Submission No. 56

SUBMISSION TO THE LEGISLATIVE COUNCIL ON THE NATIONAL SECURITY (LEGISLATIVE PROVISIONS) BILL

INTRODUCTION

1. The Hong Kong Journalists Association (HKJA) has expressed the view on previous occasions that it is totally opposed to the enactment of national security laws, given that there is no pressing social need for such laws. However, the National Security (Legislative Provisions) Bill has now been published, and the HKJA wishes to set out its position on the specific provisions, in particular as they affect journalists and other practitioners of freedom of expression.

2. The HKJA will focus in particular on the offences of sedition and theft of state secrets, as they pose the greatest threat to freedom of expression. However, other provisions are of serious concern to the Association, including those relating to proscription, search and seizure and the abolition of time limits for prosecutions.

3. Many of the provisions put forward in the bill are highly contentious, and therefore need thorough debate. The HKJA would therefore urge the Legislative Council bills committee to allow sufficient time for this process, to ensure that the bill gives maximum protection to the rights and freedoms of Hong Kong people. Any attempt to rush the bill through the legislature would reflect badly on the government and its stated desire to protect individual rights.

SEDITION AND THE HANDLING OF SEDITIOUS PUBLICATIONS

4. Clauses 9A and 9C contain the new offences of sedition and handling seditious publications. The offence of sedition was originally used to protect the British monarch and his or her government, and was used openly to suppress critics and ensure the survival of the ruling class, not to protect the interests of society as a whole. Nowadays, many experts argue that it is obsolete. Two respected British Queen's Counsel, Geoffrey Robertson and Andrew Nicol, make this argument forcefully in their book

"Media Law" (2002 edition):

"There has been no prosecution for sedition since 1947 (in Britain), and the offence now serves no purpose in the criminal law. In terms of article 10 (of the European Convention on Human Rights), it is hard to see how it is necessary in a democratic society or proportionate to any legitimate aim. The deliberate provocation of public violence or disorder is amply covered by offences contained in the 1986 Public Order Act."

5. This same argument could be used in Hong Kong, through offences in the Public Order Ordinance and other local legislation. Nevertheless, the government argues that retaining a sedition offence "would be in keeping with the practice adopted by the most liberal and democratic jurisdictions." This ignores the fact that most sedition laws in such jurisdictions have not been used for many years, and that law reform commissions in both Canada and England have called for such offences to be scrapped.

6. The HKJA agrees that the offence of sedition is archaic and should be scrapped. The offence is made worse by the vagueness of some of the wording in related sections, namely 2, 2A and 2B (treason, subversion and secession). While the government has tightened some of the wording in these latter offences, the HKJA remains concerned about the use of such terms as "intimidate" and "disestablish." Concern also remains over the definition of "serious criminal means". In this respect, the HKJA questions whether the launching of a massive e-mail campaign to government departments might be interpreted as seriously interfering with or disrupting an electronic system. Continued uncertainty over such wording will prompt people to be more reticent in expressing their views, and could therefore have a chilling effect on freedom of expression.

7. The HKJA is concerned in particular about section 9C, on the handling of seditious publications. This section poses the greatest threat to freedom of expression and press freedom, in that it deals with the written word. The HKJA is concerned whether prosecutions could be enforced against publications which carry repeated reports about comments made by Taiwan leaders or politicians that antagonize Beijing, such as advocating independence for Taiwan. Such examples show that section 9C could have a serious effect on free expression, either through actual prosecutions or the chilling effect it

would undoubtedly have. For the sake of free expression, the section should be deleted from the bill.

8. At the very least, the government should bring the offence of sedition fully in line with the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, and in particular Principle 6.

9. In this respect, the HKJA would call on the government to add a new clause 9E to make it clear that a person "has the intention to commit an offence only if, at the time of the alleged offence, his intention was to incite any other person to violence, the occurrence of which was likely or imminent, and there was a direct and immediate connection between the acts referred to in section 9A (1) and such occurrence or likelihood of occurrence".

10. The government has argued that the inclusion of such a safeguard will limit the ability of the authorities to take action against a national security threat. It further argues that the Johannesburg Principles are not widely accepted internationally. However, one of the drafters of the Principles, human rights commentator Sandra Coliver, argues that they are "based on international and regional law and standards relating to the protection of human rights, evolving state practice (including judgments of national courts), and general principles of law," and that "they reflect the drafters' view of the direction in which international law is, or should be, developing."

11. Ms Coliver states that the closest precedent for Principle 6 is the US Supreme Court's unanimous 1969 judgement in Brandenburg v. Ohio, in which the court held that speech advocating unlawful conduct may only be punished if the speech is "directed to inciting or producing imminent lawless action" and must be "likely to incite such action". The HKJA feels that this "clear and present danger" test is of paramount importance in an environment, as in Hong Kong, in which full democracy and related checks and balances are not yet properly developed in the political system.

12. Indeed, we consider it insufficient to use reference to article 39 of the Basic Law (as in section 18A) to provide safeguards against abuse. There is considerable latitude for interpretation of both Basic Law article 39 and

individual sections of the International Covenant on Civil and Political Rights. We have seen this since the handover in court judgements relating to the desecration of the regional and national flags and emblems.

13. Further, we note that the United Nations Human Rights Committee has on a number of occasions, and most recently in November 1999, accused the SAR government of failing to adhere to specific ICCPR sections. The government has disregarded such accusations, giving rise to serious doubts about the effectiveness of any all-encompassing defence based on Article 39. It is therefore incumbent on the government to introduce specific unambiguously worded safeguards.

14. The HKJA is also concerned about the decision to impose a seven-year maximum penalty for handling seditious publications. This would be an onerous sentence for publishers and journalists. The equivalent at the moment is two years for a first offence, and three years for a subsequent offence. The government should consider whether a seven-year sentence is justified.

THE THEFT OF STATE SECRETS

15. Part 3 of the bill deals with various offences related to the unauthorised disclosure of official secrets. Two new offences are created - the unauthorised disclosure of information related to Hong Kong affairs within the responsibility of the Central Authorities, and the disclosure of information acquired by means of illegal access to it.

16. The revised definition of the category of information relating to relations between the Central Authorities and the HKSAR is an improvement on the previous all-encompassing proposal. However, the revised definition - matters relating to any affairs concerning the Hong Kong Special Administrative Region which are, under the Basic Law, within the responsibility of the Central Authorities - remains vague.

17. In this respect, as we have seen in the right of abode case, anything which relates to the relationship between the central authorities and the HKSAR can potentially be extremely controversial, and ultimately open to interpretation by Beijing. The HKJA believes that given these

considerations, the new offence, if it is allowed to stand, must list in clear terms what matters are covered in this new offence. A reference to the likelihood of endangering national security is not sufficient.

18. The second new offence is also problematic. The HKJA believes that the revised definition of "illegal access" will not provide any real protection to journalists – or indeed members of the public who may not be aware that a particular document or piece of information may be secret. This is despite the offence being limited to access through theft, robbery, burglary, hacking and bribery. Indeed, the offence appears to go beyond the spirit of the Official Secrets Ordinance, which is to deal with the passing of official information from a government servant or contractor to another person. In this new offence, the information may not have originated from a government servant or contractor.

19. Indeed, journalists could be prosecuted - even if they were unsure that the information had been obtained through illegal access. This point is crucial for journalists, who may receive documents through the post in unmarked envelopes or by email through anonymous accounts, without any knowledge of how their source obtained the information. Further, they may feel that there are strong public interest arguments for publishing the material – despite belief or having reasonable grounds for believing that the information may be protected and may have been obtained through illegal access. The revised section 18 of the Official Secrets Ordinance would in such circumstances fail to provide any effective defences against prosecution.

20. Furthermore, police investigations may involve efforts to obtain the name of the source or sources of information - an issue of extreme sensitivity to journalists. This may place journalists in a very difficult position in relation to sources, and may lead to prosecution action being taken against them for refusal to disclose sources.

THE NEED FOR A STRONG PUBLIC INTEREST DEFENCE

21. If the government is to retain the two new offences, it must provide sufficient protections against abuse, by ensuring that they comply fully with principles 13 and 15 of the Johannesburg Principles. These principles state clearly that the public interest in knowing information shall be a primary consideration, and that no person may be punished for disclosure of

information if disclosure does not actually harm and is not likely to harm a legitimate national security interest, or the public interest in knowing the information outweighs the harm from disclosure.

22. The government has argued that it is difficult to define public interest, especially as public interest may be involved in national security considerations. This viewpoint is at odds with experience overseas. In the United Kingdom, for example, the concept of public interest is contained in two recently enacted laws. The Public Interest Disclosure Act 1998 provides statutory protection for employees, except those employed by the police and intelligence agencies, who in the public interest make a protected disclosure relating to criminal offences, failure to comply with a legal obligation, a miscarriage of justice, danger to the health or safety of an individual, and damage to the environment.

23. The Freedom of Information Act 2000 also makes reference to the public interest, insofar as the obligation to disclose information does not apply where "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

24. Clearly, there is no bar on governments incorporating public interest considerations in legislation. The SAR government should therefore incorporate a proper public interest defence in the Official Secrets Ordinance, along the following lines:

"It shall be a defence for a person charged with an offence under this Ordinance to prove that the disclosure or retention of the information, document or other article was in the public interest."

25. The HKJA is calling for a general public interest defence as opposed to one that lists public interest considerations, given its flexibility. The simple fact is that public interest considerations may change over time. For example, environmental considerations were not given the same significance 20 years ago as they are given now.

THE NEED FOR A PRIOR PUBLICATION DEFENCE

26. It should also be a defence for a journalist to argue that information was already in the public domain, whether in Hong Kong, mainland China or elsewhere. The secretary for security, Regina Ip, has argued that a second or subsequent disclosure can be damaging. However, both American and European courts have disputed this. For example, the European Court of Human Rights turned down requests to block the publication in Britain of the book "Spycatcher" after it was published and widely distributed in other parts of the world.

27. An obvious danger inherent in the absence of a prior publication defence is selective prosecution. There have been several examples of this on the mainland. The former Ming Pao reporter, Xi Yang, was jailed for theft of state secrets, even though some of the information had already been published in at least two other newspapers, including one prominent pro-Beijing publication in Hong Kong. Further, academic Xu Zerong was jailed for publishing information - some of which was contained in a mainland publication.

28. The HKJA would urge the government to incorporate a prior publication defence worded in the following way:

"A person does not commit an offence under this Ordinance in respect of information which before the time of the alleged offence had become available to the public or a section of the public whether in Hong Kong or elsewhere."

29. The government has argued that a judge will, even without public interest or prior publication defences, consider such issues in determining whether damage has resulted from unauthorised disclosure. Not all legal experts agree with this line of reasoning. Indeed, British Queen's Counsel Geoffrey Robertson and Andrew Nicol argue in the following way in their book "Media Law" (quoted above), in relation to the debate in Britain over the 1989 Official Secrets Act, on which Hong Kong's law is based:

"The Government refused to concede a specific public interest defence or a defence that the disclosed material had already been published before. This obduracy was unfortunate and unnecessary: juries have been loathe to convict when disclosures were made on public interest grounds (e.g. Clive Ponting

and Jonathan Aitken) and the "damage" requirement is not a perfect substitute for a public interest defence."

30. This argument applies equally to Hong Kong. The government should therefore reconsider its stance on these issues, to ensure that proper protection is given to those publishing information in the public interest. Failure to do so could result in serious abuse of the law. The government should also give serious consideration to the enactment of a Freedom of Information Ordinance, to counter-balance the onerous effects of the Official Secrets Ordinance.

OTHER ISSUES OF CONCERN:
PROSCRIPTION

31. The revised provisions on the proscription of local organisations (clause 15) fail to reduce the danger that Hong Kong will simply follow mainland legal concepts in banning groups on national security grounds. Beijing may easily issue an "open decree" relating to a mainland organisation, and the stipulation that a local organisation must be "subordinate" to a mainland group may not provide sufficient protection to a local group that is not in breach of any existing Hong Kong law.

32. The HKJA believes the proscription provision should not be enacted in new national security laws, as it is not stipulated in article 23 of the Basic Law. Further, it is contrary to the Johannesburg Principles and the common law, which punishes individuals, not groups.

33. The HKJA is also concerned about provisions allowing the exclusion of all or any portion of the public if the publication of any evidence might prejudice national security, and for the exclusion of the appellant and any legal representative. The government should ensure maximum openness for court hearings, to ensure that an appellant receives a fair trial. It should also allow for sufficient appeal channels in case a decision is made to exclude individuals from a court case.

SEARCH AND SEIZURE

34. The HKJA welcomes the inclusion of provisions stating that entry, search

and seizure operations involving journalistic material must follow procedures set down in Part XII of the Interpretation and General Clauses Ordinance. However, the HKJA maintains that there is no need for emergency powers to be incorporated at all in national security laws. The example given that emergency action might be required if a bomb is planted in the Legislative Council Building is not appropriate, given that existing legislation would provide the police with sufficient powers to deal with such a situation.

TIME LIMITS

35. The HKJA notes that the government has failed to reconsider its decision to scrap time limits for prosecutions. At the moment, a prosecution must be brought within three years of an alleged offence for treason, and six months for sedition. The removal of these limits could have a significant chilling effect on the media, given that the threat of prosecution could hang over a journalist or publication many years after an alleged offence takes place. The HKJA believes that the government should re-impose appropriate time limits.

CONCLUSION

36. The administration clearly needs to go much further in protecting freedom of expression than it has done in the National Security (Legislative Provisions) Bill. It should in particular incorporate the Johannesburg Principles in the legislation and add public interest and prior publication defences to the Official Secrets Ordinance.

37. The Legislative Council should also ensure that sufficient time is given to deliberations on the bill, to ensure that it does not impose excessive restrictions on the media and journalists.

HKJA Executive Committee
April 7th, 2003