

**The Administration's Response to Issues Raised by the  
Legislative Council Assistant Legal Adviser in her letter of 27 March 2003**

**Introduction**

This note sets out the Administration's response to certain issues raised by the Legislative Council Assistant Legal Adviser in her letter of 27 March 2003. The questions are reproduced in italics and followed by our response. The other issues raised in the letter will be dealt with separately.

**A. General Observations**

*Enforcement to be consistent with the Basic Law*

A2. *The new section 18A of the Crimes Ordinance, the new section 12A of the Official Secrets Ordinance and the new section 2A of the Societies Ordinance provide respectively that Parts I, II and IIA of the Crimes Ordinance, Part III of the Official Secrets Ordinance and the whole of the Societies Ordinance are to be interpreted, applied and enforced in a manner that is consistent with Article 39 of the Basic Law.*

*Please clarify the intended effect of these provisions and explain the reasons for the apparent difference of coverage in their respective ordinances. Why are articles on fundamental rights in Chapter 3 of the Basic Law which are relevant in the context of the Bill not included in these provisions? Is the new section 18A intended to reflect the "adequate and effective safeguards" referred to in paragraph 3.7 of the Consultation Document? In terms of drafting, has the Administration considered the need to qualify the provisions to the effect that they are made without prejudice to other provisions of that Ordinance or other Ordinances?*

**Response**

Please refer to the Administration's response issued on 9 April (Paper No. 16).

*Adaptation of laws*

A3. *The Official Secrets Ordinance and the Crimes Ordinance have not*

*been adapted under the Adaptation of Laws Programme. It is appreciated that this Bill is not an adaptation of laws bill. However, since some of the existing provisions which are relevant to the Bill contain expressions which are yet to be adapted, why are they not adapted in the current exercise?*

Response

The National Security (Legislative Provisions) Bill is to provide for the necessary amendments for the implementation of Article 23, and is therefore not intended to be an adaptation of laws bill. The Adaptation of the relevant provisions will be the subject of a separate exercise. Please refer to the Administration's paper issued to the Bills Committee on 24 April (Paper No.28).

**B. Amendments to the Crimes Ordinance (Cap. 200)  
Clauses 3 to 7, paragraphs 13 to 15 of the Schedule**

New section 2 Treason

*B1. Please explain the reasons for proposing to have the Central People's Government as the object of the intended overthrow, intimidation or compulsion in the new section 2(1)(a).*

Response

The proposed offence is based on the existing provisions under the Crimes Ordinance, and the subject of protection is "Her Majesty," who was the sovereign of Hong Kong as a colony of the UK. The constitutionally established central or federal government of a country has the responsibility and authority to exercise sovereign powers, the Central People's Government is therefore the target of protection for the treason offence in post re-unification Hong Kong. This is in line with the principles under section 2A and Schedule 8 of the Interpretation and General Clauses Ordinance.

Other common law jurisdictions also protect their central governments from being overthrown by treason offences, e.g. in USA, Canada and Australia.

*B2. Has the Administration considered providing expressly to exclude assistance rendered on humanitarian grounds from the new section 2(1)(c)?*

## Response

Yes. However, for the following reasons this is not considered necessary. Under the existing law, it is already an offence to assist a public enemy at war with the PRC. At common law, 'public enemy at war with the PRC' includes civilian nationals whose country is at war with the PRC. Under the Bill, public enemy is narrowly defined to mean only the government of a foreign country at war with the PRC, or foreign armed forces at war with the PRC. War is also limited to mean only declared war or open armed conflict between armed forces. In addition, the offence under section 2(1)(c) would only be convicted if an intent to prejudice the position of the PRC in the war can be proved beyond reasonable doubt; humanitarian actions will not be carried out with such intent, and will therefore not be caught. It is not necessary to provide for such a defence.

*B3. The new section 2(3) provides that subsections (1) and (2) apply to any Chinese national who is a Hong Kong permanent resident in relation to any act referred to in subsection (1) done by him outside Hong Kong. How does the Administration intend to implement the new section 2(3)?*

## Response

The extra-territorial clauses of the offences of treason, subversion and secession provide for the circumstances where the courts have jurisdiction to try these offences committed outside of the geographical boundaries of Hong Kong. These clauses will not extend the enforcement powers of Hong Kong authorities to investigate an offence or apprehend a suspect outside of the territory. Enforcement of the extra-territorial element of the offence provisions will be a function of various factors including relevant principles of international law, considerations of jurisdictional issues as well as relevant agreements on mutual legal assistance, rendition or extradition.

If a relevant person committed an extra-territorial offence and subsequently returned to Hong Kong, he could of course be arrested and prosecuted in the normal way.

*B4. How does a Chinese national who is also a Hong Kong permanent resident lose his status as a Hong Kong permanent resident? Why does the offence of subversion or secession apply to any person in Hong Kong and not a Chinese national?*

## Response

Please refer to the Administration's response issued separately on 17 April (Paper No. 25) regarding the loss and retention of the Hong Kong permanent residency status.

Following common law principles, any person who is within the physical boundary of Hong Kong will be subject to local laws, regardless of his nationality or residency status. Application of the offences is further explained in the Administration's response issued on 25 April (Paper No. 32).

## New section 2A Subversion

*B5. What are the intended meanings of the expressions "disestablishes the basic system of the People's Republic of China as established by the Constitution of the People's Republic of China" and "seriously endangers the stability of the People's Republic of China" in the new section 2A(1)(a) and "an essential service, facility or system" in the new section 2A(4)(b)(v)? Specifically, what does the term "廢止" mean?*

## Response

As in other common law jurisdictions such as Australia, the Constitution is the target of protection from sabotage. The phrase "basic system of the People's Republic of China" refers to the fundamental principles of governance of the state.

The phrase "seriously endangers the stability of the People's Republic of China" qualifies the extent of "force" or "serious criminal means" to be used in the offence of subversion. The formulation is intended to exclude trivial or nominal force or actions, notwithstanding that such force or action might have already constituted an offence in other contexts. The force or action used must reach a level that it would threaten the stability of the PRC before such use will constitute an element of the subversion offence.

The Chinese term "廢止" ("disestablishes") means the opposite of "確立" ("establishes"). The term is used in the new section 2A(1)(a) to describe action or otherwise to depose or terminate the proper functioning of the basic system of the State established under the Constitution. The phrase "essential service, facility or system" is intended to carry its ordinary dictionary meaning.

*B6. The new section 2A(3) provides that subsections (1) and (2) apply to any Hong Kong permanent resident in relation to any act referred to in subsection (1) done by him outside Hong Kong. How does the Administration intend to implement the new section 2A(3)?*

Response

Please see response to B3.

New section 2B Secession

*B8. What are the intended meanings of the expressions, "withdrawing any part of the People's Republic of China from its sovereignty" in section 2B(1) and "seriously endangering the territorial integrity of the People's Republic of China" in section 2B(1)(a); and how is the latter expression different from "seriously endangering the stability of the People's Republic of China" in section 2A(1)?*

Response

We have proposed to define secession as involving a physical withdrawal of a part of the PRC from its sovereignty. From an international law perspective, such acts will involve changes in recognised state boundaries. The target of protection is therefore the territorial integrity of the country. The phrase "seriously endangering the territorial integrity of the People's Republic of China" qualifies the extent of the "force" or "serious criminal means" that might be used to constitute the offence of secession. The formulation is intended to exclude trivial or nominal force or actions, notwithstanding that such force or action might have already constituted an offence in other contexts. The difference in wording for the expressions used in the subversion and secession offences is due to the difference in the target of protection. The subversion offence targets threats against the stability and functioning of government, whereas the secession offence targets threats against territorial integrity.

*B9. The new section 2B(3) provides that subsections (1) and (2) apply to any Hong Kong permanent resident in relation to any act referred to in subsection (1) done by him outside Hong Kong. How does the Administration intend to implement the new section 2B(3)?*

Response

Please see response to B3.

*B10. What are the justifications for the statement in the Explanatory Notes that "the scope of offence [of secession] is narrowly defined and will not affect human rights and freedoms"?*

Response

All the offence provisions in the Bill are constructed so as to prohibit acts that pose genuine threats to national security. The secession offence prohibits the withdrawal of a part of the country by means of war, or by force or serious criminal means of such an extent that the territorial integrity of the country is seriously endangered. We strongly believe that fundamental rights to advocacy and freedom of expression etc. are not affected, and that the sanctions are proportionate and necessary in order to deal with the threat in accordance with international standards such as the International Covenant on Civil and Political Rights.

Additional protection of human rights is provided by the proposed new section 18A of the Crimes Ordinance, which applies (amongst other offences) to secession.

*New section 2C Conspiracy and attempt to do acts outside Hong Kong*

*B11. Under the new sections 2A(3) and 2B(3), a Hong Kong permanent resident would commit the offences of subversion or secession if he does any act referred to in those two sections outside Hong Kong. It appears that the one or more of the parties to the agreement outside Hong Kong in the new section 2C(1) and the person doing any act outside Hong Kong in the new section 2C(2) include a person other than a Hong Kong permanent resident. It is possible for a person to be guilty of conspiracy or attempt even though he would not be guilty of the substantive offence. Please clarify whether there is any inconsistency in the policy.*

Response

The new sections 2C(1) and 2C(2) refer to, respectively, the acts of conspiracy and attempt which are done by any person while he is physically in Hong Kong. Following common law principles, any person who is within the

physical boundary of Hong Kong will be subject to local laws, regardless of his nationality or residency status. The relevant elements of the offence (respectively the agreement in the conspiracy offence and the action that is 'more than preparatory' in the attempt offence) are completed while the accused is within the geographical boundaries of Hong Kong. There is no inconsistency with the proposed extra-territorial application of the subversion and secession offences.

*Repeal of section 4 Limitations as to trial for treason etc*

*B13. Please justify why the existing time limit of 3 years for prosecution of treason is repealed, and why no time limit for prosecution of the new offences of subversion and secession is introduced.*

*Response*

As explained in paragraph 9.5 of the Consultation Document, we question as a matter of principle whether it is right to "write off" a serious criminal offence because of the expiry of a time limit for prosecution. Indeed, the Canadian Law Reform Commission also recommended the removal of the time limit for the prosecution of the treason offence (see the Administration's response to Q28.2 in the list of questions raised by Hon. James To on 4 December 2002). The reprehensible nature of the serious criminal acts of treason, subversion, secession and sedition will not diminish with the passage of time.

The common law and Article 14 of the ICCPR already provide for adequate safeguards against any undue delays in bringing prosecutions against criminal offences.

*Sections 6, 7 and 18 Incitement to mutiny and disaffection, unlawful drilling*

*B14. Questions relating to the rationale for not proposing to adapt provisions in the three ordinances, including sections 6, 7 and 18 of the Crimes Ordinance were asked by Members at the Bills Committee meeting held on 25 March 2003. In addition to those questions, would the Administration let the Committee have its views on why there are no amendments proposed in the Bill to existing provisions which contain outdated references when the objects of the Bill as set out in the long title to the Bill include related and incidental amendments.*

Response

Please see response to A3.

New section 9A Seditious

*B15. It is stated in paragraph 13 of the LegCo Brief that "the reformed offence of sedition does not criminalize peaceful advocacy". Would the Administration elaborate on this statement, especially in relation to the meaning of "peaceful advocacy". Is "peaceful" intended to describe the manner or content of communication, or both?*

Response

The relevant statement in the LegCo Brief is intended to highlight the Government's recognition of the obligation to safeguard the freedom of expression. In the interpretation, application and enforcement of all the provisions of the Bill, it is expressly stipulated that the same must be consistent with Article 39 of the Basic Law, which entrenches international standards on rights and freedoms. Such standards included the principles of necessity and proportionality. Rights to advocacy, amongst others, will be protected accordingly.

*B16. The Administration summarizes the common law offence of incitement at the last page of the Explanatory Notes. Please confirm—*

*(a) that the offence of incitement is complete whether or not the inciter persuades another to commit or attempt commit the offence;*

*(b) that the defence of impossibility at common law is available.*

Response

(a) The offence of incitement, at common law, does not require that the incitement is successful in persuading another person to commit, or to attempt to commit, the offence incited.

(b) The common law rules under which, in certain circumstances, impossibility is a defence to incitement shall apply in Hong Kong.

*B17. It is noted that the expression "seriously endangering the stability of the People's Republic of China" appears in sections 9A(1)(b), 9D(1)(b) and 2A(1). Please confirm if the expression is intended to bear the same meaning in the three provisions.*

Response

The expression is intended to carry the same meaning in the three provisions. Please also see response to B5.

*New section 9C Handling seditious publication*

*B18. Please explain why the penalty for handling seditious publication has been substantially raised from a fine of \$5,000 and imprisonment for 2 years for a first offence and imprisonment for 3 years for a subsequent offence (see repealed section 10) to \$500,000 and imprisonment for 7 years.*

Response

The existing wide offences on handling and possession of seditious publications are proposed to be repealed in the Bill. The proposed sedition offence is substantially narrowed down and is based on the common law offence of incitement. The required mental element is an intent to incite others to commit treason, subversion or secession. Since these latter offences each carry a maximum penalty of life imprisonment, it is appropriate to impose the proposed penalties.

*New section 9D Certain acts are not incitement*

*B19. It is stated in paragraph 14 of the LegCo Brief that the new section 9D retains the existing safeguards for advocacy under the Crimes Ordinance. Although the present formulation of the new section 9D appears to follow existing section 10, would the Administration consider modifying that so that the burden and standard of proof would be made explicit.*

Response

Strictly speaking, section 9D is not needed, since only acts done with the intention of inciting treason, subversion, secession or violent public disorder could amount to sedition. The onus of proving such an intention lies on the prosecution. However, since the current definition of seditious intention

excludes certain acts, it was decided to retain those exclusions for the purpose of reassurance. There is no need to extend their coverage.

Repeal of section 11 Legal proceedings

*B21. Please justify why no time limit for prosecution of the offences of sedition and handling seditious publication is introduced, having regard to the existing time limit of 6 months for prosecution of sedition-related offences.*

Response

Please see response to B13.

In addition, it should be noted that the proposed new offence of sedition is much narrower than the current law, and involves the incitement of very serious offence or violent public disorder. In these circumstances, there is no justification for a time limit on prosecutions.

Section 12 Evidence

*B22. Section 12 was to be amended by the Crimes (Amendment) (No. 2) Ordinance 1997 (89 of 1997) which was enacted but has not, to date, been brought into operation. The effect of the amendment is such that no person shall be convicted for an offence under Parts I and II on the uncorroborated testimony of one witness. Has the Administration considered extending the application to sections 2, 2A and 2B?*

Response

As explained in paragraph 4.20 of the Consultation Document, the general principle is that the quality not quantity of evidence should count in a criminal trial. We note that the corroboration requirement is unusual in the laws of Hong Kong, and it is also a trend in all common law jurisdictions to move away from the corroboration requirements.

While we are of the view that this requirement should be retained for the sedition offence for the sake of reassurance, we do not see any in-principle need to extend it to sections 2, 2A and 2B of the Bill.

Section 13 Search warrant

*B23. Section 13 was to be repealed by the Crimes (Amendment) (No. 2) Ordinance 1997 which was enacted but has not, to date, been brought into operation. What is the policy of the Administration in relation to section 13 in the light of amendments proposed to the section?*

Response

It is the Administration's policy intention to retain section 13, subject to relevant consequential amendments set out in paragraph 15 of Schedule 1. The amended section 13 provides for the grant of a judicial warrant for the entry and search of premises and persons, and to seize anything which any police officer has reasonable grounds to suspect to be evidence of an offence under the new sections 9A or 9C.

New section 18B Investigation power

*B24. The existing sections 8 and 13 (to be amended) provide for the issue of search warrant respectively by a judge and magistrate for the investigation of the offences under sections 7, 9A and 9C. Please justify the need for additional investigation power to the police.*

Response

The proposed powers of investigation and search are emergency powers which are to be exercised in tightly defined circumstances where -

- (i) a relevant offence has been or is being committed;
- (ii) evidence of substantial (i.e. not nominal nor 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.

Moreover, we have stipulated in the Bill that these powers can only be exercised by a police officer of or above the rank of Chief Superintendent of Police. As explained in the response to B23, a judicial warrant would have to be applied for before entry, search and seizure powers could be exercised in other non-emergency situations.

Such emergency powers are not new. As explained in an earlier paper submitted by the Administration (LC Paper No. CB(2)86/02-03(01)), in view of the serious nature of offences undermining national security, we consider giving such emergency powers to the Police justifiable. The proposed new section 18A of the Crimes Ordinance also stipulates expressly that all the provisions must be interpreted, applied and *enforced* (italics added) in a manner consistent with Article 39 of the Basic Law, in other words with prevailing international standards on rights and freedoms.

**C. Amendments to the Official Secrets Ordinance (Cap. 521)  
Clauses 8 to 12, paragraphs 32 to 34 of the Schedule**

Section 12 Interpretation

*C1. Please clarify whether there would be any change in the scope of application arising from the amendment to the definition of "public servant".*

Response

Sections 14 to 18 of the Official Secrets Ordinance relates to information held by or originated from public servants. The proposed narrowing of the definition of "public servant," where it refers only to HKSAR public officers, will restrict the circumstances in which the unauthorised disclosure of protected information will be an offence.

Section 18 Unauthorized disclosures or illegal access

*C2. What are the justifications for extending the offence of disclosure of information acquired by means of illegal access under the new section 18(2)(d) to persons who do not owe a duty of confidence?*

Response

Some people argue that the onus to safeguard protected information falls on the authorities, and we certainly agree that the authorities should take reasonable measures to protect such information. However, that does not mean that, if protection information is leaked or illegally obtained, other people should be free to make a damaging disclosure of it. The existing criminal offence under the Official Secrets Ordinance is not limited to those who owe a duty of confidence. An unauthorised and damaging disclosure of protected

information obtained by “illegal access” could be just as damaging to the public interest as a disclosure resulting from a leak by a civil servant. For example, the disclosure of information concerning a police investigation, obtained by hacking into a police computer, could tip-off the suspect in the same way as a disclosure based on a police leak. “Illegal access” is also narrowly defined to mean only obtaining access by one of four specified offences in Hong Kong, viz. hacking, theft, burglary, robbery and bribery.

The proposed new offence is very narrowly defined. Members of the public or the media who disclose information would commit an offence only if their disclosure was without lawful authority, and -

- (i) the information came into their possession or as a result of it having been acquired by means of illegal action;
- (ii) they knew, or had reasonable grounds to believe, that the information was protected, and had come into their possession in that way; and
- (iii) the disclosure was damaging and they knew, or had reasonable cause to believe, that it would be damaging.

These tests are high thresholds.

*C3. Please clarify whether the acts of "illegal access" defined in the new section 18(5A) could be covered by the offence of spying, and if so, whether the proposal duplicates or overlaps the offence of unlawful disclosure of information resulting from spying under the existing section 19.*

### Response

The underlying intent and likely consequence or damage of spying and non-spying activities are very different. Unlike unlawful disclosure offences, the type of information involved in spying is not specified. Instead, information disclosed or accessed in the spying offence must be related to a purpose prejudicial to the safety or interests of the country, and that the information is likely to be or intended to be useful to the enemy. According to case law, the term “enemy” means someone with whom the country is at war and a potential enemy with whom the country might be at war (see *R v. Parrot* (1913) 8 Cr App Rep 186). The spying offence is therefore a very narrow offence. Section 19 of the Official Secrets Ordinance penalises the unlawful disclosure of information which the accused knew or has reasonable cause to believe had come into his possession as a result of a spying offence.

In contrast, for an offence of unlawful disclosure of protected information entrusted in confidence or obtained through unauthorised disclosure under section 18, or through illegal access under the new section 18(5A), the type of information protected is defined under sections 13 to 17 and the new section 16A.

Section 23 Acts done abroad

C5. *Please clarify the policy reasons for section 23 to apply to the new sections 16A and 18(2)(d) and clarify how the Administration intends to implement it.*

Response

As with the existing offences of unlawful disclosure under the Official Secrets Ordinance, damaging disclosures of protected information under the new section 16A or of protected information obtained through illegal access under the new section 18(2)(d) are equally reprehensible whether such disclosures are made in Hong Kong or not. It is therefore logical if the provision on the extra-territorial application of the existing unlawful disclosure offences should also cover the new sections 16A and 18(2)(d). It should be noted that section 23 is only applicable to a Chinese national, a Hong Kong permanent resident or a public servant. Please also see response to B3.

**D. Amendments to the Societies Ordinance (Cap. 151)  
Clauses 13, 14 and 15, paragraphs 6 to 12 of the Schedule**

New section 8A Proscription of organizations

D1. *The proposed power to proscribe a local organization is additional to the existing powers of registering a local society, cancelling the registration or exemption of a local society and making an order prohibiting the operation of a society on the ground that it is necessary in the interests of national security under sections 5A, 5D and 8 of the Societies Ordinance. Bearing in mind that any law enacted with the effect of restricting the protected right to freedom of association must satisfy the requirement that it is necessary in a democratic society in the interest of national security or public safety etc. (Article 18 of the Hong Kong Bill of Rights), what would be the justifications, apart from the stated purpose to "thwart organization of activities that would genuinely endanger the state" (at paragraph 21 of the LegCo Brief), for enacting the*

*proposed new section 8A and provisions related to it.*

*D2. Please consider whether sections 5A, 5D and 8 should be amended to incorporate explicitly the requirement of "proportionality" as it appears that the powers vested in the Societies Officer and the Secretary for Security under these provisions are similar in nature to that being proposed under new section 8A.*

*D3. In the light of the proposed definition for "local organization" in new section 8A (5)(f), a society (as defined in section 2 of the Ordinance) would be subject to both sections 5A, 5D and 8 and the proposed new section 8A. It would assist the Bills Committee if the Administration could explain how the two regulatory regimes would operate in parallel, including the criteria for determining which of the regimes should apply under the same set of factual circumstances.*

### Response to D1, D2 and D3

We consider that the existing powers of proscription on the grounds of national security under section 8 of the Societies Ordinance are inadequate. First, the existing powers are not focused on any particular type of threat to national security. Unlike the existing powers, section 8A(2) of the Bill clearly specifies the factual circumstances one of which must be satisfied before the measure of proscription could be considered applicable.

Secondly, the existing section 8 of the Societies Ordinance extends only to 'societies' to which that Ordinance applies. The Schedule to the Ordinance contains a list of 16 types of organizations to which the Ordinance does not apply. It does not therefore provide an adequate power of proscription. We think the SAR Government should be able to proscribe any organization that posed the most serious threat to national security.

The proposed new power of proscription will apply to all forms of organizations, but only if they fall within the three categories set out in the proposed section 8A(2). In effect, this limits the local organizations that may be subject to the power to proscribe. The power to proscribe will be based entirely on Hong Kong law and must be exercised in accordance with fundamental human rights. An appeal against a proscription will lie to the Court of First Instance.

The existing powers for the refusal to register a society, cancellation of registration of a society and prohibition of the operation of a society under, respectively, sections 5A, 5D and 8 of the Societies Ordinance are

already in line with the standards of the ICCPR. It is inherent under Article 19 of the ICCPR that any restrictions to fundamental rights and freedoms must only be necessary for the protection of national security, amongst other things. The requirement of “proportionality” of any such measures taken is already applicable to these relevant sections.

The Administration is considering whether sections 5A, 5D and 8 need to be adjusted in the light of the new section 8A.

*D4. Under which of the laws of the People's Republic of China can the Central Authorities officially proclaim by means of an open decree that the operation of a mainland organization is prohibited on the ground of protecting the security of the People's Republic of China? What are the procedures to be taken to proclaim by means of an open decree officially under those laws? What is the difference between the expression "明令取締" (referred to in the leaflet on the way forward) and "明文禁令" (used in the Bill)?*

Response

Please see our letter to the Assistant Legal Adviser dated 3 April (Paper No. 27).

*D5. Please clarify why the new section 8A(5) defines "subordinate" to cover "solicitation" of funds (which may not be supplied) and why the term is restricted to acceptance of funds "for the operation of the organization". What does the Administration mean by the statement in the Explanatory Notes that "ordinary connection does not amount to subordination"?*

Response

It is the policy intention of the Administration, and as reflected in the proposed definition of “subordinate”, that ordinary or nominal connections (e.g. business communications) do not amount to subordination. In addition, it is not intended to cover organizations that receive funds as an intermediary. That explains why only the solicitation or acceptance of funds etc. intended for the “operation” of the local organization are to be required as creating a relationship of subordination.

The reference to “solicitation” of funds is also found in the definition of connection in section 2 of Cap. 151. It is considered that an organization that solicits substantial financial contribution from an organization

that is banned in the Mainland on national security grounds is indicating a willingness to establish a connection with it of a subordinate nature. This being so, it should come within the powers in section 8A.

New section 8B Procedural requirements

*D7. Please explain under what circumstances would it not be practicable to afford an organization the opportunity to be heard or to make representations under the new section 8B(2). Are these circumstances the same as the circumstances under the existing sections 5A(4), 5D(2) and 8(4)?*

Response

The current reference to circumstances in which it ‘would not be practicable’ to afford the organization an opportunity to be heard or to make representations is drawn in broad terms in order to cover any such circumstances that might arise, and is envisaged bearing in mind similar considerations for sections 5A(4), 5D(2) and 8(4) of the Societies Ordinance. Although one might be able to identify some of these (e.g. where a planned violent insurrection were about to occur), not all ‘impracticable’ situations may be foreseen.

*D9. Please justify the need for the new section 8B(4) to provide for the order to take effect on the date of publication (or latest of such days if published on different days), bearing in mind that a person would be guilty of an offence under the new section 8C on the day the order takes effect unless he succeeds in proving his defence.*

Response

The effect of section 8B(4) is that a proscription order cannot take effect before the date of its publication or, where a later date is specified, such later date. A similar provision appears in section 8(6) of Cap. 151.

*D10. Please also explain why the order takes effect notwithstanding that an appeal has been made. It is noted that under sections 5B and 5E, the operation of the decision to refuse or cancel registration of society is suspended until the Chief Executive in Council has heard and determined the appeal.*

Response

The proposed power of proscription under section 8A is similar to that in section 8 of Cap. 151. Under section 8(6), the prohibition of the operation of a society takes effect notwithstanding an appeal to the Chief Executive in Council.

New section 8C Prohibition of participating in the activities

*D11. We note that the offences in the new section 8C(1) are similar to the offences relating to an unlawful society in the existing sections 19 and 20, but some of the penalties are different. As referred to earlier in D3, a proscribed organization could be an unlawful society at the same time. What would be the criteria for determining which of the offence provisions should apply under the same set of factual circumstances?*

Response

An organization would either be prohibited under section 8, in which case the offences relating to unlawful societies would apply, or would be proscribed under section 8A, in which case the offences under section 8C(1) would apply.

New section 8D Appeal against proscription

*D12. Is it the policy intent that the Court of First Instance should confine itself to the grounds set out in the new section 8D(3)(a) in deciding the appeal?*

Response

Yes. At common law, there would be no automatic right to appeal to the courts against an administrative decision, such as the decision to proscribe an organization under the new section 8A of the Bill. The ‘appellant’ could only seek a judicial review if he is being aggrieved in such administrative decisions.

The proposed criteria that the court is asked to look at under the new section 8D(3)(a) will enable it to determine both the ‘lawfulness’ (the same objective as in a judicial review) and the ‘sufficiency’ of any evidence on which the Secretary for Security base his decision to proscribe. This represents an improvement in the rights of the appellant compared to his common law position.

However, there is no intention to ask the courts to assume the role of the Secretary for Security in deciding whether, given there is sufficient evidence to justify a proscription, a particular organization ought to be proscribed.

*D13. If the proscription is set aside, would the Administration consider publishing a notice in the Gazette and the newspapers stating that the proscription has been set aside and shall be deemed to have never been made?*

Response

The new section 8D(4) would already have achieved the described effect in law. However, the Administration would consider if the proposed arrangement would serve any other useful purpose.

*D14. Please explain the circumstances under which the Secretary for Justice would apply for the public or portion of the public to be excluded from the hearing under the new section 8D(5) on the ground that publication of any evidence might prejudice national security. Has the Administration considered imposing a stricter test such as "would prejudice national security" (similar to sections 9 and 24 of the Official Secrets Ordinance) or "reasonably necessary" (similar to section 21 of the United Nations (Anti-Terrorism Measures) Ordinance)?*

New section 8E Chief Justice may make rules for appeals

*D15. Please clarify whether the protection of equality before courts under Article 10 of the Hong Kong Bill of Rights as set out in the Hong Kong Bill of Rights Ordinance (Cap. 383) applies to the appeal proceedings against proscription. If it is applicable, please justify how the appellant may be entitled to a fair and public hearing when the proceedings are held in his absence or take place without his being given full particulars of the reasons for proscription. If not, please justify why the appeal proceedings are not "determination of rights and obligations in a suit at law".*

*D16. Please elaborate how the summary of evidence taken in the appellant's absence and the appointment of a legal practitioner may sufficiently protect the interests of the appellant in the appeal proceedings.*

*D17. Please justify the need for excluding the appellant or his legal representative from the appeal proceedings, and explain why similar rules are not necessary in other contexts where national security is relevant in the*

*contexts of the Crimes Ordinance and the Official Secrets Ordinance.*

*D18. Please provide us with a set of the draft Rules when it is available.*

Response to D14 to D18

Please refer to the Administration's paper on the proposed special hearing procedures which will be submitted to the Bills Committee separately.

**E. Consequential Amendments**  
**Remaining paragraphs of the Schedule**

Paragraph 2 of the Schedule

Section 291AAA of the Companies Ordinance (Cap. 32)

*E1. Subject to your clarification whether a proscribed organization could at the same time be an unlawful society, please advise whether there is any overlap in the proposed section 291AAA and sections 360B, 360C and 360N.*

*E2. Please explain why the Registrar is obliged to take action as prescribed but may defer taking action if he is satisfied that the right to take legal action against proscription has not been exhausted. Would it be more appropriate if the Registrar takes action after the period for appeal has lapsed and no appeal has been lodged or after all legal action has been exhausted?*

*E3. Other than the Companies Ordinance, has the Administration considered making consequential amendments to the rest of the ordinances referred to in the Schedule to the Societies Ordinance?*

Response

The Administration will prepare a separate paper on these issues.

Paragraph 23 of the Schedule

Section 91 of the Criminal Procedure Ordinance (Cap. 221)

*E4. Please clarify the policy intent. Does the Administration propose to abolish only the common law offence of compounding treason but not the offence of compounding treason under section 91 of the Criminal Procedure Ordinance?*

## Response

There is no offence of ‘compounding treason’ under section 91 of Cap. 221. That section makes it an offence for a person to accept, or agree to accept, any consideration for not disclosing information which might be of material assistance in securing the prosecution or conviction of a person who has committed an arrestable offence. The offence of compounding treason involves a failure to prosecute an offence of treason.

### Paragraph 24 of the Schedule

#### Section 100 of the Criminal Procedure Ordinance (Cap. 221)

*E5. Please explain why it would be a good defence for a wife to prove that an offence other than those specified was committed in the presence of, and under the coercion of, the husband.*

## Response

Section 100 of Cap. 221 sets out a general principle of the criminal law. Although some may query whether that principle should be retained, it is not part of the current exercise to attempt a review of that general principle.

Security Bureau  
May 2003