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Submission by JUSTICE, the Hong Kong Section of the International Commission of Jurist to the Security Bureau on the

Consultation Document:

Proposals to Implement Article 23 of the Basic Law

23 December 2002

SECTION 1

General Comments

The "duty" on the HKSAR to legislate under Article 23

1. The provisions in the Crimes Ordinance covering treason, treasonable offences and sedition and the provisions of the Official Secrets Ordinance, the Societies Ordinance and the Emergency Regulations Ordinance are legislation of the HKSAR. The duty to legislate under Article 23 has been more than satisfied by these and many other provisions of our existing laws. The interests of the State are already protected by these and other laws to a degree which is oppressive and inimical to the functioning of a democratic and open society. That said, JUSTICE is in favour of amending the existing legislation both to bring it into conformity with Articles 27-35 of the Basic Law, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and international labour conventions applicable to Hong Kong and to modernise and liberalise its content.

Timing of the legislation

2. For more than 5 years, the HKSAR Government has been considering what amendments to make to existing legislation without any process of public consultation. Amendments were made to the Societies Ordinance by the Provisional Legislative Council without any deliberative process in Hong Kong specifically in order to satisfy the requirements of Article 23. It is indefensible for the Government now to seek to curtail public consultation without allowing the public a reasonable time to consider the detail of the Government's proposals. That detail is absent from the Consultation Paper issued by the Government and cannot serve as a substitute for the publication of a draft bill for consultation.

3. The fiasco surrounding the passage of the Anti-Terrorism legislation amply demonstrates the dangers of the Government's present course of trying to "consult" first and then to correct defects in proposed legislation only whilst it is going through the Legislative Council. The outcome was an Ordinance

which the Government acknowledges to be defective. Hong Kong cannot afford a repeat of that process.

4. Given that the interests of the State are already protected by the existing legislation, there is no urgency whatsoever to pass amending legislation. What is needed is an opportunity for mature and quiet reflection without the blare of "patriotic" propaganda, fanned by the Government, which proceeds upon the mistaken basis that there is currently no legislation in place under Article 23.

JUSTICE calls upon the Government to issue a draft bill for consultation and to allow a reasonable time for the consultation process on such draft bill.

Key Principles

5. All of the offences referred to in Article 23 are offences of a political character. They would therefore be offences which are excluded from extradition on that ground. Particular care needs to be taken when amending the legislation to ensure that political dissent is not suppressed and that open

political dialogue is not just possible but welcomed as the hallmark of a free and democratic society.

6. Any amending legislation should be compatible with the rights enshrined in Articles 27-35 of the Basic Law and the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and international labour conventions applicable to Hong Kong.

7. The HKSAR enjoys a special status under the "One Country, Two Systems" principle and, under Article 5 of the Basic Law, as a region where the socialist system and policies shall not be practiced. These fundamental principles should be properly recognized. Nothing should be done to jeopardize this status.

8. Under Article 23, the HKSAR has no duty to legislate beyond the requirements of that Article. The Government should therefore not exceed the requirements of Article 23 in amending existing legislation. The current proposals go beyond the

requirements of Article 23 in a number of respects and also beyond mainland laws on treason in their application to non-nationals. There is no justification for exceeding either the requirements of Article 23 or going beyond mainland laws.

9. The Government has recognized the need to ensure that all offences encompassed by local legislation to implement Article 23 are as clearly and tightly defined as appropriate so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law. It is regrettable that the proposals in the Consultation Paper do not reflect that recognition.

10. It is incumbent on those proposing criminal laws, particularly criminal laws with potentially heavy penalties, to ensure that persons cannot be made criminals without having the necessary knowledge of facts or without having the intent to cause violence. By containing elements such as "having reasonable grounds to believe" or "having reasonable grounds to suspect" or "a publication would be likely to", the proposed offences are liable to make ignorance or

bad judgment punishable by a minimum of 7 years' imprisonment and a maximum of life imprisonment. This is unacceptable.

11. In framing laws on secession, the right of self-determination must be accorded proper recognition. This right is enshrined in both the ICCPR and the ICESCR.

12. JUSTICE believes that the 'Johannesburg Principles' should be adopted in amending legislation. Although the world has moved on since Louis XIV declared "*L'état, c'est moi*", the underlying attitude still persists among governments and rulers, whether elected or un-elected. The application of these Principles is particularly necessary where there is no avenue for a peaceful change of government. In many countries, it is common to find that the national interest is defined by what is in the interest of the governing party and even worse, by what is in the interest of a particular person or persons in power. The Johannesburg Principles are born out of a recognition that "*some of the most serious violations of human rights and fundamental freedoms are justified by*

governments as necessary to protect national security".

13. Principle 2 states the necessity of ensuring that restrictions are not sought to be justified in the name of national security when in fact the purpose of the restriction is "*to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest*". There are abundant examples of governments all around the world hiding material which is embarrassing or exposes wrongdoing under the cloak of state secrets. Governments are also prepared to see people wrongly convicted by claiming Public Interest Immunity to suppress such information which is helpful to the defence. Two recent examples from the UK are the Matrix Churchill trial and the trial of Princess Diana's butler where claims to Public Interest Immunity were made by the Government of the day. This is what governments mean when they ask ordinary people to sacrifice their rights in the interests of national security i.e. to suffer imprisonment for crimes which

they have not committed in order to save the government embarrassment. There is no balance involved; the state simply overrides the interests of the individual in order to save the government from suffering justified criticism and possible defeat at the next election where such avenues are open.

JUSTICE calls upon the Government to observe all of the Key principles above in amending legislation relating to the areas covered by Article 23

Modernising legislation involves modernising attitudes

14. A survey of existing national security legislation in other jurisdictions is not a helpful way of defining what is necessary to protect national security in the context of modern day threats. The vast majority of those laws will have been made in different times and are already outdated. The archaic language of our current law on treason and treasonable offences and sedition also reflect their incompatibility with a modern-day democratic society.

15. The Government should be more open to different perspectives when looking at the modernisation of these laws and should recognize that the more laws are passed and the more oppressive they are, the more they are treating the residents of Hong Kong and those to whom they intend to extend those laws as enemies.

16. One example of a different perspective on state secrecy is that of an independent expert, David Bickford, former Under-Secretary of State and Legal Adviser to the Security and Intelligence Service of the UK (MI5 and MI6). For copyright reasons, his views are not annexed but can be read in an article at www.sisde.it/sito%5Crivista15.nsf/servnavig/8 written by him in 1999 entitled "*State secrecy or transparency. Balanced secrecy in the new information age*".

17. In his evidence to the Select Committee on Home Affairs in December 1998 concerning the accountability of the Security and Intelligence Agencies, Mr. Bickford pointed out that when he first became Legal Adviser to the Security and Intelligence

Service, he found that no-one, not even the legal advisers, was aware of the European Convention on Human Rights, let alone the delicate balance of rights that exist in relation to national security. The situation in Hong Kong today is similar in that there appears to be no training whatsoever given to those who have the duty of implementing and applying the laws relating to national security.

18. According to the advice which David Pannick Q.C. has given the Government, it will be essential (and not just important as the Government's summary of the Advice misleadingly puts it) to ensure that the application of these laws is consistent with fundamental freedoms on the specific facts of any individual case. In Hong Kong, there are no institutional safeguards and no mechanisms for ensuring that they are so applied. Recent prosecutions under the Public Order Ordinance have shown that the courts are not able to provide any such safeguard. The only certain safeguard is that the amending legislation be narrowly drawn to avoid potential infringement of the fundamental rights and freedoms in the Basic Law and the 2 Covenants and

set at the very minimum necessary to protect national security.

The Proposals: General areas of concern

19. Paras. 2.17-2.18, 3.10-3.12, 4.21, 5.8. 6.26-6.27.
The proposal to extend offences so that they can be committed by all HKSAR permanent residents inside or outside of HK irrespective of their nationality and irrespective of their actual place of residence is one such area.

Many HKSAR permanent residents are not Chinese nationals so insofar as nationals owe a duty of allegiance to the state of which they are a national, they do not owe the duty to the PRC. Other HKSAR PRs may be living and working or studying in Canada, Australia, the UK or the US.

The extension of the law to non-Chinese nationals who are PRs of the HKSAR when they are outside HK. seems to go beyond the requirements of even the PRC Constitution which imposes duties on its citizens i.e. persons holding PRC nationality.

(See also the next section on Extra-Territorial Application)

20. Other proposals going beyond the scope of Article 23 are:

(i) the proposal to make the common law offence of misprision of treason (para.2.14) into a statutory offence.

This falls outside the requirements of Article 23 to enact legislation prohibiting any act of treason.

(ii) the proposal relating to subversion (paras. 5.4 –5.5) to extend it to protecting " the basic system of the state".

Article 23 requires legislation only against any act of subversion against the Central People's Government which, according to Article 85 of the PRC Constitution, is the State Council.

(iii) The proposal to enable the Secretary for Security to proscribe organizations.

This goes beyond that which is required by Article 23, which only requires legislation to prohibit links

between foreign political organisations and HK political organizations or bodies.

This proposal also goes beyond Article 23 which only requires legislation prohibiting "acts".

SECTION 2

Extra-Territorial Application

1. Most of the argument in favour of the extra territorial application of the offences proposed revolves around The Concept of Protection of the State which is discussed from paragraph 1.4 in the Introduction.

2. This argument is controversial and not applicable to the peculiar situation of Hong Kong. This argument is actually based on the concept of "reciproca l obligation", a kind of mutual relationship whereby individual citizens derive "the privilege of protection" from oppression by a protecting state and therefore ought to owe a duty not to harm their protector.

3. It is noted that this top-down notion of privileges is fundamentally contrary to the international norms of fundamental human rights which are possessed inalienably by all individual citizens. Individuals have inherent freedoms and rights to protection by law. These are not mere privileges granted by a government. Protection means full protection by the law so as to uphold all the freedoms and rights allowed by international human rights law, not just a selected few of those rights. This failure to follow the proper legal approach shows the fundamental conceptual error underlying the thinking behind these proposals.

4. The concept does not apply to Hong Kong. The reasoning of "reciprocal obligation" does not logically apply in the context of a non-democratic dictatorship regime whereby the individuals are living under a system which is not democratic nor in full compliance with best international practice so that:-

   a. The so called protecting government is not elected nor properly accountable in the true sense of those words;

   b. The policies of the so called protector are not those of the majority nor even the subject of proper consultation or consensus;

   c. The actions of the protector are not subject to proper scrutiny, democratic safeguards, and legal safeguards and institutional safeguards;

   d. The quality of actions by the protector may be arbitrary, illogical and unreasonable; and

   e. Those actions and policies may be beyond the practical reach of the law and proper procedures for redress for injustice as properly understood;

   f. So that far from providing that protection or freedom from oppression and violence and tyranny assumed and implicit in the concept of protection, the state may actually be a perpetrator of such acts or perpetuate a system of basic injustice;

g. so that the human rights or "well being" of the individual citizens are not actually fully protected, but only protected insofar as they coincide with the wishes or politics of those in actual power.

5. In these circumstances the suggestion of reciprocal obligation is illusory, this is not a situation of free choice, it is a situation of take as it is with its defective system or leave it and depart. If in the future it could be said there was proper democracy with a democratic society, together with the freedoms and institutional safeguards and real protections these bring in, then there may be merit in the argument. Other proper countries with a fully developed democratic system may be able to rely on this concept as a basis, but this concept and argument is is not applicable to Hong Kong with the political situation as it currently is.

6. This defective argument is however heavily relied on for proposing the extra territorial application of the various laws. There is thus no satisfactory, logical or theoretical basis for the arguments in favour of the extra territorial application of the laws which are proposed.

7. No right thinking members of an international community, which is how Hong Kong describes itself when promoting its image for finance and tourism and trade, would consider it illegal and criminal to question and challenge the moral authority of a regime which rests on a dictatorship. Many right thinking people would consider it proper to express opinions and encourage actions which are legal but contrary to the current practises of such a state, and proper to encourage acts which lead to change and reform in the system. These proposals attempt to straddle these uncomfortable facts, and thus the new laws must recognise and allow as specific defences the bona fide acts of those who are trying to achieve change for the public good in a way which is consistent with internationally accepted human rights and principles, whether those persons are in Hong Kong or outside Hong Kong.

8. It should be recognized that opinions expressed outside and acts done outside Hong Kong will not usually pose any direct or immediate or serious danger to the state and thus should not be criminalized. The distance and remoteness of the statements and actions will be enough.

9. Restrictions which will mostly have the effect of discouraging outside criticism are counter productive to the long term competitiveness and quality of life in Hong Kong. Outside consultants are often engaged for their freedom of thought and fresh solutions to old problems. Criticism from outside is seen as independent from an entrenched regime and can be an important catalyst for long term changes for good. Independent views on important matters and politics should be encouraged and not restricted as by the laws proposed.

10. It should be recognized and accepted that Hong Kong is well behind the rest of the international community in terms of deprivation of the fundamental human rights in

respect of democracy and government, and thus should not presume to make criminal in Hong Kong that which is not criminal in the country of its commission.

11. Re Chapter 2, Treason and Extra Territorial Application. See paragraph 2.17 onwards. The above arguments apply, namely the theoretical concept of protection is not valid in the context of a non democratic state and non democratic society, and even more tenuous when applied to an extra territorial situation where the person exercising his rights lawfully in one country is nevertheless deemed to have broken the law of the HKSAR.

12. Additionally foreigners are already subject to various recognized disabilities in law such as not being able to take up various offices because of their status. Presumably there is good reason for this discrimination, since foreigners are different from ordinary citizens. Since such discrimination exists, this is sufficient reason for the law of treason not to be applicable in an extra territorial way to them.

13. To suggest at 2.18 that a persons's family and property enjoys protection in Hong Kong and therefore this is the basis for his prosecution for deeds committed any where in the world is unacceptable. A concept whereby one's possessions or family can lead to conferring criminal liability on a person is not acceptable to a civilized international community.

14. Finally even if it were made of extra territorial application, this should not apply to the very broad definition of levying 'war' contained in Note 17 and the definition of War at page 9. In that context one could find a situation where someone who encouraged a large demonstration from abroad, would find himself facing accusations of treason and levying war.

15. No safeguards are proposed which would recognize the circumstance of someone abroad who does not know of the peculiar laws and practise of Hong Kong or the peculiar political situation which may or may not exist which renders the acts or statements politically unacceptable and then criminal.

16. In relation to Secession at Chapter 3 the question of extra territorial application is even more tenuous. There is no specific offence under the existing laws and the concept is contrary to the right to self-determination in International law.

17. Contrary to paragraph 3.4 many people, especially in an international trading and finance community, may rightly think that there ought to be circumstances whereby distinct and discontented communities should be able to legally express their views with a view to self-determination without being labelled as criminals.

18. The concepts in paragraph 3.5 demonstrate that something like the One China Principle is a political concept so that opposition to that would constitute a political crime which may not be recognised in other right thinking or democratic countries. In these circumstances the so called major crime against the state referred to in paragraph 3.11

would only be a crime against the state in the HKSAR and the Mainland but not elsewhere. If so there is no reason why it should be a crime when committed elsewhere. To enforce such a law would bring Hong Kong's system of law into international disrepute and cause harm to the financial and services sector of the economy. Some countries see federalism as a source of strength and unity, not as breaking up a nation. It would be wiser to not make this proposed new crime extra territorial.

19. It would be much more consistent with justice and international principles if the test for criminality is:
    a. whether the crime is internationally recognised as a crime and
    b. only prosecutable in Hong Kong where the crime is extraditable in the place where it was actually committed.
    c. In summary it is wrong in principle and unwise to extend political crimes to cover actions outside the HKSAR.

20. The specified links with the HKSAR which are relevant to ordinary crimes may not be fair in the context of the political type crimes contemplated by this Proposal. It will be extremely hard to know in advance or predict that what is said or done will have 'results' in Hong Kong or anywhere. The link will have to be much more direct and tangible and severe in consequence to be fair and proportionate.

21. Specific safeguards should be included. Someone could find himself arrested when passing through Hong Kong for something he could have difficulty in knowing or foreseeing and years later. In any event, a limitation period is essential.

22. Sedition and Chapter 4 and Subversion in Chapter 5 and Theft of State Secrets expanded to include even unauthorized access in Chapter 6. These proposals are rendered even more objectionable by widening their scope to cover acts committed abroad. Having regard to the tenuous moral basis for the non democratic system in Hong Kong, one must expect and recognize that critical views and acts concerning this system will take place abroad by persons who object to the system but who should not be criminalized and prosecuted should they visit to see the place for themselves. Their right to do things in another country in compliance with the laws of that country should not be infringed by Hong Kong's new and peculiar feeling of insecurity and exaggerated perception of its need for self protection.

23. These proposals are contrary to the world trends in freedom of expression and information. The world trend is towards free trade or liberalization in the trade in goods, services and ideas, and Hong Kong should not seek to fearfully isolate itself from those liberalizing trends and ideas by unilaterally imposing restrictions by means of its own criminal law. Hong Kong has always regarded itself as being enriched by a diversity of views from abroad and should not now discourage them by unnecessary, unpredictable and harsh new laws.

SECTION 3

Sedition and Theft of State Secrets

The sections of sedition and theft of state secrets in the Consultation Document bear special relevance to the media, since they criminalize the use of words, either spoken or written.

I. Sedition

As far as sedition is concerned, the Consultation Document proposes to provide that *inciting others*

(a) to commit the substantive offence of treason, secession or subversion; or

(b) to cause violence or public disorder which seriously endangers the stability of the state or the HKSAR

amounts to sedition.

As far as the press is concerned, what the law does is to hold the writer responsible for the way *other* people may react to his or her writings. It holds the writer responsible for actions of other people and attributes those actions to writings that may not have had that intended effect. If, out of a million people who read an article, one or two people get agitated enough to take some form of action, is the writer to be held responsible?

Clearly, different people react differently to what they see, read or hear. Some may react violently to an article that leaves other people yawning. It would be illogical to hold a writer responsible only for one response and not for the other. At the end of the day, each person should be accountable for his or her own actions, not those of other people. To hold a writer responsible, it should be necessary for the government to prove intent.

Treason

The ordinance on sedition will be directly linked to the offences of treason, secession and subversion. The Consultation Document, in the section of Treason, suggests that a person commits treason by *levying war by joining forces with a foreigner to overthrow the PRCG, or to compel the PRCG by force or constraint to change its policies or measures, or to put any force or constraint upon the PRCG, or to intimidate or overawe the PRCG.* It also says that "levying war" has been held to include a riot or insurrection involving a considerable number of people for some general purpose.

This means that a riot in Hong Kong, including at least one non-Chinese national, would suffice to meet the criteria for "levying war" with foreign forces. Moreover, it would not be necessary to have as the goal the overthrow of the PRCG: simply to "put

any constraint" upon the PRCG or even "to intimidate or overawe" the PRCG would be enough. And the terms "constraint," "intimidate" and "overawe" are not defined. Presumably, demonstrators engaging in a hunger strike can be said to be attempting to constrain or intimidate the government.

The Consultation Paper says in footnote 18 that the term "PRC Government" represents collectively the Central People's Government and other state organs established during the Constitution. This suggests that the target of demonstrators need not be the PRC Government itself but some lesser institution, such as the Ministry of Education or even a university. This raises the possibility of Hong Kong students striking or demonstrating or taking other action in support of students in mainland China.

A reporter writing on these issues, especially one critical of the government and sympathetic to the demonstrators could be accused of encouraging such activities and hence be charged with sedition.

Secession

Journalists are perhaps most vulnerable to being accused of sedition where secession is concerned. Scholars, too, may run a risk if they write about such issues as Taiwan independence, or the status of Tibet, or even who the rightful owner of the Diaoyutai islands may be. Those islands, of course, are in dispute among mainland China, Taiwan and Japan.

The Consultation Document says that any *withdrawing a part of the PRC from its sovereignty, or resisting the CPG 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 should be outlawed by the offence of secession.*

We have already seen that the Consultation Document says a riot or insurrection may satisfy the concept of "levying war." It is not clear how the term "other serious unlawful means" will be defined but presumably it would be of a lower threshold than "levying war."

The Diaoyutai islands have historically been the cause of numerous protests in Hong Kong. It would not be too far-fetched to assume a situation where a writer, say, wrote an article agreeing with former Taiwan President Lee Teng-hui that the islands actually belong to Japan, not to any Chinese government. If, as a result, there is an anti-Japanese riot (not an anti-Chinese one), would the writer be guilty of incitement? Presumably not, since the violent act stemming from his writing did not have the goal of withdrawing a part of the PRC from its sovereignty, but rather the opposite.

However, if the anti-Japanese protests resulted in rioting by the Japanese community in Hong Kong, presumably the situation would be different. Then, it appears, the writer would be open to charges of sedition.

Subversion

As for subversion, the Consultation Document proposes to make it an offence

(a) *to intimidate the PRCG; or*

(b) to overthrow the PRCG or to 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.

[It appears strange to make the successful overthrow of the PRCG an offence since, presumably, there will be no governmental organ to charge and prosecute offenders. Surely the offence should be to *attempt* to overthrow the PRCG.]

Presumably, a writer would be guilty of sedition if his writings were to incite some readers to resort to "serious unlawful means," whatever that phrase may mean, to take action "to intimidate" the PRCG, whatever that word means.

So much vagueness surrounds the various offences proposed that writers in general and journalists in particular would be extremely vulnerable to charges of sedition, regardless of whether they intended their writings to incite their readers or not.

The new offence of sedition, in addition to covering written and spoken words that incite others to commit offences against the central government, such as treason, secession or subversion, also include cover words that incite others to commit acts of violence or of public disorder that *seriously endanger the stability of the state or the HKSAR.* The same objections apply.

The Consultation Document also talks about "seditious publications" that *would incite the crime of treason, secession or subversion.* It proposes to create a separate offence of dealing with seditious publications. Thus, it *should 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.

Moreover, the mere possession of seditious publications would also be an offence.

There seems little need to create a separate offence of dealing with seditious publications. The very idea is repugnant to those who believe in press freedom. And librarians and other people have already pointed out that they would be vulnerable if possession of supposedly seditious publications were also to be criminalized.

II. Theft of State Secrets

The Consultation Document proposes that where unlawful disclosure is involved, the following categories of information should be protected—

(i) *security and intelligence information;*
(ii) *defence information;*
(iii) *information relating to international relations;*
(iv) *information relating to relations between the Central Authorities of the PRC and the HKSAR; and*
(v) *information relating to commission of offences and criminal investigations.*

While on the surface it may appear reasonable that certain categories of information should be protected, it appears much too sweeping that everything falling under all of these different heads should be protected. In terms of defence information, for example, would the identity of the commander of the PLA garrison in Hong Kong be protected information? Presumably not even though, at the time of China's war with Vietnam, at least one person was arrested for having disclosed the name of the commander on the Chinese side.

Is the size of the garrison protected information? Is the location of the garrison headquarters—the former Prince of Wales Building—protected information? It is far too broad to say that all information relating to all these categories should be protected. The areas to be protected need to be carefully defined and limited only to extremely sensitive information.

Category (iv), information relating to relations between the Central Authorities of the PRC and the HKSAR, is a new category being added to the Official Secrets Ordinance. It is difficult to understand why this category should be protected. The relationship between the HKSAR and the Central Authorities is of great interest, not only to the media, but to the Hong Kong public as well. It is important to make the relationship as transparent as possible rather than to cover it up.

After all, "one country, two systems" presupposes that the Central Authorities will not interfere in the domestic affairs of the HKSAR. If the relationship itself is to be put under a cloak of secrecy, it would be impossible for the press to monitor either the central authorities in Beijing or the local authorities in Hong Kong. Its effect would be extremely negative as far as confidence in Hong Kong is concerned.

Moreover, there are many facets to the relationship between Hong Kong and the central government, including commercial and cultural ones. It makes no sense to make a blanket declaration that all aspects of the relationship are off limits.

The Consultation Document proposes the creation of a new offence *of making an unauthorized and damaging disclosure* of protected information that *was obtained (directly or indirectly) by unauthorized access to it.*

From a practical standpoint, this proposal attempts to make all news media publish nothing but authorized information. It turns the press into government-authorized newspapers. It goes against the very concept of journalism to accept and publish only authorized information given out by governments. It is the job of journalists to ferret out information of interest to the public and to publish it.

In fact, the HKSAR government itself leaks information to the media. Secretary for Security Regina Ip, at a panel discussion on the topic "Is Hong Kong Ready for Article 23?" held at the Foreign Correspondents Club on October 30, acknowledged that "all governments" leak information to the press.

That being the case, how can the recipient of leaked information know whether the official leaking the information is authorized to make the leak or not? The onus should be on officials to preserve information, not on journalists to censor themselves by deciding that certain leaked information ought not be published. There is no way a journalist can tell whether a governmental source is making an authorized or unauthorized disclosure.

Moreover, in the 21st century, much information can be downloaded from the Internet without the person doing the downloading knowing whether the information is protected by any government. In principle, therefore, all information in the public domain should be deemed not to be protected. This is particularly true in the case of prior publication. Anything already published is, by definition, in the public domain.

In addition, even when information the government considers to be protected is published, the law should provide a public interest defense. As the publisher of The New York Times said during the Pentagon Papers episode, governments that get egg on their face like to stamp it secret. A journalist who uncovers wrongdoing in government should not be penalized for exposing official misdeeds. Such disclosures are in the public interest, which is different from the government's interest.

In fact, now that the government is proposing a new offence of making an unauthorized disclosure of protected information, it should at the same time pass freedom of information legislation so that all unprotected information would be accessible to the press and the public.

SECTION 4

Foreign Political Organisations

1. The greatest objection is that there is *no need* for such new legislation. The Societies Ordinance, Cap.151 has already given comprehensive powers to the HKSAR Government to regulate and to control the activities of those societies having affiliations / connection with FPO and/or TPO. This is admitted in the Paper. (para 7.11)

2. Article 23 creates offences of treason, secession, sedition, subversion, theft of state secrets and "prohibits FPO or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with FPO or bodies". Since the Societies Ordinance has already provided the necessary and effective sanctions to deal with activities of FPO or bodies, one just cannot see why it is necessary to have separate and distinct provisions specifically under Art 23 to prevent FPO from conducting political activities in HKSAR! The Government is obliged to see if the existing laws can (which the Government accepted they can) effectively deal with such activities. It is wholly erroneous and illogical for government to propose new laws to create new offences just for the sake of legislation. It is also unnecessary and disproportionate.

3. To grant to the Secretary for Security power to proscribe an organisation under para 7.15 is to create chaos and litigation. This is especially so when one of the reasons to proscribe is that "the organisation is affiliated with a Mainland organisation which has been proscribed in the Mainland by the Central Authorities, in accordance with national law ....." Clearly, the "Fa Lung Kung"(法輪功) organisation is in point. The Catholic Church is another perfect example, not to mention organisations like Justice. There is no mechanism for a Hong Kong Branch of a Mainland organisation to challenge the proscription of the Central Authorities. The national law is unclear or ambiguous on this point.

4. The so-called Appeal mechanism is illusory, given that the Secretary for Security and the local courts are not allowed to question the legality or correctness of the proscription of an organisation in the Mainland. Further, it is difficult to see how, in the guise of national security, public

safety or public order, it would be possible for the Secretary for Security to decide otherwise then to follow the decision of the Central Authorities to proscribe the same organisation or its Hong Kong affiliation in Hong Kong.

5. The proposed definition of "organisation" is very wide, simply, an organised effort by 2 or more people to achieve a common objective, irrespective of whether there is formal organisational structure. Any un-organised public demonstration of more than 2 persons may fall into such definition. There is no need for such a wide net.

6. In the circumstances, if one must confer much power to the Secretary to proscribe an organisation, clear guidelines and conditions must be set out in the legislation in detail. There should also be checks and balances.

ADDITIONAL POWERS

1. The Consultation Paper ("Paper") proposes to give "Additional Powers" to the authorities in their investigation. The powers sought are extensive, including emergency entry, search, seizure and financial investigation powers. The reason being that Article 23 offences affect the fundamental interests of the country. The Paper further states, in other countries "security and intelligence services are almost invariably given enhanced powers for investigative activities". (Chapter 8, Introduction)

2. In justifying the need for such additional powers, the Paper said "the existing investigation powers may not *always* be adequate to cater for the special nature of some Art 23 offences". The example cited in the Paper that a police officer has no emergency entry and search power for the purpose of an investigation.

3. In proposing to vest emergency entry, search and seizure powers to a senior police officer (e.g. a superintendent), it is bound to cause problems. Is there a need for such additional powers? Entry and search warrants can be applied for from a magistrate within a very short

span of time, for example, after preparing a simple affidavit by the investigating officer, an officer can appear before a magistrate in chambers and applied for such a warrant within an hour.

4. It is proposed that such additional powers may be exercised when the senior police officer *reasonably believes* that :
   (a) a relevant offence has been committed;
   (b) immediate action is needed to preserve valued evidence; and
   (c) the investigation would be seriously prejudiced.

   These requirements do not place too much burden on the officer concerned. It is not difficult for a senior officer to justify his reasonable beliefs. There is also no safeguards purposed in the Paper to prevent abuse.

5. Chapter 8 of the Paper proposes to give the Commissioner of Police, in cases of exceptional emergency, in the interests of national security and public safety, power to require banks and deposit taking company to disclose to him information relevant to his investigation. No safeguards are proposed or in existence. Banking institutions may not be able to protect the privacy of their clients. They are unlikely to challenge a request from the Commission of Police. There is no appeal nor review procedure. The only procedure available appears to be Judicial Review. Such powers to the CP, if granted, may cause permanent irreparable damages to the reputation of our local banking institutions.

6. The Paper proposes to include Art 23 offences under Schedule 1 to the Organised and Serious Crimes Ordinance. It is to be noted that OSCO itself is draconian enough. Under section 2 of that Ordinance, organised crime means a Schedule I offence that :
   (a) is connected with the activities of a particular triad society;
   (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule I offence and involves substantial planning and organisation; and
   (c) is committed by 2 or more persons involves substantial planing and organisation and involves :
      (i) loss of life .....

(ii) serious bodily or psychological harm .....

(iii) serious loss of liberty .....

One sees that the net is widely casted. It is too draconian a measure to extend such extensive powers to the police.

SECTION 5

Specific Comments

Treason

Objections to Proposals

- Definition of "levying war" is too broad in including any foreseeable disturbance produced by a considerable number of persons directed at some purpose of a general character
- Includes as a "criminal" intent the legitimate aim of compelling the PRCG to change its policies or measures
- Includes as a "criminal' intent the vague and subjective purpose of intimidating or overawing the PRCG
- In defining the "criminal" intent, includes the use of the vague terms "compel... by constraint" and "put any constraint upon" confusing intent with means
- Includes as criminal acts non-violent attacks
- Confuses the proposed offence of treason with the proposed offence of subversion
- No need for separate offence of instigating a foreigner to invade the country since this will be

covered by the other offences including the inchoate offences

- Offence of assisting public enemy at war is too vague since what constitutes assistance is unclear and war is not confined to a publicly declared state of hostilities
- No justification for enacting the common law (obsolete) offence of misprision of treason when the common law (obsolete) offence of compounding treason is to be abolished

Secession

Objections to proposals

- "withdrawing a part of the PRC from its sovereignty" is too vague: does it for instance include a claim to the exercise of fishing rights or mining rights within the territorial waters of the PRC?
- "resisting the CPG in its exercise of sovereignty over a part of China" is too vague: does it include the refusal of an individual to recognise the right of the PRC or the local PRC authorities to impose licensing requirements on such activities as fishing or mining within territorial waters and using arms to resist arrest?

- Definition of "levying war" is too broad (see above under 'Treason)
- 'Threat of force' should not be included as an element of the offence (Johannesburg Principle 6)
- 'Serious unlawful means' as an element of the offence is too vague; either the means are already separately criminal offences or, if not, civil wrongs should not be included
- Proscription of organizations is confused with prohibition of acts of secession: only the latter is to be criminalized under Article 23

Sedition

Objections to proposals

- Incitement of others to commit the offences of treason, secession or subversion is already in substance covered by the inchoate offences in relation to these acts: there is no justification for creating a separate offence in addition to those inchoate offences
- The words "which seriously endangers the stability of the State or the HKSAR" in the alternative limb of the proposed offence are vague, imprecise and

subjective: by what criteria is it to be determined whether the danger to stability is serious?

- The offence as proposed violates the Johannesburg Principles
- The offences relating to seditious publications, unlike the current law, can be committed without the necessary seditious intent and through misjudgment of the likely effect of the contents

Subversion

Objections to proposals

- The acts of subversion to be prohibited under Article 23 are those against the State Council not the PRCG as defined in the proposals
- The criminal intent or purpose of intimidating the PRCG is too vague and subjective
- The criminal intent or purpose of disestablishing the basic system of the state as established by the Constitution is vague and imprecise
- See above as to "levying war", "threat of force" and "other serious unlawful means"
- Proscription of organizations is confused with prohibition of acts of subversion against the CPG: only the latter is to be criminalized under Article 23

Theft of State Secrets

Objections to proposals

- As recognized by the Government in para. 6.17, the category of protected information relating to the commission of offences and criminal investigations fall outside the ambit of theft of State secrets and are therefore not required by Article 23
- There is no justification for extending protection to information relating to relations between the Central Authorities of the PRC and the HKSAR: this category was formerly an aspect of information relating to international relations but is no longer
- In relation to the offence of "spying", the proposed criteria of unauthorized disclosure of information of a sensitive nature and which is damaging is far too broad, vague and subjective
- The existing and proposed offences violate the Johannesburg Principles in particular Principles 11, 12, 15, 17 and 18
- The proposed new offence under paragraph 6.22 potentially criminalizes those who make a disclosure without knowing the source of the information

- There is no defence of disclosures in the public interest

Proscription Powers

Objections to proposals

- The proposals go beyond that which Article23 requires
- There are already extensive powers of proscription under the Societies Ordinance and the Anti-Terrorism legislation: the Government has failed to demonstrate any necessity for further powers
- The proposed independent tribunal is an insufficient safeguard against the infringement of the right to freedom of association and other fundamental rights: the Courts must have a full power of review of fact and law with the onus being on the Government to justify the exercise of the power

Search and Investigation Powers

Objections to proposals

- No justification has been put up by the Government to establish the necessity as opposed to the

administrative convenience of having the grossly intrusive powers proposed

Miscellaneous Matters

Objections to proposals

- The underlying rationale for the existence of time-limits on the offences of treason and sedition still hold good and no justification has been put forward for abolishing the time limits
- Extra-territorial application and application to non-nationals is arguably beyond the legislative competence of the SAR and in part goes beyond the PRC laws
- Statutory enactment of inchoate offences is unnecessary