

The Hong Kong Bar Association's Comments
on the Committee Stage Amendments dated 6th June 2003 to the
National Security (Legislative Provisions) Bill 2003

- 1) The Administration has proposed twenty committee stage amendments ('CSA's') to the National Security (Legislative Provisions) Bill 2003 ('the Bill'). Some of them are minor. Others are not.
- 2) The Hong Kong Bar Association ('HKBA') is pleased to see that some of the amendments reflect particular concerns that it and other critics of the Bill had made. Those amendments are, to that limited extent, welcome. However, the HKBA is still of the view that the Bill is flawed. It will not repeat at length its views on the Bill expressed in the document dated 11th April 2003 entitled 'Hong Kong Bar Association's Views on the National Security (Legislative Provisions) Bill 2003' save to say that the Bill ('the Views'), even with the CSA's incorporated in it, still represents a real threat to the rights and freedoms of Hong Kong residents.
- 3) The Bill, if it becomes law, will amend various ordinances in significant ways. Those ordinances as amended will be enforced. Enforcement may only directly affect a very small proportion of the population but the effect of enforcement action will be felt by the majority. Freedom of political expression will be curbed and the freedom to seek information through the media will be limited. The HKBA has said before, and says again, the Bill goes beyond what is strictly required by Article 23 Basic Law and those parts of the Bill that are arguably constitutionally mandated, are over-broad.
- 4) The HKBA has stated in the Views, amongst other things, the following:
 - a) A significant portion of the Bill (including the proposed amendments to the Official Secrets Ordinance and to the Societies Ordinance) is not mandated by Article 23 of the Basic Law. Only some but not all of the proposed amendments to the Crimes Ordinance are required by Article 23. Acts of subversion and secession can be prohibited without creating new offences.
 - b) The proposed offence of treason should require proof of a specific intent. For example, the offence under the proposed section 2(1)(c) should only be committed when a person does a specific act with the intention of assisting and with the intention that the PRC's position in the war should be prejudiced.
 - c) The proposed offence of treason should continue to be subject to a limitation period of prosecution of 3 years.

- d) The proposed offences of treason, subversion and secession, in so far as they use the words ‘intimidate the Central People’s Government’ create uncertainty.
- e) The proposed offence of subversion should require proof not only of the occurrence of one of the results set out in the proposed section 2A(1)(a)-(c) but also that the particular result was intended.
- f) The proposed offence of subversion, in so far as it seeks to prohibit ‘disestablishment of the basic system of the PRC as established by the Constitution of the PRC’ is unclear. There are difficulties in reconciling it with the proposed exemption of the prescribed act of ‘pointing out the errors and defects in the ... Constitution of the PRC’ which is in the proposed section 9D(3)(b).
- g) The proposed offences of subversion and secession, in so far as they use the words ‘by using force ...’ creates uncertainty and the phrase should either be defined or left out.
- h) The legal policy to introduce the proposed offence of sedition by inciting others to engage in violent public disorder endangering the security of the PRC is difficult to understand and the proposed offence of handling seditious publication is unnecessary.
- i) It is not clear on what basis some of the offences have extra-territorial effect.
- j) The HKBA questions the case of the HKSAR Government to introduce the proposed power to conduct warrantless searches for evidence concerned with the offences of treason, subversion, sedition, secession and handling seditious publication.
- k) The proposed amendments to the Official Secrets Ordinance are difficult to justify as a matter of legal policy. The new category of protected information may cover some commercial and economic information, and information of political and constitutional significance. The public interest is better served by the use of civil remedies in appropriate cases rather than the criminal law.
- l) The proposed section 8A(2)(c) of the Societies Ordinance, which makes it a condition precedent to appropriate action an act done in the Mainland by the Central Authorities, dilutes the principle of ‘One Country, Two Systems’ and may be inconsistent with the HKSARG’s obligation to safeguard the rights and freedoms of Hong Kong residents under Article 4 of the Basic Law.
- m) The proposed sections 8A(3) and (4) of the Societies Ordinance, which makes a certificate conclusive of proof of the banning of a Mainland organization in legal proceedings, should relate only to the administrative act.
- n) The so-called ‘Pannick clauses’ are unnecessary. They should at most be drafted as ‘avoidance of doubt’ clauses.

The Crimes Ordinance

CSA1: Clause 6-Proposed section 9A

- 5) The CSA concerns the proposed new offence of sedition. The amendment to the proposed section 9A(1) inserts the word ‘intentionally’ in sub-paragraphs (a) and (b)

making it clear that the offence is an offence of specific intent and cannot be committed through inadvertence or recklessness. That proposed amendment is an improvement.

- 6) The CSA also introduces a new sub-section (1A). This sub-section is an improvement in that it provides that acts that would constitute an offence under sub-section (1) will not be an offence unless the nature of the incitement and the circumstances in which the incitement is made are such that one or more persons incited are likely to be induced or an 'ordinary person' would be likely to be induced to commit the relevant offence under sub-section (1)(a) or be induced to engage in violent public disorder under sub-section 1(b).
- 7) However, there is a problem in criminalising conduct by reference to the standards of 'an ordinary person' when the acts done do not in fact produce the prohibited result. It seems harsh that a defendant's criminal liability is made to depend on not their actual consequences on a real person but on a judicial assessment of their effect on a hypothetical 'ordinary person'. The person incited may have no intention of committing the acts the subject of the incitement and may say so in court but he would be an 'extraordinary person' by definition if the court found that an 'ordinary person' would be induced to commit offences or engage in violent public disorder.
- 8) The HKBA nonetheless sees this as a further limitation on the offences under sub-section (1)(b) and, to that extent, it is an improvement. It regrets that the administration was not able to go further and limit the offence to situations where the contemplated prohibited acts do in fact occur.
- 9) There may be a drafting error in the proposed sub-section (1A). Sub-paragraph (1A)(a) refers to 'one or more persons incited' but that provision is linked to sub-section (1)(a) which refers to 'persons'. Logically, the CSA should refer to 'persons' in order to harmonize with the text of the Bill.

CSA 2: Clause 6-Proposed section 9C(1) and (3)

- 10) Section 9C(1) is amended so as to change the definition of a 'seditious publication' from a publication that is likely to cause an offence of treason, subversion or secession to a publication that is likely to induce a person to commit one of those offences.
- 11) The amendment goes some way to addressing a criticism raised by the HKBA in the Views that simply reading a publication cannot cause a person reading it to commit an offence.

- 12) The amendment will require a court to form a value judgment of the contents of a publication and the susceptibility of an ordinary reader to commit an offence having read the book. That is quite an undertaking for a judge. The HKBA is of the view that it will be in only very rare cases that a court can say that it is satisfied to the criminal standard that the constitutional limits on freedom of expression have been breached that a book or pamphlet is of such persuasive force that an ordinary reader will be induced (not incited or encouraged or persuaded) to commit a very serious offence.
- 13) As with many of the offences in the Bill, the mischief lies not so much in the fact that people might be prosecuted for this offence but the fact that it is on the statute book. Warnings given by the police to book-sellers and publishers that certain publications may fall foul of this provision would, in most cases, ensure that the publications were not made available to the public. Unenforceable laws that have this effect should not be on the statute book.
- 14) The other proposed amendment is to include a limitation period for prosecuting offence. The proposed section 9C (3) would make it impossible to prosecute the offence of handling seditious publications after 3 years had gone by from the date of the commission of the offence.
- 15) The HKBA observes that a limitation period of six months is in place for the current offence. The HKBA is against the offence altogether but it can at least see the logic in a shorter limitation period. As it has said before, offences like the one under consideration are political offences in which the government of the day has an interest. Time limits ensure that such offences are prosecuted with due expedition.
- 16) Unlike offences against the person or property, the circumstances which may make a publication controversial in one year and the occasion of a prosecution may have changed in the next so that the publication becomes uncontroversial. Prosecutors should be required to act promptly when there is a claim that political speech so

threatens the public interest so that people are actually induced to commit serious offences by means of the written word.

- 17) The HKBA continues to regret the failure of the Administration to restore time-limits for the offence of treason and for other offences of sedition.

CSA 3: Clause 7-Proposed Section 18A

- 18) The CSA amends the proposed section 18A to make it clear that Parts I and II of the Ordinance must be interpreted consistently with the Basic Law and not just Article 39 BL.

- 19) This CSA does no more than reflect a constitutional obligation. Without it the obligation would still be there as a matter of necessary constitutional implication.

CSA 4: Clause 7- Proposed Section 18B

- 20) The CSA amends the proposed section 18B to enable a police officer of or above the rank of assistant commissioner to authorize a search of premises if he or she reasonably believes that an offence of treason, subversion, secession, sedition or handling seditious publications has been committed or is being committed and that immediate action is necessary to safeguard evidence.

- 21) The HKBA has said before that it is not persuaded that a case has been made out for by-passing judges or magistrates in such circumstances. The increase in rank in the officers competent to issue such orders does not overcome the HKBA's basic objection set out in the Views that a police officer should not have this power of, if the circumstances exist which really warrant it, more safeguards should be built in.

The Official Secrets Ordinance

CSA 5: Proposed new Clause 1A

22) This CSA proposes the inclusion of a section like the one discussed at paragraphs 18 and 19 above. There are no further implications arising.

CSA 6: Proposed Clause 9

23) This CSA complements the one discussed at paragraph 22. It is of technical significance only.

Societies Ordinance

CSA 7: Proposed New Clause 14A

24) The CSA has the effect of removing the words ‘national security’ from section 8(1)(a) of the ordinance. That was an existing power to ban a society on the grounds of national security.

25) The amendment is presumably necessary to avoid any arguments that might be made that the existence of the older provision might somehow inhibit the operation of the new power to ban organizations on the grounds of national security.

26) The HKBA has already pointed out that the existing power at section 8(1)(a), now proposed to be repealed, was a means of discharging the constitutional obligation under Article 23 BL and that new provisions were not necessary. It is still of this view.

CSA 8: Clause 14-Proposed section 2A

27) This CSA has the same effect as the ones discussed at paragraphs 18, 19 and 22 above.

CSA 9: Clause 15-Proposed Section 8C(1)

28) This CSA makes it clear that an offence is committed under section 8C (1) only when an organization is proscribed under section 8A and not otherwise.

CSA 10: Clause 15:Proposed section 8D

29) This CSA affects the appeal procedures where an organization has been banned.

30) The proposed amendment respecting section 8D (3) is welcome. It requires the Court of First Instance on an appeal to be not satisfied as to certain positive facts so as to set aside an order of proscription rather than be satisfied about certain negative facts before so doing. The effect is to make clear that the burden of proof is on the Secretary for Security on any appeal.

31) The proposed amendment to section 8D(6) would enable the Court of First Instance to admit evidence even though it would not be admissible in any other proceedings before the court.

32) The HKBA objects to this provision. If legal policy requires that jurisdiction be given to the Court of First Instance then it means giving it to the body described in section 12 High Court Ordinance, Cap. 4 with all the attendant powers, including the ability to administer the law of the land which includes the common law as it relates to evidence as modified by the Evidence Ordinance, Cap. 8 and any other relevant legislation.

- 33) If the CSA were passed, the Court of First Instance would have enhanced powers because it would be free from the constraints of the law of evidence. That would be highly undesirable. A person might be liable to be committed for contempt in appeal proceedings because he refuses to comply with an order to provide evidence or answer questions that would not be admissible in a court of law normally whereas in 'ordinary' proceedings he would have a complete answer to a charge of contempt on the grounds that the information sought was not admissible.
- 34) The HKBA notes that when tribunals are empowered to receive evidence that would not be admissible in a court of law the safeguard is that the tribunal is amenable to judicial review and has not the power to commit for contempt. Abuses of power can be checked by the Court of First Instance. However, the supervisory jurisdiction of the Court of First Instance does not extend to supervising itself.
- 35) There might be constitutional objections too. Article 87 Basic Law provides that in civil proceedings in the HKSAR the 'principles previously applied in Hong Kong and the rights previously enjoyed by parties' shall be maintained. It is arguable that it was a right of a person before the High Court before 1997 not to have a case heard by that court except under and in accordance with the normal rules of evidence applicable in the case.
- 36) The HKBA considers that the following situation could arise if the CSA were enacted. The Secretary for Security proscribes an organization on the grounds of information received from Mainland security sources. The organization then appeals and the information and/or opinion from the Mainland is admitted by the court under the provision without requiring the attendance of the Mainland witnesses. There would be no chance of the appellant cross-examining the Mainland witnesses or requiring proof of their unavailability to come to HK. The position today is that even in civil cases the availability of a witness to give evidence and be cross-examined is a relevant fact when the court decides whether to admit hearsay evidence. Opinion evidence would not be received, even if first-hand, if it were not given by an expert.

Doing away with these long-established rules would mean that hearsay opinion evidence about an organization could be given by Mainland law enforcement agents and the rights of Hong Kong residents will be affected thereby. This would be a serious encroachment on the ‘One Country, Two Systems’ principle.

37) This CSA also provides that an appeal from the Court of First Instance would only lie with leave of that court or the Court of Appeal and that such an appeal must involve a question of law. At the moment, save in a small number of cases, appeals to the Court of Appeal are as of right. There is no justification shown for this limitation.

38) The HKBA also notes the narrowness of this right of appeal. It would like to be assured that the Administration does not take the view that this right of appeal on a limited point is not an exclusive remedy and that judicial review is available as well. (See Secretary for Justice v. Oriental Press Group [1998] 2 HKC 627 (CFA) on the narrow breadth of such an appeal. In that case the Court of Final Appeal found that such a limited right of appeal to the Court of First Instance did not exclude judicial review.)

CSA 12: Clause 15-Proposed New Section 8E.

39) This provision enables the Secretary for Security to make regulations concerning appeals. Previously, the Chief Justice was allocated this task. In its present and previous form the regulation making power allowed regulations (or rules) to be made that limited a party’s and his lawyer’s participation in the appeal. Either or both could be excluded from an appeal, for all or some of the hearing.

40) The HKBA objected to such a regulation making power on the grounds such limitations would amount to denial of access to a court, contrary to Article 35 Basic Law. That the Chief Justice was expected to formulate such limiting rules was a secondary objection.

41) The HKBA sees no reason to change its view. It has still to be persuaded that a regulation providing for the exclusion of an appellant and his lawyer from the appeal hearing would be compatible with Article 35 Basic Law which guarantees access to a court and access to a lawyer in both civil and criminal proceedings.

42) In any event, assuming that such regulations could be made, the HKBA considers they should be in the form of primary legislation. If subsidiary legislation is used, then it believes that the person responsible should be a person other than the respondent to the appeal. The Chief Executive in Council would appear to be the obvious alternative choice.

CSA 13: Clause 15-Proposed New Section 8F

43) This CSA gives the Rules Committee constituted under section 55 High Court Ordinance the power to make other, less controversial, rules relating to the appeals.

44) This is unexceptional. It is a normal provision in an ordinance creating a right of appeal to the Court of First Instance.

CSA's 13, 14, 15, 16 and 17: Clause 15-Proposed New Section 8G and New Schedule

45) These CSA's provides for a new second schedule to be added to the ordinance. The schedule deals with matters occurring after the proscription of an organization.

46) The aim of the new schedule is to make provision for the cancellation of registration of relevant organizations and consequential matters once they are proscribed. It covers limited companies, unregistered companies and organizations registered under other ordinances

47) The HKBA considers these provisions problematic. For example, under Paragraph 1 a limited company that has been proscribed under section 8A must be struck off,

dissolved and then wound up. This is the reverse of the normal process. A company is wound up and placed in receivership whilst its obligations are satisfied and it pursues debts owing to it. After that has been done, it is dissolved. Dissolution before winding up will leave third party claims unsatisfied and, likewise, will relieve the company of any obligations to third parties.

48) Another cause for concern is the position of trade unions. Under the Trades Union Ordinance, Cap. 332 the fact of registration makes a trade union a corporate body. There are specific provisions enabling the Registrar of Trade Unions to cancel registration of a registered trade union but only after giving the trade union notice and providing its members with procedural rights in respect of the cancellation of registration, including the right to be heard.

49) It is not clear whether these provisions are repealed by the Schedule or still remain in force. If they are not impliedly repealed, then the inter-relationship between them needs careful explanation.

50) The HKBA is of the view that the proposed Schedule 2 should not be included in the Bill or, alternatively, consideration of the Bill should be postponed until the ramifications of the measure have been explained.

CSA 18: Proposed Paragraph 13

51) This CSA repeals the consent provision in section 7 of the Crimes Ordinance, Cap. 200 which makes it an offence to 'seduce' from their duty members of the armed forces, the Government Flying Service and the police. The provision says that no prosecution for an offence can be instituted without the consent of the Secretary of Justice.

52) No explanation has been given in any papers accompanying the CSA's as to why this safeguard is being abolished.

CSA 19: Schedule Paragraph 29

53) This CSA appears to remedy a drafting error in the Bill. The effect of the Bill as originally drafted was to disapply the provisions of section 5(8) of the Organized and Serious Crimes Ordinance, Cap. 455 which made searches under various provisions of the Official Secrets Ordinance subject to section 83 of the Interpretation and General Clauses Ordinance, Cap. 1 which is, in turn, located at Part XII of the ordinance which deals with search and seizure of journalistic material.

54) Section 83 of the Interpretation and General Clauses Ordinance, Cap. 1 has the effect of subjecting search and seizure powers generally to stringent restrictions on searching premises where journalistic material may be seized. Journalistic material is any material created or acquired for the purpose of journalism. The special procedures for obtaining a warrant in such a case are described in Apple Daily v. Commissioner ICAC [2000] 1 HKC 295.

55) The effect of this CSA is therefore to reinstate that procedural protection that had been removed (presumably, inadvertently) by the Bill.

CSA 20: Proposed New Paragraph 36

56) This CSA repeals the Crimes (Amendment) (No.2) Ordinance 1997 which has not come into force. The Crimes (Amendment) (No.2) Ordinance 1997 repeals the laws on treasonable offences, assaults on the Queen and the requirement of Attorney General's consent on prosecution for incitement to disaffection. In view of the Bill, the amendment is superfluous.

Date prepared: 13th June 2003