National Security (Legislative Provisions) Bill - Protecting National Security and Human Rights

Introduction

On 5 July 2003, the SAR Government proposed further Committee Stage amendments to address concerns in respect of three areas of the National Security (Legislative Provisions) Bill, namely the proposed proscription mechanism, the absence of a "public interest defence", and the proposed emergency investigative powers for the Police (please refer to paper no. 111). This note sets out the rationale for and discusses the effect of the amendments.

Proscription Mechanism

2. Perhaps the most contentious issue has been the proposed power to ban a local organization that is subordinate to a Mainland organization that has been banned by Central Authorities on the grounds of protecting the security of the PRC.

3. The proposal is consistent with the "One Country, Two Systems" principle. Any decision to ban a Mainland organization would be made under PRC law, and would not affect the lawfulness of its activities in Hong Kong. If there were a local organization that was subordinate to one banned in the Mainland, it could not be banned in Hong Kong under Mainland law. And it could only be banned under Hong Kong law if its activities were such that the Secretary for Security reasonably believed that this was necessary in the interests of safeguarding territorial integrity and the independence of the PRC, and that such a ban would be proportionate to the threat that it posed.

4. When the Societies Ordinance was first enacted in 1949 it gave the Executive the power to refuse registration of any society on the grounds that the society was likely to be used for a purpose prejudicial to or incompatible with peace, welfare or good order in Hong Kong. Those grounds were amended in 1992 to permit the operation of a society to be prohibited if it might be prejudicial to the security of Hong Kong or to public safety or public order. They were further amended in 1997 to permit prohibition on the grounds of national security. The Governor in Council (now the Chief Executive in Council) also had a power to strike companies off the register of companies on

similar grounds since 1959.

5. Under the current law, any society or company can be banned by the Executive on the grounds of national security, provided that international human rights standards are satisfied. Under the proposed new section 8A(2) of the Societies Ordinance to be added by Clause 15 of the Bill, that power will be replaced by a power to ban an organization on national security grounds only in three circumstances. One of these circumstances (under the new section 8A(2)(c)) is that it is subordinate to a Mainland organization that has been banned under PRC law.

6. Under the Bill, before an organization could be banned in Hong Kong, not only must international human rights standards be satisfied, but one of the three circumstances mentioned above must also be satisfied. The 'link' with the Mainland does not, therefore, extend the power of proscription, but acts as a limitation on it.

7. Despite these considerations, it was clear that there was widespread concern about the proposal. The Government therefore agreed to drop it. As a result, the Bill as so amended would not contain any provision referring to Mainland laws or decisions. There is therefore no need for any further concern that the Bill might blur the distinction between the two legal systems. There is also no need for any reference to a certificate to be issued by the CPG regarding the fact of the prohibition of a Mainland organization.

8. It should be noted, however, that the Bill would still contain a power to proscribe a local organization which -

(i) has an objective of engaging in acts of treason, subversion, secession, sedition or spying, or

(ii) has committed or attempted to commit such acts.

Article 23 of the Basic Law requires the Hong Kong SAR to prohibit such acts, and creating a power to ban such organizations is a legitimate way of prohibiting those acts.

9. If a local organization were banned, an appeal would lie both on law and on facts to the Court of First Instance, which would be required to consider the issue in accordance with international human rights standards. If the Secretary for Security did not satisfy the court that the proscription was

justifiable, the court would set it aside.

"Public interest defence"

10. Criticism has also been directed at the absence of any public interest defence in respect of the unauthorized disclosure of protected information. Such a defence has never been provided either in Hong Kong's official secrets legislation, or in the UK legislation on which it is based. The issue was thoroughly debated in the UK Parliament in 1989, and in the Legislative Council in 1997. Both legislatures rejected the call for such a defence. The main reason was that the offence of unauthorized disclosure is structured in such a way that it can never be in the public interest to commit the offence. So far as the media and general public are concerned, only disclosures that are "damaging" in defined ways are offences. Moreover, the legislation has been in place for over ten years and has clearly *not* had a "chilling effect" on the media.

11. The Bill retains the "damaging" test. So far as the one newly defined category of protected information of "Hong Kong affairs within the responsibility of the Central Authorities" is concerned, unauthorized disclosure will only be an offence if it endangers, or is likely to endanger, the territorial integrity or independence of the PRC. It can never be in the public interest to commit that offence.

12. Despite the fact that a general public interest defence was not included in the UK Official Secrets Act 1989, or in secrecy laws based on the UK Act found in other common law jurisdictions, the SAR Government has announced that it is introducing a public interest exception to alleviate concerns.

13. The exception would apply in respect of an existing offence of making a damaging disclosure of protected information. A member of the media, or of the community, who made such a disclosure would not commit an offence if –

(i) the disclosure reveals any unlawful activity, abuse of power, serious neglect of duty or other serious misconduct by any public official, or reveals a serious threat to public order, public security, or the health or safety of the public,

(ii) the disclosure does not exceed the extent that is necessary for revealing that matter, and

(iii) having regard to all the circumstances of the case, the public interest served by the disclosure outweighs the public interest served by not making that disclosure.

14. This provision is based on a defence found in the Prevention of Bribery Ordinance. It is an offence to disclose the identity of a person who is subject to an ICAC investigation, or the details of such an investigation, unless the disclosure is made with lawful authority or reasonable excuse. A reasonable excuse exists if, but only to the extent that, the disclosure reveals –

(i) any unlawful activity, abuse of power, serious neglect of duty, or other serious misconduct by any ICAC officer; or

(ii) a serious threat to public order or to the security of Hong Kong or to the health or safety of the public.

15. Some of those who called for a public interest defence in the Bill suggested that it should be based on the provision in the Prevention of Bribery Ordinance. The Government has adopted that suggestion, but has modified the defence by adding a balancing test. That test requires that the public interest served by disclosure must outweigh the public interest in non-disclosure. This is considered necessary, since it would be illogical for a seriously damaging disclosure to be permitted on the grounds of some trivial benefit to the public interest.

Emergency investigative powers for the Police

16. Under the Bill, the Police would be able to exercise *emergency* entry and search powers, without having to obtain a judicial warrant, if a police officer of or above the rank of chief superintendent of police reasonably believes that -

(i) a relevant offence has been or is being committed;

(ii) evidence of substantial (i.e. not nominal or incidental) value to the investigation of the offence is in the premises in question; and

(iii) such evidence will be lost unless immediate action is taken, and such loss would seriously prejudice the investigation of the relevant offence.

17. These proposed emergency powers are no different in nature than existing powers available to the Police for crimes like illegal gambling, drug trafficking, vice and illegal possession of fire arms. The Bill provides that the proposed emergency powers can only be exercised by a senior police officer at or above the rank of Chief Superintendent of Police. The rank of the authorizing officer was later proposed to be raised to Assistant Commissioner of Police.

18. We have stressed that the emergency powers could only be exercised under tightly-defined circumstances, and that a judicial warrant would have to be applied for before entry, search and seizure powers could be exercised in all other non-emergency situations. In addition, the Bill specifically provides that all search and seizure powers involving journalistic materials could only be exercised under authority of a judicial warrant. In other words, the emergency powers would not have applied to those materials.

19. The Government is proposing to remove from the Bill the proposed emergency investigation powers.

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