

Panel on Security and Panel on Administration of Justice and Legal Services

Summary of concerns and queries raised by Members at the joint meeting on 26 September 2002

A. General issues		
Major area	Concerns and queries raised by Members	Administration's response
1. Timing to enact laws to implement Article 23 of the Basic Law	<p>(a) The phrase "enact laws on its own" in Article 23 of the Basic Law (BL23) meant that the Hong Kong Special Administrative Region (HKSAR) could decide when and how local legislation was to be introduced. It was presently not an appropriate time to enact laws to implement BL23.</p> <p>(b) There was no need to pass any legislative proposals in a hurry, especially in view of the fact that there had not been any cases of treason or sedition in the past five years after reunification.</p>	<p>(i) With matters of principle having been discussed and the detailed proposals being made available, and with sufficient time to examine professional views, there was no reason why the legislation to be proposed could not be enacted in July 2003, especially under the principle that any matter should be dealt with efficiently. It was undesirable to leave a gap in the legislation of Hong Kong.</p>
2. Consultation with the Central People's Government	<p>(a) Whether the Administration had discussed and reached an agreement with the Mainland regarding its proposals and legislative timetable to implement BL23.</p>	<p>(i) Consultation had been made with the Central People's Government (CPG) on matters of principle and concepts such as national security, territorial integrity and unity. Technical issues, points of law and enforcement aspects would be dealt with by the HKSAR on its own.</p> <p>(ii) The common wish regarding the legislative timetable was that the proposals to implement BL23 should be enacted as soon as possible.</p>

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3. Issuing of a white bill	(a) The Administration should, after the consultation period, issue a white bill in early 2003 setting out the details of legislative proposals to implement BL23 for a consultation period of a few months before introducing a blue bill in mid-2003.	(i) It was not the Administration's usual practice to issue a white bill before the introduction of a blue bill.
	(b) From a constitutional point of view, a white bill differed from a blue bill in that the Administration had not taken a position on the provisions to be enacted and the legislative process had not yet commenced.	(ii) The introduction of a blue bill after the consultation period would be the most efficient way to deal with the matter. A blue bill and a white bill could equally serve the purpose of providing details about the legislative proposals.
4. Human rights implications	(a) Whether the enacted legislation would override existing provisions in the Hong Kong Bill of Rights Ordinance (BORO).	(i) The enacted legislation would not override the provisions in BORO. Under BL39, the laws enacted by the HKSAR ought to be consistent with the provisions in International Covenant on Civil and Political Rights (ICCPR).
	(b) Whether the proposed proscription mechanism would restrict freedom of association. (c) Whether the increase in Police power arising from the proposed emergency powers for investigating some BL23 offences would undermine the human rights of the people of Hong Kong.	(ii) The human rights enjoyed by the people of Hong Kong, such as the freedom of speech, freedom of expression, freedom of association and freedom of assembly, would not be undermined. Where an act had gone beyond the limits and was in breach of local legislation, it would become an offence and it would no longer be a matter of freedom.

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	<p>(d) The Chief Executive of the HKSAR (CE) had emphasised on 24 September 2002 that the Administration's proposals would not undermine in any way the existing human rights and civil liberties enjoyed by the people of Hong Kong. With the proposals regarding secession and the proposed proscription of organisations affiliated with a proscribed Mainland organisation, how CE could conclude that the existing human rights enjoyed by the people of Hong Kong would not be undermined.</p>	<p>(iii) Holding or expression of opinions would not constitute an offence under the Administration's proposals. Thus, the rights as guaranteed under the ICCPR would not be undermined.</p> <p>(iv) In respect of the legislation to be proposed on secession, there would not be any extension of the existing criminal law in relation to acts or speech of people.</p>
<p>5. Proscription of local organisations</p>	<p>(a) While the Societies Ordinance (SO) sought to prohibit the operation of a society which had a connection with a foreign political organisation or a political organisation of Taiwan, the Administration proposed to extend the coverage to a society which had a connection or affiliation with a proscribed Mainland organisation.</p> <p>(b) BL23 provided, among others, that the HKSAR should enact laws to prohibit foreign political organisations or bodies from conducting political activities in the HKSAR. It was doubtful whether the proposed proscription of an organisation affiliated to a proscribed Mainland organisation was within the scope BL23, as it was not a foreign organisation.</p>	<p>(i) SO was not only restricted to a society which had connection with a foreign political organisation or a political organisation of Taiwan. Existing provisions in SO already provided for the Societies Officer to recommend to the Secretary for Security (S for S) the making of an order prohibiting the operation or continued operation of a society on the grounds of national security, public safety or public order (<i>ordre public</i>).</p> <p>(ii) Even after S for S had proscribed a local organisation, the proscription would not come into force until the appeal process was concluded. Where a proscription came into force, it only involved prohibiting the operation of an organisation but not the arrest of persons.</p>

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	<p>(c) Proscriptions made by the Central Authorities were based on rule of man rather than common law principles. The proposed proscription mechanism might result in the introduction of Mainland's rule of man and legal system into Hong Kong. This would undermine the rule of law and the legal system in Hong Kong.</p>	<p>(iii) As the continental law system was adopted in the Mainland, a decision of the Central Authorities to proscribe a Mainland organisation in the Mainland was not made in accordance with the common law. It was a lawful decision made in accordance with national laws on the ground that the particular Mainland organisation endangered national security.</p>
	<p>(d) Whether it was appropriate for S for S to proscribe a local organisation on the basis of a proscription by the Central Authorities of a Mainland organisation to which it was affiliated.</p>	<p>(iv) There was no reason why Hong Kong should not consider whether such a decision made in accordance with the law by the Central Authorities, especially under the "one country" principle, would impact on Hong Kong.</p> <p>(v) Before proscribing a local organisation affiliated with a proscribed Mainland organisation, S for S had to be satisfied by evidence that it was affiliated to the proscribed organisation in the Mainland, and there was a threat to national security that it was both necessary and proportionate to proscribe the local organisation. S for S's power of proscription was subject to the safeguards of appeal to an independent tribunal on points of fact and the court on points of law, and the ordinary remedy of judicial review.</p>

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	<p>(e) Whether S for S or the court could come to the decision that a local organisation should not be proscribed, if the CPG had certified that a Mainland organisation to which the local organisation was affiliated had been proscribed on the ground of national security.</p>	<p>(vi) The proscription of a Mainland organisation by the Central Authorities would be a fact that the court must accept. However, sufficient evidence admissible to the court would have to be presented by the prosecution to prove that the local affiliated organisation was a threat to national security.</p>
	<p>(f) Why an independent tribunal was to be established to consider points of fact while the court would only consider points of law.</p> <p>(g) It would be very difficult for an accused to defend himself, if information heard by the independent tribunal was confidential.</p>	<p>(vii) It was an established practice to establish tribunals to handle appeals on points of facts, while appeals regarding points of law were dealt with by the court. The decision of the tribunal was subject to judicial review.</p> <p>(viii) As the nature of evidence likely to be considered in an appeal was highly confidential, the establishment of an independent tribunal was appropriate. Special tribunals were also established in many other jurisdictions to deal with similar matters.</p>
	<p>(h) If the CPG certified that a Mainland organisation was proscribed on national security ground, and that a certain organisation in Hong Kong was affiliated to that proscribed organisation, the proscription and certification would be an act of state over which the courts of Hong Kong had no jurisdiction.</p>	<p>(ix) A certification by the Mainland authorities of the proscription of a Mainland organisation would be conclusive evidence that the Mainland organisation had been proscribed in the Mainland on the grounds of national security. It would not be conclusive for any other purpose.</p>

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	<p>(i) Whether the "points of fact" as referred to in paragraph 7.18 of the Consultation Document were "facts concerning acts of state" as referred to in BL19.</p>	<p>(x) In relation to a Mainland proscription, the Administration was proposing a system of certification which was similar to that referred to in BL19. However, it did not mean that the proposed system would operate under BL19. It only meant that the court must accept the fact that the Mainland organisation had been proscribed, if there was a certificate to such effect.</p> <p>(xi) While a decision by the Mainland to proscribe a Mainland organisation would be based on the interpretation of national security in the Mainland, S for S would make an independent decision as to whether a local organisation was a threat to national security.</p>

B. Issues specific to major areas in the Consultation Document		
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1. Treason	No specific concern or query was raised	
2. Secession	(a) In the event that the Mainland decided to reunite with Taiwan with the use of force, whether a person would be in breach of the legislation on secession if he expressed the opinion that the Mainland should not use force to reunite with Taiwan or that any resistance by Taiwan under such a situation was legitimate.	(i) Holding or expressing opinion, which were different from incitement, would not amount to an offence of secession.
3. Sedition	(a) Examples should be provided to illustrate contents that would render a document falling into the definition of a seditious publication.	(i) The Administration proposed to narrow down the definition of seditious publications to publications that would incite the crime of treason, secession or subversion. (ii) Distinguishing whether a publication was seditious was not in practice very difficult.
	(b) Whether giving speeches or donation to support peaceful civil disobedience in the Mainland which caused serious disruption of an essential service would be in breach of provisions relating to sedition.	(iii) Adequate and effective safeguards would be in place to protect the freedoms of demonstration and assembly, etc. as guaranteed by BL, including peaceful assembly or advocacy. Thus, peaceful assembly or peaceful advocacy should not amount to an offence of secession. However, whether a specific act would amount to an offence would depend on the facts of each case.

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4. Subversion	No specific concern or query was raised	
5. Theft of state secrets	(a) Elaboration should be made on the type of information that would fall within the meaning of information relating to relations between the Central Authorities of the People's Republic of China (PRC) and the HKSAR.	<p>(i) Information relating to relations between the Central Authorities of the PRC and the HKSAR could be defined in a manner similar to information related to international relations under section 16(1) of the Official Secrets Ordinance.</p> <p>(ii) While the scope of section 16(1) of the Official Secrets Ordinance might appear broad, no person had been prosecuted for such an offence in the past.</p>
6. Foreign political organisations	No specific concern or query was raised	
7. Investigation powers	<p>(a) With the emergency power of entry, search and seizure provided to the Police for investigating some BL23 offences, no one would be willing to provide the media with any information, thus undermining press freedom.</p> <p>(b) How and who to decide whether an emergency situation had arisen.</p>	<p>(i) The emergency powers could only be exercised in relation to the offences set out in Annex 1 of the Consultation Document.</p> <p>(ii) The emergency powers were proposed to be exercised only by a sufficiently senior Police officer who had reasonable grounds to believe that -</p>

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		<ul style="list-style-type: none"> - a relevant offence had been committed or was being committed; - unless immediate action was taken, evidence of substantial value to the investigation of the offence would be lost; and - the investigation of the relevant offence would be seriously prejudiced as a result.
8. Procedural and miscellaneous matters	(a) With the Mainland authorities declaring organisations involved in the student movement as organisations that endangered national security and the absence of a time limit for bringing prosecutions, many persons who expressed support or gave donation to support the student movement in June 1989 would be liable to prosecution under the legislation to be enacted.	<ul style="list-style-type: none"> (i) Existing provisions in the Crimes Ordinance provided that prosecution against treason had to be instituted within three years, and that for sedition had to be brought within six months, after the offence was committed. This was very unusual for serious offences. Thus, it was proposed that the time limit for prosecution should be removed. (ii) The proposed removal of time limit for instituting prosecution only referred to the time after an offence was committed. The legislation to be enacted would not have any retrospective effect.

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9. Application	(a) Whether a HKSAR permanent resident who participated in a civil disobedience event in the Mainland would be prosecuted after his return to Hong Kong.	(i) HKSAR permanent residents would be subject to the proposed legislation regardless of where they were. Since the offences of subversion and secession were as serious as treason, it was appropriate for such legislation to have extra-territorial effect.

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