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Secretary for Security
Security Bureau
6/F, Main Wing
Central Government Offices
Hong Kong

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BY FAX

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(Attn: Mr Johann Wong
Principal Assistant Secretary)

Dear Mr Wong,

National Security (Legislative Provisions) Bill

We are scrutinizing the above Bill with a view to advising Members on the legal and drafting aspects. In addition to the questions raised by Members at the previous joint meetings of the Panel on Security and Panel on Administration of Justice and Legal Services listed in Appendix I of the Background Brief (LC Paper No. CB(2) 1378/02-03(03)), we write to seek your clarifications on the issues set out in the enclosed Schedule.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

Encl

c.c. D of J (Mr Gilbert Mo, DLD) (Fax : 2869 1302)
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SCHEDULE

A. General Observations

Definitional issues

A1. Would the Administration inform the Bills Committee expressions used in the Bill which are not provided with a definition, but in respect of which there are relevant judicial authorities on their respective meanings? It would be appreciated if those judicial authorities, if any, could be provided to the Committee.

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?

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?

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).

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

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)?

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?

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?

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)?

B7. "Serious criminal means" is defined in the new section 2A(4)(b) to mean any act set out in (i) to (v) which, if done in Hong Kong, is an offence under the law of Hong Kong. Please provide a list of the relevant statutory provisions under which the acts are offences in Hong Kong.

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)?

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)?

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"?

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.

B12. Section 159D provides where an offence has been committed in pursuance of any agreement and proceedings may not be instituted for that offence because the time limit applicable to the institution of such proceedings have expired, proceedings for conspiracy under section 159A to commit that offence shall not be instituted against any person on the basis of that agreement. Since the Administration does not propose any time limit for prosecuting the offences of subversion and secession, please clarify the policy of section 2C(1)(b) in providing section 159D to have effect.

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.

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.

New section 9A Sedition

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?

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.

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.

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.

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.

B20. Please explain why "different classes of population" is rendered "人口中不同組別".

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.

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?

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?

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.

B25. Section 18 of the Police Force Ordinance (Cap. 232) provides that the warrant card is only evidence of his appointment under that Ordinance. Should section 18B(3) also require the police officer to produce evidence of direction made by a police officer of or above the rank of chief superintendent?

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".

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?

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.

C4. Please consider whether the expression "而落入他的管有或維持由他管有" in section 18(5A) could be improved in terms of drafting. One suggestion for your consideration is "而給他管有或繼續由他管有".

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.

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.

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)?

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"?

D6. Why is it necessary to use the words "an act that is" in the definitions of "treason", "subversion", "secession" and "sedition" in the new section 8A(5)?

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)?

D8. Why does the new section 8B(3) require the Secretary to affix a copy of the order at the nearest police station of the police district in which the building or premises which appear to him to be occupied or used as a place of meeting of the organization?

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.

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.

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?

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?

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?

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.

Section 2 *Interpretation*

D19. It would be helpful if you could provide a list of the office title of the bodies of persons in the Schedule which the Administration regards as falling within the new definition of "office-bearers".

E. Consequential Amendments
Remaining paragraphs of the Schedule

Paragraph 2 of the Schedule

Section 29IAAA 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?

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?

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.

Paragraph 26 of the Schedule

Second Schedule of the Magistrates Ordinance (Cap. 227)

E6. Please explain the policy for repealing item 5 of Parts I and III of the Second Schedule. Is it intended that a special magistrate or permanent magistrate may deal with indictable offences under Parts I and II of the Crimes Ordinance summarily?