Chief Commissioner of Police, being persons to provide services for the protection of certain public office holders, the general public in certain places, and certain

places of public importance.[28] Nevertheless, it is clear from these examples that the expanded categories are still premised on public protection through defence of the realm or public order maintenance.

75.3. The Bar's research has not so far identified any example where such an offence had been extended to all public officers.

75.4. The Bar considers that using the phrase of "*public officer*" may create uncertainty which may not be desirable in an offence of this nature. The Bar notes that:

75.4.1. in s.3 of the IGCO "*public officer*" (公職人員) is defined to include "*any person holding an office of emolument under the Government, whether such office be permanent or temporary*"; and

75.4.2. in BL 99 and 100, the concept of "*public servants*" (公務人員) is used which covers all public servants in all government departments. Both meanings convey the notion that it applies to all Government employees. The use of the phrase "*public officers*" is thus likely to lead to confusion and generate uncertainty, which is undesirable.

75.5. Further, "*public officers*" in the HKSARG cover a vast range of roles and responsibilities, many of which would be far removed from defence of the realm or public order maintenance. Indeed, in CP§4.5, the Administration is not suggesting that this offence should be applied indiscriminately but has singled out those responsible for "*the formulation and implementation of policies, the maintenance of public*

[28] Sections 37-38 of the Victoria Police Act 2013.

order, the management of public finance, the upholding of due administration of justice, and those public officers with statutory powers of investigation against government departments". Given the serious nature of the offence and the potential penalty it may impose, it is desirable that the categories proposed to be added should be sufficiently and demonstrably connected to its rationale, namely defence of the realm and public order maintenance.

75.6. In addition, the proposed addition is linked to "*uphold the Basic Law and bear allegiance to the HKSAR*" as defined in s.3AA of the IGCO, which covers a wide range of circumstances, including for instance committing acts that undermine or have a tendency to undermine the overall interests of the HKSAR. This, in the context of a concept of "*public officers*" that potentially covers all civil servants, may raise questions as to potential implications of the proposed offence on the freedom to strike protected under BL 27, and the freedom of expression and speech under BL 27 and BOR 16. For example, on issues which may turn on value judgment or fall within a range of plausible acceptable options (e.g. fiscal policies), one may attempt to persuade policy makers to formulate policies or make decisions on such issues which one genuinely believes to be in the best interest of the HKSAR, which position others may equally genuinely consider to have a "*tendency to undermine the overall interests of the HKSAR*".

76. Accordingly, the Bar considers that:

76.1. The Bar has concerns on the expansion of the offences to cover personnel not connected with armed force or disciplinary field. Further justifications will be welcomed.

76.2. The expansion of the categories should be specific, just like the proposal concerning "*Chinese armed force*".

76.3. For each of the specific category proposed to be added, such category's roles and responsibilities should be sufficiently and demonstrably shown to be connected to the rationale of the offence.

76.4. Thus, one may consider, for example, that officers of the Correctional Services Department could be covered, subject to appropriate demonstration that their roles and responsibility are connected to and justified by the rationale.

76.5. Further, given the potential implications in §75.6 above, if the Administration is still minded to adopt the defined phrase "*uphold the Basic Law and bear allegiance to the HKSAR*", the Bar recommends that consideration be given to the adoption of a good faith defence (discussed in §69 above), so that there could be a mechanism to address any unintended effect of the offence as and when they arise and on the facts of the particular case.

D. <u>Acts with seditious intention</u>

77. Offences for acts with seditious intention currently exist in ss.9-11 of the CO as follows.

77.1. Section 9 defines "*seditious intention*" exhaustively under 7 limbs:

> "*(1) A seditious intention is an intention –*
>
> *(a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or*

the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established; or

(b) *to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or*

(c) *to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or*

(d) *to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or*

(e) *to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or*

(f) *to incite persons to violence; or*

(g) *to counsel disobedience to law or to any lawful order."*

77.2. Section 9(2) excepts or negates the seditious intention in four circumstances:

"(2) An act, speech or publication is not seditious by reason only that it intends –

(a) *to show that Her Majesty has been misled or mistaken in any of Her measures; or*

(b) *to point out errors or defects in the government or constitution of Hong Kong as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or*

(c) *to persuade Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established; or*

(d) *to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Hong Kong."*

77.3. Section 10 provides for offences for acts, speech and publication with a seditious intention, and possession of publication with a seditious intention:

"(1) Any person who –

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or

(b) utters any seditious words; or

(c) prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publication; or

(d) imports any seditious publication, unless he has no reason to believe that it is seditious,

shall be guilty of an offence and shall be liable for a first offence to a fine at level 2 and to imprisonment for 2 years, and for a subsequent offence to imprisonment for 3 years; and any seditious publication shall be forfeited to the Crown.

(2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and shall be liable for a first offence to a fine at level 1 and to imprisonment for 1 year, and for a subsequent offence to imprisonment for 2 years; and such publication shall be forfeited to the Crown.

...

(5) In this section –

seditious publication *(煽動刊物) means a publication having a seditious intention;*

seditious words *(煽動文字) means words having a seditious intention."*

77.4. Section 11 then provides safeguards with respect to legal proceedings prosecuting these offences, by (i) a limitation period of 6 months after the offence is committed; and (ii) the need for consent from the SJ.

78. Sedition is expressly stipulated in BL 23 as one of the subject matters which the HKSAR shall enact laws on.

79. The CP proposes to retain an offence concerning sedition.

80. As to the content of such offence, CP§4.8 proposes as follows:

80.1. The existing provisions in ss.9-10 of the CO are largely retained.

80.2. The "seditious intention" will be revised into 6 limbs:

> *"(i) the intention to bring a Chinese citizen, Hong Kong permanent resident or a person in the HKSAR into hatred or contempt against, or to induce his disaffection against, the following system or institution - the fundamental system of the State established by the Constitution; a State institution under the Constitution; or a CPG office in Hong Kong;*
> *(ii) the intention to bring a Chinese citizen, Hong Kong permanent resident or a person in the HKSAR into hatred or contempt against, or to induce his disaffection against, the constitutional order, executive, legislative or judicial authority of the HKSAR;*
> *(iii) the intention to incite any person to attempt to procure the alteration, otherwise than by lawful means, of any matter established in accordance with the law in the HKSAR;*
> *(iv) the intention to induce hatred or enmity amongst residents of the HKSAR or amongst residents of different regions of China;*
> *(v) the intention to incite any other person to do a violent act in the HKSAR;*

(vi) *the intention to incite any other person to do an act that does not comply with the law of the HKSAR or that does not obey an order issued under the law of the HKSAR."*

80.3. The exceptions and negations of seditious intention will be retained and revised as follows:

"... an act, word or publication does not have seditious intention by reason only that it has any of the following intention –

(i) *the intention to give an opinion on the abovementioned system or constitutional order, with a view to improving the system or constitutional order;*
(ii) *the intention to point out an issue on a matter in respect of the abovementioned institution or authority with a view to giving an opinion on the improvement of the matter;*
(iii) *the intention to persuade any person to attempt to procure the alteration, by lawful means, of any matter established in accordance with the law in the HKSAR;*
(iv) *the intention to point out that hatred or enmity amongst residents of the HKSAR or amongst residents of different regions of China is produced or that there is a tendency for such hatred or enmity to be produced, with a view to removing the hatred or enmity."*

80.4. The Administration has expressed the intention (as set out in CP§4.12) that the proposed sedition offence would *"not affect legitimate expression of opinions (such as making reasonable and genuine criticism of government policies based on objective facts, or pointing out issues, offering views for improvement, etc.)"* and the recognition of the need to strike an appropriate balance between safeguarding national security and protecting rights and freedoms. The Bar supports this approach.

80.5. It appears that the safeguards in the existing s.11 of the CO will be retained.

81. There are two further points on the existing law of note.

81.1. First, the offence requires proof that the defendant (i) intends to perform the prescribed act, (ii) knows that the act in question (whether act, speech or publication) is seditious, and (iii) has a seditious intention in performing such act.[29]

81.2. Second, what amounts to sedition must depend, among other things, on the state of society at a particular point in time when the seditious act, speech or publication was said to have been done, uttered or published: ***Boucher v R*** [1951] SCR 265, 281, citing ***The Queen v. Fussell***—

> *"You cannot, as it seems to me, form a correct judgment of how far the evidence tends to establish the crime imputed to the defendant, without bringing into that box with you a knowledge of the present state of society, because the conduct of every individual in regard to the effect which that conduct is calculated to produce, must depend upon the state of the society in which he lives. This may be innocent in one state of society, because it may not tend to disturb the peace or to interfere with the right of the community, which at another time, and in a different state of society, in consequence of its different tendency, may be open to just censure."*

82. Having set out all of the above, the Bar's position as to the proposed legislation is as follows.

83. First, as mentioned above, the HKSAR has an obligation, under BL 23, to enact laws on its own to prohibit any act of sedition. The Bar therefore

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[29] See ***HKSAR v Lai Man Ling*** [2022] 4 HKLRD 657, §§74-78.

supports, in principle, the Administration's proposal to enact laws against sedition.

84. Second, moving on to content, the legislation should, as a matter of general principle, adequately reflect and balance:

84.1. The actual circumstances of the HKSAR in 2024 including its social, political and economic settings.[30]

84.2. Human rights and freedoms and the rule of law values, which are enshrined in the BL and the BOR.[31]

84.3. As already mentioned, it would be beneficial to take heed of the international experience. While it is recognized that national security considerations are state-specific and must necessarily depend on the prevailing circumstances of the state in question, the HKSAR, as a jurisdiction of international standing and import, signatory to many international conventions (including the ICCPR), and a place renowned for its diverse international population (both permanent and transient), would benefit from drawing on the international experience, as a cross-check against the level of restriction it proposes to pitch.

85. The Bar considers that having regard to the developments of the law in other jurisdictions, and the various concerns which have been raised judicially, by academics and others set out below, there are understandable

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[30] Aspects of which are very different now compared to the circumstances in, say, 2002 and 2003, when there was a previous attempt to introduce legislation pursuant to BL 23, which the Bar commented on.
[31] See the Court of Final Appeal's confirmation that these values and national security legislation co-exist in Hong Kong and these values continue to provide the context within which national security related legislation are applied: ***HKSAR v Lai Chee Ying*** (2021) 24 HKCFAR 33, §42.

concerns about the ambit of the sedition offence as presently proposed and which should be addressed. The Bar believes that there may well be room to fine tune the proposed offence of sedition so as to ensure that it achieves the result it seeks to target, while ensuring constitutionally protected rights under the BL are being adequately protected. This is a fine balance to be maintained and a complicated constitutional issue.

86. Third, the law on sedition is of long lineage and antiquated; if it is to be retained as presently proposed, the Administration should utilize this opportunity to modernize and streamline it.

86.1. The existing sedition offence (which the CP proposes to model on) is of antiquated origins[32]; it was first introduced as statute law in 1914, and its current form dated back to the amendments in 1970.

86.2. That the existing offence is outdated is recognized by the Administration, for example in the proposal to remove antiquated wording such as "*excites*" and "*ill-will*" and replace them with more modern terminology and streamlined concepts.

86.3. Hong Kong is not alone in having sedition legislation of some antiquity; our existing sedition law is one of many in substantially similar forms adopted across many common law jurisdictions. In these other jurisdictions, there is a clear trend towards revising, updating and narrowing the offence, and in some cases abolishing it altogether (often with new legislation addressing the modern day concerns of such state in place).

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[32] See a helpful summary in ***AG of Trinidad and Tobago v Vijay Maharaj*** [2023] UKPC 36, §§31-42.

86.3.1. Such offences have been abolished or partly abolished in the UK, Ireland, Singapore and New Zealand, against a backdrop that other legislation is considered adequate to address sedition-related concerns.

86.3.2. In the UK, sedition is being addressed by public order legislation[33]; in Ireland, by provisions such as Offences Against the State Act 1939; in Singapore, by the introduction of an offence targeting acts that could lead to violence, disobedience to the law or a breach of the peace, which required the offender intended for the violence, disobedience to the law, or breach of the peace to occur, or knew or had reason to believe that these would likely occur; and in New Zealand, by public order legislation such as Terrorism Suppression Act 2002 and Human Rights Act 1993.

86.3.3. In the US and Australia, the offences are retained, but are narrowed down to require the use of force or violence being involved.

86.4. Fourth, the Bar considers there are a number of options available which would modernize, bring up to date and fine-tune the sedition offence, having regard to the principles identified in §84 above. The guiding principle is to first identify the mischief which is targeted by the offence. This could be described as "*preventing the overturning of, or serious endangerment of the security of the state*" and then tailoring it so as to target that mischief but to go no further than is necessary for

[33] Racial and Religious Hatred Act 2006 and Terrorism Act 2006.

that purpose. The ultimate aim is thus to target the mischief while ensuring adequate protection to human rights and in particular freedom of expression in a manner which is relevant to the actual situation[34]. The options set out below are not in the alternative, and can be considered in conjunction with each other.

86.5. The *first* is to consider whether to adopt the existing s.9 of the CO as the foundation for the proposed new offence (with a structure of 6 limbs and largely following fairly antiquated sentence structure and wording), or to draft afresh keeping the categories / limbs limited in number and clear, which would facilitate certainty.

86.6. *Second*, in seeking to streamline and make clearer the offence, it is important to identify what is the true vice the offence targets. As noted above, the core of the offence is directed at <u>preventing overturning, or serious endangerment of the security of the state</u> (in this case, this should cover the PRC, as well as the HKSAR). Each of the 6 limbs identified in CP§4.8 are, in one sense, illustrations of this fundamental principle. Thus, if this principle can itself be adopted as the core ingredient of the offence, it will effectively target seditious acts and remove reliance on historically antiquated provisions, and would likely help all concerned understand the true target of the offence and the severity required for it to be engaged.

86.7. For completeness, the Bar supports the proposal in the CP to target "*the fundamental system of the State established by the Constitution; a State*

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[34] As the Minister for Home Affairs and Minister of Law in Singapore Mr Shanmugam noted in the second reading of the Sedition (Repeal) Bill, "*some of the key aspects of the Sedition Act are no longer relevant and have not been relevant for a long time*".

institution under the Constitution; or a CPG office in Hong Kong" and "*the constitutional order, executive, legislative or judicial authority of the HKSAR*", for these directly capture the concept of the state identified in the principle above. The Bar's suggestion is that the current proposal can be further streamlined in accordance with §86.6 above.

86.8. *Third,* a related benefit of the approach advocated in §86.6 above is that it helps enhance coherency in the whole corpus of law and reduce duplication. In our law there already exists other specific and well-defined offences to deal with, say, acts with an intention to incite violence or disobedience with the law, or to address acts with an intention to bring into hatred or contempt or induce disaffection against the judicial authorities of the HKSAR (namely, the offence of contempt of court for scandalizing the court: ***Wong Yeung Ng v Secretary for Justice*** [1999] 2 HKLRD 293). Sedition is clearly directed at conduct of the most serious nature. Thus, identification of the main or governing criterion being overturning or seriously endangering the security of the state will serve to clearly signal and separate those conduct that should fall within sedition. Those which do not go to this true vice should properly be dealt with using other existing offences.

86.9. *Fourth,* consideration may be given to whether the seditious intentions mentioned in CP§4.8(a)(i) to (iv) should be further narrowed down by the requirement of an intention to incite violence, disorder or counselling others to disobey the law.

86.9.1. As mentioned in §86.3.2 above, in some jurisdictions there has been a legislative choice to adopt this requirement.

86.9.2. At common law there are differing decisions on whether this requirement applies to sedition (in the absence of clear words indicating one way or the other). The Supreme Court of Canada has held in ***Boucher v R*** that such requirement applies, which was followed in ***R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*** [1991] 1 QB 429, and the Privy Council in ***Maharaj*** at §§46-47 held *obiter* that there is much to be said for the proposition that the requirement that there must be an intention to incite violence or disorder applies. In Hong Kong, following the early Privy Council decision in ***Wallace-Johnson v The King*** [1940] AC 231 (which is doubted obiter in ***Maharaj***), the Court of Appeal in ***Fei Yi Ming v R*** (1952) 36 HKLR 133 held that incitement to violence was not a necessary element to be proved, though the issue has not been considered by the appellate court since.[35]

86.9.3. What is the appropriate balance to be struck must necessarily have regard to the experiences and prevailing conditions of Hong Kong. The Bar notes that the Administration is alive to the distinction between making incitement to violence as a requirement and not (see CP§4.8(c)). Nevertheless, we consider that the introduction of such a requirement is worth considering, for (i) even with it the offence would likely capture most of the instances where protection is needed (see, for example, the SJ's stance that recent sedition convictions

[35] Applied in a recent District Court case: ***Lai Man Ling***, §§81-87. The District Court is of course bound by ***Fei Yi Ming***.

concerned "*very extreme speeches*"); (ii) it serves to highlight and remind that sedition targets the most serious and extreme type of situation of seeking to overthrow or seriously endanger the state; (iii) its alignment with the position in a number of major common law jurisdictions will give welcoming assurance to the local and international community alike; and (iv) whilst noting the Administration's concern over the "*cumulative effect*" of acts of incitement which do not incite the use of violence, this may not necessarily outweigh as a matter of principle the considerations set out above.

86.9.4. One formulation that the Administration may take into account is to require knowledge of a *likelihood* that violence, disobedience to the law or breach of the peace may occur.[36]

87. Fifth, the Bar welcomes the proposed retention of the exceptions to the seditious intention offence, which the Bar considers to be an important safeguard in the balancing exercise to the protection of human rights and freedoms, in particular the freedom of speech. In addition:

87.1. The Bar recommends the retention of the "*misled or mistaken*" exception, which exists under the current law (s.9(2)(a)). There is no apparent reason why, where the state or the Government has *in fact* been misled or is mistaken, one should not be allowed to point that out; indeed it must be in the interest of the state or the Government to be informed of that.

[36] See s.267C of the Singapore Penal Code as an example.

87.2. The Bar also recommends that further consideration be given to the formulation of the proposed exceptions (i) and (ii):

87.2.1. The Bar welcomes the expansion of the exception from the current s.9(2)(b) of the CO (limited to pointing out errors or defects) to "*an issue with respect to a matter in respect of the abovementioned institution or authority*", which is considerably wider in scope.

87.2.2. However, the Bar notes that the proposed wording of conduct being excepted only if done "*with a view to giving an opinion on the improvement of the matter*" (emphasis added) may not fully capture the myriad of situations in which people may and should legitimately be able to comment on the system or decisions of the authorities, and strike the correct balance with the freedom of expression. People may sometimes express frustration with the authorities without necessarily being able to provide constructive comments at the same time such that it can be said to be "*with a view to giving an opinion on the improvement of the matter*". The freedom of expression includes the freedom to express disagreement. There should be sufficient room for people to ventilate their grievances even if their views are disagreeable, unpopular or distasteful: ***Leung Kwok Hung v HKSAR*** (2005) 8 HKCFAR 229 at §§1-2. The Administration is invited to consider formulations that ensures legitimate, genuine and honestly-held speech is not inadvertently caught under the proposed offence.

E. Insurrection

88. CP§4.9 proposes a new offence for insurrection to target the following:

> *"(a) joining or being a part of an armed force that is in an armed conflict with the armed forces of the People's Republic of China;*
>
> *(b) with intent to prejudice the situation of the armed forces of the People's Republic of China in an armed conflict, assisting an armed force that is in an armed conflict with the armed forces of the People's Republic of China;*
>
> *(c) with intent to endanger the sovereignty, unity or territorial integrity of the People's Republic of China or the public safety of the HKSAR as a whole (or being reckless as to whether the above would be endangered), doing a violent act in the HKSAR."*

89. The Bar has the following observations in relation to the proposed offence.

90. First, focusing on limbs (a) and (b) which concern participating in, or assisting an enemy in, armed conflict with the PRC, as CP§4.10 notes, similar offences exist in many other jurisdictions, and the Bar in principle supports the introduction of such an offence.

91. On the other hand, limb (c) of the proposed offence relates to a "*violent act*" with the requisite intent or recklessness, regardless of the existence of any armed conflict or hostile armed forces.

92. Second, also on limb (b), "*assisting*" is a word of great width, and clarity is needed as to whether it, for instance, covers certain conduct or expression, such as:

92.1. donating for the purpose of humanitarian aid to people in territories under the control of the hostile armed forces (such that one may not

be able to rule out the possibility that some of that aid may end up in the hands of such armed forces); and

92.2. peaceful expression of anti-war sentiments or *bona fide* disagreements with the position taken by the PRC armed forces in a particular armed conflict.

93. With respect to the first scenario above, that such consideration is not far-fetched is demonstrated by the debate over whether humanitarian aid should be provided to the Hamas-controlled territories in the context of the ongoing Israel-Hamas conflict. In the Canadian case of ***Lampel v Berger*** (1917), 38 D.L.R. 47 (Ont. S.C.), it was indicated that the payment of money to an enemy alien residing in neutral territory, knowing some of the money would be sent by the alien to his wife and family still living in enemy territory, would be assisting the enemy, and therefore treason.[37] The Administration is invited to consider whether further clarity can be introduced, for instance as suggested by the Law Reform Commission of Canada[38], by specifying that the assistance has to be related to the war effort and must be substantial.

94. As to the second scenario:

94.1. It is widely recognized that it not always easy to distinguish between legitimate dissent and actual aid to the enemy: see for example ***Phillips v Secretary of State for Foreign, Commonwealth and Development Affairs*** [2024] EWHC 32 (Admin) at §§50-51; the Australian Law Reform Commission Report 104 '***Fighting words: A***

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[37] Law Reform Commission of Canada, '***Crimes Against the State***' (Working Paper 49, 1986), p.31, fn 67 (the "**CLRC Report**").
[38] Ibid, p.31.

review of sedition laws in Australia' (13 December 2006), §§11.7-11.13 and 11.20-11.23[39]; and the Administration's response to the Report of the Bills Committee in 2003 (LC Paper No. CB(2)2646/02-03), §§25-26.[40]

94.2. One possible method to address the above concern is to adopt a good faith defence (discussed in §69 above).

95. Third, as regards limb (c), the Bar observes that it is very different in nature with limbs (a) and (b) such that the considerations and justifications applicable to them do not apply here, and as formulated there is significant duplication between this limb (c) under the insurrection offence and the proposed limb (v) under the seditious intention offence. If the Administration is minded to substantially adopt the proposed formulations for limb (c) under the insurrection offence, there may not be a need for a duplicative offence in the proposed limb (v) under the seditious intention offence.

96. Fourth, with regards to the mental element of the offence, we note that the Australian and Canadian provisions referred to in CP§4.10 appear to require an intent to overthrow the constitution or the government, while

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[39] Australian Law Reform Commission, , accessible at https://www.alrc.gov.au/publication/fighting-words-a-review-of-sedition-laws-in-australia-alrc-report-104/

[40] *"25. As to the offence of assisting public enemy at war in new section 2(1)(c), some members consider the meaning of "prejudice the position of the PRC in the war" unclear. These members are concerned that expressing anti-war views and providing humanitarian aid to a foreign country at war with the PRC would amount to assisting public enemy. These members have suggested that such acts should be excluded from the offence.*
26. The Administration has pointed out that for the offence of assisting public enemy, it would not be sufficient merely to prove that a person intentionally assisted an enemy. The prosecution would also need to prove that the person's purpose in giving such assistance was to prejudice the position of the PRC in the war, and the person knew that such prejudice was a virtually certain consequence of his acts. Providing humanitarian aid to a foreign country at war with the PRC would not be conducted with such an intent, and therefore would not amount to the offence. It is not necessary to provide an express exclusion in the Bill. The Administration has stressed that mere expression of opinion would not amount to treason."

recklessness would suffice for limb (c) of the proposed offence. Bearing in mind the serious nature of the offence, and the need to clearly demarcate those acts of violence which would constitute an offence endangering national security, explanation from the Administration on the justification for the inclusion of recklessness would be welcomed.

97. Fifth, in line with the other offences, the Bar would recommend that the SJ's consent be required for the prosecution of insurrection.

COMMENTS ON CP 5 - THEFT OF STATE SECRETS AND ESPIONAGE

A. Introduction: General Observations

98. The Official Secrets Ordinance (Cap. 521) ("**OSO**") is modelled on the UK Official Secrets Act which was enacted in 1911 and amended in 1920. The UK Law Commission's Report on Protection of Official Data published in September 2020[41] opined that *"[t]he scale and potential impact of espionage and of unauthorised disclosures ("leaks") has changed considerably in the 21st century"* due to development in technology. It was concluded and recommended that the offences in the Official Secrets Act *"are outdated and in urgent need of reform"*.[42]

99. The said comments are in line with the observations in CP§§5.13-5.14 that modern-day espionage activities have evolved. As a general observation, the Bar agrees that existing laws relating to the protection of state secrets and counterespionage would need to be updated to cope with the increasingly diversified modes of espionage activities and enhance protection of state secrets.

B. Theft of State Secrets

100. As mentioned in CP§§5.1 to 5.2, HKNSL 29 and the OSO already provides for the offence of *"collusion with a foreign country or with external elements to*

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[41] Available at https://lawcom.gov.uk/project/protection-of-official-data/

[42] Summary of the Protection of Official Data Report, p.1, available at: https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2020/09/6.6798_LC_Protection-of-official-data_summary_Final_Web.pdf.

endanger national security" and offences relating to "*unlawful disclosure of protected information*".

101. The CP recommends improving the offence of "*protection of state secrets*" by:

101.1. amending the definition of "*state secrets*";

101.2. amending the definition of "*public servants*"; and

101.3. introducing specific offences pertaining to the protection of state secrets.

Definition of "state secrets"

102. The suggested amended definition of "state secrets" is set out in CP§5.8.

103. The Bar agrees with the view expressed in CP§5.7 that "*it is necessary to clearly define "state secrets" so that public officers, government contractors and the general public can understand what secret matters constitute "state secrets""*, to promote legal certainty, and also to ensure compatibility with the BL. We also agree with the observation that "*all types of state secrets should be protected in every place within one country*", as it would be illogical for something to be a state secret under PRC Law but not so under the laws of the HKSAR, when the HKSAR is an inalienable part of the PRC. We therefore agree that the definition of state secrets in the proposed legislation should be consistent with the definition of state secrets under PRC Law. However, many of the categories of "state secrets" as currently specified relate to the HKSAR, some of which have commercial implications such as economic, social and technological developments. We recommend that serious consideration be given to the proposed legislation providing greater specificity in respect of such information so as to give more clarity to those who are positively

contributing to the economic, social and technological development of Hong Kong.

104. Consideration should be given as to making it clear which entity would be determining, in a trial of an offence concerning "*state secrets*" under Chapter 5, the questions whether:-

104.1. the secret in question "*amounts to a state secret*" in any particular case; and

104.2. whether "*the disclosure of [such secret] without lawful authority would likely endanger national security*".

105. In this regard, as noted in §14 above, HKNSL 47 sets out the procedure for offences therein. HKNSL 47 stipulates as follows: "*The courts of the Hong Kong Special Administrative Region shall obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case. The certificate shall be binding on the courts*".[43] HKNSL 41(1) stipulates that the HKNSL "*shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the [HKSAR] exercises jurisdiction*".

106. CP§9.5 notes that most of the provisions under the HKNSL apply "*also to the offences endangering national security under the existing laws of Hong Kong*". If HKNSL 47 is applicable for present purposes, it would appear that the

[43] To be read together with Interpretation by the Standing Committee of the National People's Congress of Article 14 and Article 47 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (adopted at the 38th Session of the Standing Committee of the 13th National People's Congress on 30 December 2022).

Courts shall be obliged to request and obtain a relevant certificate from the Chief Executive in respect of the two questions mentioned above, and such certificate once given shall be binding on the Courts, which may effectively determine at least one essential element of the offences concerning "*state secrets*" under Chapter 5, i.e. whether the secret in question "*amounts to a state secret*" for the purposes of the trial of any accused in respect of such offences.

107. Apart from the aforesaid, questions may also arise as to whether the Courts shall also be obliged to request and obtain such a certificate under HKNSL 47 in respect of any other elements of the proposed offences under Chapter 5, e.g. whether the information, document or other article in question is "*evidence involving State secrets*" and hence "*is or contains a state secret*", or whether the act of "*acquiring*", "*possessing*" and/or "*disclosing*" the information, document or other article in question and/or the act of "*leaving the HKSAR*" is an "*act involving national security*" (and if so, whether and to what extent such certificate may be relevant to the element of *mens rea*, i.e. "*with intent to endanger national security*").

108. It is unclear from the CP whether and if so to what extent HKNSL 47 would be applicable to the proposed local legislation in general, and to the offences under Chapter 5 in particular; or whether any statutory equivalent of HKNSL 47 may be provided within the proposed local legislation. The Bar considers that further elaboration on the applicability of HKNSL 47 in the present context would promote legal certainty.

<u>Definition of "public servants"</u>

109. As set out in CP§5.10, "*public servant*" is defined in the OSO as:

"any person who holds an office of emolument under the Crown in right of the Government of Hong Kong, whether such office is permanent or temporary" and "any person employed in the civil service of the Crown in right of the United Kingdom, including Her Majesty's Diplomatic Service and Her Majesty's Overseas Civil Service".

110. In this regard, the Bar agrees with the recommendation in CP§5.10 to replace the term "*public servant*" with "*public officer*", and suitably adjust the scope of the definition to "*cover officers who are more likely to obtain or possess state secrets*".

Offences relating to "unlawful disclosure"

111. CP§§5.11-5.12 set out various "*other shortcomings*" in relation to the OSO and the HKNSL, and propose 5 new offences to address these shortcomings.

112. CP§5.12(1) sets out the offence of "*Unlawful acquisition of state secrets*". In our view, the offence addresses the lacunae in the existing legal framework where the obtaining of state secrets itself is not criminalised. We note that similar criminalisation of "*acquisition*" is commonly adopted in relation to trade secrets. For instance:-

112.1. The US Economic Espionage Act of 1996 §1831 criminalises the following:

"'§ 1831. Economic espionage

(a) IN GENERAL. – Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly –

"(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;

(3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in any of paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined not more than $500,000 or imprisoned not more than 15 years, or both.

(b) ORGANIZATIONS. – Any organization that commits any offense described in subsection (a) shall be fined not more than $10,000,000"

112.2. Similarly, Article 4 of the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure ("**Trade Secrets Directive**") states:

"Article 4 Unlawful acquisition, use and disclosure of trade secrets

1. *Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret.*

2. *The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:*

    (a) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
    (b) any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

3. *The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:*

    (a) having acquired the trade secret unlawfully;
    (b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;
    (c) being in breach of a contractual or any other duty to limit the use of the trade secret.

4. *The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.*

5. *The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for*

those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully within the meaning of paragraph 3."

113. Article 39 of the World Trade Organisation's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement also provides as follows:

> *"2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:*
>
> *(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*
> *(b) has commercial value because it is secret; and*
> *(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."*

114. Although the provisions above concern trade secrets instead of *"state secrets"*, an analogy can readily be drawn as both concern confidential information which are subject to safeguards and can cause detriment if disclosed. This, on one view, lends support to the additional criminalisation of acquisition of *"state secrets"* as proposed in CP§5.12(1).

115. The threshold requirement of *"knowing"* or *"having reasonable ground to believe"* that the information, document or other article is or contains a state secret is also similar to the authorities above. It further reflects the existing provisions of the OSO, where there is a defence (see e.g. s.13(3) of the OSO) for an accused to prove that *"at the time of the alleged offence, he did not know*

and had no reasonable cause to believe that the information, document or article in question" was prohibited from disclosure.

116. It is noted that the *mens rea* requirement of "*with intent to endanger national security*" is only stipulated in relation to "*having reasonable ground to believe any information, document or other article is or contains a state secret*", but not in relation to "*knowing that any information, document or other article is or contains a state secret*". The same applies also to the other 2 new offences set out in CP§§5.12(2)-(3), i.e. "*unlawful possession of state secrets*", and "*unlawful disclosure of state secrets*".

117. In a case where a person knows that the information, document or article in question is or contains a state secret carries out the act in question (i.e. acquiring, possessing or disclosing such information, document or article), while it may in an appropriate case be relatively easier to infer that he does so with intent to endanger national security, there may well be cases where he does not have such intent. Indeed, we note from CP§5.12(5) (in relation to the offence of unlawful possession of state secrets when leaving the HKSAR) that the *mens rea* requirement of "*with intent to endanger national security*" is also stipulated in respect of document, information or other article that the public officer "*knows to be a state secret*".

118. The Bar therefore recommends as follows:-

118.1. We recommend that the *mens rea* requirement of the offence of "*unlawful acquisition of state secrets*", i.e., "*with intent to endanger national security*", should be applicable to both limbs of "*knowing that any information, document or other article is or contains a state secret*" as well as "*having reasonable ground to believe that any information,*

document or other article is or contains a state secret". The same recommendation applies to the other 2 new offences set out in CP§§5.12(2)-(3).

118.2. CP§5.12(2) sets out the proposed offence of "*unlawful possession of state secrets*". In our view, the analysis above on "*unlawful acquisition of state secrets*" applies *mutatis mutandis* to the proposed offence of "*unlawful possession of state secrets*".

118.3. Possession is different from acquisition and disclosure in one material aspect, in that acquisition and disclosure normally occurs in one distinct moment, whereas possession could last for a period of time. There might be cases where a person has acquired and/or possessed information, a document or an article that is or contains a state secret initially with lawful authority, but such lawful authority comes to an end while he is still possessing the same. Likewise, a person may come into possession of information, a document or an article containing a state secret passively (e.g. by receiving an email), and/or initially without knowledge or reasonable grounds to believe in the nature of the information received and in his possession, but later on acquires that relevant state of mind. The Bar therefore considers that there should be guidance as to how such a person may legitimately dispossess such information, document or article when dispossession is warranted in the circumstances, and that the timely and proper dispossession of the same should amount to a defence under specified conditions.

119. Further, information is also different from documents and articles which are normally physical or tangible matters - "*information*" normally depicts an

intangible matter. A person may dispossess a document or article by simply delivering up the same and destroying all copies in his possession or custody. Questions may however arise as to how a person may dispossess "*information*" (should the need for such dispossession arise) which he has once acquired and/or possessed such with lawful authority. If "*possessing the information*" is intended to cover possession of intangible information (such as information memorized by the person in his mind), as a safeguard, it is important that the *mens rea* requirement of "*with intent to endanger national security*" should be one of the elements to be established by the prosecution in such cases, even in cases where the person possessing the information in question knows that such information is or contains a state secret.

120. The Bar therefore recommends as follows:-

120.1. There should guidance as to how a person may dispossess such information, document or article when dispossession is warranted in the circumstances, and that the timely and proper dispossession of the same should amount to a defence under specified conditions in order to ensure that those who come into possession of information passively or unknowingly can have a legal avenue to act accordingly without fear of violating the offence.

120.2. If "*possessing the information*" is intended to cover possession of intangible information (such as information memorized by the person in his mind), as a safeguard, it is important that the *mens rea* requirement of "*with intent to endanger national security*" should be one of the elements to be established by the prosecution in such cases,

even in cases where the person possessing the information in question knows that such information is or contains a state secret.

121. CP§5.12(3) sets out the offence of "*Unlawful disclosure of state secrets*". The major change is to prohibit *any* person from disclosing such information, instead of being limited to public officers or government contractors.

122. This is consistent with s.1 of the NSA (UK) that criminalises the "*obtaining or disclosing of protected information*" by "*a person*", without limiting liability to public officials or government contractors. Similarly, liability under the Canadian Security of Information Act also criminalises conduct by "*every person*". Part 5.6 Division 122.4A of the CCA (Aust) also creates a separate offence of "*communicating and dealing with information by non-Commonwealth officers etc.*".

123. In principle, the Bar agrees with the broadening of the offence of "*unlawful disclosure of state secrets*" to encompass the conduct of any person. Individuals who might have been public officers or government contractors previously may no longer be holding that post by the time of unlawful disclosure. Further, there is also a policy reason to expand the ambit of the offence in this manner, in order to catch and prosecute individuals who may be intermediaries in the unlawful acquisition and disclosure of state secrets, and therefore not be public officials and yet possess the impugned information.

124. As noted earlier above, the *mens rea* requirement of "*with intent to endanger national security*" should be applicable to both limbs of "*knowing that any information, document or other article is or contains a state secret*" as well as

"having reasonable ground to believe that any information, document or other article is or contains a state secret".

125. Further, while by definition, state secrets can no longer be secretive and its further acquisition or dissemination could no longer cause any incremental endangerment to national security once it enters the public domain (and thus no longer constitute state secrets), for the sake of clarity it may be useful to provide guidance to avoid any ambiguity, especially given the serious consequences of breach. This is particularly relevant to journalists who may otherwise struggle to identify whether certain facts which had come to his/her attention has properly entered the public domain and can be re-published without falling foul of the legislation.

126. CP§5.12(4) sets out the offence of *"Unlawful disclosure of information that appears to be confidential matter"*. It only applies to a public officer or government contractor, but has a broad ambit which covers *"any information, document or other article"* which *"would be (or likely to be) a confidential matter if it were true, regardless of whether the relevant information, document or article is true or not"*. It is said that *"a similar offence can be found in foreign legislation"*, and reference is made at footnote 40 to Section 13(1) of the Security of Information Act of Canada.

127. Section 13(1) of the Security of Information Act of Canada states that:

> *"Every person permanently bound to secrecy commits an offence who, intentionally and without authority, communicates or confirms information that, if it were true, would be special operational information."*

128. It is therefore a provision which only concerns *"special operational information"*, which is further defined as:

"information that the Government of Canada is taking measures to safeguard that reveals, or from which may be inferred,

(a) the identity of a person, agency, group, body or entity that was, is or is intended to be, has been approached to be, or has offered or agreed to be, a confidential source of information, intelligence or assistance to the Government of Canada;

(b) the nature or content of plans of the Government of Canada for military operations in respect of a potential, imminent or present armed conflict;

(c) the means that the Government of Canada used, uses or intends to use, or is capable of using, to covertly collect or obtain, or to decipher, assess, analyse, process, handle, report, communicate or otherwise deal with information or intelligence, including any vulnerabilities or limitations of those means;

(d) whether a place, person, agency, group, body or entity was, is or is intended to be the object of a covert investigation, or a covert collection of information or intelligence, by the Government of Canada;

(e) the identity of any person who is, has been or is intended to be covertly engaged in an information- or intelligence-collection activity or program of the Government of Canada that is covert in nature;

(f) the means that the Government of Canada used, uses or intends to use, or is capable of using, to protect or exploit any information or intelligence referred to in any of paragraphs (a) to (e), including, but not limited to, encryption and cryptographic systems, and any vulnerabilities or limitations of those means; or

(g) information or intelligence similar in nature to information or intelligence referred to in any of paragraphs (a) to (f) that is in relation to, or received from, a foreign entity or terrorist group. (renseignements opérationnels spéciaux)"

129. The definition of "*special operational information*" is therefore narrow and specific, and tailored to the intelligence or military operations of the Government of Canada. It may be more justifiable to impose an offence for representing or holding out that information is "*special operational*

information", since such information (and its misuse) could have grave effects on the intelligence and military operations of the country. Apart from Canada, it would seem that a similar form of "*holding out*" offence is not commonplace in other jurisdictions.

130. By contrast, we note that the proposed offence applies to "*any information, document or other article*" that "*would be (or likely to be) a confidential matter if it were true*". As to this, we have the following observations.

130.1. First, the CP recommends that the information, document and article covered by this offence "*should not be limited to state secrets but should cover any confidential information the disclosure, without lawful authority, of which would prejudice the interests of the Central Authorities or the HKSAR Government*". We note that the aforesaid probably reflects a policy decision on the Administration's part, and therefore further explanation from the Administration as to the policy considerations behind such a choice would be welcomed.

130.2. Second, whilst CP§5.7 states that "*state secrets*" will be defined, it is unclear whether there will be a definition for "*confidential matter*". While CP§5.12(4) recommends covering "*any confidential information the disclosure, without lawful authority, of which would prejudice the interests of the Central Authorities or the HKSAR Government*", the underlined part is not reflected in the proposed offence as proposed. We consider that "*confidential matter*" should be defined, and the underlined part can be included in the definition (like what is being proposed in relation to "*state secrets*"). Alternatively, even if "*confidential matter*" is not going to be specifically defined, the

underlined part should still be adequately reflected in the offence itself.

130.3. Third, it is unclear why the offence is intended to cover the disclosure of information, a document or an article which "*would be (or likely to be)*" a confidential matter if it were true, as opposed to information, a document or an article which "*would be*" a confidential matter if it were true. Section 13(1) of the Security of Information Act of Canada applies only to communication of information which "*would be*" special operational information if it were true, but not information which "*would ... likely to be*" special operational information. It is also uncertain in what circumstances the element of "*would ... likely to be*" a confidential matter if it were true be satisfied. Again, further elaboration in this regard would be welcomed.

130.4. Fourth, there is presently no *mens rea* requirement as to the status of the relevant information as being (or likely to be) confidential. There appears to be good reason for the same formulation of *mens rea* for the preceding state secret offences to be applicable to the offence of "*Unlawful disclosure of information that appears to be confidential matter*". The Bar is not aware of any reason why "*knowing or having reasonable grounds to believe*" in the nature of the relevant information is a prerequisite for the state secret offences but not for this offence.

131. The Bar therefore recommends as follows:-

131.1. The term "*confidential matter*" should be defined, which definition should include the phrase "*the disclosure of which* [i.e. the confidential

matter] *would prejudice the interests of the Central Authorities or the HKSAR Government*".

131.2. Even if "*confidential matter*" is not going to be specifically defined, the said phrase, i.e. "*the disclosure of which* [i.e. the confidential matter] *would prejudice the interests of the Central Authorities or the HKSAR Government*", should still be adequately reflected in the offence itself.

131.3. Further explanation and justification from the Administration as to the phrase "*would ... likely to be*" in the draft offence would be welcomed.

131.4. There should be a *mens rea* requirement of "*knowing or having reasonable grounds to believe*" as to the status of the relevant information as being (or likely to be) confidential.

132. CP§5.12(5) sets out the offence of "*Unlawful possession of state secrets when leaving the HKSAR*", targeting only public officers. As to this, we have the following observations.

132.1. First, an alternative *mens rea* of "*being reckless as to whether national security would be endangered*" is proposed for this offence.[44] As the rationale behind the provision for such alternative in this particular offence is not readily apparent, further explanation from the Administration would be welcomed.

132.2. Second, our observations above regarding the distinction between document and article (being tangible matters) on the one hand, and

[44] It is noted that the same alternative *mens rea* is also proposed for certain offences concerning espionage, e.g. CP§§5.20(b) and 5.22.

information (being intangible matters) on the other hand, applies *mutatis mutandis* to this offence. A public officer could leave the HKSAR without any document or article that is or contains a state secret by simply not bringing the said document / article with him. Questions may however arise as to how the public officer could leave the HKSAR without the information that is or contains a state secret when such information stays in his memory. Whilst such a situation may be addressed by the requirements of *"with intent to endanger national security"* and *"without lawful authority"*, the additional alternative *mens rea* of *"being reckless as to whether national security would be endangered"* may still leave such a public officer in a problematic position in respect of such information. We recommend that the offence provision expressly deal with the situation of information being in possession of the former public officer simply by virtue of the same being in his memory.

133. We thus recommend as follows:-

133.1. The Administration shall consider providing further explanation as to the rationale behind introducing an alternative *mens rea* of *"being reckless as to whether national security would be endangered"* for the offence of *"Unlawful possession of state secrets when leaving the HKSAR"*.

133.2. If *"possessing ... information"* is intended to cover intangible information (such as information memorized by the person in his mind) as to which dispossession may be practically infeasible, further consideration may have to be given as to the appropriate *mens rea* required for this offence. The relevant offence provision

should expressly deal with the situation of information being in possession of the former public officer simply by virtue of the same being in his memory.

134. Finally, for offences relating to "unlawful disclosure", we believe the inclusion of a public interest defence should be considered and anyone charged with the proposed offence should be able to invoke such a defence and not just journalists. We believe that such a defence, which involves the Court considering the effect of disclosure on the overall well-being of the public in all aspects, is conducive to the proper protection of the public in appropriate case. Insofar as other jurisdictions are concerned:

134.1. In the United Kingdom, under the UK Official Secrets Act (1989), a person who is or has been a member of the security and intelligence services commits an offence if, without lawful authority, he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position. In *Shayler* [2002] UKHL 11, the House of Lords held it is not a defence that the defendant believed that it was, in the public or national interest to make the disclosure in question. The prosecution was not required to prove that the disclosure was damaging or was not in the public interest. However, the UK Law Commission recommended the introduction of a public interest defence in a report on Protection of Official Data published in September 2020.[45] Under the recommendation, a person would not be guilty of an offence if he proves, on the balance of probabilities, that: (a) it was in the public

[45] https://lawcom.gov.uk/project/protection-of-official-data/

interest for the information disclosed to be known by the recipient; and (b) the manner of the disclosure was in the public interest.

134.2. The US Espionage Act does not allow the public interest in the information disclosed to be considered as a defence or in mitigation of penalty, and does not require proof of harm or intent to harm.

134.3. By section 15 of Security of Information Act of Canada, it is a defence to an allegation of communication or confirming special operational information if the individual acted in the public interest. The public interest is assessed by reference to (i) the subject matter of the disclosed information (which must relate to a criminal offence being committed by a person in purported performance of public functions) and (ii) whether the public interest in disclosure outweighs the public interest in non-disclosure. The latter assessment must be conducted by reference to a defined list of considerations including whether the extent of the disclosure is no more than reasonably necessary to disclose the alleged offence, whether there was reasonable grounds to believe the disclosure was in the public interest, the damage caused by it etc.

134.4. In Australia, the general secret offences in Part 5.6 of the Criminal Code includes a defence for "public interest journalism". Section 122.5(6) of the Criminal Code provides that it is a defence to a prosecution for an offence against Part 5.6 of the Criminal Code if the person communicated, removed, held or otherwise dealt with relevant information: (a) in their capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media, and (b) at the time, the

person reasonably believed that engaging in that conduct was in the public interest.[46]

134.5. In addition, Denmark protects a person from criminal prosecution for disclosing State secrets when there is an 'obvious public interest' in the disclosure.[47] In Thailand, the Official Information Act 1997 section 20 provides that officials are not to be held liable for good faith disclosure aimed at securing an overriding public interest, where the disclosure is reasonable.

C. Espionage

135. As mentioned in CP§5.13, the OSO already provides for an offence of "*spying*" at s.3. The CP recommends improving the offence of espionage by:

135.1. amending the definition of "*prohibited place*";

135.2. replacing the word "*enemy*" with "*external forces*";

135.3. replacing words such as "*sketch, plan, model or note*" / "*secret official code word or password, any sketch, plan, model or note*" with "*information, document or other article*" to cover more advanced modes of data storage;

135.4. introducing a new type of offence regarding collusion with "external forces" to publish false or misleading statements of fact to the public with intent to endanger national security; and

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[46] Review of Secrecy Provisions Consultation Paper (March 2023) by Attorney-General's Department of Australia, at https://consultations.ag.gov.au/crime/review-secrecy-provisions/user_uploads/review-secrecy-provisions-consultation-paper.pdf

[47] Criminal Code 1930 (Denmark) art 152

135.5. introducing a new offence of participating in or supporting external intelligence organisations or receiving advantages from external intelligence organisations, etc.

136. A comparison between s.3 of the OSO and the draft provisions for the offence of espionage suggested in the CP is set out below:

	Section 3 of OSO	**Draft provisions in §§5.20, 5.22 of the CP (material changes are marked in double underline)**
Intent	(1): A person commits an offence if he, for a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong–	(a) Doing the following act with intent to endanger national security –-
Espionage by trespass/ proximity	(a) approaches, inspects, passes over or is in the neighbourhood of, or enters, a prohibited place;	(i) approaching, inspecting, passing over or under, entering or accessing a prohibited place, or being in the neighbourhood of a prohibited place (including doing such act by electronic or remote means);
Espionage by information gathering/ communication	(b) makes a sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or (c) obtains, collects, records or publishes, or communicates to any other person, any secret official code word or password, or any sketch, plan, model or note, or other	(ii) obtaining (including by intercepting communication), collecting, recording, producing or possessing, or communicating to any other person, any information, document or other article that is, or is intended to be, for a purpose useful to an external force.

	document or information, that is likely to be or might be or is intended to be directly or indirectly useful to an enemy.	
Colluding with an external force to publish false or misleading statement		(b) Colluding with an external force to publish a statement of fact that is false or misleading to the public, and the person, with intent to engender national security or being reckless as to whether national security would be endangered, so publishes the statement; and knows that the statement is false or misleading.
Participating in or supporting or receiving advantages from external intelligence organisations		With intent to endanger national security (or being reckless as to whether national security would be endangered), knowingly doing the following act in relation to an external intelligence organisation – (a) becoming a member of the organisation; (b) offering substantial support (including providing financial support or information and recruiting members for the organisation) to the organisation (or a person acting on behalf of the organisation); or (c) receiving substantial advantage offered by the organisation (or a person acting on behalf of the organisation).

"Prohibited place"

137. In relation to the offence of espionage by trespass, CP§5.17 recommends improving the definition of *"prohibited place"* to *"provide appropriate safeguards in the light of the modern-day espionage activities"*.

138. *"Prohibited place"* is defined in s.2 of the OSO by reference to a list of places including, for example, any work of defence establishment, any places where any munitions, or any sketches, models, plans or documents relating thereto are stored, or any places belonging to or used by the HKSARG that is for the time being declared to be a prohibited place on the ground that information with respect thereto, or damage thereto, would be useful to an enemy.

139. The said list of places has a strong military focus. As explained in the UK Law Commission Report[48], that was due to the background of the enactment of the UK Official Secrets Act in 1911. After discussing with stakeholders from government departments, the Law Commission concluded that[49]:

> *"...the list of prohibited places was under-inclusive and failed to recognise that in the modern era, sensitive information may be held on sites which are not solely or primarily military ones. We also noted that the legislation does not currently protect sites which store sensitive economic information and which may be targeted by those whose aim is to injure the national interest."*

140. The said comment is equally apt in describing the shortcomings of the current definition of *"prohibited place"* under the OSO. The Bar agrees that

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[48] Law Commission Report (UK) on Protection of Official Data published (September 2020), §3.71
[49] Ibid, §3.72

the definition should be improved to protect sites which are prone to become targets of trespass etc.

141. The CP does not provide any proposed new definition for *"prohibited place"*. In formulating the definition, the Bar suggests that reference may be made to s.7 of the NSA (UK), which defines *"prohibited place"* by reference to the *purpose* of the facility. Section 7(1) provides that:

> *"In this Part "prohibited place" means –*
>
> *(a) Crown land in the United Kingdom or the Sovereign Base Areas of Akrotiri and Dhekelia which is used –*
>
> *(i) for UK defence purposes;*
> *(ii) for extracting any metals, oil or minerals for use for UK defence purposes;*
> *(iii) for the purposes of the defence of a foreign country or territory;*
>
> *(b) a vehicle –*
>
> *(i) situated in the United Kingdom or the Sovereign Base Areas of Akrotiri and Dhekelia which is used for UK defence purposes or for the purposes of the defence of a foreign country or territory;*
> *(ii) not so situated which is used for UK defence purposes;*
>
> *(c) any land or building in the United Kingdom or the Sovereign Base Areas of Akrotiri and Dhekelia which is used for the purposes described in subsection (2)(b) or (3)(b) (or both);*
>
> *(d) any land or building in the United Kingdom or the Sovereign Base Areas of Akrotiri and Dhekelia which is –*
>
> *(i) owned or controlled by the Security Service, the Secret Intelligence Service or GCHQ, and*
> *(ii) used for the functions of the Security Service, the Secret Intelligence Service or GCHQ;*

(e) any land or building or vehicle designated as a prohibited place in regulations made under section 8."

142. National security legislation in other jurisdictions may not be of much assistance on this issue because:

142.1. The definition of *"prohibited places"* under the Security of Information Act of Canada is similar to the current definition in the OSO.

142.2. Title 18, Chapter 37 of the United States Code only criminalises the conduct of gathering or transmitting defense information etc. but did not make it an offence to enter or access places containing such information.

142.3. The CCA (Aust) does not contain a similar offence.

143. The Bar therefore recommends reference may be made to s.7(1) of the NSA (UK) in formulating the new definition of *"prohibited place"*.

Replacing "enemy" with "external forces"

144. CP§5.19 suggests that the word *"enemy"* is too restrictive and should be replaced by the phrase *"external forces"*.

145. The NSA (UK) moved away from the concept of *"enemy"* and instead provides for an offence of assisting a foreign intelligence service. The change is based on the rationale that *"[i]n a modern, interconnected world it is right that the legislation moves away from binary concepts of a country being an "enemy" and covers the wide range of threats and harms that constitute espionage today."*[50]

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[50] Policy paper on "New espionage offences: factsheet" by Home Office (updated on 13 July 2023), available at: https://www.gov.uk/government/publications/national-security-bill-factsheets/espionage-etc-national-security-bill-factsheet.

146. The Bar agrees that the concept of "*enemy*" used in the OSO is outdated and needs to be replaced.

147. At CP§5.19, it is suggested that "*external forces*" may cover "*any government of a foreign country, authority of a region or place of an external territory, external political organisation, etc. (including a government, authority or political organisation of a country etc. with which it is not in a state of war), as well as its associated entities and individuals*", and an entity or individual may be considered an "*associated entity*" or "*associated individual*" if:

147.1. the above-mentioned government, authority or organization "*is able to exercise a substantial degree of control over*" such entity or individual;

147.2. such entity or individual "*is accustomed or under an obligation to act in accordance with the directions, instructions or wishes*" of that government, authority or organisation; or

147.3. that government, authority or organization "*is in a position to exercise substantial control by virtue of other factors*" over such entity or individual.

148. In principle, we do not have any concerns in respect of the definition of "*external forces*" encompassing "*associated entities and individuals*" if another government, authority or organization is able to exercise a substantial degree of control over an entity or individual. However, whether such "*substantial degree or control*" can be established in the context of the proposed offence should be a fact-sensitive issue which can only be resolved by a consideration of the evidence in any particular case. However, the elaborations upon the definition of "*substantial degree or control*" could make the definition potentially very wide, and can legitimately include anyone

who is subject to the lawful authority of another jurisdiction at any point in time, since the "*obligation to act*" is not confined to any specified period of time, nor is that obligation tied to the prohibited acts that form the offence of espionage.

149. For example:

149.1. A sovereign fund may be legally obliged to comply with a lawful direction from a foreign government to hand over data on its foreign and/or Hong Kong servers relating to its operations in Hong Kong. The fund will be "*under an obligation to act in accordance with the directions, instructions or wishes of that government*" and thus become an "*external force*" for the purposes of the proposed external interference offence.

149.2. Citizens (or foreign enterprises) from many jurisdictions are subject to world-wide tax regimes of their home jurisdictions even if they are working or doing business in Hong Kong, along with associated disclosure obligations. Such persons will be "*under an obligation to act in accordance with the directions, instructions or wishes of that government*" (albeit only in respect of tax matters) and thus become an "*external force*" for the purposes of the proposed external interference offence.

149.3. Since the new law is intended to have extra-territorial application, any Hong Kong person who travels abroad will be subject to the lawful authority of another jurisdiction whenever he/she sets foot in the foreign jurisdiction (albeit only in respect of a specified period of time). The effect of the provision is that any person who visits any foreign jurisdiction will be "*under an obligation to act in accordance with*

the directions, instructions or wishes of that government" and thus become an "*external force*" for the purposes of the proposed external interference offence.

150. As noted in the CP, the proposed definition was taken from the Foreign Influence Transparency Scheme Act 2018 (Australia) (the "**2018 Act**") and the Foreign Interference (Countermeasures) Act 2021 (Singapore). But the Australian statute is for the purpose of *registration of foreign agents*, and it was confirmed at CP§7.4 that the Administration would not introduce a registration system of a similar nature. The penalties for failure to register or providing misleading information are lower than for the respective foreign interference offences. Singapore does not appear to have a registration system, so the UK is included for comparison:

	Failing to Register	**Foreign Interference**
UK	5 years imprisonment[51] (s.80 of USA (UK))	14 years imprisonment (s.13 of USA (UK))
Australia	3 years imprisonment (s.57 of 2018 Act)	20 years imprisonment (s.92.2 of CCA (Aust))

151. The definitions for the purposes of foreign interference offences are, accordingly, much narrower:

151.1. Section 90.2 of the CCA (Aust)

[51] This is the penalty for failing to register "*foreign activity arrangements*" which are conducted with "*specified persons*", which are persons designated under s. 66 of the NSA (UK) by the Secretary of State to be "*controlled by a foreign power*". Schedule 13 of the NSA (UK) provides guidelines of when a specified person is controlled by a foreign power. These are extremely detailed and involve mostly describing shares and voting powers in corporations and associations. There is no mention of obligations or customs like the Singaporean Act (except in relation to how voting rights in a company are exercised).

"Each of the following is a foreign principal:[52]

(a) a foreign government principal;

(aa) a foreign political organisation;

(b) a public international organisation within the meaning of Division 70 (see section 70.1);

(c) a terrorist organisation within the meaning of Division 102 (see section 102.1);

(d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (aa), (b) or (c);

(e) an entity or organisation owned, directed or controlled by 2 or more foreign principals within the meaning of paragraph (a), (aa), (b) or (c)."

151.2. Section 32 of the NSA (UK)

"In this Part "foreign power" means –

(a) the sovereign or other head of a foreign State in their public capacity,

(b) a foreign government, or part of a foreign government,

(c) an agency or authority of a foreign government, or of part of a foreign government,

(d) an authority responsible for administering the affairs of an area within a foreign country or territory, or persons exercising the functions of such an authority, or

(e) a political party which is a governing political party of a foreign government."

152. The focus of all these offences (rather than the more minor registration offences) are the organs of a foreign state or entities under their direct control, rather than individuals or entities that may be influenced by, or under an obligation to, a foreign state.

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[52] Section 90.2 of the CCA (Aust) and section 10 of the 2018 Act both use the word "*foreign principal*" but the definition in the 2018 Act is wider.

153. We do however note that the Singaporean legislation follows the wide approach advocated for in the CP:

153.1. Section 4 Foreign Interference (Countermeasures) Act 2021

'"foreign principal" means –

(a) a foreigner;
(b) a foreign government;
(c) a foreign government-related individual;
(d) a foreign legislature;
(e) a foreign political organisation;
(f) a foreign public enterprise; or
(g) a foreign business;'

'"foreign government-related individual" means an individual who is related to a foreign principal that is a foreign government, foreign political organisation or foreign public enterprise in either or both of the following ways:

(a) the individual is accustomed, or under an obligation (whether formal or informal), to engage in conduct in accordance with the directions, instructions or wishes of the foreign government, foreign political organisation or foreign public enterprise;
(b) the foreign government, foreign political organisation or foreign public enterprise (as the case may be) is in a position to exercise, in any other way, total or substantial control over the individual;'

153.2. Section 6 Foreign Interference (Countermeasures) Act 2021

"In this Act, "foreign interference" –

(a) means interference that is undertaken by or on behalf of –

(i) a foreign principal; or
(ii) another person acting on behalf of a foreign principal; and

(b) *includes any activity undertaken or conduct engaged in as part of preparing for, or planning, interference mentioned in paragraph (a).*"

154. The Bar therefore recommends that the definition of "*external forces*" should be further refined and should not be cast too widely (e.g. referring to those entities or individuals who are merely "*accustomed or under an obligation to act in accordance with the directions, instructions or wishes of that government*").

Replacing the terms such as "sketch, plan, model or note"/ "secret official code word or password, any sketch, plan, model or note" with "information, document or other article" to cover more advanced modes of data storage

155. Terms such as "*sketch, plan, model or note*" etc. may not accurately reflect the type of information that requires protection in the modern age, and it is agreed that more generic terms should be used to replace those references.

156. The proposed replacement of "*information, document or other article*" is consistent with the definition of "*protected information*" under s.1(2) of the NSA (UK).

157. As noted by the UK Law Commission in its report on Protection of Official Data, the change is not a change in substance.[53] Further, since s.3(1)(c) of the OSO already makes reference to "*other documents or information*", the proposed change would not widen the scope of the offences.

158. The phrase "*information, document or other article*" is also generally in line with the formulation used in other jurisdictions, for example:

158.1. Section 91.3 of the CCA (Aust) uses the term "*information or an article*".

[53] Law Commission Report (UK) on Protection of Official Data published September 2020, §3.88.

158.2. Section 78 of the New Zealand Crimes Act 1961 uses terms such as "*information*", "*document*" and "*object*".

New offence of colluding with an external force to publish false or misleading statements

159. CP§5.20 proposes to introduce a new type of offence regarding collusion with "*external forces*" to publish false or misleading statements of fact to the public with intent to endanger national security. A person can also be guilty of the offence if he is reckless as to whether national security would be endangered in publishing the false or misleading statements.

160. The Bar's research has so far not identified any equivalent offence under national security legislation in other jurisdictions. Part 4 of the HKNSL contains offences on collusion with a foreign country or with external elements to endanger national security. However, Part 4 does not contain any provisions preventing the publication of false or misleading information.

161. We note that the proposed offence bears some similarity to the offence of "*foreign interference*" under the UK and Australian legislations:

161.1. Under s.13 of the NSA (UK), a person commits the offence of foreign interference if:

161.1.1. the person engages in prohibited conduct,

161.1.2. the foreign power condition is met in relation to the prohibited conduct, and

161.1.3. the person intends or is reckless as to whether the prohibited conduct, or a course of conduct of which it forms part, to have an interference effect.

161.2. "*Prohibited conduct*" is defined to include the making of a misrepresentation, provided that (a) a reasonable person would consider to be false or misleading in a way material to the interference effect, and (b) the person making the representation knows or intends to be false or misleading in a way material to the interference effect.[54]

161.3. "*Interference effect*" means any of the following effects[55]:

161.3.1. interfering with the exercise by a particular person of a Convention right in the United Kingdom,

161.3.2. affecting the exercise by any person of their public functions,

161.3.3. interfering with whether, or how, any person makes use of services provided in the exercise of public functions,

161.3.4. interfering with whether, or how, any person (other than in the exercise of a public function) participates in relevant political processes or makes political decisions,

161.3.5. interfering with whether, or how, any person (other than in the exercise of a public function) participates in legal processes under the law of the United Kingdom, or

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[54] Section 15(3)&(4) of the NSA (UK).
[55] Section 14(1) of the NSA (UK).

161.3.6. prejudicing the safety or interests of the United Kingdom.

161.4. The CCA (Aust) also contains provisions on foreign interference. Section 92.2(1) provides that:

"A person commits an offence if:

(a) the person engages in conduct; and
(b) any of the following circumstances exists:

(i) the person engages in the conduct on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;
(ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and

(c) the person intends that the conduct will:

(i) influence a political or governmental process of the Commonwealth or a State or Territory; or
(ii) influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty; or
(iii) support intelligence activities of a foreign principal; or
(iv) prejudice Australia's national security; and

(d) any part of the conduct:

(i) is covert or involves deception; or
(ii) involves the person making a threat to cause serious harm, whether to the person to whom the threat is made or any other person; or
(iii) involves the person making a demand with menaces."

161.5. The offence can also be committed if the person is reckless as to whether the conduct will have the consequence set out in s.92.2(1)(c) above.[56]

162. Comparing the above provisions with the draft provision in the CP:

162.1. Both the offence of *"foreign interference"* and the proposed offence of colluding with an external force to publish false or misleading statement can be committed with a specific intent or in a reckless manner.

162.2. Under the UK regime, although the conduct of publishing false or misleading information may amount to foreign interference, the offence is qualified by an exhaustive list of interference effects. An intent (or recklessness) to cause the interference effect must be proven before a person can be found guilty of the offence. On the other hand, the draft provision in the CP refers to a relatively more general intent, i.e. an intent (or recklessness) to endanger national security.

162.3. That said, it is noted that both the English and Australian models include a catch-all provision on the intended effects/consequences of the prohibited conduct:

162.3.1. Section 14(1)(f) of the NSA (UK) provides that *"prejudicing the safety or interests of the United Kingdom"* is an *"interference effect"*.

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[56] Section 92.3(1)(c) of the CCA (Aust).

162.3.2. Section 92.2(1)(c)(iv) of the CCA (Aust) includes *"[to] prejudice Australia's national security"* as an intended consequence caught by the offence.

163. In the premises, the Bar considers that a general reference to *"endangering national security"* is not problematic *per se*, but it is desirable to provide clearer guidelines as to what kind of consequences or effect would be considered to be *"endangering national security"* in this context. Reference may be made to s.14(1) of the NSA (UK) or s.92.2(1)(c) of the CCA (Aust).

164. Further, based on the draft provision in the CP, the new offence only requires the following elements:

164.1. colluding with an external force to publish a statement of fact that is false or misleading to the public;

164.2. knowledge that the statement is false or misleading; and

164.3. an intent to endanger national security or recklessness as to whether national security would be endangered.

165. In other words, the current draft provision does not appear to require there to be any nexus between the falsity of the statement published and the intended impact of endangering national security. This may lead to an obscure situation where the false or misleading part of the statement published is irrelevant or immaterial to the intended consequence of endangering national security, but the conduct would still be caught by the offence.

166. This may be avoided if the draft provision contains an additional requirement that the false or misleading aspect of the statement is material

to the intended consequence of endangering national security. Reference may be made to s.15(4) of the NSA (UK).

167. The Bar therefore recommends as follows:-

167.1. Clearer guidelines should be provided as to what kind of consequences or effect would be considered *"endangering national security"* in this context. Reference may be made to s.14(1) of the NSA (UK) and/or s.92.2(1)(c) of the CCA (Aust).

167.2. The current draft provision should include an additional element that the false or misleading aspects of the statement is material to the intended consequence of endangering national security. Reference may be made to s.15(4) of the NSA (UK).

<u>New offence of participating in or supporting external intelligence organisations or receiving advantages from external intelligence organisations etc.</u>

168. The CP recommends introducing a new offence in the following terms to impose punishment for acts of supporting external intelligence organisations:

> *"With intent to endanger national security (or being reckless as to whether national security would be endangered), knowingly doing the following act in relation to an external intelligence organisation –*
>
> *(a) becoming a member of the organisation;*
> *(b) offering substantial support (including providing financial support or information and recruiting members for the organisation) to the organisation (or a person acting on behalf of the organisation); or*
> *(c) receiving substantial advantage offered by the organisation (or a person acting on behalf of the organisation)."*

169. As mentioned in CP§5.21, the UK and Australia have enacted legislation to prohibit offering material support for, or receiving material advantage from, foreign intelligence organisations.

169.1. Section 92.7 of the CCA (Aust) provides that[57]:

"A person commits an offence if:

(a) the person provides resources, or material support, to an organisation or a person acting on behalf of an organisation; and
(b) the person knows that the organisation is a foreign intelligence agency."

169.2. Section 92.9 of the CCA (Aust) prohibits funding or being funded by foreign intelligence agency[58]:

"A person commits an offence if:

(a) the person:

(i) directly or indirectly receives or obtains funds from, or directly or indirectly makes funds available to, an organisation or a person acting on behalf of an organisation; or
(ii) directly or indirectly collects funds for or on behalf of an organisation or a person acting on behalf of an organisation; and

(b) the person knows that the organisation is a foreign intelligence agency."

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[57] The offence can be committed in the form of recklessly supporting foreign intelligence agency: see s.92.8 of the CCA (Aust).
[58] The offence can be committed in the form of recklessly funding or being funded by foreign intelligence agency: see s.92.10 of the CCA (Aust).

169.3. Section 3 of the NSA (UK) criminalises conduct which is intended to materially assist, or likely to materially assist a foreign intelligence service in carrying out UK-related activities. Section 3(3) provides that *"[c]onduct that may be likely to materially assist a foreign intelligence service includes providing, or providing access to, information, goods, services or financial benefits (whether directly or indirectly)."*

169.4. Section 17(1) of the NSA (UK) deals with obtaining etc. material benefits from a foreign intelligence service[59]:

"A person commits an offence if –

(a) the person –

(i) obtains, accepts or retains a material benefit which is not an excluded benefit, or
(ii) obtains or accepts the provision of such a benefit to another person,

(b) the benefit is or was provided by or on behalf of a foreign intelligence service, and
(c) the person knows, or having regard to other matters known to them ought reasonably to know, that the benefit is or was provided by or on behalf of a foreign intelligence service."

170. While the UK and Australian legislation prohibit providing material support to or receiving material benefits from a foreign intelligence service[60], becoming a member of the foreign intelligence organisation *per se* is not an offence. Further explanation and elaboration from the Administration as to the rationale behind adopting this stringent approach of criminalizing the

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[59] An agreement to accept material benefit from a foreign intelligence service also amounts to an offence: see Section 17(2) of the NSA (UK).
[60] On the other hand, the Security of Information Act of Canada and Crimes Act of New Zealand do not contain such an offence.

act of merely "*becoming a member of the organisation*", *per se* and without more, would be welcomed.

171. Further still, we would note that, at the drafting stage, due care should be made to ensure that the scope of the offence would not be too wide. For example, s.3(7) of the NSA (UK) provides for a number of specific defences:-

> "*(7) In proceedings for an offence under this section it is a defence to show that the person engaged in the conduct in question –*
>
> *(a) in compliance with a legal obligation under the law of the United Kingdom which is not a legal obligation under private law,*
> *(b) in the case of a person having functions of a public nature under the law of the United Kingdom, for the purposes of those functions,*
> *(c) as a lawyer carrying on a legal activity, or*
> *(d) in accordance with, or in relation to UK-related activities carried out in accordance with, an agreement or arrangement to which –*
>
> *(i) the United Kingdom was a party, or*
> *(ii) any person acting for or on behalf of, or holding office under, the Crown was (in that capacity) a party.*
>
> *(8) A person is taken to have shown a matter mentioned in subsection (7) if –*
>
> *(a) sufficient evidence of the matter is adduced to raise an issue with respect to it, and*
> *(b) the contrary is not proved beyond reasonable doubt.*"

172. At present, the CP (understandably) does not set out these details. However, we would simply caution that care should be taken to survey, at the drafting stage, the appropriate defenses in comparable foreign legislation and ensure

that the Hong Kong equivalent would be armed with all of those thought appropriate. For example, of particular importance to the Bar (and the legal profession as a whole) is the need for a similar carve out in relation to the provision of legal services (s.3(7)(c)). Indeed, this particular defence was inserted into the British legislation[61] after the point was specifically raised by Lord Pannick when the Bill was debated in the House of Lords[62], and his concern echoes, it would seem to the Bar, equally in this jurisdiction.

173. The Bar therefore recommends as follows:-

173.1. Further explanation and elaboration from the Administration as to the rationale behind adopting the approach of criminalizing the act of merely "*becoming a member of [an external intelligence] organisation*", *per se* and without more, would be welcomed.

173.2. The draft provision should make clear that knowledge that the organisation is an "*external intelligence organisation*" as defined is required.

173.3. Due care should be taken to ensure that suitable defences (including carve-outs for the provision of legitimate legal advice) be added at the drafting stage for the proposed offence.

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[61] See National Security Bill: Lords amendments, Research Briefing by the House of Commons Library, 23 June 2023, pp.11, 18

[62] "I have a concern because of my professional interest as a practising barrister, and I would welcome advice from the Minister as to whether I will be committing a criminal offence under Clause 3(1) if I give legal advice to a foreign intelligence service in carrying out UK-related activities. Clause 3(1) refers to "conduct of any kind"; it is a criminal offence, punishable with 14 years' imprisonment, for me to materially assist a foreign intelligence service in carrying out UK-related activities. My advice, of course, may be to say to that foreign intelligence service, "*You can't do this in the United Kingdom, it would be unlawful, and you should be aware of that*", but what are the potential defences if I am prosecuted?": HL Deb 19 December 2022 c995-996l.

COMMENTS ON CP 6 - SABOTAGE ENDANGERING NATIONAL SECURITY AND RELATED ACTIVITIES

A. Introduction

174. Chapter 6 of the CP proposes two new national security offences relating to sabotage, namely:

174.1. "**Sabotage Activities Which Endanger National Security**" –

174.1.1. damaging or weakening public infrastructure

174.1.2. with intent to endanger national security, or being reckless as to whether national security would be endangered

(the "**First Sabotage Offence**") (CP§6.4); and

174.2. "**Doing an Act in relation to a Computer or Electronic System without Lawful Authority and Endangering National Security**"

174.2.1. doing an act in relation to a computer or electronic system thereby endangering, or likely endangering, national security

174.2.2. with intent to endanger national security and knowing that one acts without lawful authority

(the "**Second Sabotage Offence**") (CP§6.7).

175. As a starting point, the Bar agrees that the aims of any drafting exercise in relation to these national security offences are articulated in CP§6.8:

> *"The actual provisions will clearly define the elements of the relevant offences to ensure that acts endangering national security are precisely*

targeted and the provisions will not stifle technological innovation, but rather provide a safe environment for the development of the fields concerned." (emphasis added)

176. The CP also highlights that similar offences enacted in other jurisdictions are "*to reflect the seriousness of such acts and for greater deterrence*" (CP§6.1).

B. The First Sabotage Offence

177. CP§6.2 explains that the necessity for the First Sabotage Offence is concerned with acts that impair public infrastructure such as transport facilities, railway systems, critical telecommunications infrastructure, and electronic systems.

178. As a general description of the proposed offence, CP§6.4(a) is similar to the Australian offences referred to in the CP, i.e. ss.82.3 to 82.9 of the CCA (Aust). The CCA (Aust) sets out seven specific offences, each of which is carefully defined. The following features of the CCA (Aust) provide a helpful reference for specific offences of this nature:

178.1. The provisions distinguish between offences:

178.1.1. conducted on behalf of, in collaboration with a foreign principal, or at their direction, with their funding, or under their supervision;

178.1.2. committed with intent to prejudice Australia's national security or advantage the national security of a foreign country; and/or

178.1.3. committed in circumstances where the offender is reckless as to whether their conduct prejudice Australia's national

security or advantage the national security of a foreign country,

with varying maximum penalties (varying from 15 years' imprisonment to 25 years' imprisonment) depending on which factor(s) is/are present.

178.2. Clear definition of core concepts are supplied, including (among others) as to the meaning of:

178.2.1. advantaging the national security of a foreign country (s.82.1);

178.2.2. public infrastructure (s.82.2) and damage to public infrastructure (s.82.1);

178.2.3. national security (s.90.4); and

178.2.4. foreign principal (s.90.2).

178.3. For sabotage offences (ss.82.3 to 82.6), actual damage to public infrastructure is required. Pursuant to the definition of "*damage to public infrastructure*" in s.82.1, the damage must be of a serious character, for example where the infrastructure is destroyed, rendered unserviceable, loses its function or becomes unsafe or unfit for use, etc. If it is an electronic system, the conduct must "*seriously disrupt it*".

178.4. The offences of introducing a vulnerability into a thing or software (ss.82.7 and 82.8) require that the introduction results in the article, thing, or software becoming vulnerable to misuse or impairment, or

to being accessed or modified by a person without authority to do so.

178.5. These offences, too, distinguish between acts done with the intention of prejudicing national security (s.82.7, maximum penalty 15 years' imprisonment) and being reckless as to whether such prejudice will occur (s.82.8, maximum penalty 10 years' imprisonment).

178.6. A specific offence of preparing or planning sabotage offences is supplied (s.82.9), rather than having recourse to the general common law governing inchoate offences (e.g. attempt, conspiracy, incitement, counselling or procuring, etc.).

178.7. Specific defences are supplied at s.82.10 for officials and persons concerned with the public infrastructure acting in good faith.

178.8. The consent of the Attorney-General is required for any prosecution (s.82.13).

179. CP§6.4(b) states:

> *"The public infrastructure to be protected may include facilities of the Central Authorities or the HKSAR Government, public transport facilities and any public facilities providing public services such as water supply, drainage, energy, fuel or communication."*

180. Consideration should be given to providing for a precise and exhaustive definition of *"public infrastructure"*. An exhaustive definition will be best suited to illustrate the need for heightened protection of certain specified public infrastructure, and in turn justify the enhanced penalties that are above and beyond the current general law on criminal damage and

dishonest access to computer offences. For comparison, s.82.2(1) of the CCA (Aust) supplies an exhaustive definition of "*public infrastructure*".

181. CP§6.4(c) discusses the concept of "*weakening*", identifying four subtypes of weakening in CP§6(4)(c)(i) through (iv). These four subcategories follow those set out in ss.82.7 and 82.8 of the CCA (Aust).

182. CP§6.4(c) appears to contain what may be a typographical error, namely the words "*(including anything or software constituting the infrastructure)*". Presumably the word "*anything*" should read "*any thing*", so as to mean "*any article*" or "*any object*". The equivalent provisions in the CCA (Aust) (in s.82.7(c) and 82.8(c)) read: "*the article or thing, or software, is or is part of public infrastructure*" (emphasis added). The Chinese version of the CP§6.4(c) seems to read "*any thing… constituting the infrastructure*" as well ("*組成該設施的東西*" (emphasis added)), i.e. in line with the equivalent CCA (Aust) provisions. We trust that it will be made clear in the eventual bill.

C. The Second Sabotage Offence

183. The CP explains that this proposed offence relates to the risks arising from electronic systems being hacked into or interfered with (CP§6.5).

184. Comparison is drawn with UK legislation in s.3ZA of the Computer Misuse Act 1990 (the "**CMA 1990**"). In s.3ZA of the CMA 1990:

184.1. The elements of the offence, as set out in s.37ZA(1) are:-

184.1.1. the person does any unauthorised act in relation to a computer;

184.1.2. at the time of doing the act the person knows that it is unauthorised;

184.1.3. the act causes, or creates a significant risk of, serious damage of a material kind; and

184.1.4. the person intends by doing the act to cause serious damage of a material kind or is reckless as to whether such damage is caused.

184.2. Concrete definitions are supplied of key concepts, including when damage is of a "*material kind*": s.3ZA(2) and (3).

184.3. The maximum penalty is 14 years' imprisonment unless the offence creates a significant risk of serious damage to "*human welfare*" (a defined term) or serious damage to national security, in which case the maximum penalty is life imprisonment.

185. Consideration can be given to adopting the concepts in s.3ZA(1) of the CMA 1990 to form parts of the proposed Second Sabotage Offence, namely:

185.1. the act done in relation to a computer is unauthorised,

185.2. the accused has knowledge that the act is unauthorised;

185.3. the act causes or creates a significant risk of serious damage to national security; and

185.4. the offender intends their act to cause or create a significant risk of serious damage to national security.

186. While the CMA 1990 offence requires proof that a person "*does an unauthorised act in relation to a computer*", CP§6.7 uses the phrase "*without lawful authority ... doing an act in relation to a computer or electronic system*". The Bar observes that these can be very different concepts:

186.1. The element of an "*unauthorised act in relation to a computer*" connotes a requirement, to be proved by the prosecution, that the act involved either unauthorised access to a computer (e.g. hacking, misuse of another's password, etc.) or an act done in excess of authority granted in relation to a system (e.g. by installing malware, altering or stealing data, etc.).[63] This element is similar to that set out in the Hong Kong offence of misuse of a computer contrary to s.59 of the CO, to which the CP makes reference.

186.2. By contrast, the words "*without lawful authority*" generally connote a defence, often to be proved by the accused person,[64] that they had lawful authority to perform the act. This is, in substance, the opposite of a requirement for the prosecution to show that the accused gained unauthorised access to (or made unauthorised use of) a computer.

187. Given the nature and seriousness of the proposed Second Sabotage Offence, we suggest that it should be an element of the offence that it was committed through the unauthorised use of a computer or electronic system.

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[63] See e.g. ***Usman Ahzaz v The United States of America*** [2013] EWHC 216 (Admin); ***R v Gareth Crosskey*** [2013] 1 Cr App R (S) 76 (CA).

[64] See s.94A of the Criminal Procedure Ordinance (Cap. 221); ***Secretary for Justice v Chan Chi Wan Stephen*** (2017) 20 HKCFAR 98, §74. But *cf.* ***Yeung May Wan v HKSAR & Ors*** (2005) 8 HKCFAR 137, §41.

COMMENTS ON CP 7 - EXTERNAL INTERFERENCE AND ORGANISATIONS ENGAGING IN ACTIVITIES ENDANGERING NATIONAL SECURITY

A. Introduction

188. Chapter 7 of the CP proposes a new criminal offence of "*external interference*" which is intended to cover "*the prohibition of any person from collaborating with external forces to interfere with the affairs of a foreign state through improper means*". It also proposes to revise provisions of the Societies Ordinance (Cap. 151) to facilitate prohibiting organizations that endanger national security from operating in Hong Kong.

189. In general, the proposals made by the Administration in Chapter 7 of the CP are broadly consistent with the offences criminalising external interference in other common law jurisdictions such as Australia, Singapore and the UK. The Bar further notes, in particular, that any proposed criminal offence concerning external interference must strike the appropriate balance between safeguarding national security and preserving Hong Kong's status as an international hub for the free flow of commerce, technology, and innovation as well as the freedoms which are constitutionally protected under BL.

190. With that objective in mind, the Bar considers that there is scope for certain parts of the Administration's proposals to be further considered and possibly refined before being promulgated into law. In particular, the scope of the elements of the offence would benefit from further clarification to ensure that the definition of an "*external force*" is not overly wide, and that all relevant elements of the offence require proof of *mens rea* to secure a

conviction. We note that significant discretion is conferred upon the Secretary for Security to prohibit organizations from operating on grounds of national security. Additional safeguards may be considered to strike a better balance between various competing factors.

B. The definition of "external force"

191. We have already commented upon the definition of "*external forces*" at CP§5.19 in our comments to CP 5 at §§144-154 above, and repeat the same observations and recommendations.

C. Lack of mental element for "collaborating with an external force"

192. We note that the current approach of the proposed legislation is to list out examples of what may constitute "*collaborating with an external force*" (CP§7.6(b)).

193. None of the examples, however, contain a "*mental*" or *mens rea* element. For example, a person may participate in a rally organized by an "*external force*" (he himself using improper means and intending to bring about an interference effect), but was in fact *unaware* of the identity of the organizer as an "*external force*". A question would arise as to whether or not such a person is intended to be caught by the proposed offence. The same point can be made with respect to funding by an external element, especially where fund flows are disguised or unclear.

194. In this regard, it may be useful to consider legislation in other common law countries. By way of example, under the NSA (UK) a general interference offence will only be made out under s.13 if the "*foreign power condition*" is

met in relation to the prohibited conduct. Section 31 defines the "*foreign power condition*" as follows:

> "***31 The foreign power condition***
>
> *(1) For the purposes of this Part the foreign power condition is met in relation to a person's conduct if–*
>
> *(a) the conduct in question, or a course of conduct of which it forms part, is carried out for or on behalf of a foreign power, and*
> *(b)* ***the person knows, or having regard to other matters known to them ought reasonably to know, that to be the case****.*
>
> *(2) The conduct in question, or a course of conduct of which it forms part, is in particular to be treated as carried out for or on behalf of a foreign power if–*
>
> *(a) it is instigated by a foreign power,*
> *(b) it is under the direction or control of a foreign power,*
> *(c) it is carried out with financial or other assistance provided by a foreign power for that purpose, or*
> *(d) it is carried out in collaboration with, or with the agreement of, a foreign power."*

195. Therefore, we consider it may be appropriate to add the mental element of "*knowingly*" undertaking the acts in CP§§7.6(b)(i) to (v) to render persons not culpable under this section if their acts were done without any knowledge of the involvement of an "*external force*".

D. The Chinese text of CP§7.6(a) omits *mens rea*

196. The text at CP§7.6(a) provides the core definition of the proposed offence which reads "***With intent to*** *bring about an interference effect as follows, collaborating with an external force to engage in a conduct, and using improper*

means when engaging in the conduct" (emphasis added). However, the Chinese text reads: "配合境外勢力使用不當手段帶來以下干預效果 ..."

197. There is no mention in the Chinese text of any *mens rea* or intention ("意圖") required to be proven on the part of the defendant charged with the proposed offence. The Bar considers that as a matter of principle an element of "*intent*" should be included for a serious offence of this type.

E. <u>Additional safeguards regarding the Secretary for Security's discretion to prohibit the operation of an organization (CP§§7.9-7.10)</u>

198. National security considerations are wide-ranging and may be difficult to define comprehensively. Accordingly, both the HKNSL and the CP have rightly sought to give concrete examples of acts which endanger national security and have identified concrete offences in response to such acts. In the same spirit, the eventual legislation should, to the extent possible, provide clear guidance as to the categories of considerations the Secretary for Security may/should consider before exercising his/her discretion to prohibit the operation or continued operation of an organisation.

199. In this regard, useful reference may be made to ***Leung Kwok Hung & Ors v HKSAR*** (2005) 8 HKCFAR 229, §29: "*a law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, must give an adequate indication of the scope of the discretion*".

COMMENTS ON CP 8 AND 9 - EXTRA-TERRITORIAL APPLICATION OF THE PROPOSED ORDINANCE & OTHER MATTERS RELATING TO IMPROVING THE LEGAL SYSTEM AND ENFORCEMENT MECHANISMS FOR SAFEGUARDING NATIONAL SECURITY

A. Chapter 8: Extra-territorial Application of the Proposed Ordinance

200. It is in line with international practice as well as HKNSL 37 and HKNSL 38 to provide for extra-territorial effect for the proposed offence based on the "*personality principle*" and/or the "*protective principle*".

201. The Bar welcomes the Administration's approach of differentiating between various offences based on "*the national security threats which the offences are designed to address, as well as the circumstances in which different individuals or organisations may commit such relevant acts outside the HKSAR*" (CP§8.6) in order to ensure the extra-territorial effects for each category of offences are necessary, proportionate and reasonable (CP§§8.6 & 8.7).

202. In general, the application of the "*protective principle*" is considered more draconian and may require greater justification than the application of the "*personality principle*", which is based on allegiance to, and protection by, the State of a citizen or resident. Taking the US as an example, according to CP§8.8, it would appear that the "*personality principle*" is adopted for treason and the "*protective principle*" is adopted for terrorism.

203. The application of the proposed legislation to acts of foreign nationals and organisations under the "*protective principle*" may also have implications on acts of foreign governments and their officers and agents. How the doctrine

of sovereign and diplomatic (if applicable) immunity will work coherently with the proposed extra-territoriality thus requires careful consideration.

204. Further, legitimate acts of others such as the press or academics should not be unduly affected by the "*protective principle*".

205. The Bar considers that it will be important for the Administration to explain the policy reason(s) for the choice of the applicable extra-territorial principles in respect of each offence in due course.

B. Chapter 9: Other Matters relating to Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security

General observations

206. The importance of the concerns raised in CP§9.2, such as full and thorough investigation and the prevention of (further) offences in the meantime, is indisputable. It goes without saying that any increase in the power of the State in the prevention, suppression and punishment of acts endangering national security should be balanced against the protection of fundamental rights.

207. CP§§2.19-2.24 expressly acknowledge that human rights of individuals should be respected. In this regard the Administration ought to consider, as an explicit safeguard, to insert provisions similar to HKNSL 4 and 5 into the proposed legislation.

208. The most important fundamental rights in the present context are the following:

208.1. The right to a fair trial, including the presumption of innocence, the right to silence and privilege against self-incrimination (BL 35 and 87; BOR 10 and 11).

208.2. Freedom of the person, the rights to liberty, and the right to be tried without undue delay (BL 28; BOR 5; BOR 8 and BOR 11).

209. The importance of the principle that persons arrested or detained on a criminal charge are entitled to trial within a reasonable time or to be released pursuant to BOR 5(3) cannot be overstated. BOR 11(2)(c) stipulates the right to be tried without "*undue delay*". The rationale for the foregoing is that "*a person charged should not remain too long in a state of uncertainty about his fate*"; and "*a person who is facing conviction and punishment should not have to undergo the additional punishment of protracted delay, with all the implications that it may have for his health and family life*".[65]

210. The importance of not making inroads into the fundamental rights of individuals unless they are no more than strictly necessary cannot be over-emphasised. In this regard, the Bar urges the Administration to consider the following matters:

210.1. As noted above, the proposed legislation should contain general provisions such as HKNSL 4 and 5 to reiterate the Administration's commitment to the protection of the fundamental rights.

210.2. When drafting each specific provision, any inroad into any basic rights of individuals guaranteed by BL, BOR and the general law must be no more than strictly necessary.

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[65] ***O'Neill v HM Advocate (No 2)*** [2013] 1 WLR 1992, §34 *per* Lord Hope of Craighead.

210.3. Any such inroad ought to be applied on a case-by-case basis, and insofar as practicable the Courts, rather than the enforcement agencies, should be the decision-maker and gatekeeper.

211. We provide our more specific comments on particular aspects thereof below.

Prolonged detention without charge

212. Prolonging the detention of persons who are arrested on suspicion of an offence endangering national security but not charged beyond 48 hours (CP§9.8 *et seq*) should generally be authorised by the Courts, and be subject to periodical review after a suitable interval. The principles of the law of bail should be applied. It should be noted that the questions of prevention of absconding or further offences etc. are already matters the Courts would consider in granting bail.

213. Periodical review can also ensure that the prosecution is conducted in a "*fair and timely manner*", as stated in HKNSL 42. It would also enable proactive case management by the Courts at the earliest stage (CP§9.18), which otherwise would not happen if the suspect is detained without charge for a prolonged period without the Courts' supervision.

214. At CP§9.12(a), reference was made to the NSA (UK). It is suggested that such legislation has conferred extensive power upon the UK law enforcement authorities to take prevention and investigation measures, including the powers for "*the police to apply to a judicial authority for extension of detention, so that the detention period of an arrested person can be extended without charge*". One however should not lose sight of the following features of the NSA (UK), which provide for the necessary safeguards to the relevant

fundamental rights of the detained suspect when the enforcement agencies seek prolonged detention beyond 48 hours:

214.1. The NSA (UK) provides that the police can apply to a judicial authority for an extension of detention, when the police "*reasonably suspects*" the person "*is, or has been, involved in foreign power threat activity*".[66] This, however, can be extended, if considered appropriate, to other types of offences under the proposed legislation.[67]

214.2. A judicial authority must approve detention beyond 48 hours in the form of a warrant of further detention, and can only do so for a specified period of no more than seven days from time of arrest.[68] The application for the warrant must be made within 54 hours of arrest, and furthermore the judicial authority "*must*" dismiss the application if it considers that it would have been "*reasonably practicable*" to have made the application during the first 48 hours of detention.[69]

214.3. Insofar as the substantive requirements for the grant of such application are concerned:

214.3.1. The judicial authority must be satisfied that there are reasonable grounds for believing the further detention is

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[66] Section 27 and Schedule 6, §§37-45.
[67] Thus, references to "*foreign power threat activity*" under the NSA (UK) herein is to be understood to refer to an offence under the proposed legislation.
[68] Schedule 6, §37(1)-(3).
[69] Schedule 6, §38(1)-(2).

necessary, and the investigation is being conducted diligently and expeditiously.[70]

214.3.2. The relevant evidence being obtained or preserved must relate to the person's involvement in foreign power threat activity.[71]

214.4. The detained person must be notified as to when the application is to be heard, and the grounds upon which the extension of detention is sought.[72] The detained person must have the opportunity to make representation on the further detention.[73]

214.5. The specified period in the warrant of further detention may specify only a maximum of seven days beginning with the time of the person's arrest.[74] Applications for extensions or further extensions are also limited to a further seven days from the expiry of the last warrant or 14 days from time of arrest (whichever is earlier).[75]

214.6. The NSA (UK) also requires an annual independent review of the operation of the provisions on detention (including in particular the extent of compliance with the relevant requirements in relation to persons detained under a warrant of further detention), and for such report of the review to be placed before Parliament.[76]

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[70] Schedule 6, §40. The necessity must be (a) to obtain relevant evidence whether by questioning the person or otherwise, (b) to preserve relevant evidence, (c) pending the result of an examination or analysis of any relevant evidence, or (d) pending the examination or analysis of anything which is being carried out, or is to be carried out, with a view to obtaining relevant evidence.
[71] Schedule 6, §40(3).
[72] Schedule 6, §39.
[73] Schedule 6, §41.
[74] Schedule 6, §37(2)-(4).
[75] Schedule 6, §44.
[76] Sections 63-64.

215. The aforesaid features of the NSA (UK) should be considered in the proposed legislation in striking the appropriate balance.

Access to lawyers

216. Restricting or delaying access to lawyers (CP§9.12(b)) would be a derogation from the right to fair trial and the right to legal representation (BL 35 and 87; BOR 10 and BOR 11):

216.1. BL 35 makes specific mention of choice of lawyers as a means for the "*timely protection*" of an individual's lawful rights and interests. The failure to advise a defendant of his rights to legal representation (or to restrict or deny access to legal representation) until, for example, after the taking of an incriminatory statement could deny such person the protection against self-incrimination and may prejudice fair trial. This right to timely legal advice without delay is so fundamental that it should not be interfered with save in compelling circumstances.

216.2. BL 35 and BOR 11(2) do not provide an absolute right to choose one's legal adviser.[77] However, denial of a request for a specific lawyer ought to be justified by cogent reasons, such as possible conflict of interest arising from the same lawyer's representation of a co-

[77] "*A litigant is not entitled as of necessity to the counsel of his choice. A court or tribunal would attempt to accommodate any reasonable request. Provided a litigant or person appearing before a court or tribunal could obtain proper legal representation in adequate time there is no reason which requires that a litigant or person appearing before a court or tribunal should be entitled, as of right, to an adjournment to accommodate a particular counsel.*": ***The Law Society of Hong Kong v A Solicitor*** (CACV 424/2006, 28 October 2008), §12 *per* Rogers VP.

defendant,[78] or where the court's diary is unable to accommodate a particular counsel in great demand.[79]

217. CP§9.12(b) refers to the relevant power of the UK police under the NSA (UK)to restrict or delay the arrested persons' access to lawyers. Again, the relevant provisions of the NSA (UK) must be considered in its entirety:

217.1. Paragraph 7 of Schedule 6 to the NSA (UK) stipulates the right of a person arrested and detained on reasonable suspicion of being involved in foreign power threat activity to consult a solicitor as soon as reasonably practicable.

217.2. Paragraph 8 provides for a power for police officers of the rank of superintendent or above to prohibit a detained person from consulting a particular solicitor, provided that there must be a reasonable ground to believe that one of the specified consequences set out in paragraph 8(4) will arise if the consultation were to go ahead. [80]

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[78] ***R v Lam Kwok Wai*** [1996] 4 HKC 481.

[79] ***R v Deacon Chiu Te-ken*** (1992) 2 HKPLR 245.

[80] Those consequences are—
"*(a) interference with or harm to evidence of an indictable offence,*
(b) interference with or physical injury to any person,
(c) the alerting of persons who are suspected of having committed an indictable offence but who have not been arrested for it,
(d) the hindering of the recovery of property obtained as a result of an indictable offence,
(e) interference with the gathering of information about a person's involvement in foreign power threat activity,
(f) making it more difficult, by the alerting of a person, to prevent foreign power threat activity, and
(g) making it more difficult, by the alerting of a person, to secure a person's apprehension, prosecution or conviction in connection with the person's involvement in foreign power threat activity". This can be compared with article 3(6) of Directive 2013/48/EU, which provides:
"*In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:*
(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a

217.3. Paragraph 9 provides for a power for police officers of the rank of superintendent or above to temporarily delay the detained person's access to a solicitor, provided that such delay shall be limited in time and there is a reasonable ground to believe that those specified consequences will arise if the consultation were to go ahead without delay. However, the detained person must be permitted to exercise his right to consult a solicitor before the end of the 48-hour period. [81] The decision under paragraph 9 must be recorded in writing and the detained person must be told of the reason for it,[82] and the delay in permitting the exercise of the right must be lifted once the reason for the delay no longer applies.[83]

217.4. The NSA (UK) also requires an annual independent review of the operation of the provisions on restricting access to lawyers (including in particular the extent of compliance with the relevant requirements in relation to restricting such access), and for such report of the review to be placed before Parliament.[84]

218. Save in those compelling circumstances as identified in the NSA (UK), denial or restriction of access to lawyers is difficult to justify. Also, any of such denial or restriction cannot be longer than strictly necessary, and ought to be subject to judicial scrutiny. On this note, it is considered that the conditions for temporary suspension of the right to access lawyers as

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person;
(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings".
The conditions in the NSA (UK) are more detailed and probably can fit into one or both of the two conditions in the Directive, and may be preferable.
[81] Schedule 6, §9(2).
[82] Schedule 6, §9(6)-(7).
[83] Schedule 6, §9(8).
[84] Sections 63-64.

provided in Article 8 of Directive (EU) 2013/48 are conducive to striking a fair balance:

> *"1. Any temporary derogation under Article 3(5) or (6) or under Article 5(3) shall*
>
> *(a) be proportionate and not go beyond what is necessary;*
> *(b) be strictly limited in time;*
> *(c) not be based exclusively on the type or the seriousness of the alleged offence; and*
> *(d) not prejudice the overall fairness of the proceedings.*
>
> *2. Temporary derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned."*

Restrictive measures during investigation

219. CP§9.12(c) refers to a range of measures including restrictions on residence, communications and complying with directions in respect of movements, etc., imposable under the NSA (UK). These measures may interfere with rights to liberty as well as the right to privacy, right to freedom of expression, and right to property. It is therefore, again, important to consider those measures together with the safeguards and restrictions as provided in the NSA (UK).

220. The UK has from 2005 onwards developed a regime of "*control orders*" that has undergone changes from time to time. The NSA (UK) at s.39 and Schedule 7 provides for the power to impose prevention and investigation

measures, including those briefly described at CP§9.12(c). The imposition of those measures is subject to the following restrictions: [85]

220.1. The Secretary of State must reasonably believe that the individual is or has been involved in foreign power threat activity.[86]

220.2. Some or all of the relevant activity must be "new" foreign power threat activity.[87]

220.3. The Secretary of State must reasonably consider that it is necessary, for purposes connected with protecting the State from the risk of acts or threats of foreign power threat activity for prevention and investigation measures to be imposed on the individual.[88]

220.4. The Secretary of State must reasonably consider that it is necessary, for purposes connected with preventing or restricting the individual's involvement in foreign power threat activity, for the prevention and investigation measure to be imposed on the individual.[89]

220.5. The Secretary of State must have obtained the Court's permission before imposing the measures. Alternatively, the Secretary of State must reasonably consider the urgency of the case requires the measure to be imposed without first obtaining permission. In the

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[85] Section 40.
[86] Condition A.
[87] Condition B.
[88] Condition C.
[89] Condition D.

latter situation, the case must then be referred to the Court immediately after imposing the measures.[90]

220.6. Those measures can only be imposed for one year, subject to the power to extend them for not more than four times. Each extension is for not more than one year and must be subject to the conditions noted above.[91]

220.7. The NSA (UK) also requires an annual independent review of the operation of the provisions on such measures, and for such report of the review to be placed before Parliament.[92]

221. Judicial approval (whether prior or subsequent in urgent cases) is essential for any control measures similar to those under the NSA (UK). Also, those conditions governing the applications by the State under the NSA (UK) should also be considered.

Elimination of procedures (CP §9.19)

222. As a general principle, many, if not all, Court procedures are designed with a consideration (even though not necessarily the sole consideration) to protect the rights of a suspect. Generally speaking, procedures should not be eliminated unless the relevant rights that such procedures were designed to protect will not be compromised.

Early release

[90] Condition E; see also s.42 and Schedule 8.
[91] Section 41.
[92] Section 63.

223. CP§§9.20-9.22 appears to suggest that measures regarding early release of persons convicted of the offence of endangering national security (CP§§9.20-9.22) should be tightened.

224. The Administration refers to the Terrorist Offenders (Restriction of Early Release) Act 2020 (UK) as an example of tightening the early release arrangement for persons convicted of terrorism offences. Such legislation provides that terrorist offenders should not be automatically released before the end of their custodial term without being referred to the Parole Board for assessment before release. Furthermore, the release point for terrorist offenders was changed from half-way to two-thirds of the sentence.[93] The not more than one-third remission is already the position in Hong Kong.

225. It is further noted that the arguments against early release (absconding or reoffending) apply equally to other offences. Also, protection of the public is already a requirement under s.5(2)(b) of the Post-Release Supervision of Prisoners Ordinance (Cap.475) and s.8(d) of the Long-term Prison Sentences Review Ordinance (Cap.524), such that the relevant bodies must be satisfied that the public is not at risk before they can order the early release of any convicted persons. Further, a prisoner released early under a supervision order may have the same revoked if public interest requires his immediate reimprisonment: see s.14(3) of the Prisoners (Release under Supervision) Ordinance (Cap.325).

226. For reasons stated above, the Bar would therefore welcome the Administration's clarification as to the need for any further special

[93] Section 1(2), inserting a new section 247A into the Criminal Justice Act 2003.

provisions regarding early release of convicted persons under the proposed legislation.

Protection of persons handling cases or work involving national security

227. Regarding the matters discussed at CP§§9.23-9.26, it is acknowledged that proper protection of persons handling cases or work involving national security is necessary. Further elaboration on the need to expand the protection on top of the existing legislation, including the recently amended Personal Data (Privacy) Ordinance (Cap.486), the offence of criminal intimidation and the offence of loitering in a public place, will be welcomed.

228. As for the suggestion of creating a new offence of harassment (CP§9.25), the Bar considers that substantive examples as to what constitutes "*harassment of a certain level of severity*", and how such harassment would fall outside the existing offences, will be useful in assessing the necessity and proportionality for a new offence as proposed.

- THE END -