

Press Release

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Consultation paper on proposals to implement BL 23 released

The Hong Kong Special Administrative Region (HKSAR) has both moral and legal obligations to implement Article 23 of the Basic Law, the Secretary for Security, Mrs Regina Ip, said today (September 24).

Releasing the consultation document on proposals to implement Article 23 at a press conference, Mrs Ip said Article 23 was about the protection of sovereignty, territorial integrity, unity and national security.

"Every nation has laws to protect such fundamental interests of the country and Hong Kong, being an inalienable part of the People's Republic of China (PRC), definitely has a duty to enact laws on its own to protect national security," she said.

"The Central People's Government have authorized the SAR Government to 'enact laws on its own' to implement Article 23," Mrs Ip stressed.

"This means that Mainland laws on national security will not be extended to Hong Kong. The HKSAR is given an opportunity to formulate legislative proposals on its own, having regard to the requirements of the Basic Law, its assessment of the national security requirement and similar legislative provisions in jurisdictions around the world. The precise legislation to be enacted will ultimately be determined by the HKSAR's legislature," she said.

She said the offences listed under Article 23 came under the genre of "offences against the state". Such offences were highly serious in nature because of the threat they posed to the fundamental well-being of the state.

For this reason, almost all jurisdictions had laws and provisions criminalising such offences, even though they occur infrequently, Mrs Ip explained.

"Because of their infrequent nature, the ordinary man in the street is unlikely to be involved in the commission of such offences. Thus few people are likely to be affected by the enactment of local legislation to prohibit activities that could undermine national security," Mrs Ip added.

Referring to concerns regarding the possible negative impact of any such legislation on existing rights and freedoms, Mrs Ip pointed out that many countries, including the most liberal democracies, had laws in place to deter and penalise activities which threaten national security, and such legislation had not been found to be in breach of fundamental rights and freedoms.

"We have studied carefully similar legislation prohibiting activities referred to in Article 23, both in the Mainland and overseas, and are satisfied that the HKSAR Government should be able to enact local legislation that serves to protect national security without undermining fundamental rights and freedoms," she stressed.

"In drawing up proposals to implement Article 23, the Administration decided to make use of provisions in existing laws as far as possible, and to ensure that all of its proposals are consistent with the international human rights covenants applicable to Hong Kong," she said.

"The existing rights, freedoms and lifestyle of Hong Kong people are unlikely to be affected by the implementation of the proposals," she said.

Treason

Elaborating on the proposals, Mrs Ip said treason meant betrayal of one's country in conjunction with a foreign enemy. The offence of treason in the common law system dates back to the 14th century. In Hong Kong, the Crimes Ordinance already includes the offence of treason but contains many outdated feudal elements, such as equating attacks on the sovereign with acts of treason, which need to be removed.

"We propose to update and improve the treason provisions in Part I of the Crimes Ordinance by restricting the substantive offence to levying war against the PRC Government by joining forces with a foreigner; instigating a foreigner to invade the PRC; or assisting by any means a public enemy at war with the PRC," she said.

Secession and Subversion

"Although there are at present no specific offences of 'secession' or 'subversion' in the laws of the HKSAR, these concepts are inherent in the existing treason offence," Mrs Ip said.

"We have carved out elements of secession and subversion from the existing treason provisions to create specific offences in accordance with the requirements of the Basic Law.

" We propose to define the specific offence of secession as withdrawing a part of the PRC from its sovereignty or resisting the Central People's Government in its exercise of sovereignty over a part of the PRC by levying war, force, threat of force or by other serious unlawful means.

"We propose to define the offence of subversion as (a) to intimidate the PRC Government; or (b) to overthrow the PRC Government, or to disestablish the basic system of the state as established by the PRC constitution, by levying war, or by force, threat of force, or by other serious unlawful means," she said.

Mrs Ip said extremely tight definitions of these offences had been proposed so as to avoid uncertainties regarding possible infringement of fundamental human rights and freedoms, in particular the freedom

of expression.

"In short, there must be a necessary condition of use of force, threat of force or action of a grave criminal nature for the secession or subversion offence to take place," she said.

Sedition

"We propose to tighten the existing offence of sedition so that it is an offence - (a) to incite others to commit the substantive offences of treason, secession or subversion; or (b) to incite others to violence or public disorder that seriously endangers the stability of the state or the HKSAR.

"We also propose to tighten the definition of seditious publication. A publication should only be regarded as seditious if it would be likely to incite persons to commit the substantive offences of treason, secession or subversion," Mrs Ip said.

"The mere expression of views, or mere reports or commentaries on views or acts of others, will not be criminalised, unless such expression, report or commentary incites others to achieve a purpose prejudicial to national security through levying war, use of force, threat of force or other serious unlawful means, or violence or public disorder," she stressed.

Theft of State Secrets

The Administration are of the view that the activities to be prohibited under the head of "theft of state secrets" are already covered by the existing Official Secrets Ordinance (OSO). The OSO already has provisions criminalising spying and the unlawful disclosure of official information.

"We propose to make use of existing provisions of the Official Secrets Ordinance to prohibit 'the theft of state secrets'. This will be achieved by making use of the existing offence of 'spying' which involves the procurement of information useful to an enemy and prejudicial to the safety or interests of the state or Hong Kong.

"Where unlawful disclosure is involved, we would also follow existing provisions under the OSO, which currently lists only four categories of information as protected information, namely, security and intelligence information, defence information, information on international relations, and information relating to commission of offences and criminal investigations. We propose to add only one additional category of protected information, i.e. information relating to relations between the Central Authorities of the PRC and the HKSAR, to the current list.

"The other amendment we propose here is to criminalise unauthorised and damaging disclosure of protected information obtained, directly or indirectly, by unauthorised access," Mrs Ip said.

Foreign Political Organisations

Article 23 prohibits foreign political organisations or bodies from

conducting political activities in the HKSAR, and political organisations or bodies of the HKSAR from establishing ties with foreign political organisations. In drawing up proposals to implement these provisions, the Administration have taken into account the fact that definitions of "political bodies", "foreign political organisations" and "connection" are already included in the Societies Ordinance.

"The Administration propose to make use of existing definitions and criminalise only those political activities that truly endanger the security of the state, that is to say, activities that involve the commission of treason, secession, sedition, subversion or theft of state secrets.

"The Administration also notice that activities to undermine the security of the state, such as treason or secession, are rarely committed by an individual acting entirely on his or her own. Organised activities are often involved. To thwart the organisation of activities that would genuinely endanger the state, it is proposed that an organisation that endangers state security could be proscribed, but only where this is necessary under the standards of the ICCPR to protect national security, public safety and public order and where one of the following circumstances exist -

(a) the objective, or one of the objectives, of the organisation is to engage in acts of treason, secession, sedition, subversion, or spying; or

(b) the organisation has committed or attempts to commit acts of treason, secession, sedition, subversion, or spying; or

(c) the organisation is affiliated with a Mainland organisation which has been proscribed in the Mainland by Central Authorities in accordance with national law on the ground that it endangers national security.

The Administration point out that similar powers to refuse to register a society, or exempt a society from registration, to cancel the registration of a society or to prohibit a society from operation on grounds of national security are already vested in the Societies Officer or the Secretary for Security under the existing Societies Ordinance.

Such powers have never been invoked but they are an important safeguard against organised activities that could jeopardise national security. The Administration propose to vest similar powers to prohibit an organisation on national security ground in the Secretary for Security.

The decision to proscribe and to declare an organisation unlawful would be subject to an appeals procedure. To ensure fairness, this procedure should involve two levels of appeal. First, points of fact may be appealed to an independent tribunal. Secondly, points of law may be appealed to the courts.

"We propose to make it an offence also to organise or support the activities of proscribed organisations, or to manage or to act as an office-bearer for these organisations. An organisation which has a connection with a proscribed organisation might also be declared as

unlawful where necessary under the standards of the ICCPR," Mrs Ip said.

Jurisdiction

It is necessary to ensure that sufficient account is taken of the possible implications of technological developments and the vastly increased ease of communications on extra-territorial acts.

"Very broadly, we propose to claim jurisdiction over an offence committed outside Hong Kong only where a sufficient nexus with the HKSAR is present. That is, either the act is committed by a HKSAR permanent resident overseas, or the act has a specified 'link' with the HKSAR, e.g. where part or all of the act takes place in the HKSAR or where relevant offences are intended to take place in the HKSAR," Mrs Ip said.

At present, under the Criminal Jurisdiction Ordinance (Cap.461), HKSAR courts already have jurisdiction over various offences of fraud and dishonesty even if they do not take place in Hong Kong, provided there is a specified link with the HKSAR.

"Effective investigation powers are required to deal with threats to the security or interests of the State or the HKSAR. We propose some special powers for dealing with the more serious of the Article 23 offences," she said.

In conclusion, Mrs Ip said the Government was introducing proposals to implement Article 23 on the basis of existing laws and in accordance with well-established common law and international human rights principles.

"Most of our proposals are based on existing legislation and very few new offences are created. In formulating the proposals, we have adhered to the principles of necessity and proportionality.

"I hope the community would look at them objectively, rationally and dispassionately," she said.

The consultation exercise will end on December 24. Copies of the consultation documents can be obtained from the district offices or downloaded from the Security Bureau website : www.info.gov.hk/sb or the Government Information Centre website: www.info.gov.hk/eindex.htm.

A table listing out the legislative proposals relating to BL23 and similar legislation adopted in other jurisdictions can be downloaded from the following website: <http://www.info.gov.hk/gia/general/200209/24/annex-e.doc>.

Members of the public could send in their views by post to the Security Bureau, 6/F., East Wing, Central Government Offices, Lower Albert Road, Hong Kong, or by fax (2521 2848), or by e-mail (bl23@sb.gov.hk)

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