

**Hong Kong Political Science Association
Views on the National Security Blue Bill
April 2003**

As members of the Hong Political Science Association, the association of teachers and researchers of political science in Hong Kong, we have prepared this memorandum to express our concerns over the National Security Blue Bill now before the Legislative Council. This submission supplements and updates our earlier memorandum on the Government Consultation Document submitted in the consultation exercise.

As we expressed in our earlier submission, it is our view that any legislation on national security is of particular concern in a free society and should be guided by certain well-established principles. Chiefly, it is the view of our members that national security should be grounded in the security of the individual in their rights, liberties and privacy. In this respect the laws should not be vague or ambiguous, that is they should clearly delineate the boundaries of what is prohibited and what is not, so that all Hong Kong residents can easily comply with their requirements. At the same time such laws should not be overbroad, exceeding the boundaries set by our commitments to democracy, human rights and the rule of law.

It is our view that existing laws in Hong Kong already meet the needs of Article 23 of the Hong Kong Basic Law and that no new legislation is needed. If new legislation is to be enacted it should only aim to reform existing laws to better secure human rights.

Areas of specific concern in the Blue Bill are discussed below.

AREAS OF SPECIFIC CONCERN IN THE PROPOSED LEGISLATION.

Treason, Subversion and Secession

In regard to the proposed crimes of treason, subversion and secession vagueness is pervasive, posing a severe threat to civil liberties. Respecting treason, what does it mean to “assist any public enemy at war with the People’s Republic of China (PRC) by doing an act with intent to prejudice the position of the PRC in the war?” Would this include assisting public information overseas by speaking to the press of such country or speaking in an academic forum? What does it mean for a Chinese national to “join or is a part of foreign armed forces at war”? Would even medical assistance be sufficient? The subversion provisions are equally vague, with such language as “intimidates the Central People’s Government, by using force or serious criminal means that seriously endangers the stability of the People’s Republic of China.” Someone commits secession if he “withdraws any part” of the PRC by “using force or serious criminal means.” For both, “serious criminal means” is too broadly defined. Given the long-standing problems between China and such peripheral communities as Taiwan and Tibet, it is questionable whether the burden of responsibility for divided loyalties should be imposed on Hong Kong citizens. The added burden of the inchoate crimes of attempt, conspiracy, aiding and abetting can only add to the confusion these crimes engender for the unwary. It is of further concern to permanent Hong Kong residents who are overseas that the latter two crimes reach acts done outside Hong Kong.

Sedition and Handling Seditious Publications

The Blue Bill defines sedition as inciting others to commit treason, subversion, secession or engage in violent public disorder. The sedition provisions thereby partake of all the vagueness embodied in each of these areas. Simply urging or encouraging others to commit the offense is enough without any regard to the likelihood of occurrence. It is doubtful whether any sedition law should be enacted. Sedition is largely a political crime constraining speech and has no place in a free society. If a sedition law is to be enacted it should be narrowly confined to incitement of armed rebellion and fully conform to the Johannesburg Principles. Accordingly, the sedition provisions should require that the speaker intend the imminent unlawful action specified in the statute and that such unlawful action be likely to occur. The crime of handling seditious publications should be dropped. While the crime of possession has been dropped the mere printing or reproduction of such materials is covered. Both sedition and handling seditious publications have great potential to reach acts related to academic research. For scholars who study contentious politics, the broad scope of these crimes should be of great concern.

Official Secrets

The confidentiality requirements relating to official secrets should not be extended to non-officials. In the view articulated by the United States Supreme Court in the Pentagon Papers Case, the burden should be on officials to keep secrets, not on others when officials have failed. Given the chilling effect that such secrecy laws might have on reportage and academic research, the law should err on the side of free speech. Language reaching "information related to Hong Kong affairs within the responsibility of the Central Authorities" is both overbroad and vague. "Public interest" and "prior publication" defenses should be available to both the media and academics. There should be no new crime of acquiring such material by means of illegal access. Existing laws regarding theft should be sufficient.

Proscription of Organizations Endangering National Security

A local organization can simply be banned, subject to appeal, if the Secretary for Security "reasonably believes that the proscription is necessary in the interests of national security." The proposed legislation further permits proscription of a local organization based on subordination to a political organization banned on the mainland on national security grounds. A certification from the Central People's Government is conclusive and may trigger such local banning. This poses a severe risk to the "one country, two systems" framework by importing mainland laws and administrative decisions. Mere financial support from the banned mainland organization is sufficient under the proposed legislation to establish such subordination. The scope of appeal of any banning is narrow, presumably confined to correct application of the law and the justification for the Secretary for Security's reasonable belief, without regard to whether the decision to ban was correct in all aspects. The appeal process involving closed hearings is even more inconsistent with Hong Kong's human rights tradition. The appellant may be denied the "full particulars of the reasons for the proscription" and be denied access to evidence and the use of existing counsel. To justify these procedures the government relies on special procedures in immigration cases abroad, procedures that seem inappropriate to this sensitive area. These procedural concerns are of heightened importance because of the criminal implications of such banning, in that the

proposed legislation makes it a crime to continue to act as a member or officer of such banned group. Hong Kong has gotten by without relying on such procedures in respect of groups and it seems inappropriate to adopt such procedures now.

Investigative Powers

Proposed Article 18B allows a chief superintendent to authorize a search without judicial warrant. The proposed suspension of the warrant requirement for searches in investigating crimes in this area is of grave concern. The common law has long emphasized the security of the individual; in the words of the 4th Amendment to the US Constitution, that “people be secure in their persons, houses, papers and effects against unreasonable searches and seizures.” Exceptions to the warrant requirement are already made for criminals caught in the act. It is difficult to see why further exception is needed in this area. Surely, as with police elsewhere, Hong Kong law enforcement officials can obtain a warrant from a duty judge or magistrate before conducting a search. The proposal acknowledges an exception with respect to journalistic materials. At a minimum, scholarly research should be given the same protection. Hong Kong should simply be seen to maintain an extraordinary commitment to long valued rights.

Severe Punishment

Treason, subversion, secession and sedition are all subject to the maximum punishment in Hong Kong law, imprisonment for life. In any area where regulation may have a chilling effect on the exercise of free speech such severe punishment can only bring about great detriment to our free speech tradition. Having a sedition law at all is questionable; imposing a life sentence for sedition is unconscionable.

Time Limits for Prosecution

By repealing Sections 4 and 11 of the Crimes Ordinance the Blue Bill has effectively removed the time limits in existing law of three years for treason and six months for sedition. No time limits remain. If you combine the dropping of time limits with the dropping of warrant requirements and the imposition of severe punishment one can only imagine the powerful weapon to be placed in the hands of a public official who may want to silence dissent. If the Secretary for Justice can simply withhold prosecution until a time of her choosing the possibility that a government, armed with these powerful tools, will compile dossiers on its opponents, to be used as needed, is certainly not farfetched. The Secretary for Justice should be compelled to make any prosecution decision under strict time limits.

Referral to the NPC Standing Committee

The concern that the local courts not be usurped by a Government referral to the NPC Standing Committee for an interpretation of the Basic Law requirements remains. The government argues that ordinances can not be so referred. However, if an ordinance is challenged under the Basic Law and the requirements of the Basic Law are at issue this risk remains. A matter concerning local rights in Hong Kong is clearly within the autonomy of the local HKSAR and the Hong Kong courts. Given the Government’s referral of a similar matter of local rights in the right of abode case, further legislative assurances are needed.