SOPA
The Society of Publishers in Asia

December 24, 2002

Security Bureau
Attn: AS(F)2, F Division
6th Floor, East Wing
Central Government Offices
Lower Albert Road
Central
Hong Kong

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 (A list of SOPA Members is attached for your information). 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 stifle the free flow of information in Hong Kong. This is not merely of concern to the local media, but will also have a chilling effect on the many regional and international media organizations which have chosen Hong Kong as their media hub in Asia.

We appreciate the effort that the Security Bureau and the Justice Department have made to engage in a dialogue about the Consultation Document thus far. This has been a very healthy first step in the process. In particular, we appreciate that Deputy Solicitor General James O'Neil and Security Bureau Principal Assistant Secretary Johann Wong took the time to meet recently with members of the Boards of SOPA and the Cable and Satellite Broadcasting Association of Asia.

Although our dialogue with the government has been helpful, we continue to have significant concerns about certain provisions of the Consultation Document. These concerns derive from our firm belief that 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 has made Hong Kong home to numerous international publications, most 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. Finally, to the extent

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that provisions implementing Article 23 make the SAR a less attractive place for international media organizations to maintain employment and investment, there may be more direct negative economic impact.

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.

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 and allow an additional three-month period for consultation. This will allow the public to respond to specifics rather than merely to general principles.

We are pleased that there are now indications that the government may be reconsidering its initial refusal to publish a draft bill for commentary. But we would like to highlight once again the importance of allowing adequate time for full public discussion on the draft legislation, before a bill is submitted to the Legislative Council.

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 the media business in Hong Kong. This letter will focus on four provisions that cause us particular concern:

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. As the Consultation Document points out, "the act of inciting others to commit these substantive offences is already an offence under common law."

Indeed, the Consultation Document itself makes a weak case for including sedition as an offence, stating that the government is doing so "to underscore the seriousness of such

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acts [governing treason, secession, and subversion] by codifying these incitement offences in the context of sedition." We believe it is dangerous to criminalize an act in order to emphasize the seriousness of other offences, rather than because of the substance 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, adding one more non-essential regulation simply adds potential for abuse. The potential risk of abuse of the sedition offence to restrict freedom of thought and freedom of expression is simply too great. The Consultation Document's provisions could do real damage to a free and commercially viable press in Hong Kong.

Even if the government feels it is absolutely necessary to maintain a sedition offence of incitement, we believe the way the crime is defined in the Consultation Document is too ambiguous and open-ended, and should be refined. For example, it should require that there be a direct and immediate relationship between the seditious incitement and the imminent use of violence to commit a substantive offence.

Also, we believe there should be no offence of "dealing with seditious publications." 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 is truly worrying to those of us in the media business, because of its broad scope and vague standard. In particular, we are concerned that no malicious intent on the part of an individual would be required in order for that individual to commit the crime. Indeed the proposed standard is simply that someone would have "reasonable grounds to suspect" that it "would be likely to incite others to commit" the other offences. Further, the Consultation Document does not require that violence or the threat of violence actually result from these activities. We believe this provision encompasses an unnecessarily broad range of activities, and establishes unreasonably high expectations of an individual's knowledge about the potential effects of his actions.

Based on the wording in the provision, 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 impose self-censorship among journalists, publishers, retailers, and others, thus undermining the quality and integrity of press in Hong Kong.

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We are encouraged that the government is apparently considering altering this provision by adding the element of intent. However, even with the element of intent added, we fear that the offence would be too broad, and we would urge the government to remove entirely the offence of "dealing with seditious publications."

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." We are encouraged that the government has expressed a willingness to re-examine the scope of this "reasonable excuse" defence. However, any description of exempted categories is still likely to be too narrow, implying that it is not a "reasonable excuse" for someone to possess such publications simply for their private use or information. We believe that the offence of possession should be removed completely, as it is unreasonable to make it a crime for any 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 six month time limit should remain.

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.

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

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those who pursue information in the course of their work, such as journalists and academics. We are concemed that the Consultation Document expands certain aspects of the existing Official Secrets Ordinance without adding important safeguards.

The Consultation Document proposes to create a new class of protected information – "relations between the Central Authorities of the People's Republic of China and the HKSAR." The Document defines neither "damaging disclosure" nor "Central Authorities" in this context. Of course, information relating to true national security issues, such as defence or international relations, could understandably be included here. But these are already covered in the existing categories of protected information. We cannot see any justification for covering other information, such as economic policy, under this criminal offence. Relations between Beijing and Hong Kong are of utmost importance to how Hong Kong is governed, and we would go so far as to say that, in the interest of transparency and good governance, the public has a right to know about these relations, with the exception of the narrow categories of defence and national security intelligence. We are encouraged that the government will consider narrowing the scope of this provision in the draft legislation.

The Document also adds 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 inclusion of indirectly obtained information criminalizes actions by an individual several steps removed from the commission of any actual theft of state secrets. It criminalizes an action by someone who does not owe a duty of confidence to the government. Further, this standard will make it difficult if not impossible to determine whether certain information was originally from a prohibited source or not. This would be a minefield for media organizations, and we believe it should be dropped.

In addition, it is worrying that the Consultation Document expands the list of people on whom the duty of confidentiality is imposed. The Document would include all present and former public servants or government contractors. It would also add agents and informants that provide information to the police. Here again, this would significantly expand the amount of restricted information.

We propose that the government re-examine the above aspects of the Consultation Document's Theft of State Secrets offences, and consider additional safeguards, along the lines of the following:

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1) Protection of information should not depend simply on how the information was obtained, but rather on whether the content of that information would truly damage national security. If the government wishes to protect information based on national security, it should be required to demonstrate that security interest and to produce evidence of real or potential damage.

2) There should be a Public Interest Defence. If the public good resulting from disclosure outweighs any damage, then this should be considered a valid defence.

3) Information already in the public domain, not matter how it was originally obtained, should not be included in the category of restricted information.

4) Information exposing unlawful or unconstitutional acts by public officials should not be included in the category of restricted information.

5) The government should consider establishing a balancing statutory right of access to information, along the lines of a "freedom of information" law.

We are pleased that the government has expressed a willingness to consider the public interest defence and the public domain defence above. We would urge the government to include these two safeguards, along with the others listed above, in any draft legislation.

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

We believe that this provision goes well beyond the requirements of Article 23. We are encouraged that the government has recognized that this aspect of "Chapter 7, Foreign Political Organizations" needs significant redrafting before a draft bill is put forward for public comment. However, we object on principle to the Consultation Document's apparent extension of mainland legal principles to Hong Kong. Unless "Chapter 7, Foreign Political Organizations" is changed significantly, we fear 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. Likewise, the media organizations that report on such groups could be threatened.

This proposal is problematic in part because the Document does not adequately explain what is meant by "affiliation," a crucial concept in determining whether a local organization may be proscribed on the grounds of its relationship with a mainland organization. The Societies Ordinance as it stands provides definition of "connection" but not of "affiliation." It should be defined to mean a very high degree of connection –

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not be merely because the local organization bears the same name, contributes financially to the other, nor merely because members from one organization have attended the meetings of another.

We are also concerned with the Consultation Document's proposal that, while courts would hear appeals based on points of law, an "independent tribunal" would be empowered to rule on "points of fact." There is no reason to violate the courts' ability to rule on these questions. The court, rather than a special tribunal, should be fully empowered to hear an appeal against the Government's determination that a local organization is affiliated to a mainland organization.

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, by reference to the Societies Ordinance, 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. 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 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. This should be clarified.

4. Investigative Power

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

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Article 23 offences, 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.

We note the assurances by the Deputy Solicitor General that journalists' actual reporting materials would be protected from this search power. And we understand that at present, the police can already enter private premises without a warrant in emergencies to stop an imminent crime. However, we believe this expansion of emergency investigative powers is unnecessary and could easily be abused, so this provision should be deleted.

The offences dealt with in Article 23 are not the same as imminent crimes. Surely if a conspiracy to commit one of the Article 23 offences is underway and constitutes a real threat, the police will have adequate time to obtain a search warrant. This provision of the Consultation Document touches on the kinds of investigative activities where threats to civil liberties are at their greatest. Expanding emergency entry and search powers to such investigations, 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.

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 moved 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. It runs counter to Hong Kong's aspiration to be regarded a "world city".

While there remain archaic statutes on the books regarding treason, sedition and official secrets, derived from the long history of the British legal tradition, these are in effect "dead letters" in enlightened administrations. It is not that Hong Kong society has no problem with these provisions remaining in the legal framework of the SAR: it has no difficulty accepting that these are and should be, legally dead in practice.

We have however, witnessed how these antiquated laws have been rejuvenated and abused to stifle democratic dissent and to entrench authoritarian governments in Singapore, Malaysia and now in Zimbabwe. We see how easily the Law itself can be subverted through administrative process. The SAR should be mindful of this in drafting

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new legislation that covers the critical civil liberties that Hong Kong currently enjoys. Assurances from civil servants are no substitute for a robust legal framework that protects the legitimate rights and freedoms of Hong Kong citizens.

It is a particular responsibility of the SAR to tighten the language of legal provisions which may be open to abuse in the future, against civil liberties and freedoms which have been guaranteed to the people of Hong Kong. The modernization opportunity to re-draft and update antiquated laws, which the SAR now has, regarding the legal definitions of treason, sedition, secession and official secrets, should be specific, unambiguous, clear and not inhibit the legitimate expression of free speech, assembly, a free press and all other civil and human liberties which characterize Hong Kong's way of life.

The Society of Publishers in Asia supports legislation under Article 23 to protect the sovereignty of China against armed subversion and external attack. We are against expansion of that mandate to criminalize aspects of the legitimate exercise of freedoms of a civil society and a free press environment, which Hong Kong currently enjoys and which have been guaranteed under the Basic Law.

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

Yours sincerely,

Cyril Pereira
Chairman
Encl.

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