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Hong Kong

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Chairman,
Bills Committee on the National Security
(Legislative Provisions) Bill,
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By fax 25090775

Dear Mr. Ip,

National Security (Legislative Provisions) Bill

1. I am writing to the Bills Committee on the National Security (Legislative Provisions) Bill ("the Bill") from the perspective of a concerned longtime resident of the Hong Kong Special Administrative Region ("HKSAR"). While I note that a number of positive changes have been made to the flawed proposals contained in the *Consultation Document on Proposals to Implement Article 23 of the Basic Law* ("Consultation Document"), I believe that there are still serious problems with the Bill as drafted. My concerns are explained further below.

Amendments to the Crimes Ordinance (Cap.200)

Treason (Clause 4, section2)

2. The meaning of "intimidate the Central People's Government ('CPG')" in the proposed section 2(1)(ii) of the Crimes Ordinance (Cap.200) is unclear, particularly given that it is apparently not necessary to establish that such intimidation was for any specific or general purpose.

3. It is unclear why the CPG is the target of this offence rather than the head of state or the People's Republic of China, depending upon which limb of the offence is being considered, as would appear to be the norm in respect of treason laws in other jurisdictions.

Subversion (Clause 4 section 2A)

4. As in the case of the provisions dealing with treason, the meaning of "intimidates the CPG" in section 2A(1)(c) is not clear. It is even more unsatisfactory in relation to subversion because here it does not refer to the defendant's intent but is part of the actus reus of the offence. It seems to be unreasonable to include such a loosely-worded provision when the offence carries a maximum penalty of life imprisonment. What tests would be used to determine whether an accused person had intimidated the CPG?

5. The definition of "serious criminal means" in section 2A(4)(b) is too broad. The gravity of an act that "causes serious damage to property" (subsection (4)(b)(iv)) depends to some extent on the nature of the property. As it stands it seems that causing serious damage to litter bins by throwing them at the gate of the office of the CPG Foreign Ministry in the HKSAR could be construed as committing subversion (depending again on the interpretation of "intimidating the CPG"). If so, this would seem to be unreasonable.

6. More generally, if the term "serious criminal means" is to reflect the sense of gravity that it purports to convey then the reference to "offence" in subsections (4)(b)(vi) and (vii) should instead be to "indictable offence" or, as a minimum, to an offence that may be tried on indictment.

7. The extra-territorial application of this offence and the offence of secession to foreign nationals who are Hong Kong permanent residents is questionable, particularly given that permanent residency is not in fact a permanent status for foreign nationals, because, according to my understanding, if they leave HKSAR and do not return within a certain time frame they will cease to be permanent residents. As drafted, the law would apply to such a person who has left the HKSAR for, say, over one year and does not intend to return. This should be reconsidered.

Secession (Clause 4, section 2B)

8. The same objection applies to the use of the term "serious criminal means" in this context as in the context of subversion (paragraphs 5-6 above).

Sedition (Clause 6, section 9A)

9. The case for introducing specific statutory offences of sedition has not been made. The Consultation Document (paragraph 4.13) acknowledged that the act of inciting others to commit the substantive offences of treason, secession and subversion is already an offence under the common law. One wonders why, therefore, given that the HKSAR remains a common law jurisdiction, it should be so important to codify these offences, particularly when other jurisdictions are considering doing away with offences of sedition altogether. The inclusion of the sedition-related offences should therefore be reconsidered.

10. Furthermore, the penalties have been increased out of all proportion to those currently applying to acts done with a "seditious intention" under sections 9 and 10 of the Crimes Ordinance and they appear to be excessive. Cap.200 provides for maximum penalties of a fine of $5000 and imprisonment for 2 years for a first offence and imprisonment of 3 years for subsequent offences, in contrast to life imprisonment for inciting others to commit an offence of treason, subversion or secession under the proposed section 9A. The excessive nature of the penalties is exacerbated by the fact that the substantive offences of treason, subversion and secession are themselves not sufficiently clearly delineated, as indicated above.

11. Given that the offence of sedition places a limitation on freedom of expression, it is important that there should be an explicit requirement to show that the expression concerned was intended to incite the relevant offence referred to in the proposed section 9A(1)(a) or the violent public disorder referred to in 9A(1)(b) and was likely to do so, and that there was a direct connection between the expression and the likelihood of occurrence of the offence or violent disorder (c.f. Johannesburg Principles on National Security, Freedom of Expression and Access to Information). It should be noted that existing offences in Cap.200 that are referred to in the relevant headnote as "incitement" (e.g. incitement to mutiny and incitement to disaffection, sections 6 and 7 respectively) require a person to "knowingly" attempt to carry out the relevant action. However, it would appear from the Bill and the explanation given in the Consultation Document that there is a basic inconsistency in the Government's position in relation to the sedition offences.

12. While, on the one hand, arguing that it is "necessary to underscore the seriousness of such acts by codifying these incitement offences in the context of sedition" (Consultation Document, paragraph 4.13), the Government points out, on the other hand that, although the existing offences relating to seditious acts in Cap.200 are based on a common law offence which is committed only if the defendant intends to achieve his seditious objective by causing violence, creating public disorder, etc., the case of Fei Yi-ming v. R (1952)[36 HKLR 133] decided that the legislation "is not be construed according to the common law but on its own terms" (Consultation Document paragraph 4.8). However, they go on to suggest that the Fei Yi-ming case must now be viewed in the light of the guarantee of freedom of speech under Article 27 of the Basic Law ("BL 27") and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong by BL 39, and they conclude: "It is therefore highly likely that the court will read into the legislation the common law element" (Consultation Document paragraph 4.8).

13. Thus, it would seem that the Government's position is that, on the one hand, it is very important to codify the offences, while, on the other hand, the safeguards, such as they are, can be left to be provided under the common law, despite the fact that the relevant precedent on this point indicates that a common law interpretation will not be given to the Cap. 200 offences. Thus

what remains is merely an assurance that, in the Government's opinion, an interpretation by the court today would be not be likely to follow the precedent case in the light of the guarantees under the BL.

14. This seems to be an unbalanced approach. If it is necessary to codify the offences, then it should also be necessary to codify the safeguards and, more specifically, to require that an intention to incite others to commit the relevant offence or to engage in violent public disorder, etc, be shown. This ought be the case when the law provides for a maximum penalty of life imprisonment for some of the relevant offences.

Handling seditious publication (Clause 6, section 9C)

15. Provisions on the handling of seditious publications are not required under BL 23 and it is not clear why specific provisions of this nature should be required in addition to provisions on sedition. In relation to the details of the proposed provisions, it is noted that intent is part of this offence which makes it even more surprising that it is not explicitly part of the offence of sedition itself. It is also questionable whether there is a need for the offences under the proposed sections 9C(2)(b), printing or reproducing, and 9C(2)(c), importing or exporting, when presumably such publications could in practice constitute a danger only if they were to be distributed, and the acts of publishing, offering for sale, distributing, etc. are already covered by subsection (2)(a).

Certain acts are not incitement (Clause 6, section 9D)

16. The purported safeguards in the proposed section 9D(1) provide a clear indication of one the pitfalls of not requiring that intention must be established in the context of prosecuting the sedition offences relating to the new sections 2, 2A and 2B. In section 9D, the Bill relies on ring-fencing a defined list of acts called "prescribed acts" which are not in and of themselves to be regarded as inciting others to commit one of the relevant offences. However, this is an unsatisfactory approach as a definitive list of prescribed acts will inevitably not be able cover all acts that should be excluded from the provisions on sedition.

17. As regards the details of the provisions on prescribed acts, firstly, it is not clear for example that forms of expression such as political satire, criticism, holding up to ridicule particular measures that may be considered to be ineffective, counter-productive, etc., would be covered under this section. These forms of expression could be an end in themselves and it might not be possible to show any specific intent, for example, to remedy the matter that is the subject of the expression. In a society that genuinely desires to protect freedom of expression "prescribed acts" should not be limited only to those which can be shown to have a definite practical or functional purpose. Why, for example, is there no wider no carve out for artistic expression (c.f. the defence of public good under section 28 of the Control of Obscene and Indecent Articles Ordinance (Cap.390)?

18. Secondly, the purposes specified in section 9D(3), such as "showing that the Central People's Government….has been misled or mistaken" or "pointing out errors or defects…with a view to remedying of such errors or defects", appear to offer an inadequate safeguard because they suggest that a defendant would need to establish that, for example, the CPG had actually been misled or mistaken or that there was in fact an error or defect in the government, laws, administration of justice, etc. This may be extremely difficult to prove, particularly if the relevant authority is unwilling to concede the point, and it should not be a requirement to have to show this in order to be able to invoke this section successfully as a defence. In order to have any meaningful effect as safeguards, therefore, these forms of prescribed acts should require the defendant to establish only that he "intended" to show or point out the relevant matters.

19. However, to reiterate the point, the problems with the provisions on prescribed acts highlight the main concern, which is that the sedition offences seem to be akin to offences of strict liability and there is apparently no need for the prosecution to establish a defendant's intention actually to incite others to commit the substantive offences to which the sedition relates.

Investigation power (Clause 7, section 18B)

20. The proposed police powers of entry, search and seizure without first having to obtain a warrant are extreme and, in the case of any but the most exceptional circumstances, are not justified. The Consultation Document indicates that "at common law a police officer can, inter alia, enter private premises without a warrant in emergencies in order to stop a crime" (paragraph 8.4). As regards investigation powers, the Consultation Document stated that the existing provisions governing investigation into treason, sedition and official secrets in Cap.200 and the Official Secrets Ordinance (Cap.521) continue to be appropriate and should be retained "subject to certain adaptations" (paragraph 8.3). The example is given of the criteria for the exercise of the existing power under section 14, to remove seditious publications without a court warrant which, it is stated, "should not be conditioned solely upon whether such publications are visible from a public place. Instead, *such powers should only be exercised in case of great emergency* [existing emphasis] irrespective of whether the publications are visible to the public…" (paragraph 8.3). Despite this statement, the Bill does not limit the use of such powers to emergencies but instead provides that they may be invoked in a broader set of circumstances.

21. The issue of protecting evidence is not peculiar to the offences contained in this Bill and would arise in relation to many different kind of crimes. Why should an investigation into handling of seditious publications, for example, be regarded as being a matter of such great importance and urgency that a court order should not be required before premises, etc. may be broken into and searched and goods seized? Even were such a power to be justifiable in very extreme cases, a distinction needs to be drawn between the offences

under the proposed sections 2, 2A and 2B of Cap.200 and those relating to sedition under sections 9A and 9C. The latter should be excluded from the scope of this investigation power altogether.

22. If it is intended that this investigation power should be called upon only in rare and extreme cases, as the Consultation Document suggested, then, if it is to be introduced at all, the power to authorise its use should be limited to the Commissioner or Acting Commissioner, or at most a Deputy Commissioner.

Amendments to the Official Secrets Ordinance (Cap.521)

Information resulting from unauthorised disclosures or illegal access or information entrusted in confidence (Clause 11, section 18(2))

23. The existing provisions of section 18 of the Official Secrets Ordinance (Cap.521)("OSO") cover a damaging disclosure by other persons of protected information obtained by a public servant (or a government contractor) in the course of his duties. The Bill adds a new category under the proposed section 18(2)(d), that is, information "acquired by means of illegal access (whether by himself or another)".

24. Whilst it is good that the Bill has narrowed down the vague proposal contained in the Consultation Document, which covered information acquired directly or indirectly by "unauthorised access", the proposed section 18(2)(d) is still fraught with difficulties. It appears to confuse the questionable means by which the information has been obtained with the need to justify secrecy and non-disclosure of that information. Although the means by which the information has been obtained in a particular case may have been unlawful, it should not automatically follow that the information so obtained should be protected as an official secret, a damaging disclosure of which should be an offence. In principle this is far too broad an extension of the OSO and in practice it is also likely to lead to problems.

25. As regards practical issues, although under section 18(1) it is necessary to show that a person knew or had reasonable cause to believe that the information was protected against disclosure under any of sections 13 to 17 of the OSO and that it had come into his possession in one of the ways mentioned in section 18(2), as the information may have been obtained by the defendant only indirectly, he may in fact not be aware that the information had been acquired unlawfully and yet he may still be prosecuted for making a damaging disclosure. Lack of knowledge or belief may not in itself be sufficient to escape prosecution given that the test of awareness is one of "having reasonable cause to believe" which, at least in part, is an objective test.

26. What might this mean, for instance, for a newspaper which does not have any direct knowledge of how a person offering information has acquired that information. Would the newspaper be required to make enquiries and if,

having been asked, the person offering information indicated that he had not acquired it unlawfully, would this be an adequate defence for the publisher of the information? It would seem that a recipient of information will potentially be taking a risk whenever he makes a damaging disclosure having reasonable cause to believe that the information is in a protected category and that disclosure of it would be damaging (by virtue of sections 18(1) and 18(3)(b)). While it could be argued that such uncertainty already applies in relation to the existing means by which information may come into a person's possession under section 18(2), the concern is that the new section 18(2)(d) expands considerably the scope of what is already a problematic provision.

27. The present major news story of the spread of atypical pneumonia suggests a possible example of the dangers of the proposed legislation. It is quite likely that the effect of the law will be to stifle investigative journalism and strong reporting, which is in the public interest, in relation to events such as this, and that, as a result, the important role that the media has to play as a check and balance against the abuse of executive power, will be adversely affected. Occurrences such as this also provide a clear illustration that the interests of governments to control the dissemination of information and the interests of the community to be apprised of relevant facts do not always coincide.

28. As indicated above, a person does not commit an offence under this section unless the disclosure is damaging and he makes it knowing, or having reasonable to believe, that it would be damaging. As regards the definition of "damaging", this differs in different sections of the OSO and, under section 18, the relevant definition depends upon the category of protected information involved and will be determined, under section 18(4), in the same way as it would be determined in the case of a disclosure by a public servant under the relevant section of the OSO. Regarding disclosures of information falling under the heading of "international relations", for example, the definition can be found in the existing section 16(2) and is as follows:

> " (a) the disclosure damages the interests of the United Kingdom [People's Republic of China?]* or Hong Kong elsewhere, seriously obstructs the promotion or protection of British nationals [Chinese nationals]* or Hong Kong permanent residents elsewhere; or
>
> (b) the information, document or article in question is of such a nature that its unauthorised disclosure would be likely to have any of the effects described in paragraph (a)".
>
> Section 16(3) goes on to state, in respect of certain categories of information, that "to establish as a fact that the information is confidential; or to establish its nature or contents" may be sufficient to satisfy (b) above.

Under section 16(4), it is a defence to a charge under section 16 if a person can prove that he did not know or have reasonable cause to believe that the information was in the protected category or that the disclosure would be damaging (i.e. in effect, a reversal of the burden of proof).

* [*N.B. Although there are general post-Handover "adaptation" provisions in the Interpretation and General Clauses Ordinance (Cap.1) as amended by the Hong Kong Reunification Ordinance (Cap.2601), the OSO has not been specifically adapted and it seems to be unclear which terms in the OSO have in fact been superseded. See below*].

Information related to Hong Kong affairs within the responsibility of the Central Authorities (Clause 10 section 16A)

29. Under the proposed section 16A of the OSO, the Bill adds a new category of protected information in addition to the information that is currently covered (i.e. information relating to security and intelligence; defence; international relations; and commission of offences and criminal investigations). The category added by the Bill is information "that relates to any affairs concerning the Hong Kong Special Administrative Region which are, under the Basic Law, within the responsibility of the Central Authorities". Section 18, which deals with damaging disclosures by persons who may not be public servants and, as discussed above, includes disclosure of information obtained by unlawful access, is also expanded to cover the category of information introduced under section 16A.

30. In relation to this new category of protected information, a disclosure is damaging if either (a) the disclosure endangers national security or (b) the information, etc. is of such a nature that its unauthorised disclosure would be likely to endanger national security.

31. Although the above-mentioned new category of protected information has been narrowed in scope from the category proposed in the Consultation Document, namely "information relating to relations between the Central authorities of the PRC and the HKSAR" (paragraph 6.19 of the Consultation Document), it is still too vague and is likely to create uncertainty. Is it intended to refer only to foreign affairs (BL 13) and defence (BL 14)? If so, this should be stated more explicitly. If the intended scope is broader, then that intention should be defined more clearly. No further attempt to explain the meaning is made in the Legislative Council Brief or the Explanatory Statement to the Bill. As drafted, it could arguably cover a wide range of issues that concern relations between the Mainland and the HKSAR.

32. As to whether an issue like, for example, atypical pneumonia could fall within the scope of the OSO, that would depend upon whether it could be construed as falling within one or other of the categories of protected information. This is a question of interpretation. The subject has clearly

become very much a matter of global concern and it is possible, given the international dimension, that it might be interpreted as coming within the term "international relations" as defined in section 12(1) of the OSO (as amended by Cap.1 (but see above as regards the effect of the general adaptations) and paragraph 32 of the Schedule to the Bill itself).

33. One subject that could well fall within the scope of the OSO is information relating to the question of proscription of local organisations under the amendments to the Societies Ordinance contained in Part 4 of this Bill. The relevant amendments contain provisions that, for example, allow the Secretary for Security (S for S) to apply to have the public excluded from any part of an appeal hearing and for rules to be made by the Chief Justice to inter alia enable proceedings to take place without the appellant being given all the particulars of the reasons for the proscription, or for the court to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him.

34. Decisions that have a bearing on whether a person may be prosecuted and imprisoned may, therefore, be taken without the appellant or the public knowing all the reasons for those decisions. At the same time, a person making a "damaging" disclosure of information regarding such decisions, which has been obtained originally through, for example, computer hacking, may also be liable to prosecution and imprisonment, regardless of whether the disclosure would be considered by a court to be in the public interest in a particular case. Furthermore, if the above analysis of the determinants of what is "damaging", and of the knowledge or belief required of the person making the disclosure, is correct, it would seem that it will not necessarily demand a great deal of evidence to successfully prosecute a person for making a damaging disclosure.

35. Under the circumstances, there is a strong case for arguing that some form of "public interest" defence should be provided for in the OSO as amended, to protect persons who have made disclosures of information which, although they may be regarded as damaging, as defined, are in the public interest and the court is satisfied that the public interest outweighs the damage sustained. Again the issue of atypical pneumonia could be a case in point. The community at large would consider it to be important that information about the nature and extent of the spread of the disease should not be concealed if it is be fought as effectively as possible and confined as far as possible.

36. I note the Government's paper on the question of unauthorised disclosure of protected information and the public interest (Paper No.20) which has been reproduced on the Legislative Council website. The paper refers widely to the debate on a similar issue the United Kingdom (UK) when the equivalent UK law was passed. However, it is not sufficient to refer only to the example of the UK on such matters. The UK is known to have restrictive official secrets legislation. For example, in the case of the publication of the book "Spycatcher" in 1987 written by a former MI5 officer, I believe that

the UK Government was still trying to impose injunctions and take legal action against newspapers which published articles based on the book after the book had been published overseas and was freely circulating in the UK. The matter was eventually referred to the European Court of Human Rights which found against the UK Government for trying to "gag" the various newspapers involved. I would therefore urge the Bills Committee to require the Government to provide more information on how the issue of the public interest is dealt with in official secrets legislation in various other major jurisdictions.

37. As regards other aspects of Paper No.20, in paragraph 10, it is stated that "offences of unauthorised disclosure generally involve a damaging test which ensures that an offence is only committed where the public interest is harmed". As discussed above, this is not strictly accurate. The concept of "damaging" is not defined in terms of the public interest but instead has its own specific meaning, which differs depending upon the category of protected information disclosed. In paragraph 15 of Paper No.20, apparently in relation to the form of damaging disclosure covered in the new section 16A, it is stated that "[t]he Administration does not believe that it can ever be in the public interest to make a disclosure that is damaging in that way". However, firstly, if on the facts it unlikely to be able to be used under such circumstances, then there should be even less concern about making provision for it in the Bill. Secondly, whatever the rights and wrongs of the Government's view on this point as a matter of policy, it should be remembered that the Bill is a piece of legislation and, as with other legislation, much will depend on the legal definition of terms. In this regard, as indicated above, the precise scope of the new section 16A of the OSO remains in doubt.

38. In paragraph 3 of Paper No.20, another general and somewhat emotive point is made, that is: "No person should be allowed to disclose information which he knows may, for example, lead to loss of life simply because he has general reason of a public character for doing so". While this again may appear to be uncontrovertible, any public interest defence could be written in such terms as to make it clear that the balance would have to weigh very clearly in favour the public interest for it to be invoked successfully. On the basis of the very limited information given in paragraph 3, this kind of example would be unlikely to meet the requirements of a stringent test. However, matters are never black and white. If a damaging disclosure is made that could lead to loss of life but in making it a much greater loss of life is likely to have been prevented, then could this not be in the public interest?

39. As a final point on the OSO, the existing section 18(5) contains references that appear to be obsolete but may not have been adapted. Section 18(5) states that a person does not commit an offence in respect of information disclosed in the circumstances referred to in subsection 2(a) or 2(c) "unless that disclosure was by a British national or Hong Kong permanent resident or took place in Hong Kong". However, the new section 18(2)(d), relating

to information acquired by means of illegal access, will not be subject to this provision. As indicated in the note above, there are certain general adaptation provisions contained in other ordinances, but the extent to which they cover all the obsolete references in the OSO needs to be clarified. It seems to be unsatisfactory that major changes are being made to this ordinance before it has undergone a specific adaptation exercise to bring it fully up-to-date. The fact that the OSO has not been put into proper order first may result in confusion and uncertainty.

Amendments to the Societies Ordinance (Cap.151)

Proscription of organisations endangering national security (Clause 15, s8A)

40. There is no requirement under BL 23 to introduce laws to proscribe organisations that endanger national security. BL 23 requires only that the HKSAR has laws "to prohibit foreign political organisations or bodies from conducting political activities in the [Hong Kong Special Administrative] Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies". The Consultation Document stated the following in relation to the conduct of organised political activities endangering the security of the state: "The existing power under the Societies Ordinance to prohibit the operation of a society on national security grounds already provides effective sanctions against such activities" (paragraph 7.13). Under the circumstances, the proposed amendments to the Societies Ordinance (Cap.151) relating to proscription of local organisations on these grounds are unnecessary and should be dropped.

41. Under the proposed section 8A(2)(c) of the Societies Ordinance, a local organisation that is subordinate to a prohibited mainland organisation may be proscribed. In relation to this provision, one of the fundamental general procedural safeguards, under the proposed section 8A(1), namely that the S for S must reasonably believe that "the proscription is necessary in the interests of national security and is proportionate for such purpose", is likely to be more apparent than real. This is so because this provision will be invoked only when a local organisation is deemed to be "subordinate to a mainland organisation 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 under the law of the People's Republic of China". Under section 8A(3) a certificate given on behalf of the CPG stating the above, shall be conclusive evidence of the prohibition. This being the case, it is difficult to see how the S for S could have any basis for taking a different view on national security than the CGC had done when it made such a decree. As such, this provision will potentially directly impinge upon freedoms in Hong Kong and merge the distinction between HKSAR and mainland law.

42. Furthermore, as regards the details of this particular proposal, under the proposed section 8A(5)(h)(iii) of the Societies Ordinance, one of the grounds

for defining a local organisation as being subordinate to a mainland organisation is "the policies of the former or any of such the policies are determined, directly or indirectly, by the latter". This is clearly far too wide, given especially that, under subsection (5)(h)(ii), if the local organisation is under the direction or control, directly or indirectly, of the mainland organisation, then it is already considered to be subordinate to the latter. If, for example, a local organisation's policy on the procurement of stationery was that it would source it from wherever a particular mainland organisation sourced it, under the Bill as drafted, it could find itself being labelled as subordinate to that mainland organisation. The test of direction or control ought to be sufficient in itself. In any event, subsection (5)(h)(iii) should be confined to, for example, "governing" or "basic" policies, and not any policy whatsoever.

43. It seems unreasonable that an order should in all cases take effect notwithstanding that an appeal has been lodged, as stated in the proposed section 8B(4). If there were particular circumstances where the S for S reasonably believed that it would not be practicable to allow the appeal to take place first or the time for appeal to lapse without an appeal having been made, then the order could take effect prior to any appeal. In other words, a provision similar to the proposed section 8B(2) in relation to representations could and should also be applied to appeals.

44. Under the proposed section 8C of the Societies Ordinance, a person who, for example, acts as or claims to be an office-bearer of a proscribed organisation or manages or assists in the management of, or attends a meeting of, such an organisation, is guilty of an offence and is liable on conviction to a fine and imprisonment for 3 years. Under section 8C(2) it is a defence for a person charged with an offence under subsection (1) if he proves that at the time of the alleged offence he did not know and had no reason to believe that the organisation had been proscribed. Under the new section 8C(3), it is also a defence, in relation to his being or acting as an office-bearer or member, if he proves that he had taken all reasonable steps to cease being such an office-bearer or member.

45. It would seem, therefore, for example, that the person who does the accounts for a proscribed organisation who is unaware that the organisation has been proscribed and has attended a meeting in his capacity as the accountant would have a defence. However, under the Bill, the burden of proof that he was unaware of the proscription would fall on that person. This is not entirely satisfactory. In addition, it seems to be inappropriate that the offence of "attending a meeting" of a proscribed organisation should be put on a par with "acting as an office-bearer" or "managing or assisting in the management" of a proscribed organisation. It would not, however, be an adequate response to this point to suggest that the court is at liberty to impose a lesser penalty for one situation than for another – the problem lies with equating the activities in the first place.

46. Under the proposed section 8D(1), any office-bearer or member of an organisation proscribed under section 8A who is aggrieved by the proscription may appeal to the court within 30 days after the proscription takes effect. It is not clear why an apparently arbitrary time limit should be imposed in this regard. If a person who wishes to appeal is out of Hong Kong for a few weeks at the time of the proscription then he could be barred from appealing. It would be more equitable to allow a period of at least 60 days.

47. It is also not clear why the court should be restricted in an appeal to considering the matters specified in section 8D(3).

48. Where a proscription is set aside by the court, the proposed section 8D(4) states that the proscription "shall be deemed to have never been made". Under these circumstances what will happen to persons who may be being prosecuted under section 8C – will the prosecution automatically lapse? If not then something should be added to section 8D to clarify the position. Furthermore, how will the public be informed of the setting aside of an order?

49. The grounds for excluding all or any portion of the public from an appeal hearing, under the proposed section 8D(5), are not sufficiently stringent. It is not enough that the court should be satisfied upon application by the Secretary for Justice that the publication of material "might prejudice national security". It should, more appropriately, be a requirement that the court should be satisfied that publication would be likely to prejudice national security

50. As mentioned above, under the proposed section 8E(3), the Chief Justice may make rules to enable proceedings to take place without the appellant being given all the particulars of the reasons for the proscription, or for the court to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him. There appears to be no reference elsewhere in this part of the Bill to the circumstances in which this may be necessary, other than the proposed section 8D(5). However, in allowing for the appellant and his appointed legal representative to be excluded and for particulars of the reasons for proscription to be withheld from the appellant, this seems to go beyond section 8D(5). On the face of it, it is inappropriate to deal with a matter of such potential importance, given its implications for the rules of natural justice, merely "in passing" under a regulation-making power. If there is a need for what would appear to be fairly draconian powers, then the circumstances under which they may be invoked should be clearly spelled out in the Bill.

I hope that the Bills Committee will give consideration to the points contained in this submission.

Yours sincerely,

P. M. Tisman