

**WHY THE BLUE BILL IS NOT GOOD ENOUGH  
SUBMISSION OF THE ARTICLE 23 CONCERN GROUP TO THE BILLS  
COMMITTEE ON THE NATIONAL SECURITY (LEGISLATIVE PROVISIONS)  
BILL**

**THE ARTICLE 23 CONCERN GROUP** is a group of lawyers, legal academics and public figures formed especially to inform the public and express views to the Government on Article 23 legislation proposed by the Government. A list of the members of the Group is attached. The Group has published their views on the Consultation Document in a series of "rainbow pamphlets" in November 2002. More than 40,000 copies had been distributed in Hong Kong and overseas, and can be accessed online at <http://www.margaretng.com>.

1. **THE GROUP'S FUNDAMENTAL POSITION** is that further legislation to implement Article 23 is unnecessary. Nor is there any urgent need to rush through the legislation. A law reform exercise should be carried out to tidy up existing legislation to ensure they conform to human rights standards and are adapted to Hong Kong's new status as a SAR of the PRC. The Group deplores the form and content of the Government's Consultation Document and its failure to hold a genuine and open consultation exercise. With numerous organizations and individuals, the Group has strongly advocated the publication of a white bill for further public consultation. The Group regrets that the HKSAR Government has ignored the wide demand and introduced a blue bill - the National Security (Legislative Provisions) Bill - into LegCo on 26 February 2003.

2. **THE GROUP REMINDS THE GOVERNMENT AND LEGCO OF THEIR PROMISE** that the blue bill will be open to the widest public consultation and changes to the provisions remain open in a way which is no different from a white bill, and that there is no deadline for enactment. We hold the Government and LegCo to their promise.

3. **AT THIS STAGE, GOVERNMENT AND LEGCO SHOULD CONCENTRATE ON HOW THE BILL CAN BE IMPROVED BY LISTENING TO AND ACTIVELY DISCUSSING VIEWS FROM THE PUBLIC INCLUDING CRITICS OF THE BILL WITHOUT MAKING IT A PRE-CONDITION THAT PEOPLE ABANDON THEIR OPPOSITION TO LEGISLATION.**

4. THE LEGAL COMMUNITY, OTHER PROFESSIONAL GROUPS AND HUMAN RIGHTS ORGANISATIONS CAN MAKE A SPECIAL CONTRIBUTION TO THIS STAGE OF DISCUSSION. They are familiar with legal concepts and the legislative and judicial procedures. They are experienced in handling the fine balance between the legitimate protection of the interest of the State and necessary safeguards for fundamental rights. They have devoted time and effort to analyse the proposed legislation and comment in detail. They have all manifested an interest that if legislation is to be passed, then it should be one which is compatible with human rights.

5. IN PARTICULAR, THE CONCERN GROUP WISHES TO REMIND THE GOVERNMENT AND LEGCO THAT THE LEGISLATIVE COUNCIL HAS A CONSTITUTIONAL DUTY under the Basic Law to invite groups most likely to be affected to air their views on the Bill. These groups include the media, academia, publishers, librarians and groups branded as "political groups" by the Government such as local and international human and civic rights organizations, Falun Kung and the Hong Kong Alliance in Support of Patriotic Movements of China. There will not be any genuine and meaningful consultation if the views of these groups are ignored.

6. THE CONCERN GROUP IS PREPARED TO CONTRIBUTE TO THAT DISCUSSION by enhancing the public's understanding of the major provisions in the bill, and by assisting the Bills Committee by participating in its hearings. We have published a bilingual "user's guide" pamphlet to the blue bill entitled 'WHY THE BLUE BILL IS NOT GOOD ENOUGH', which highlights in straightforward language the parts of the bill which require amendment and the kind of amendments we recommend in broad terms. They are not meant to be exhaustive. We are prepared to elaborate and to formulate the amendments in legislative language if called upon to do so. A copy of the pamphlet is attached.

7. AN OVERVIEW is given in the first section of the pamphlet. We have provided in the center pages a TABLE SUMMARY OF THE AMENDMENTS FOR LEGCO MEMBERS to push for, and the reasons for them. The Bills Committee and the public may find it helpful to use this table as an aide-memoire for scrutiny of the bill

8. THE GROUP CONSIDERS THE BILL AS DRAFTED in need of MUCH

RETHINKING TO REACH THE REQUISITE STANDARD for legislation of such fundamental constitutional importance. Apart from provisions of the bill, the adaptation of the unamended parts of the Ordinances involved must be tackled. Otherwise, the enactment will result in a disreputable, constitutionally incorrect and excessively confusing collection of ordinances; the public will suffer the consequences.

9. THIS CHALLENGING AND INTENSIVE PROCESS IS NOT ASSISTED BY THE UNFORTUNATE OUTBREAK OF SARS (Severe Acute Respiratory Syndrome) which has absorbed the full attention of the community. The Group regrets that some people appear to see this as an opportunity to ram through the bill without proper consultation and scrutiny. We urge Government and LegCo not to take such a stance. If the Government is confident of the necessary support for the bill to be passed, there can be no harm in allowing time for thorough consideration. On the other hand, if legislation is rushed through, the damage of unsound and unjust legislation will be lasting and to the discredit of the HKSAR.

Article 23 Concern Group  
April, 2003

**Members of the**

ARTICLE

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## Why the Blue Bill is not good enough

The Blue Bill contains a number of major problems:

1. The proscription mechanism goes beyond the requirements in Article 23, and it threatens freedom of association and expression as well as the right to open justice and legal representation because:
  - (a) A certificate from the Central People's Government can trigger off the proscription of a Hong Kong organization;
  - (b) Judicial protection is impaired, as the certificate will bind the courts; and
  - (c) Appeal against proscription can be held in secret and in the absence of the appellant and his legal representatives.
2. The Official Secrets Ordinance threatens the freedom of information and the free press because there is no public interest or prior publication defence.
3. The offence of sedition endangers freedom of speech because:
  - (a) It is defined as incitement to commit treason, subversion and secession, and incitement can be committed by mere speech without any unlawful act; and
  - (b) Handling "seditious publication" is an offence on its own.
4. Wording in many parts of the blue bill is too vague and open to potential abuse. Examples include:
  - (a) Offences of attempting to commit treason, secession and subversion, or inciting, aiding and abetting others, or conspiring with others to commit them; and
  - (b) "Serious criminal means" as it relates to subversion and secession does not require the use of violence or war.
5. Apart from treason, all Article 23 offences apply to all Hong Kong permanent residents whatever their nationality and wherever they live and for what they do in or outside Hong Kong.

**Why the Blue Bill on National Security (Legislative Provisions)  
is Not Good Enough**

6. The blue bill proposes to abolish important safeguards in the existing law that prosecution of treason should be within 3 years and sedition within 6 months.
7. There is no reason to give the chief superintendent the power to approve police break in, search and seizure of property. A court warrant is the only adequate safeguard.

The blue bill implements the Government's Article 23 legislative proposals by amending three ordinances. Treason, subversion, secession and sedition are dealt with by amending the Crimes Ordinance. Theft of state secrets is dealt with by amending the Official Secrets Ordinance. The proscription mechanism and appeal procedure are incorporated by amending the Societies Ordinance.

In its present form, the blue bill should not be passed. Please fill in the form and send it to your LegCo representative.

**Article 23 Concern Group  
April, 2003**

## **Amendments to the Crimes Ordinance**

### **Treason, Subversion, Secession and Sedition**

#### **1. Summary**

- A. The definitions of “treason”, “subversion” and “secession” require further clarification.
- B. As the blue bill stands, it is unclear when a person may be liable to be prosecuted:
- (a) for attempting, aiding and abetting, counseling and procuring or conspiring with others to commit treason, subversion or secession;
  - (b) for sedition, which is inciting others to commit these offences;
  - (c) for handling seditious publication, which is publication likely to cause others to commit these offences; and
  - (d) it will expose more organizations to the danger of the new proscription mechanism.
- C. “Subversion” and “secession” can be committed by “serious criminal means” which do not necessarily involve any violence or war. The meaning of “serious criminal means” is unclear and the worry is that it could be used as a political instrument to thwart legitimate dissent.

#### **2. Specific problems:**

##### **Treason (*section 2, Crimes Ordinance*)**

1. It is unclear what is meant by to “intimidate” (2(1)(a)(ii)) or “compel” (2(1)(a)(iii)) the Central People’s Government.
2. To “instigate” (2(1)(b)) foreign armed forces to invade China suggests the offence can be committed by mere speech.

3. “Assist any public enemy at war with the People’s Republic of China” and “prejudice the position of the People’s Republic of China in the war”(2(1)(c)) can include the following:
  - (a) anti-war activities to protest against China’s war with other countries;
  - (b) providing medical or humanitarian assistance to a foreign country at war with China;
  - (c) where war has broken out in the Taiwan straits, calling on “Chinese not to fight against Chinese”.

To prevent these acts from being turned into criminal offences, “treason” should be narrowly defined to refer to specific acts involving the use of violence.

4. The existing safeguard of a 3 year time limit for prosecutions under section 4 of the Crimes Ordinance should be retained, to ensure that the offence will not be a tool for political persecution.

### **Subversion (section 2A, Crimes Ordinance)**

5. “Seriously endangers the stability of the People’s Republic of China” (2A(1)) may aim at narrowing down “force” and “serious criminal force”, but as “serious” and “stability” are not defined, and no direct causal relationship between the act and the consequence is explicitly required, the aim is not achieved.
6. “Disestablishes” and “intimidates” (2A(1)(a)&(c)) the People’s Republic of China are ambiguous, uncertain and cannot be objectively determined.
7. The definition of “serious criminal means” (2A(4)(b)) raises serious concerns because:
  - (a) There is no explicit protection for the rights and freedom of peaceful demonstration and assembly;
  - (b) Whether an act constitutes a “serious criminal means” depends on the outcome of the act and not its culpability, e.g. a peaceful unauthorised assembly may be “serious

criminal means” if it results in seriously interfering with an essential facility or transport system.

- (c) it is unclear what kind of act is targeted by (2A(4)(b)(vii)) providing that a criminal offence committed outside Hong Kong can be “serious criminal means”.

### **Secession (*section 2B, Crimes Ordinance*)**

8. “Seriously endangers the territorial integrity of the People’s Republic of China” (2B(1)(a)) raises the same doubts as in subversion discussed in paragraph 5.
9. “Serious criminal means” (2B(1)(a)) raises the same doubts as in subversion discussed in paragraph 7.

### **Sedition (*Section 9A-D, Crimes Ordinance*)**

10. Sedition is defined as inciting others to commit treason, subversion, secession, or to engage in violent public disorder. “Incite” simply means urge or encourage, including by making speeches or publishing articles. All the prosecution is required to prove is that a person made the speech or wrote the article with intent to urge or encourage others.
11. Thus, a person who makes a speech at a rally to commemorate June 4, urging people to organize nationwide demonstrations to fight for the end of one party dictatorship in China may be prosecuted for sedition.
12. The danger is increased by the vague way in which parts of treason, subversion and secession is defined. For example, subversion includes “intimidating the Central People’s Government” even where no violence is involved.
13. Although the offence of possession of seditious publication has been abandoned, handling seditious publication is still an

offence. This means people can be prosecuted for publishing, selling, displaying, distributing or copying “seditious publication”.

14. By repealing *section 11* of the Crimes Ordinance, the blue bill removes an important existing safeguard that no prosecution for sedition should be begun except within 6 months after the offence is committed.
15. Sedition is a purely political offence. It should be restricted to prohibiting incitement of armed rebellion.

### **Investigation Power of Police (*Section 18B*)**

The new *section 18B* introduced by the blue bill gives the police the power to break in, search and seize property without a warrant, if approval is given by an officer of the rank of chief superintendent or above. It is not an onerous task to apply to the court for a warrant, which is the best safeguard against abuse.

## Amendments to the Official Secrets Ordinance

### Protection of State Secrets

1. Open and accountable government requires maximum disclosure of government information. Restriction should go no further than is necessary and must be clearly defined. Compelling justification is required to suppress information that is already in the public domain, or where disclosure is in the public interest. The Official Secrets Ordinance does not meet these criteria.
2. The blue bill proposes to amend the Official Secrets Ordinance by introducing two new offences:
  - (a) Under *section 16A* it is an offence to disclose information relating to affairs of the HKSAR, which are within the responsibility of the Central Authorities under the Basic Law. This new category of protected information is both sweeping and vague, and can cover many different areas of interaction between Hong Kong and the mainland, and would include commercial and economic information. The degree of harm required to show damaging effect is unclear.
  - (b) *Section 18(2)(d) and 18(5A)* create the new offence of unauthorized disclosure of protected information obtained by “illegal access” which is narrower than “unlawful access” proposed earlier in the consultation document. But this does not remove the difficulties faced by the press. Unless the information is disclosed through official channels, there is always a possibility that it was acquired by someone by illegal access. It will be hard to refute the Government’s allegations, and the information which can be published will depend on the whim of the Government.
3. The following amendments are essential:
  - (a) Protected information should be defined by content and not by source or class.
  - (b) Damaging disclosure should require proof of a strong

likelihood of specified harm or clear and present danger of harm, which flows from content rather than from the nature or class of information disclosed.

- (c) Honest beliefs that the information is not protected or that the information is lawfully acquired should be a defence.
- (d) Once information has been made generally available, there is no further justification to prohibit disclosure from the public.
- (e) There should be a defence of public interest.
- (f) 'National security' should be defined to explicitly exclude protection of the Government from embarrassment or exposure of wrongdoing or concealment about the proper functioning of public institutions.
- (g) The entire Official Secrets Ordinance should be reviewed in the context of a public right of access to government information, and a Freedom to Information Ordinance should be enacted.

## Amendments to Societies Ordinance

### Proscription and Court Procedure

1. The new proscription mechanism and appeal procedure introduced by the blue bill by adding Sections 8A-E to the Societies Ordinance is in all important respects unchanged from the Consultation Document.
2. Under *Section 8A(2)(c)*, the Secretary for Security may proscribe a Hong Kong organization which is “subordinate” to a Mainland organization banned by the Central People’s Government if the Secretary reasonably thinks that this is in the interest of national security. A certificate from the Central authorities that the Mainland organization is banned by “open decree” must be accepted by the Hong Kong courts as final.
3. “Subordinate” is defined in section 8A(5)(h) as a Hong Kong organization which either (i) asks for or receives substantial funding (“substantial” is not defined) from the Mainland organization, or (ii) is directly or indirectly under the direction of the Mainland organization, or (iii) has its policies determined directly or indirectly by the Mainland organization. These conditions are vague and unreasonable. For example, an NGO applying for funding from a funding organization does not usually make this NGO a subordinate of the funding organization. It is also difficult to ascertain what degree of indirect influence will amount to control.
4. There are already three existing proscription mechanisms. Under *Section 8* of the Societies Ordinance, the Secretary for Security can prohibit a society from operating for reason of national security. Under existing anti-terrorism legislation, the Chief Executive and the court can proscribe terrorist groups. It is questionable why another and more powerful mechanism should be created and put into the hands of the Secretary for Security. It is unnecessary and creates a bridge for bringing

into Hong Kong the Mainland system or concept of national security.

5. Under *Section 8C*, once an organization is proscribed, it is an offence to be or to act as its officers or members, and anyone who attends a meeting or gives any assistance or pays money to the organization will commit an offence. This targets freedom of association and may affect religious freedom. This is because the PRC Government is known to exert a tight control over religious groups.
6. Under *Sections 8D-E*, the Chief Justice may make rules for appeals against an order of proscription to be held in secret and in the absence of the appellant or his legal representative. Although proscription is not a criminal procedure, being proscribed has direct criminal consequences. If a person is not allowed to see the full evidence against him, he cannot defend himself properly. This runs contrary to the principles of natural justice. It also brings Hong Kong closer to the closed door and summary trials in the Mainland for national security offences and seriously undermines “One Country, Two Systems”.
7. The Government argues that Canada and the UK have similar procedures, but admits that they apply to immigration matters only, and are not used for dealing with their own nationals. Existing national security law in Hong Kong, including proscription of organizations and terrorist groups, do not have similar procedures. Further, by contrast, for other serious Article 23 offences, which involve national security such as treason, subversion and secession, the accused can elect to have jury trial.
8. Proscription of organizations “subordinate” to Mainland organizations is outside the scope of Article 23, which only prohibits ties with foreign political organizations.
9. There are frequent reports of Mainlanders being charged or

convicted of national security offences for defending workers' rights or engaging in relief work. Many Hong Kong organizations which have liaison with such Mainlanders may be vulnerable under this new proscription procedure.

10. All powers to proscribe organizations under *Sections 8A-E* should be deleted.