BL 23 – Justice Forum, 26 October 2002

Consultation

As you know, we are in the middle of the consultation period. This forum offers a timely opportunity for participants to express their views. This is a genuine consultation on principles and proposals set out by the SARG. What then should be my role during this period?

I do not think I should be trying to sell the package, since that is not the object of the exercise.

I should primarily be listening to the views expressed. However, in order to ensure that the proposals are fully understood, I may from time to time need to explain or clarify them, or make comparisons with existing law.

That is the approach I propose to adopt this morning. I welcome all views on this subject. I sincerely believe that those views can help the government to produce a Bill that gets the right balance between protection of the national interest, and protection of individual rights and freedom.

Why enact BL 23 laws?

Some people have said that we should not enact laws to implement BL 23, and that existing laws are adequate. But –

(1) there is a constitutional obligation;

(2) current laws are British and antiquated.

We therefore need to replace those antiquated colonial laws with laws that satisfy Article 23.

BL 23

Some people object to this exercise because they regard Article 23 as inherently obnoxious. Given its development at the time of events in Tiananmen Square, and its particular reference to "subversion", some consider that any implementing laws must necessarily be bad.

I do not share that view.

(1) The ability that Hong Kong has to enact laws <u>on its own</u> to protect national security is far preferable to the

only alternative – having Mainland laws extend to Hong Kong.

(2) Twelve years have passed since June 4, 1989, and China has come a long way in that time. It signed the ICCPR and ICESCR, and joined WTO.

(3) The proof of the pudding is in the eating. These proposals seek to strike the proper balance between protecting national security and the rights of individuals. I do not believe that they are draconian.

(4) With regard to the offence of "subversion", the Consultation Paper demonstrates that you need not be scared by labels. Look at the substance of the proposal and you will see that it does not seek to criminalize criticism of the CPG or the Communist Party. It relates to the violent overthrow of the PRCG and other such activities.

Why enact the laws now?

Some people have queried why the proposals are being made at

this stage, and allege pressure from the Mainland.

That is not the case.

The fact is – five years have passed since Reunification and we have not yet discharged our obligation to enact laws under Article 23.

Guiding principles

The Consultation Paper sets out the guiding principles that were adopted in the formulation of the proposals. These are –

(1) making use of existing legislation as far as possible;

(2) full compliance with the Basic Law, including its guarantees of human rights in Articles 27 and 39;

(3) the need to protect sovereignty, territorial integrity, unity and national security; and

(4) the need for clear and tightly defined laws.

I would welcome views as to whether these guiding principles are appropriate, and as to whether we have observed them.

In preparing the proposals we drew heavily on existing laws :

- proposals on treason, secession and subversion are based on concepts found in the current law of treason and treasonable offences

- the current Official Secrets Ordinance is to be left to deal with the theft of state secrets with very few amendments

- the law of sedition is to be made narrower than under the current law

As a result, there will be very few areas in which the criminal law will be extended at all.

The proposals

As to the proposals themselves, I do not intend to go through them one by one. But I would like to make a few general points.

(1) The proposed offence of treason would only be committed by a person who “levies war” by joining forces with a foreigner for various purposes e.g. to

overthrow the PRCG.

(2) The proposed offences of secession and subversion could only be committed by someone who levies war, or uses or threatens to use force, or takes criminal action that falls within the definition of "serious unlawful means" for specified purposes. [That definition is based on the definition of "terrorist act" in the UN (Anti-terrorism Measures) Ordinance.]

(3) These three offences – treason, secession and subversion – do not create any significant extension of the current criminal law and do not have any real implications for freedom of speech.

Freedom of speech

The two offences that will relate to freedom of speech are sedition and the theft of state secrets.

The current law of sedition has been criticised for being too broad. An offence can be committed by a person who utters "seditious words" even though he has no intention of causing violence or

creating public disorder or a public disturbance. The offence has been criticised for interfering with freedom of expression. We propose to restrict the offence accordingly.

The proposed new offence of sedition would only be commited by someone who incites others to commit –

- treason, secession or subversion, or
- acts of violence or of public disorder that seriously endanger the stability of the state or the HKSAR.

Offences relating to seditious publications will be limited to those that are likely to incite treason, secession or subversion.

With regard to the theft of "state secrets", the current law, found in the Official Secrets Ordinance, will remain basically unchanged. That Ordinance is based on UK legislation and deals both with "spying" and unauthorized disclosures.

"Spying" involves a narrow band of activities that are done for a purpose prejudicial to the safety or interests of the state or of Hong Kong. The offence primarily targets information that is

likely to be useful to an enemy.

The offences relating to unauthorized disclosure mainly affect public servants and government contractors. They are prohibited from disclosing four categories of information ("protected information") unless they are authorized to do so. The four categories relate to –

- security and intelligence
- defence
- international relations
- the commission of offences and criminal investigations.

In relation to the last three of these categories, an offence is committed only if the disclosure is damaging. The Ordinance explains what damaging means. For example, the unauthorized disclosure of information relating to criminal investigations is an offence if it results in the commission of an offence, helps a prisoner to escape, or impedes the prevention or detection of offences, or is likely to have such an effect. With very few

exceptions, the unauthorized disclosure of such information in other circumstances would not be an offence.

Members of the public or of the media who disclose protected information commit an offence only if their disclosure was without lawful authority, and

- the information came into their possession through an unlawful disclosure or entrustment,

- they knew, or had reasonable grounds to believe, that the information was protected, and had come into their possession in that way, and

- the disclosure was damaging and they knew, or had reasonable cause to believe, that it would be damaging.

These current principles are to be retained.

The only significant extension of the current law that is proposed in this area is to create an offence of making an unauthorized and damaging disclosure of protected information obtained (directly or indirectly) by unauthorized access. The existing safeguards

in respect of unauthorized disclosures by those who are not public servants or government contractors would apply equally to the new offence.

In addition, the existing statutory protection of information concerning relations between the UK and Hong Kong under the definition of "international relations" will be adapted to refer to "relations between the Central Authorities and Hong Kong".

The power to proscribe organizations

Turning to another area, the Consultation Paper proposes that the Secretary for Security be given a power to proscribe certain organizations.

One type of organization that can be proscribed is an organization that is affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities in accordance with national law on the ground that it endangers national security.

The proposal has given rise to some concern. I would like to make it clear that the proposal involves two quite separate

decision-making processes; one in the Mainland under Mainland law, and one in Hong Kong under Hong Kong law.

There is no question of a Mainland ban being automatically followed by a local ban. That would be unlawful.

The Secretary for Security must –

(1) be satisfied by evidence that the local organization is a subordinate organization of the one in the Mainland; and

(2) reasonably believe that it is necessary in the interests of national security or public safety or public order to ban the local organization.

The Secretary's decision would be subject not only to appeal but also to judicial review. The courts would need to be satisfied that the Secretary acted lawfully, both under established principles of administrative law, and under human rights principles of rationality and proportionality.

Grey areas and devils

I am aware that attempts by me to reassure the public that these proposals are not a threat to their human rights do not convince everybody.

Some people say they will not convinced until they see the details in the Bill. We have all become familiar with the expression that the "devil is in the details".

I accept that you may not be able to give unqualified support to some of these proposals until the draft legislation can be studied.

But that does not detract from the value of the current consultation.

We are consulting on the guiding principles and broad approach to this exercise, as well as specific recommendations in relation to each of the Article 23 issues.

We would like to know whether these are along the right lines. If they are not, we may need to rethink the approach.

If they are, by all means identify areas of concern and, if possible,

suggest ways in which that concern can be addressed.

The government has no wish to enact laws that are broader than necessary or which criminalize innocuous acts. Our aim is to target the real threats to national security.

I hope that, through this consultation exercise, we can develop our initial ideas in a way that ensures that these objectives are met, and a Bill that is acceptable to the community can be produced.