Protecting National Security and Human Rights
by Bob Allcock, Solicitor General

Now that the Legislative Council is concluding its deliberations of the National Security (Legislative Provisions) Bill, it may be helpful to take stock of the proposals that will soon be put to the vote.

The original proposals

A lot has happened since the Consultation Document was published last September. At that time, the government's proposals were already consistent with international human rights guarantees, and were comparable with legislation in liberal democracies. However, after considering the thousands of public submissions, the government clarified its proposals in important respects. In particular, it decided to

- limit treason to times of war or the instigation of an armed invasion
- abolish the offence of failing to report an act of treason
- delete "threat of force" as an element of secession and subversion
- delete "resisting the exercise of sovereignty" from secession
- abolish the offence of possessing seditious publications
- exclude journalistic materials from police powers of search
- limit the types of information concerning relations between the HKSAR and the Central Authorities that are protected from unauthorized and damaging disclosure
- restrict the protection of information obtained by "unauthorized access" to information obtained through criminal means, such as theft or bribery

The Bill

When the Bill was published in February, further safeguards were revealed. These included

- the new laws would be interpreted in accordance with international

human rights guarantees

- trial by jury would be available for all Article 23 offences
- subversion and secession would be limited to those who engage in war or use force or serious criminal means that seriously endangers the stability or territorial integrity of the PRC.
- unauthorized disclosures of protected information leaked by public servants would not apply to leaks by Mainland public servants
- the offence of handling seditious publications would be limited to persons who intend to incite others to commit treason, subversion or secession.

The Bill has now been thoroughly scrutinised by a Bills Committee in meetings lasting over eighty hours. Over one hundred individuals or NGOs made representations to that committee during four special sessions. More than ninety papers relating to the Bill have been prepared for legislators.

Proposed amendments

As a result of this process, the government recently announced proposals for further improvements to the Bill. These include –

- limiting sedition to situations where a person intends, and is *likely to*, induce other to commit treason, subversion or secession, or to engage in violent public disorder
- imposing a three-year time for prosecuting an offence of handling seditious publications
- extending the interpretation clause to cover all human rights guarantees in Chapter III of the Basic Law
- subjecting regulations on appeal procedures to positive approval by the Legislative Council.

If the Bill is amended as proposed and enacted, fundamental human rights in Hong Kong will be fully safeguarded. Indeed, the Basic Law prevents laws from being enacted that would infringe those rights. Why is it, then, that some critics are still not satisfied?

Striking the right balance

National security legislation is inherently controversial, and is particularly so in Hong Kong, given the unique arrangement of "one country, two systems". It is natural for views to differ as to how to strike the balance between individual rights and national security. Provided fundamental human rights are protected – which they will be – there is no right or wrong answer. It is a matter of opinion. The views of human rights activists are likely to differ from the views of those whose duty it is to protect national security. The question is finding the right balance.

In order for readers to judge whether the Bill will strike the right balance, it may be helpful to review the main areas of criticism.

Proscription

Perhaps the most controversial provision is the proposed power to ban an organization that is subordinate to a Mainland organization that has been banned on the grounds of national security. It has been alleged that this introduces Mainland law into Hong Kong; blurs the distinction between the two systems; and is targeted at certain identified local organizations. None of these allegations is correct.

The Secretary for Security could only ban a local organization if that was permissible under Hong Kong (not Mainland) law, as being necessary for the protection of the territorial integrity or independence of the PRC, and proportionate for that purpose. International human rights standards would apply to ensure that freedom of association and freedom of speech were not unjustifiably curtailed. An appeal to the Court of First Instance would be possible and, unless the Secretary for Security satisfied the court that there was sufficient evidence to justify the banning, the proscription would be set aside.

Those who argue that the Secretary for Security could not withstand pressure from Beijing to ban an organization should look at the government's track record. Since 1997 the Secretary for Security has had the power to ban any society on the grounds of national security. She has never exercised that power, even though some societies operating in Hong Kong are banned in the Mainland.

Public interest

Criticism has also been directed at the absence of any public interest defence in respect of the unauthorized disclosure of protected information. Such a defence has never been provided either in Hong Kong's official secrets legislation, or in the UK legislation on which it is based. The issue was thoroughly debated in Parliament in 1989, and in the Legislative Council in 1997. Both legislatures rejected the call for such a defence. The main reason given was that the offence of unauthorized disclosure is structured in such a way that it can never be in the public interest to commit the offence. So far as the media and general public are concerned, only disclosures that are "damaging" in defined ways are offences. Moreover, the legislation has been in place for over ten years and has clearly *not* had a "chilling effect" on the media.

The Bill retains the "damaging" test. So far as the one newly defined category of protected information is concerned, unauthorized disclosure will only be an offence if it endangers, or is likely to endanger, the territorial integrity or independence of the PRC. It can never be in the public interest to commit that offence.

Seditious publications

The retention of the offence of handling seditious publications has been criticised as being a threat to the free flow of information. But the offence could only be committed by someone who –

- *intends* to incite others to commit treason, subversion or secession, and
- does so by means of a publication that is *likely* to induce a person to commit such an offence

Such an offence poses no threat to the media or to the free flow of information.

U-turn by critics

The power of proscription, the absence of a public interest defence, and the offence relating to seditious publications share one thing in common. They are all aspects of the current law. Of course, people are entitled to call for changes in the current law. But it is clear that the retention of that law will

not have the disastrous impact on human rights that some allege.

Some of the leading critics originally argued that we should not introduce new national security laws, but should make do with the current ones. Now that the proposed legislation can be seen to be a liberalising measure, they have done a U-turn and are criticising aspects of the current law. If one looks behind their rhetoric, one can see that there is no reason to fear the proposed legislation.