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**BY FAX**

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Dear Mr Allcock,

**National Security (Legislative Provisions) Bill :  
interpretation, application and enforcement**

At the meeting of the Bills Committee on 10 May 2003, members requested us to write to the Administration setting out our views on your Paper No. 16 in relation to 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 (collectively "the Pannick Clauses") .

**Background to the provisions**

2. According to paragraph 3 of your Paper, the Government stated in the Consultation Document that one of its guiding principles was the need to meet fully the requirements of the Basic Law, including Article 39. We note that in the Consultation Document, paragraph 5 of the Summary and paragraphs 1.7 and 1.11 of the text specifically refer to Chapter III of the Basic Law, Articles 27 and 39, and international human rights covenants, conventions and declarations and related literature.

3. One of the guiding principles stated in the Consultation Document and reiterated in paragraph 6(a) of the LegCo Brief is "the need to meet fully the requirements of the Basic Law, including Article 23 which stipulates the acts to be prohibited; and other relevant provisions in Chapter III, in particular Article 27 which guarantees certain fundamental rights and freedoms of Hong Kong residents, and Article 39 which stipulates, *inter alia*, that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on

Economic, Social and Cultural Rights (ICESCR), as applied to Hong Kong shall remain in force, and shall be implemented through the laws of the HKSAR".

4. Paragraph 4 of your Paper explains that the Pannick Clauses are provided in response to the advice of Mr David Pannick QC. We note :

- (a) that he advised in paragraph 12 of his Opinion (CB(2)375/02-03(01)), *"for the avoidance of doubt, it may well be considered desirable to state generally in the new law that nothing in it is intended to contravene Articles 27 or 39 of the Basic Law, and that restrictions apply only in so far as they are lawful pursuant to those provisions of the Basic Law (italics added)"*;
- (b) that the advice was directed at the concern over "serious unlawful means" proposed in the Consultation Document ("serious criminal means" in the Bill). According to paragraph 11 of the Note of Conference between Counsel and the Solicitor General (CB(2)438/02-03(01)), Mr Pannick added that a savings provision [to make clear that the provisions in which "serious unlawful means" are an element are not intended to make unlawful any activity in Hong Kong that is protected by BL 27 or 39] that was limited in this way could have implications for other parts of the legislation. He therefore recommended a general savings provision that would apply to all of the proposed provisions;
- (c) that he took into account paragraph 3.7 of the Consultation Document that "adequate and effective safeguards should be in place to protect the freedoms of demonstration and assembly etc, as guaranteed by the Basic Law, including peaceful assembly and advocacy".

### **Effective safeguards?**

5. You explain in paragraph 6 of your Paper that one of the intended effects of the Pannick Clauses is to require the courts to interpret the provision in the legislation in a manner that is consistent with Article 39 of the Basic law, thereby preserving its validity. In the absence of the Pannick Clauses, the court might refuse to give effect to any provision in the legislation if it were inconsistent with Article 39. You conclude in paragraph 9 that the Pannick Clauses would prevent any provision in the Bill from being invalid.

6. Article 39 stipulates, *inter alia*, that the provisions of ICCPR as applied to Hong Kong shall remain in force, and shall be implemented through the laws of the HKSAR. ICCPR is implemented in Hong Kong by the Hong Kong Bill of Rights Ordinance (Cap. 383) which contains a number of restrictions. In particular, the following rights and freedoms in the Hong Kong Bill of Rights are restricted in the interest of or for the protection or reason of national security :

- (a) Article 8 Liberty of Movement
- (b) Article 9 Restrictions on expulsion from Hong Kong
- (c) Article 10 Equality before courts and right to fair and public hearing
- (d) Article 16 Freedom of opinion and expression
- (e) Article 17 Right of peaceful assembly
- (f) Article 18 Freedom of association

7. As the rights and freedoms referred to in the last paragraph may be restricted in the interest of or for the protection or reason of national security according to the respective Articles :

- (a) what legal tests the courts would apply in determining whether any provision in the Bill should be declared invalid for reason that the provision contravenes relevant provisions in the Basic Law in the absence of the Pannick Clauses?
- (b) how would the Pannick Clauses function as an "adequate and effective safeguard" in protecting the rights and freedoms as guaranteed by the Basic Law, if courts in Hong Kong were to adopt U.K. courts' approach in applying the doctrine of margin of appreciation? That approach as approved by Lord Hope in *R v DPP, ex parte Kabeleine* [1999] 4 All ER 801, 847 and as applied by the court in *R v Lambert* [2001] 1 All ER 1014, is that the courts under the convention [European Convention for the Protection of Human Rights and Fundamental Freedoms 1950] are entitled and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the convention, having in mind that legislation was passed by a democratically elected Parliament.

8. In relation to actions taken by those who purportedly apply or enforce provisions covered by the Pannick Clauses, how would these clauses be adequate and effective safeguards for protecting the freedoms guaranteed by the Basic Law in view of the fact that non-compliance with these clauses does not carry any penalties?

### **Need for Pannick Clauses**

9. Paragraphs 13 to 20 of your Paper deals with the power of the Standing Committee of the National People's Congress ("NPCSC") in the interpretation of the Basic Law. We wish to add that there is an additional role of NPCSC under Article 17 of the Basic Law.

10. Article 17 provides that laws enacted by the legislature of the HKSAR must be reported to the NPCSC for the record. NPCSC may return the law in question if it considers, after consulting the Committee for the Basic Law of the HKSAR under it, that any law is not in conformity with the provisions of the Basic

Law regarding affairs within the responsibility of the Central Authorities, or regarding the relationship between the Central Authorities and the Region.

11. In the Administration's view, do the proposals in the Bill relate to affairs within the responsibility of the Central Authorities, or the relationship between the Central Authorities and the Region? If yes, how would the Pannick Clauses have effect on the jurisdiction of the court to declare that a provision is inconsistent with Article 39 if NPCSC has not returned the enacted Ordinance pursuant to Article 17?

12. Furthermore, under Article 11 of the Basic Law, no law enacted by the legislature of the HKSAR shall contravene the Basic Law. The Administration has explained that the effect of this article is that if any provision in the legislation is inconsistent with the Basic Law, the court will not give effect to the provision to the extent of that inconsistency. It has also stated that one of the objectives for providing the Pannick Clauses is to prevent these provisions from being invalid by requiring the courts to interpret the provisions in a manner that is consistent with Article 39 of the Basic Law. That stated objective appears to be for forestalling a court from invoking Article 11 of the Basic Law to determine the constitutionality of these provisions. Would the Pannick Clauses, therefore, be held to be unconstitutional for that reason?

13. Under section 6(1) of the Hong Kong Bill of Rights Ordinance, a court or tribunal -

- (a) in proceedings within its jurisdiction in an action for breach of that Ordinance; and
- (b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant,

may grant such remedy or relief, or make such order, in respect of such a breach, violation, or threatened violation as it has power to grant or make in those proceedings and as it consider appropriate and just in the circumstances. Although we do not believe that the effect of section 6(1) would be displaced by the Pannick Clauses, would it be at least arguable that they would prevent a defendant charged with an offence covered by them from inviting the court to invoke section 6(1)?

**Other human rights Articles in Chapter III of the Basic Law**

14. There are other Articles in Chapter III of the Basic Law relating to fundamental rights other than those listed in paragraph 21 of your Paper. Examples are Articles 28, 29 and 38. In *Ng Ka Ling v Director of Immigration* [1999] 1 HKC 291 and *Director of Immigration v Chong Fung Yuen* [2001] HKCFA 35, the Court of Final Appeal held that Chapter III defined the class constituting Hong Kong residents and provided for the rights and duties of these residents. The provisions containing these rights and duties were the constitutional guarantees for the freedoms that lay at the heart of Hong Kong's separate system and a generous interpretation should be given to them.

15. Some of the rights and freedoms guaranteed in the other Articles are absolute and without any restrictions. For example, Article 27 of the Basic Law provides "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike". However, the rights and freedoms protected under Articles 16, 17 and 18 (i.e. freedom of opinion and expression, right of peaceful assembly and freedom of association) of the Hong Kong Bill of Rights Ordinance (Cap. 383) are subject to restrictions. The Hong Kong Bill of Rights Ordinance was enacted to incorporate into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong. The Ordinance may therefore be regarded as one of the laws for the implementation of the international covenant as referred to in Article 39 of the Basic Law. Would the Administration please clarify whether it had considered this apparent anomaly between the extent of protection accorded by Article 39 of the Basic Law (which provides protection which may be subject to restrictions) and other articles in Chapter III of the Basic Law, such as Article 27 (which provides absolute protection) when deciding how the Pannick Clauses should be drafted?

**Drafting concerns**

16. Assuming that it is satisfied that it would be constitutionally and legally in order to give effect to the policy objectives for the proposed Pannick Clauses as set out in Paper No. 16, would the Administration consider the following issues which may have to be addressed :

- (a) to whom the Pannick Clauses are directed;
- (b) implications on other relevant Articles in Chapter III and Article 87 of the Basic Law;
- (c) implications on other parts of the Crimes Ordinance and the Official Secrets Ordinance not covered by the Pannick Clauses as well as other Ordinances.

Yours sincerely,

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