SOPA
The Society of Publishers in Asia

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Clerk to Panel on Security
Legislative Council Secretariat
3/F Citibank Tower
3 Garden Road
Central
Hong Kong

29 October 2002

Dear Sir/Madam,

I am writing on behalf of the Executive Board and membership of The Society of Publishers in Asia (SOPA), which is based in Hong Kong and represents more than 100 local, regional, and international publications. We are deeply concerned about certain provisions of the Consultation Document entitled "Proposals to implement Article 23 of the Basic Law," which is currently open for public comment. We believe that many of the proposals made in the Consultation Document would have a stifling effect on freedom of expression in Hong Kong. This is not merely of concern to the local media, but also will have a strong impact on the many regional and international media organizations operating in Hong Kong.

One of Hong Kong's important competitive strengths in the international marketplace is its reputation for a free and unfettered press. Hong Kong's free press is a key aspect of the city's quality of life, and of the vibrant civil society that exists here. The city's reputation as a haven for open information exchange and free discussion have made Hong Kong home to numerous international publications, many of which are represented by our organization. Moreover, an environment of media freedom contributes to development of an informed, globally-aware public, crucial to the highly productive workforce for which Hong Kong is renowned. We believe that certain provisions of the Consultation Document will seriously weaken these important Hong Kong advantages. We believe that substantial changes are required before the proposals are compatible with a free press and an open society.

We would like to begin by saying that the Consultation Document by itself is insufficient to allow a full discussion of the planned Article 23 legislation. A consultation paper, by its very nature, is designed to outline general principles. As a

result, the current Document omits important specifics and, in some cases, defines terms vaguely, implying a very broad interpretation that could be open to abuse. We believe the government is sincere in saying, in the Document's introduction, "We welcome your views." But in order to obtain meaningful commentary, it is essential that the government produce actual draft legislation in the form of a white bill for consultation, so that the public can respond to specifics rather than merely to general principles. The government should publish a white bill as soon as possible, allowing adequate time for full public discussion of the white bill, before a bill is submitted to the Legislative Council.

Surely it is in the government's own interest to produce a white bill that defines terms more specifically, and thus reassures the public. Because the Article 23 proposals contemplate new restrictions on the rights and freedoms of Hong Kong citizens, the precise wording of the laws will be of vital importance. If we have no white bill to examine, the public must necessarily fear the worst.

Even within the existing Consultation Document, there are provisions that we believe should be altered or withdrawn because of the impact they are likely to have on press freedom. This letter will focus on four provisions that cause particular concern us:

1. Sedition

First, we believe that there is no need for a separate provision covering sedition. The offences in the sedition section of the Consultation Document are already adequately covered by the provisions governing treason, secession, and subversion. Indeed, the consultation document itself makes a very weak case for including sedition as an offence, stating that the government is doing so "to underscore the seriousness of such acts [governing treason, secession, and subversion] by codifying these incitement offences in the context of sedition." It is dangerous to criminalize an act in order to emphasize the seriousness of other offences, rather than because of the content of the act itself. Sedition has fallen into disuse in most developed countries, even where old statutes sometimes remain on the books. Where Article 23 is concerned, we believe strongly that adding one more non-essential regulation simply adds more potential for abuse.

Rather than codifying sedition as an offence in the Article 23 legislation, we believe instead that the existing sedition provisions of the Crime Ordinance should be rolled back, and no new provisions included in the Article 23 legislation. The Consultation Document's provisions could do real damage to a free and commercially viable press in Hong Kong.

For example, the Consultation Document indicates that it will be a criminal act if someone "prints, publishes, sells, offers for sale, distributes, displays or reproduces any publication; or imports or exports any publication, knowing or having reasonable grounds to suspect that the publication, if published, would be likely to incite others to commit the offence of treason, secession, or subversion."

This encompasses a very broad range of activities, and establishes an unreasonably high test for the individual's knowledge of the likely effects of his actions. It is unreasonable to require that an individual avoid any dealings with all published materials if there may be "reasonable grounds to suspect" the material "would be likely to incite others to commit" another offence. The wording in the Consultation Document does not require that malicious intent be present, nor does it require that violence or the threat of violence actually arise as a result of these activities. A reasonable individual might well wonder whether the law requires him to avoid all potentially controversial publications, on a wide range of topics. The "gray area" created by the broad scope of this provision would certainly encourage a high-degree of self-censorship among journalists and publishers, thus constraining the press in Hong Kong.

It further concerns us that the Consultation Document maintains a separate offense of possession of seditious materials. Here again, the scope of the offence is unreasonably broad. Possession would be a crime if the person concerned knew or had "reasonable grounds to suspect it would be likely to incite others" to commit treason, secession, or subversion. It is highly unfair to put the burden on an individual to distinguish what publications in his possession would be likely to incite others. Only two exceptions to the possession offense are mentioned in the Consultation Document, which states "to cater for cases where such publications are dealt with under legitimate circumstances, such as academic research or news reporting, a defense of 'reasonable excuse' should be provided." The exempted categories are very narrow, apparently not including those who are in possession of publications for their private use or information. It is unreasonable to make it a crime for an individual, who has no intent to incite violence, merely to possess such information.

Finally, the consultation document proposes to abolish the time limit within which sedition may be prosecuted. The limit is now six months after commission for seditious offences. There is no reason why the risk of prosecution should hang over an individual for an infinite period of time, and a lengthy delay will certainly be detrimental to an individual's ability to defend himself in a court of law.

The cumulative effect of these very broad provisions related to sedition would be to

dampen press freedom in Hong Kong. We believe that the crime of sedition, as outlined in the consultation document, is flawed and unnecessary. Sedition should be eliminated from the Crimes Ordinance, and should not be included in the Article 23 legislation.

2. Theft of State Secrets

Another provision which could do real damage to the functioning of Hong Kong's free press is the provision relating to the Theft of State Secrets. This is especially important to those who pursue information in the course of their work, such as journalists and academics. The existing Official Secrets Ordinance is already too broad and ambiguous. In that respect, Article 23 provides an opportunity for the government to add additional safeguards when it comes to spying and disclosure of "protected information." Instead, the consultation document proposes to expand the scope of restricted information further, in ways that would be open to abuse.

SOPA urges the government to reconsider this matter, and to add reasonable safeguards for individuals who are acting in the public interest. Documents exposing unlawful or unconstitutional acts of the government should not be protected as State Secrets. Also, information already in the public domain should not be protected.

The Consultation Document, by incorporating elements of the Official Secrets Ordinance, seems to set a very low hurdle for what constitutes criminal disclosure of information by a current or former public servant or a government contractor. It merely needs to be proven that the disclosed information is "protected" and that its disclosure would be "damaging." For some categories of information, the definition of damaging is very broad, including any information that "endangers the interests of either the state or the HKSAR." Even this minimal safeguard does not apply to members of the security and intelligence services.

The Consultation Document's definitions are highly subjective, and it is quite easy to envision information that may be perceived as "damaging" by the government, but which would clearly be in the public interest to expose. Such vague definitions should be revised and significantly narrowed.

In addition, the Consultation Document adds a new category of State Secrets -- "information relating to relations between the Central Authorities of the People's Republic of China and the HKSAR." This is an unnecessary and worrisome addition to the list of protected information. Such information should only be protected if it falls into one of the other categories of state secrets (security and intelligence

information; defence information; information relating to international relations; information relating to commission of offences and criminal investigations.) Under the "one country-two systems" model, communications between the HKSAR and the Central Authorities on topics other than those listed above should definitely not be protected. Indeed, they should be public documents. There will certainly be a stifling effect on the media if it is against the law for the press to report widely on these communications between Hong Kong and the Central Government.

The Consultation Document also proposes a new offence "of making an unauthorized and damaging disclosure of information protected under Part III of the Ordinance that was obtained (directly or indirectly) by unauthorized access to it." This could penalize parties who publish such information long after it has entered the public domain. It is unreasonable for the government to reach beyond the actual disclosure of protected information, and punish a party several steps beyond the disclosure. This should be of grave concern to academics, journalists, and members of non-governmental organizations, because this proposal clearly increases the potential risk for anyone who discloses information which is in the public interest but which might, nonetheless, be regarded as "damaging." We believe this provision should be deleted from the proposal.

3. Ban Organizations Connected with Organizations Banned in the Mainland.

We deeply object to the Consultation Document's extension of mainland legal principles to Hong Kong. This provision would put at risk many organizations that have been operating in the HKSAR for many years, without causing any threat to the security of the HKSAR or the Central Government.

Although the consultation paper only applies the ban to organizations affiliated with mainland organizations banned on "national security" grounds, it further states that formal notification from the CPG that an organization has been banned on national security grounds "should be conclusive." The Secretary for Security is empowered to decide on this basis, and the consultation paper does not seem to allow the courts to look behind either the communication from the Central Government, or the Secretary for Security's decision. Any decision to proscribe an organization in Hong Kong should involve the courts, and should be based solely on the determination of Hong Kong security officials and the Hong Kong judiciary. It should not be related to decisions made by the Central Government, using a different legal system.

In addition, the Consultation Document takes the law one step further, beyond an "affiliation," to a "connection," proposing the prohibition of any Hong Kong

organization that has a "connection" with a proscribed organization.

The Consultation Document defines "connection" very broadly. It includes "solicitation or acceptance by the organization of financial contributions, financial sponsorships or financial support of any kind or loans from a proscribed organization, or vice versa; affiliation with a proscribed organization, or vice versa; direction, dictation, control or participation in the association's decision making process by a proscribed organization, or vice versa." This is a very broad restriction that covers many types of contact, irrespective of intent. The bilateral nature of this provision is worrying - both "support" to and "support" from a proscribed organization violates the law. If a Hong Kong media organization has sent reporters to the meetings of such a group, has the Hong Kong organization violated the law? This would be a minefield for the media, and should be removed from the proposal.

Further, the consultation paper says nothing about timing. There is no stipulation that a connection would have to have come after the banning. A connection from years past, long before the organization was banned in Hong Kong, could put one in violation of the law.

4. Investigative Power

Finally, in addition to our concerns about the specific Article 23 offences listed above, we are also concerned that the Consultation Document proposes to expand police powers in ways that are open to abuse. The consultation paper states that "the existing investigation powers may not always be adequate to cater for the special nature of some Article 23 offences" and proposes to extend emergency entry and search powers to all Article 23 offenses, with the exception of drilling. The consultation paper proposes to allow the police, on the decision of a superintendent, to break into and search a person's home or office without a search warrant, if he reasonably believes that "the investigation of such an offence would be seriously prejudiced" without immediate entry.

This provision should be deleted, because it is unnecessary could easily be abused. At present, it is reasonable that the police can enter private premises without a warrant in emergencies to stop a crime. But to expand this power to emergency entry and search powers for the purpose of an investigation, when no crime is imminent, is a dangerous expansion of police powers. All acts infringing a person's basic rights, like search and entry, should require approval by the court.

In conclusion, we believe that the provisions of the Consultation Document listed

above would inhibit the functioning of the local, regional, and international press in Hong Kong. In addition to the real threat of legal action for new offences, we believe that the media will be more prone to practice self-censorship. Laws making Hong Kong's media environment less free will affect not just journalists and the media companies who employ them, but all of us who depend on the important role of the free press in a modern, open society.

Thank you for giving us the opportunity to express our views.

Yours sincerely,

Cyril Pereira

Chairman
Encl.

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