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**SUBMISSION TO THE LEGCO ON THE GOVERNMENT'S  
CONSULTATION PAPER ON BASIC LAW ARTICLE 23 OFFENCES**

On September 24th, the government released its consultation paper on proposals to implement article 23 of the Basic Law. This document covers in particular proposals for enacting offences covering treason, sedition, subversion, secession and the theft of state secrets.

The Hong Kong Journalists Association (HKJA) must put on record at the outset that it believes there is no pressing need for the government to legislate on the various national security offences. The simple fact is that Hong Kong has not posed a security threat to Beijing in the five years since the handover. However, the government insists that it will now proceed with plans to enact legislation in this extremely sensitive area.

The HKJA cannot ignore this intention, and therefore is obliged to comment on the consultation document, and put forward its own proposals for ensuring that the national security laws do not become in any way a threat to freedom of expression.

One problem - pointed out already by many groups and individuals - is that the consultation document does not provide the exact wording of the laws to be enacted. The government says this will be available next year- in the form of a blue bill, which would provide much less scope for changes. Given the vagueness of the proposals, critics are arguing - and the HKJA fully supports this position - that the government must first produce a white bill.

This is particularly important given the sensitive nature of national security laws. It would certainly delay passage of the relevant laws, but surely it is better to have a well-crafted bill containing all necessary safeguards, rather than an imperfect law that has been rushed through the legislature to meet an artificial deadline.

**THE MAJOR PROBLEMS**

The HKJA will focus on how the law will affect journalists. Two offences in particular will have a major impact on press freedom - sedition and the theft of state secrets. Other offences could also harm the media, including the proposal to grant the police additional powers of search and seizure without first obtaining a court warrant.

The HKJA has identified the following problem areas:

**1) Sedition:** The sedition offence strikes at the very heart of media freedoms. The government goes to great lengths to argue that its new sedition offence will not have an onerous effect on the media. Its consultation document states, "(t)he crux lies in striking a balance between proscribing . . . highly damaging communications and protecting the freedom of expression."

It argues that the mere reporting of views will not be criminalized unless it incites others to commit treason, secession or subversion, or causes violence or public disorder which seriously endangers the stability of China or Hong Kong. The maximum penalty is harsh - life imprisonment.

However, the HKJA is not convinced by this argument. The sedition offence will, in certain circumstances, allow the government to prosecute individuals solely for the expression of the opinions they hold, or the articles they write. The media, as the reflector of various views in society, could easily be trapped by such a law. The offence would also have a significant chilling effect on the media, in particular over issues which are sensitive to China.

The paper also proposes an offence of dealing with seditious publications. This covers the whole range of publishing activities - printing, selling, distributing, importing and exporting. An element of knowledge and reasonable suspicion is involved in the offence. The penalty is seven years - substantially higher than under the pre-handover law which is now in effect.

The government argues that its proposals are in line with the International Covenant on Civil and Political Rights, which is enshrined in the Basic Law. But many journalists worry that in more controversial areas - Taiwan, Tibet, Chinese dissidents, Falun Gong - they could fall through the cracks in the law.

The offence of dealing with a seditious publication carries a defence of "reasonable excuse". This, the consultation paper argues, would cater for 'legitimate

circumstances” such as academic research or news reporting. The HKJA is not convinced this defence is sufficient, given that the mere act of taking a publication to court would have a chilling effect and could deter sources from supplying information.

**2) Theft of state secrets:** This is the other area of grave concern to journalists. Hong Kong's existing law - the Official Secrets Ordinance - is based on a 1989 British law, which deals with spying and the unauthorized disclosure of information in several major areas - including security and defence, international relations, the commission of offences and criminal investigations. While the prosecution has to prove harm in some cases, there are no public interest or prior publication defences.

The consultation document proposes several new offences - including the addition of a new category on "information relating to relations between the central authorities of the PRC and the HKSAR." The addition of this new category, covering relations between Beijing and Hong Kong, is disturbing. The relationship between the sovereign and its special administrative region is of utmost importance to how Hong Kong is run. Indeed, the government should be arguing for the greatest transparency possible in this area, as a way to promote a more accountable government.

The HKJA fails to understand, for example, why details of talks between the mainland and Hong Kong on infrastructure development or economic matters should be protected information. Indeed, the government argues that economic information will not be covered – yet the consultation document fails to spell this out.

Another new offence is also proposed: Making an unauthorised and damaging disclosure of information ... that was obtained (directly or indirectly) by unauthorised access to it.

The government argues that this will close a loophole, whereby, for example, a hacker may sell stolen information to a publisher, who may then publish it. This is curious, because the British law, on which Hong Kong's ordinance is based, does not include such a provision. The British law draftsmen did not feel it necessary to include such a provision. So why do Hong Kong's legal experts consider it necessary? It is not at all clear.

This proposal involves the concept of "theft". The Secretary for Security, Elsie Leung, has referred to this concept in connection with the arrest and jailing of former Ming

Pao journalist, Xi Yang. She noted that Mr Xi had refused to reveal his sources, and that the case had therefore fallen into the category of stolen or unauthorised information. We must emphasize that Miss Leung wrongly equated the protection of sources with theft. The implications for journalists are immense, given that journalistic codes of conduct bar reporters from revealing their sources of information. The violation of this code would seriously affect a journalist's credibility and weaken the profession's monitoring role.

Government officials have also stated that they will consider the opinions of the Central People's Government in determining what is a state secret. This could open the floodgates for mainland intervention and, by extension, further weaken the media's monitoring role.

**3) Treason:** The government is proposing to produce a more tightly defined offence than that contained in the existing version of the Crimes Ordinance. It will cover anyone who levies war by joining forces with a foreigner with the intent to overthrow the PRCG (the government of the People's Republic); compel the PRCG by force or constraint to change its policies or measures; put any force or constraint upon the PRCG; or intimidate or overawe the PRCG.

The HKJA is concerned about the vagueness of some of these terms. These include "constraint", "intimidate" and "overawe". The law will also apply to anyone who is voluntarily in Hong Kong. It could therefore apply to visitors. There will also be extra-territorial dimensions to the offence.

**4) Secession:** This is a completely new offence, which clearly answers the sensitivities of the central government about the Taiwan question or calls for independence for areas of China such as Tibet or Xinjiang.

The consultation document proposes that the law should outlaw any move to withdraw a part of the PRC from its sovereignty, or resisting the PRC in its exercise of sovereignty over a part of China, by levying war, use of force, threat of force or by other serious unlawful means.

The document defines the rather broad term "serious unlawful means" as serious violence against a person, serious damage to property, endangering a person's life, creating a serious risk to the health or safety of the public, serious interference or serious disruption of an electronic system, or serious interference or serious disruption

of an essential service, facility or system.

The document proposes that effective safeguards should be in place to protect the freedoms of demonstration and assembly, including peaceful assembly or advocacy. This is a crucial safeguard, yet the document is silent on exactly how this should be done.

**5) Subversion:** This is another new offence - one which was inserted into the final draft of the Basic Law in the wake of the 1989 pro-democracy protests. Unlike treason, which focuses on an external threat, subversion deals with threats from within.

The government proposes to make it an offence for an individual or group to intimidate the PRCG, or to overthrow the PRCG or disestablish the basic system of the state as established by the constitution by levying war, use of force, threat of force, or other serious unlawful means.

Again, one of the major problems in this offence is vagueness. The term "intimidate", for example, could be interpreted in a very broad manner. There is also doubt about the term "the basic system of the state", which is likely to be interpreted as it would in mainland China. This would appear to expand the scope of article 23 of the Basic Law, which refers only to subversion against the Central People's Government. The consultation document widens the scope of the offence to all levels of government – from the lowest to the highest.

**6) Foreign political organisations:** This section proposes to give the Secretary for Security the power to outlaw a Hong Kong organisation if he or she believes that this is necessary in the interests of national security, public safety or public order. The government proposes in particular that an organisation could be banned if it is affiliated with a mainland organisation that has been proscribed on the mainland on the ground that it endangers national security.

The document goes on to state starkly that the SAR government should defer to Beijing on the question of whether a mainland organisation endangers national security. In other words, Beijing holds all the cards in such matters - even though the SAR government proposes an appeal mechanism for banned organisations in Hong Kong. One wonders whether the Falun Gong or the Hong Kong Alliance in Support of Patriotic Democratic Movements in China could become victims of these

provisions.

**7) Investigation powers:** The consultation document proposes that the police should be given emergency entry, search and seizure powers for most of the offences - including sedition and dealing with seditious publications (although not for theft of state secrets). Such powers could be extremely damaging for any media organisation or journalist coming under police suspicion.

**8) Time limits:** The government proposes to do away with time limits for prosecutions for various national security offences. At the moment, a prosecution must be brought within three years of an alleged offence for treason, and six months for sedition. Unlimited time limits could have a serious chilling effect on journalists and media organisations.

**9) Penalties:** The government is proposing to increase penalties in several areas. For example, a person or group convicted of sedition or dealing with seditious publications will face a maximum jail term of seven years. At the moment, the maximum term is two years for a first offence and three years for a subsequent offence.

The government is also proposing to increase the maximum term for the unauthorised disclosure of protected information from two to five years on conviction. The government fails to give convincing reasons for increasing these penalties.

## **POSSIBLE SOLUTIONS**

The obvious solution to these threats is simple: Do not proceed with such legislation. The HKJA feels strongly that the government should scrap the proposals on sedition, and in particular seditious publications. They have the severe effect of inhibiting free speech, encouraging self-censorship and placing journalists, publishers, librarians and book and film distributors in the impossible situation of having to guess where the limits lie.

The proposals also have the effect of making police and prosecutors the arbiters of what is suitable for the public to read. World-class universities, an international financial centre and a knowledge economy – all of them the stated priorities of the Hong Kong government – do not survive with this kind of sword hanging over their heads.

Furthermore, the proposals are superfluous. It is difficult to justify curbs on the free flow of ideas and information on the grounds that ideas and information could lead to actions that could endanger national security, when already other proposals in the consultation document deal adequately with actual actions.

However, if the government proceeds with legislation, the HKJA would insist on the following safeguards to ensure that freedom of expression is respected adequately:

1) **The adoption of the Johannesburg Principles** on National Security, Freedom of Expression and Access to Information: These guidelines were drawn up by a group of legal experts meeting in the South African city of Johannesburg in October 1995.

Principle 6 states that expression can be punished only if there is an intention to incite violence, a strong likelihood of violence and a direct and immediate connection between the expression and the risk of violence.

These principles are considered to be at the more liberal end of interpretation of the International Covenant on Civil and Political Rights. So much so that the Hong Kong government already appears to have shot them down. It says in its consultation document that they "are not yet widely accepted international norms."

The solicitor-general, Bob Allcock, goes further, quoting human rights expert Sandra Coliver as saying that some of the Johannesburg Principles are "more protective of freedom of expression than widely accepted international norms." Given the significant impact of the government's proposals on freedom of expression and press freedom, as well as the democratic deficit in Hong Kong, this is precisely what the Hong Kong government should be aiming for in drafting national security laws.

This principle should be incorporated in particular in any new sections on sedition, to ensure that there is maximum protection for media organisations or journalists accused of any of the national security offences,

2) **The adoption of public interest and prior publication defences in the Official Secrets Ordinance**: These are essential to protect journalists and media organisations that may face prosecution under the theft of state secrets proposals.

It should be legitimate to publish information or documents, where public interest clearly outweighs harm. Such instances would include instances where information

indicates the existence of crime, fraud, unlawful activity, abuse of authority, and neglect or other serious misconduct by an official.

In this respect, the government should take reference from principles 13 and 15 of the Johannesburg Principles, which state clearly that the public interest in knowing information shall be a primary consideration, and that no person may be punished for disclosure of information if disclosure does not actually harm and is not likely to harm a legitimate national security interest, or the public interest in knowing the information outweighs the harm from disclosure.

It should also be a defence for a journalist to argue that the information was already in the public domain, whether in Hong Kong, mainland China or elsewhere.

3) **Scrap the new category of protected information in the Official Secrets Ordinance**: The government is proposing that all information relating to relations between the Central People's Government and the Hong Kong government should be protected. This is an extreme position, given that Hong Kong has autonomy over all matters except for defence and foreign affairs. The government can legitimately argue that these matters should be protected; indeed, they are already covered in the Official Secrets Ordinance.

However, there is no obvious case for the protection of other information - for example details of exchanges on trade matters, relations with provincial governments and cross-border infrastructure development. The government would therefore appear to be taking an all-encompassing approach towards the question of which information should be protected. A rethink is clearly required.

4) **Scrap the new offence of making an unauthorised and damaging disclosure of protected information**: This is an arbitrary new offence, which encapsulates the concept of "theft". Such an offence could become a serious hindrance to the work of journalists who rely on sources for seeking information. It may involve journalists having to reveal their sources of information. If journalists refuse to do so, there could then be a presumption that the information in question had been obtained through unauthorised access. Such an offence should clearly be kept out of Hong Kong's statute book.

5) **Prevent arbitrary search and seizure powers for journalistic material**: The emergency powers proposed in the consultation document could have a far-reaching



chilling effect on the media. Sufficient protection should be provided to ensure that such powers are never used in cases involving the media and journalists. At the very least, the government must include clear provisions in the relevant laws stating that search and seizure procedures incorporated in the Interpretation and General Clauses Ordinance apply to all journalistic material.

6) **The government should re-think its proposals for scrapping time limits and increasing penalties.** These are both elements of the consultation document which could have a severe chilling effect on the media, and which in some cases could be used to intimidate publications many years after an article has been published.

## CONCLUSION

The HKJA is extremely concerned about the implications of many of the proposals put forward in the government's consultation document. The administration should re-think whether such measures are necessary, especially when the SAR suffers a serious democratic deficit.

The government should, if it proceeds with legislation, ensure that sufficient safeguards are incorporated in the new or revised offences. These should be in line with international human rights standards, and sufficient to ensure that the offences do not in any way threaten the media and journalists. Given the extreme sensitivity of the matter, the government should be willing to consider safeguards including principle 6 of the Johannesburg Principles.

Again, given the sensitivity of the offences in question, the government should publish a white bill, so that experts and interested parties may comment authoritatively on the exact wording of the offences. Such a move would ensure that the public is given a sufficient opportunity to comment on the various offences - even if enactment is delayed until the next legislative session. This is a matter which should not be rushed - for the sake of freedom of expression and the government's credibility.