<u>Submission No. 177</u>

Submission of the Article 23 Concern Group
on the Government's amendments on the National Security
(Legislative Provisions) Bill

1. The Article 23 Concern Group wishes to record its protest against the short time allowed for the community to study and respond to the amendments of the Government dated 3.6.2003 and 6.6.2003. In fact they did not become available to the public until sometime later. Given the arbitrary deadline of 12 June set by the Bills Committee, we have less than a week for the preparation of this submission. We also note that submissions have to be in writing since oral presentation is precluded. This is not the full public consultation the Government and LegCo promised.

2. As for the substance of the amendments, the Concern Group's view is that while a small improvement is made in the provision regarding sedition, that improvement does not go nearly far enough. The amendments in relation to the special appeal procedure have made the whole process even more unacceptable. Most of the other amendments, e.g., enlarging the "Pannick Clause" to Chapter III of the Basic Law, are just tinkering at the edges or merely cosmetic. Taken as a whole, we consider the bill, if amended accordingly, will remain unacceptable because of the threat it poses to rights and freedoms.

3. We state our comments to specific amendments below on the basis of the 6.6.2003 draft.

   <u>Sedition</u>: We do not think the insertion of "Intentionally" before "incites" adds anything, since incitement by definition requires the intent that the consequence be brought about. However, we accept that it may be a clarification which can give comfort. The insertion of (1A) adds the requirement of a nature and circumstance test. We accept it is an improvement. However, we query the "ordinary person" test under (1A)(b)

the meaning of which is unclear in law. We consider that the improvement is insufficient for the minimum protection of the freedom of expression. First, the test under (1A)(a) is so loose. In effect, one would fail the test only if the incitement is unlikely to incite anyone. This disregards the person to whom the incitement is addressed. Secondly, the amended version still allows an old and spent incitement as well as one for some vague action in the far future to be made the basis of prosecution. The Concern Group is of the view that, to give real protection to free speech, it is necessary to require that imminent unlawful act is intended and likely. Further, we see no justification to increase the penalty from the existing maximum of 3 years to life imprisonment. We consider a maximum sentence of 7 and 5 years for the first and second limb respectively of the offence to be the highest justifiable.

Handling of seditious publication – We note that the new subsection 9C(3) is intended to be an improvement. However, we maintain that there is no justification for this offence which either overlaps with sedition or is a #preparatory# or preventative crime. It goes beyond Article 23 and the need for it is unsupported by any evidence. The time limitation in subsection(3) does not apply to section 9A sedition. We strongly believe the limitation under the existing section 11 or, at most a limitation of 1 year, is necessary for the protection of free speech and indeed freedom of thought, since speech or exchange of ideas is an inalienable part of thinking.

Investigation power: We do not accept that the amendment makes any difference. In fact it exposes the Government's case of convenience to be even weaker. It is probably quicker to obtain an urgent warrant than to await the convenience of an assistant commissioner. The reason for a warrant is the supervision of an independent authority.

Proscription – We are wholly opposed to the new proscription powers and mechanism. The reasons of our objection previously given stand unchanged.

Appeal against proscription – We strongly object to the original as well as the amended version which is even worse than the original. The drastic changes

from version to version clearly indicates that the Government has not thought through the process. We need only state our reasons briefly. Our fundamental objection is that it is a procedure which comes impaired, because of the possibility of hearings in camera and in absentia of the appellant and his chosen counsel. The UK and Canadian procedures purported to be similar and on which this is purportedly based are inappropriate to the proposed proscription. Immigration and deportation deal with aliens who have no substantive rights. While the UK Terrorism Act is referred to, no details have been provided or arguments as to why such procedures, even if appropriate in the wholly different factual circumstance of the UK, are applicable in Hong Kong. Where the curtailment of fundamental rights is involved, a strong case of appropriateness has to be made out.

Specifically, we consider it inappropriate that the Secretary for Security, the person whose order is being appealed against, should be given the wide power to make regulations for the "handling of appeals … including matters which are incidental to or arise out of the hearing" to which the High Court's Rules Committee must conform in making rules of procedure. This is tantamount to giving the prosecution the right to determine the appeal mechanism. Moreover, any departure from a normal fair and open hearing such as hearing in camera and in absentia of the appellant and his chosen advocate, even supposing such a procedure is accepted and we do not, must be provided by tightly drafted primary legislation.

We object to the proposal of some "panel" of "special advocates", the idea of which, we gather, has not yet been fully considered by the Government. We consider this may bring far-reaching and unwelcome change challenging the independent Bar.

We object to the new schedules I & II as part and parcel as the draconian proscription powers of the Secretary for Security.

There are fundamental objections to extending the scheme of proscription to organisations which are not currently subject to the provisions of the Societies

Ordinance. The last minute amendment to extend the scheme to the 16 types of organisations (which includes registered and unregistered companies) currently exempt has made it impossible to give detailed scrutiny to the effect which the proposed amendments will have on the statutory regimes which govern the organisations concerned.

However, it is immediately evident that insufficient consideration has been given as to how the provisions in the Societies Ordinance will inter-relate with the statutory regimes currently governing those organisations in matters concerning cancellation of registration and appeals and the impact on innocent third parties who have had dealings with such organisations and whose right to recover property or damages may be affected. What the Government does in effect will amount to overriding existing legislative provisions by way of consequential amendment without full examination.

4. We should like to state that necessary amendments have not been made to treason, subversion, secession, and the official secrets Ordinance, in spite of previous submissions of the Concern Group and many other groups. These include tightening the definitions to exclude such clauses as "intimidating the CPG", "disestablish the basic system of the PRC" etc., and the provision of a public interest and prior publication defence for unauthorized disclosure. In the time available, it is not possible for us to put forward our full arguments or proposals. We intend to propose further amendments for the consideration of the Government and the Bills Committee and will submit this through a member of this Bills Committee.

Dated the 12th Day of June 2003