

**Letter to Hong Kong :
“Implementing Article 23 of the Basic Law”
by the Solicitor General, Mr Bob Allcock**

1. As you may know, we are nearing the end of the consultation period in respect of the Government’s proposals for implementing Article 23 of the Basic Law. Let me try to take stock of the position at this stage.

2. When the proposals were first released in September this year, initial reactions were quite favourable. But, as time has gone by, concern has grown. Having attended many meetings on this subject, I know that some people are sincerely worried. I would like to offer some comments on their worries.

First stage

3. My first comment is that the concerns expressed so far have been noted by the Government. That was the whole point of the consultation exercise – to listen to the views of the community.

4. In several areas, the Government has already said it will review the proposals. For example, concern has been expressed about the offence of possessing seditious publications, about powers of police investigation, and about proposed appeal avenues in respect of any banning of a local organization. The Government has said that it will revisit all those proposals.

5. I have no doubt that other areas will be reviewed in the light of many submissions received.

Second stage

6. My second comment relates to the “devils in the details” argument. Many commentators feel unable to respond fully to the proposals until they see the draft legislation. That is an understandable position to take.

7. However, the opportunity to comment on a Bill **will** arise early next year – we hope in February. The Bill will be the start of the second stage of this exercise, when everyone – not merely LegCo members – will be

encouraged to discuss the fine print.

8. That second stage will, I am sure, lead to further suggestions on ways to improve the proposed new laws. And I have no doubt that the Bill will be amended before it is enacted by the Legislative Council.

Reassurance

9. Since the proposals were released, Government officials, including myself, have tried to reassure members of the public that many of their fears are groundless. For example, we have pointed out that advocacy of the independence of Taiwan by peaceful means would **not** be an offence; and that criticism of the Central Government or the Communist Party will remain **lawful**.

10. Of course, our statements do not have the force of law. But they do indicate what the Government's intentions are. Those intentions can be checked against the wording of the Bill when it is produced, to ensure that assurances are given legal backing.

Human rights guarantees

11. The best safeguards against draconian laws are already in place. The Basic Law contains a constitutional guarantee that no law can be validly enacted if it contravenes international standards of human rights referred to in Article 39. It also ensures that a judicial remedy is available should the Government try to enforce a law in a way that breaches those standards.

12. Our experience during the past five years indicates that the guarantees in the Basic Law are not empty words. They are enforced by the independent Judiciary, which is our ultimate and effective safeguard of human rights.

Tight drafting

13. However, that does not mean there is any excuse for loose drafting in our new laws. We cannot justify over-broad provisions by saying that they will be enforced selectively, or that the courts will throw out inappropriate cases. We must, and will, ensure that the laws are drafted as tightly as possible.

14. No one wants to turn harmless acts of protest into serious crimes against the state. Hong Kong's reputation as a free and tolerant society must not be undermined.

Freedom of expression

15. In particular, Hong Kong's reputation as a place where freedom of speech, and freedom of the press, flourish must be defended at all costs. Some people are concerned that the proposals would undermine those freedoms. Areas of particular concern have been noted – for example, the concern about seditious publications that I mentioned earlier. And the Government will try to address these.

16. I wish to emphasize that the proposals should not have the so-called “chilling effect” that some have alleged. The fact is – only **two** areas covered by Article 23 relate directly to freedom of expression. They are sedition and the theft of state secrets.

17. So far as sedition is concerned, the Government proposes to **liberalise** the law. At present, words can be seditious if they merely bring the Government into hatred or contempt, or if they merely raise discontent amongst the inhabitants of Hong Kong. The Government proposes to replace that very broad offence by an offence of sedition that can be committed in only two ways –

- (1) by inciting others to commit treason, secession or subversion; or
- (2) by inciting others to violence or public disorder that seriously endangers the stability of the state or the HKSAR.

Since restrictions on freedom of expression would be reduced, that proposal should have a “warming effect” on freedom of expression.

18. So far as the theft of state secrets is concerned, broadly speaking the proposal is that we should retain the current law, which is contained in the Official Secrets Ordinance. That law has applied in Hong Kong, directly or indirectly, for the past ten years and has **not** interfered with the free flow of information. By retaining that legislation, we will ensure that it is Hong Kong

law, and Hong Kong courts, that determine what information is protected from unauthorized disclosure. The fact that a document is classified in the Mainland as “secret” would continue to be irrelevant so far as Hong Kong law is concerned. Mainland laws, and Mainland concepts of state secrets, will **not** be introduced.

19. Since the Government proposes to liberalize the law of sedition, and to retain the current approach to official secrets, I am puzzled by allegations that the proposals will have a “chilling effect”. In my view, members of the media have nothing to fear from these proposals.

Treason, secession and subversion

20. Before the proposals were released, there had been much concern about the need to create new offences of “secession” and “subversion”. Those labels seemed very worrying. Many feared that such offences would necessarily crack down on freedom of expression.

21. If you study the proposals, you will see that this is not the case. In fact, the creation of these two new offences will not extend the criminal law to any significant extent. This is because the Government proposes to narrow the current offence of treason – so it applies only to threats to national security coming from **outside** the country. **Internal** threats that are currently covered by treason and related offences will, it is proposed, be covered by new offences of secession and subversion.

22. Those new offences could **not** be committed merely by calling for peaceful change or by criticising the government. Conduct amounting to levying war, or the use or threat of force, or criminal conduct that is akin to a terrorist act would have to be proved. The proposed offences are therefore much narrower than many people appreciate.

Conclusion

23. In describing the proposals, I am not claiming that they are perfect. I am sure that they can be improved as the legislative exercise progresses. But the Department of Justice has advised that they are consistent with the human rights guarantees in the Basic Law and in the International Covenant on Civil

and Political Rights. And that view has been endorsed by a leading human rights expert – Mr David Pannick QC.

24. The key objective of this exercise is to strike the right balance between protecting national security and safeguarding the rights and freedoms of individuals. As the exercise moves forward, a rational debate is the best way to achieve this objective. I look forward to that continuing debate.

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