

立法會 *Legislative Council*

LC Paper No. LS 44/02-03

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

Legal Service Division's Comments on Administration's Response made to the Panels in relation to Proposals to implement Article 23 of the Basic Law

Area of discussion of the Joint Panels	Administration's Response [#]	Comments
A. General issues		
1. Issuing of a white bill	"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." <i>(Item 3(ii) of the Summary of concerns and queries raised by Members set out in LC Paper No. CB(2) 814/02-03(01))</i>	Part K of the Rules of Procedures (Rules 50 to 66) provides the procedure on bills. There is no categorization of bills into blue bill or white bill. A bill is published in the Gazette after it is received for presentation to the Council. First reading of the bill takes place at a Council meeting specified by the Member (including a designated public officer) in charge of the bill.

[#] Papers to the Joint Panels and minutes of Joint Panel meetings extracted in the Summary of concerns and queries raised by Members

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2. Rendition-related issues	<p>"There was not yet a rendition agreement between the Mainland and the HKSAR."</p> <p>"None of the extradition agreements entered into by Hong Kong and other countries covered such offences. A person could be extradited only if the offence concerned fell within the list under the agreement and that it was an offence in both jurisdictions. It was not a practice at the international level to extradite individuals for offences endangering national security."</p> <p><i>(Items 5(i) and (ii) of the Summary of concerns and queries raised by Members set out in LC Paper No. CB(2) 814/02-03(01))</i></p>	<p>The issue of rendition agreement with the Mainland was discussed by the Panel on Security at the meetings on 3 December 1998, 13 April 2000 and 3 April 2001 (see minutes contained in LC Paper Nos. CB(2)1258/98-99, CB(2)2606/99-00 and CB(2)1691/00-01). The Panel on Administration of Justice and Legal Services also held a meeting on 16 January 1999 to discuss with academics and the legal profession (see LC Paper No. CB(2)1690/98-99).</p> <p>Political crimes such as treason and sedition, military offences and religious offences are not very often extraditable. The definition of such crimes is an area for much argument.</p>

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3. Application	<p>"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."</p> <p><i>(Administration's response to question 19.1 set out in LC Paper No. CB(2) 744/02-03(01))</i></p>	<p>The general rule in public international law is that jurisdiction extends (and is limited) to everybody and everything within the sovereign's territory and to his nationals wherever they may be. The discussion of jurisdiction involves the identification of principles rather than the assertion of rigid rules of law. Five general principles are identified¹:</p> <ul style="list-style-type: none"> (a) the territorial principle, determining jurisdiction by reference to the place where the offence is committed; (b) the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; (c) the protective principle, determining jurisdiction by reference to the national interest injured by the offence; (d) the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; (e) the passive personality principle, determining jurisdiction by reference to the nationality of national character of the person injured by the offence.

¹ Dickinson, 'Introductory Comment to the Harvard Draft Convention on Jurisdiction with Respect to Crime 1935' (1935) 29 *AJIL*, Supp 443 quoted in Sourcebook on Public International Law, Hillier 1998 at page 252

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	<p>"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."</p> <p><i>(Item 9(i) of the Summary of concerns and queries raised by Members set out in LC Paper No. CB(2) 814/02-03(01))</i></p>	<p>The Administration has provided the following response to the Bills Committee on Chemical Weapons (Convention) Bill in relation to the status of permanent resident of the HKSAR:</p> <ul style="list-style-type: none"> (a) A HKSAR permanent resident of Chinese nationality may relinquish his Chinese nationality by making a declaration of change of nationality in accordance with paragraph 5 of the "Explanations of some questions by the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in the HKSAR", or by applying for renunciation of Chinese Nationality under Article 10 of the Chinese Nationality Law; (b) Under paragraph 7 of Schedule 1 to the Immigration Ordinance (Cap. 115)- <ul style="list-style-type: none"> (i) a HKSAR permanent resident who falls within the category in paragraph 2(d) or (e) loses his permanent resident status, if he has been absent from Hong Kong for a continuous period of not less than 36 months since he ceased to have ordinarily resided in Hong Kong;

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		<p>(ii) a HKSAR permanent resident who falls within the category in paragraph 2(f) loses his permanent resident status, if he has been absent from Hong Kong for a continuous period of not less than 36 months after he obtained the right of abode in any place other than Hong Kong and has ceased to have ordinarily resided in Hong Kong.</p> <p>Members may refer to LC Paper Nos. CB(1) 305/02-03(04) and CB(1) 486/02-03(03). The question that arises from the above response is how a HKSAR permanent resident who falls within the category in paragraph 2(a), (b) or (c) of Schedule 1 to the Immigration Ordinance may lose his permanent resident status.</p>
	<p>“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.”</p> <p><i>(Administration's response to questions 9.1 and 9.2 set out in LC Paper No. CB(2) 744/02-03(01))</i></p>	<p>The concept of being "voluntarily in the HKSAR" was referred to when the Bills Committee on Immigration (Amendment) Bill 2001 considered the meaning of the term "ordinarily resident" used in Article 24 of the Basic Law.</p> <p>This is an important element which may justify a statutory definition.</p>

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B. Specific issues		
1. Treason	<p>"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)."</p> <p><i>(Administration's response to question 5.2 set out in LC Paper No. CB(2) 744/02-03(01))</i></p>	<p>On the question of what amounts to war in public international law, McNair and Watts² state:</p> <p>"The existence of a state of war depends upon the determination of the parties to the conflict, and can arise where only one of the parties to the conflict asserts the existence of a state of war, even if the other denies it or keeps silence. That so fundamental a concept of international law as war should depend upon the view of the parties involved—even if one of them alone — has been a principal reason for criticism and for the attraction of other, more objective, concepts such as the 'threat or use of force'."</p> <p>There has been a broadening of the definition of international conflict to include armed conflicts in which peoples are fighting for self-determination against colonial and alien occupation and against racist regimes in the exercise of their rights of self-determination. The levying of war has been widely interpreted by the courts³.</p>

² *The Legal Effects of War* (4th ed., 1966) pp. 7-8 quoted in Cases and Materials on International Law, Harris 1986 at page 283

³ *R v Dowling* (1848) 7 St. Tr. (N.S.) 381 and *R v Gallagher* (1883) 15 Cox C.C. 291

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	<p>"Typical acts of state include the annexation and cession of territory, the declaration of war and peace, the making of treaties, the sending and receiving of diplomatic representatives, and the recognition of foreign states and governments. These acts performed between governments cannot be challenged, controlled or interfered with by the courts, and must be accepted without question."</p> <p><i>(Paragraph 5 of the Administration's response to issues raised at the Joint Panel Meeting on 21 October 2002 set out in LC Paper No. CB(2) 86/02-03(02))</i></p>	<p>The concept of an act of state may become relevant because typical acts of state include the declaration of war and peace. In <i>R v Bottrill</i> [1946] 2 All ER 435, the UK Court of Appeal held that the certificate of the Foreign Secretary given on behalf of the Crown as to the existence of a state of war involving His Majesty was conclusive and binding on the court, whether questions of fact or law were involved therein.</p>
2. Secession	<p>"The terms ["serious unlawful means" and "serious interference or serious disruption of an electronic system"] 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."</p> <p><i>(Administration's response to questions 11.1-11.4 set out in LC Paper No. CB(2) 744/02-03(01))</i></p>	<p>The following provides background information on how the definition of "terrorist act" in the United Nations (Anti-terrorism Measures) Ordinance was arrived at:</p> <p>The definition of "terrorist act" proposed in the United Nations (Anti-Terrorism Measures) Bill was modelled on the definition of "terrorism" under the United Kingdom Terrorism (United Nations Measures) Order 2001, which in turn was modelled on the United Kingdom Terrorism Act 2000. Paragraphs (a)(i)(F) and (b) of that definition were derived from the Canadian Anti-Terrorism Act.</p>

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		<p>The Administration pointed out to the Bills Committee that the proposed definition followed the international consensus that a "terrorist act" must satisfy three criteria-</p> <ul style="list-style-type: none">(a) it involves the use of action or threat of action to influence a government or intimidate the public;(b) the use or threat of action is for the purpose of advancing a political, religious or ideological cause; and(c) the action or threat of action involves serious violence, serious damage to property or serious risk to public health or safety. <p>The proposed definition also provided for certain exceptions in respect of advocacy, protest, dissent or stoppage of work to avoid the inadvertent inclusion of normal activities. The Administration was satisfied that the proposed definition was consistent with the human rights provisions in the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).</p> <p>During the Committee stage, the following amendments were made to the proposed definition:</p> <ul style="list-style-type: none">(a) in paragraph (a)(i)(A) and (B), replacing "involves" with "causes";

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		<p>(b) in paragraph (a)(i)(E) and (F), replacing "designed" with "intended";</p> <p>(c) in paragraph (a)(ii)(A), replacing "influence the Government" with "compel the Government";</p> <p>(d) in paragraph (b), replacing "stoppage of work" with "industrial action";</p> <p>(e) extending the application of paragraph (b) to paragraph (a)(i)(D), (E) and (F).</p> <p>Other amendments considered at Committee stage but not adopted were:</p> <p>(a) deleting "threat of action";</p> <p>(b) replacing "the use or threat of action" with "an act or omission".</p> <p>For the definition of "terrorist act", please see Part II.1 of LC Paper No. LS 6/02-03.</p>
	<p>"As defined in the offence of secession, the act of "resisting" [the CPG in its exercise of sovereignty over a part of China] must be done by means of "levying war, force, threat of force or serious unlawful means"."</p> <p><i>(Administration's response to questions 10.1 and 10.2 set out in LC Paper No. CB(2) 839/02-03(01))</i></p>	<p>Use of violence is not a condition in the case of:</p> <p>(a) threat of force;</p> <p>(b) serious interference or serious disruption of an electronic system; or</p> <p>(c) serious interference or serious disruption of an essential service, facility or system, whether public or private.</p>

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3. Sedition		Please refer to the part on incitement in our Information Paper on Inchoate Offences in LC Paper No. LS 34/02-03.
4. Subversion	<p>"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."</p> <p><i>(Administration's response to questions 17.1 and 17.2 set out in LC Paper No. CB(2) 744/02-03(01))</i></p> <p>"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."</p>	<p>Extracts of the relevant provisions of overseas legislation referred to in the Administration's response are at the Annex.</p> <p>No reference to "disestablishing the basic system of the State as established by the Constitution" is found in other jurisdictions.</p>

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	<p>"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"."</p> <p><i>(Administration's response to questions 18.1-18.4 set out in LC Paper Nos. CB(2) 744 and 839/02-03(01))</i></p>	
5. Theft of state secrets	<p>"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."</p> <p><i>(Administration's response to question 20.3 set out in LC Paper No. CB(2) 839/02-03(01))</i></p>	<p>Existing offences relevant to hacking include:</p> <ul style="list-style-type: none"> (a) unauthorized access to computer (section 27A of the Telecommunications Ordinance (Cap. 106)); (b) criminal damage relating to the misuse of computer (sections 59 and 60 of the Crimes Ordinance (Cap. 200)); and (c) access to computer with criminal or dishonest intent (section 161 of the Crimes Ordinance). <p>Under the Theft Ordinance (Cap. 210), a person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. "Property" is defined in section 5(1) of that</p>

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		Ordinance to include money and all other property, real and personal, including things in action and other intangible property.
	<p>"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."</p> <p><i>(Administration's response to question 20.9 set out in LC Paper No. CB(2) 839/02-03(01))</i></p>	At present, access to official information is regulated by the Code on Access to Information. There is no legislation providing for access to official information.
	<p>"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."</p> <p><i>(Administration's response to question 22.3 set out in LC Paper No. CB(2) 839/02-03(01))</i></p> <p>"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</p>	<p>It would be useful to find out what the term "Central Authorities" is intended to mean in this context and how it is distinguished from the PRC Government (PRCG) referred to in the proposed offences of treason, secession and subversion.</p> <p>The Bills Committee on Adaptation of Laws Bill 1998 held the following discussion on the two terms "中央" (Central Authorities) and "中央人民政府" (Central People's Government) in the context of the savings provision of a private bill:</p> <p>(a) By virtue of Annex 3 of the Decision of the Standing</p>

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	<p>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.</p> <p>As an analogous example, in the Interpretation and General Clauses Ordinance (Cap 1), the term "Government" is defined as "Government of the Hong Kong Special Administrative Region," rather than any specific departments or systems.</p> <p>As we have explained at the above joint panel meeting, the term "Central Authorities" as referred in paragraph 7.15 of the Consultation Document means the authorities at the state level but not those at provincial or other lower levels."</p> <p><i>(Paragraphs 9, 10 and 11 of the Administration's response to issues raised at the Joint Panel Meeting on 21 October 2002 set out in LC Paper No. CB(2) 686/02-03(01))</i></p>	<p>Committee of NPC on Treatment of the Laws Previously in Force in Hong Kong made in accordance with Article 160 of the Basic Law, the savings provision shall be construed as a reference to "nothing in this Ordinance shall affect or be deemed to affect the rights of the Central People's Government or the Government of the HKSAR under the Basic Law or other laws. The Chinese text refers to the rights of "中央" etc. to be saved.</p> <p>(b) The construction has been incorporated into item 21 of Schedule 8 to Cap. 1, but the Chinese text refers to the rights of "中央人民政府".</p> <p>(c) There is no definition of "中央" in the PRC Constitution.</p> <p>(d) After discussion with the Bills Committee, and to be consistent with the Chinese text of the Standing Committee's Decision, the Administration agreed to amend the provision to save "the rights of the Central Authorities or the Government of the HKSAR under the Basic Law or other laws (中央或香港特別行政區政府根據《基本法》和其他法律的規定所享有的權利)".</p>

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6. Foreign political organisations		<p>No response has been provided by the Administration to the following :</p> <p>"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><i>(Item 6(h) of the Summary of concerns and queries raised by Members set out in LC Paper No. CB(2) 814/02-03(01))</i></p>
	<p>"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 Guomindang registered under the Societies Ordinance as a society in Hong Kong."</p> <p><i>(Administration's response to questions 23.1-23.4 set out in LC Paper No. CB(2) 839/02-03(01))</i></p>	<p>According to paragraph 7.11 of the Consultation Document, the Administration believes that the existing provisions in the Societies Ordinance (Cap. 151) are sufficient for the purpose of prohibiting foreign political organizations from taking part in the political process of the HKSAR and that these provisions should be retained.</p>

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	<p>"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."</p> <p><i>(Administration's response to question 25.1-25.4 set out in LC Paper No. CB(2) 839/02-03(01))</i></p>	<p>The definition of "connection" (聯繫) in the Societies Ordinance (Cap. 151) includes the circumstance if the society or the branch is "affiliated" directly or indirectly with a foreign political organization or a political organization of Taiwan.</p>

Encl

Prepared by

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Canada : Criminal Code

Section 46

(2) Every one commits treason who, in Canada,

- (a) uses force or violence for the purpose of overthrowing the government of Canada or a province.

Section 51

Every one who does an act of violence in order to intimidate Parliament or the legislature of a province is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

United States of America : United State Code, Title 18-Crimes and Criminal Procedure

Section 2383

Whoever incites sets on foot, assists, or engages in any rebellion or insurrection against the authority of the US or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than 10 years, or both; and shall be incapable of holding any office under the US.

Section 2384

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the US, conspire to overthrow, put down, or to destroy by force the Government of the US, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the US, or by force to seize take, or possess any property of the US contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than 20 years, or both.

United Kingdom : Treason Felony Act 1848

Section 3

If any person whatsoever shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our Most Gracious Lady the Queen, ... from the style, honour, or royal name of the imperial crown of the Unite Kingdom, or of any other of her Majesty's dominions and countries, or to levy war against her Majesty, ...

within any part of the United Kingdom, in order by force or constraint to compel her ... to change her ... measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of her Majesty's dominions or countries under the obeisance of her Majesty, ... and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, ... or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable, ... to be transported beyond the seas for the term of his or her natural life ...

Australia : Crimes Act 1914

Section 24AA

(1) A person shall not :

(a) do any act or thing with intent :

- (i) to overthrow the Constitution of the Commonwealth by revolution or sabotage; or
- (ii) to overthrow by force or violence the established government of the Commonwealth, of a State or of a proclaimed country; or

Germany : Criminal Code

Section 81

(1) Whoever undertakes with force or through threat of force :

- 1. To undermine the continued existence of the Federal Republic of Germany; or
- 2. to change the constitutional order based on the Basic Law of the Federal Republic of Germany,

shall be punished with imprisonment for life or for not less than 10 years.