

The Law Society of Hong Kong
COMMENTS ON THE CONSULTATION DOCUMENT
ON PROPOSED LEGISLATION UNDER ARTICLE 23
OF THE BASIC LAW

Introduction

With assistance from the Constitutional Affairs Committee, the Council of the Law Society has considered the proposals in the Government's Consultation Document and sets out its comments below.

The Council has concentrated on the points considered by its members to be most significant but they expect to make further comments when the results of the consultation and the draft legislation are published.

In view of the issues arising from the Consultation Document and the widespread interest they have provoked the Council considers that a White Bill should be published by the Government.

1. General Principles

The Law Society endorses the following principles in relation to the implementation of Article 23 of the Basic Law:

- (a) The Hong Kong Special Administrative Region has a constitutional obligation to enact laws pursuant to Article 23.
- (b) Article 23 is a statement of principle, and the Hong Kong Special Administrative Region is entrusted with the right to determine the manner of compliance.
- (c) The Hong Kong Special Administrative Region has no obligation to go beyond Article 23, and all existing and proposed laws should be evaluated on that basis.
- (d) Insofar as existing laws referred to in the Consultation Document go beyond the requirements of Article 23, the opportunity should be taken to examine whether they should be retained or repealed.

2. Treason – definition of “levying war”

The common law definition of levying war cited in paragraph 2.7 of the Consultation Document ought not to be adopted. It includes “a riot or insurrection involving a considerable number of people for some general purpose”. This is too wide. War should be defined in the sense in which it is generally understood. One such definition is that judicially approved in *Driefontein Consolidated Gold Mines v. Janson* [1900] 1 QB 339: “When differences between states reach a point at which both parties resort to force, or one of them does an act of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant”.

3. Misprision of Treason

This offence previously taken over from English law should now be repealed. It is accepted that a citizen has a civic duty to report crime, but to criminalize a failure to do so shows a degree of mistrust and antagonism damaging to social harmony. The offence has long been considered obsolete in Britain. A 1950 edition of Stephen's Commentaries on the Laws of England stated as follows: "There is, however, no modern precedent of an indictment for the crime, and it seems, for all practical purposes, to be obsolete".

4. Secession

Any legislation against secession must take into account the complex and delicate situation existing between the Mainland and Taiwan, for example at what point "separation" (the present description of the situation) could become "secession" (an offence under the proposed law). It is suggested that any law on secession should only become activated when and only for so long as there is a declared state of secession in respect of a specified territory, evidenced by a certificate of the Chief Executive. This will avoid any unintended infringement of the law triggered by events outside the control of Hong Kong, such as some act or statement by the Taiwan leadership which could amount to secession under the proposed law.

5. Sedition

The proposed new offence, namely inciting others (a) to commit the substantive offence of treason, secession or subversion; or (b) to cause violence or public disorder which seriously endangers the stability of the state or the Hong Kong Special Administrative Region, should replace all existing sedition offences.

There should be a high threshold of proof to establish the offence, namely, the incitement:

- (a) is intended to incite imminent violence;
- (b) is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

There should be no other sedition offences.

6. Seditious Publications

There should be no separate offence relating to seditious publications and the current law dealing with seditious publications should be repealed.

If a person prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publications with intent, then he commits the substantive offence of sedition. The Consultation Document acknowledges (in paragraph 4.8) that intention will remain an essential element of the offence. But to continue to single out publication as a distinct seditious act is and will be seen as an attempt to curb freedom of expression.

The Consultation Document suggests that possession of seditious publications with knowledge should be an offence (paragraph 4.18). For the reason stated above there should be no such offence.

7. Subversion

"Intimidating" the PRCG should not be part of the offence of subversion because this would make the offence unnecessarily far-reaching, particularly if the ambit of inchoate or accomplice acts is taken into account.

8. Theft of State Secrets

There are two important questions: what are "state secrets" and how should they be protected.

The existing Official Secrets Ordinance covers two principal areas: "spying" and "unauthorized disclosure".

Where spying is concerned, the information (or state secrets) sought to be protected is "information likely to be useful to an enemy, and is obtained or disclosed for a purpose prejudicial to the safety or interests of the state or the Hong Kong Special Administrative Region" (paragraph 6.19 of the Consultation Document).

Where unauthorized disclosure is concerned the following categories of information are proposed:

- (a) security and intelligence information;
- (b) defence information;
- (c) information relating to international relations;
- (d) information relating to relations between the Central Authorities of the PRC and the HKSAR.

Apart from information relating to relations between the Central Authorities of the PRC and the HKSAR, all the above categories are already in the existing Official Secrets Ordinance.

The category covering relations between the Central Authorities of the PRC and the HKSAR will presumably be modelled on section 16 of the Official Secrets Ordinance which covers international relations.

Under section 16 the "damaging disclosure" of "any information, document or other article relating to international relations" is an offence. A disclosure is damaging if it "endangers the interests of the state or HKSAR elsewhere, seriously obstructs the promotion or protection by the state or HKSAR of those interests or endangers the safety of Chinese nationals or HKSAR permanent residents elsewhere". The words "interests of the state or HKSAR" are open to wide interpretation and have not been tested in court, and the apparent protection afforded by the requirement of a "damaging disclosure" could be dissipated by the wide meaning of "interests of the state or HKSAR".

The concepts of "damaging disclosure" and "interests of the state" should be considerably narrowed down and more precisely defined.

9. Foreign Political Organizations

There should be no additional power to proscribe an organization on the ground of national security. The necessary safeguards are already provided in the existing power to prohibit a society and the proposed law on treason, secession, sedition, subversion and theft of state secrets.

The power to proscribe an organization on the ground of "national security" effectively creates new offences which would follow from the power to proscribe. This is unnecessary and beyond the scope of Article 23. In particular it should be noted that an organization or the affiliate of an organization could be proscribed even without committing lawful acts in Hong Kong, if the organization is proscribed on the Mainland on the ground of national security, and the Secretary for Security considers its proscription in Hong Kong to be in the interest of national security or public safety or public order.

10. Investigation Powers

No case has been made for the introduction of -

- (a) an emergency entry and search power for the purpose of investigation (as distinct from stopping a crime the power for which already exists); and
- (b) an additional power to require a bank or deposit-taking company to disclose financial information.

The attempted justification is that evidence might be lost or an investigation might be prejudiced. The police already have substantial and adequate investigation powers and it is unnecessary and undesirable to give an additional power and discretion to a senior police officer.

11. Organized and Serious Crimes Ordinance Powers

The proposal as extension of powers under the Organized and Serious Crimes Ordinance should only be considered after the other issues on legislative enactment pursuant to Article 23 have been settled.

12. Inchoate or accomplice acts

The concept of inchoate or accomplice acts could greatly extend the range of activities which could become unlawful or criminal under the offences proposed to be enacted, for example in relation to secession or a proscribed organization. The issue of inchoate or accomplice acts should be considered in relation to each specific new offence after it has been formulated in formal legal terms.

13. Trial by Jury

An accused under any of the Article 23 offences should have a right to elect for a trial by jury.

14. White Bill

The Consultation Document has resulted in the raising of issues not addressed in that document, and there should be further elaboration of Government thinking as well as full consideration of the submissions the Government has received. In the circumstances it is desirable that a White Bill containing the draft legislation and an explanatory memorandum should be published by the Government.