

Submission No. 165

**Legal Aid Services Council's views on the  
National Security (Legislative Provisions) Bill  
presented to the Legislative Council**

(A) Preamble

The Legal Aid Services Council (the Council) is a statutory body with the duties of supervising the provision of legal aid services in Hong Kong provided by the Legal Aid Department (LAD) and to advise the Chief Executive of the Hong Kong Special Administrative Region on legal aid policy. A fact sheet on the Council is attached at *Appendix*.

2. The Bill proposes certain amendments to the Legal Aid in Criminal Cases Rules, and apart from commenting on those, the Council will also comment on the Bill from the broad perspective of its effect on legal aid in general. The Bill proposes to create new offences and this may increase legal aid expenditure. Legal aid is not a stand alone activity, but is related to various social institutions. For example, the legal system and the demand for legal aid are closely related. The Council has always borne in mind that legal aid is a publicly funded service which should be operated cost-effectively and to minimize abuse. Over the years, the Council has worked to enhance public understanding of legal aid service so that a member of the public may know whether or not he should seek legal aid. In this way, frivolous demand on legal aid can be reduced. New legislation naturally tends to increase the demand for legal aid because new offences are created. Moreover, the demand for legal aid can be minimized if the provisions of a law are clear.

3. The Council acknowledges that it is necessary for Hong Kong to legislate in accordance with Article 23 of the Basic Law. It notes that there are new offences punishable by heavy penalties. As commission of treason, secession, sedition or subversion is regarded as very dishonourable, a person charged with any of those offences will defend vigorously, seeking legal aid where applicable. This will result in increase in legal aid expenditure.

4. The Council wishes to point out certain shortcomings in the Bill, and believes that if they are rectified, the chance of litigation will be reduced, and accordingly the demand for legal aid and the cost to public funds.

5. The Council requests that Committee Stage Amendments be moved to improve the Bill.

## **(B) Clarity of expressions**

6. If the expressions are clear and provide certainty in meaning, there will be less opportunity for costly dispute and uncertainty if an offence is committed. The same point can be made of vague expressions. For example the following expressions can be suitably revised to enhance clarity :

- (a) Proposed sections 2(1)(a)(ii) and 2A(1)(c) of the Crimes Ordinance : how one can "intimidate" or attempt to "intimidate" the Central People's Government (CPG) remains to be explained.
- (b) The meaning of "instigating" in the proposed section 2(1)(b) of the Crimes Ordinance is close to that of "inciting". The Bill seems to avoid the occasion of someone being charged with inciting to incite another to commit a national security offence in the proposed section 2D. Yet, it contradicts itself by including the proposed section 2(1)(b) "instigating foreign armed forces to invade the People's Republic of China (PRC) with force".
- (c) Proposed section 2(1)(c) of the Crimes Ordinance refers to "prejudice the position of PRC in the war". This is wide ranging and vague, and presumably, the court will be asked to assess, usually after the event, the intended effect of an act done (or purported to be done) in the midst of a war. It will be a difficult and expensive task to litigate.
- (d) Proposed section 2A(1)(a) of the Crimes Ordinance refers to "disestablishes the basic system of PRC as established by the Constitution of PRC". Neither the meaning of "disestablishes" nor the contents of the elements of the "basic system" are clear or definitive.
- (e) Proposed sections 2A(1) and 9A(1)(b) of the Crimes Ordinance refers to "seriously endangers the stability of PRC". The court will probably have to consider as a matter of degree the effect or alleged effect (in the case of sedition) on the "stability" of the PRC, which is a difficult concept in and of itself.
- (f) Proposed section 9C of the Crimes Ordinance refers to "likely to cause the commission of an offence". What may be likely to cause a commission to one person may not be likely to cause a commission to another. It will be clearer to provide that there is the intention to cause the commission.

(C) Proof of intent

7. Offences covered by the Bill are very serious offences and must require proof of intent (*mens rea*). We note that offences under proposed sections 2(1)(a) (joining or being part of foreign armed forces at war with the PRC), 2(1)(c) (assisting public enemy at war with the PRC), 9A (sedition by inciting the commission of treason, etc or violent public disorder) and 9C(2) (handling seditious publications) of the Crimes Ordinance, and the offence under proposed section 18(1) of the Official Secrets Ordinance explicitly require the prosecution to prove intention on the part of the accused.

8. The position is not explicitly spelt out in respect of the offences in proposed sections 2(1)(b) (treason by instigating an invasion), 2A (subversion) and 2B (secession) of the Crimes Ordinance. Although one may presume that all statutory offences require the prosecution to prove *mens rea* unless the contrary intention is shown in the provisions, it will be beneficial if these provisions can be amended as in the instances referred to in paragraph 7.

(D) Onus of proof

9. Proposed section 16A of the Official Secrets Ordinance on information related to Hong Kong affairs within the responsibilities of the Central Authorities and proposed section 8C of the Societies Ordinance on prohibition of participating in the activities of proscribed organization put the burden on the accused to prove as part of his defence that he did not have *mens rea* at the time of the alleged offence. These two sections should be revised to the effect that prosecution has the duty to prove that at the time of the alleged offence, the accused knew or had reasonable cause to believe the relevant facts.

(E) Time limits for prosecution

10. Paragraph 13 of the Schedule to the Bill proposes to abolish the existing time limits for the prosecution of the offences of treason and sedition (3 years after the commission of treason and 6 months after the commission of sedition). There should be timely prosecution of such offences since the practical effect of such acts is likely to be immediate. Instituting prosecution a long time after the act, when the act itself may be looked upon with different values, is likely to be considered oppressive or could lead to an application for permanent stay. Either way, it would increase complexity and cost. Stale

cases could fail with increased costs. Therefore the existing time limits should be retained.

(F) Extra-territoriality to Hong Kong permanent residents

11. The Bill seeks extra-territorial power against a Hong Kong permanent resident in respect of the offence under proposed sections 16A (information related to Hong Kong affairs within the responsibility of the Central Authorities) and 18 (information resulting from unauthorized disclosures or illegal access or information entrusted in confidence) of the Official Secrets Ordinance. Extra-territoriality would be of little concern if it binds only Chinese nationals who are Hong Kong permanent residents, as in the case of proposed section 2(3) of the Official Secrets Ordinance. It is a concern if it binds Hong Kong permanent residents in respect of their action elsewhere, given that Hong Kong permanent residency is not a form of nationality and should not be equated with nationality. Further, there is a possibility that the act in question may not be considered a criminal offence, if committed in a Hong Kong permanent resident's country of nationality. The proposed sections 16A and 18 should be amended so that the proposed offences may apply only to Chinese nationals.

(G) Rule 13 of the Legal Aid in Criminal Cases Rules [Cap. 221 Subsidiary legislation]

12. It is existing policy that complex and serious offences involving the state and national security merit special legal aid consideration, as made evident by Rule 13. Accordingly, this independent safeguard should be provided for all national security offences. Rule 13 should be revised so that it will also apply to the following offences proposed in the Bill :

- (a) sedition by handling seditious publication [section 9C(2) of the Crimes Ordinance] in addition to section 9A(2)(a) of the Crimes Ordinance (sedition by inciting commission of treason, subversion and secession), the former offence being closely related to other offences covered by the Rule – treason, subversion, secession and sedition by inciting commission of treason, subversion and secession.
- (b) inchoate offences (conspiracy and attempt) and accomplice acts

(aiding, abetting, counseling or procuring the commission of offences) of treason; subversion; secession; sedition by inciting commission of treason, subversion or secession; and handling seditious publication.

13. This is because :

- (a) prosecution for the substantive offences is rare when compared with that for the inchoate offences and the accomplice acts;
- (b) the maximum penalty for inchoate offences and accomplice acts is the same as the substantive offences; and
- (c) these are very grave offences and are regarded as very dishonourable acts and just as complex and worthy of legal aid as the substantive offences.

(H) Societies Ordinance (Cap 151)

14. Proposed section 8C (1)(e) (prohibition of paying money or providing aid to proscribed organization) of the Societies Ordinance as read with proposed section 8B(4) (providing that an order of prosecution takes effect upon publication whether or not there has been an appeal) may mean that any party providing in any way for legal aid to an office-bearer or member of a proscribed organization to enable him to appeal against the proscription is unlawful. This will include the Director of Legal Aid or the assigned lawyer, Duty Lawyer Service, Bar Association's Free Legal Service Scheme, and pro bono service. The relevant sections should be amended so that legal aid and legal assistance can be provided without infringing the law.

15. The Bill provides that an order made by the Secretary for Security to proscribe a local organization may take effect immediately upon publication or on such later date as may be specified. If the Administration does not afford those linked to the organization a period of time to dissociate themselves before being made potential subjects of criminal prosecution, the demand for legal aid will increase. We propose that proposed section 8B(4)(a) be revised so that an order to proscribe a local organization will take immediate effect only if there are compelling reasons to do so.

16. Proposed section 8E provides for powers to make rules in respect of appeals under proposed section 8D to enable the appeal to take place without the appellant being given full particulars of the reasons for the proscription in

question; to enable the court hearing the appeal to hold the proceedings in the absence of the appellant and any legal representative appointed by him; to enable the court to give the appellant a summary of any evidence taken in his absence; and to enable a legal practitioner to be appointed to act in the interest of the appellant in the case where proceedings are to be held in the absence of the appellant and the legal representatives he appointed. Such rule-making powers may be contrary to Article 35 of the Basic Law, which guarantees the following rights : the right to confidential legal advice, the right of access to the courts, the choice of lawyers for timely protection of lawful rights or interests or for representation in the courts, and the right to judicial remedies. As a result, the spirit of legal aid will be defeated, and there would be double standards in the eyes of the public.

17. Currently, legal aid is available to individuals but not organizations. The right to lodge an appeal to the Court of First Instance against proscription under proposed section 8D (1) of the Societies Ordinance rests with individuals as an office bearer or member of the proscribed organization. However, section 5(2) of the Legal Aid Ordinance provides that legal aid cannot be granted to a person to whom the right to take proceedings ("a chose in action") is assigned by the organization ("a body of persons, corporate or incorporate"). Since the right to commence proceedings against the proscription decision is provided by legislation to an individual, it appears that such right is not assigned by any body of persons, and section 5(2) of the Legal Aid Ordinance will not bar the grant of legal aid. It will be necessary to revise proposed section 8D of the Societies Ordinance to remove any uncertainty on the effect of section 5(2) of the Legal Aid Ordinance.

#### (I) Official Secrets Ordinance [OSO]

18. Proposed section 16A seeks to create a new offence of disclosing information related to Hong Kong affairs which are within the responsibility of the Central Authorities. The Administration claimed in the Consultation Document that this was necessary on the ground that information relating to the relationship between Hong Kong and the Mainland was protected under the rubric of "international relations" of the OSO. If any information emanating from PRC came under the protection of the OSO prior to 1997, it was because the information related to the relationship between the UK and the PRC, and not because the information related to the relationship between Hong Kong and the Mainland. We question the necessity of section 16A.

19. Further, constitutionally speaking, the governing of Hong Kong is within the ultimate responsibility of the Central Authorities (or CPG). Therefore, proposed section 16A is vague and will cause unnecessary controversy. If the section has to be retained unfortunately, we propose to limit its scope to foreign affairs and defence (Articles 13 and 14 of Basic Law).

20. There should be a public interest defence for those accused of an offence under Part II of the OSO (i.e. making damaging disclosure of protected information). Whereas the Administration may consider such disclosure will have damaging effect contrary to public interest, the person who receives and discloses the information may conscientiously believe such disclosure is in public interest too. It will be up to the court to decide in the light of what is put before it, whose reasons or facts represent public interest.

(J) Hong Kong Arts Development Council Ordinance (Cap. 472)  
Legislative Council Ordinance (Cap. 542)  
District Councils Ordinance (Cap. 547)

21. Paragraph 35 of the Schedule to the Bill proposes to disqualify for life those convicted of treason, subversion, secession or sedition by inciting the commission of treason, subversion or secession, to be members of the Legislative Council, District Council and the Arts Development Council. There seems to be hardly any justification. These bodies have their own specific local terms of reference, and bear little relevance to national security. If they were to be so regarded, where would the list of bodies end ?

Date : 2 June 2003

\*\*\*\*\*