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LC Paper No. CB(2)438/02-03(01)

DEPARTMENT OF JUSTICE

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來函檔號 Your Ref.:
電話號碼 Tel. No.: 2867 2003

19 November 2002

Clerk to Panel on Security
LegCo Secretariat
3/F, Citibank Tower
3 Garden Road
HONG KONG

(Attn: Mrs Sharon Tong)

Dear Mrs Tong,

Proposals to implement Article 23 of the Basic Law

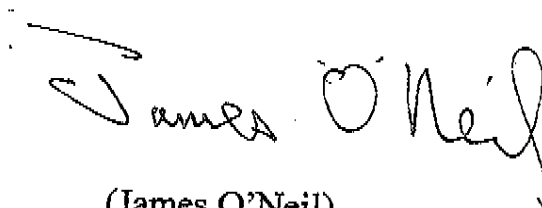
I refer to my letter of 14 November enclosing Mr Pannick's opinion.

Subsequently there have been representations raised at a public forum to the effect that disclosure of the instructions to Mr Pannick would help to give a complete picture.

For the sake of transparency and completeness I enclose the Instructions to Counsel (Annex A) together with the Note of Conference between Counsel and the Solicitor General (Annex B); letter of 17 October 2002 requesting a formal opinion (Annex C) and copy email in relation to the addendum endorsed on Annex B (Annex D).

I do not wish to repeat what was said in the previous letter but would reiterate that the release of the legal advice and supporting papers on this occasion should not be regarded as a precedent for such release in other contexts.

Yours sincerely,

A handwritten signature in black ink that reads "James O'Neil". The signature is written in a cursive style with a large, looped "O" and "N".

(James O'Neil)
Solicitor General (Acting)

#59769

IN THE MATTER OF :

**Legislative Proposals to implement
Article 23 ("BL 23") of the Basic Law**

INSTRUCTIONS TO COUNSEL

Counsel has herewith copies of the following documents :

1. The Consultative Paper on the implementation of BL 23 ("the Consultative Paper")
2. The Basic Law
3. The ICCPR as applied to Hong Kong
4. Hong Kong Bill of Rights Ordinance, Cap. 383
5. Hong Kong Reunification Ordinance
6. Crimes Ordinance, Cap. 200, Parts I & II
7. Crimes (Amendment) (No. 2) Bill 1996
8. Crimes (Amendment) (No. 2) Ordinance 1997 (not yet in force)
9. Official Secrets Ordinance, Cap. 521
10. Public Order Ordinance, Cap. 245
11. Societies Ordinance, Cap. 151
12. Organised and Serious Crimes Ordinance, Cap. 455

2. Counsel is instructed to advise in conference as to whether the legislative proposals to implement BL23 as set out in the Consultative Paper are consistent with the ICCPR, in particular Articles 19, 21 and 22 which guarantee,

inter alia, the right to freedom of expression and information; the right of peaceful assembly and the right to freedom of association with others.

The Basic Law

3. The Basic Law is the constitutional document of the Hong Kong Special Administrative Region ("the HKSAR"). It prescribes the systems to be practised in the HKSAR in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong. It is premised on the "one country, two system" principle, and provides for a high degree of autonomy of Hong Kong.

4. BL8 provides that the laws previously in force in Hong Kong shall be maintained, except for any that contravene the Basic Law. BL11 further provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law.

Protection of rights

5. In relation to the protection of individual rights, BL4 guarantees that the HKSAR shall safeguard the rights and freedoms of the residents of the region and of other persons in accordance with law.

6. Chapter III of the Basic Law is devoted to the protection of fundamental rights and the stipulation of duties of the residents. BL27 guarantees to Hong Kong residents (a term defined in BL24) freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

7. BL39 further provides that :

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on

Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.”

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

8. The ICCPR, as applied to Hong Kong, contains a number of reservations but the HKSAR Government is not seeking to rely on any of them.

9. The ICCPR is implemented in Hong Kong by the Hong Kong Bill of Rights Ordinance which incorporates into domestic law the provisions of the international covenant.

The Issue

10. Under BL23 which is in Chapter II : Relationship between the Central Authorities and the HKSAR, the HKSAR has a constitutional obligation to enact laws to protect the state (“shall enact laws on its own”) in seven enumerated areas :

- treason;
- secession;
- sedition;
- subversion against the Central People’s Government;
- theft of state secrets;
- prohibition of foreign political organisations or bodies from conducting political activities in the Region; and
- prohibition of political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies.

11. However, the HKSAR Government is also committed to compliance with the ICCPR when formulating laws to implement BL23. The Consultative Paper, which has just been issued, is considered to achieve that objective. The Consultative Paper sets out the arguments of the HKSAR Government in detail on the proposed legislation.

12. For the purpose of Counsel advising in conference as referred to in paragraph 2 above, our Mr Bob Allcock, Solicitor General, will be meeting Counsel at 5 p.m. on 9 October 2002 in Counsel's Chambers.

13. Please contact Ms Roxana Cheng at roxanacheng@doj.gov.hk or by telephone at **852-28674902** if further information or materials other than those enclosed are required.

Dated this 24th day of September 2002.

R. Cheng
Ms Roxana Cheng
Senior Assistant Solicitor General
Human Rights Unit
Legal Policy Division
Department of Justice

#57087

IN THE MATTER OF :

**Legislative Proposals To
Implement Article 23 Of
The Basic Law**

INSTRUCTIONS TO COUNSEL

To : Mr David Pannick QC
Barrister-at-law
Blackstone Chambers
Blackstone House
Temple
London EC4Y 9BW

Human Rights Unit
Legal Policy Division
Department of Justice
Hong Kong

#57087

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Proposals to implement Article 23 of the Basic Law

Advice of Mr David Pannick, QC,

given in conference to the

Solicitor General on Wednesday, 9 October 2002,

at Blackstone Chambers, The Temple, London

General Advice

1. The Basic Law imposes an obligation to enact laws in accordance with Article 23, and so it is right for the Hong Kong SAR to produce proposals in that respect.
2. The basic principles that are set out in the Consultation Document, namely that Articles 27 and 39 of the Basic Law must be complied with, are absolutely right.
3. The rights referred to in Articles 27 and 39 are not absolute : a balance must be struck between the rights of individuals and other interests, such as the rights of other persons and the rights of society (see e.g. Shayler).
4. Critics of the proposals must recognize that the question whether a fair balance is being struck is difficult to decide in the abstract. In practice, the question will need to be decided in the context of particular facts, and it will be for the courts to decide that question. It is unlikely that the courts will decide in the abstract whether legislative provisions of the kind proposed are consistent with human rights guarantees. Moreover, it is no basis for objecting to the proposals that one can envisage circumstances in which the drafting of the provisions might allow for an unfair application of the law.
5. If there is concern about the way in which the law may be implemented, the answer is that the courts must interpret and apply general provisions consistently with BL 27 and the ICCPR. This is especially the case given that the express intention behind the proposals is to ensure such consistency. A recent English authority for the proposition that the courts will read down provisions so that they are implemented

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consistently with human rights guarantees is *Sims* [2000] 2 AC 115, 130-132.

- 6. No particular proposal in the Consultation Document causes Mr Pannick any concern, although there is always the possibility that the legislation could be misapplied to particular facts.

Responses to SG's queries

Power to proscribe

- 7. SG referred to concerns expressed about the proposed power to proscribe an organization in Hong Kong that is affiliated to a Mainland organization that has been proscribed on the grounds of national security. Mr Pannick advised that there is nothing inherently objectionable about this. Proscription in the Mainland would merely be a pre-condition to the existence of the power. The Secretary for Security could only exercise the power if he or she reasonably believes that this is necessary in the interests of national security or public safety or public order.
- 8. The question whether there was such a reasonable belief could be challenged by way of judicial review. The test of "necessity" was also a high test. In addition, the question whether the power to proscribe was being correctly exercised would need to be considered in the context of the rights that are being restricted. A recent English case on this point is *Shayler*, in which Lord Bingham emphasized the role of judicial review in cases concerning national security.
- 9. As to the fears that the Secretary for Security might automatically proscribe an organization that was affiliated to an organization that was banned in the Mainland, Mr Pannick advised that this would be plainly unlawful. The basic principles of administrative law would have been contravened. In discussing the proposals, one must assume that the Secretary for Security will act in a lawful manner, and that the courts would intervene if he or she does not do so.

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Serious unlawful means

10. SG referred to one of the proposed heads of "serious unlawful means", namely "serious interference or serious disruption of an essential service, facility or system, whether public or private". He said that this might possibly include conduct in the Mainland that was protected by the ICCPR e.g. strike action or a peaceful demonstration. If this were so, a person in Hong Kong who incited such conduct would commit an offence.
11. Mr Pannick appreciated this might be a cause for concern, but doubted whether the problem could be addressed by listing in the definition of "serious unlawful means" all the types of activities that are to be regarded as lawful. Another possible approach would be to make it clear that the provisions in which "serious unlawful means" are an element are not intended to make unlawful any activity in Hong Kong that is protected by BL 27 or 39. However, Mr Pannick added that a savings provision that was limited in this way could have implications for other parts of the legislation. He therefore recommended a general savings provision that would apply to all the proposed provisions.
12. Mr Pannick could see no disadvantage in a general savings provision since –
 - (1) it was the HKSARG's stated intention to safeguard fundamental human rights; and
 - (2) the courts would in any event read down the legislation in order that it complies with those rights.

Such a savings provision need not suggest that relevant human rights are absolute, but could be along the lines that nothing in this law is intended to contravene Article 27 or 39 of the Basic Law and restrictions apply only in so far as they are lawful pursuant to the Basic Law.

Articles 23 and 39

13. SG referred to concerns that had been expressed that BL 23 might override BL 39. Mr Pannick advised that it was quite impossible to

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interpret Article 23 as overriding Articles 27 and 39. Article 23 requires a judgment to be made as to what laws are required, and any court would decide that the powers in Article 23 are subject to Articles 27 and 39. Mr Pannick said that the debate on the proposals cannot proceed on the assumption that fundamental human rights will be overridden.

Public position

- 14. SG said that it would be helpful if the general advice of senior counsel could be made public. Mr Pannick said that he had given his advice and the HKSARG could use it as it saw fit. He repeated that, in human rights terms, he could not see any objections to the proposals. The general principles set out in the Consultation Document were perfectly acceptable. He noted, however, that the manner in which the proposed laws were implemented was a separate matter, and all powers could in theory be exercised in a manner that was disproportionate. *If that were to occur, the Courts have ample powers to ensure that the provisions are interpreted and applied consistently with Articles 27 and 39 of the basic Law.**

(Bob Allcock)
Solicitor General
15 October 2002

** added by Mr. Pannick per e-mail dated 17 Oct. 2002.*

Ref: LP 5066/2/23C SF(A) IX

#58001

Copied to SASG/BL.

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來函檔號 Your Ref:

電話號碼 Tel. No.: 2867 4902

17 October 2002

Mr. Gary Oliver,
Clerk to Mr David Pannick QC,
Blackstone Chambers,
Blackstone House, Temple,
London EC4Y 9BW,
England
(via SG) *17/10*

BY FAX (020 7822 7350)

Dear Mr. Oliver,

**Proposals to implement
Article 23 of the Basic Law**

Further to Mr. Pannick's conference with our Solicitor General, Mr. Bob Allcock, on 9 October 2002, I attach a note of the advice given by Mr. Pannick prepared by Mr. Allcock. Grateful if you could pass the note to Mr. Pannick for his consideration.

*Pannick's
v. reply -
see folio 11
e-mail
dated
17 Oct. 2002*

In order that we may deploy Mr. Pannick's advice in public, I have instructions to request a formal opinion from Mr. Pannick at his easiest convenience, please.

Yours faithfully,

R. Cheng
(Ms Roxana Cheng)
Senior Assistant Solicitor General
Human Rights Unit

c.c. Mr. Anthony Wu, Deputy Law Officer (Civil)
Encls.



David Pannick
<davidpannick@blackstonechambers.com>

17/10/2002 11:05 PM

To: "roxanacheng@doj.gov.hk" <roxanacheng@doj.gov.hk>
cc:
Subject: Article 23 of the Basic Law
 Urgent Return Receipt

Roxana,

I have only two comments on Bob Allcock's Note of the Conference:

- 1 At the end of paragraph 5, it is "Simms", not "Sims".
- 2 At the end of paragraph 14, please add a further sentence: "If that were to occur, the Courts have ample powers to ensure that the provisions are interpreted and applied consistently with Articles 27 and 39 of the Basic Law".

I'm not sure whether you want a "formal opinion" in addition to the approved conference note. It is not going to say anything different from that Note.

If you do need an Opinion, please return my papers.

Please will you let me know your wishes.

Regards

David Pannick

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