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## Hong Kong Special Administrative Region: Response to Hong Kong SAR Government Consultation Document on proposals to implement Article 23 of the Basic Law

17-03

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SUMMARY

AI INDEX: ASA 19/003/2002

*"The HK SAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."*

Article 23 of the Basic Law of the Hong Kong SAR

The issues surrounding the implementation of Article 23 of the Basic Law are widely viewed as the most important since the return of Hong Kong to Chinese sovereignty for defining the future direction of fundamental freedoms and the concept of "One Country, Two Systems".

The attached document describes Amnesty International's concerns about the proposals made by the Hong Kong SAR government to implement Article 23 of the Basic Law. These concerns fall into two main areas. The first are general, including concerns about the consultation process and timing. The second are specific initial concerns about the proposed legislation

Amnesty International is concerned that the government has presented a draft consultation document and not a draft White Bill. This means that the public still have little information as to how the Bill may be worded. Amnesty International is calling for a longer public consultation period and a White Bill to be presented before the more final "Blue Bill".

Amnesty International is disappointed that the need to implement Article 23 of the Basic Law has not led to the removal of archaic laws and the development of legislation in line with human rights and international laws and standards. Instead the authorities have created more offences, many of which have the potential to conflict with human rights standards.

Amnesty International urges the HK SAR Government to ensure that any legislation passed in the HK SAR to prohibit "any act of treason, secession, sedition" or "subversion against the Central People's Government" should not criminalize or otherwise restrict the exercise of fundamental rights, such as freedom of association and peaceful assembly. It also urges that no legislation on political organizations or state secrets limit the exercise of fundamental rights as safeguarded under international standards. As the proposals stand, the wording of several criminal definitions are vague and ill defined, contrary to international law and standards which require that the definitions of criminal acts should be clear and specific to clarify what types of conduct are criminalized.

This report summarizes a 12 page document (5,151 words): HONG KONG SPECIAL ADMINISTRATIVE REGION: RESPONSE TO HONG KONG SAR GOVERNMENT CONSULTATION DOCUMENT ON PROPOSALS TO IMPLEMENT ARTICLE 23 OF THE BASIC LAW (ASA 19/003/2002) issued by Amnesty International in December 2002. Anyone wishing further details or to take action on this issue should consult the full document.

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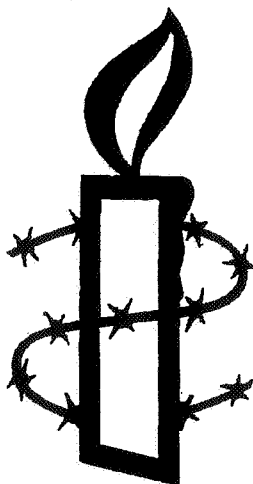
# **amnesty international**

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## **Hong Kong Special Administrative Region: Response to Hong Kong SAR Government Consultation Document on proposals to implement Article 23 of the Basic Law**

**Submission to Legco 12 December 2002**

Submitted by the Hong Kong section of Amnesty International on behalf  
of AI's international movement



**November 2002  
AI Index: ASA 19/003/2002**

**INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM**



# **Response to Hong Kong SAR Government Consultation Document on proposals to implement Article 23 of the Basic Law<sup>1</sup>**

## **Submission to Legco 12 December 2002**

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*"The HK SAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."*

**Article 23 of the Basic Law of the Hong Kong SAR**

1. The issues surrounding the implementation of Article 23 of the Basic Law are widely viewed as the most important since the return to Chinese sovereignty for defining the future direction of fundamental freedoms and the concept of "One Country, Two Systems".
2. Amnesty International is concerned that the government has presented a draft consultation document and not a draft White Bill which means that the public still have little information as to how the Bill may be worded. Amnesty International is calling for a longer public consultation period and a White Bill to be presented before the more final "Blue Bill".
3. We believe that the legislation as proposed goes far beyond what is needed to implement Article 23 of the Basic Law and may increase the limits and restrictions of fundamental human rights
4. Amnesty International is disappointed that the need to implement Article 23 of the Basic Law has not led to the removal of archaic laws and the development of legislation in line with human rights and international laws and standards. Instead the authorities have included more offences, many of which have the potential to conflict with human rights standards. The authorities have also proposed the introduction of offences such as sedition which have been abolished in many countries.
5. Amnesty International has serious concerns about the proposals. These concerns fall into two main areas. The first are general, including concerns about the consultation process and timing. The second are specific initial concerns about the proposed legislation.

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<sup>1</sup> This response confines itself to commenting on the proposals as they stand in the government consultation documents. It does not attempt to suggest alternative solutions or wording to specific parts of the proposals about which Amnesty International is concerned – it simply describes these concerns.

## GENERAL CONCERNS

### *The Consultation Process*

6. Given the importance of the issues and the potential negative effects of the proposed legislation on some of the most fundamental human rights as set out in the International Covenant on Civil and Political Rights (ICCPR) and given the potentially deleterious effects on freedoms, transparency and the Hong Kong SAR's international reputation, and the potential repercussions therefore for the economic, social, and cultural rights and freedoms contained within the International Covenant on Economic, Social and Cultural Rights (ICESCR), Amnesty International is supportive of the moves for a "White Bill" and for a greatly increased time period to properly study the proposed legislation before the process moves to the legislative phase.

7. Amnesty International considers that the present timetable does not allow adequate time to research and study the proposals particularly given that the HK SAR government has had over 4 years and extensive resources devoted to putting forth their position. The present rushing through of the proposals does not allow for rational and informed debate about the issues. In particular, the HK SAR Government has cited, in its favour, legislation from a number of other jurisdictions. Comparisons with other jurisdictions can be misleading and adequate time is required to review these materials in their proper context.

8. No adequate justification for the timing of its proposals and for it being rushed through to the "legislative process" has been provided. Amnesty International notes and supports the position as set out in a joint letter from the Chairman of the Hong Kong Bar Association, the President of the Law Society of Hong Kong and the Legal Profession Member of the Legislative Council to the Secretary for Justice which, *inter alia*, states:

*We do believe that it is wrong to put speed above soundness.*

*...In a serious and technically complex matter such as the present, the legal profession has a special duty to make their own assessment of the legal effect of the law being proposed and make it available to its members, to the legislature and to the wider community for their consideration and response. It is not possible to do so without studying the draft bill to see how each provision is drafted. Once the actual ("blue") bill is gazetted and introduced into LegCo, the scope and time available for discussion on the drafting will be of necessity severely limited...And then to rush on regardless of defects discovered at that stage will undermine the confidence of the public and the international community in the law thus enacted.<sup>2</sup>*

9. Given that Article 23 of the Basic Law states that the HK SAR "shall enact laws on its own"<sup>3</sup> and in light of the concerns expressed above Amnesty International urges the HK SAR Government to ensure

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<sup>2</sup> Letter to the Secretary for Justice dated 5<sup>th</sup> October 2002.

<sup>3</sup> Article 23 states that "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit

that the proposed legislation is discussed and developed in a process of adequate consultation with the public and legislators within the HK SAR and according to the provisions of the Basic Law. Article 2 of the Basic Law gives the HK SAR "a high degree of autonomy" with "executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law".

10. Amnesty International is also concerned about the potential enactment of new national security laws with vaguely worded provisions, which may criminalize those who peacefully exercise their right to freedom of expression and association, and about the proposals for a host of new emergency investigative powers for the police.

11. Amnesty International is concerned that some of the proposed offences, such as publication of seditious material and leaking of state secrets as well as the emergency investigation powers could result in widespread censorship or self censorship of the media as well as further limiting civil society and the activities of human rights defenders. Amnesty International notes the comments given by the Human Rights Committee (Hong Kong) from a study by the Political and Economic Risk Consultancy (PREC) on press practices that found that "the practice of self-censorship in particular was very widespread"<sup>4</sup>

12. Generally, Amnesty International finds the proposals to be disproportionate given that specific criminal offences are already defined elsewhere in Hong Kong law. Amnesty International considers that a number of the comparisons to other jurisdictions are inappropriate, given the current legislative system in the HK SAR. For example, the Consultation Document (CD) para 1.4 is misleading by referring in the footnote to the Canadian Law Reform Commission Working Paper 49 (1986) pp. 43-44, to support the concept of reciprocal relationship between the state and the individual. The CD later refers to the same report to support its view that the offence of treason should apply to all those who enjoy protection by the state (CD para. 2.16 fn 22). Amnesty International is concerned that while citing the Canadian report with favour it fails to set out the conclusions of the Canadian report which are, *inter alia*, that: seditious offences be repealed (the CD proposes to keep and expand them); the "offence of sedition is in part unsupportable because it interferes with constitutionally protected democratic rights and freedom of expression"; the offence of treason and the concept of "levying war" were unclear and needed to be restricted; and, generally, that the offences against the State in Canada were "out of date and lacking in principle" resulted in "overcriminalization" and "may very well infringe the Canadian Charter of Rights and Freedoms" (which includes internationally recognized fundamental rights).

13. Secondly, the influence of practices affecting fundamental human rights in the People's Republic of China cannot be underestimated.<sup>5</sup> Even before the addition of new "security legislation", the negative effects of these practices in the People's Republic of China on fundamental freedoms has been felt in

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political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

<sup>4</sup> Summary record of the 1804th meeting (Hong Kong) : China. 17/01/2000. CCPR/C/SR.1804.

<sup>5</sup> Amnesty International remains deeply concerned by grave human rights violations committed throughout the PRC, including arbitrary detention and imprisonment, unfair trials, serious restrictions on rights to freedom of expression, torture and numerous executions.

the HK SAR including: those critical of the PRC central government being refused access to Hong Kong; and academics having recently been detained on charges of state secrets and related offences. Incidents such as these already restrict the space for fundamental freedoms even before the introduction of legislation on Article 23 which has the potential to severely undermine rights to freedom of expression and association.

#### **SPECIFIC CONCERNS**

14. Amnesty International is extremely concerned that much of the proposed legislation is vague - particularly treason, secession (particularly a/, c/, d/, and e/ of section 9(1) of the Consultation Document (CD) and sedition. The proposals as they stand could be used to imprison prisoners of conscience, or to harass those expressing views by abusive use of search and seizure: particularly in the treason legislation with such vague and potentially wide-ranging terms as to "intimidate or overawe" "constraint to change its policies" and "to put force on the PRC" which may be interpreted as including peaceful expressions of the rights to freedom of expression and association. Misprision of treason is also very problematic, given the vagueness of the definition of treason. Amnesty International is also concerned that under the proposed offence of secession, disruption of public services could be used to criminalize peaceful protests on issues such as Tibet and Taiwan.

15. Amnesty International urges the HK SAR Government to ensure that any legislation passed in the HK SAR to prohibit "any act of treason, secession, sedition" or "subversion against the Central People's Government" should not criminalize or otherwise restrict the exercise of fundamental rights, such as the freedom of association and peaceful assembly. We also urge that no legislation on political organizations or state secrets limit the exercise of fundamental rights as safeguarded under international standards. As the proposals stand, the wording of several criminal definitions are extremely vague and ill defined, contrary to international law and standards which require that the definitions of criminal acts should be clear and specific to clarify what types of conduct are criminalized, to allow people to guide their conduct to avoid inadvertently committing criminal acts.

#### ***Consultation Document (CD) Introduction, p.1 - 6***

16. Paragraph 1.3 of the Consultation Document (CD Para 1.3) refers to the International Covenant in Civil and Political Rights (ICCPR) and notes that some limitations are allowed by the ICCPR on the right to freedom of expression and peaceful assembly and association including those necessary for the protection of national security of public order. Amnesty International however notes that legal commentators have specified that such restrictions should only be implemented in "serious cases of political or military threat to the entire nation".<sup>6</sup> Such circumstances may include a call for the violent overthrow of the government in a period of political unrest or propaganda for war. The limits of the restrictions allowed by the ICCPR would necessarily exclude for example, peaceful civil protests, the reporting on HK SAR relations with the Central People's Government and other actions which could be criminalized under the government's proposals.

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<sup>6</sup> See for example; Manfred Nowak, "UN Covenant on Civil and Political Rights, a Commentary", 1993 PAGE 355.



17. CD para 1.7 (c) under the heading "Guiding Principles" states that the "legislation to implement Article 23 are as clearly and tightly defined as appropriate, so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law". Amnesty International finds that the proposals do exactly the opposite. All and any legislation passed on Article 23 should be clearly and narrowly drafted to limit any disproportionate restrictions on human rights and attempts to criminalize fundamental human rights, in order to avoid public uncertainty about what conduct is criminalized and hence avoid potentially abusive prosecutions.

18. CD para. 1.10 – Amnesty International is concerned with the borrowing of concepts from mainland China on protection of the state (Constitution of PRC art. 51-55) since much of the legislation and practice of state security and state secrets in the PRC runs counter to the protection and promotion of fundamental rights and freedom of expression. Amnesty International notes that the corner stone of the Basic Law and the concept of "One Country, Two Systems" is that central government legislation and underlying concepts on these issues are not to be introduced into the HK SAR for a period of fifty years after 1997. Article 5 of the Basic law states that "The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

19. CD para 1.11- Amnesty International is concerned that the proposals do not comply with the Johannesburg Principles on National Security, Freedom of Expression and Access to Information<sup>7</sup> which state that expression might be punished only if the government can demonstrate the expression was intended to incite imminent violence, the expression was very likely to incite such violence, and there was direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Amnesty International notes the views expressed by the Human Rights Committee (Hong Kong) which state that "all laws enacted under article 23 of the Basic Law must be in conformity with the Covenant [ICCPR]". Amnesty International calls upon the HK SAR government to ensure that it revises its proposals to ensure that any legislation is in full conformity with the Covenant.<sup>8</sup>

Amnesty International has three main concerns relating to most if not all of the specific offences;

20. Amnesty International is extremely concerned at the potential effect of the wide definition given to the "state" in the proposals. In the proposal, it is defined as the Central Government of the PRC, any of its departments or any other "competent authority". The Central People's Government and organs of state power are defined in the Chinese constitution as potentially including local and provincial people's congresses as well as other administrative, judicial or procuratorial organs.<sup>9</sup> This could mean that an

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<sup>7</sup> Adopted at an international conference of scholars, judges and lawyers in 1995 and used in reference by the Commission on Human Rights Resolutions in 2000/38.

<sup>8</sup> Concluding observations of the Human Rights Committee (Hong Kong) : China. 12/11/99. CCPR/C/79/Add.117.

<sup>9</sup> Article 2 of the PRC Constitution (1982) states that "The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power", Article 105 states that "Local people's governments at various levels are the executive bodies of local organs of state power as well as the local organs of state administration at the corresponding level", Article 123 states that "The people's courts in the People's Republic of China are the judicial organs of the state" and Article 129 states that "The people's

action by NGOs or others to call for the release of a person detained in one particular province may in effect be seen as an action to "intimidate" or "overawe" the Central People's Government and be treated as a treasonable offence and as such be punishable by this legislation.

21. Amnesty International is extremely concerned at the substantial rise in penalties for many offences, which are already contained in one form or another in existing legislation. In some cases the penalties include much increased prison sentences and unlimited fines. For example, the fine for possession of seditious material has increased 25 fold. In the case of the extremely large increase in fines for dealing in seditious materials Amnesty International is concerned at the potential impact an abuse of this offence may have for publishers, the publishing industry and for freedom of the press as well as civil society and human rights defenders.

22. Amnesty International is also concerned at the application of the proposed provisions, including treason and secession, to include "all people voluntarily in the HK SAR".

23. The extra territoriality of some offences (including treason, secession, sedition) is also of concern as offences can apply to all HK SAR permanent residents regardless of their current residence in respect of their actions outside the HK SAR. In view of the vagueness of the proposed legislation, there is a risk that HK SAR residents exercising peacefully their right to freedom of expression in other countries might be held criminally responsible for it when they return to HK.

#### *Treason*

24. CD para. 2.8- Amnesty International is concerned that the ambit of the offence is too broad and is contrary to the guiding principle under human rights law that definition of crimes must be certain and clear so that people can know what behaviour is prohibited. The proposals state that treason is committed if a person "levies war" against the state... "in order by force or constraint to compel the Central People's Government or other competent authorities of the PRC to change its measures or councils, in order to put any force or constraint upon, or to intimidate or overawe the legislature".

While the common law concept of levying war has itself been found to be unclear <sup>10</sup>, the concepts of "constraint" and "public enemy", "intimidate or overawe", are also vague and open to expanded interpretation and therefore abuse such as the criminalization of those exercising peacefully their right to freedom of expression and association. They could conceivably cover any form of opposition including peaceful political protest designed to limit or influence the action of the Government of the People's Republic of China. Footnote 17 of the Consultation Document seems to add to the confusion and uncertainty since international armed conflict is not even required and instead can include riots or insurrections. Amnesty International also notes that the Hong Kong Bar Association recommends a public declaration of war is necessary for offences relating to treason.<sup>11</sup>

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procuratorates of the People's Republic of China are state organs for legal supervision". This means in practice that the definition of Central Government could in effect include any organ of state at any level.

<sup>10</sup> The archaic expression "levies war" is taken directly from the 1351 UK Statute of Treasons (this is contained in the Canadian Law Reform Commission Working Paper 49 (1986), page 35 and in The Law Commission Working Paper No. 72 Second Programme, Item XVIII Codification of the Criminal Law, Treason, Sedition and Allied Offences (1977) or see footnote 22 of Consultation Document).

<sup>11</sup> Amnesty International notes that the proposals are not in line with current legal thought on treason. Amnesty International also notes that the UK Law Commission recommended its present statutes dealing with treason... be

25. Amnesty International asks that the proposed legislation be revised and that terms used such as "intimidation" or "constraints" be removed unless they can be adequately narrowed or defined. As the proposal stands they are too vague and mean that peaceful protests and other actions involving the exercise of fundamental rights could be interpreted as falling into the definition of treason.

26. CD para 2.13-Amnesty International is extremely concerned by the addition of the offences "inchoate and accomplice acts". Given the vague concepts involved in the primary offences (treason, secession, subversion), the addition of the offences for: "attempting, conspiring, aiding and abetting, counselling and procuring" are far too broad and are contrary to the very essence of the Johannesburg Principles.

27. CD para. 2.14- Amnesty International is seriously concerned that the offence of misprision on treason is proposed as this is surplus to the Basic Law requirements and, given the extreme vagueness of the offence of treason, an additional offence of misprision could enlarge the scope of application and be open to abuse. The fact that the HK SAR, "on its own" wishes to revive the almost forgotten and archaic offence of misprision of treason has far-reaching consequences. It has the potential to lead to a climate of fear in which it is one's duty to spy on other citizens. Amnesty International also notes that the UK Law Commission proposed that the offence of misprision of treason should be abolished. The generic definition of this offence as set out in CD para 2.14 would potentially allow a prosecution against anyone who had not made any report to the authorities which could lead to the possibility of abusive and unfounded prosecutions against potentially anyone.

28. CD para 2.5 - Amnesty International is further concerned that the offence of compounding treason directed at people who "agree for value to abstain from prosecuting a person who has committed treason" will be abolished (see CD, Annex 2) and that instead the much wider offence of misprision of treason will be created to target "all persons who are voluntarily in the HK SAR" rather than officials who consciously fail to take appropriate official action on alleged or potential cases of treason.

#### *Secession*

29. CD para 3.2- This is a completely new offence and Amnesty International believes that the offence, as currently proposed, is too vague and ill-defined, contrary to international law and standards of clarity on criminal law, and should therefore be revised or removed.

30. CD para 3.4 - Amnesty International notes that the HK SAR government comments on the "pressing need" to pass legislation on secession if there are "discontented communities" associated with a geographical territory in respect of which they intend to establish new independent states. Amnesty International notes that there is no such territory in the HK SAR and as such no "pressing

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repealed and the offence only applicable during existence of a state of war; that misprision of treason be abolished; that common law offence of sedition be abolished - none of this was mentioned in the Consultation Document. Regarding the offence of misprision of treason the Canadian Law Reform Commission (1986) considered it a prime example of "overcriminalization" and further stated, "Nowhere else in the criminal law is there an affirmative duty to warn the authorities when crimes are about to be committed, not even for murder. ...Indeed, it is at least arguable that the existence of these unusually coercive provisions only serves to foster public suspicion that these are really 'political crimes' designed to serve the ruling party at all costs."

need" for such legislation. Amnesty International, while respecting the rights of states to preserve their integrity, is concerned that attempts to limit secessionist activities does not extend to limiting fundamental human rights and the right to freedom of expression.

31. CD para 3.7 - The proposed offence of secession is defined as attempting secession by the use of force or threat of force as well as the broader and more worrying concept of using "serious unlawful means" including the "serious disruption of an electronic system; or serious interference or serious disruption of an essential service, facility or system, whether public or private". This definition is far too broad and could, for example, potentially criminalize any demonstration for a secessionist cause which seriously disrupted traffic or used email as a means of protest.<sup>12</sup>

32. CD para 3.9-Given the broad nature of the proposed substantive offence, the dangers in codifying the inchoate and accomplice acts are apparent. Amnesty International is concerned that the offences of "attempting and conspiring to commit" secession as well as "aiding and abetting, and counselling and procuring" of secession are far too broad given the wide-ranging definition of secession itself and could be open to abuse.

33. CD para. 3.10-The "Extra-territorial application" aspects of the proposals are extremely wide and the combined effects of the secession proposals place serious restrictions on the freedoms presently enjoyed by persons in the HK SAR. They pose extremely serious potential consequences for the peaceful expression of views on sensitive issues such as Tibet and Taiwan and could potentially criminalize the activities of large numbers of people who will then not be willing to enter or re-enter Hong Kong.

#### *Sedition*

34. Sedition is a crime of speaking words against the state and has long been used as a tool to suppress dissent and imprison dissidents and others for peacefully exercising her rights to freedom of expression and association. It has origins from the 1600's in England, and the offence was a concomitant of the once prevalent view that rulers were superior beings exercising a divine mandate and beyond reproach of the common people. It has been removed from the legislation in many countries and in many countries where it is retained it is no longer used.<sup>13</sup> Malaysia is one example of a country which retains the offence and also uses it against opposition leaders and writers in order to stifle legitimate dissent.<sup>14</sup>

35. Amnesty International believes that the offence of sedition should be omitted from the proposals for several reasons including the fact that it duplicates other offences. If the proposed offence of Sedition is intended to refer to incitement to commit other offences such as treason or secession and, as such, to include incitement to commit violence or murder, then this [incitement to violence] could be covered by other legislation. Given the broadness of the proposed offences of treason and secession, the

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<sup>12</sup> The uncertainty about e-mail protests being covered by the proposed offences is a further restriction of freedom of expression.

<sup>13</sup> See for example states like the United Kingdom, United States of America, Canada since *Boucher c. 1951 SCC*.

<sup>14</sup> It is for these reasons that in detailed studies of the offence of sedition the U.K Law Commission and the Law Reform Commission of Canada recommended that seditious offences be abolished. For more information on the use of sedition legislation in Malaysia, see Amnesty International Report "*Malaysia, Human Rights Undermined: Restrictive Laws in a parliamentary Democracy*", September 1999, AI Index ASA 26/06/99, pp 35-39.

addition of sedition could severely limit the right to peaceful expression of opinion. Furthermore, sedition has been abolished in most countries and introducing it in HK would be a retrograde step.

36. The proposed offence does not comply with the Johannesburg Principles on National Security, Freedom of Expression and Access to Information which state that expression might be punished only if the government can demonstrate the expression was intended to incite imminent violence, the expression was very likely to incite such violence, and there was direct and immediate connection between the expression and the likelihood or occurrence of such violence.

The concept of "incitement" in the proposal is vague and unclear resulting in uncertainty in the law which is contrary to the government's own "Guiding Principles" in proposing this legislation. The expression: using "serious unlawful means" to incite "public disorder which seriously endangers the stability of the state or the HK SAR" is open to wide interpretation. The definition of incitement is extremely broad and, combined with the potential scope of the offences of secession or treason, means that the legislation could be open to abuse and may infringe upon human rights.

37. The current proposals go far beyond existing legislation and include extremely harsh penalties for, among other things, knowingly possessing a seditious document. The definition of a seditious document is extremely vague and relies on the vague and wide ranging scope of the other offences – it might include documents critical of the PRC or alternative histories of Tibet and Taiwan. The proposed offence of possessing a seditious publication should not be introduced. Freedom of expression is protected under article 19(2) with respect to "information and ideas of all kinds". Amnesty International notes that legal commentators have specified that "States parties may not extend the right of state security (under Article 19(3)) so far as to penalize and suppress mere expression of opinions, even though their content may be highly critical." <sup>15</sup>

38. The enlargement of offences dealing with seditious publications, in conjunction with the other government proposals, would further restrict human rights including freedom of speech, and restrict access to ideas and information.

#### *Subversion*<sup>16</sup>

39. CD 5.2- Amnesty International notes that this offence does not feature in existing Hong Kong laws as a separate crime and urges most strongly for its removal from the proposals as its inclusion could result in it being used as a tool for the suppression of fundamental rights to freedom of expression and belief. <sup>17</sup>

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<sup>15</sup> Nowak's Commentary on the ICCPR p341-2, 1993

<sup>16</sup> Since the offence will utilize concepts as in the offences of treason and secession we refer to our comments above.

<sup>17</sup> Subversion is widely used in the PRC as a means of suppressing dissent and many thousands of people remain in detention in the PRC for offences relating to subversion.

40. The proposals are very broad, particularly the terms "to intimidate" and "serious unlawful means" and could cover many legitimate activities which fall short of what should be a very high and tightly defined threshold. The concept of "threat of force" should be more narrowly defined.

#### *Theft of State Secrets*

41. AI considers the proposals under this head to greatly expand the ambit of the term "protected information" and consequently more uncertainly is created in the law.

42. CD 6.19-The definitions of the "Central Authorities" and "relations" between the Central Authorities and Hong Kong are unclear. Amnesty International is concerned at the addition of a new class of protected information relating to "relations between the central authorities of the PRC and the HK SAR". This proposed clause is far too vague and potentially encompasses information which should be made public in the interests of transparency. The proposals could have negative effects on the HK SAR's reputation as an international centre for business, trade and the media.<sup>18</sup>

Amnesty International is aware of the vagueness and all encompassing nature of the term "state secrets" in the PRC and the number of people currently detained for allegedly revealing what are purported to be state secrets - which can include the passing on of published newspaper articles, news of demonstrations or statistics on the death penalty.

43. The new offence of Unauthorized and Damaging Disclosure may prohibit disclosure of information, which is widely available elsewhere or legitimately obtained and where there is strong public interest in its disclosure.

44. The proposals would seriously curtail press freedom as it would be very difficult to ascertain whether information is from a prohibited source or not. This may lead to further self-censorship. Amnesty International notes the concerns already expressed by journalists, librarians and the information technology sector in Hong Kong.

#### *Foreign Political Organizations*

45. CD para 7.11-The Societies Ordinance has already attracted criticism from human rights groups for the potential impact on freedom of expression and association and the proposed proscription mechanism goes even further.

46. The proposal is outside the scope of Article 23 in that it not only refers to foreign political organizations but also to ties with PRC organizations. The linking of proscribed organizations on the mainland to organizations in Hong Kong goes far beyond the terms of Article 23 and the proposals allow for PRC central government concepts of national security to have precedence in the HK SAR. This has far reaching consequences and may mean that if an organization is banned in the PRC on national security grounds, then it may be banned in the HK SAR as well.

Given the widespread restrictions on basic human rights on the Chinese mainland and the difficulties for some groups and organizations to obtain official registration - which has often led to the arrest and

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<sup>18</sup> There are also concerns in the Information Technology sector about the negative effects of the proposals.

detention of people involved in those groups - it is feared that many organizations would be proscribed in the HK SAR. Groups of Mainland Chinese dissidents in Hong Kong may well be at particular risk and face unnecessary restrictions on their work.

47. Amnesty International is also concerned at the additional powers given the Secretary for Security to proscribe an organization if he or she "reasonably believes" such a proscription to be in the interests of national security.<sup>19</sup> Amnesty International urges the HK SAR to remove the reference unless it sets out clear criteria for defining what is a "reasonable belief" and implements a proper appeal system.

48. Amnesty International is also extremely concerned at the proposed appeal system, which will remove the power of the court to review the case on points of fact. AI is concerned with the proposals given that under Article 19 of the Basic Law Hong Kong courts have no jurisdiction over "acts of state" or "defence and foreign affairs" and therefore the supposed protection of the courts in the circumstances where executive powers are abused may be illusory.

#### *Investigative Powers*

49. The increased police powers including the power to enter homes without a search warrant are of serious concern, particularly given the vagueness of the definitions of treason and the other offences outlined above which would be the basis of entering a home without a warrant, and therefore wide open to abuse. No adequate justification has been provided for their introduction.

50. Such powers do not even exist under the newly passed Anti-Terrorism Ordinance and have never been necessary for other crimes, including murder.

51. Amnesty International is concerned that an abuse of the additional powers of "emergency entry, search and seizure" could be used as a means of harassing and repressing freedom of speech.

#### *Penalties*

52. As noted above, AI is concerned that all the penalties have been increased, in some cases very dramatically. Given the serious concerns on the proposals outlined above and the potential of the proposed legislation to be used to imprison or fine people for the peaceful exercise of freedom of expression and association, this level of sentencing and the use of heavy fines is extremely dangerous.

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<sup>19</sup> The proposed power of the Chief Executive of the HK SAR to classify an organization as "terrorist" if he or she "reasonably believes" that organization to be so was recently withdrawn from the Anti Terrorist Ordinance after much criticism from NGOs and legislators (although such powers remain in terms of the classification of funds). Amnesty International is concerned that powers containing such vague terminology with indefinable criteria of proof as "reasonably believes" are again proposed.

## CONCLUSION

Amnesty International believes that the proposals for the enactment of Article 23 legislation set out in the Consultation Document issued by the HK SAR Government, are imprecisely worded and contrary to international standards on clarity and consistency in the definition of criminal offences.

Amnesty International regrets that the HK SAR Government has not taken this opportunity to modernize HK SAR legislation by removing outdated colonial legislation, such as that on sedition. In fact, the proposals that have been put forward go far beyond the requirements according to the Basic Law to enact Article 23 legislation. These proposals have caused consternation in such diverse sectors of the Hong Kong community as the information technology industry, library associations, lawyers groups, journalists and the Catholic Church, as well as concern in the international community.

Amnesty International urges the HK SAR Government to heed the many voices in Hong Kong and elsewhere who are calling for an extension of the consultation period, and the production of a draft "White Bill".