Hong Kong Bar Association's Views on the

National Security (Legislative Provisions) Bill 2003

EXECUTIVE SUMMARY

1. The Hong Kong Bar Association considers that the National Security (Legislative Provisions) Bill 2003 ("the Bill") consisted of issues of great public and constitutional importance and at the same time a number of fundamental flaws, both of which warrant close scrutiny and examination before the Bill is enacted into law.

Bill Exceeding Mandate of Article 23

2. The Bar considers that some of the provisions of the Bill, including the proposed amendments to the Official Secrets Ordinance and the proposed amendments to the Societies Ordinance, are not mandated by Article 23 of the Basic Law. Only some but not all of the proposed amendments to the Crimes Ordinance are required by Article 23. The laws on the offence of treason should be modernized and the laws on sedition refined. However, the Bar is of the view that acts of subversion and secession can be prohibited without creating new offences.

Treason

3. In respect of the proposed offence of treason, the Bar has the following points to make:–

- The proposed offence of treason should require a specific intent. For example, the offence under the proposed section 2(1)(c) of the Crimes Ordinance should only be committed when a person does a specific act with the intention of assisting and with the intention that the PRC's position in the war should be prejudiced.

- The Government should provide illustrations as to what kind of 'intent' would be sufficient to constitute as an intent to intimidate the Central People's Government ("CPG").

- The element in the proposed section 2(1)(a) of the Crimes Ordinance of "joining or is a part of foreign armed forces" may present problems to those HKSAR permanent residents of Chinese nationality who joined the armed forces of a foreign country (an act permissible in say, France) before the existence of a state of war but did not participate in

any hostile action against the PRC.

- There should be a limitation period for the prosecution of the proposed offence of treason, a political crime. It should not be removed as proposed by the HKSAR Government.

Subversion

4. In respect of the proposed offence of subversion, the Bar has the following points to make:–

- The HKSAR Government should clarify whether the proposed offence of subversion is one of intent so that the prosecution must not only prove the occurrence of one of the results set out in the proposed section 2A(1)(a)-(c) of the Crimes Ordinance but also that the particular result was intended.

- The word "force" in the element of "by using force …" creates uncertainty and should be either defined or left out.

- The HKSAR Government should clearly explain what acts amount to "disestablishment of the basic system of the PRC as established by the Constitution of the PRC" and how the employment of this concept of "disestablishment of the basic system of the PRC" as an element of the offence of subversion reconcile with the exempting of the prescribed act of "pointing out the errors and defects in the … constitution of the PRC" from being sedition under the proposed section 9D(3)(b).

- The HKSAR Government should also illustrate situations in which the Central People's Government might reasonably feel 'intimidated'.

Sedition

5. In respect of the proposed offence of sedition, the Bar has the following points to make:–

- The proposed offence of sedition by inciting others is a departure from the old common law offence of sedition (which criminalized certain provocative political speech) and appears to criminalize an intention, and only an intention, which is not necessarily manifested in the public domain.

- The Bar cannot understand the legal policy behind the proposed section 9A(1)(b) of the Crimes Ordinance which makes it an offence for a

person, not necessarily a Chinese national or HKSAR permanent resident, to incite others to engage in violent public disorder seriously endangering the stability of the PRC. The Bar notes also that the proposals go further to claim extraterritorial jurisdiction over acts of incitement that, if performed, will not necessarily have repercussions in Hong Kong. The claim is apparently made in respect of a potential threat to the PRC by such acts. The Mainland does not necessarily claim jurisdiction in similar circumstances. As no violent public disorder seriously endangering the stability of the PRC need have occurred before a person can be prosecuted, how is a court to decide whether the acts done were intended to incite violent public disorder (whether within or outside the PRC) that would in fact seriously endanger the stability of the PRC.

- The proposed offence of handling seditious publication appears to be unnecessary since in essence it is sedition by inciting others by means of the printed word. Prosecuting this offence as presently drafted will encounter difficulties. The law does not generally recognize things as having any decisive influence over conduct. If a person writes a pamphlet with the intention of persuading or encouraging the readers to commit a crime, then the authorities should charge the writer with incitement to commit the particular offence.

- The Bar fails to see the reason for the proposed removal of the limitation period for bringing prosecution for sedition. Whether an inflammatory speech, spoken or published, creates a real danger to the public peace, or for that matter, the stability of the PRC, depends very much on conditions and circumstances prevailing at the material time. If the speech is considered to be seditious, then the offence should be prosecuted expeditiously and vigorously and not be left to grow stale.

Secession

6. In respect of the proposed offence of secession, the Bar has the following points to make :-

- The Bar repeats its comments on the offences of subversion and treason, in so far as they employ similarly worded elements of offence.

- The Bar considers that the reasonableness of the proposed offences of subversion and secession lies not so much in the wordings of the substantive offences but in looking at factual situations that might form the basis for a charge of attempt or other inchoate offence.

- The HKSAR Government has not answered the Bar's queries on its proposals to give extraterritorial effect to the proposed offences under the Crimes Ordinance.

Enforcement Provisions

Warrantless Search

7. As to the proposed power to conduct 'warrantless searches' under section 18B of the Crimes Ordinance for evidence concerned with the offences of treason, subversion, sedition, secession and handling seditious publication, the Bar considers that the HKSAR Government should make out a really convincing case for such a new power. While the Bar feels that a case may possibly be made out for the offences of treason, subversion and secession, it is not convinced of the case for sedition and handling seditious publication. The proposed section 18B should be tightened to ensure that an order authorizing 'warrantless search' be truly an exceptional event and that it goes no further than necessary. Additional safeguards are proposed.

Consent to Prosecute

8. The Bar is of the view that prosecution for offences under Parts I and II of the Crimes Ordinance should only be instituted with the personal and non-delegable consent of the Secretary for Justice.

Trial by Jury

9. The Bar supports making the new offences in the Crimes Ordinance ones to be tried by a jury and giving the option of trial by jury for those offences that do not carry the maximum penalty of life imprisonment.

Amendments to Official Secrets Ordinance

10. The proposed amendments to the Official Secrets Ordinance are not mandated by Article 23 of the Basic Law. Further, they appear to be unnecessary as a matter of legal policy. In this respect, the Bar has the following points to make :–

- The HKSAR Government has not provided a rationale for protecting information relating to Hong Kong affairs which are within the responsibilities of the Central Authorities. The situation before 1997

was entirely different and of no relevance to the discussion.

- The HKSAR Government must define in the Bill the areas to be covered by the proposed new category of protected information with some precision to avoid confusion.

- The Bar notes that some commercial and economic information will be caught by the new category of protected information. So will information of political significance and constitutional importance.

- The Bar considers that there is no need for the proposed offence of using protected information acquired as a result of illegal access. The public policy is served already under the existing law by prosecuting the offender who accessed the information illegally and, where necessary, by seeking an injunction to restore the accessed information to the Government and restraining further publication (if the information comes into the public domain). It is wrong to equate information held by the HKSAR Government with private property, so that "handling" it by a third party becomes a criminal offence. The proposed offence would inhibit the free flow of information about Government. On a practical level, this provision is capable of being abused to plug "leaks" or to compel reporters to disclose their sources.

- The Bar questions whether the proposed amendment to section 18(2) of the ordinance extending the scope of the offence of disclosing unauthorized information to cover disclosures of information from former public servants and former government contractors is a 'technical' amendment. The amendment has not been made in the United Kingdom to the equivalent section in the Official Secrets Act 1989. The Bar can see that the public interest does not necessarily require the prosecution of the publishers of information from such sources given that there are adequate civil remedies open to the Government to prevent the dissemination of such information.

Amendments to Societies Ordinance : Proscription of a Local Organization

11. The proposed amendments to the Societies Ordinance are not mandated by Article 23 of the Basic Law. The Bar makes the following additional points :–

- The proposed section 8A(2)(c) of the Societies Ordinance, which makes it a condition precedent to appropriate action an act done in the Mainland, dilutes the principle of "One Country, Two Systems" and may be inconsistent with Article 4 of the Basic Law, which obliges the HKSAR to safeguards the rights and freedoms of the residents of the

Region in accordance with the Basic Law. The Secretary for Security is supposed to exercise an independent judgment on facts related to national security. There is no justification for the link to a state of affairs in the Mainland.

- The Bar notes that the definition of "local organization" in the proposed section 8A(5) of the Societies Ordinance is wide, which include limited companies, unincorporated trusts and credit unions, which are not at present under the scheme of control of the Societies Ordinance.

- The Bar considers that the proposed section 8A(3) of the Societies Ordinance, which provides for a certificate to be conclusive of proof of the banning of a Mainland organization, should relate only to the administrative act. The Secretary for Security should be required to prove the relevant act of the proscription in the Mainland on any appeal as a fact in the ordinary way and should not be allowed to rely only on the certificate.

- The HKSAR Government should confirm that an appeal to the Court of First Instance against a decision to proscribe a local organization is a civil cause or matter within the meaning of section 13(1)(a) of the High Court Ordinance so that there can be further appeals to the Court of Appeal and the Court of Final Appeal.

- Conferring a right of appeal to the Court of First Instance directly engages Article 35 of the Basic Law, which guarantees the rights of access to the courts and to choose a lawyer for timely protection of lawful rights and interests or for representation in the courts. If rules made under the proposed section 8E of the Societies Ordinance provide for the exclusion of the appellant and his lawyer from the appeal proceedings and the appointment of a legal representative to represent the appellant's interests in their stead, then it is the Bar's belief that such rules would be unconstitutional as being inconsistent with Article 35. The situations in Canada and the United Kingdom are not sure guides to the constitutionality of a law in Hong Kong since those jurisdictions do not have a constitutional guarantee equivalent to Article 35 of the Basic Law. The HKSAR Government should rather devise court procedures that would enable the person affected and his lawyer to have access to all the materials relied on to support the administrative act of proscription. Giving effect to Article 35 would not affect the common law rules on public interest immunity or the ability of the court to sit in camera.

- Rules that limit access to a court should be in the form of primary

legislation. The Chief Justice should not be placed in the invidious position as the maker of such rules, which would almost certainly be subject to a constitutional challenge in due course.

The 'Pannick' Clause

12. The so-called 'Pannick' clause (which seeks to expressly subordinate the proposed amendments to the three Ordinances above to Article 39 of the Basic Law) is unnecessary. Article 23 of the Basic Law makes clear that the laws required are HKSAR laws and as such they must be compatible with not only Article 39 but also all of the Basic Law. If it is thought that these clauses are somehow necessary, they should be in the formula of an "avoidance of doubt" clause.

Dated this the 11th day of April 2003.

Hong Kong Bar Association