

**Submission No. 184**



**International Chamber of Commerce - Hong Kong, China Business Council** 國際商會 香港中國商務會  
*The world business organization*

By Fax no: 2537 1851 and Delivery

12 June 2003

The Hon Ip Kwok Him, JP  
Chairman, Legislative Council Bills Committee  
on the National Security (Legislative Provisions) Bill  
Legislative Council  
8 Jackson Road, Central,  
Hong Kong

Dear Mr. Ip,

National Security (Legislative Provisions) Bill

Last year the Administration issued the Consultation Document "Proposals to implement Article 23 of the Basic Law". Like many people in Hong Kong who were concerned about the adverse impact the proposals might have on Hong Kong's viability, the Council sent its comments to the Administration seeking assurances for preserving Hong Kong's fundamentals and changes to substance of the proposals. A copy of our comments is attached for reference.

2. When the blue Bill was published this year, we noticed certain changes meeting some of our concern. We welcome those.

3. On the other hand, we regret that the Administration has chosen to ignore our request, and that of many others in Hong Kong for a second round of public consultation before bringing the matter to the Legislative Council, and rigidly following its own timetable. The Consultation Document is complicated enough, and has taken us much time to prepare a response. The Bill is even more difficult to study as it relates to a number of existing ordinances, if nothing else. Yet we have to rush to forward our comments to meet a deadline. This timetable also puts undue pressure on the Legislative Council to finish scrutiny in a hurry. For a matter of such great significance, it is to be regretted that it should have to be rushed through at the risk of sacrificing quality.

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Requirement of Article 23 of the Basic Law

4. The assumption in formulating this Bill is to comply with Article 23 of the Basic Law. Yet there appears to be provisions in the Bill which are not related to Article 23. If it is the Administration's intention to "add on" further requirements, it will be necessary for the Administration to explain which provisions are to comply with the stipulations of Article 23, and which are the Administration's additional proposals and why. Otherwise, there would be a gross misrepresentation and gross public misunderstanding.

Freedom of Information

5. The Bill imposes serious restrictions on freedom of information. Hong Kong is a world information hub, and business benefits immensely by operating here. A free flow of information is part of a favourable business environment, and unnecessarily restricting information passage can only damage one of Hong Kong's important ingredients of success. To protect information relating to Hong Kong affairs which are within the responsibility of the Central Peoples' Government (CPG), the Bill should limit the scope of this only to foreign affairs and defence as stipulated in the Basic Law.

6. Whereas the Administration sees the need to make it an offence to make damaging disclosure of protected information, there is also a need to safeguard the public interest of the right to know. Hence, the processors and recipients of such information should be protected by allowing in the Bill a public interest defence. The court will decide where public interest lies.



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Freedom of Association

7. Article 23 states, inter alia "to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies". We suggest that firstly only political organizations or bodies are affected, and secondly only local ties with foreign political organizations or bodies should be prohibited. On that basis, the proscription provisions of the Bill are not within the ambit of Article 23, and directly in breach of Article 27 and Article 39 which protected the freedom of association. As such, the proscription provisions of the Bill should be removed altogether.

8. The suggestion that regulations may be made under the Bill depriving an appellant of his right of presence in court and a lawyer of his own choosing is also inconsistent with Article 35 of the Basic Law, and Article 14 of the International Covenant on Civil and Political Rights enshrined in Article 39 of the Basic Law. Moreover, to force a lawyer on the appellant is totally unfair to the appellant.

Time Limit for Prosecution

9. The Bill proposes not to set a time limit for prosecution in respect of the offences in question. We should like to reiterate the point made in our earlier communication with the Administration that there should be a time limit for prosecution. The recently proposed amendment by the Administration to allow prosecution of sedition offences within 3 years instead of the existing time of 6 months is too long. We propose the existing time limits of 3 years be applied to treason, cessation and subversion and 6 months to sedition offences.



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Extraterritoriality

10. The Bill singles out Hong Kong permanent residence as the denominator for applying extraterritorial power in respect of the relevant proposed offences. We are of the view that if extraterritoriality has to be introduced unfortunately it should apply to Chinese nationals of Hong Kong permanent residence status. Moreover, Hong Kong permanent residents in their country of nationality may not be regarded to have committed an offence under that country's laws.

Proof of Intent and Onus of Proof

11. The Bill requires the proof of intention for certain offences, but is silent on others. As all the offences are very serious, we consider that there has to be a requirement to prove the intention to commit any of the offences. Moreover, as we have pointed out in our communication to the Administration, the onus of proof in all cases must rest with the prosecution.

Bar from Public Office

12. Paragraph 35 of the Schedule to the Bill proposes to bar for life an offender from being member of the Legislative Council, District Council or the Arts Development Council. We believe such disqualification needs justification, and in the absence of sufficient and reasonable justification, this proposal should be deleted.



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### Legal Aid

13. An offence under reference is a very serious matter, and it also puts into question the accused's personal integrity and honour to the highest order. Hong Kong has a good legal aid system to help those in hardship to have access to justice. Given the above reasons, we consider that all the offences referred to in the Bill including inchoate offences and accomplice acts should be covered by the provisions of the Legal Aid in Criminal Cases Rules.

### Clarity of Provisions

14. We expressed our concern about vagueness and imprecision of terms and phraseology in the Consultation Document in our last communication with the Administration, and we regret that we have to repeat the same concern regarding the contents of the Bill. Examples are "intimidating" CPG, "disestablishes" the basic system or "seriously endangers the stability" of the Peoples' Republic of China or likely to cause commission of an offence of incitement (no reference to real consequences). Such imprecision will no doubt intimidate and consequently have a chilling effect on and cause self-censorship in the exercise of basic rights. The division between the government and the people in Hong Kong will be more widened and public discontent will mount. It is not for us to suggest technical corrections and we hope the Legislative Council will conduct a due diligence check on the workability of the Bill.

### No Retrospective Effect

15. It is said that the Administration has fixed its timetable to pass the Bill into law by July. Whatever the date of passage or gazetting, we should like to stress that the Bill, if passed, should have no retrospective effect. This is we believe consistent with the general spirit of law, and preserve the normal way of life of Hong Kong.



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General Observations and Appeal

16. Overall, the Bill is an improvement to the Consultation Document, but it is still seriously defective. As regards the amendments recently proposed by the Administration the requirement of intent under section 9A(1) is a welcome alteration. The other proposed amendments however create new problems placing further restrictions on appeal and risking the abrogation of private property of the members / shareholders of the proscribed organization / company. In particular, one of the amendments will give the Secretary for Security the power of making regulations on appeal against proscription. As the Secretary is the prosecutor, it is contrary to natural justice for her to delineate and limit the parameters of the appeal procedure. All those amendments should not be adopted.

17. Much redrafting needs to be done to improve the Bill because the Administration has yet to justify the necessity, the reasonableness and the proportionality of the legislative extent or power sought. Safeguards are insufficient to put people's heart at ease. The Bill will hurt the "One country, two systems" and eventually the future sustainability of Hong Kong. In this regard, may we reiterate what we previously submitted to the Administration, which is contained in our comments attached. We earnestly hope members of the Legislative Council will have a proper opportunity to and conduct a thorough examination of the Bill, and take into account our comments in this letter and its attachment.

Yours sincerely,

Anthony Chan  
Secretary

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**Comments on  
 Consultation Document on  
Proposals to Implement Article 23 of the Basic Law**

Article 23 stipulates that "The Hong Kong Special Administration Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies "

In this context therefore, Hong Kong has to legislate in compliance with the Basic Law.

It is noteworthy, however, that the Article specifies that Hong Kong as a locality shall enact laws on its own. Hong Kong is a multi-cultural and pluralistic city and before any legislative proposal is to be introduced, the people (including the business community) in Hong Kong should have the opportunity to discuss the matters concerned thoroughly. Based on the outcome of these consultations, the Administration would initiate the legislative process, which must accept the values, aspirations and concern of the people, and proceed at such pace as is necessary and comfortable to the community at large. While a working timetable may be useful to the Administration, final enactment must be the result of comprehensive consultation and broad social acceptance, consistent with the spirit of "One country, two systems".

We learn that the Administration has consulted the Central People's Government for some period of time to come to certain consensus on certain matters of principle. If the Administration has taken time to do so, even before broad consultation in Hong Kong, the more necessary it will have to be that the Administration should now give ample time for the Hong Kong community to study the principles involved (and if they can be made known publicly) and the details of the proposals to follow. A flexible timetable to enact is therefore essential.

The Document has raised concern in manners below:

- a) The freedom of information and the freedom of assembly may be restricted significantly, unless the legislation is tightly and carefully worded. The matters at point are the definition of "protected information", targeting information processors and recipients and the basis of proscribing organizations.
- b) Article 23 relates to the Central People's Government and not the government of provinces, special zones or regions or special administrative regions. The Constitution defines "Central

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People's Government" as the State Council. Hence, legislation should be restricted to issues of the State Council.

- c) Many terms or phrases are imprecise and what would constitute an offence is not clear. For example, power of the police, selectivity of offences, "affiliated" or "connected" in terms of proscribing organizations or "other serious unlawful means".
- d) There are insufficient details, and issues are discussed in such general terms that it is difficult to visualize the details.
- e) There is no time limit to the commencement of prosecution, if the Administration considers that an offence has been committed.
- f) The proposals create an undesirable impact on foreign nationals and on Hong Kong permanent residents who have acquired foreign nationality.
- g) There is an absence of information on safeguards to Hong Kong residents versus the Administration's legislative proposals.
- h) There is insufficient information to justify the necessity, the reasonableness and the proportionality of the legislative extent or power sought. For example, the codification of offences, the inclusion of inchoate and accomplice acts and other ancillary acts.

We believe the public must be convinced of the relevant proposals, and given the foregoing consideration, the Administration should issue a consultation document in the light of public concern expressed. In this connection, we should like to suggest the Administration to incorporate the following in the new document:

- a) An assurance for the proposals to be consistent to the Common Law System; and the basic freedoms guaranteed under the Constitution and the Basic Law.
- b) An offence is committed only when:
  - i. necessary intention has been proven in court, and
  - ii. where action following the intention has taken place, it causes violence or serious destruction in terms of national security.
- c) The onus of proof under (b) is on the prosecution.
- d) Knowledge of an act which may be deemed subsequently by the Administration to be an offence, will not constitute an offence.





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- e) An appeal against proscribing organization should be laid before a court in Hong Kong, and not a tribunal outside the judicial system.
- f) Given the severity of the legislative proposals and the penalties, an offence should be tried before a jury.

As the Document stands now, the likely adverse impact will be damaging to Hong Kong in achieving pre-eminence as an international business centre. The harmonious and cosmopolitan environment so closely tied to the Hong Kong way of life will be changed, and most of the freedoms enjoyed will be caged. Hong Kong's international business status on the contrary will be eroded through the extraterritorial application of the proposals. Knowledge or skills which are the great assets to Hong Kong's future, may be lost as many working in Hong Kong possess foreign passports as well as being permanent residents. The rigour of the proposals will stifle business vigour and flexibility, with reduced security in and ebbed information flow. The proposals will also have an invisible adverse impact on initiative, creativity and research which the government has advocated as being important to Hong Kong's future economic success. Worse, there is a sad suspicion that these proposals may be linked to the Administration's intention to introduce the smart identity card, to tighten social control over the life of Hong Kong people.

Hong Kong has over the years developed to be a great city with a truly international flavour. It has ranked to be the top free economy, and regarded to be a favourable place for investment and work. Its advantages are well known and need not be repeated here. Ever since the Asian financial and economical crisis in 1997, Hong Kong has undergone a period of economic and social stress. There is apparently a reduction in confidence of Hong Kong's being, and its international character has lost some colours beginning with a persistent drop in its proficiency in and use of English. Our cost structure compares unfavourably with rivalling cities only being compensated by the ingenuity and productivity of Hong Kong people, Hong Kong's sound physical and telecommunication infrastructure, the simple tax system and the conviction to uphold the rule of law and the freedoms enjoyed. At a time when Hong Kong strives to be more competitive, business would look forward to a more favourable business environment so that Hong Kong may even move one step ahead of others in attracting business and posturing as Asia's world city. The Document however will compromise those efforts and intentions with subsequent damaging consequences. We sincerely hope the Administration will review the entire process afresh and provide another document not excluding a White Bill taking into account the views and concern expressed by different sectors of the community.

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