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THE
LAW SOCIETY OF HONG KONG
香 港 律 師 會

3/F WING ON HOUSE · 71 DES VOEUX ROAD
CENTRAL · HONG KONG DX-009100 Central 1
香港中環德輔道中71號
永安集團大廈3字樓

TELEPHONE（電話）: (852) 2846 0500
FACSIMILE（傳真）: (852) 2845 0387
E-MAIL（電子郵件）: sg@hklawsoc.org.hk
HOME PAGE（網頁）: http://www.hklawsoc.org.hk

Our Ref : SG/FA/1946
Your Ref :
Direct Line :

17th December 2002

Mrs. Regina Ip, GBS, JP,
Secretary for Security,
Security Bureau,
6th Floor, Main Wing,
Lower Albert Road,
Central,
Hong Kong.

Dear Mrs. Ip,

Re : Article 23 of the Basic Law

I have pleasure in enclosing the English and Chinese versions of the submission made by the Law Society of Hong Kong in response to the Government's Consultation Document on Proposals to implement Article 23 of the Basic Law. We are, of course, happy to discuss these further with you or your representative should you so wish.

Yours sincerely,

Patrick Moss
Secretary General

Encl.

PM/ff

COMMENTS ON THE CONSULTATION DOCUMENT ON PROPOSED LEGISLATION UNDER ARTICLE 23 OF THE BASIC LAW.

Introduction

With assistance from the Constitutional Affairs Committee, the Council of the Law Society has considered the proposals in the Government's Consultation Document and sets out its comments below.

The Council has concentrated on the points considered by its members to be most significant but they expect to make further comments when the results of the consultation and the draft legislation are published.

In view of the issues arising from the Consultation Document and the widespread interest they have provoked the Council considers that a White Bill should be published by the Government.

1. **General Principles**
   The Law Society endorses the following principles in relation to the implementation of Article 23 of the Basic Law:

   (a) The Hong Kong Special Administrative Region has a constitutional obligation to enact laws pursuant to Article 23.
   (b) Article 23 is a statement of principle, and Hong Kong Special Administrative Region is entrusted with the right to determine the manner of compliance.
   (c) The Hong Kong Special Administrative Region has no obligation to go beyond Article 23, and all existing and proposed laws should be evaluated on that basis.
   (d) Insofar as existing laws referred to in the Consultation Document go beyond the requirements of Article 23, the opportunity should be taken to examine whether they should be retained or repealed.

2. **Treason – definition of "levying war"**
   The common law definition of levying war cited in paragraph 2.7 of the Consultation Document ought not to be adopted. It includes "a riot or insurrection involving a considerable number of people for some general purpose" This is too wide. War should be defined in the sense in which it is generally understood. One such definition is that judicially approved in Driefontein Consolidated Gold Mines v. Janson [1900] 1 QB 339: "When differences between states reach a point at which both parties resort to force, or one of them does an act of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant".

3. **Misprision of Treason**

This offence previously taken over from English law should now be repealed. It is accepted that a citizen has a civic duty to report crime, but to criminalize a failure to do so shows a degree of mistrust and antagonism damaging to social harmony. The offence has long been considered obsolete in Britain. A 1950 edition of Stephen's Commentaries on the Laws of England stated as follows: "There is, however, no modern precedent of an indictment for the crime, and it seems, for all practical purposes, to be obsolete".

4. **Secession**

Any legislation against secession must take into account the complex and delicate situation existing between the Mainland and Taiwan, for example at what point "separation" (the present description of the situation) could become "secession" (an offence under the proposed law). It is suggested that any law on secession should only become activated when and only for so long as there is a declared state of secession in respect of a specified territory, evidenced by a certificate of the Chief Executive. This will avoid any unintended infringement of the law triggered by events outside the control of Hong Kong, such as some act or statement by the Taiwan leadership which could amount to secession under the proposed law.

5. **Sedition**

The proposed new offence, namely inciting others (a) to commit the substantive offence of treason, secession or subversion; or (b) to cause violence or public disorder which seriously endangers the stability of the state or the Hong Kong Special Administrative Region should replace all existing sedition offences.

There should be a high threshold of proof to establish the offence, namely, the incitement:

(a) is intended to incite imminent violence;
(b) is likely to incite such violence; and
(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

There should be no other sedition offences.

6. **Seditious Publications**

There should be no separate offence relating to seditious publications and the current law dealing with seditious publications should be repealed.

If a person prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publications with intent, then he commits the substantive offence of sedition. The Consultation Document acknowledges (in paragraph 4.8) that intention will remain an essential element of the offence. But to continue to single out publication as a distinct seditious act is and will be seen as an attempt to curb freedom of expression.

The Consultation Document suggests that possession of seditious publications

with knowledge should be an offence (paragraph 4.18). For the reason stated above there should be no such offence.

7. Subversion

"Intimidating" the PRCG should not be part of the offence of subversion because this would make the offence unnecessarily far-reaching, particularly if the ambit of inchoate or accomplice acts is taken into account.

8. Theft of State Secrets

There are two important questions: what are "state secrets" and how should they be protected.

The existing Official Secrets Ordinance covers two principal areas: "spying" and "unauthorized disclosure".

Where spying is concerned, the information (or state secrets) sought to be protected is "information likely to be useful to an enemy, and is obtained or disclosed for a purpose prejudicial to the safety or interests of the state or the Hong Kong Special Administrative Region" (paragraph 6.19 of the Consultation Document).

Where unauthorized disclosure is concerned the following categories of information are proposed:-

(a) security and intelligence information;
(b) defence information;
(c) information relating to international relations;
(d) information relating to relations between the Central Authorities of the PRC and the HKSAR.

Apart from information relating to relations between the Central Authorities of the PRC and the HKSAR, all the above categories are already in the existing Official Secrets Ordinance.

The category covering relations between the Central Authorities of the PRC and the HKSAR will presumably be modelled on section 16 of the Official Secrets Ordinance which covers international relations.

Under section 16 the "damaging disclosure" of "any information, document or other article relating to international relations" is an offence. A disclosure is damaging if it "endangers the interests of the state or HKSAR elsewhere, seriously obstructs the promotion or protection by the state or HKSAR of those interests or endangers the safety of Chinese nationals or HKSAR permanent residents elsewhere". The words "interests of the state or HKSAR" are open to wide interpretation and have not been tested in court, and the apparent protection afforded by the requirement of a "damaging disclosure" could be dissipated by the wide meaning of "interests of the state or HKSAR".

The concepts of "damaging disclosure" and "interests of the state" should be

considerably narrowed down and more precisely defined.

9. **Foreign Political Organizations**
There should be no additional power to proscribe an organization on the ground of national security. The necessary safeguards are already provided in the existing power to prohibit a society and the proposed law on treason, secession, sedition, subversion and theft of state secrets.

The power to proscribe an organization on the ground of "national security" effectively creates new offences which would follow from the power to proscribe. This is unnecessary and beyond the scope of Article 23. In particular it should be noted that an organization or the affiliate of an organization could be proscribed even without committing lawful acts in Hong Kong, if the organization is proscribed on the Mainland on the ground of national security, and the Secretary for Security considers its proscription in Hong Kong to be in the interest of national security or public safety or public order.

10. **Investigation Powers**
No case has been made for the introduction of –
(a) an emergency entry and search power for the purpose of investigation (as distinct from stopping a crime the power for which already exists); and
(b) an additional power to require a bank or deposit-taking company to disclose financial information.

The attempted justification is that evidence might be lost or an investigation might be prejudiced. The police already have substantial and adequate investigation powers and it is unnecessary and undesirable to give an additional power and discretion to a senior police officer.

11. **Organized and Serious Crimes Ordinance Powers**
The proposal as extension of powers under the Organized and Serious Crimes Ordinance should only be considered after the other issues on legislative enactment pursuant to Article 23 have settled.

12. **Inchoate or accomplice acts**
The concept of inchoate or accomplice acts could greatly extend the range of activities which could become unlawful or criminal under the offences proposed to be enacted, for example in relation to secession or a proscribed organization. The issue of inchoate or accomplice acts should be considered in relation to each specific new offence after it has been formulated in formal legal terms.

13. **Trial by Jury**
An accused under any of the Article 23 offences should have a right to elect for a trial by jury.

14. **White Bill**
The Consultation Document has resulted in the raising of issues not addressed in that document, and there should be further elaboration of Government thinking as well as full consideration of the submissions the Government has received. In

the circumstances it is desirable that a White Bill containing the draft legislation and an explanatory memorandum should be published by the Government.

DOC 64555

就基本法第二十三條立法諮詢文件提出的評論

引言

香港律師會理事會參考了憲制事務委員會提供的資料及意見，對政府發表的《諮詢文件》提出以下評論。

理事會現時對諮詢文件要點發表意見，但在諮詢結果及有關草案公布後，將會繼續發表評論。

基於《諮詢文件》所帶出的各種事項及其所引起的廣泛興趣，理事會認爲政府應就有關立法建議發表白紙草案。

1. 一般原則
   就實施《基本法》第二十三條，香港律師會支持以下原則：

   a. 香港特別行政區政府有憲制義務須根據《基本法》第二十三條自行立法。
   b. 香港特別行政區立法須符合第二十三條所訂的原則，但在此前提下可自行決定條文內容。
   c. 香港特別行政區毋需訂立超越第二十三條規定的法例。所有已訂及擬訂立的條例應根據這原則衡量。
   d. 在《諮詢文件》中提及的現存法例超越了第二十三條的情況下，當局應考慮應將該法例保留或廢除。

2. 叛國——「發動戰爭」的定義
   《諮詢文件》2.7 段所引述關於「發動戰爭」的普通法定義——「相當數目的人爲某一般公共目的而發動的暴亂或暴動」，過於寬鬆，不宜採用。「戰爭」應以其普遍被接納的意義作出定義。Driefontein Consolidated Gold Mines v. Janson [1900] 1 QB 339 一案作出了如下定義：「當兩國之間的分歧令雙方要訴諸武力；或令單方施以暴力行爲，而另一方則視之爲和平的破壞，雙方便進入戰爭狀態。在此情況下，交戰雙方均會向對方施以受限制的暴力，直至一方願意接受敵方願意給予的條件。」

3. 隱匿叛國
   此源自英國法例的罪行應予取消。市民有責任舉報罪行，這點毋容置疑；但沒有舉報者不應負上刑事責任，因爲這顯示出政府對市民有一種不信任及敵對的態度。在英國，此罪行在多年前已被視作過時。一九五零年版《史提芬英國法例評註》(Stephen's Commentaries on the Laws of England) 指出：「近代並無就此罪行作出起訴的案例；此罪行從實際角度上看似乎已屬過時。」

4. 分裂國家

任何有關分裂國家的法例均須考慮現時內地及台灣的複雜及微妙關係，例如「分離」（現時情況的描述）在甚　情況下可演變爲「分裂」（擬議訂立的罪行）。有關分裂國家的罪行應在當局宣佈某地進入分裂狀態下（並獲行政長官作出書面證明）始可引用。在建議的法例下，台灣領導層一些言行可在香港構成罪行，而根據普通法「初步或從犯行爲」的概念，一些在香港的行爲亦可相應成爲罪行。以上建議可防止外圍因素影響一些香港活動的合法性。

5. **煽動叛亂**

建議新訂的罪行「煽動他人（一）干犯叛國、分裂國家或顛覆罪實質罪行；或（二）製造嚴重危害國家或香港特區穩定的暴力事件或公眾騷亂」應取代所有原有的煽動叛亂罪。

控方在證實此罪行時，應證明所涉行爲

a. 必須旨在煽動即時發生的暴力事件；
b. 極有可能煽動此類暴力事件發生；及
c. 發表的意見與暴力事件的發生或發生的可能性有直接和緊貼的關係。

除上述罪行之外，不應再有其他煽動叛亂罪行。

6. **煽動刊物**

現存有關煽動刊物的法例應予取消，亦不應就煽動刊物另立法例。

如有人意圖刊印、發布、出售、要約出售、分發、展示或複製任何煽動刊物，即可以以煽動叛亂入罪，不須另立法例。《諮詢文件》在 4.8 段所承認，意圖是此罪行的一項必要原素。另外立法針對煽動刊物而把意圖放在次要地位，實際上和意識上是限制了言論自由。

《諮詢文件》4.18 段提議保留在知情的情況下管有煽動刊物的罪行。基於以上所述的原因，此罪行應予取消。

7. **顛覆**

「脅迫」中華人民共和國政府不應構成顛覆罪行，因爲這字眼加上「初步或從犯行爲」的概念將把罪行的範圍大爲擴闊。

8. **竊取國家機密**

有兩個問題須予解答：甚麼是「國家機密」？我們應如何保護「國家機密」？

現時，《官方機密條例》包含兩主要範圍：「諜報活動」及「非法披露」。

就諜報活動而言，打算納入受保護的資料（或稱官方機密）包括「那些可能會對敵人有用的資料，而有關資料是爲了損害國家或香港特別行政區的安全或利益而取得或披露的」（《諮詢文件》6.19 段）。

就非法披露而言，以下類別的資料建議應受保護：

a. 保安及情報資料；
b. 防務資料；
c. 有關國際關係的資料；
d. 有關中華人民共和國中央與香港特區之間關係的資料。

除了「有關中華人民共和國中央與香港特區之間關係的資料」外，以上其他類別的資料均可見於現時的《官方機密條例》內。

有關中華人民共和國中央與香港特區之間關係的類別，應將會建基於《官方機密條例》第十六條，該條涉及國際關係的資料。

根據第十六條，對關乎國際關係的資料、文件或其物品作出損害性的披露，即屬犯法。如披露「危害國家或香港特別行政區在其他地方的利益、嚴重妨礙國家或香港特別行政區促進或保障該等利益，或危害中國國民或香港永久性居民在其他地方的安全」，即屬具損害性。「國家或香港特別行政區的利益」的含義甚廣，法院亦未曾就此作出詮釋。這廣闊含義，將削弱法例中有關「具損害性披露」可給予的保障。有關「具損害性披露」及「國家利益」等概念，均須作出嚴謹及清晰的定義。

9. 外國政治性組織

當局不應額外加添以國家安全爲理由禁制組織的權力。現行法例有關禁制組織的機制，及建議有關叛國、分裂國家、煽動叛亂、顛覆及竊取國家機密的各項罪行，已提供了足夠的保障。

以國家安全爲理由禁制組織，實質上加添了新的刑事罪行，而超越了第二十三條的範圍。尤應注意的是，如保安局局長認爲在香港禁制一已在內地以國家安全爲理由遭禁制的組織或其從屬組織，是維護國家安全、公共安全或公共秩序所必需，即使其沒有在香港作出違法行爲，也可遭禁制。

10. 調查權力

當局對引入以下權力沒有提出有說服力的理由：

a. 在調查罪案時的緊急進入及搜查權力（有別於警方現時爲制止罪案發生所有的權力）；及
b. 要求銀行或接受存款公司披露財務資料的額外權力。

當局提出的理由是該等資料可能會遭損失，或會對調查造成影響。事實上，警方現時已擁有充足的調查權力。在此之上給予高級警務人員額外的權力及決定權，實無必要，也非可取之舉。

11. 《有組織及嚴重罪行條例》的權力

當局應首先考慮根據第二十三條應訂立何種實質罪行，才考慮把《有組織及嚴重罪行條例》的額外權力延伸至第二十三條的罪行。

12. 初步或從犯行爲

初步或從犯行爲的概念會大幅擴大在建議增訂的罪行下將會被視爲非法的行爲，例如有關分裂國家或被禁制組織的罪行。此等初步或從犯行爲的範圍

應在每一新訂罪行訂定條文後作出適當研究。

13. **陪審團會同審訊**
因第二十三條被控告的人士應有權選擇由陪審團會同審訊的權利。

14. **白紙條例草案**
《諮詢文件》帶出了很多尚未有充分研究及討論的問題，故政府有責任進一步向公眾說明政府的用意及對諮詢所收到的意見作出回應。在此情況下，政府應發表有擬議條文的白紙草案，並附上條文的摘要說明。