

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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22 September 2020

Clerk to Legislative Council Panel on Security
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn: Ms Betty MA)

Dear Ms Ma,

**Legislative Council Panel on Security, Panel on Constitutional Affairs
and Panel on Administration of Justice and Legal Services**

Follow-up to Joint Meeting on 7 July 2020

Please find attached at Annex the Government's response to the follow-up issues raised by Members enclosed in your letter dated 8 July 2020.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A. Li', with a small dot at the end.

(Apollonia LIU)
for Secretary for Security

**Legislative Council Panel on Security, Panel on Constitutional Affairs
and Panel on Administration of Justice and Legal Services’
Letter Dated 8 July 2020**

Questions regarding the National Security Law

**Whether individual slogans breach the National Security Law (“NSL”)
[Letter of 3 July 2020]**

1. Freedom of speech and expression is protected by law in Hong Kong. However, such freedom is not absolute. If the exercise of freedom involves any unlawful acts, it exceeds the limits of legal protection and is subject to punishment by the law.
2. Chapter III of the NSL provides for four types of offences of endangering national security. Whether a case amounts to an offence shall depend on facts and circumstances of the case.

**How to construe the words, phrases and provisions of various articles
in the NSL [Q1 & Q3 of the letter of 7 July 2020]**

3. When adjudicating relevant cases, courts of the Hong Kong Special Administrative Region (“HKSAR”) will construe the relevant provisions of the NSL, just as they dealt with the Basic Law (“BL”), the Nationality Law of the People’s Republic of China (“PRC”) and other national laws listed in Annex III to the BL.
4. When applying the provisions of the NSL, the courts would give consideration to the legislative intent and the context (e.g. the General Principles in Chapter I), and would also make reference to other relevant materials (e.g. the Explanations on the draft Decision of the National People’s Congress (“NPC”) and on the draft NSL).
5. When construing the term “national security” in the NSL, it is necessary to consider the legislative intent as set out in the General Principles in Chapter I as well as the relevant decision of the NPC.

The latter makes clear that the purposes of the Decision are, amongst other things, to safeguard national sovereignty, security and development interests, and to uphold and improve the “One Country, Two Systems” regime. It also clearly stipulates that it is the HKSAR’s constitutional duty to safeguard the sovereignty, unification and territorial integrity of the PRC. The NSL has also clearly prescribed four categories of offences endangering national security.

“Fundamental provisions” in the BL [Q4 & Q5 of the letter of 7 July 2020]

6. The NSL is enacted to safeguard national sovereignty, security and development interests, uphold and improve the “One Country, Two Systems” regime, safeguard the long-term prosperity and stability of Hong Kong, as well as to safeguard the legitimate rights and interests of Hong Kong residents. Article 4 of the NSL stipulates that human rights shall be respected and protected in safeguarding national security in the HKSAR, while Article 2 stipulates that the provisions in Articles 1 and 12 of the BL of the HKSAR on the legal status of the HKSAR are the fundamental provisions in the BL. No institution, organisation or individual in the HKSAR shall contravene Articles 1 and 12 of the BL in exercising their rights and freedoms.
7. The exercise of rights and freedoms should be qualified by Articles 1 and 12 of the BL concerning the legal status of the HKSAR. This is in line with the provisions of the International Covenant on Civil and Political Rights (“ICCPR”). Rights and freedoms such as freedom of speech and of the press, freedom of association, of assembly, of procession and of demonstration, freedom to leave a country and the right to privacy are not absolute and may be restricted by law for the protection of national security, public order (*ordre public*), etc.

Provisions regarding standing for elections or assuming public offices by residents of the HKSAR [Q6, Q7 & Q36 of the letter of 7 July 2020]

8. As stipulated in paragraph 3 of Article 6 of the NSL, a resident of the HKSAR who stands for election or assumes public office shall

confirm in writing or take an oath to uphold the BL and swear allegiance to the HKSAR of the PRC in accordance with the law. The expression “in accordance with the law” in that paragraph means that the person must sign a document or take an oath in compliance with the requirements under the applicable laws of the HKSAR (including the NSL).

9. Hong Kong courts have ruled in cases involving declarations for election nominations and oath of office that making a declaration or taking an oath to uphold the BL and swear allegiance to the HKSAR of the PRC are substantive requirements. The person who makes a declaration or takes an oath must truthfully uphold the BL and swear allegiance to the HKSAR of the PRC.
10. Where, in the course of performing statutory, executive or judicial functions, it is necessary to consider if a person who makes a declaration or takes an oath fulfills the above substantive requirements, all relevant circumstances and evidence should be taken into consideration before a decision is made.
11. Article 35 of the NSL also stipulates that a person who is convicted of an offence endangering national security by a court shall be disqualified from standing as a candidate in the elections of the Legislative Council and District Councils of the HKSAR, holding any public office in the HKSAR, or serving as a member of the Election Committee for electing the Chief Executive (“CE”). The provision has not set a limit on the convicted person’s disqualification period and can be construed that the disqualification shall be permanent. Section 39(1)(c) of the existing Legislative Council Ordinance (Cap. 542) also stipulates that a person is disqualified from being nominated as a candidate at an election and from being elected as a Member of the Legislative Council if the person has been convicted of treason.

Concerning the Committee for Safeguarding National Security of the HKSAR (“HKSAR Committee on National Security”) [Q8, Q9 & Q10 of the letter of 7 July 2020]

12. Article 14 of the NSL provides for the duties and functions of the

HKSAR Committee on National Security. Paragraph 3 of Article 43 further stipulates that the CE may, in conjunction with the HKSAR Committee on National Security, make relevant implementation rules for the purpose of applying the measures under paragraph 1 of that article. The implementation rules so made form part of the laws of Hong Kong.

13. It is stipulated under Article 12 of the NSL that the HKSAR Committee on National Security shall be responsible for affairs relating to, and assume primary responsibility for, safeguarding national security in the HKSAR, and shall be under the supervision of and accountable to the Central People's Government ("CPG").
14. As stipulated in paragraph 2 of Article 14 of the NSL, decisions made by the HKSAR Committee on National Security shall not be amenable to judicial review. As to whether acts of institutions or individuals executing such decisions are similarly not amenable to judicial review either, the facts and circumstances of the case concerned have to be taken into account.

Concerning secession and subversion [Q12, Q16, Q18 & Q19 of the letter of 7 July 2020]

15. The NSL has clearly set out all elements of the four categories of offences endangering national security. In addition to the criminal act itself, the prosecution is also required to prove the requisite *mens rea* (e.g. whether the offence was committed knowingly or intentionally) before the defendant may be found guilty. This reflects one of the principles provided in Article 5 of the NSL, i.e. "A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law."
16. Article 20 of the NSL stipulates that a person who organises, plans, commits or participates in any of the specified acts "with a view to committing secession or undermining national unification", whether or not by force or threat of force, shall be guilty of an offence.

Although the specified acts are not necessarily done by force or threat of force, the prosecution is required to prove that the defendant organises, plans, commits or participates in such acts “with a view to committing secession or undermining national unification”.

17. The NSL is enacted for the purpose of, amongst other things, safeguarding national security, maintaining prosperity and stability of the HKSAR, and safeguarding the lawful rights and interests of Hong Kong residents. Article 4 of the NSL stipulates that human rights shall be respected and protected in safeguarding national security in the HKSAR, while Article 2 stipulates that the provisions in Articles 1 and 12 of the BL on the legal status of the HKSAR are the fundamental provisions in the BL. No institution, organisation or individual in the HKSAR shall contravene Articles 1 and 12 of the BL in exercising their rights and freedoms. The rights and freedoms protected by the ICCPR such as freedom of speech and of the press, freedom of association, of assembly, of procession and of demonstration, freedom to leave a country and the right to privacy are not absolute but may be restricted by law for the protection of national security, public order (*ordre public*), etc. In the process of enacting the NSL, the Standing Committee of the NPC (“NPCSC”) has taken human rights considerations into account. The provision in Article 20 of the NSL is in line with the provisions concerning the protection of human rights.
18. As regards “assists in” or “provides pecuniary or other financial assistance or property for the commission by other persons” of the offence of secession or subversion as stipulated in Articles 21 and 23 of the NSL, the prosecution would need to establish and particularise the acts and state of mind of the defendant which constitute the offence. Whether the defendant is guilty would depend on relevant evidence, and ultimately be determined by the court having regard to the facts and circumstances of the case.
19. The phrase “other unlawful means” as stated in Article 22 of the NSL refers to unlawful means other than “by force or threat of force”. As the article does not limit the means so used to those that violate the criminal law, “other unlawful means” may be construed as any means

which violates the law but does not involve the use of “force or threat of force”. As to judging whether the circumstances are serious enough to constitute “seriously interfering in, disrupting, or undermining”, the literal meaning of the phrase should be adopted using a common sense approach.

Concerning “incitement” and “advocacy” [Q14, Q15 & Q25 of the letter of 7 July 2020]

20. Articles 21, 23 and 27 of the NSL provide that a person who “incites” the commission of secession, subversion or a terrorist activity or “advocates” terrorism is guilty of an offence. The prosecution would need to establish and particularise the acts and state of mind of the defendant which constitute the offence. Whether the defendant is guilty would ultimately be determined by the court having regard to the facts and circumstances of the case.

Concerning terrorist activities [Q21, Q22, Q23 & Q24 of the letter of 7 July 2020]

21. As stipulated in paragraph 1 of Article 24 of the NSL, the prosecution must prove that the defendant “organises, plans, commits, participates in or threatens to commit any of the [specified] terrorist activities causing or intended to cause grave harm to the society” for the specified purposes before the defendant could be convicted of the offence of committing a terrorist activity. As to whether it is a terrorist activity causing “grave harm to the society”, the literal meaning of the phrase should be adopted using a common sense approach.
22. Two sentencing ranges are prescribed in paragraph 2 of Article 24 of the NSL. Which range is applicable depends on whether the offence has “caus[ed] serious bodily injury, death or significant loss of public or private property”.
23. As stipulated in Article 26, a person who provides support, assistance or facility such as training, weapons, information, funds, supplies, labour, transport, technologies or venues to a terrorist organisation or

a terrorist, or for the commission of a terrorist activity, shall be guilty of an offence. Whether the person has the *mens rea* to commit the offence should be determined by the court in specific cases.

Concerning collusion with a foreign country or with external elements to endanger national security [Q27 to Q32 of the letter of 7 July 2020]

24. On the phrases including “unlawfully provides”, “State secrets or intelligence concerning national security”, “other kinds of support”, “provoking ... hatred” and “serious consequences” as referred to in Article 29, the court in adjudicating specific cases could construe them with reference to the legislative intent (including the General Principles stated in Chapter I of the NSL), the context of the provision and other relevant materials. Whether the facts of a case constitute an offence under Article 29 or 30 depends on the specific circumstances.

Provisions on penalties [Q13, Q17, Q20, Q26 & Q33 of the letter of 7 July 2020]

25. As for the application of the provisions on “principal offender”, “a person who actively participates in”, “other participants”, “circumstances ... of a serious nature” and “circumstances ... of a minor nature” in Articles 20 to 23 of the NSL to a defendant in a specific case, the prosecution would need to establish and particularise the acts and state of mind of the defendant which constitute the offence, as well as his role and position in the commission of the offence. The criminal liability of the defendant would ultimately be determined by the court having regard to the facts and circumstances of the case.

26. According to Article 64 of the NSL, “confiscation of property” as mentioned in Articles 26 and 27 means “confiscation of proceeds of crime”.

27. Articles 31 and 32 of the NSL apply only if the accused has committed a criminal act under the NSL. According to Article 64 of the NSL, “criminal fine” as mentioned in Article 31 means “fine” to be

determined by the court; and “seiz[ure] and confiscat[ion]” as stated in Article 32 will also be determined and enforced by the court.

Provisions on offences and penalties in respect of an offender who is not a permanent resident of the HKSAR [Q34, Q35 & Q37 of the letter of 7 July 2020]

28. The difference between paragraph 1 and paragraph 2 of Article 34 of the NSL is that the subject of the former has committed an offence under the NSL, while the subject of the latter has contravened the provisions of the NSL but is not prosecuted for any reason. According to paragraph 1 of Article 34, the offender, not being a permanent resident of the HKSAR, “may be subject to deportation as the sole or an additional punishment”. This means that whether or not to impose deportation as the sole or an additional punishment would be decided having regard to the specific circumstances. Regarding the provision in paragraph 2 of Article 34, a person who is not a permanent resident of the HKSAR has contravened the provisions of the NSL but is not prosecuted for any reason may also be deported. The HKSAR has an established mechanism on deportation, and the issue can be dealt with in accordance with the law through the established mechanism.
29. Article 38 of the NSL stipulates that the NSL shall apply to offences under the NSL committed against the HKSAR from outside the HKSAR by a person who is not a permanent resident of the HKSAR. As Articles 29 and 30 of the NSL have created the offence of collusion with a foreign country or with external elements to endanger national security, Article 38 shall also apply to offences under Article 29 or 30 committed against the HKSAR from outside the Region. For instance, a foreigner who targets at the HKSAR from outside the Region and requests “a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the PRC” to commit any of the acts¹ specified in paragraph 1 of Article

¹ The acts include:

- (1) waging a war against the PRC, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the PRC;
- (2) seriously disrupting the formulation and implementation of laws or policies by the Government of

29 shall be guilty of an offence.

The discharge of duties by police officers under the NSL [Q11 & Q38 of the letter of 7 July 2020]

30. Police officers discharge their duties in accordance with the law. Article 43 of the NSL makes provisions for the measures that the department for safeguarding national security of the Police Force may take when handling cases concerning offences endangering national security, including the seven measures listed in paragraph 1 of Article 43. The CE, in conjunction with the HKSAR Committee on National Security, has made relevant implementation rules (“Rules”) under paragraph 3 of Article 43. The Rules have the force of law and form part of the laws of Hong Kong. The law enforcement officers have to exercise the power conferred on them in accordance with the provisions of the Rules, and their decisions are amenable to judicial review.
31. Should members of the public find any misconduct involving police officers or have views on police officers’ conduct, they may complain to the Complaints Against Police Office (“CAPO”) through the existing mechanism. The CAPO is responsible for dealing with all complaints involving police officers. Members of the public may also seek legal advice having regard to their own circumstances.

Article 54 of the NSL [Q39 of the letter of 7 July 2020]

32. Any measures taken in accordance with Article 54 of the NSL need to comply with relevant legal requirements in the HKSAR.
33. As stipulated in Article 154 of the BL, the HKSAR Government may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions. As with past

the HKSAR or by the CPG, which is likely to cause serious consequences;

- (3) rigging or undermining an election in the HKSAR, which is likely to cause serious consequences;
- (4) imposing sanctions or blockade, or engaging in other hostile activities against the HKSAR or the PRC;
- (5) provoking by unlawful means hatred among Hong Kong residents towards the CPG or the HKSAR Government, which is likely to cause serious consequences.

practice, depending on the circumstances of individual cases, the Immigration Department will handle the immigration matters in accordance with the laws of Hong Kong and immigration policies.

Handling of cases over which jurisdiction is exercised by the Office for Safeguarding National Security of the CPG in the HKSAR [Q40 of the letter of 7 July 2020]

34. Article 57 of the NSL stipulates that the Criminal Procedure Law of the PRC and other related national laws shall apply to procedural matters, including those related to criminal investigation, examination and prosecution, trial, and execution of penalty, in respect of cases over which jurisdiction is exercised by the Office for Safeguarding National Security of the CPG in the HKSAR pursuant to Article 55 of the NSL. Article 52 of the Criminal Procedure Law of the PRC strictly prohibits the extortion of confessions by torture and the collection of evidence by threat, enticement, deceit or other unlawful means; and prohibits compelling any person to provide evidence that incriminates him. Relevant officers will investigate the cases in accordance with the law.

Power of interpretation of the NSL [Q2, Q41 & Q42 of the letter of 7 July 2020]

35. The NSL is part of the laws of the HKSAR and is binding on the executive authorities, legislature and judiciary of the HKSAR. These organs have the responsibility to implement the various requirements of the NSL and fully discharge their constitutional obligation to safeguard national security, with a view to ensuring the effective enforcement of the NSL in the HKSAR. According to Article 84 of the BL, the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the HKSAR as prescribed in Article 18 thereof. The relevant applicable laws now include the NSL, which is listed in Annex III to the BL. Whether a particular act violates the provisions of the NSL depends on the facts and actual circumstances of the case. Also, the consequences of violation cannot be considered by adopting a generalised approach.

36. According to Article 67 of the Constitution of the PRC, the functions and powers of the NPCSC include interpreting laws. Article 65 of the NSL also stipulates that the power of interpretation of the NSL shall be vested in the NPCSC.
37. Section 4 in Chapter II of the Legislation Law of the PRC makes provisions for the power of interpretation of laws by the NPCSC. For instance, Article 45 thereof stipulates that the NPCSC shall interpret a law under the following circumstances: (1) the specific meaning of a provision needs to be further defined; (2) after its enactment, new developments make it necessary to define the basis on which to apply the law.
38. Regarding Article 62 of the NSL, it lays down a rule of principle. It stipulates that the NSL shall prevail where provisions of the local laws of the HKSAR are inconsistent with the NSL. The “local laws of the HKSAR” means the laws previously in force in Hong Kong as provided in Article 8 of the BL, laws enacted by the legislature of the HKSAR and case-law of the courts of the HKSAR. As to whether the provisions of a local law are inconsistent with the NSL, it shall be determined according to the actual circumstances and cannot be considered by adopting a generalised approach.