

# 立法會 *Legislative Council*

LC Paper No. LS61/02-03

## **Paper for the House Committee Meeting on 28 February 2003**

### **Legal Service Division Report on National Security (Legislative Provisions) Bill**

#### **I. SUMMARY**

1. **Objects of the Bill** According to the long title, the objects of the Bill are "to amend the Crimes Ordinance, the Official Secrets Ordinance and the Societies Ordinance pursuant to the obligation imposed by Article 23 of the Basic Law and to provide for related, incidental and consequential amendments".
2. **Comments**
  - (a) The Administration issued a Consultation Document on the Proposals to implement Article 23 of the Basic Law on 24 September 2002 and conducted public consultation for a period of three months.
  - (b) The Bill proposes to provide for -
    - (i) the offences of treason, subversion, secession and sedition;
    - (ii) the prohibition of unauthorized disclosure of certain official information;
    - (iii) the proscription of certain organizations if it is necessary in the interests of national security and is proportionate for such purpose; and
    - (iv) other amendments as set out in paragraph 5 of the Report.
  - (c) The Bill raises issues relating to human rights, court procedures and formulation of offences.
3. **Public Consultation** Public consultation on the Bill has not been carried out.
4. **Consultation with LegCo Panels** The Panel on Security and the Panel on Administration of Justice and Legal Services held five meetings to discuss the Consultation Document with the Administration, seven meetings to listen to views of deputations on the Consultation Document, and two meetings to receive the Administration's briefings on the outcome of the consultation exercise, the Compendium of Submissions and the Bill.
5. **Conclusion** In view of the complexity of the Bill, Members may wish to set up a Bills Committee to study it in detail.

## **II. REPORT**

### **Objects of the Bill**

According to the long title, the objects of the Bill are "to amend the Crimes Ordinance, the Official Secrets Ordinance and the Societies Ordinance pursuant to the obligation imposed by Article 23 of the Basic Law and to provide for related, incidental and consequential amendments".

### **LegCo Statement and LegCo Brief**

2. (a) The Statement made by the Secretary for Security on the Bill at the Council meeting on 12 February 2003. A press release containing the Statement is in LC Paper No. CB(2)1171/02-03(01);
- (b) The LegCo Brief, File Reference SBCR 2/1162/97, issued by the Security Bureau on 13 February 2003;
- (c) The booklet entitled "Explanatory Notes" and the Leaflet on the overview of the Bill issued by the Security Bureau together with the LegCo Brief.

### **Date of First Reading**

3. 26 February 2003.

### **Comments**

#### Article 23 of the Basic Law

4. Under Article 23 of the Basic Law ("BL23"), the Hong Kong Special Administrative 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.

5. The Bill proposes to provide for -
  - (a) the offences of treason, subversion, secession and sedition;
  - (b) the prohibition of unauthorized disclosure of certain official information;
  - (c) the proscription of certain organizations if it is necessary in the interests of national security and is proportionate for such purpose;

- (d) the power of entry, search, seizure, detention and removal by the police without warrant for the investigation of treason, subversion, secession, sedition and handling seditious publication;
- (e) the election of trial by jury in respect of sedition by inciting violent public disorder, handling seditious publication and any of the offences of unlawful disclosure;
- (f) the removal of existing time limit for prosecution of offences; and
- (g) related, incidental and consequential amendments.

Human rights issues

6. The Bill seeks to add express provisions in the Crimes Ordinance (Cap. 200), the Official Secrets Ordinance (Cap. 521) and the Societies Ordinance (Cap. 151) to the effect that the relevant provisions are to be interpreted, applied and enforced in a manner that is consistent with Article 39 of the Basic Law ("BL39"). Under BL39, the provisions of the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and the restrictions imposed shall not contravene the above provisions. These express provisions are new to Hong Kong legislation. Detailed study of their legal effect and implication is warranted.

7. Members may also wish to consider any implications of the Bill on the following rights and freedoms:

- (a) equality before courts and right to fair and public hearing as protected in Article 14.1 of ICCPR and Article 10 of the Hong Kong Bill of Rights ("BOR") set out in BORO;
- (b) protection of privacy, family, home, correspondence, honour and reputation as protected in Article 17 of ICCPR and Article 14 of BOR;
- (c) the freedom of thought, conscience and religion as protected in Article 18 of ICCPR and Article 15 of BOR;
- (d) the freedom of opinion and expression as protected in Article 19 of ICCPR and Article 16 of BOR;
- (e) the right to peaceful assembly as protected in Article 21 of ICCPR and Article 17 of BOR; and

- (f) the freedom of association as protected in Article 22 of ICCPR and Article 18 of BOR.

Issues relating to court procedures

8. The Bill seeks to add a new section 8D to the Societies Ordinance to provide for a right to appeal to the Court of First Instance against proscription, and a new section 8E to empower the Chief Justice to make rules in relation to such appeals. The rules are subsidiary legislation subject to the scrutiny of LegCo under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

9. The new section 8D(5) proposes that if the Court is satisfied that the publication of any evidence to be given or any statement to be made in the course of the proceedings might prejudice national security, the Court may order that all or any portion of the public shall be excluded during any part of the hearing. The new section 8E(3) empowers the Chief Justice to make rules enabling the Court to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him.

10. It may be relevant to examine :

(a) in relation to the new section 8D-

- (i) the nature of the appeal proceedings;
- (ii) the circumstances in which the Court may order exclusion of the public from any part of the hearing and the justifications for exercising such power;
- (iii) other similar existing legislation in Hong Kong and elsewhere;

(b) in relation to the new section 8E-

- (i) the use of public interest immunity under Order 24 rule 15 of the Rules of the High Court (Cap. 4 sub. leg.);
- (ii) the justifications for proceedings to be so held;
- (iii) the reasons for limiting the power to proscription and not to other offences relating to national security;
- (iv) the adequacy of protection of the interests of the appellant;
- (v) other similar overseas legislation.

Formulation of offences

11. One of the principles of legal policy, known as the principle against doubtful penalization, requires strict construction of penal enactments. It means that a person should not be penalized except under clear law. It would therefore be advisable to study the elements of the offences proposed in the Bill and the onus and burden of proof in the legal proceedings. If there is any ambiguity in the legislative

intent as reflected in relevant provisions, such ambiguity should be clarified. It would also be advisable to examine the implications of the proposed offences on the provisions in existing legislation.

### **Public Consultation**

12. On 24 September 2002, the Administration issued a Consultation Document on the Proposals to implement Article 23 of the Basic Law for public consultation. The consultation period ended on 24 December 2002. Members may refer to paragraph 28 of the LegCo Brief for the meetings attended by Government officials during the consultation period, and the Compendium of Submissions issued by the Administration on 28 January 2003.

13. No public consultation has been conducted on the Bill.

### **Consultation with LegCo Panels**

14. The Panel on Security and the Panel on Administration of Justice and Legal Services held five joint meetings between 26 September 2002 to 17 January 2003 to discuss the Consultation Document with the Administration. The two Panels held another seven joint meetings in November and December 2002 to listen to views of deputations on the Consultation Document. Minutes of the joint meetings held up to and including 5 December 2002 are in LC Papers Nos. CB(2)461/02-03, CB(2)618/02-03, CB(2)701/02-03, CB(2)762/02-03, CB(2)956/02-03, CB(2)957/02-03 and CB(2)933/02-03. Members may refer to the background papers issued by the Legal Service Division relating to the proposals in the Consultation Document (LC Papers Nos. LS 6/02-03 (Existing Legislation relevant to the proposals to implement Article 23 of the Basic Law), LS 34/02-03 (Information Paper on Inchoate Offences) and LS 44/02-03 (Legal Service Division's Comments on the Administration's Response made to the Panels)).

15. The two Panels met on 6 February 2003 to receive the Administration's briefings on the outcome of the consultation exercise and the Compendium of Submissions, and on 15 February 2003 to receive the Administration's briefing on the Bill.

16. Members and deputations raised various concerns and queries about the proposals in the Consultation Document. A summary of views expressed and suggestions made by organizations and individuals is in LC Paper No. CB(2) 896/02-03(01). A summary of concerns and queries raised by members at the joint meetings on 26 September 2002, 21 October 2002, 19 December 2002 and 7 January 2003 is in LC Paper No. CB(2) 1082/02-03(01).

17. Some deputations expressed opposition to enact legislation to implement BL23. Some members and deputations considered that it was presently not an appropriate time to enact laws to implement BL23. Other members and deputations

were of the view that there was no need to pass any legislative proposal in haste, especially in view of the fact that there had not been any cases of treason or sedition in the past five years. These members and deputations urged that the Administration should, after the consultation period, issue a white bill in early 2003 setting out the details of legislative provisions for public consultation, before introducing a blue bill.

18. Some other deputations expressed support for the enactment of legislation to implement BL23 and considered that there was no need to issue a white bill. However, some of these deputations had also raised concerns about various proposals in the Consultation Document.

19. The major areas of concern expressed by members and deputations at the joint Panel meetings on the proposals in the Consultation Document and the Bill include the following -

- (a) the human rights implications of the Administration's proposals;
- (b) the proposal to make misprision of treason a statutory offence;
- (c) the extra-territorial application of the offences of treason, secession, sedition and subversion to HKSAR permanent residents;
- (d) the offences of sedition and possession of seditious publications;
- (e) the proposals to protect information relating to relations between the Central Authorities and the HKSAR, and to create a new offence of unauthorized disclosure of protected information by unauthorized access;
- (f) restriction of freedom of expression, freedom of the press and freedom of association;
- (g) the proposal to provide the police with emergency power of entry, search and seizure without a warrant for investigation of certain BL23 offences; and
- (h) the proposed mechanism to proscribe a local organization by the Secretary for Security on the basis of a proscription by the Central Authorities of a Mainland organization to which the local organization is affiliated.

20. The Administration has informed the two Panels that it has made a number of changes to its proposals as reflected in the Bill, having taken into account the views received during the exercise. Members may refer to a copy of the leaflet outlining the way forward in LC Paper No. CB(2) 1069/02-03(01) and the Statement made by the Secretary for Security in the Legislative Council.

21. Some members do not find the changes adequate and consider that there are still problems with the Bill, for example, the lack of public interest defence, the provisions relating to unauthorized disclosure of protected information and the proscription of local organizations. Some members remain opposed to the introduction of the Bill.

### **Conclusion**

22. The Legal Service Division is scrutinizing the Bill and will seek clarification from the Administration on the legal and drafting aspects of the Bill. In view of the complexity of the Bill, Members may wish to set up a Bills Committee to study it in detail. In anticipation of a Bills Committee to be set up, members of the two Panels had, at the last meeting, requested the Administration to provide certain information in writing to facilitate the scrutiny of the Bill.

Prepared by

Legal Service Division  
Legislative Council Secretariat  
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