Submission No. 125

The Law Society of Hong Kong

Summary Response to the Article 23 Blue Bill

1. General

The Law Society has stated that it considers the Hong Kong SAR has a constitutional obligation to enact legislation pursuant to Article 23 of the Basic Law, and proposes to examine the proposals in the Blue Bill on the basis of their reasonableness, the requirements of the Basic Law and such general principles as may be applicable. The Law Society requests the legislature to take into account the following observations.

2. Treason – the instigation offence

The Law Society does not consider that the proposed section 2(1)(b) of the Crimes Ordinance (Cap.200) should be enacted. This proposed section is as follows:-

> A Chinese national commits treason if he…..instigates foreign armed forces to invade the People's Republic of China with force.

This offence is very easily committed. A Chinese national merely has to "instigate" to be guilty of treason.

The legal policy behind this legislative proposal is inconsistent with that behind the other newly defined treason offences, where certain specific mental elements (such as "with intent to overthrow the "Central People's Government") or certain specific acts (such as "joins or is part of foreign armed forces") are required to be present to constitute an offence.

In Paper No.18 of April 2003 the Justice Department stated the justification for this offence as follows:

> In most situations, the offence of instigating foreign armed forces to invade the PRC by force would not amount to the

offence of sedition. It therefore needs to be included as a head of treason.

This argument means that if a Chinese national instigated foreign armed forces to invade he ought to be charged with a crime, and since he could not be charged with anything else, such instigation should be included as a head of treason.

The proper question is whether mere instigation ought to be a crime, or a crime so serious as treason. It should be noted that if a Chinese national played any active role in invasion by foreign armed forces, he would have joined or be part of foreign armed forces and guilty of treason under another provision.

In line with the legal policy that proposed the repeal of misprision of treason, the existing instigation offence should be repealed and not re-enacted in a modified form. As with misprision of treason, there is no modern reported case on the offence. The last reported case occurred in Ireland in 1867.

Instigating foreign armed forces to invade China may be reprehensible conduct, but to make such conduct a treason offence is not justified, particularly when the origin of this offence is an English Act passed in the 19th century (the Treasons Felony Act 1848).

3. Official Secrets Ordinance

Under this Ordinance an offence is committed if a "damaging disclosure" is made. The meaning of "damaging disclosure" is therefore a matter of great importance.

Under the Ordinance the meaning of "damaging disclosure" varies according to the nature of the information, such as that relating to security and intelligence or to defence.

In relation to the proposed section 16A dealing with "information related to Hong Kong affairs within the responsibility of the Central Authorities" a disclosure is damaging if it "endangers national security".

"National security" is in turn defined as "the safeguarding of the territorial integrity and independence of the People's Republic of China".

It is reasonably clear as to what would constitute a "damaging disclosure" under the new section 16A.

However, the same phrase means something else under the existing section 16 covering "information related to international relations". Under section 16(2)(b) a disclosure is damaging if it "endangers the interests of the People's Republic of China or Hong Kong elsewhere". What is meant by "endangers the interest"? No prosecution has ever been brought under this section in the United Kingdom (which invented this law) or in Hong Kong and it is urged that the meaning of "endangers the interests" should be clarified and tightened up at the same time that the other amendments to the Ordinance are being considered.

4. Proscription of organizations

A new section 8A is proposed to be added to the Societies Ordinance (Cap.151) enabling the Secretary for Security to "proscribe any local organization to which this section applies if he reasonably believes that the proscription is necessary in the interest of national security and is proportionate for such purpose".

There are already existing powers under the Ordinance to prohibit an unlawful society (sections 18 to 20 of the Ordinance).

The difference between the proposed power to proscribe and the existing power to prohibit an unlawful society appears to be:

(a) There are specified conditions which will enable the Secretary for Security to proscribe, namely where an objective of a local organization is treason, subversion, secession, sedition, spying or where it is subordinate to a mainland organization prohibited by open decree by the Central Authorities under the law of the PRC on the ground of protecting the security of the PRC;

(b) the Secretary does not have to act on the recommendation of the Societies Officer; and

(c) there is a specified appeal procedure in case of proscription.

The Secretary for Security is effectively given a "pre-emptive" power to proscribe on the ground of national security.

There are certain unusual features in the appeal procedure where a society is proscribed. The proposed section 8D(5) provides that if "the Court is satisfied, upon application by the Secretary for Justice, that the publication of any evidence to be given or any statement to be made in the course of proceedings might prejudice national security, the Court may order that all or any portion of the public shall be excluded during any part of the hearing so as to avoid such publication".

The proposed section 8E empowers the Chief Justice to make rules for the appeals. One requirement sought to be imposed on the Chief Justice is that he shall have regard to "the need to secure that information is not disclosed to the detriment of national security". For that purpose it is further provided that rules made may make provision -

(a) enabling proceedings to take place without the appellant being given full particulars of the reasons for the proscription in question;
(b) enabling the Court of First Instance to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him; and
(c) enabling the Court of First Instance to give the appellant a summary of any evidence taken in his absence.

However, where proceedings are held in the absence of the appellant and any representatives appointed by him, the rules should make provision for –

(a) a person to appoint a legal practitioner to act in the interests of the appellant; and
(b) the function and responsibility of such legal practitioner.

The rationale for these arrangements appears to be that if the society proscribed found out the evidence on which they come to be proscribed, it would be detrimental to national security (namely the territorial integrity and independence of China).

The circumstances which could justify such an arrangement must be extraordinary and extreme. The requirements of Article 23 are already met by the other proposals in the Blue Bill and there appears to be no need to enact this additional power to proscribe and the extreme measures contained in the proposed appeal procedure.

5. Police investigation powers

A police officer of or above the rank of chief superintendent is proposed to be given certain investigation powers, including the right for any police officer directed by him to enter, stop and detain a conveyance, search, seize, or remove by force any person or thing obstructing him where he reasonably believes that:-

(a) an offence under section 2 (treason), 2A (subversion), 2B (secession), 9A (sedition) or 9C (handling seditious publication) has been committed or is being committed;

(b) anything which is likely to be or likely to contain evidence of substantial value to the investigation of the offence is in any premises, place or conveyance; and

(c) unless immediate action is taken, such evidence would be lost and the investigation of the offence would be seriously prejudiced as a result.

The power must therefore only be exercised where evidence would be lost without immediate action. However, a more important question is whether evidence obtained in breach of the requirements of the new section 18B is admissible in evidence. The general rule is that evidence which a judge rules relevant is admissible, however obtained, though the criminal judge has a discretion to exclude admissible evidence if the strict application of the law would operate unfairly against the accused (*R.v. Sang [1980] A.C. 450-451*).

The proposal in the Blue Bill is more restricted than that in the Consultation Document but the Law Society does not consider that a case has been made out for giving the police the additional investigation power. Further, evidence obtained pursuant to an unlawful exercise of the power might still be admissible in evidence. The Law Society therefore does not consider that this provision for additional investigation power should be enacted.

Dated the 2nd day of May, 2003.