

The Administration's response to questions

raised by Hon James TO on 4 December 2002 (Second Batch)

Introduction

Further to our note of 19 December 2002, this note sets out the Administration's response to a number of questions raised by the Hon James TO on 4 December 2002.

Replies to questions

General Questions

- 1.3 Why does the Government aim at passing the laws to implement the proposal on Basic Law 23 by July 2003?

Administration's reply to 1.3

July 2003 is the working target of the Government on passing the laws implementing Article 23 of the Basic Law. As a responsible Government we consider it necessary to set a working target for this important task. We have taken into full consideration the needs for the public to be adequately consulted in setting this target.

- 1.4 During the process of legislation, may the Government promise not to consult the PRCG on the implementation of BL 23?

Administration's reply to 1.4

The Government has exchanged views with the CPG on issues of principle over the implementation of the national security legislation.

Treason

2.8c

- 6.2 Why was Parliament and HK LegCo exchanged for the PRCG instead of National People's Congress and HKSAR LegCo?

Administration's reply to 6.2

There is no exact equivalence of the UK Parliament under the

Constitution of the PRC. As explained before, the concept of the PRCG would represent a collective concept of Government. Acts against the National People's Congress, if aimed at the Government as a collective body, would be covered. The offence of treason is the most serious offence, and its Chinese term means "betrayal of the country." We therefore focus on the protection of the state as a whole.

Secession

3.6

- 10.1 What constitutes "resisting the CPG in its exercise of sovereignty over a part of China"?
- 10.2 Must a use of violence to resist be a condition of "resisting the CPG in its exercise of sovereignty over a part of the country"?

Administration's reply to 10.1 - 10.2

As defined in the offence, the act of "resisting" must be done by means of "levying war, force, threat of force or serious unlawful means".

Subversion

5.5b

- 18.1 What is the "basic system"?
- 18.2 Who has the jurisdiction to interpret it and how (procedurally) is it defined?
- 18.3 What is the definition of "disestablish the basic system"?

Administration's reply to 18.1-3

The full phrase in the consultation document is "disestablish the basic system of the state as established by the constitution". As with all HKSAR legislations, the power of interpretation of the term rests with the courts of the HKSAR. Questions of definition will be considered when the Bill is drafted.

Theft of State Secret

6.10-6.11, 6.23

- 20.1 Is the information in question determined to be a violation of the offence by its source or substance?

Administration's reply to 20.1

Paragraphs 6.10-6.11 of the Consultation Document refers to the existing provisions in the Official Secrets Ordinance, which has clearly defined the elements of the offence in relation to unauthorized disclosure. It would be over-simplistic to classify such provisions as either defining protected information "by source" or "by substance".

- 20.3 What is authorized access, as there is no legal right of access to any official information?

Administration's reply to 20.3

It is possible that official permission might be granted for someone to access official information. The term "unauthorized access", as used in the proposals, means access to information without proper authorization, such as by means of hacking or theft. In view of the concerns expressed during consultation we would consider further refining the term.

- 20.5 How does one argue against mens rea?

Administration's reply to 20.5

It is not clear what is meant by the question.

- 20.9 Will the Government prepare to draft a white bill on access to Official Information or prepare a consultation document on this issue?

Administration's reply to 20.9

It is not clear what is meant by "Access to Official Information". The "Official Secrets Ordinance" defines the information whose unauthorized disclosure would constitute an offence. Such information should not be made accessible.

- 20.10 Will the HKSARG request the Central Authorities to give certificate or evidence to prove whether there exists "prejudicial to the interest of the state"?

Administration's reply to 20.10

The power of final interpretation and adjudication of whether a purpose is “prejudicial to the interest of the state” rests with the courts of the HKSAR. No “certificate” mechanism exists in either the existing legislation or the proposals. If “certificate” in the question refers to that stipulated in Article 19 of the Basic Law, the position has already been explained in the paper responding to the issues raised at the Joint Panel Meeting on 21 October 2002. It is not possible to answer hypothetical questions concerning the evidence to be produced in unknown future cases.

6.19

- 22.2 What amounts to damaging disclosure of the information relating to relations between the Central Authorities of the PRC and the HKSAR? How is it measured?
- 22.3 What is the definition of “Central Authorities” under this offence?

Administration's reply to 22.2-22.3

Our intention regarding this proposed category is to continue to protect the information already being protected under the category of “international relations” in the existing Ordinance, under a category whose name more properly reflects the constitutional situation after Reunification.

On the “damaging” test, reference could be drawn from the existing test at section 16(2) of the Official Secrets Ordinance. The existing formulation in the Ordinance is -

- (a) the disclosure endangers the interests of the United Kingdom or Hong Kong elsewhere, seriously obstructs the promotion or protection by the United Kingdom or Hong Kong of those interests or endangers the safety of British nationals or Hong Kong permanent residents elsewhere; or
- (b) the information, document or article in question is of such a nature that its unauthorized disclosure would be likely to have any of the effects described in paragraph (a).

The term “Central Authorities” has the same meaning as was explained in the paper responding to the issues raised at the Joint Panel Meeting on 21 October 2002.

Foreign Organizations

7.5

- 23.1 How is “an agent of a political subdivision” and “an agent of a political party” defined (i.e., KMT, Chinese Nationalist Party)?
- 23.2 How many associations of the Guomintang are considered agents in the HKSAR?
- 23.3 What organizations/associations are they?
- 23.4 How much ownership (percentage of shares in stock) by the Guomintang is required to have the association/organization/company be considered an agent.

Administration’s reply to 23.1-23.4

Although the term “agent” is not defined in the Societies Ordinance (Cap. 151) or the Interpretation and General Clauses Ordinance (Cap. 1), in law it is commonly used to refer to a person who has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. According to the Halsbury's Laws of England, the relation of “agency” arises whenever one person, called “the agent”, has authority to act on behalf of another, called “the principal”, and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. The question whether any organisation is or is not an agent for another must be determined on the facts of each particular case.

In accordance with section 5A(3)(b) of the Societies Ordinance, the Societies Officer may, after consultation with the Secretary for Security, refuse to register or to exempt from registration a society or a branch if the society or the branch is a political body that has a connection with a foreign political organization or a political organization of Taiwan. According to the Society Office’s record, there is no association of the Guomintang registered under the Societies Ordinance as a society in Hong Kong.

7.4-7.6

- 24.1 How many political bodies, according to the definition provided by the Societies Ordinance, are in Hong Kong?

- 24.2 Are organizations that participate in the LegCo election in the functional constituency regarded as political bodies by the administration?
- 24.3 How many agents of foreign political parties are in Hong Kong?

Administration's reply to 24.1-24.3

According to section 2 of the Societies Ordinance, political body means a political party or an organization that purports to be a political party; or an organization whose principal function or main object is to promote or prepare a candidate for an election. Professional bodies which participate in the elections of functional constituencies have not been regarded as political bodies under the Societies Ordinance. There is no definition of the term "political party" under the Ordinance. Currently there are five societies registered under the Societies ordinance which have prepared candidates for the general election or by-election in either LegCo or District Councils.

7.7, 7.17b

- 25.1 What determines affiliation?
- 25.2 How strong must ones affiliation be? Is former affiliation punishable?
- 25.3 If an organization is proscribed, how and how much time does one have to break affiliation before he is committing an offence?
- 25.4 How much financial contributions constitutes the organization is financially supported by the FPO or TPO?

Administration's reply to 25.1-25.4

The term "affiliation" is not defined under Societies Ordinance. Nevertheless, the Chinese version corresponding to the term "affiliation" as used in the Societies Ordinance is "附屬", which means "subordination". Under the proposals, the members of an affiliated organisation would not commit an offence unless the affiliated organisation itself (in addition to the parent organisation) were proscribed.

The Societies Ordinance does not stipulate how much financial contribution would constitute the organization being financially supported by the FPO or TPO.

26.3 What is the definition of “Central Authorities” under this offence?

Administration’s reply to 26.3

The meaning of “Central Authorities” has been explained in the paper responding to the issues raised at the Joint Panel Meeting on 21 October 2002.

7.15(c)

27.1 How is “the organization is affiliated with a Mainland organization” defined?

27.2 Does it include an organization based in HKSAR with cells in the Mainland?

Administration’s reply to 27.1 - 27.2

As explained in the reply to question 25 above, this would mean that the organization is subordinate to a Mainland organization proscribed in the Mainland by the Central Authorities, rather than the reverse.