Submission No. 187

COMMENTS ON BEHALF OF THE BAR OF ENGLAND AND WALES

PROSCRIPTION

Coverage

1. This paper sets out some comments, from the perspective of the Bar of England and Wales, on those provisions of the National Security (Miscellaneous Provisions) Bill 2003 (the "Bill") which amend the Societies Ordinance to provide for the proscription of organisations. It also summarises the appeal procedures created in the UK under immigration and terrorism legislation.

Introductory comments

2. In approaching the proposed provisions we consider that it is fundamental to recognise the importance of the right of an individual to freedom of expression, to freedom of association and to freedom of thought, conscience and religion.

3. Only where absolutely necessary should these freedoms be restricted on the grounds of national security. Any such restriction should be necessary and proportionate.

4. Any legislation providing the basis for restriction of these rights should be absolutely clear and should protect the rule of law.

Comments on Section 8A(2)(a) and (b)

5. There is inevitably a problem in defining with sufficient precision the minimum conditions which must be met before an order for proscription may be made. One solution to the problem is to seek

to define the types of activity which may lead to proscription of an organization which commits, promotes, encourages or is otherwise concerned with such acts. This broadly speaking is the approach adopted in England by the Terrorism Act 2000 ("TA 2000") in Sections 1 and 3.

6. This statutory scheme and its implementation are very controversial in the UK. Hence we express no view as to whether it is consistent with international human rights standards. But whether one approves of the scheme or not, one can at least acknowledge that it is rational in that it focuses attention on specified activities.

7. It seems to us that the scheme proposed in Section 8A(2)(a) and (b) of the Societies Ordinance is irrational and virtually unworkable in that it focuses on crimes rather than activities. The proposed section reads:

"This section applies to any local organisation-

(a) the objective, or one of the objectives, of which is to engage in treason, subversion, secession or sedition or commit and offence of spying;

(b) which has committed or is attempting to commit treason, subversion, secession or sedition or commit an offence of spying;"

"Local organization" is defined in section 8A(5)(f) of the Bill as

"(i) any society which is registered, registrable or exempted from registration under this Ordinance; or

(ii) any body of persons listed in the Schedule"

8. In Section 8A(2), both (a) and (b) assume that it is possible for a "local organization" to commit the offences of treason, subversion, secession, sedition and spying. There are enormous difficulties in applying this concept.

9. Firstly, the question arises whether it is even possible for an organization to commit some of these crimes as defined in the Bill. Take treason as an example. Section 2 of the Bill, defining treason begins with the words "A Chinese national commits treason if he…". Of course a number of Chinese nationals could collectively commit acts of treason. But then each would be liable as an individual. They could not be collectively liable as an organization simply because organizations cannot possess nationality.

10. Secondly, the offences of subversion, secession, and sedition, as defined in the Bill, and spying, as defined in the Official Secrets Ordinance, can only be committed by "a person". Moreover the acts which are made offences are acts which one would normally think of as being committed by one or more human beings; such as joining armed forces, instigating foreign forces, overthrowing, intimidating, inciting. An organization cannot do any of these things. Nor can it perform such physical activities as approaching, inspecting or passing over a prohibited place, making sketches, models or notes etc. which may constitute spying.

11. Suppose that 5 men agree to gather secret information and pass it on to a hostile government. They do so in a number of ways (e.g. making sketches and notes). They are all members of an

association having 2000 members. One could sensibly say that all 5 were guilty of spying. But it would make no sense to accuse the association itself of the offence, unless some proper basis of non-personal liability can be invoked.

12. Of course it may be said that some principle of corporate or vicarious liability may be invoked. But what is that principle and why is it not expressed in the Bill if it is to be relied upon? If the organization is an incorporated body, then it has legal personality. There is substantial – and very complex - authority on the question whether a corporation can commit criminal offences. We do not propose to make a detailed review of those authorities. It has been held that those who represent the directing mind of the corporation can render it criminally liable for their actions as in the leading case of *Tesco v Natrass* [1]. But again there is an insuperable physical problem. Because a company cannot go to prison it can only commit offences punishable with a fine[2]. The Bill provides that any person convicted shall be liable to imprisonment for life in the case of treason, subversion secession and sedition under Section 9A(1)(a) namely inciting others to commit treason, sedition or subversion. The only case where a fine can be imposed is under Section 9A (1)(b) (inciting others to violent public disorder).

13. It may be argued that there is no obligation to impose a prison sentence for any of these offences. The Bill merely creates a liability to be sentenced to imprisonment. But we cannot conceive of any act which could properly be prosecuted as treason, secession

[1] (1972) AC 153 see also Smith and Hogan Criminal Law (10th ed) at 201 – 205

[2] Smith and Hogan at p205

subversion or incitement thereto which would merit a penalty no greater than a fine.

14. Thus the Bill appears to contemplate the possibility that an organization might be guilty of all of these offences even though it could never be prosecuted for them. This is a quite artificial and unfair basis for proscription.

15. The difficulties are even greater if the association is not incorporated. In *A.G. v Able* [3] Woolf J in dealing with an alleged offence under the Suicide Act 1961 said

"It must be remembered that the (Voluntary Euthanasia Society) is an unincorporated body and there can be no question of the society committing an offence"

16. However Smith and Hogan question whether this is correct. They rely on the Interpretation Acts for the proposition that [4]

"Since 1889 unincorporated bodies have been able to commit any offence under an enactment passed after 1989 which makes it an offence for a "person" to do anything which an unincorporated body is capable of doing".

17. But is an unincorporated body capable of committing any of the offences of treason, subversion, secession, sedition or spying? This begs the question. We would submit that the answer is "no" for the reasons already given.

18. Thus proscription of a local organization under (a) or (b) of Section 8A(2) depends upon it having the objective of committing, or

[3] (1984) QB 795

[4] At p208

actually committing, or attempting to commit certain crimes. But there is a powerful argument that as a matter of law it could never commit any of those crimes because (for example) it could never be a citizen, lacks any physical capacity and could never go to prison.

19. Moreover the Bill gives no guidance as to how these difficulties are to be overcome. It is typical of political organizations that they may represent many shades of opinion and ranges of activity. If members of an organization commit or plan acts of treason then one would need clear statutory criteria for judging how many must do so and at what level of seniority within the organization to render it guilty of treason and hence liable to proscription. Moreover if one were considering the "objectives" of the organisation then one would have to ask the hypothetical question whether a particular objective would constitute an offence of (say) subversion if it were to be translated into physical action.

20. Dealing with these complex issues effectively and fairly is all the more difficult because the Bill defines treason, subversion, secession and sedition so vaguely and broadly. We make a number of points in relation to these proposed offences in our separate paper dealing with the relevant sections of the Bill in which the proposed offences are set out.

Comment on Section 8A(2)(c)

21. The operation of this section stems from a decision to proscribe an organisation by the Central Authorities under the law of the PRC.

22. It is unclear if or to what extent the Hong Kong government will have any further discretion in relation to the primary decision to proscribe the parent organisation. None is provided in the Bill.

23. How is the Hong Kong government to decide whether it "reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose" (as it is required to do under Section 8A(1)) when it has not been party to the original decision and is merely supplied with a certificate as conclusive evidence of the prohibition (under Section 8A(3))? It seems to us that this will not be possible.

24. We have no knowledge of the procedures which may exist in the PRC for any appeal against the original decision to proscribe the parent organisation. Even bearing in mind the principle of deference to the decision of the executive (which in our jurisdiction is based upon the concept of primacy of an elected government in certain areas) and the possible need to protect sensitive information, other jurisdictions have recognised the need to provide for independent appeal or review procedures (as to those in the UK, see paragraphs 30 to 64 below).

25. Section 8A(2)(c) is wholly unclear as to how the rights of individuals will be protected in circumstances in which the decision to proscribe has been taken by the Central Authorities.

Appeal procedures under Sections 8D and 8E of the Bill

26. It is understood that reliance is placed upon UK practice for some of the procedures suggested in sections 8D and 8E of the Bill.

27. We believe that it is important to bear in mind the limited context, and in relation to terrorism the urgent and exceptional circumstances, in which these procedures have been developed.

28. The context of legislation is all-important. For example, in relation to the procedures under the ACTSA 2001, it has been recognised that apart from the emergency situation arising from the 11 September 2001 atrocity some of the procedural provisions would not be acceptable.

29. It is therefore with considerable caution that the UK procedures should be approached in order to establish any form of analogy with the purposes of Section 8A of the Bill.

30. Bearing in mind this overall caveat, three forms of procedure are briefly summarised below:

(a) Special Immigration Appeals Commission ("SIAC") under the Immigration Act 1971 ("IA 1971");

(b) SIAC under the Anti-terrorism, Crime and Security Act 2001 ("ATCSA 2001");

(c) Proscribed Organisations Appeal Commission ("POAC") under the Terrorism Act 2000 ("TA 2000").

SIAC under IA 1971

31. The context of the origin of the SIAC procedure in the UK was that of a decision of the Secretary of State to make a deportation order under the IA 1971.

32. It is important to bear in mind that deportation of aliens involves no fair trial rights under European Convention on Human Rights ("ECHR") Article 6. The issue of deportation does not involve the determination of a criminal charge and therefore the applicant is not entitled to the full protection of Article 6.

33. The background to the SIAC procedure is set out in the judgments of the House of Lords and Court of Appeal in *Sec of State for Home Dept v Rehman [2003] 1AC 153 at 157 and 188.*

34. Section 3 of the 1971 Act contains the general provisions for regulation and control of immigration. S.3(5) identifies who is liable to deportation:

"(5) A person who is not [a British Citizen] shall be liable to deportation from the United Kingdom... (b) if the Secretary of State deems his deportation to be conducive to the public good; or...."

35. If the Secretary of State proposes to make a deportation order, the first step is to make a decision to deport. The decision to deport is one in relation to which there is normally an appeal under s.15 of the 1971 Act. Section 15(1)(a) which provides:

"(1) Subject to the provisions of this Part of this Act, a person may appeal to an adjudicator against - (a) a decision of the Secretary of State to make a deportation order against him by virtue of section.3(5) above; or..."

36. Deportation involves a two-stage process. First the decision to make a deportation order and then, if there is no successful appeal, the deportation order. Once a deportation order has been made, there can be an appeal against a refusal to revoke the deportation. There are however limitations both with regard to who is entitled to

appeal against a decision to make a deportation order and who can appeal against a decision to refuse to revoke a deportation order. The limitation on such an appeal is expressed in the Act as follows:

"15(3) A person shall not be entitled to appeal against a decision to make a deportation order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature."

37. Although s.15(3) refers to three specific grounds why deportation can be conducive to the public good, s.3(5) does not refer to those grounds. S.3(5) is silent as to the circumstances which need to exist to make a deportation because it is conducive to the public good to do so. The Secretary of State is however required to give his reasons why he considers deportation to be conducive to the public good and if he relies on "interests of national security" etc. he brings into play s.15(3).

38. Although there was no appeal under the IA 1971 in s.15(3) cases, there was a non-statutory advisory procedure which enabled those to whom the section applied to appear before "the Three Advisors" and then make representations to them. They then advised the Secretary of State as to whether he should adhere to his decision.

39. The question whether this non-statutory protection complied with the standards of the ECHR was considered by the European Court of Human Rights in *Chahal v The UK [1997] 23 EHRR 413*. In that case it was held that the procedures did not do so as the advisory panel was not a "court" within the meaning of Article 5 (4) ECHR and judicial review, where national security was involved,

did not provide an "effective remedy" within the meaning of Article 13. The court however recognised that the use of confidential material may be unavoidable where national security is at stake and the European Court of Human Rights was impressed by the fact that in Canada a more effective form of judicial control had been developed for cases of this type.

40. The response of the government was to introduce the Special Immigration Appeals Commission Act 1997 ("SIAC Act 1997"). That Act was clearly designed to bring the United Kingdom into a position where it complied with its obligations under the European Convention and to provide greater protection for individuals who it was intending to deport on national security grounds.

41. Section 1 of the SIAC 1997 Act established the SIAC. Its membership was significant: one member has to have held high judicial office and one had to be or have been the Chief Adjudicator or a legally qualified member of the Immigration Appeal Tribunal. While there was no statutory restriction as to who was to be the third member, it had been indicated that the third person would be someone who had experience of national security matters.

42. Section 2 dealt with the jurisdiction of the Commission. One situation in which the jurisdiction exists is where a person would have been entitled to appeal but for s.15(3). SIAC's task in relation to determining appeals is set out in s.4(1) and (2) of the 1997 Act. S.4 so far as relevant provides:

> *"(1) The Special Immigration Appeals Commission on an appeal to it under this Act - (a) shall allow the appeal if it*

considers - (i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and (b) in any other case, shall dismiss the appeal.

(2) Where an appeal is allowed, the Commission shall give such directions for giving effect to the determination as it thinks requisite, and may also make recommendations with respect to any other action which it considers should be taken in the case under the Immigration Act 1971; and it shall be the duty of the Secretary of State and of any officer to whom directions are given under this subsection to comply with them."

43. The SIAC has full jurisdiction to review questions of fact and law. It was emphasised in *Rehman (at para 49, page 191)* that this jurisdiction was limited by:

(a) The fact that it was exercising a judicial function and that it had to recognise the constitutional boundaries between judicial, executive and legislative power;

(b) The fact that it was an appellate body and thereby had to show deference to the primary decision-making body.

44. However within the constraints set out above it was emphasised (*Rehman para 54, page 193)* that the SIAC had responsibility to check the decision of the executive to ensure that:

(a) The factual basis for deportation had to be established by evidence;

(b) The decision of the executive was not one that no reasonable minister advising the Crown could in the circumstances reasonably have held;

(c) There was no other issue which should have been taken into account by the executive which was outside its exclusive competence; for example whether deportation would have infringed the individual's rights under Article 3 ECHR (as to relief from torture or inhuman treatment)

45. Rule making powers under Section 5 of the 1997 Act gave the Lord Chancellor wide powers to make rules for regulating the exercise of the rights of appeal, enabling him to make the most satisfactory arrangements practicable to deal with the tension which will inevitably arise in cases involving national security between the rights of the individual and the need to maintain the confidentiality of security information. The 1997 Act provided for the appointment of a special advocate in accordance with Section 6. He was able to represent the appellant before the SIAC during those parts of the proceedings from which the appellant and his legal representatives might be excluded. In order to perform this purpose, the special advocate would usually be present during the entire proceedings and not only the closed sessions. This means that in practice an appellant will have two sets of legal representatives. Those of his own choice can represent him during open sessions and in private sessions (sessions during which the public are excluded but not the appellant) and the special advocate in closed sessions, where the information is of a category which it is necessary to keep confidential from the appellant and the appellant is not present. It should be emphasised that the special advocate should be independent of the executive and acts on behalf of the appellant.

46. Section 7 of the 1997 Act gave “any party” the right to bring a further appeal “on any question of law material” to SIAC’s determination.

47. The rules anticipated by the 1997 Act are the *Special Immigration Appeals Commission (Procedure) Rules 1998* (”the SIAC 1998 Rules”).

48. To this extent it is correct that the UK’s SIAC system was introduced following the criticisms of the wise men procedure in the *Chahal* judgment that prevented a suspected terrorist detained pending deportation effective access to a court to secure his release. The system was supposedly based on the Canadian system. There is a debate as to the extent to which it is. The case of *Canada v Chiarelli (1992) 1 SCR 711* is a case in which the Canadian Supreme Court upheld the procedure.

49. As stated above it is important to bear in mind that deportation of aliens involves no fair trial rights under Article 6. There is no requirement in human rights for a deportation appeal, and the SIAC system can be said to be better than nothing.

50. Strasbourg has twice commented on the SIAC:

    (a) In *Tinnelly v UK (62/1997/846/1052-1053)*, it found a violation of Article 6 where a discrimination claim was ousted by a national security certificate and it pointed out that SIAC showed some measure of judicial control was possible in such circumstances. This was implicit recognition of SIAC although not explicit

(b) In *Al Nashif v Bulgaria June 2002* the Court expressly indicated it was not approving the SIAC procedure but again noted that it provided some guarantee against arbitrary executive decisions where no appeal rights were expressly needed. In this case there was a violation of Article 5(4) in respect of the review of detention, Article 8 in respect of a deportation on national security grounds because the law was not sufficiently specific to regulate the proscribed conduct as well as a violation of Article 13 because of procedural deficiency.

The POAC under the TA 2000

51. The context of the TA 2000 and the Proscribed Organisations Appeal Commission (POAC) procedure was the activity of terrorist organisations in Northern Ireland.

52. Two new procedures accompanied the Act. That providing for an application for de-proscription to the Secretary of State under Section 4(1) of the Act and an application to the POAC in the event of refusal of the former, pursuant to Section 5. A right then exists for further appeal on a point of law to the Court of Appeal.

53. The POAC (Procedure) Rules 2001 (the "POAC Rules") regulate the procedure for the appeal to the POAC.

54. The constitution of the POAC is independent of the executive; the panel must be three strong and must include a (past or present) senior judicial member.

55. By section 5(3) of the Act, the POAC reviews the decision of the Secretary of State "*in the light of principles applicable on an application for judicial review*".

56. In summary the POAC Rules provide for:

(a) appeals to be heard in the absence of the appellant and his representative where necessary;

(b) the circumstances in which a special advocate is to be appointed to represent the interests of the appellant; a similar procedure to that of the SIAC;

(c) the ability of the Secretary of State to adduce evidence which would not be admissible in a court of law;

(d) application for permission to appeal on a point of law to the Court of Appeal.

57. The extension of the SIAC system to POAC is controversial and the legislation and its procedures have not been tested at higher court level. The combination of limited powers of scrutiny under the principles of judicial review and the limited involvement of the applicant in the process because of evidential sensitivity may trigger a breach of Article 6 if a challenge is made.

Extension of the SIAC procedure by the ACTSA 2001

58. In December 2001 the ATCSA 2001 extended the SIAC procedure to national security internment of suspected members of the Al Qa'ida network and derogation was made to Article 5 (the right to liberty).

59. There was vigorous opposition to this move but the government was firm about the threat and the need for exceptional measures.

60. The Lord Chief Justice made clear the exceptional context of this legislation and the associated appeal procedure in the judgment of the Court of Appeal in *A & Others v Sec State for Home Dept [2002] EWCA Civ, at para 64:*

"The unfortunate fact is that the emergency which the government believes to exist justifies the taking of action which would not otherwise be acceptable"

61. A challenge was brought to various aspects of the SIAC regime in *A & Others v Sec State for Home Dep*. The CA held that SIAC did, within the exceptional circumstances, meet the standards of Article 6 as far as a challenge to a decision to detain was concerned. The matter is pending before the House of Lords. In brief UK law and Strasbourg seems to have concluded that this is a relevant and permissible procedure for reviewing decisions to detain alien terrorists facing removal on national security grounds, in circumstances of a national emergency caused by global terrorism.

62. Even within such exceptional circumstances it was important that the courts should protect the rule of law.

63. ATCSA 2001 provided for a regular independent review of the actions of the executive under these provisions. The review of Lord Carlile dated January 2003 is to be found on the Home Office web site. A further review is to be carried out by a committee of Privy Counsellors who have not reported yet.

64. It is of note that Lord Carlile was particularly concerned (at para 4.28) with the disadvantage created for the certified person in not being provided with evidence which would have enabled him to know and address the true issues. He stated that: *"the justification for this apparent inequality if there is justification could only be founded in overwhelming national security consistent with the emergency upon which the ECHR derogation is founded"*. He also made a number of comments about the role of the Special Advocate.

Comments on the relevance of the UK procedures to the proscription provisions under the Bill

65. The Bill seeks to apply features of these procedures to cases of executive proscription of Hong Kong domestic organisations envisaging procedural rules which would deny a full right of appeal in which the proscribed organisation could respond to the evidence.

66. The most obvious point is that the procedures summarised above have been developed within certain strictly limited contexts. The context in which an organisation in Hong Kong is considered for proscription might or might not fall within the context of terrorism and global emergency. However the proposed sections are not limited to such circumstances and the uncertainty of their terms exposes the provisions to much wider use.

67. Even within the narrow confines of the particular UK legislative context the appeal procedures are the subject of criticism and debate within the UK and have not expressly been endorsed by the European Court of Human Rights.

68. Within these narrow contexts the appeal procedures in the UK:

(a) provide for a level of independent review of the primary decision; the precise limitations varying with the context;

(b) restrict the limitations on the subject's rights to a minimum within the particular context;

(c) provide for a special advocate independent of the executive;

(d) provide for judicial independence in making an independent assessment of whether an organisation violates national security;

69. Aspects of these contentious procedures adopted in the UK for situations of national emergency or other established terrorist threat have been drafted into Sections 8D and 8E whose operation is not restricted to such narrow situations.

70. Of particular concern is the situation envisaged by Section 8A(2)(c) in which the appeal procedures suggested in Sections 8C and 8D will not avail the subordinate organization because they will not enable a review of or challenge to the original decision to proscribe the parent organization taken by the Central Authorities under PRC law. The appeal will only permit a challenge to the decision of the Hong Kong Secretary of Security whose own decision will have been dictated by the conclusive certificate of the Central Authorities.

71. Accordingly the proposed legislation provides no protection at all to the subordinate organisation proscribed in Hong Kong against an

arbitrary or unsupportable decision by the Central Authorities to proscribe the parent organisation.

SUBMISSIONS ON BEHALF OF THE BAR OF ENGLAND AND WALES

OFFICIAL SECRETS AND THE CASE OF SHAYLER

1. The case of *Shayler* (2002) 2 WLR 754 is plainly very important. Although Mr Shayler lost his appeal, the speeches of Lords Bingham, Hope and Hutton stress the crucial importance in a democratic society of the right to freedom of expression. However, we believe that the case has been seriously misunderstood in some quarters as being authority for the proposition that there can be no public interest defence to any offence under the Official Secrets Act 1989 ("OSA"). This view is, in our submission, demonstrably wrong.

2. The OSA is a complex piece of legislation. For ease of reference we have copied its principal sections in an Appendix. It was extended to Hong Kong subject to specified exceptions, adaptations and modifications by the Official Secrets Act 1989 (Hong Kong) Order 1992 (S.I. 1992 No. 1301).] The Official Secrets Ordinance therefore replicates the provisions of OSA mutatis mutandis.

3. Both OSA and the Ordinance cover a variety of different activities by different categories of persons. The conditions for liability and the defences vary from one section to another. We set out below a list of categories which, even if not exhaustive, is indicative of the complexity of the legislation

Different categories of persons:

4. OSA distinguishes between a number of different categories of possible offender:

> Current members of the security services and those notified that they are subject to the provisions of s1(1). They may commit offences under ss1(1) and 4
>
> Current or past Crown servants or government contractors. They may commit offences under ss1(3) 2, 3, and 4.
>
> Current Crown servants or government contractors. They may commit offences under s8
>
> Persons who are not and never have been members of the security services, Crown servants or government contractors. They may commit offences under ss 5 and 6

Different Categories of activity

5. All the offence-creating sections apply to disclosures without lawful authority save that s8 applies to failures to safeguard information.

Different categories of material

6. OSA distinguishes between "information, document of other article":

> Relating to security or intelligence (s1)
>
> Relating to defence (s2)
>
> Relating to international relations (s3)
>
> Relating to crime and special investigation powers (s4)
>
> Relating to security, intelligence defence or international relations and communicated by the UK in confidence to another state or international organisation (s6)

Whether any actual or likely consequence of disclosure must be proved

7. Under s1 (1) the mere disclosure by a member of the security forces or by a person who has been "notified" of any information relating to security or intelligence which has come into his possession by virtue of his position as such is an offence. There is no need to prove any actual or likely consequence of that disclosure. The same is true of any disclosure made by a current or past Crown servant or government contractor of intercepted communications (e.g. the results of phone tapping) and of information obtained under certain types of warrant (see s4 (3)).

8. But in every other case a consequence of disclosure, actual or likely, must be proved. Under ss1 (3), 2(1), 3(1) and 5(3) the disclosure must be shown to have been "damaging" in the sense defined by the particular section. This term does not appear in section 4. But s4 (2) requires proof of one of three actual or likely specified consequences of the disclosure (commission of an offence, facilitating escape from custody or impeding detection apprehension or prosecution)

Different types of authorisation.

9. These are specified by s7 and vary according to whether the capacity of the defendant (whether he is, or was, a member of the security services, a government contractor etc)

Different elements of the offence and different defences available

10.As one would expect the strictest liability is imposed on members of the security and intelligence services and on those who have been notified. No mens rea is required. In order to escape conviction such a person must prove either that he did not know and had no reasonable cause to believe that the material related to security or intelligence (s1 (5)) or that he believed that he had authority to make the disclosure and had no reason to believe otherwise (s7 (4)).

11.Liability is less strict for a Crown servant or government contractor. He too may rely on the defences we have referred to under ss 1(5) and 7(4). In addition it is a defence to a charge under any of ss1 – 4 for him to prove either that he did not know and had no reasonable cause to believe that the disclosure would be damaging, or (in the case of a charge under s4) that it would have any of the effects referred to in s4 (2)

12.Section 5 applies to certain disclosures by those who never worked for government in any capacity. The threshold for conviction is higher than under any of ss1 – 4. As in each of those sections the disclosure must be "without lawful authority". But s5 (2) requires an additional element which we set out in bold type

> "Subject to subsections (3) and (4) below, the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority **knowing, or having reasonable cause to believe, that it is protected against disclosure by the foregoing provisions of this Act and that it has come into his possession as mentioned in subsection (1) above."**

13.There is a requirement of mens rea both in this subsection and in s5 (3) which reads

> "In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless -

a. the disclosure by him is damaging; and

b. he makes it knowing, or having reasonable cause to believe, that it would be damaging;

and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or3 (1) above."

14.Note that in cases to which this subsection applies it is for the prosecution to prove knowledge and/or reasonable cause to believe that a disclosure would be damaging; whereas in ss 1 – 4 these were matters to be disproved by the defendant.

15.Again in s6 (which applies to any person) s6 (2) creates a requirement of mens rea similar to that which applies under s5 (2).

16. In s8 the elements of the offence and the statutory defence are different to those in any of the earlier sections. The offence is failing to take reasonable care to prevent unauthorised disclosure. A statutory defence in s7 (2) is available if the defendant proves that he believed that he was acting in accordance with his official duty and that he had no reasonable cause to believe other wise.

17.The point is that there are a large number of closely defined offences, which vary as to subject matter, the categories of persons who may commit them, strictness of liability and available statutory defences. A decision of the courts which relates to one section may be of little assistance – or even wholly irrelevant – in construing another.

Shayler. The Facts

18.The defendant was a member of the security service from November 1991 to October 1996. At the outset of his service he signed a declaration pursuant to the Official Secrets Act 1989, acknowledging the Confidential nature of documents and other information relating to security or intelligence that might come into his possession as a result of his position, and an acknowledgement that he was under a

contractual obligation not to disclose, without authority, any information that came into his possession by virtue of his employment. On leaving the service he signed a further declaration acknowledging that the provisions of the Act continued to apply to any information, documents or other articles relating to security or intelligence which might have come into his possession as a result of his previous employment. In 1997 the defendant disclosed a number of documents relating to security or intelligence matters to a national newspaper. Shortly thereafter he left the country. In August 2000 he returned to the United Kingdom and was charged with disclosing documents or information without lawful authority, contrary to OSA s1 and s4. When charged he told police that he did not admit to making any disclosures which were contrary to the criminal law, that any disclosures made by him were made in the public and national interests and that in his defence he would rely on his right of freedom of expression as guaranteed by the common law, the Human Rights Act 1998 and article 10 of the Convention.

19.In the course of a preparatory hearing under Criminal Procedure and Investigations Act 1996 s29, the trial judge ruled that the defence of duress or necessity of circumstances was not open to the defendant, having by implication been excluded by the 1989 Act, nor could he argue, at common law or as a result of the coming into force of the Human Rights Act 1998, that his disclosures were necessary in the public interest to avert damage to life or limb or serious damage to property.

20.The Court of Appeal dismissed the defendant's appeal and ruled that the defence of duress or necessity of circumstances was available to a person who committed an otherwise criminal act to avoid an imminent danger to life or serious injury to himself or to individuals for whom he reasonably regarded himself as being responsible, but that the defence was not available to the defendant since there was no sufficient nexus between his disclosures and possible injury to members of the public, that having regard to national security the restrictions placed on past and present members of the security service were not a contravention of their right to freedom of expression, and that the judge had been entitled to make the ruling he did.

21.The Court of Appeal certified 3 questions of law:

"1. Whether the offence of disclosing information relating to security or intelligence without lawful authority contrary to section 1(1) of the Official Secrets Act 1989 was committed if, or was subject to the defence that, the disclosure was necessary in the public interest to avert damage to life or limb or serious damage to property, or to expose serious and pervasive illegality or iniquity in the obtaining of warrants and surveillance of suspected persons, either at common law or as a result of the coming into force of the Human Rights Act 1998.

"2. Whether the offence of disclosing information obtained under warrants issued under the Interception of Communications Act 1985 contrary to section 4(1) of the Official Secrets Act 1989 was committed if, or was subject to a defence that, the disclosure was necessary in the public interest to avert damage to life or limb or serious damage to property or to expose serious and pervasive illegality or iniquity in the obtaining of warrants and surveillance of suspected persons, either at common law or as a result of the coming into force of the Human Rights Act 1998.

"3. Whether an 'extended' defence based on the doctrine of necessity was available under the Official Secrets Act 1989, and if so, what its limits were."

22.It should be noted that of these 3 questions only the third could apply to the whole of the OSS. The first could apply only to s1(1) and the second only to offences under s4 where the material disclosed was obtained under a warrant pursuant to ICA 1985. As we have already pointed out in both these cases the liability is especially strict.

Decision of the House of Lords. Summary based on the WLR headnote.

23.The House of Lords held, dismissing the appeal

(1) that since the defendant's case was complex and likely to lead to a long trial the criteria in s29 of the 1996 Act were satisfied and the judge was entitled to conduct a preparatory hearing in order to expedite the proceedings before the jury and assist in the management of the trial; but that the judge's power at a preparatory hearing was limited by s31(3)(b) to questions of law "relating to the case", and that limitation was to be strictly observed; that the facts of the defendant's case did not raise any questions relating to the defences of necessity or duress of circumstances, and that therefore neither the judge nor the Court of Appeal should have made any ruling on those

defences; and that, accordingly, it was unnecessary to consider or express any view on them

(2) That (per Lord Bingham of Cornhill, Lord Hutton, Lord Hobhouse of Woodborough and Lord Scott of Foscote) ss 1(1)(a) and 4(1) and (3)(a) of the OSA, when given their plain and natural meaning and read in the context of the Act as a whole, made it clear that Parliament did not intend that a defendant prosecuted under those sections should be acquitted if he showed that it was, or that he believed that it was, in the public or national interest to make the disclosure in question, or if the jury concluded that it might have been, or that the defendant might have believed it to be, in the public or national interest to make the disclosure; that the sections did not require the prosecution to prove that the disclosure was damaging or was not in the public interest; and that, accordingly, the defendant was not entitled to argue as a defence that the unauthorised disclosures he had made were made in the public interest or that he thought that they were

(3) That the ban imposed by the 1989 Act on the disclosure of information by members and former members of the security service was not absolute but was confined to disclosure without lawful authority; that there were procedures available under the Act to enable them to make official complaints about malpractices in the service or to seek official authorisation before disclosing information or documents; that if authorisation was refused it was open to a member or former member to apply for judicial review of that refusal, and, since such an application would involve an alleged violation of a human right, the court would be entitled to conduct a more rigorous and intrusive review than was normally permissible under its judicial review jurisdiction; that the safeguards built into the Act, if properly applied, were sufficient to ensure that unlawfulness and irregularity could be reported to those who could take effective action, that the power to withold authorisation was not abused and that proper disclosures were not stifled; that, therefore, in view of the special position of members of the security and intelligence services, and the highly confidential nature of information which came into their possession, the interference with their right to freedom of expression prescribed by the 1989 Act was not greater than was required to achieve the legitimate object of acting in the interests of national security; and that, accordingly, OSA ss1 and 4 Act came within the

qualification in article 10(2) as a justified interference with the right to freedom of expression guaranteed by article 10 and were not incompatible with the Human Rights Act.

24. Lord Bingham delivered the leading speech. He stressed at para. 12 that the OSS "makes important distinctions leading to differences of treatment" referring to different classes of discloser, different kinds of information, different statutory defences and the requirement of damage in some but not all of the offence creating sections. He repeatedly emphasised the special position of the security and intelligence services. At para.18 he said

> "As already demonstrated, a member or former member of the security and intelligence services is treated differently under the Act from other persons, and information and documents relating to security and intelligence are treated differently from information and documents relating to other matters. Importantly, the section does not require the prosecution to prove that any disclosure made by a member or former member of the security and intelligence services was damaging to the interests of that service or the public service generally.

25. Again at paras. 25 and 26 he said

> "25. There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the s service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 118c, 213-214, 259a, 265f; Attorney General v Blake [2001] 1 AC 268, 287d-f. In the Guardian Newspapers Ltd (No 2) case, at p 269e-g, Lord Griffiths expressed the accepted rule very pithily:
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> "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

As already shown, this judicial approach is reflected in the rule laid down, after prolonged consideration and debate, by the legislature.

26 The need to preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion has been recognised by the European Commission and the Court in relation to complaints made under article 10 and other articles under the Convention: see Engel v The Netherlands (No 1) (1976) 1 EHRR 647, paras 100-103; Klass v Federal Republic of Germany (1978) 2 EHRR 214, para 48; Leander v Sweden (1987) 9 EHRR 433, para 59; Hadjianastassiou v Greece (1992) 16 EHRR 219, paras 45-47; Esbester v United Kingdom (1993) 18 EHRR CD 72, 74; Brind v United Kingdom (1994) 18 EHRR CD 76, 83-84; Murray v United Kingdom (1994) 19 EHRR 193, para 58; Vereniging Weekblad Bluf! v The Netherlands (1995) 20 EHRR 189, paras 35, 40. The thrust of these decisions and judgments has not been to discount or disparage the need for strict and enforceable rules but to insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question."

26. The crux of the case was the need to strike a proper balance the security and freedom. In the speech of Lord Bingham at para. 21 there is a most vivid passage on the importance of freedom of expression:

"21 The fundamental right of free expression has been recognised at common law for very many years: see, among many other statements to similar effect, Attorney General v Guardian Newspapers Ltd [1987] 1 WLR 1248, 1269b, 1320g; Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 178e, 218d, 220c, 226a, 283e; R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, 126e; McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277, 290-291. The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in

this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.

22 Despite the high value placed by the common law on freedom of expression, it was not until incorporation of the European Convention into our domestic law by the Human Rights Act 1998 that this fundamental right was underpinned by statute. Article 10(1) of the Convention, so far as relevant, provides:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Section 12 of the 1998 Act reflects the central importance which attaches to the right to freedom of expression. The European Court of Human Rights for its part has not wavered in asserting the fundamental nature of this right. In paragraph 52 of its judgment in Vogt v Germany (1995) 21 EHRR 205 the court said:

"The court reiterates the basic principles laid down in its judgments concerning article 10:

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

It is unnecessary to multiply citations to the same effect. Thus for purposes of the present proceedings the starting point must be that the appellant is entitled if he wishes to disclose information and documents in his possession unless the law imposes a valid restraint upon his doing so."

27.Their Lordships analysed at great length whether the restrictions which sections 1 and 4 imposed on the right of members of the security and intelligence services to freedom of expression under Article 10 of the

Convention were necessary and proportionate. At the end of para. 26 (to which we have already referred) Lord Bingham put it this way:

> "The acid test is whether, in all the circumstances, the interference with the individual's Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve. The OSA 1989, as it applies to the appellant, must be considered in that context."

28.In deciding to dismiss the appeal, their Lordships attached the highest significance to the means which were available to such persons to make lawful disclosures where they were concerned that that he public interest required it. Lord Bingham dealt with these matters at paras. 27 – 31

> "27 The OSA 1989 imposes a ban on disclosure of information or documents relating to security or intelligence by a former member of the service. But it is not an absolute ban. It is a ban on disclosure without lawful authority. It is in effect a ban subject to two conditions. First of all, the former member may, under section 7(3)(a), make disclosure to a Crown servant for the purposes of his functions as such.
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> (1) The former member may make disclosure to the staff counsellor, whose appointment was announced in the House of Commons in November 1987 (Hansard (HC Debates) 2 November 1987, written answers col512), before enactment of the OSA 1989 and in obvious response to the grievances ventilated by Mr Peter Wright in Spycatcher. The staff counsellor, a high ranking former civil servant, is available to be consulted: "by any member of the security and intelligence services who has anxieties relating to the work of his or her service which it has not been possible to allay through the ordinary processes of management staff relations." In February 1989 the role of the staff counsellor was further explained: see the judgment of the Court of Appeal [2001] 1 WLR 2206, para 39.
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> (2) If the former member has concerns about the lawfulness of what the service has done or is doing, he may disclose his concerns to (among others) the Attorney General, the Director of Public Prosecutions or the Commissioner of Metropolitan Police. These officers are subject to a clear duty, in the public interest, to uphold the law, investigate alleged infractions and prosecute where offences appear to have been committed, irrespective of any party affiliation or service loyalty.
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> (3) If a former member has concerns about misbehaviour, irregularity, maladministration, waste of resources or incompetence in the service he may disclose these to the Home Secretary, the Foreign Secretary, the Secretary of State for Northern Ireland or Scotland, the Prime Minister, the Secretary to the Cabinet or the Joint Intelligence Committee. He may also make disclosure to the secretariat, provided (as the House was told) by the Home Office, of the

parliamentary Intelligence and Security Committee. He may further make disclosure, by virtue of article 3 of and Schedule 2 to the Official Secrets Act 1989 (Prescription) Order 1990 (SI 1990/200) to the staff of the Comptroller and Auditor General, the National Audit Office and the Parliamentary Commissioner for Administration.

28 Since one count of the indictment against the appellant is laid under section 4(1) and (3) of the OSA 1989, considerable attention was directed by the judge and the Court of Appeal to the role of the commissioners appointed under section 8(1) of the Interception of Communications Act 1985, section 4(1) of the Security Service Act 1989 and section 8(1) of the Intelligence Services Act 1994. The appellant submits, correctly, that none of these commissioners is a minister or a civil servant, that their functions defined by the three statutes do not include general oversight of the three security services, and that the secretariat serving the commissioners is, or was, of modest size. But under each of the three Acts, the commissioner was given power to require documents and information to be supplied to him by any Crown servant or member of the relevant services for the purposes of his functions (section 8(3) of the 1985 Act, section 4(4) of the 1989 Act, section 8(4) of the 1994 Act), and if it were intimated to the commissioner, in terms so general as to involve no disclosure, that serious abuse of the power to intercept communications or enter premises to obtain information was taking or had taken place, it seems unlikely that the commissioner would not exercise his power to obtain information or at least refer the warning to the Home Secretary or (as the case might be) the Foreign Secretary.

29 One would hope that, if disclosure were made to one or other of the persons listed above, effective action would be taken to ensure that abuses were remedied and offenders punished. But the possibility must exist that such action would not be taken when it should be taken or that, despite the taking of effective action to remedy past abuses and punish past delinquencies, there would remain facts which should in the public interest be revealed to a wider audience. This is where, under the OSA 1989 the second condition comes into play: the former member may seek official authorisation to make disclosure to a wider audience.

30 As already indicated, it is open to a former member of the service to seek authorisation from his former superior or the head of the service, who may no doubt seek authority from the secretary to the cabinet or a minister. Whoever is called upon to consider the grant of authorisation must consider with care the particular information or document which the former member seeks to disclose and weigh the merits of that request bearing in mind (and if necessary taking advice on) the object or objects which the statutory ban on disclosure seeks to achieve and the harm (if any) which would be done by the disclosure in question. If the information or document in question were liable to disclose the identity of agents or compromise the security of informers, one would not expect authorisation to be given. If, on the other hand, the document or information revealed matters which, however, scandalous or embarrassing, would not damage

> any security or intelligence interest or impede the effective discharge by the service of its very important public functions, another decision might be appropriate. Consideration of a request for authorisation should never be a routine or mechanical process: it should be undertaken bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate.
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> 31 One would, again, hope that requests for authorisation to disclose would be granted where no adequate justification existed for denying it and that authorisation would be refused only where such justification existed. But the possibility would of course exist that authority might be refused where no adequate justification existed for refusal, or at any rate where the former member firmly believed that no adequate justification existed. In this situation the former member is entitled to seek judicial review of the decision to refuse, a course which the OSA 1989 does not seek to inhibit. In considering an application for judicial review of a decision to refuse authorisation to disclose, the court must apply (albeit from a judicial standpoint, and on the evidence before it) the same tests as are described in the last paragraph. It also will bear in mind the importance attached to the Convention right of free expression. It also will bear in mind the need for any restriction to be necessary to achieve one or more of the ends specified in article 10(2), to be responsive to a pressing social need and to be no more restrictive than is necessary to achieve that end."

29.His Lordship then considered the appellant's submission that judicial review was an inadequate safeguard since courts are reluctant to intervene in matters relating to national security and intelligence. In rejecting this submission he stressed at paras. 33 - 35 that in such a case judges would now be empowered to conduct a "more rigourous and intrusive review than was once thought permissible" since Convention rights were in issue. Then at para. 35 he referred to "one further safeguard" namely that the consent of the AG is required for prosecution. Such consent would not be given unless there were a reasonable prospect of conviction and the prosecution was in the public interest. He concluded at para. 36

> "36 The special position of those employed in the security and intelligence services, and the special nature of the work they carry out, impose duties and responsibilities on them within the meaning of article 10(2): Engel v The Netherlands (No 1) 1 EHRR 647, para 100; Hadjianastassiou v Greece 16 EHRR 219, para 46. These justify what Lord Griffiths called a brightline rule against disclosure of information of documents relating to security or intelligence obtained in the course of their duties by members or former members of those services. (While Lord Griffiths was willing to accept the theoretical possibility of a public interest defence, he made no allowance for judicial review: Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 269g). If, within

> this limited category of case, a defendant is prosecuted for making an unauthorised disclosure it is necessary to relieve the prosecutor of the need to prove damage (beyond the damage inherent in disclosure by a former member of these services) and to deny the defendant a defence based on the public interest; otherwise the detailed facts concerning the disclosure and the arguments for and against making it would be canvassed before the court and the cure would be even worse than the disease. But it is plain that a sweeping, blanket ban, permitting of no exceptions, would be inconsistent with the general right guaranteed by article 10(1) and would not survive the rigorous and particular scrutiny required to give effect to article 10(2). The crux of this case is whether the safeguards built into the OSA 1989 are sufficient to ensure that unlawfulness and irregularity can be reported to those with the power and duty to take effective action, that the power to withhold authorisation to publish is not abused and that proper disclosures are not stifled. In my opinion the procedures discussed above, properly applied, provide sufficient and effective safeguards. It is, however, necessary that a member or former member of a relevant service should avail himself of the procedures available to him under the Act. A former member of a relevant service, prosecuted for making an unauthorised disclosure, cannot defend himself by contending that if he had made disclosure under section 7(3)(a) no notice or action would have been taken or that if he had sought authorisation under section 7(3)(b) it would have been refused. If a person who has given a binding undertaking of confidentiality seeks to be relieved, even in part, from that undertaking he must seek authorisation and, if so advised, challenge any refusal of authorisation. If that refusal is upheld by the courts, it must, however reluctantly, be accepted. I am satisfied that sections 1(1) and 4(1) and (3) of the OSA 1989 are compatible with article 10 of the Convention; no question of reading those sections conformably with the Convention or making a declaration of incompatibility therefore arises. On these crucial issues I am in agreement with both the judge and the Court of Appeal. They are issues on which the House can form its own opinion. But they are also issues on which Parliament has expressed a clear democratic judgment."

30. Thus, once again his Lordship emphasised the special position of members of the 2 services. He referred to "this limited category of case" and stressed that members of the 2 services had given binding undertakings of confidentiality.

31. The decision of the House to dismiss the appeal was unanimous. Lords Hope and Hutton delivered quite lengthy speeches. Lord Hope, whilst agreeing with Lord Bingham was plainly troubled. He expressed concern that the White Paper which preceded OSA had not referred to Article 10 rights (at para. 41). He went on to say that academic writers were generally agreed that there was an "apparent lack of harmony" between s1(1) and Article 10. At para 45 he said:

"45 Against this background I would approach the question which lies at the heart of this case from a position of considerable doubt as to whether the problems which it raises have really been faced up to by the legislature. I would place the onus firmly on those who seek to rely on article 10(2) to show that sections 1(1) and 4(1) are compatible with the Convention right."

32. At paras. 64 - 66 he observed that

"I do not think that a person who has read the relevant provisions of these statutes and the orders made under them can be said to have been left in any doubt as to wide range of persons to whom an authorised disclosure may be made for the purposes of their respective functions without having first obtained an official authorisation. Section 2(2)(b) of the Security Service Act 1989 imposes a duty on the Director General of the Security Service to secure that disclosures are made for the discharge of the service's functions. In Esbester v United Kingdom 18 EHRR CD 72, 74 the Commission rejected an argument that the fact that the guidelines relating to the Director General's supervision of information obtained by the security service were unpublished meant that they were not sufficiently accessible to the individual.

65 In this connection it should be noted that Mr Shayler signed a declaration on leaving the service in which he acknowledged that his attention had been drawn to the Official Secrets Acts and the consequences that might follow any breach, and that he understood he was liable to be prosecuted if he disclosed either orally or in writing any information or material which had come into his possession as a result of his employment as a Crown servant on terms requiring it to be held in confidence unless he had previously obtained the official sanction in writing of the service by which he was appointed. He also acknowledged that to obtain such sanction "two copies of the manuscript of any article, book, play, film, speech or broadcast, intended for publication, which contains such information or material shall be submitted to the Director General". In fact, the class of person from whom official authorisation may be obtained in terms of section 7(5) of the Official Secrets Act 1989 is very wide.

66 Whether making use of the opportunities of disclosure to Crown servants would have been a practical and effective means of addressing the points which Mr Shayler wished to raise is another matter. The alternative, which requires the seeking of an official authorisation duly given by a Crown servant, is not further explained in the Act. It too requires more careful examination. I shall have to return to these points once I have set the scene for their examination more precisely."

33. After reviewing the principle of proportionality he said at paras. 69 – 72:

"69 The problem is that, if they are to be compatible with the Convention right, the nature of the restrictions must be sensitive to the facts of each case if they are to satisfy the second and third requirements of proportionality. The restrictions must be rational, fair and not arbitrary, and they must impair the fundamental right no more than is necessary.

70 As I see it, the scheme of the Act is vulnerable to criticism on the ground that it lacks the necessary degree of sensitivity. There must, as I have said, be some doubt as to whether a whistle-blower who believes that he has good grounds for asserting that abuses are being perpetrated by the security or intelligence services will be able to persuade those to whom he can make disclosures to take his allegations seriously, to persevere with them and to effect the changes which, if there is substance in them, are necessary. The integrity and energy of Crown servants, as defined in section 12(1) of the Official Secrets Act 1989, of the commissioners and members of the Intelligence and Security Committee is not in question. But one must be realistic, as the Court of Appeal recognised. Institutions tend to protect their own and to resist criticism from wherever it may come. Where this occurs it may require the injection of a breath of fresh air from outside before institutional defects are recognised and rectified. On the other hand, the sensitivity and effectiveness of this system has not been tested, as Mr Shayler chose not to make use of any of these opportunities.

71 The official authorisation system provides the final opportunity. It too has not been tested by Mr Shayler. But it must be effective, if the restrictions are not to be regarded as arbitrary and as having impaired the fundamental right to an extent that is more than necessary. Here too there must be some doubt as to its adequacy. I do not regard the fact that the Act does not define the process of official authorisation beyond referring in section 7(5) to the persons by or one behalf on whom it is to be given as a serious defect. The European Court of Justice has held that article 17 of the Staff Regulations, which requires an official of the Commission of the European Communities to obtain prior permission for the publication of material dealing with the work of the Commission, is compatible with the right of freedom of expression in article 10: Connolly v Commission of the European Communities (Case C-274/99) (not yet reported) 6 March 2001. Members and former members of the security and intelligence services are unlikely to be in doubt as to whom they should turn for this purpose, and common sense suggests that no further formalities require to be laid down: see paragraphs 64-65 above. The defect lies in the fact that the Act does not identify the criteria that officials should bear in mind when taking decisions as to whether or not a disclosure should be authorised.

72 But the scheme of the Act does not stand alone. Any decision to decline an official authorisation will be subject to judicial review. The European Court of Human Rights has recognised, in the context of a complaint of lack of impartiality in breach of the article 6(1) Convention right, the value which is to be attached to a process of review by a judicial body that has full jurisdiction and provides the

guarantees of that article: Bryan v United Kingdom (1995) 21 EHRR 342, 360-361, paras 44 and 46; Kingsley v United Kingdom The Times, 9 January 2001; Porter v Magill [2002] 2 WLR 37, 80a-f. I would apply that reasoning to the present case. An effective system of judicial review can provide the guarantees that appear to be lacking in the statute."

34. He went to analyse the scope of judicial review and said at paras 78 – 79:

"78 In Smith and Grady v United Kingdom (1999) 29 EHRR 493, 543, para 138 the European Court said that the threshold of review had been placed so high in that case by the High Court and the Court of Appeal that it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order claims pursued by the Ministry of Defence policy which placed a limitation on homosexuals in the army. It is now clear that, if the approach which was explained and approved in Daly [2001] 2 AC 532 is adopted, the more precise method of analysis which is provided by the test of proportionality will be a much more effective safeguard.

79 So I would hold that, where a refusal of official authorisation under section 7(3)(b) to disclose information is in issue, the court should address the following questions. (1) What, with respect to that information, was the justification for the interference with the Convention right? (2) If the justification was that this was in the interests of national security, was there a pressing social need for that information not to be disclosed? And (3) if there was such a need, was the interference with the Convention right which was involved in withholding authorisation for the disclosure of that information no more than was necessary. This structured approach to judicial control of the question whether official authorisation should or should not be given will enable the court to give proper weight to the public interest considerations in favour of disclosure, while taking into account at the same time the informed view of the primary decision maker. By adopting this approach the court will be giving effect to its duty under section 6(1) of the Human Rights Act 1998 to act in a way that is compatible with the Convention rights: see paragraph 58 above."

At paragraph 85 he said:

"I think therefore that there is in the end a strong case for insisting upon a system which provides for the matter to be addressed by requiring that official authorisation be obtained by former members of the security and intelligence services, if necessary after judicial review of any refusal on grounds of proportionality, before any disclosures are made by them other than to Crown servants of information, documents or other articles to which sections 1(1) and 4(1) of the Act apply.

He concluded that for the reasons given by Lord Bingham and those that he had given the appeal should be dismissed.

35.Lord Hutton agreed with Lord Bingham. He posed the problem to be addressed at para. 90

> "90 I commence the consideration of these submissions and the submissions of the Crown by observing, as did Bingham LJ in Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 213 (the Spycatcher Case), that they represent a clash between two competing aspects of the public interest. On the one hand there is the assertion by the appellant of the public interest in freedom of speech and the exercise of that freedom by those who give information to the press so that the press may publish it and comment on it for the public benefit. On the other hand there is the reliance by the Crown on the public interest in the maintenance of the secrecy of the work of the security service so that it can operate effectively to protect national security. Both interests are valid and important and it is for the courts to resolve the clash of interests and to decide how the balance is to be struck."

36.At para. 95 he stressed the special position of members of the security service:

> "95 In the present case also there were special conditions attached to life in the security service and there were special duties and responsibilities incumbent on the appellant whereby, unlike the great majority of other citizens, he was prohibited by statute from disclosing information about his work or about the actions of others engaged in the same work. Moreover these duties and responsibilities were specifically acknowledged and accepted by the appellant ... Therefore in considering whether the restrictions contained in sections 1 and 4 of the 1989 Act were permissible under article 10(2) it is relevant to take into account that the appellant was subject to particular duties and responsibilities arising from his membership of the security service. Such restrictions or penalties as are prescribed by law "

37.He held at para. 98 that the restrictions of freedom of expression imposed upon members of the security service by sections 1 and 4 of the Act were imposed for a legitimate aim at paras. 99 and 100 he considered whether there were necessary in a democratic society and said

> "99 As regards the second requirement, the judgments of the European Court have also established that a restriction which is necessary in a democratic society must be one which is required by a pressing social need and is proportionate to the legitimate aim pursued. On these issues the appellant advanced two principal arguments. One argument was that whilst there are many matters relating to the

work of the security service, which require to be kept secret in the interests of national security, there are other matters where there is no pressing need for secrecy and where the prohibition of disclosure and the sanction of criminal punishment are a disproportionate response. An example of such a matter would be where a political figure in the United Kingdom had been under surveillance for a period a considerable number of years ago. It was submitted that the disclosure of such information could not constitute any impairment of national security or hinder in any way the efficient working of the security service.

100 I am unable to accept this submission. It has been recognised in decisions in this jurisdiction that the disclosure of any part of the work or activities of the security service by a member or past member would have a detrimental effect upon the service and its members because it would impair the confidence of the members in each other and would also impair the confidence of those, whether informers or the intelligence services of other states, who would entrust secret information to the security service of the United Kingdom on the understanding and expectation that such information would never be revealed to the outside world. As Lord Nicholls of Birkenhead stated in Attorney General v Blake [2001] 1 AC 268, 287:

"It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and dangerous operations, would jeopardise the effectiveness of the service. An absolute rule against disclosure, visible to all, makes good sense."

38. Having reviewed the European jurisprudence and the opportunities available to the Appellant to make lawful disclosures he said at para. 111:

"111 In the light of these principles stated by the European Court I consider that if the appellant were refused official authorisation to disclose information to the public and applied for judicial review of that decision, a judge of the High Court would be able to conduct an inquiry into the refusal in such a way that the hearing would ensure justice to the appellant and uphold his rights under article 6(1) whilst also guarding against the disclosure of information which would be harmful to national security. The intensity of the review, involving as it would do Convention rights, would be greater than a review conducted under the Wednesbury principle: see per Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] AC 532, 547d-g."

39. At para. 117 he said that "sections 1 and 4 of the 1989 Act are not incompatible with Article 10" and dismissed the appeal.

40.Lord Hobhouse agreed with Lord Bingham. Lord Scott agreed with Lords Bingham, Hope and Hutton but reserved his position on the matters referred to in paras. 99 – 100 of Lord Hope's opinion.

Applying *Shayler* in Hong Kong

41.The House of Lords merely decided that a public interest defence was not available to members of the security and intelligence services under ss 1(1) and 4(1) of the OSA. The House gave great weight to the special position of such persons and the obligation of confidentiality, which they had voluntarily undertaken. That obligation necessarily involved a restriction of the right to freedom of expression guaranteed by Article 10 of the European Convention. But there was no breach of their Convention rights because there were substantial safeguards for the right to freedom of expression in 2 respects. First there were procedures available under OSA to enable them to make official complaints about malpractices in the service. Secondly there were procedures available under OSA to enable them to seek official authorisation before disclosing information or documents. Such requests for authorisation should be considered bearing in mind the importance of the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate. If authorisation were refused it was open to the individual to apply for judicial review of the refusal, and, since such an application would involve an alleged violation of a human right, the court would be entitled to conduct a more rigorous and intrusive review than was normally permissible under its judicial review jurisdiction.

42.In interpreting the corresponding sections of the Ordinance, the Hong Kong Courts could properly follow Shayler only if satisfied that substantial safeguards very similar to those available in England existed in Hong Kong. We are aware that concern has been expressed that some at least of the safeguards do not exist under the Hong Kong system. This is not a matter about which we feel qualified to express a view.

43.We submit that *Shayler* cannot apply to persons who are not members of either service and who do not bear their special obligations. In any event in both the OSA and the Ordinance the conditions for criminal liability and the scope of available defences vary so widely from one section to another that it is difficult to apply the principles in Shayler by way of analogy. Those

principles would appear to be wholly irrelevant when one is considering the activities of a private citizen who has never even worked for any government agency. It will be necessary to apply Lord Bingham's "acid test" – see para. 27 above

44.In all cases other than those involving members of the security and intelligence services the prosecution is required to prove damage. Moreover in some cases the prosecution must prove the defendant knew or had reasonable cause to believe that damage would occur, whilst in others he is entitled to acquittal if he disproves such knowledge or ground for suspicion. These questions inevitably involve a consideration of what was in the public interest and/or what the defendant himself believed to be in the public interest. In that sense some elements of a "public interest defence" may be said to be implicit in many provisions of the legislation.

45.There is nothing to prevent LegCo enacting a specific public interest defence if it so wishes.

Extension of Section 18 of the Ordinance to information acquired by "illegal access"

46.Section 18 closely mirrored s5 of OSA. Both sections apply to all persons. Both are confined to 2 categories of information: that which is protected against disclosure because it relates to security or intelligence, defence, international relations or crime and that which is acquired in confidence.

47.It is now proposed to extend s18 of the Ordinance to cover information obtained by person A "by virtue of" an offence committed by person "B". The offence must fall into one of a number of categories: telephone tapping, hacking, theft robbery burglary of bribery. As we understand the proposed amendment B would be liable to conviction if he merely had reasonable cause to believe that the information had been illegally obtained.

48.We understand that the Hong Kong authorities have suggested that this is merely a technical amendment. We strongly disagree. It is a matter of principle. We consider that it is objectionable on a number of grounds.

49.It is unnecessary. B will in every case be liable to prosecution. Civil proceedings will be available against A.

50.We see no reason why A who has no obligation of confidence should be liable to prosecution. Nobody suggests that a similar extension of the Official Secrets legislation is necessary in the UK.

51.The new provision is likely to have a chilling effect on freedom of expression. Suppose a journalist acquires information relating to government policies which he honestly believes should be published in the public interest. He may be deterred from publication through fear of prosecution unless he can be absolutely sure that the government has sanctioned its disclosure. What Lord Bingham called the "powerful disinfectant" of publicity may be seriously diluted.

The suggested "lacuna" relating to Crown Servants and government contractors

52. Section 5 of the Official Secrets Act 1989 refers only to "Crown servants or government contractors" and, unlike sections 1 to 4, contains no reference to "former" Crown servants or contractors. It is suggested that this was an oversight by the draftsman, creating a *lacuna* which should be filled by an amendment to section 18(d) of the Official Secrets Ordinance.

53. We do not think that this was an oversight on the part of the draftsman. First, as the 1988 White Paper emphasised, the Official Secrets Act 1989 sought to distinguish clearly between the responsibilities and potential criminal liability of those employed by the government who owed direct duties of confidentiality and third parties such as journalists who did not. Sections 1 to 4 deal with the former. Section 5 deals with the latter whose liability was made – as a matter of deliberate policy – less extensive and less strict.

54. Secondly it is not to be supposed that the omission of words in one section which appear in others must be an oversight by the draftsman. OSA was the result of years of hotly contested public debate and emerged in its final form only after a number of earlier attempts to reform the law had failed [5]. Every section of the OSA has been very carefully formulated.

55. Thirdly the "lacuna / oversight" argument is greatly weakened since OSA s8 also applies only to current servants and contractors.

56. We have carried out some research into the legislative history of the Official Secrets Act 1989. There is a great deal of material, in particular in Hansard. We have not been able in the time available to read it all. But nothing we have come across thus far suggests that the drafting of section 5 was anything other than part of the deliberate structure of the Act.

[5] Lord Bingham reviewed the history briefly at paras. 9 – 10 of Shayler

57.We submit, relying on the dictum of Lord Hope that we have quoted in para. 31 above, that, since the proposed extension would restrict rights of freedom of expression the onus is firmly on those who argue that there was a lacuna or oversight to establish their point. This would involve 2 elements: proof that the difference in terminology could not have been a deliberate act by the UK Parliament and a convincing case that there now exists a pressing need in a democratic society which could justify the proposed amendment.

The proposed s16A.

58.The proposal is to introduce a new class of protected information document or other article which "relates to any affairs of the HKSAR which are under the basic law within the responsibility of the Central Authorities". We are not convinced that there is any justification for this extension of the law. The argument that there is an analogy with information as to international relations is very difficult to sustain since Hong Kong is now part of a unitary state. Moreover we are concerned at the total failure to define the categories of protected material. Arguably it could include information relating to economic and commercial matters.

59.A restriction on freedom of expression which is so vaguely and inadequately defined cannot be said to be "prescribed by law". (Compare para. 24 of *Shayler* where Lord Bingham commented that in OSA s1 the restriction was prescribed "with complete clarity").

Burdens of proof upon the defence

60.OSA is replete with reverse burdens provisions whereby the burden of proving a fact or facts is placed on a defendant. This structure is faithfully replicated in the Ordinance and is not affected by any of the proposed amendments. However, the Human Rights Act has brought about a major change in English attitudes towards such provisions. They are now, as the House of Lords made clear in *Lambert* [6], open to challenge on the basis that they are incompatible with the presumption of innocence. In some recent English statutes we see the results of this new thinking. For example the Terrorism Act 2000 s 118 provides that in relation to certain reverse burden provisions the following shall apply

[6] (2001) 3 WLR 206

(1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.

(2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(3) Subsection (4) applies where in accordance with a provision mentioned in subsection (5) a court -

(a) may make an assumption in relation to a person charged with an offence unless a particular matter is proved, or

(b) may accept a fact as sufficient evidence unless a particular matter is proved.

(4) If evidence is adduced which is sufficient to raise an issue with respect to the matter mentioned in subsection (3)(a) or (b) the court shall treat it as proved unless the prosecution disproves it beyond reasonable doubt.

61.S118 (5) then specifies the relevant provisions to which this regime is to apply. Thus a burden of proof is, in some cases, converted into an evidential burden. We respectfully suggest that all of the reverse burden provisions in the Ordinance should now be reconsidered with a view to introducing a similar amendment in relation to at least some of them. For example, it might well be decided that there should be no probative burden imposed on anyone who has never been a member of the security or intelligence services, a public servant or government contractor. We believe if the UK Parliament were now to re – examine the provisions of OSA it is very likely that such reforms would be made.

SUBMISSIONS ON BEHALF OF THE BAR OF ENGLAND AND WALES

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

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

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

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

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

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

Treason

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

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

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

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

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

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

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

11. As far as we are aware there has not been a prosecution for treason in England since the cases immediately after the Second World War. The last prosecution for treason felony was the case of *Meany* in 1867 (see Archbold 2003 at chapter 25 para. 35). Indeed the 2003 edition of Archbold contains no precedent for an indictment under the 1875 Act. We do not think it likely that will ever be another prosecution under that Act. Recently the editor of the Guardian has been given leave to argue that, since on one view the 1848 Act makes it an offence to publish articles suggesting that the UK should become a republic, it is incompatible with the Human Rights Act. The case is pending before the House of Lords [7]

12. The fact that there have been no recent prosecutions probably explains the survival of these archaic provisions [8]. We believe that if the law of treason and treason felony were to be codified by a new statute it would be very different. The emphasis would probably be on providing substantial assistance to the enemy in time of war and seeking to overthrow the government rather than on an attack or a threat directed against a particular individual or group. Offences against the sovereign would no longer be a form of treason, for precisely the reasons identified in the Proposals at paragraph 2.6 [9]. Moreover we cannot

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

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

imagine that intimidating or overawing Parliament would remain an element of any offence of treason. Indeed we believe that a 21st Century prosecution for an offence of treason based on such notions as "compelling", "intimidating", "force" or "constraint" would be open to challenge under the Human Rights Act on the basis that the ancient statutory language was too vague and imprecise.

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

    (a) kills, wounds or causes bodily harm to her Majesty, or imprisons or restrains her;

    (b) forms an intention to do any such act as is mentioned in paragraph (a) and manifests such intention by any overt act:

    (c) levies war against Her Majesty

        (i) with the intent to depose Her Majesty ……

        (ii) in order by force or constraint to compel Her Majesty to change her measures or counsel, or in order to put any force or constraint upon, or to intimidate or overawe Parliament or the legislature of any British territory

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

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

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

14. Section 2 of the Bill defines Treason:

    (1) "A Chinese national commits treason if he

        (a) with intent to-

            (i) overthrow the Central People's Government;

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

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

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

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

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

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

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

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

(4) For the purposes of this section-

(a) "foreign armed forces" means-

(i) armed forces of a foreign country;

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

(iii) armed forces which are, not based in, and are not armed forces of, the People's Republic of China;

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

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

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

(c) a state of war exists when-

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

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

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

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

17. Again, in the phrase "compel the CPG to change its policies or measures", is derived from the old English precedents and is inappropriate to modern democracy. The phraseology is vague: what is the difference between "policies" and "measures"? [10] It should not be enough that the accused joined an army attacking the PRC simply in order to force a change of mind amongst the members of the CPG as to what action they should take in a particular sphere.

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

19. **Section 2(1)(c).** Assisting a public enemy is clearly based on the Ordinance which criminalised assisting the enemy "by any means whatever". The Bill proposes the phrase "any act with intent to prejudice the position of the PRC in the war". It seems to us that this goes much too far. As we understand it, a Chinese doctor who treated wounded enemy soldiers would fall within this provision and, if he could be said to have an intent to intimidate or compel the CPG, he would be at risk of conviction for treason. We suggest that if this provision is to be retained, "assistance" should be defined so as to exclude

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

humanitarian activities, commerce, advocacy of a cause or the mere expression of views, whether verbally or in writing. We notice that in the Explanatory Notes to the Bill it is said that "humanitarian assistance to ordinary people will not constitute "assisting public enemy". We are not clear what is meant by "ordinary people". The implication may well be that a Hong Kong doctor treating (say) a soldier or civil servant of the enemy might be prosecuted as a traitor. This reinforces our view that the law should be defined so as to exclude any humanitarian assistance from the offence. Those who provide such assistance should not have to make difficult judgment calls as to whether the exercise of their skills would lead to prosecution.

Subversion

20. Section 2A provides that

(1) A person commits subversion if he

"(a) disestablishes the basic system of the People's Republic of China as established by the Constitution of the People's; Republic of China;

(b) overthrows the Central People's Government; or

(c) intimidates the Central People's Government,

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

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

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

(4) For the purposes of this section-

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

(b) "**serious** criminal means" means any act which-

(i) endangers the life of a person other than the person who does the act;

(ii) causes **serious** injury to a person other than the person who does the act;

(iii) **seriously** endangers the health or safety of the public or

basic system of the People's Republic of China as established by the Constitution of the People's Republic of China

(iv) causes **serious** damage to property; or

(v) **seriously** interferes with or disrupts an electronic system or an essential service, facility or system (whether public or private),

and-

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

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

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

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

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

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

23. Secondly the language is tautologous. The word "serious" is used both as part of the definition of the means which are to be criminal and in the definitions of

the specific examples of those means. The words which we have quoted in bold type demonstrate this point.

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

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

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

Secesssion

27. Section 2B provides

> (1) A person commits secession if he withdraws any part of the People's Republic of China from its sovereignty by-
>
> (a) using force or serious criminal means that seriously endangers the territorial integrity of the People's Republic of China; or
>
> (b) engaging in war.
>
> (2)A person who commits secession is guilty of an offence and is liable on conviction on indictment to imprisonment for life.
>
> (3)Subsections (1) and (2) apply also to any Hong Kong permanent

resident in relation to any act referred to in subsection(1) done by him outside Hong Kong

(4)For the purposes of this section –

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

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

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

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

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

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

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

Sedition

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

prosecution for sedition was that of *Caunt* in 1947 [11]. An attempt in 1991 to bring a private prosecution for seditious libel against Salman Rushdie the author of the Satanic Verses failed. [12] We believe that today a prosecution for sedition in England would be likely to fall foul of the Human Rights Act.

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

35. Section 9A provides:

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

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

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[11] (1947) 64 LQR 203

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

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

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

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

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

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

it, attempt and conspiracy are already covered by Part VIIA of the Crimes Ordinance (Cap. 2000) and aiding and abetting counselling and procuring by s89 of the Criminal Procedure Ordinance (Cap. 221). Incitement remains a common law offence [13]. The Proposals contained, at para. 2.13, 3.9 and 5.7 a statement of intent to codify the law relating to inchoate and accomplice offences so far as they related to treason secession and subversion (for convenience we shall refer to these as "the principal offences").

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

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

42. Our third concern is the converse of the second. Lack of definition of an inchoate offence creates an uncertainty as to the scope of the principal offences. "Incitement" is not defined. It is unclear whether the scope of incitement for the purposes of the new legislation will be broader, narrower or the same as that of the common law offence. This problem is exacerbated insofar as certain elements of some of the principal offences are similar to those of inchoate or accomplice offences. We have already commented on the similarity between "instigating" in section 2(1)(b) and incitement. Again instigating is very similar to counselling and procuring which, both in English and Hong Kong

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

law, is an accomplice offence. The question arises where does a principal offence end and incitement (or any other inchoate of accomplice offence) begin? The Bill does not provide a clear answer.

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

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

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

46. **The time limits** We note that the Ordinance contains time limits for prosecution in 2 cases namely 3 years from the date of commission of the offence in the case of treason and 6 months in the case of sedition. These are to be abolished. We do not know the reason: the Proposals do not discuss these amendments. We believe that all acts deserving of prosecution as treason or sedition would be likely to come to light within the existing time limits. We therefore respectfully submit that they should be retained. Consideration should be given to time limits for any offence of subversion or secession that it is to be enacted.