

4th December 2002

Mrs. Sharon Tong, Clerk to Penal on Security,

I request the Administration to provide written answers to the following questions to the Members of the Penal on Security and the Panel on Administration of Justice and Legal Services before the joint meeting of 19 December 2002 on the issue Article 23 of the Basic Law.

General Questions

- 1.1 What is the prioritization of the three guiding principles?
- 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?
- 1.3 Why does the Government aim at passing the laws to implement the proposal on Basic Law 23 by July 2003?
- 1.4 During the process of legislation, may the Government promise not to consult the PRCG on the implementation of BL 23?
- 1.5 Does the Government regard all the offences under BL 23 are crimes of a political character? If not, which offences are regarded as offences of a political character? Please provide reasons for the Government’s views.

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.
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- 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?
 - 3.2 How is “intimidate” defined?

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

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

- 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.

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

Footnote 17³:

- 5.1 What constitutes the intention "to debar the government from the free exercise of its lawful power"?
5.2 What is the definition of "true war" under international law?

2.8c

- 6.1 What constitutes "any force or constraint upon the PRCG" and how is it measured?
6.2 Why was Parliament and HK LegCo exchanged for the PRCG instead of National People's Congress and HKSAR LegCo?

2.9

- 8.1 What is the definition of the "entire territory" of the state?

2.10

- 8.1 Can a public enemy exist when the CPG or HKSARG is not at war?
8.2 Does the individual have to be linked to the war adversary to be a public enemy?
8.3 Can they be linked to another group not at war but causing unrest in the PRC or HKSAR?

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"?

Secession

3.6

- 10.1 What constitutes "resisting the CPG in its exercise of sovereignty over a part of

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

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”?

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?

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

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”?

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 “disaffection” 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.

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?

4.13 b

15.1 What are the definitions of “public disorder” and “violence”, respectively?

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

- 15.2 How is “seriously endangering the stability of the state and the HKSAR” defined?
- 15.3 Will the HKSARG request the Central Authorities to provide evidence or a certificate, similar to the procedure regarding the proscription of an organization in the Mainland, to verify the element “seriously endangered the stability of state”?
- 15.4 Are there any examples of the element “seriously endangered the stability of state” in congruent foreign criminal code?

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?

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?

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”?
- 18.4 Are there examples of “disestablish the basic system” in congruent foreign criminal code?
- 18.5 Will the HKSAR Government invite the legal expert(s) in the Mainland of the Central Authorities to provide evidence as what is “the basic system” or what amounts to “disestablish the basic system”?

5.8

- 19.1 How does the HKSARG have the jurisdiction to prosecute a foreign national

the Basic Law.

living outside the HKSAR that took the offensive action outside the HKSAR as prescribed in 5.8b?

Theft of State Secrets

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?
- 20.2 What is the meaning of "without lawful authority"?
- 20.3 What is authorized access, as there is no legal right of access to any official information?
- 20.4 What are possible defenses for the offence?
- 20.5 How does one argue against mens rea?
- 20.6 Is "the information did not actually cause damage" a possible defense?
- 20.7 Can public interest trump or outweigh the harm from disclosure as a defense?
- 20.8 Would subjective mens rea be accounted for if one believes the information was not protected or its disclosure was in the public interest as a defense?
- 20.9 Will the Government prepare to draft a white bill on access to Official Information or prepare a consultation document on this issue?
- 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"?

Footnote 49

- 21.1 How many and what are the locations of the prohibited places defined by the Official Secrets Ordinance in Hong Kong?
- 21.2 How do places declared to be "prohibited places"?
- 21.3 Must this be declared through the Gazette?
- 21.4 If yes, under which ordinance and/or regulation/rule is this found?

6.19

- 22.1 Is it an offence if the receiver or transmitter is unaware the information is protected?
- 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?

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 Guomindang 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 Guomindang is required to have the association/organization/company be considered an agent.

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?

7.7, 7.17b

- 25.1 What determines affiliation?
- 25.2 How strong must one's 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 offense?
- 25.4 How much financial contributions constitutes the organization is financially supported by and FPO or TPO?

7.15

- 26.1 What is the national law(s), including the relevant regulations and/or guidelines, to proscribe an organization in the Mainland on the grounds of endangering national security?
- 26.2 Please provide the relevant part(s) of the national law(s) in question.
- 26.3 What is the definition of "Central Authorities" under this offence?

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?

Procedural and Miscellaneous Matters

9.5

28.1 What are the legal foreign precedents for time limits on the prosecution of treason and sedition offences, respectively?

28.2 What are the rationales behind the prosecution time limits for treason and sedition, respectively?

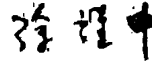
Annex 2

29.1 How have the serious consequences regarding sedition changed for the offence of sedition that would warrant a marked increase in penalty?

29.2 What are the foreign precedents for the penalties?

29.3 Please provide a comparisons between the increased penalties in Annex 2 and the penalties in the US, UK, Canada, Australia, and New Zealand criminal law for similar crimes.

Yours faithfully,



Mr. James To Kun-sun, Member of the Penal
on Security and the Panel on Administration
of Justice and Legal Services