

COMMENTS BY THE BAR OF ENGLAND & WALES
REGARDING
THE HONG KONG SAR GOVERNMENT'S CONSULTATION DOCUMENT
ON THE PROPOSALS TO IMPLEMENT ARTICLE 23 OF THE BASIC LAW

1. The Bar of England & Wales is grateful for the opportunity to comment upon the Hong Kong SAR Government's Consultation document on the proposals to implement Article 23 of the Basic Law. The Chairman of the Bar, David Bean QC, has set up a distinguished working party of senior members of the English Bar to consider the matter comprising Lord Brennan QC of Bibury, Michael Birnbaum QC, Charles Haddon-Cave QC and Adrian Hughes (Chairman China Law Council).
2. The Bar of England & Wales has been impressed by the successful implementation of the Basic Law since the handover and the role of the Basic Law in ensuring the maintenance of Hong Kong SAR as a fundamentally free and fair society. The experience of the past five years provides a firm foundation on which to build for the future.
3. The grave importance of the proposed legislation for the future of Hong Kong SAR cannot, however, be over-emphasised. Its importance relates not only to its potential effect on the rights and freedom's presently enjoyed by the people of Hong Kong SAR, but also to its effect on the perception of the outside world of Hong Kong SAR as a place to do business, and indeed the PRC itself. It is critical to the future of Hong Kong that the concept of 'one country, two systems' is not undermined or breached in any respect and that Hong Kong remains, and is seen to remain, a free and fair society.
4. We welcome the efforts of the Hong Kong SAR Government to consult widely and internationally in order to obtain guidance as to how best to frame laws which do not

infringe upon human rights. Such laws go to the root of the maintenance of a free and fair society and therefore require the utmost care and consideration.

5. The introduction of any such laws, whether by way of expansion or contraction of fundamental rights and freedoms, should first be considered in the light of a careful review of all existing laws. Where a government is contemplating enacting new laws which might impinge upon human rights and fundamental freedoms, such laws should only be introduced if a clear case is made out that the existing legislative framework is inadequate.
6. In the light of the above, it is absolutely essential that any such laws are subject to and enjoy the maximum possible consultation and scrutiny both before, and during, the legislative process; and that at every stage the Government responds positively and in detail to proposals and comments made from all quarters.
7. The difficulties of drafting such legislation are manifest, not least because of the conceptual and practical problems inherent in drafting laws for the Hong Kong SAR designed to protect the State PRC where the people of the latter do not enjoy the rights and freedoms of the former. It is not a process that can be rushed or short-circuited.
8. In this context, we consider that it would be appropriate for] the Hong Kong SAR Government to publish a White Bill containing the draft text of the proposed legislation to enable full and detailed public consultation to take place. We understand that the Government of the Hong Kong SAR may be contemplating going straight to a Blue Bill to present to LegCo thereby by-passing the normal White Bill procedure¹. We hope that the usual White Bill procedure will be adopted to enable full public consultation and confidence to be achieved in what is the most important and far reaching legislation to be enacted since the handover.

¹ We understand there have been 24 White Bills in the past 20 years and 3 since the handover.

9. We have read the Hong Kong Bar Association's Response to the Consultation Document published on 9th December 2002. We commend it as the most comprehensive and scholarly analysis of the proposals to date. We find many of the points raised persuasive and compelling. We highlight two points, in particular, raised by the Hong Kong Bar:
- (a) First, the concerns regarding the proposal in paragraph 6.22 of the Consultation Document for legislation to criminalise "damaging disclosure by a person who obtains protected information through an unauthorised source" (see paragraphs 140-158 of the Response). Such legislation could fundamentally undermine the freedom of the press in Hong Kong.
- (b) Second, the concerns regarding the proposals in paragraphs 7.15 and 7.16 of the Consultation Document whereby the Secretary for Security may proscribe any organisation "if he or she reasonably believes that this is necessary in the interests of national security or public safety or public order" and should defer to the decision of the Mainland Central Authority as to whether or not any Mainland organisation is proscribed in the Mainland (see paragraphs 181-187 of the Response). Such legislation could fatally breach the legal wall inherent in the concept 'One country, two systems'.
10. We believe that all the points made by the Hong Kong Bar Association in its Response require the most careful consideration. The Hong Kong SAR is fortunate in having an independent Bar of great ability and integrity that is prepared to offer detailed and forthright views on matters of profound public importance.
11. It is difficult and unsatisfactory to be asked to express an opinion as to the impact of such legislation on fundamental rights and freedoms such as those protected by Articles 27 and 39 of the Basic Law and the International Covenant on Civil and Political Rights without having had sight of the actual 'black letter' text of the proposed legislation. The devil is always in the detail. Faced with this difficulty

one English silk (David Pannick QC) emphasised that “if and when the enacted provisions are applied, it will be essential to ensure that the application is consistent with fundamental freedoms on the specific facts of the individual case”. The preliminary view of another English silk (Rabinder Singh QC) is that it is more appropriate to assess the compatibility of proposed legislation before it is enacted. For this purpose, therefore, it is desirable to see the draft bill in detail.

12. The Bar of England & Wales therefore hopes that the Government of the Hong Kong SAR will consider publishing the draft text of the proposed legislation in a White Bill for further public consultation. The Bar of England & Wales will then give the matter maximum attention and study the text of such draft legislation very carefully before offering constructive comments on how such legislation might best be drawn so as to achieve its aims without undermining the fundamental rights and freedoms presently enjoyed by the Hong Kong people.
13. The Bar of England & Wales supports the evident desire on the part of the Government of the Hong Kong SAR to achieve legislation that does not infringe human rights and preserves the rights and freedoms presently enjoyed by the Hong Kong people. The Bar of England & Wales will give every assistance it can to achieving that aim.

The Chairman of the General Council of the Bar of England & Wales

London, 23rd December 2002