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HONG KONG HUMAN RIGHTS MONITOR
4/F Kam Tak Building, 20-24 Mercer Street, Sheung Wan, Hong Kong
Phone: (852) 2811-4488 Fax: (852) 2802-6012
Email: hkhrm@hknet.com Website: http://www.hkhrm.org.hk

Response to Government Consultation Document

"Proposals to Implement Article 23 of the Basic Law"

Submission to the Legislative Council Panel on Security

15 November 2002

Introduction

1. Human Rights Monitor is totally opposed to legislation under Article 23 of the Basic Law. Such legislation is completely unnecessary by any rational criteria and if enacted can only do damage to Hong Kong. Such damage is likely to be severe.

2. In this response we first explain why the proposed legislation is wrong in principle. We then deal with the individual proposals.

3. The Sino British Joint Declaration on the question of Hong Kong ("the Joint Declaration") is a treaty registered with the United Nations and binding on all parts of the People's Republic of China.

4. Article 3(3) of the Joint Declaration provides that "the laws currently in force in Hong Kong will remain basically unchanged".

5. Article 3(5) of the Joint Declaration provides that "Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region."

6. Article XIII of the Annex to the Joint Declaration states that:-

> "The HKSAR Government shall protect the rights and freedoms of inhabitants and other persons in the HKSAR according to law.

> The HKSAR Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely".

7. Ever since Article 23 was first added to the draft of the Basic Law, on the insistence of the Government of the PRC in the aftermath of the Tien An Men Square massacre, most experts have agreed that its provisions were in breach of the provisions of the Joint Declaration set out above, because it applied to Hong Kong Mainland legal concepts which are incompatible with the freedoms guaranteed by Article 3(5).

8. As the International Commission of Jurists stated as long ago as 1991 in its report "Countdown to 1997"

> "Article 23 requires the SAR to prohibit, among other matters, 'subversion against the Central People's Government' … Such [prohibition] would be contrary to the articles of the International Covenant on Civil and Political Rights relating to freedom of expression and freedom of association and therefore to Article XIII of Annex 1 to the Joint Declaration."

9. The Government states in the introduction to its consultation paper (page v) that it has both practical and legal obligations to implement Article 23. However Article 23 does not set a time-table. At the same time Government spokespersons have said that they expect prosecutions to be very rare.

10. The Government cannot have it both ways. Either there is no urgency about this legislation because offences under it are likely to be extremely rare, or it is needed, in the Government's eyes, because the Government wishes to criminalise conduct which is presently lawful. All the indications in this consultation document are that the Government, despite its bland reassurances to the contrary, does intend by this proposed legislation to criminalise much conduct which is lawful in free societies and has hitherto been lawful in Hong Kong.

11. Legislation of this kind, striking at the heart of Hong Kong's traditional freedoms, is obviously against Hong Kong's interest. This is so, firstly, because it reduces Hong Kong's quality of life; secondly, because it damages Hong Kong free and traditionally vibrant media which have been one of Hong Kong's strengths; thirdly, because it damages Hong Kong's trade with Taiwan; fourthly, because it damages overseas confidence in Hong Kong, with consequential effects on investments; fifthly because it does all this at

time when Hong Kong is suffering an unprecedented economic recession and record unemployment. Although the SAR Government refuses to come clean on the issue it is clear that the impetus for such damaging legislation at this difficult time must come from the Central People's Government.

12. It is the duty of the Government of the HKSAR to defend Hong Kong's interests. When necessary that includes defending them against pressure from the Central People's Government.

13. A constitution such as the Basic Law is intended to protect and strengthen the society for which it is written, and not to strangle it through over-rigid and ill-judged literal application of provisions which prove to be damaging. This should, if necessary, be explained to the Central Government and the plan for legislation abandoned. Hong Kong needs legislation to deal with numerous other pressing problems (it has not yet, for example, found time to improve its image as a "world city" by legislating to outlaw racial discrimination, although it has been formally committed to doing this since becoming a party to the Convention on the Elimination of Racial Discrimination in 1966). It has no need of the present proposals.

14. Turning to the nature of the specific proposals put forward the Government has only provided vague general statements as to what is intended. It has not included in its consultation document a "White Bill" or draft bill, which would make clear exactly what was proposed. Nor has it given sufficient detail about the proposals in the body of the document to make this clear. This omission has already been pointed out to the Government and it has refused requests to provide a "White Bill". In these circumstances the community is entitled to assume the worst as to what is intended by the proposals.

15. The proposals are justified by the Government on the basis that they are required by Article 23. However the most sinister and far-reaching proposal – to ban organisations with links to Mainland organisations banned on security grounds – does not fall within the wording of Article 23. The leadership of the Chinese Communist Party will be protected in the name of the need "to prohibit any act of … subversion against the Central People's Government".

16. Article 23 reads:

> "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies."

17. It will be seen that Article 23 contains no reference at all to links between Hong Kong organisations and Mainland organisations.

18. The proposal to ban organisations linked with Mainland organisations banned on security grounds is dealt with more fully below. It has the potential to allow the Government to ban any organisation which the Beijing Government disapproves of. It is extremely sinister that the Government has included this provision which is not even required by Article 23.

<u>The concept of protection of the state</u>

19. It is important to analyse in detail the purported justification for the proposed legislation which is set out in the Consultation Document (paragraph 1.4), under the rubric "the concept of the protection of the state".

20. Paragraph 1.4 states that:-

> "The protection of the state, the prevention of crimes posing serious threats to sovereignty and national security, is a concept of high importance both past and present. The constitutionally established government has the responsibility to exercise its powers in accordance with the law to protect its nationals from violent attack and coercion, whether by foreign invaders or domestic insurgents, to provide welfare for its nationals, and the peace and stability within which to pursue their individual pursuits. To achieve such aims it is an essential and foremost task of every nation to afford their states (sic) special protection against crimes which threaten their well-being and hence indirectly the well-being of individuals who make up the state, ensuring the sovereignty, territorial integrity and security of the nation."

21. It is not clear why the need to protect citizens from violent attack and coercion justifies the proposed legislation. Violent attacks and coercion are already crimes under the provisions of the Crimes Ordinance. Threats to peace and stability are extensively provided for by the Public Order Ordinance.

22. Paragraph 1.4 continues:-

> "All countries around the world, including both common law and civil law jurisdictions, have express provisions on their statute books to prevent and punish crimes which endanger the sovereignty, territorial integrity and security of the state."

23. This statement is profoundly misleading. Firstly, most countries do not have the range of crimes proposed in this document. Few have express laws against secession. Many do not have laws against subversion. In many countries the ambit of laws of treason and sedition is less wide than these proposals.

24. Secondly, there has been a world-wide trend for hundreds of years, accelerating in the last 20 or 30 years, to limit the scope of offences against the state, corresponding with the rise in respect for individual rights as against the powers of the state. Many of the proposals in this document are to revive archaic offences, such as misprision of treason, which have remained on the statute book but long fallen into disuse. Other proposals have the effect of removing basic safeguards for individual liberty which were first developed by the common law well over 200 years ago. A striking example is the proposal to allow search without warrant for seditious publications, something which was declared unlawful at common law as long ago as 1765 in the landmark case of Entick v Carrington.

25. Thirdly, the common law countries with which Hong Kong shares a legal system are democracies. Governments are subject to the will of the people through elections and the pressure of an elected legislature. These are powerful constraints on government power. Generally at most times they ensure that laws to protect national security are not abused to protect the short term interests of the government in power or individuals within it. Hong Kong has no such safeguards, and the People's Republic of China of which it is now part is one of the world's notorious repressive dictatorships. The PRC concept of national security is completely different from that in democratic countries. The deal agreed by the Joint Declaration was that the PRC concept of national security, which denies the rights of free speech, freedom of association and freedom of assembly, would not be applied to Hong Kong. The present proposals pretend that they are simply modernising archaic laws but they are in fact applying Mainland Communist concepts of national security under a disguise.

26. Paragraph 1.4 of the Consultation Document concludes:-

> "Therefore, while nationals of a state enjoy the privilege of protection provided by it on the one hand, the individual citizens have a reciprocal obligation to protect the state by not committing criminal acts which threaten the existence of the state and to support legislation which prohibits such acts on the other hand" (emphasis added).

27. The very idea that citizens have an obligation, not only to obey the law, but also to support particular Government legislative proposals, is not compatible with a free society. The inclusion of this statement shows the repressive

thinking behind the document, namely that from now on citizens will be expected to actively support Government policy.

28. A footnote to this paragraph quotes Canadian Law Reform Commission Working Paper No 49 as providing "a good summary of this concept of a "reciprocal relationship" between the state and the individual". However the Consultation Document omits anywhere to mention the conclusion of this Working Paper, which was that the offence of sedition should be entirely abolished as being incompatible with modern concepts of freedom speech. A similar conclusion was reached by the United Kingdom Law Reform Commission in its Working Paper No 72 on Treason, Sedition and Allied Offences, in 1977. Both reports also recommended a narrowing of the law of treason.

29. Finally a major complication in relation to legislation on this subject is that the People's Republic of China is legally in a state of war with Taiwan, although Hong Kong has never been at war with Taiwan and has massive trade relations with it. The Government's proposals are silent about how the proposed laws would relate to the Taiwan situation.

Treason

30. The Government appears at first sight to have adopted the advice of liberal critics who have emphasised that treason must involve an intention to overthrow the state by violence. However when the proposal is examined in more detail it is far from clear that the proposed new offences are limited in this way.

31. The consultation paper proposes that it should be treason to:-

    (a) "[levy] war by joining forces with a foreigner with the intent to --
        (i) overthrow the [People's Republic of China Government]; or
        (ii) compel the PRCG by force or constraint to change its policies or measures; or
        (iii) put any force or constraint upon the PRCG; or
        (iv) intimidate or overawe the PRCG." (Consultation Document, paragraph 2.8)
    (b) instigate a foreigner to invade the PRCG. (Consultation Document, paragraph 2.9)
    (c) assist by any means a public enemy at war with the PRC. (Consultation Document, paragraph 2.10)

32. The Government does not give any indication what the term "constraint" is meant to cover. Given its ordinary meaning, this word would appear to cover

any form of opposition designed to limit the freedom of action of the Government of the PRC. It would therefore cover both industrial action such as a strike, and peaceful protest or other forms of peaceful speech designed to constrain the PRC Government by stopping it from e.g. persecuting dissidents. It appears to give carte blanche to the Government to suppress any form of organised opposition to the policies of either the Central People's Government or the Government of the SAR (which is of course part of the Government of the People's Republic of China according to the proposed definition).

33. The use of this wide term "constraint" becomes even wider when it is read in conjunction with the definition of PRC Government at Note 18 on page 10 of the Consultation Document. This states that "In the context of this paper, the term "PRC Government" represents collectively the Central People's Government, and other state organs established under the Constitution." This concept of "PRC Government" is much wider than that of "the Central People's Government" mentioned in Article 23 of the Basic Law."

34. Article 2 of the Constitution of the People's Republic of China states that "The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels." Article 3 states that "All administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate. Article 31 provides that "The state may establish special administrative regions when necessary." Article 105 states that "local people's governments at different levels are the executive bodies of local organs of state power as well as the local organs of state administration at the corresponding level." Article 123 provides that "the People's Courts in the People's Republic of China are the judicial organs of the state". Article 129 provides that "The people's procuratorates of the People's Republic of China are state organs for legal supervision."

35. It appears from the definition that anyone who joins with a foreigner to constrain any organ of the state at any level will be committing the offence of treason. This would seem to cover anyone who launches an international appeal for the release of a person detained by the local procuratorate anywhere in the Mainland.

36. Nor is the term "Public enemy" defined. Unlike a "foreigner" which is a term generally taken to me a national of another state, "public enemy" is not a term with a defined meaning at common law. A public enemy at war with the PRC would certainly appear to include the Republic of China, whose citizens would not be regarded as foreigners under PRC law, but which is at war with the PRC, no peace treaty ever having been signed between the two entities. Moreover if there is even one foreigner – in the sense defined by the People's Republic of China as a person who does not hold the nationality of

either the People's Republic of China or Taiwan ("the Republic of China") - in the armed forces of Taiwan, everyone else who is active in the defence of Taiwan will be also be "joining forces with a foreigner" to levy war against the People's Republic of China". The Solicitor-General of Hong Kong when questioned about the status of Taiwan in the context of these proposals stated that it was not the Government's intention to criminalise any existing trade relations with Taiwan. However this appears to be the effect of the Government's proposals as drafted.

37. These provisions are even more sinister when it is seen that the Government intends at the same time to codify the offences of attempting, aiding and abetting, counselling and procuring the commission of substantive offences, and conspiring to commit the substantive offences (Consultation Document, paragraph 7).

38. It is proposed to define treason as "a formal state of war or an armed conflict to which sufficient publicity has been given" (Consultation Document paragraph 2.10). This covers the conflict between the People's Republic of China and Taiwan which have been in a state of declared war for many decades. As recently as 1996 the PRC attempted to terrorise Taiwan by firing live missiles into Taiwan's main shipping lanes. (The existence of a state of war between the People's Republic of China and anywhere else is almost certainly matter falling within the definition of act of state in Article 19 of the Basic Law. Under Article 19 a certificate from the Central People's Government that there is such a state of war would be conclusive and not open to challenge in any court).

39. If these provisions become law, any businessperson who trades with Taiwan will be at risk of prosecution, if his products end up being used by the Taiwan armed forces or by other bodies in Taiwan in such a way as to assist Taiwan's defence needs. Assurances by the Government that it does not want to disrupt Taiwan trade are of no weight. Once the law exists it can be used, either by the present administration or a future administration, and everyone thinking of trading with Taiwan will have to take account of it. No time limit is proposed for the offence, so some-one who sells computer components for use by the Taiwan Navy for anti-missile defences the year the proposed law is enacted may face prosecution at any time for the rest of their life.

40. The last treason prosecutions in Hong Kong were in the 1940's arising from World War II. They involved persons who were British subjects (and so owed allegiance to Britain) and who assisted the Japanese in their prosecution of the war.

41. The extension of treason to the on-going low level conflict between the PRC and Taiwan threatens thousands of peaceful and law-abiding Hong Kong

citizens with prosecution and will fundamental transform Hong Kong's way of life and damage its economy.

42. The proposal to retain and modernise the archaic and almost forgotten offence of misprision of treason (Consultation Document, paragraph 2.14) is equally sinister and far-reaching. Misprision of treason is failure to inform the authorities of treason being committed by some-one else. It is doubtful whether there has ever been a prosecution for this offence in Hong Kong's history. Nor has there been a prosecution in England during the 20th or 21st centuries despite two world wars. The last English prosecution arose from the Cato Street conspiracy in 1820.[1] The proposed retention and modernisation of this offence means that anyone who knows that some-else is committing the proposed new broadly defined offence of treason will themselves be guilty of an offence if they do not inform the authorities. It thus opens the door to a "Big Brother" society in which it will be every citizen's duty to spy on every other citizen.

43. The Government proposes that the new treason offences should apply to "all persons who are voluntarily in the SAR" (Consultation Document, paragraph 2.16).

44. Treason is a form of treachery. The concept of treason involves the idea of loyalty. In the case of Joyce v DPP [1946] 1 All. E. R. 186, which the Government briefly refers to in the footnote on page 12 of the Consultative Document, the English House of Lords held, with one dissenting opinion, that Joyce, an American citizen who had falsely claimed to have been born a British subject and thus obtained a British passport by misrepresentation, was capable of being guilty of treason as he was under the protection of Britain because he was holding a British passport, notwithstanding that the passport had been wrongly obtained and he was not entitled to it.

45. The decision in Joyce has been severely and cogently criticised as being logically flawed and inconsistent with previous law [2]. The Canadian Law Reform Commission Working Paper from which the Consultation Document selectively quotes describes this decision as "astonishing", and as "a decision which went too far, and is best attributable to the high feelings running in post-War England".

46. The HKSAR Government cites Joyce as the authority for its proposal that anyone entitled to the protection of the state, and not merely its nationals, should be liable for treason. The proposals are that (1) anyone who ever sets foot in Hong Kong will from then on be liable to be prosecuted for alleged acts of treason in Hong Kong against the Government of the People's Republic of China; and (2) anyone who is a Hong Kong Permanent Resident

[1] R v Thistlewood, 33 State Trials, 681
[2] See particularly Glanville Williams, 1948 Cambridge Law Journal, 54

even if not a Chinese national will be liable to be prosecuted for treason for such acts whether done in Hong Kong or anywhere else in the world.

47. Human Rights Monitor does not object in principle to Hong Kong Permanent Residents being subject to a law of treason, as Hong Kong Permanent Residency is a form of citizenship and can reasonably be regarded as conferring obligations as well as rights.

48. However it is wrong in principle for laws of treason to be applied to persons who owe Hong Kong no loyalty. Hong Kong non-permanent residents may have their conditions of stay curtailed and be required to leave. The same applies even more strongly to visitors, who have no right to remain in the territory for more than a limited period. We consider that the Canadian Law Reform Commission is wrong to acquiesce in the idea of treason law applicable to non-residents. A visitor who attempts to overthrow the state will inevitable commit other crimes for which s/he can be punished under ordinary criminal law, and will also be liable to be removed and refused re-entry. A visitor who would only be caught by the wide definition of treason in the Government's Consultation Document, e.g. if they join in a high profile and embarrassing demonstration ("joined with others") which blocked a road ("a foreseeable public disturbance") and which prevented ("constrained") the Government ("the Government of the PRC") from pursuing one of its stated policies might perhaps merit prosecution in some circumstances for obstruction or a public order offence. Prosecution of such a visitor for treason would be both tyrannical and ridiculous.

Secession

49. The proposed new offence of secession is limited to attempting secession by levying war, use of force, threat of force or serious unlawful means, including serious violence against a person, serious damage to property, endangering a person's life, creation of a serious risk to the health or safety of the public or a section of the public, serious interference with or disruption of an electronic system, or of an essential service, whether public or private. However, the offence also targeted at "resist[ing] the CPG in its exercise of sovereignty over a part of the PRC" which on the face of it would include resisting any trivial exercise of executive, judicial or judicial powers as in theory such the exercise of such powers are ultimately an exercise of sovereignty.

50. At first glance it is reassuring that the Government does not propose to criminalise the peaceful expression of secessionist views. However the extension to serious interference with an electronic system or disruption of a an essential service appear to go beyond existing criminal law and criminalise as a very serious offence actions which are either not an offence

at all at present or are only very minor offences. It would for example appear to cover such actions as interrupting a television broadcast signal so as to cast pro-Taiwan or pro Free Tibet propaganda on the screen. So would the jamming the fax or telephone lines of the authorities to protest against one party dictatorship by repeated faxes or calls. It would also catch demonstrations for a secessionist cause which seriously disrupted the traffic.

51. The Government proposes extra-territorial jurisdiction for the secession offences. This means that a Taiwan resident who has at any time after enactment of the proposed legislation been involved in activities against the People's Republic of China e.g. as a member of the Taiwan Armed Forces, will be liable for prosecution for secession if they ever set foot in Hong Kong, or if their fishing boat strays into Hong Kong waters. (The Secretary for Justice has said that Taiwan is a case of "separation, not secession". However this appears to be an ideological statement rather than a statement of law, and the proposed secession law in the document would clearly apply to Taiwan).

52. The Government compares this with the extra-territorial jurisdiction increasingly sought by states for offences such as fraud. However these are offences which are universally agreed to be morally wrong. There is no such consensus about secession. In many countries supporting a free Tibet organisation would be regarded as a morally good action, even though it would be regarded as hostile by the People's Republic of China.

53. The effect of extra-territorial jurisdiction of this kind would be to widen considerably the number of people who either will not be admitted to Hong Kong or who will not regard it as safe to enter Hong Kong. These will usually be people who have done nothing that would be regarded as a crime in their own country. Enforcement of a law of this kind will make even more of a mockery of Hong Kong's fading ambition to be a world city.

Sedition

54. The proposed offence of sedition is broadly similar to the existing common-law offence. It is totally unnecessary. The last prosecution for sedition in Hong Kong was in 1952.[3]

55. The offence of sedition has a long and disreputable history of use as tool of repression against legitimate political opposition, particularly in a colonial context. Sedition within the proposed narrow definition will inevitably involve the committing of other criminal offences such as conspiracy to murder, attempted riot, or inciting violence at public meetings contrary to Section 26 of Hong Kong 's Public Order Ordinance, or equivalent

[3] Fei Yi Ming v R 1952 36 HKLR 133

provisions in other jurisdictions. It is because of this combination of a discreditable dangerous history and total duplication with other existing offences that the Law Reform bodies of both the UK and Canada have recommended that this archaic offence be abolished.

56. In an attempt to ensure that considerations of national security are not used as an excuse to restrict fundamental human rights the United Nations convened a conference of distinguished international lawyers at Johannesburg, South Africa in 1995 which drew up the "Johannesburg principles" as guidance as to when restrictions on national security grounds were or were not legitimate. The Hong Kong SAR Government in this consultation document expressly rejects the Johannesburg principles on the grounds that they are not yet accepted as international norms. Government spokespersons have explicitly rejected Principle 2, which provides that a national security interest is not legitimate unless its purpose is to protect against the use or threat of force. This again indicates that this new offence is planned for use against peaceful dissent.

57. The Hong Kong SAR Government, in contrast to the recommendations of the UK and Canadian Law Reform Commissions, proposes not merely to retain and modernise the offence of sedition, but also to have a separate offence of publishing a seditious publication (Consultation Document, paragraph 4.17).

58. This proposed offence is widely defined. It will be an offence if a person

> "(a) prints, publishes, sells, offers for sale, distributes, displays or reproduces any publication; or
>
> (b) 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". (Consultation Document, paragraph 4.18)

59. A defence of "reasonable excuse" is suggested but not defined. Academic research and news reporting are mentioned as possible reasonable excuses.

60. In addition there will be a separate offence of knowingly possessing such seditious publications (Consultation Document, paragraph 4.18).

61. It will be apparent that these proposals are the end of freedom of information. Anyone in possession of a book likely to incite others to commit treason or subversion will commit an offence. This must include any book describing recent events in Chinese or Tibetan history in a way which might objectively make a reader other than the possessor likely to conclude that Communist party rule in China should be overthrown or that Tibetans should act to end Chinese rule. It should be noted that there is no proposal that the offence should be linked to possession for the purpose of distribution. Anyone who

has a copy of such a book for their own interest will be committing the offence.

62. It is again proposed that sedition like secession should be subject to extra territorial jurisdiction. The same objections apply as in relation to secession (see paragraphs 51-53 above).

Subversion

63. "Subversion" is the offence traditionally used by the People's Republic of China to persecute and suppress legitimate opposition. It has extreme sinister connotations. It does not exist as a common law offence.

64. The Government proposes to link the offence of subversion to intimidate or overthrow the PRCG and to disestablish the basic system of the state by levying war, violence, threat of violence or serious unlawful means (Consultation Document, paragraph 5.6). The same criticisms apply in relation to the "serious unlawful means" as apply in relation to secession (see paragraphs 49-50 above). The same criticisms as to the planned extra-territorial effect apply as in relation to secession and subversion (paragraphs 51-53 and 62 above). The criticisms relating to the concept of "PRCG" in relation to treason are also applicable here (paragraphs 15, 31-34).

65. The concept of "the basic system of the state as established by the PRC constitution" (Consultation Document, paragraph 5.5) would include the leadership of the Chinese Communist Party which is provided for in the Chinese Constitution. However, the protection of the leadership of the Chinese Communist Party has nothing to do with Article 23 on prohibition of "any act of … subversion against the Central People's Government" in Article 23 of the Basic Law.

Theft of State Secrets

66. The Government proposes to maintain the existing official secrets legislation but to add a new provision criminalising unlawful disclosure of information relating to relations between the central authorities of the PRC and the HKSAR.

67. Human Rights Monitor opposes the blanket criminalisation of all disclosure of information relating to relations between the central authorities of the PRC and the HKSAR.

68. The Government justifies this change on the ground that before the Handover communications between Hong Kong and Beijing were protected because

they related to international relations, and that such a term is no longer appropriate.

69. However the fact that Hong Kong and Beijing are now part of the same country is a good reason why communications between the regional government and the central government should not any longer be given the special confidentiality protection given traditionally to diplomatic relations.

70. It should be the norm that communications between the Central People's Government and the SAR Government are in the public domain. Such communications should only be confidential where they fall within one of the three existing confidential areas, security and intelligence, defence information, or information relating to international relations. Otherwise there is no reason why communications between central and local government should be hidden from public scrutiny.

71. There should in theory be few communications between the CPG and the SARG on matters others than security, defence, and foreign affairs, in view of Hong Kong wide area of autonomy.

72. In most countries communications between central and local government are not state secrets. In the UK regular British Whitehall (central Government) circulars to local authorities on matters such as health, transport and education policy are usually publicly available documents.

73. In Hong Kong there should be very few communications between Central and local Government on such matters as health, transport and education, as these subjects are all within Hong Kong's autonomy. However if the CPG does communicate with the SARG on such a matter e.g. on the routing of the planned bridge across Deep Bay to Shenzhen, this should be as part of the public debate on the issue and should not be regarded as a state secret.

74. The Government also proposes to create a new offence of making an unauthorised and damaging disclosure of information protected under Part III of the Official Secrets Ordinance that was obtained directly or indirectly by unauthorised access to it. This is described as plugging a loophole and an example is given of a hacker who sells stolen protected information to a publisher who openly publishes it.

75. A more compelling example of a person who would be caught by the proposed new offence is the newspaper editor who publishes a story which turns out to have been directly or indirectly obtained by unauthorised access to protected information.

76. The proposed offence will criminalise many newspaper scoops about Government policy. It will also have a chilling effect on newspaper reporting

and publishing generally, as any newspaper which publishes a story directly or indirectly involving Government, other than from a handout from an official press spokesperson, will risk finding out too late that the information is protected information, and facing prosecution.

77. There is an urgent need for the introduction of a “public interest” or “whistleblower” defence into the Official Secrets Ordinance. Secrecy in all governments is often a cover for incompetence and maladministration, and sometimes for crime, as in the Watergate and Iran- Contra scandals in the USA or the Iraqi Supergun scandal in the UK. Only the introduction of protection for a person who reveals a secret reasonably believing that it is in the public interest to do so to prevent crime or maladministration can even the present extent of official secrets legislation be justified.

Foreign Political Organisations

78. The Government does not propose any extensions to the law on relations with foreign political organisations. However it proposes a completely new mechanism for banning “organisations affiliated with a Mainland organisation which has been proscribed in the Mainland by the Central authorities, in accordance with national law on the ground that it endangers national security.” (Consultation Document, paragraph 7.15) “Affiliated” in fact is to mean “connected” (Consultation Document, paragraph 7.17). An "organization" is “defined as an organized effort by two or more people to achieving a common objective, irrespective of whether there is a formal organizational structure” (Consultation Document, paragraph 7.15). So a company, a newspaper or an underground church are "organisations" which could be banned if the conditions set out in the proposals are met.

79. There is no requirement under Article 23 of the Basic Law to introduce any legislation of this kind. Article 23 does not mention links with Mainland organisations.

80. Mr Allcock, Hong Kong’s Solicitor-General, has suggested orally that this proposal is an aspect of legislating on treason. However a Hong Kong organisation which is affiliated with a Mainland organisation which has been proscribed in the Mainland by the central authorises on the ground that it endangers national security may not have done anything treasonable. Even assuming (a big assumption) that the proscription by the Mainland authorities reflects a real danger to national security from the relevant Mainland organisation, this does not mean that the Hong Kong organisation is a danger to national security. The existence of an affiliation does not mean that the Hong Kong organisation has been doing the same thing as the Mainland organisation.

81. The Secretary for Security has tried to defend this proposal by saying that since 1949 the Mainland has never banned any organisation on grounds of national security.

82. However the proposal is accompanied by the further proposal that "Formal notification by the CPG that a Mainland organisation has been proscribed on national security grounds should be conclusive of the fact that the organisation has been so proscribed." (Consultation Document, paragraph 7.16).

83. This means that even if a Mainland organisation has been banned on one of the grounds traditionally used to ban organisations in the past, such as "counter-revolutionary", or still used in the present, such as "subversive", "anti-social" or an "evil cult", a certificate can be produced by the Mainland Government stating that it has been banned on grounds of national security. Nor would such a certificate necessarily be untrue, as something does not logically have to be banned under a law entitled national security law in order for national security to be the reason for the ban.

84. The effect of these two proposals would be to give the Government power to shut down any organisation with which even a weak connection with a Mainland organisation could be shown. It would merely have to produce a certificate from the Central People's Government that a Mainland organisation had been banned on national security grounds and prove a connection

85. It is proposed to define connection to include:-

> "(a) solicitation or acceptance by the association of financial contributions, financial sponsorships or financial support of any kind or loans from a proscribed organisation or vice versa;
> (b) affiliation with a proscribed organisation, or vice versa;
> (c) determination of the association's policies by a proscribed organisation, or vice versa; or
> (d) direction, dictation, control or participation in the association's decision making process by a proscribed organisation, or vice versa." (Consultation Document, paragraph 7.17)

86. The use of the Latin phrase "vice versa" disguises the worst part of this proposal. It means that where a Hong Kong organisation has contributed financial support of any kind to a Mainland organisation the Hong Kong organisation will fall be to banned. There is nothing in the Consultation Document about limiting the contributions to contributions made after the Mainland organisation was banned. So a contribution by a Hong Kong group to a Mainland group that is perfectly lawful in the Mainland at the time of the

contribution but which is banned years later, may also lead to the banning, years later, of the Hong Kong group.

87. This proposal would appear almost bound to lead to the banning in Hong Kong of the Falun Gong organisation, and the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China. Government spokespersons have claimed orally that these two organisations will not be banned but these claims are impossible to reconcile with the wording of what is proposed in the Consultation Document.

88. The proposal is also likely to lead to the banning of many church groups which have given financial contributions to illegal churches in the Mainland – where all churches which are not formally recognized by the state are illegal, including the Roman Catholic church recognized by the Vatican.

Investigation powers

89. The Government proposes emergency powers of entry and search without a warrant, and emergency power to obtain financial information, in relation to all these proposed offences.

90. As there have been no prosecutions for any comparable offences in Hong Kong for 50 years, and neither the prosecution for sedition in 1952 nor the prosecutions for treason in 1946-47 involved any need for emergency searches without warrant, it is clear that there is no genuine need for any powers of this kind.

91. The real reason for seeking these extraordinary wide powers, which do not exist in relation to murder, terrorism or any other offence, would appear to be to enable the Government to terrorise political opponents by entering their homes without warning to carry out searches for seditious publications – as happens in many totalitarian countries.

92. Already indicated above, arbitrary searches without warrant for sedition publications were declared unlawful at common law as long ago as 1765 in Entick v Carrington [4]. The use of searches without warrant in the British North American colonies led directly to the American Revolution. The 4th Amendment to the US constitution reflects this history, stating "The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons and things to be seized".

[4] (1765) 19 State Trials 1029.

93. The Commissioner of Police has commented that these powers are necessary. He cannot have any relevant professional expertise in this field, as his force has not been involved in prosecuting anyone for any of the offences proposed in this consultation paper during the many years he has been a policeman. The most charitable explanation of his comment is that he does not understand what is proposed.

Procedural and miscellaneous matters

94. At present there is a 3 year time limit for prosecutions for treason and sedition. The Government proposes to abolish these time limits and to have no time-limits for any of the proposed new offences. This means that some-one who, the year these proposals comes into effect, helps Taiwan "wage war" by selling it goods useable for military defence, can be prosecuted 40 years later or any time in between.

Penalties

95. Even allowing for the fact that maximum penalties are intended for the most serious examples of a given offence, the penalties proposed for the proposed offences are draconian. Life imprisonment for subversion, or for incitement to commit subversion, where by definition the conduct is neither treason not any existing criminal offence such as an act of terrorism, is not compatible with the most basic concept of a free society. The same applies to 7 years for mere possession of a seditious publication, and to 7 years for misprision of treason i.e. not reporting that some-one else is doing something treasonable.

Conclusion

96. These proposals represent the end of Hong Kong as a free society and the creation of a repressive state where people are punished for their beliefs.

97. Government spokespersons have claimed that the Government can be trusted not to prosecute for these offences except in rare cases where prosecutions can be justified. Such empty reassurances are not to be believed. These proposals are shameful and should be withdrawn.