



## ASIAN HUMAN RIGHTS COMMISSION

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### NATIONAL SECURITY LEGISLATION AND ITS ADVERSE CONSEQUENCES

#### A submission on 'Proposals to implement Article 23 of the Basic Law'

As a regional human rights non-government organization based in Hong Kong, the Asian Human Rights Commission (AHRC) has observed the adverse effects of national security legislation in many parts of Asia. AHRC is thus deeply concerned that the proposals contained in the Hong Kong government's consultation paper entitled 'Proposals to implement Article 23 of the Basic Law' (Consultation Document, Security Bureau, September 2002) will unnecessarily threaten the freedoms of Hong Kong's people. The foreseeable outcomes of these proposals include serious damage to the rule of law in Hong Kong, loss of public confidence, increased corruption and a concomitant decline in economic conditions.

Though the declared intention of the consultation document is to improve the stability of Hong Kong SAR, the paper has in fact already caused much uncertainty that may have a very harmful impact on the society. The primary fear is that this paper may be a forerunner to some dangerous repressive measures. Numerous statements that have been published by responsible organizations such as the Bar Association of Hong Kong, persons from universities, from the churches and from many social organizations, all expressing considerable misgivings about the unfamiliar future that may be awaiting Hong Kong.

Hong Kong has continued to experience a sense of optimism and certainty since becoming a Special Administrative Region (SAR) of the People's Republic of China (PRC) on 1 July 1997. There are currently no foreseeable threats to national security stemming from Hong Kong. Indeed, "one country, two systems" has been hailed as a success by many local and international observers, as well as the Hong Kong government itself. It is unfortunate, then, that this general mood has now been disturbed such that every group fears that its sphere of activity will be adversely affected by the proposal to introduce new security laws, without there being any internal reason to do so. Because of these proposals, the anxiety local people felt prior to the transfer of Hong Kong's sovereignty in July 1997 is again manifest. The fear is that by way of interpretation all areas of activity brought under security laws, even religious affiliations, may become a problem. Labour disputes, trade union protests, legitimate political activities, publications and human rights programmes may also fall under its aegis. The fear also stems from the perception that these proposed legislative changes may usher a new era of repression into Hong Kong akin to other parts of Asia.

Since the consultation document was released in late September, government officials have tried to reassure the community that the proposed changes will not be misused. However, oral guarantees do not possess the weight of law, and no amount of assurances by well-meaning state officers and senior bureaucrats will appease such concerns, as there is no guarantee that new persons holding positions of authority will not change their minds. Thus, the immediate consequences of this proposal have not been good for Hong Kong. Some may say that the fears are exaggerated, however, the very nature of fear is that once unleashed it cannot be controlled.

The anxiety spreading among the many respected groups expressing concerns over the Article 23 proposals stems from a number of aspects. First, the content of the consultation document seems to have been ill-defined, causing confusion and uncertainty. Key offences of treason, secession, sedition and subversion are referred to with an ambiguity that would allow the government to use the law as a legal weapon to deny, rather than protect, people's rights.

Second, the intention to proscribe any organisation in the community that has been banned on national security grounds by the central government thereby absolves the government of Hong Kong SAR from having either any responsibility or authority over such matters. Under this particular proposal, the definition of "national security" in Hong Kong would be determined in Beijing, and local organisations would become unlawful without any oversight and protection by the courts in Hong Kong, thereby eroding the "two systems" model.

Third, there is much uncertainty surrounding the expansion of police power given to enter premises to conduct a search and seize materials merely for investigative purposes, without any warrant issued by a court. The oversight function of the judiciary in granting warrants must be preserved if the rule of law is not to be diluted or threatened. This section of the consultation document clearly grants too much discretionary power to the police, regardless of the rank of the officer.

Fourth, the proposal to widen the provisions on unlawful disclosure of information may inhibit freedom of information and the press, for what is deemed a "state secret" may in reality merely be a remark or decision that is politically embarrassing. While the consultation paper outlines the types of information that should not be unlawfully disclosed, it does not indicate who will make the important decision about what specific information is a state secret. Journalists and other local and international observers have already noted a trend towards self-censorship in the Hong Kong media since 1997. The provisions of this consultation document, if enacted into legislation, will only further contribute to the decline of press freedom in the territory.

Fifth, problems also exist regarding the possible targets of the proposed legislation. In particular, members of Hong Kong's diverse expatriate communities could be at risk of committing one of these crimes, especially if their country were at war with the PRC. The growth of a perception among the international community in Hong Kong that its members are exposed to personal risk under the proposed amendments may have an adverse effect on the atmosphere in Hong Kong, and particularly among foreign investors.

In all countries of Asia where laws similar to the new proposals under Article 23 have been adopted, the rule of law has suffered severely. Indonesia's long years of national security laws, for instance, have led to a society where it is now very difficult to re-root basic institutions for justice. Similarly, in more affluent Malaysia, basic freedoms and the independence of the judiciary are also in peril due to such legislation. And special mention must be made of Singapore. Unlike Hong Kong, the development model of Singapore was premised on the sacrifice of rights and freedoms. Hong Kong was able to achieve equal or greater economic development while at the same time preserving its open society with basic freedoms. It would be a tragedy to needlessly sacrifice this advantage.

The experiences of these neighbouring countries stand in contrast to those western states that have already passed similar legislation apparently without major adverse consequences mentioned in the document to support its case. Those jurisdictions have deep-rooted democratic traditions with a well-defined separation of powers and a system of checks and balances. Hong Kong, on the other hand, does not have a fully functioning democratic legislature; and the PRC much less so. Regional comparisons, then, are likely to be much more revealing than those from further abroad.

Observing the experiences of other Asian jurisdictions, the expansion of discretionary power to the police, especially lower ranking officers, often leads to an abuse of this power, resulting in a greater number of human rights abuses and more corruption. To believe that strict rules relating to arrest without warrants, detention and judicial supervision can be changed without causing abuse of power and an increase of corruption both within and outside the police force is a delusion that other societies have paid a heavy price for holding.

One of the greatest achievements of Hong Kong SAR has been its Independent Commission against Corruption (ICAC). A central tenet of this institution is recognition that the police must be controlled from outside. Since 1974 Hong Kong has clearly demonstrated that there is an explicit relationship between elimination of corruption in the police and in other sectors of society. However the fear is that in case the proposed Article becomes effective, the police may have the right to retain, maintain certain practices,

procedures, persons, specific documents or information under the guise of national security which cannot be examined by the ICAC even if there are serious complaints. This will seriously undermine the authority of ICAC that could lead to police abuses being put under the carpet on grounds of national security. The confidence of both investors and the general public in the economic management of Hong Kong is also closely related to the mechanisms for accountability and transparency put in place by the government. If the prevailing system is tampered with, in the present circumstances of economic downturn potential investors may well go elsewhere.

The 'Proposals to implement Article 23 of the Basic Law' appear to constitute a threat to the freedoms that Hong Kong has enjoyed prior to and since the transfer of its sovereignty to the PRC. They seem intended to inhibit the participation of Hong Kong people in decision-making and debate relating to their society, to the advantage of the authorities. In reality, however, both the entire community of Hong Kong SAR and its government will be losers. While the proposals ought not to proceed at all, if they appear destined to do so nonetheless, then it is vital that a white bill be introduced before the final legislation is presented, to permit detailed community dialogue. Under any circumstances, the setting of arbitrary deadlines for completion of the legislative changes is inappropriate. Hong Kong SAR, as noted earlier, has functioned well for the past five years without this legislation, and faces no imminent threat that demands it. The introduction of a specific deadline may result in an undue element of hurry and an air of inevitability to the whole procedure that would harm the social morale in Hong Kong, already sufficiently damaged by the government's treatment of these proposals to date. The Hong Kong SAR government would do well to reconsider its approach in this instance, and restore public confidence through an open and sensible consultation process that may, if necessary, ultimately contribute to national security without trampling on the human rights of its citizens.

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The Asian Human Rights Commission (AHRC) was founded in 1986 by a prominent group of jurists and human rights activists in Asia. AHRC is an independent, non-governmental body which seeks to promote greater awareness and the realization of human rights in the Asian region and to mobilize Asian and international public opinion to obtain relief and redress for the victims of human rights violations. AHRC promotes civil and political rights as well as economic, social and cultural rights.

The sister organization of AHRC, the Asian Legal Resource Center (ALRC), has general consultative status with the United Nations Economic and Social Council (ECOSOC).