

**National Security (Legislative Provisions) Bill :
The Mental Element Required for Subversion**

A person could only be convicted of the substantive offence of subversion if he **succeeded** in –

- (a) disestablishing the basic system of the People's Republic of China as established by the Constitution of the People's Republic of China;
- (b) overthrowing the Central People's Government; or
- (c) intimidating the Central People's Government,

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

Inchoate offences

2. It is unlikely that any person will succeed in achieving these results, and it is more likely that any prosecution brought in respect of subversion would be for a conspiracy, attempt, or incitement to commit that offence. By virtue of the proposed section 2D of the Crimes Ordinance, inciting others to commit subversion is an offence only under the proposed section 9A i.e. sedition.

3. The mental element required for a conviction for conspiracy, attempt or incitement are as follows.

Conspiracy : The parties to the conspiracy must intend to agree to be a party to conduct which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of the offence of subversion by one or more of the parties to the agreement.

Attempt : The person must intend to commit the offence of subversion.

Incitement : The accused must have intended that the person he incited would commit the offence of subversion. It must be proved that the accused knew of (or deliberately closed his eyes to) all the circumstances of the act incited which are elements of the crime of subversion. He must have intended the consequences that amount to the offence of

Substantive offence

4. If a person were charged with the substantive offence of subversion, according to the established common law presumption, it would be necessary for the prosecution to prove intention, knowledge, or recklessness on the part of the accused in respect of all elements of the offence.

5. It is not unusual for a statutory offence to define the prohibited conduct solely in terms of the proscribed physical acts without saying anything about the mental element. The established common law presumption is that a mental element is an essential ingredient unless the legislature has indicated a contrary intention either expressly or by necessary implication. This governing principle was stated by Lord Reid in Sweet v Parsley [1969] 1 All ER 347 at 349-350, [1970] AC 132 at 148-149 :

“... there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, **whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of the Parliament, we must read in words appropriate to require mens rea ... it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.**” (Emphasis added.)

6. Where an offence is “truly criminal” in character (e.g. the proposed offence of subversion) the courts have held that the presumption that mens rea is required before a person can be found guilty is particularly strong.

Means or consequences?

7. The Administration has been asked to explain whether “serious criminal means that seriously endangers the stability of the PRC” refers to the means by which a person may achieve an objective or to the consequences of a person’s actions.

8. Since an offence of subversion is only committed if specified objectives are achieved “by using force or serious criminal means that seriously endangers the stability of the People’s Republic of China or by engaging in war”, it is considered that the words quoted in paragraph 7 refer to one of the means by which subversion can be committed.

9. It is noted that –

- (1) the definition of “serious criminal means” refers to an act that has specified consequences (e.g. it endangers the life of a person other than the person who does the act); and
- (2) the serious criminal means must be of such a nature that it seriously endangers the stability of the PRC.

However, these requirements must all be satisfied before it can be said that a person has used means that are an element of the offence of subversion.

10. The key factor is that each of the requirements (however described) referred to above is an element of the offence of subversion. For the offence to be proved, it must be established beyond reasonable doubt that the accused intended that those requirements should be satisfied, or was reckless as to whether they would be satisfied.

11. A person who does an act without intending to, and without being reckless as to whether it would –

- (1) cause the consequences specified in the definition of “serious criminal means”; or
- (2) seriously endanger the stability of the PRC,

would not have satisfied the element of the offence quoted in paragraph 7 above.

Department of Justice
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