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Dear

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

I refer to your letter of 14 May 2003 in which you set out some views on Paper No. 16. I set out below the Administration's responses to those views.

Effective safeguards?

Paragraph 7 of the letter is as follows.

“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 UK courts’ approach in applying the doctrine of margin of appreciation? That approach as approved by Lord Hope in **R v DPP, ex parte Kebilene** [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.”*

The answer to paragraph (a) is that, where there is a prima facie breach of the rights referred to, the party seeking to uphold the provision must show that any restriction on the exercise of such rights is –

- (1) prescribed by law;
- (2) necessary for the advancement of one or more specified objectives (such as the protection of national security); and
- (3) proportionate to the specified objective.

A measure will satisfy the proportionality test only if three criteria are satisfied –

- (1) the legislative objective must be sufficiently important to justify limiting a fundamental right;
- (2) the measures designed to meet the legislative objective must be rationally connected to that objective – they must not be arbitrary, unfair or based on irrational considerations;
- (3) the means used to impair the right and freedom must be no more than is necessary to accomplish the legitimate objective – the more severe the deleterious effects of a measure, the more important the

objective must be if the measure is to be justified in a democratic society.

With regard to question (b) above, the doctrine of margin of appreciation is one test adopted by the courts for deciding whether or not a fair balance has been struck between the general interest of the community and the requirements of the protection of the individual's fundamental rights. If, as a result of applying that doctrine, the court finds that a fair balance has been struck, there will have been no breach of the guaranteed right. The interpretation clause in the Bill would not therefore need to be relied upon to save the provision from invalidity. It is not intended that the interpretation clause should provide greater protection for individual rights than is guaranteed under Article 39 of the Basic Law.

Paragraph 8 of the letter reads as follows.

“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?”

The purpose of the interpretation clause is to ensure that relevant provisions in the Bill cannot be applied in a manner that would be inconsistent with the rights guaranteed under Article 39. By effectively achieving that, relevant human rights will be protected by this legislation.

If someone should act outside the scope of the legislation and thereby violate human rights, a civil remedy may be available to the victim (e.g. under section 6(1) of the Hong Kong Bill of Rights Ordinance) and, in some circumstances, the act might be a criminal offence (e.g. if an official tortured a suspect).

Need for the interpretation clauses

Paragraph 11 of the letter reads as follows.

“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?”

The Administration considers that the Bill relates to the relationship between the Central Authorities and the Region.

If the NPCSC does not return an enacted Ordinance pursuant to Article 17 of the Basic Law, it is not considered that this would prevent the courts from deciding that a provision in it contravened the Basic Law.

If the interpretation provisions in the current Bill are enacted, the court would be required to construe all provisions in it consistently with Article 39 of the Basic Law. It could, however, decide that a provision was invalid for contravening another Article in the Basic Law.

Paragraph 12 of the letter ends as follows.

“..... 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?”

The Administration does not consider that the provision would be unconstitutional. On the contrary, its purpose is to ensure that the legislation is consistent with Article 39 of the Basic Law. Moreover, the courts could declare that, in the absence of the interpretation clause, a provision would have been unconstitutional but, given the existence of the clause, the provision will be applied in a manner that is constitutional.

Paragraph 13 of the letter refers to the court’s power to grant remedies for breach of the Hong Kong Bill of Rights Ordinance, under section 6(1) of that Ordinance. It asks whether it would be at least arguable that the interpretation provision would prevent a defendant charged with a relevant offence from inviting the court to invoke section 6(1).

The Administration considers that a person who is charged with a relevant offence is, as a result of the interpretation provision, guaranteed that the offence provision will be construed in a manner that is consistent with the Hong Kong Bill of Rights Ordinance. This being the case, the question of a remedy

for a breach of that Ordinance in that context does not arise.

Chapter III of the Basic Law

Paragraph 15 refers to the fact that, whereas some ICCPR rights may be subject to restrictions, some rights under other Articles in Chapter III of the Basic Law are not stated to be subject to possible restrictions. The paragraph ends as follows.

“..... 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?”

The Administration does not accept that other Articles in Chapter III are necessarily absolute, even though they do not expressly provide for exceptions. For example, the Court of Final Appeal’s decision in the flag case indicates that Article 27 does not confer absolute protection.

In any event, the Administration was not influenced by any such consideration when restricting the interpretation clause to Article 39. That Article was singled out primarily because it entrenches international human rights covenants, which are the subject of a great body of judicial and academic explanation around the world.

Drafting concerns

Paragraph 16 of the letter asks the Administration to address the following issues –

- “(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.”*

So far as (a) is concerned, the interpretation clause is addressed to all who need to interpret, apply or enforce relevant provisions. That would ultimately mean the Judiciary, but would also include those who deal with the provisions as law enforcement officers or prosecutors.

With regard to (b) above, the Administration’s first paper on this subject discusses (at paragraphs 21 to 23) the implications of not including in the interpretation clause other Articles in Chapter III.

For example, if (for the sake of argument) the proposed investigation power in new section 18B of the Crimes Ordinance were found by a court to be inconsistent with Article 29 of the Basic Law, that section might (to the extent of the inconsistency) be declared invalid by the court. As a result, any police action taken under the invalid provision (whether in the past or in the future) would be unlawful. Moreover, the section would need to be repealed or textually amended to bring it into line with Article 29.

If, on the other hand, the interpretation provision were extended to cover all of the Chapter III of the Basic Law, the position would be slightly different. The court would be required to construe section 18B consistently with Article 29 of the Basic Law. In order to do so, it might either read down the provision or even read into it some additional safeguards. Police action that did not satisfy the section as so interpreted would continue to be unlawful. However, the section would not need to be repealed for inconsistency with Article 39.

Either approach would fully protect the rights guaranteed by Chapter III of the Basic Law.

Article 87 of the Basic Law (which is in Section IV of Chapter IV) provides that –

“In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained.

Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.”

That Article must be complied with. Therefore if anything in the Bill were inconsistent with the Article, the courts would not give effect to it.

With regard to paragraph (c) above, the Administration’s first paper on this subject discusses the issue in paragraphs 24 to 26. Any provision that is not subject to the interpretation clause would, if found to be inconsistent with Article 39 of the Basic Law, not be given effect to.

Yours sincerely,

(Bob Allcock)
Solicitor General

cc : Secretary for Security (Attn. Mr Johann Wong)