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The Society of Publishers in Asia

Hon Ip Kwok-him, JP
Chairman
Bills Committee on National Security (Legislative Provisions) Bill
Room 523G
West Wing
Central Government Offices
Hong Kong

15 April 2003

Dear Mr Ip,

I am writing on behalf of the Executive Board and membership of The Society of Publishers in Asia (SOPA), which is based in Hong Kong and represents more than 100 local, regional, and international publications (A list of SOPA Members is attached for your information). We are writing to express our concerns about the National Security Bill relating to implementation of Article 23 of the Basic Law, recently submitted to the Legislative Council by the Hong Kong Special Administrative Region Government.

We recognize the necessity of legislation implementing Article 23. However, we believe several of the proposals made in the legislation would stifle free expression of ideas in Hong Kong.

Our concerns derive from our firm belief that one of Hong Kong's primary competitive strengths in the international marketplace is its reputation for a free and unfettered press. Hong Kong's free press is a key aspect of the city's quality of life, and of the vibrant civil society that exists here. Moreover, an environment of media freedom is necessary to ensure that the citizens of Hong Kong remain informed and globally-aware, thus helping to keep Hong Kong's workforce among the world's most productive.

The Bill is of serious concern not merely to local media, but also to the many regional and international media organizations that have chosen Hong Kong as their hub in Asia. Hong Kong's reputation as a haven for open information exchange and free discussion has made our city home to numerous international publications, most of which are represented by our organization. To the extent that provisions implementing Article 23

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make the SAR a less attractive place for media organizations to maintain employment and investment, the legislation may also have a more tangible and immediate economic impact.

However, we are very hopeful that the Bill's most worrying provisions can be addressed during the legislative process, through full discussion and appropriate amendment. This is a unique opportunity for Hong Kong's Legislative Council to place the SAR in the forefront of legal and legislative practice, by enacting the world's most modern national security legislation. To that end, we respectfully submit the following proposals to improve the legislation:

## The Sedition Offence Should Be Removed

First, we are concerned about provisions of the Bill relating to sedition. We believe there is no need for a separate offence of sedition. The acts described in the sedition section of the Bill are already adequately covered by provisions governing treason, secession, and subversion. The act of inciting others to commit these substantive offences is already an offence under common law. Therefore, there is no need to add another layer of criminality, in the form of a separate sedition offence.

During the consultation process, the Government asserted that it was necessary to include sedition as an offence, in order "to underscore the seriousness of these acts [governing treason, secession, and subversion] by codifying these incitement offences in the context of sedition." The Government also maintained that because Article 23 specifically uses the word "sedition," the SAR is required to enact an offence with the name "sedition."

We disagree. If such incitement is already effectively prohibited under other sections of the law, the intent of Article 23 is satisfied, and there is no need to codify an offence of sedition separately. We believe it is dangerous to criminalize an act simply in order to emphasize the seriousness of other offences, rather than because of the substance of the act itself. Adding a non-essential criminal offence simply adds potential for abuse. The risk of abuse of the sedition offence to restrict freedom of thought and freedom of expression is simply too great.

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In fact, sedition has fallen into disuse in most other developed common law countries, even where old statutes sometimes remain on the books. There has not been a prosecution for sedition in Britain since 1947. Hong Kong should adopt national security legislation that accords with the best legal practices of the 21st Century. Such legislation should not include sedition as a separate offence. We fear that the sedition provisions of the Bill could do real damage to a free and commercially viable press in Hong Kong.

Handling Seditious Publications Should Not Be an Offence

Regardless of whether sedition itself is included as a specific offence, we believe there should be no offence of "handling seditious publications." The legislation indicates that it would be a criminal act if someone "publishes, sells, offers for sale, distributes, or displays any seditious publication; prints or reproduces any seditious publication; or imports or exports any seditious publication, with intent to incite others, by means of the publication, to commit [treason, subversion, or secession]."

This is truly worrying to those of us in the media business, because of its broad scope and vagueness. The offence is simply unnecessary. If a person has authored a document with the intention of inciting another person to commit an offence, then that person should be charged with incitement of the relevant offence. However, the offence of "handling seditious publications" encompasses an extremely wide range of activities, and applies to individuals far removed from the actual authorship of any words that might incite others. It would have the effect of causing printers, importers, distributors, retailers, and others (even someone who is simply copying an article to show a friend) to question legitimate trade and commercial actions. To that extent, it is bound to stifle free discussion and debate.

We note that a standard of intent has been included. However, we do not believe that this provides sufficient protection against the potentially stifling effect of the provision. According to Section 9C, a seditious publication is defined as one that is "likely to cause the commission of [treason, subversion, secession]." This constitutes an objective test of what a "reasonable individual" would consider likely. It does not refer to the actual state of mind of the reader of a given document, or to that of the accused. In fact, different individuals would naturally react to the same document quite differently. But with the objective test in place, the door is easily left open to prove "intent" to incite -- if a "reasonable individual" *should* know that a publication is seditious, and if a person still

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handles that publication, should he not by definition be accused of having the intention to do so? This is, at best, an unclear, ambiguous standard.

If such provisions are enacted, the safest course for anyone would be simply to avoid dealing with any potentially controversial publications, on a wide range of topics. The "gray area" created by the broad scope of this provision could create an environment of self-censorship among journalists, publishers, printers, retailers, and others.

We strongly urge the Legislative Council to amend the National Security Bill by striking out the offence of "handling seditious publications."

**If There Is No Imminent Danger, There Should Be No Offence**

We believe the ambiguity and redundancy of these sedition offences is best dealt with by removing them entirely from the legislation. But even if the Legislative Council deems it absolutely necessary to retain provisions dealing with "sedition" and "handling seditious publications," it should at the very least amend the Bill to clarify the responsibilities placed on Hong Kong citizens.

That could be done by remedying one of the provision's major shortcomings. As it stands, the Legislation does not require that violence or the threat of violence actually result in order for "seditious" activities to be criminalized. Instead, it merely requires that a document be "likely to cause the commission" of treason, subversion, or secession, according to the objective test noted earlier. Yet whether or not a publication truly endangers security depends entirely on the conditions prevailing when it is published. It is unreasonable to criminalize activities if there is in fact no imminent danger to national security.

If "sedition" and "handling seditious publications" are not to be entirely removed from the Bill, we would urge the Legislative Council to clarify the provisions by specifying that only behavior for which there is a direct and immediate connection to occurrence of the offence (treason, subversion, or secession) is subject to criminal penalty. This is a well-established safeguard in other developed common law jurisdictions. Some jurisdictions have referred to this standard in terms of a "clear and present danger" to national security, which must be present in order for offences related to sedition to apply. Other jurisdictions have done so by reference to Principle 6 of the Johannesburg

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Principles, which also enshrines this concept. We believe the SAR should follow this practice.

Restore Time Limit for Prosecution

Finally, the Legislation proposes to abolish the time limit within which sedition may be prosecuted. The limit is now six months after commission for seditious offences. Repealing Section 2 of the Crimes Ordinance has removed the existing offence, along with the time limit attached. If newly enacted offences do not reinstall the time limit, it is effectively open-ended. There is no reason why the risk of prosecution should hang over an individual for an indefinite period of time, and a lengthy delay will certainly be detrimental to an individual's ability to defend himself in a court of law. The six-month time limit should remain.

Remove New Category of Protected Information Under State Secrets

The new provisions relating to the Theft of State Secrets could also do real damage to the functioning of Hong Kong's free press. We are concerned about several aspects of the Legislation that expand the existing Official Secrets Ordinance without adding important safeguards.

First, the Legislation proposes to create a new class of protected information, encompassing "relations between the Central Authorities of the People's Republic of China and the HKSAR." We note that the bill applies this principle only to "affairs concerning the Hong Kong Special Administrative Region which are, under the Basic Law, within the responsibility of the Central Government."

However, we believe this standard is ambiguous and unclear, and we do not see the need for this provision. We agree that information relating to true national security issues, such as defence or international relations, could understandably be restricted. But these are already covered within the existing categories of protected information. We cannot see a justification for covering any other information under this criminal offence. Among the affairs which may be considered as falling "within the responsibility of the Central Government" under the Basic Law are the appointment of the Chief Executive and principal officials; the election participation process for the

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National People's Congress; the establishment of Mainland departments and offices in the HKSAR; and numerous other issues.

Relations between Beijing and Hong Kong are of utmost importance to how Hong Kong is governed, and we would go so far as to say that the public has a right to know about these relations, in the interest of good governance and the smooth functioning of "one country, two systems." We believe this new category of protected information should be removed from the legislation.

Remove Restriction on Indirectly Obtained Information

In addition, the legislation adds a new offence making it a criminal act for an individual to make an unauthorized and damaging disclosure of information protected under Part III of the Ordinance, if it is acquired by means of illegal access "whether by himself or another." The Bill defines illegal access as "unauthorized access to computer or telecommunications;" "access to computer with criminal or dishonest intent;" "theft, robbery, or burglary;" or "bribery." We do not condone any of these acts. If protected information is obtained through a criminal act by an individual, the offender should be prosecuted and an injunction may be sought to restrain publication.

However, applying this provision to indirectly obtained information would criminalize actions by an individual several steps removed from the commission of any actual theft of state secrets. It would place an unreasonable burden on that person to attempt to determine the original source of the information. As a practical matter, journalists would always have to treat information obtained anonymously as information that could have been obtained illegally. Moreover, it is deemed unethical for news reporters to disclose the sources of their information, yet under compulsion by the prosecution, there may be no other way to prove the information did not come from a protected source.

Under the legislation, indirect disclosure would only be excused if the accused could prove "he did not know and had no reasonable cause to believe" the information came from a protected source. It is likely to be difficult if not impossible to ascertain whether certain information was originally from a prohibited source or not, making it difficult to claim there was "no reasonable cause" to believe that the information is protected. This would be a minefield for media organizations, and it should be dropped.

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## The Duty of Confidentiality Should Not Be Further Expanded

It is worrying that the legislation expands the list of people on whom the duty of confidentiality is imposed. The Bill would include all present and former public servants or government contractors. It would also add agents and informants who provide information to the police. Here again, this would significantly expand the amount of restricted information. The legislation should not impose a duty of confidence on these new categories of people.

## Add Public Interest and Prior Publication Defences

As with the sedition provision, the best possible way of dealing with these ambiguities would be to drop these three new Theft of State Secrets provisions entirely. However, if the Legislative Council deems them essential to the implementation of Article 23, the Legislative Council should, at the very least, include two important safeguards to enable media organizations to make accurate judgments about whether or not information can legally be published.

First, the Legislation should provide for a "public interest defence." The public interest in knowing a given piece of information should be a primary consideration in whether or not that information should be disclosed. If information is true, and if the public good resulting from disclosure outweighs any damage, then this should be considered a valid defence. Other jurisdictions have made reference to the public interest in this context. For example The United Kingdom's Public Interest Disclosure Act of 1998 and Freedom of Information Act of 2000 both incorporate the notion of public interest in determining whether or not a disclosure of information is permitted.

Second, there should be a "prior publication defence." Information already in the public domain, no matter how it was originally obtained, should not be included in the category of restricted information. This merely recognizes the reality that Hong Kong citizens have access to print, broadcast, and electronic information from around the world. If they can access such information through other sources, it does not make sense to restrict the ability of local media to publish it. Omitting a prior publication defence creates the risk of selective prosecution.

## Decisions Outside Hong Kong Should Not Relate To Local Organizations

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Finally, we would like to note one other area of concern.

The legislation proposes that the Secretary for Security may proscribe any local organization "which is subordinate to a mainland organization the operation of which has been prohibited on the ground of protecting the security of the People's Republic of China, as officially proclaimed by means of an open decree, by the Central Authorities of the People's Republic of China." We believe that determinations related to the actions of Hong Kong organizations should be made exclusively by the Hong Kong Courts, based on criteria relevant to the SAR, upon application by the Secretary for Security. This process should be an independent exercise of judgment on the part of SAR officials. It should not be triggered by decisions outside the Special Administrative Region. Otherwise, the principle of "one country, two systems" will be seriously undermined.

We note the right of appeal through the judiciary against a proscription. However, we are concerned that, upon application from the Secretary for Justice, "the Court may order that all or any portion of the public shall be excluded during any part of the hearing," if making evidence public "might prejudice national security." A closed-door trial would seriously prejudice the rights of the appellant, and we cannot envision instances where national security interests would be jeopardized to the extent that they should outweigh the right of the appellant to a fair and open trial.

Further, the Legislation criminalizes "participating in the activities of a proscribed organization" and indicates an individual is guilty of such participation if he "is, or acts as a member of; attends a meeting of, or pays money or gives any other form of aid to." This is an unnecessarily broad application that is likely to catch the innocent or naïve, rather than those plotting criminal activities. If a media organization has sent reporters to the meetings of such a group, has the organization violated the law?

These proscription provisions go well beyond the requirements of Article 23. We fear the Bill would put at risk many organizations that have been operating in the HKSAR for years, without causing any threat to the security of the HKSAR or the Central Government. Likewise, the media organizations that report on such groups could be threatened.

<u>Conclusion</u>

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We believe that the provisions discussed above would inhibit the functioning of the local, regional, and international press in Hong Kong. In addition to the very real threat of legal action for new offences, we believe that the media will be moved to practice self-censorship. Laws that make Hong Kong's media environment less free will affect not just journalists and the media companies who employ them, but all of us who depend on the important role of the free press in a modern, open society. It runs counter to Hong Kong's aspiration to be regarded a "world city."

The Legislative Council now has a unique opportunity to re-draft and update the SAR's existing, antiquated laws. We urge the Legislative Council to replace these outdated statutes with national security laws which are specific, unambiguous, and do not inhibit the legitimate expression of free speech, assembly, a free press and the other liberties that characterize Hong Kong's way of life.

The Society of Publishers in Asia supports legislation under Article 23 to protect the sovereignty of China against armed subversion and external attack. We are against expansion of that mandate to criminalize aspects of the legitimate exercise of freedoms of a civil society and a free press environment, which Hong Kong currently enjoys and which have been guaranteed under the Basic Law.

Thank you for giving us the opportunity to express our views.

Yours sincerely,

Cyril Pereira
*Chairman*
Encl

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