

**The Administration's response to questions raised
by Hon James TO on 4 December 2002**

Introduction

This note sets out the Administration's response to a number of questions raised by Hon James TO on 4 December 2002.

Replies to questions

General Questions

- 1.1 What is the prioritization of the three guiding principles?

Administration's reply to 1.1

All three guiding principles are important considerations in the formulation of our proposals. We have a constitutional duty to fully comply with the Basic Law, including Article 23 and the provisions protecting human rights in Chapter III of the Basic Law.

- 1.2 What are the grounds for the Government to allege that "the Siracusa Principles and the Johannesburg Principles are not yet widely accepted international norms?"¹

Administration's reply to 1.2

The Siracusa and Johannesburg Principles are not international covenants or treaties that are binding on states, nor have they been adopted by the United Nations as non-treaty standards. These principles are developed by academics and human rights experts, and go further than the ICCPR. As recently confirmed by Dr. Frances D'Souza, one of the drafters of the Johannesburg Principles, in her meeting with the Administration, for example, no country has adopted Principle 6.

¹ Footnote 6 of the *Consultation Document on Proposals to Implement Article 23 of the Basic Law*.

Treason

2.8²

- 2.1 How is “constraint” defined?
- 2.2 What constitutes constraint upon the PRCG to change its policies or measures?
- 2.3 Please provide any supporting case law examples and the government’s stance to illustrate the answer.

Administration’s reply to 2.1-2.3

“Constraint” is taken from the existing treason offence. There is no Hong Kong case law which would assist. In the absence of a definition it would be given its ordinary dictionary meaning. “Constraint” means – bring about by compulsion, confine forcibly, imprison, and “constraint” would be interpreted accordingly as “being constrained”; “limitation imposed on motion or action”.

- 3.1 What agencies does the PRCG include? Does it include the Hong Kong Special Administrative Region Government (HKSARG), Village People’s Government and/or City’s Neighborhood Committee in the Mainland, and/or the Central Government Liaison Office in HKSAR?

Administration’s reply to 3.1

As explained at footnote 18 of the Consultation Document, the term “PRC Government” represents “collectively the Central People’s Government and other state organs established under the Constitution”. While “Government” is ultimately formed by persons organized into a number of institutions, its meaning, as expressed in the Consultation Document, should be taken in a collective sense instead of construed as a particular person, group of persons or department space. The provision should be interpreted in the context.

- 3.2 How is “intimidate” defined?
- 3.3 Must it include actual violence?
- 3.4 Please provide supporting case law examples and the Government’s stance, respectively, to illustrate the answer.

² Paragraph 2.8 of the *Consultation Document on Proposals to Implement Article 23 of the Basic Law*.

Administration's reply to 3.2-3.4

“Intimidate” is taken from the existing treason offence. There is no Hong Kong case law in the context of “treason” which would assist. In the absence of a definition it would be given its ordinary dictionary meaning; “intimidate” means “overawe with fear, especially in order to influence conduct”. Actual violence is not necessarily included.

- 4.1 How is “overawe” defined?
- 4.2 Please provide supporting case law examples and the Government’s stance, respectively, to illustrate the answer.

Administration's reply to 4.1-4.2

“Overawe” is taken from the existing treason offence. There is no Hong Kong case law in the context of “treason” which would assist. In the absence of a definition it would be given its ordinary dictionary meaning.

“Overawe” means “restrain by awe; keep in awe”. “Awe” means “reverential fear or wonder”.

Footnote 17³

- 5.1 What constitutes the intention “to debar the government from the free exercise of its lawful power”?

Administration's reply to 5.1

This must be read in the context of the whole extract quoted in footnote 17. The extract makes that the intended action must be directed at some purpose which is not private but is of a general character (e.g. to release all prisoners in the jails) and that there must be a readiness to resist with violence any opposition from the government in exercising its lawful powers to stop carrying out the illegal purpose.

- 5.2 What is the definition of “true war” under international law?

Administration's reply to 5.2

The term “true war” has to be considered in the context of the quotation from which it is taken. “True war” is not a term that is used or defined in the context of international law. The state of “war” may be formally declared or may consist of armed conflicts to which sufficient publicity has been given (i.e. open hostilities).

³ Footnote 17 of the *Consultation Document on Proposals to Implement Article 23 of the Basic Law*.

2.8c

- 6.1 What constitutes “any force or constraint upon the PRCG” and how is it measured?

Administration’s reply to 6.1

The terms “force” and “constraint” would be given their normal dictionary meanings. “Force” means “strength, power, violence and military strength”. The meaning of constraint is given above.

2.10

- 8.1 Can a public enemy exist when the CPG or HKSARG is not at war?

Administration’s reply to 8.1

A public enemy is someone whose country is in a state of war with one’s country. The state of war may be formally declared or may consist of armed conflicts to which sufficient publicity has been given, i.e. open hostilities. There need not have been any formal declaration of war.

2.16

- 9.1 What is the definition of being “voluntarily in the HKSAR”?
- 9.2 Under what circumstances will the Administration regard a person not being “voluntarily in the HKSAR”?

Administration’s reply to 9.1-9.2

“Voluntarily” would be given its usual meaning, thus voluntarily in the HKSAR would mean persons who were in HKSAR by their own free will or choice. It would most importantly exclude members of a foreign invasion force.

Secession

3.7

- 11.1 How is “serious” defined?
- 11.2 Please provide examples and case law precedent, if any, for (a)-(f).
- 11.3 Does “serious unlawful means” equate to “serious illegal means”?
- 11.4 How is “serious interference or serious disruption of an electronic

system” defined?

Administration’s reply to 11.1-11.4

The terms would be given their ordinary meaning. Serious in this context means “important” or not “slight”. The definition of “serious unlawful means” is taken largely from the definition of “terrorist act” under the United Nations (Anti-terrorism Measures) Ordinance (Ord. 27 of 2002). There are no case law precedents available.

- 11.5 Are unsolicited/junk faxes and/or e-mail spam included as “serious interference or serious disruptions of an electronic system”?

Administration’s reply to 11.5

Sending unsolicited junk faxes or e-mail is not of itself an offence and would not fall within the definition.

3.8

- 12.1 What is the definition of “use of force” and “threat of force” for this offence?

12.2 Please provide any supporting case law examples and the government’s stance to illustrate the answer.

- 12.3 Would the words “打倒（某領導人）” and “戰鬥到底” in a protest constitute a “threat of force”?

Administration’s reply to 12.1-12.3

These terms are taken from the existing treason offence. They are not defined and would be given their ordinary dictionary meaning. There are no precedents in Hong Kong case law.

Sedition

4.2 c, d and e

- 13.1 How is “discontent” defined and measured?
- 13.2 How is “disaffection” defined and measured?
- 13.3 What a level of “discontent” and “disaffected” must one cause to be considered an offence, respectively?

- 13.4 Please provide supporting case law examples and the Government's stance, respectively, to illustrate the answer.

Administration's reply to 13.1-13.4

“Discontent” and “disaffection” are terms taken from the existing law. They are defined according to their ordinary dictionary meanings. They are not used in the proposal. The existing law does not specify a particular level of discontent or disaffection in the definition of seditious intention.

4.2 (a)-(g)

- 14.1 Please use case law to define and support the meaning of a “seditious intention”.

14.2 In what ways the Administration “propose to narrow the existing offence of sedition”⁴?

Administration's reply to 14.1-14.2

Under the existing statutory law an offence is committed if one simply speaks or writes any word with a seditious intention. Seditious intention is very broadly defined. As the provision stands there is no requirement that there be any intention to cause violence or public disorder. The new offence will remove the existing wide definition of seditious intention and recast the offence as one of incitement. There will be a high threshold of intention to incite violence, or public disorder.

4.14

- 16.1 Who bears the burden of proof that “expression, report, or commentary incites others to achieve a purpose of endangering the state through levying war, the threat of force or serious unlawful means, or incites violence or public disorder which seriously endangers the stability of the state or HKSAR”?

- 16.2 What is the mens rea for sedition?

Administration's reply to 16.1-16.2

The prosecution must prove all the elements of an offence beyond

⁴ Paragraph 11 of the Summary of the *Consultation Document on Proposals to Implement Article 23 of the Basic Law*.

reasonable doubt to secure a conviction. The proposal is that sedition be cast as an “incitement” offence. The mental element of incitement is that the accused must have the purposive intention that a sufficient act for the offence incited should be committed and that any requisite consequence of that act would result. Incitement requires an element of persuasion or encouragement (or threats or other pressure) to commit the substantive offence.

Subversion

5.3

17.1 Paragraph 5.3 states “although there are not many examples of offences termed ‘subversion’ in common law jurisdictions”. Please provide examples of these offences found in common law jurisdictions.

17.2 How many are there?

Administration’s reply to 17.1-17.2

Analogous offences involving the violent overthrow or intimidation of the State or the government may be found in the laws of Canada (S.46(2) & 51 of the Criminal Code), USA (18 USCS #2383/2384), UK (S.3 of the Treason Felony Act (1848), Australia (S.24AA(1)(a) of Crimes Act). Most jurisdictions have such an offence.

5.5b

18.4 Are there examples of “disestablish the basic system” in congruent foreign criminal code?

Administration’s reply to 18.4

The full phrase in the consultation document is “disestablish the basic system of the state as established by the constitution”. Other jurisdictions have offences which refer to “the overthrow of the constitution” of the state (e.g. Australia S.24A(1)(a) Crimes Act). An example from a civil law jurisdiction refers to using force to “change the constitutional order based on the Basic Law of the Federal Republic of Germany”.

5.8

19.1 How does the HKSAR have the jurisdiction to prosecute a foreign national living outside the HKSAR that took the offensive action outside the HKSAR as prescribed in 5.8b?

Administration's reply to 19.1

The existing common law position, whereby the courts have jurisdiction over acts of persons, committed outside Hong Kong which amount to an attempt or to a conspiracy, or to an incitement of another, to commit the offence in Hong Kong, to commit the offence in Hong Kong, would be applied. The courts would also have jurisdiction where some part of the offence is committed in Hong Kong.

Security Bureau

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