There will be no 'secret trials'
- Bob Allcock, Solicitor General

Contrary to what some have alleged, the Bill to implement Article 23 of the Basic Law does **not** provide for 'secret trials'. Any criminal prosecution under the proposed new laws would be subject to normal trial procedures. In addition, if anyone were charged with one of the serious offences against national security, he or she would have the right to trial by jury.

2. It is only in the context of appeals against the banning of a local organization that the possibility of special court procedures arises under the Bill. The banning of an organization would **not** be a criminal trial. It would be an administrative decision by the Secretary for Security, akin to many other administrative decisions such as the revocation of a licence to conduct a certain activity. It would not directly result in any criminal sanction, such as a fine or imprisonment, but it would mean that the organization's activities must cease.

3. Many administrative decisions are subject to an appeal to a special tribunal, such as the Administrative Appeals Board. In some cases, an appeal on a point of law can be made to the courts. The Consultation Document in respect of Article 23 suggested that, if a local organization were banned, it should be possible for points of law to be appealed to the courts, and points of fact to be appealed to an independent tribunal. The document expressly stated that 'Given that sensitive information or intelligence may be involved, the rules of procedures of appeal should protect confidential material and sources from disclosure while ensuring procedural fairness'. Information, which if disclosed, would reveal the identity or even the existence of an informer inside a violent secessionist organization, and which would put lives at risk, would be an example of that sort of sensitive information.

4. In response to concerns that a special appeal tribunal might not be as independent as the courts, the government now proposes that any appeal against a ban should go to the courts. But there is still the need to protect confidential material and sources from disclosure. How can this be done without prejudicing the fairness of the appeal?

5. The European Court of Human Rights grappled with this problem in a case in 1996, when a Sikh separatist leader, Mr Karamjit Singh Chahal, challenged certain decisions made by the UK Government. He had been detained in custody for deportation purposes since August 1990, after the Home Secretary decided that he was a threat to national security.

6. The Court upheld several of his claims under the European Convention on Human Rights, including the claim that he had been denied the opportunity to have the lawfulness of his detention decided by a court. At the time, Mr Chahal could only make representations concerning his detention to an advisory panel, whose decision was not binding on the Home Secretary.

7. In deciding that such procedures did not comply with the Convention, the European Court of Human Rights nevertheless recognized that the use of confidential material may be unavoidable where national security is at stake, and that special procedures may be required to protect that confidentiality. It was impressed by the effective form of judicial control that had been developed by Canada for cases of this type.

8. The Canadian model is found in the Canadian Immigration Act. In dealing with entry and immigration to Canada, it provides for the exclusion of persons who may engage in espionage or terrorism or who otherwise may constitute a danger to security. There is an appeal procedure provided where a person other than a citizen or permanent resident is "certified" as an excluded person based on security reports. This allows for an examination by a senior judge in camera of the security intelligence reports, with special procedures for evidence obtained in confidence from foreign governments. Another provision allows for a review of a removal order based on such a certificate in certain circumstances. Provision is made for a hearing in camera in the absence of the applicant, his right to a hearing being based on a summary of the evidence in camera.

9. Following the decision and comments in *Chahal*, legislation was enacted in the UK to cure the defects in its procedural safeguards. A Special Immigration Appeals Commission was established to review certain immigration decisions. The Lord Chancellor was empowered to make rules that –

(a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,

(b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,

(c) make provision about the functions of a special advocate appointed to represent the interests of an appellant in any proceedings before the Commission from which the appellant and any legal representative of his are excluded; and

(d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence.

10. In 1998, Rules were made under this power. In 2000, the English Court of Appeal commented that –

> 'The rule-making power enables the Lord Chancellor to make the most satisfactory arrangements practical to deal with the tension which will inevitably arise in cases involving national security between the rights of the individual and the need to maintain the confidentiality of security information.'

In October, last year, a member of the English Court of Appeal commented that 'the special advocate procedure is a better way of dealing with this than any procedure devised in this country in the past'.

11. A rule-making power similar to that described above also appears in the UK Terrorism Act 2000. Under that Act, an organization may be proscribed if it is believed to be concerned in terrorism. A proscribed organization may appeal to the Proscribed Organizations Appeal Commission. The Act provides that the Lord Chancellor may make special rules relating to that Commission that are of the kind described above.

12. The Article 23 Bill adopts a similar approach, by providing that the Chief Justice may (but is not obliged to) make rules similar to those provided for in the UK. If any such rules were made, they would be subject to vetting

by the Legislative Council. The Bill does not therefore of itself impose any restrictions on the manner in which appeals would be heard. And any such restrictions that were made could be amended or repealed by LegCo.

13. The proposed rule-making power has prompted some critical comment. Some commentators have pointed out that the UK and Canadian precedents relate to immigration decisions, which do not apply to nationals or permanent residents. An appeal against a proscription could, however, affect all persons who are members of the proscribed local organization, irrespective of whether or not they are Hong Kong permanent residents. Whilst the two situations are clearly not identical, the fact remains that they both raise the same question : how can the appeal mechanism satisfy procedural safeguards under human rights guarantees and, at the same time, maintain the confidentiality of security information? The UK and Canadian models offer a workable solution.

14. More importantly, the overseas precedents are **not** limited to immigration cases. The UK rule-making power in respect of appeals by proscribed terrorist organizations is clearly of direct relevance to the current proposal.

15. The proposed rule-making power is nevertheless of an exceptional nature and its implications need to be fully explored as the Bill goes forward. The government is committed to ensuring that the constitutional right to a fair hearing should be fully protected. At the same time, it must ensure that national security is not put at risk by the disclosure of highly sensitive intelligence information.

February 2003