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Report of the Bills Committee on Safeguarding National Security Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Safeguarding National Security Bill ("the Bills Committee") and the Subcommittee to Study Matters Relating to Basic Law Article 23 Legislation ("the Subcommittee")[1].

Background

Constitutional duty of the Hong Kong Special Administrative Region to safeguard national security

2. The Hong Kong Special Administrative Region ("HKSAR") has the constitutional duty to safeguard national security. Article 23 of the Basic Law stipulates that the HKSAR shall enact laws on its own to prohibit seven types of acts and activities endangering national security, i.e. prohibiting any act of treason, secession, sedition, subversion against the Central People's Government ("CPG") and theft of state secrets, prohibiting foreign political organizations or bodies from conducting political activities in the HKSAR, prohibiting political organizations or bodies of the HKSAR from establishing ties with foreign political organizations or bodies. However, since its return to the motherland, the HKSAR has not been able to enact legislation on Article 23 of the Basic Law.

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1 For details of the Subcommittee, please refer to paragraphs 7 to 9 below.

3. The National People's Congress adopted the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security ("5.28 Decision") on 28 May 2020, which states the basic principles in respect of safeguarding national security in the HKSAR and enunciates national policies and positions. The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("HK National Security Law") was enacted by the Standing Committee of the National People's Congress on 30 June 2020 and promulgated for implementation by the HKSAR Government on the same day. The HK National Security Law contains a total of 66 provisions which are divided into six chapters. Chapter III provides for four types of offences relating to national security (namely secession, subversion, organizing and committing terrorist activities, and collusion with a foreign country or with external elements to endanger national security).

4. The 5.28 Decision and the HK National Security Law have clearly provided for the HKSAR's constitutional duty and institutional set-up for safeguarding national security. Article 3 of the 5.28 Decision provides that it is the HKSAR's constitutional responsibilities to safeguard national sovereignty, unity and territorial integrity, and the HKSAR must complete the national security legislation stipulated in the Basic Law at an earlier date. Article 4 provides that the HKSAR must establish and improve the institutions and enforcement mechanisms for safeguarding national security, strengthen the enforcement forces for safeguarding national security, and step up enforcement to safeguard national security. Article 7 of the HK National Security Law not only requires the HKSAR to complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law, but also requires the HKSAR to refine its relevant laws on safeguarding national security.

5. The HKSAR Government conducted a public consultation exercise on the Basic Law Article 23 legislation from 30 January to 28 February 2024, during which 98.6% of the submissions received showed support and gave positive comments, indicating that the legislation has a strong popular support. Having carefully considered the views collected during the public consultation, the HKSAR Government has finalized the provisions of the Safeguarding National Security Bill ("the Bill").

The Safeguarding National Security Bill

6. The Bill was published in the Gazette on 8 March 2024 and received its First Reading at the Legislative Council ("LegCo") meeting on the same day. The Bill seeks to improve the law for safeguarding national security in the HKSAR; and to provide for related matters. Excluding the preamble, the contents of the Bill mainly cover the following areas:

(1) preliminary;
(2) offences in connection with treason;
(3) offences in connection with insurrection, incitement to mutiny and disaffection, and acts with seditious intention;
(4) offences in connection with state secrets and espionage;
(5) offences in connection with sabotage endangering national security;
(6) external interference[2] and organizations engaging in activities endangering national security;
(7) enforcement powers and procedures in legal actions in connection with safeguarding national security;
(8) mechanisms for safeguarding national security and relevant protections; and
(9) related amendments to other enactments.

The main contents of the Bill are set out in paragraphs 10 to 70 of the LegCo Brief (File Ref.: SBG/3/101/2024) issued by the Department of Justice and the Security Bureau on 8 March 2024.

The Subcommittee to Study Matters Relating to Basic Law Article 23 Legislation and the Bills Committee on Safeguarding National Security Bill

7. At its meeting on 23 February 2024, the House Committee ("HC") agreed to Hon Martin LIAO's proposal to set up a subcommittee under HC to commence the study of matters relating to the Basic Law Article 23 legislation as early as possible. HC also agreed that once the relevant Bill received its First Reading in LegCo, the subcommittee would immediately become a Bills Committee without the need for further consideration by HC; and that to ensure continuity of the scrutiny work, the Chairman, Deputy Chairman and members of the subcommittee would also become the Chairman, Deputy Chairman and members of the Bills Committee.

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[2] The Administration has proposed to introduce an amendment to change the name of the offence to "external interference endangering national security", so as to highlight the nature of endangering national security of the offence of external interference (see paragraph 123 below).

8. The Subcommittee consisted of 15 members. Hon Martin LIAO and Hon CHAN Hak-kan are the Chairman and Deputy Chairman of the Subcommittee respectively. The membership list of the Subcommittee is in **Appendix 1**.

9. After the Bill received its First Reading in LegCo on 8 March 2024, the Subcommittee immediately became a Bills Committee pursuant to the decision of HC. The membership list of the Bills Committee (in **Appendix 2**) is the same as that of the Subcommittee. The Subcommittee and the Bills Committee have held a total of 25[3] meetings (or nearly 50 hours of discussion) with the Administration.

Deliberations of the Bills Committee and the Subcommittee

10. Members have pointed out that enacting legislation on Article 23 of the Basic Law is the constitutional duty of the HKSAR, and that there are indeed necessity and urgency for the legislative exercise given the ever-changing international landscape and the increasingly complex geopolitics. Members have commended the Administration for its vigorous efforts in conducting explanatory work, publicity and refutation of untruthful remarks during the public consultation period, and promptly consolidating the views received and releasing the consultation results within a short period of time. They are pleased to learn that the vast majority of the views received by the Administration are supportive of the proposed legislative proposals. In putting forward the current legislative proposals, the Administration has drawn reference from the relevant laws of the state and the HKSAR, and has also made due reference to various laws on safeguarding national security enacted by other common law jurisdictions. The legislative proposals have also taken into account the actual situation in Hong Kong and the views received by the Administration during the public consultation period, and will protect as in the past, in accordance with the law, the rights and freedoms enjoyed under the Basic Law and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to the HKSAR. Members fully support the completion of this legislative exercise as soon as possible in order to fully perform the constitutional duty as stipulated under Article 23 of the Basic Law, the 5.28 Decision and the HK National Security Law to ensure the early establishment of a comprehensive and effective legal system

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[3] These include a joint meeting of the Subcommittee with the Panel on Security and the Panel on Administration of Justice and Legal Services to receive a briefing by the Administration on the results of the public consultation on the Basic Law Article 23 legislation.

for safeguarding of national security, so that the HKSAR can focus its efforts on developing the economy, improving people's livelihood and maintaining the long-term prosperity and stability of the HKSAR.

11. In the course of considering the enactment of legislation to implement Article 23 of the Basic Law, members have had in-depth discussions and expressed concerns on a number of issues. Members have also given detailed consideration to the views and suggestions collected by the Administration during the consultation period. The major deliberations of the Bills Committee and the Subcommittee are set out in the ensuing paragraphs.

Drafting principles of the Bill

12. Members have noted that the Administration has, in drafting the Bill, followed the established drafting approach, techniques and practice commonly adopted under Hong Kong's common law system, one of which is to ensure, as far as reasonably practicable, that the legal provisions are detailed and clear. This includes providing detailed definitions for some special terms and concepts that are relatively critical and important. The offence provisions also set out clearly the acts and circumstances, added with the intent, that would constitute an offence and, where appropriate, whether there are any exceptions or defences and the conditions that must be met. If an offence has extra-territorial effect, the target and scope of application of the extra-territorial effect are also specified. As for penalties, only the maximum penalties are specified.

13. In view of the fact that the legislative proposals must achieve a high degree of convergence, compatibility and complementarity with the HK National Security Law in order to establish a comprehensive and effective legal system for safeguarding national security, members are concerned that the Bill has only specified the maximum penalties for the proposed offences, without specifying the range of sentences (including the minimum terms) for the offences as in the case of the HK National Security Law. They have enquired whether this would lead to inconsistency between the legislative proposals and the HK National Security Law, therefore undermining the deterrent effect and effectiveness of the legislative proposals.

14. The Administration has advised that the drafting of the Bill has all along been carried out in accordance with the principle of achieving convergence, compatibility and complementarity with the HK National Security Law. Article 62 of the HK National Security Law provides that the HK National Security Law shall prevail where provisions of the local laws of the HKSAR are inconsistent with the HK National Security Law.

The authorities would specify the maximum penalties with sufficient deterrent effect for the proposed offences instead of providing for the minimum terms. Upon the enactment of the Bill, the Court will continue to apply and develop relevant sentencing principles under the existing common law system and lay down sentencing guidelines as and when appropriate.

Legislative intent, legislative basis and duty of the HKSAR to safeguard national security

15. The first part of the preamble of the Bill states that the purposes of this legislation are: (a) to resolutely, fully and faithfully implement the policy of "one country, two systems" under which the people of Hong Kong administer Hong Kong with a high degree of autonomy; (b) to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security; and (c) to prevent, suppress and punish acts and activities endangering national security in accordance with the law, to protect the lawful rights and interests of the residents of the HKSAR and other people in the HKSAR, to ensure the property and investment in the HKSAR are protected by the law, to maintain prosperity and stability of the HKSAR.

16. The second part of the preamble states that the relevant legislative basis is the Constitution of the People's Republic of China ("the Constitution"), the Basic Law (including the provisions of Article 23 of that Law), the 5.28 Decision, the HK National Security Law and the Interpretation by the Standing Committee of the National People's Congress of Article 14 and Article 47 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region regarding the HKSAR's performance of its constitutional duty to safeguard national security and the requirement to improve the law for safeguarding national security in the HKSAR. The third part of the preamble states the basic responsibilities of the authorities of the HKSAR, residents of the HKSAR and any institutions, organizations and individuals in the HKSAR in safeguarding national security.

17. The Administration has advised the Bills Committee that the preamble does not have any legal effect but it seeks to provide information to facilitate the Court's consideration of the relevant legislative background and intent when it is necessary to interpret the relevant provisions in the future. The wording of the first part of the preamble is based primarily on the relevant contents and provisions of the 5.28 Decision and the HK National Security Law, whereas other supplementary contents have also been added as appropriate. The responsibilities in safeguarding national security set out in the third part are derived from the relevant requirements of the Constitution and the HK National Security Law.

18. Regarding the English equivalent of the term "其他人" in point (c) in the first part of the preamble, members have opined that "other persons" instead of "other people" should be adopted as the English equivalent of the term pursuant to Article 42 of the Basic Law. This is particularly the case if the term is originally intended to cover "includes any public body and any body of persons, corporate or unincorporate" referred to in the definition of the term "person" (the Chinese equivalent is "人、人士、個人、人物、人選") under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1). The Administration considers that the current drafting of point (c) in the first part of the preamble of the Bill can serve its purpose. It has also considered proposing to amend the English text of the term, but eventually decided not to make the relevant amendment having regard to the requirement under Rule 58(8) of the Rules of Procedure of LegCo and the fact that the amendment is textual in nature only.

Principles and interpretation of the Bill and meaning of certain terms in the Bill

Principles of the Bill

19. According to clause 2 of the Bill, the Bill is based on the following principles: (a) the highest principle of the policy of "one country, two systems" is to safeguard national sovereignty, security and development interests; (b) human rights are to be respected and protected, the rights and freedoms, including the freedoms of speech, of the press and of publication, the freedoms of association, of assembly, of procession and of demonstration, enjoyed under the Basic Law, the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to the HKSAR, are to be protected in accordance with the law; and (c) for acts and activities endangering national security, there must be adherence to active prevention in accordance with the principle of the rule of law, and suppression and punishment in accordance with the law.[4]

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[4] Accordingly —

(a) a person whose act constitutes an offence under the law is to be convicted and punished in accordance with the law; no one is to be convicted and punished for an act that does not constitute an offence under the law;

(b) a person is to be presumed innocent before the person is convicted by a judicial authority;

(c) the right to defend, and other rights in a legal action, enjoyed in accordance with the law by a criminal suspect, defendant and other participants in the action are to be protected; and

(d) a person who has already been finally convicted or acquitted of an offence in judicial proceedings is not to be tried or punished again for the same act.

20. The Legal Adviser to the Bills Committee has enquired whether the principle of the rule of law under clause 2(c) of the Bill should be regarded as exhaustive. In addition, members are concerned about whether the clause has safeguarded the privilege against self-incrimination, and whether the exercise of such privilege would be in conflict with the responsibilities of any institution, organization and individual in the HKSAR to provide assistance in accordance with the law in response to a request made by the executive, legislative and judicial authorities of the HKSAR when conducting the work on safeguarding national security in accordance with the law as provided in point (b) in the third part of the preamble.

21. The Administration has advised that the principle of the rule of law set out in clause 2(c) of the Bill is the same as the principle of the rule of law that shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security as specified in Article 5 of the HK National Security Law. It has embodied that the principle of the rule of law must be fully taken into account in the various offences, enforcement powers, procedures and other provisions stipulated in laws to safeguard national security (including the Bill) in order to dispel doubts. The Administration has emphasized that the aforementioned principle of the rule of law and other principles of the rule of law and privileges under the common law (e.g. privilege against self-incrimination) shall continue to apply to the Bill. Any institution, organization and individual providing assistance to the executive, legislative and judicial authorities of the HKSAR on safeguarding national security is providing such assistance in accordance with the law.

Definition of "Central Authorities"

22. Members consider that the definition of "Central Authorities"[5] under clause 3(1) of the Bill should set out "the Communist Party of China" ("CPC") to highlight its leading position. They have also expressed concern about whether the General Office of the State Council under the State Council of the People's Republic of China (i.e. CPG); components of the State Council; special institutions, institutions, and public institutions directly under the State Council as well as the offices of the State Council; and national bureaux administrated by the ministries and commissions of the State Council fall within the meaning of "the body of central power" referred to in the definition of "Central Authorities".

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[5] The proposed definition of "Central Authorities" is: The body of central power under the constitutional order established by the Constitution, including (but not limited to) the National People's Congress of the People's Republic of China and its Standing Committee, the President of the People's Republic of China, the Central People's Government of the People's Republic of China and the Central Military Commission of the People's Republic of China.

23. The Administration has explained that the meaning of the term "Central Authorities" in the Bill should be read together with the content of the provisions of the Bill and the constitutional system of the state. According to the Constitution, leadership by CPC is the defining feature of socialism with Chinese characteristics. CPC governs all the bodies of central power.[6] The listing of certain authorities under the reference to "the body of central power" in the definition is illustrative and non-exhaustive in nature. The Administration considers the current drafting of the definition of "Central Authorities" appropriate.

Definition of "international organization"

24. Members note that under the proposed definition of "international organization", an organization would be an "international organization" if its members include one or more countries, regions or places; or entities entrusted with functions by any country, region or place. Members are concerned that the definition of "international organization" is too broad, and may cover some professional bodies the members of which include one or more countries, regions or places; or commercial entities receiving financial contributions from or established by the government of a certain country.

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[6] See the following "reply to a question on the interpretation of the term 'Central Authorities' in the Safeguarding National Security Bill of the Hong Kong Special Administrative Region" promulgated by the Legislative Affairs Commission of the Standing Committee of the National People's Congress on its official web page on 9 March 2024:

1. The meaning of "Central Authorities", "Central People's Government" and "the body of central power" in the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region must be understood and grasped in connection with the relevant statutory provisions and the context.

2. Based on the provisions of the Constitution of the People's Republic of China and relevant laws, the definition of "Central Authorities" and "the body of central power" in the proposed Safeguarding National Security Bill of the Hong Kong Special Administrative Region may be specified as follows, to include: (1) the National People's Congress and its Standing Committee; (2) the President of the People's Republic of China; (3) the Central People's Government; (4) the Central Military Commission of the People's Republic of China; and (5) other body of central power of the People's Republic of China.

25. The Administration has explained that Part 1 of the Bill does not contain any offence provisions. The definition of "international organization" in clause 3 of that Part mainly seeks to include it in the definition of "external force" under the Bill, and stressed that the term "international organization" under the Bill is a neutral one which does not carry any negative connotation. No organization would commit any of the proposed offences under the Bill simply because it falls within the definition of "international organization" or "external force". It is necessary to define "international organization" given the complexity of the international geopolitical situation nowadays. The Administration considers that the stringency of the definition of "international organization" is appropriate, and when complemented by elements of the relevant offences, it can effectively address some national security risks that Hong Kong or the state is now facing.

26. Members have sought clarification from the Administration as to whether an organization should be regarded as an "international organization" referred to under the Bill if its members comprise only one country, region or place. The Administration has advised that the word "include" used in item (a) of the definition means that members of the organization comprise more than one country, region or place. The drafting of the definition has drawn reference from the definition of the term "international organization" under section 198 of the Copyright Ordinance (Cap. 528). Members consider that the current drafting should be amended to avoid giving the wrong impression that certain international organizations can have only one member. After consideration, the Administration has agreed to take on board members' suggestion and will propose an amendment to this effect.

Definition of "external place"

27. Under the Bill, "external place" means "a region or place outside the HKSAR (other than the Mainland and Macao)". Members have enquired whether the definition should be amended to "a country, region or place outside the HKSAR" in order to represent the concept of "external place" more comprehensively. Members are also concerned whether the expression "other than the Mainland and Macao" will create a loophole, rendering the Bill inapplicable to acts endangering national security involving the Mainland and Macao.

28. The Administration has advised that the subject of the Bill is the HKSAR, and "external place" means a region or place outside the HKSAR (other than the Mainland and Macao). It would not be appropriate to amend

the definition to "a country, region or place outside the HKSAR", which will juxtapose the HKSAR and a country in concept. The current proposed definition can tie in with and accurately manifest the concept of the HKSAR as a local administrative region of the People's Republic of China directly under CPG under the Basic Law. The proposed definition of "external place" is consistent with the treatment of the term in Article 29 of the HK National Security Law,[7] and the Administration does not see the need to amend it.

29. Members have enquired about the need to define the term "Mainland" and the reason for using "external place" instead of "external territory" as the English equivalent of "境外". The Administration has explained that since the term "Mainland" can be interpreted in the context of everyday use and does not carry any ambiguity, it does not necessarily require a definition according to the principles of law drafting in the common law system. In the Administration's view, the term "Mainland" is already very clear in the context of the Bill. The adoption of "external place", which is a more neutral term, as the English equivalent of "境外" in the Bill has taken into account the fact that the HKSAR is a local administrative region of the People's Republic of China, and has drawn reference from the formulation adopted in other legislation (e.g. the Import and Export Ordinance (Cap. 60) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)) when referring to the concept of "a place outside Hong Kong".

Meaning of national security

30. Clause 4 of the Bill provides for the definition of "national security". The Administration has advised the Bills Committee that, as the same set of national security standards should apply throughout a country, the Bill adopts the same definition in the National Security Law of the People's Republic of China and ensures that the term "national security" in other local laws of Hong Kong adopts the same definition. In this regard, clause 115 of the Bill proposes to amend section 3 of the Interpretation and General Clauses Ordinance by adding the definition of "national security" and specifying that the definition shall be seen in section 4 of the enacted ordinance after the Bill is passed. Clauses 126(4) and 145 of the Bill propose to amend the Societies Ordinance (Cap. 151) and section 2(2) of the Public Order Ordinance (Cap. 245) respectively by deleting the definition of "national security" in the provisions.

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[7] With regard to Article 29 of the HK National Security Law, in the unofficial English translation published by the Xinhua News Agency in the early hours of 1 July 2020, the formulation for the concept of "external place", i.e. "outside the Mainland, Hong Kong and Macao", is consistent with the wording in this Bill.

31. Regarding the inclusion of a note under clause 4 of the Bill, which specifies the reference to the meaning of national security under Article 2 of the National Security Law of the People's Republic of China, members have enquired whether the note under this clause will need to be amended accordingly if the National Security Law of the People's Republic of China is amended by the state in the future. The Administration has advised that after the Bill is passed and enacted as local legislation, the law shall continue to adhere to the principle that the same set of national security standards should apply throughout a country.

Meaning of colluding with external force

32. Clause 5 of the Bill sets out the meaning of "colluding with external force"[8] for the purposes of an offence under the Ordinance. Members have enquired whether the meaning of "colluding with external force" in this clause will apply to the offence of "collusion with a foreign country or with external elements to endanger national security" prescribed in Part 4 of Chapter III of the HK National Security Law. The Administration has explained that "colluding with external force" is one of the elements of acts (e.g. the offence of "espionage" which involves colluding with an external force to publish to the public a statement of fact that is false or misleading) or a condition leading to increased penalties (e.g. colluding with an external force to incite disaffection) for certain offences under the Bill. The purpose of this clause is to state what acts will constitute the above circumstances. As for "collusion with a foreign country or with external elements to endanger national security" referred to in the HK National Security Law, this is the title of Part 4 of Chapter III of the HK National Security Law, and the term "collusion" is not used in the relevant offence provisions.

33. Members are concerned that the acts prescribed in clause 5(a) to (e) of the Bill have not set out the specific elements relating to the offences, which may easily mislead the public into thinking that doing an act will readily amount to the commission of such offences, and whether it can be used as a defence if a person commits an act under coercion or without

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[8] For the purposes of an offence under the Bill, a person colludes with an external force to do an act if one or more of the following circumstances exist—
(a) the person participates in an activity planned or otherwise led by an external force, and the act is an act that the person's participation in the activity involves;
(b) the person does the act on behalf of an external force;
(c) the person does the act in cooperation with an external force;
(d) the person does the act under the control, supervision or direction of, or on request by, an external force;
(e) the person does the act with the financial contributions, or the support by other means, of an external force.

choice. The Administration has stressed that other elements of these offences must exist at the same time in order for those who collude with external forces to have committed the offences concerned. The legislative intent in respect of the acts prescribed in clause 5(a) to (e) refers to a person who does an act out of his or her own wish. The Administration has confirmed that in prosecuting the relevant offences under the Bill, the prosecution will have to prove that the defendants knew that the party with whom they were "colluding" was an external force.

Meaning of external force

34. Clause 6 of the Bill provides for the definition of "external force". The Administration has advised the Bills Committee that the term "external force" under the Bill is neutral without any negative connotation. If an organization meets the definition of "external force", this will not in itself cause the organization to commit any offence. Members have suggested that the Administration should consider adding the expression "For the purposes of an offence under this Ordinance" at the beginning of the clause to specify that the purpose of this clause is to define "external force" in the context of the proposed offences under the Bill.

35. In reply to members' enquiry, the Administration has advised that it is currently common for external forces to carry out acts endangering national security in the HKSAR through "agents" (i.e. bodies or individuals funded or actually manipulated by external forces). It is therefore necessary to add references to "related entity" and "related individual" to the definition of "external force" to cover "agents" of external forces. The drafting of the relevant provisions has drawn reference from the laws in Australia and Singapore relating to safeguarding national security. The Legal Adviser to the Bills Committee has enquired whether the Administration can provide concrete wording or some actual examples to explain the ways "to exercise, by virtue of other factors, substantial control", whereby a "related entity" and "related individual" will come about. The Administration has advised that these other factors are wide-ranging, and illustrated with examples from the newspapers that many foreign governments use money and financial contributions to make the bodies concerned work for them under their control and require them to act in accordance with their directions. The Legal Adviser to the Bills Committee has also enquired whether consideration needs to be given to broadening the definition of "external force", which does not explicitly include "individuals" (e.g. monarchs or heads of state). The Administration is of the view that such individuals are already covered by clauses 6(1)(a) and (b) and 6(4) of the Bill.

36. Pointing out that in recent years, there has been an increasing number of organizations or bodies in the international arena which operate in the mode of virtualization, decentralization, etc., members are concerned whether the reference to "organization" in clause 6(1)(d) and (e) and the reference to "related entity" in clause 6(1)(f) of the Bill cover such organizations or bodies. The Administration has advised that the Bill is drafted on the "technology-neutral" principle. The meaning of "external force" does not confine the mode of operation of the relevant organizations or bodies, and "organizations" and "bodies" may include those operating on the Internet.

Offences relating to treason

Proposals of the Bill

37. Clause 10 of the Bill proposes to provide for the offence of "treason": A Chinese citizen who does any of the acts set out in this clause (e.g. joins an external armed force that is at war with China) commits an offence and is liable to a maximum penalty of life imprisonment. Clause 11 of the Bill provides for the offence of "publicly manifest intention to commit offence of treason": A Chinese citizen commits an offence if the Chinese citizen publicly manifests an intention to commit the offence of "treason". Clause 12 of the Bill provides for the requirement on "disclosure of commission by others of offence of treason": If a Chinese citizen knows that another person commits the offence of "treason", the Chinese citizen must make a disclosure to the police as soon as possible, and if the Chinese citizen contravenes the requirement, the Chinese citizen commits an offence. The maximum penalty for these two offences is imprisonment for 14 years.

38. Clause 13 of the Bill proposes to provide for the offence of "unlawful drilling": If a person provides or participates in drilling such as practice of military exercises without permission, the person commits an offence unless the act is done under the specified exceptional circumstances. The maximum penalty for providing specified drilling without permission, or being present at a meeting for the purpose of providing specified drilling, is imprisonment for seven years; and the maximum penalty for receiving specified drilling at a meeting held without permission, or being present at a meeting for the purpose of receiving specified drilling, is imprisonment for three years. If any external force is involved in the unlawful drilling, higher penalties will be applicable.

Treason and related acts

39. Clause 10(1) of the Bill provides for the related acts and persons to whom the offence of "treason" applies (i.e. Chinese citizens). Members have asked whether Chinese citizens included citizens with dual nationality. The Administration has explained that any Hong Kong resident of Chinese descent who was born in the territory of China, or any other person who meets the requirements for Chinese nationality as prescribed by the Nationality Law of the People's Republic of China is a Chinese national.

40. Under clause 10(1)(b) of the Bill, one of the acts in the offence of "treason" is "assists an enemy at war with China in a war". Members have asked the meaning of the term "assists" in the provision. The Administration has advised that the term "assists" has a broad meaning, including any form of assistance to an enemy. However, the relevant act of assistance requires mens rea (i.e. "intent to prejudice the situation of China in a war") to constitute the offence of "treason". Hence, a person who provides humanitarian assistance to enemy civilians in accordance with the International Humanitarian Law without the aforementioned mens rea does not commit the relevant offence.

41. Noting that the maximum penalty for the offence of "treason" is life imprisonment, members have enquired about the penalties for the offence of "treason" under foreign laws. The Administration has advised that the maximum penalty is imposed for the offence of "treason" under the laws of all jurisdictions. In Hong Kong, the maximum penalty is life imprisonment. The maximum penalty for this offence in Australia, Canada and the United Kingdom is also life imprisonment, whereas that in the United States and Singapore is death penalty.

42. The Legal Adviser to the Bills Committee has enquired how to distinguish between "levies war against China" in clause 10(1)(c) and "with intent to endanger the sovereignty, unity or territorial integrity of China, uses force or threatens to use force" in clause 10(1)(e) of the Bill. The Administration has advised that clause 10(1)(c) refers to levying war, whereas clause 10(1)(e) includes situations which have not yet developed into war.

43. Members have enquired about the reason for the need to distinguish between "external armed force" and "enemy at war with China" in clause 10(2) of the Bill, and the meaning of "at war" in the provision. The Administration has advised that "enemy at war with China" includes parties not covered by the definition of "external armed force". If the actual

situation has entered a state of war, it is already "at war", in which there may not be the need for declaration of war. The Administration has further advised that the reference to "war" in this clause refers to physical war. It does not include other situations such as technological war or financial war.

44. Members have noted that clause 131 of the Bill seeks to repeal Parts I and II of the Crimes Ordinance (Cap. 200), including the repeal of the provisions on treason ("叛逆") in Part I of the Crimes Ordinance, which will be replaced by the offence of "treason" ("叛國"). The Legal Adviser to the Bills Committee has stated that according to the relevant requirement in the Crimes Ordinance, prosecution against "treason" has to be commenced within three years after the offence is committed, but the Bill does not impose a time limit on prosecution for the offence of "treason". The Administration has explained that treason is a very serious offence which may involve complicated external circumstances and the investigation may take a long time. It would not be in the best interests of the state to set a time limit for prosecution. For this reason, the relevant time limit is removed.

Disclosure of commission by others of offence of treason

45. Clause 12(1) of the Bill provides that if a Chinese citizen knows that another person commits the offence of "treason", the person must disclose the commission of offence to a police officer as soon as reasonably practicable after the person knows of the commission of offence. Members have asked whether "knows" in the provision means "ought to know" or "having actual knowledge", and what constitutes "reasonably practicable". The Administration has advised that "knows" means "having actual knowledge". Considering that the person in the know may not be able to report the case immediately owing to various reasons, "reasonably practicable" seeks to give a more specific description of what is meant by making a disclosure "as soon as possible".

46. Clause 12(3) of the Bill provides that "This section does not affect any claims, rights or entitlements on the ground of legal professional privilege". Members have asked the Administration to explain how this provision will apply to cases which may involve national security. The Administration has explained that Article 35 of the Basic Law guarantees that Hong Kong residents shall have the right to confidential legal advice, including cases that may involve national security. However, legal professional privilege does not apply to situations where a lawyer learns as a friend that a friend may have intent to endanger national security. Nor does it cover situations where the lawyer concerned is an accomplice.

Unlawful drilling

47. Members have cited different activities and circumstances and enquired the Administration whether they fall within the meaning of "specified drilling" in clause 13 of the Bill. The Administration has advised that the offence of "unlawful drilling" refers to physical drilling which does not include online drilling. Nevertheless, the offence of "sabotage endangering national security" in Part 5 of the Bill includes crimes committed in relation to computers or electronic systems.

48. Members have pointed out that some foreign schools would provide military or militia training for their students. They have asked whether Hong Kong students studying in these schools will thus commit the offence of "unlawful drilling". The Administration has advised that under clause 13(5)(f) of the Bill, if the specified drilling is provided by the military, national defence or police department of a government of a foreign country, and the drilling is a part of a course or extra-curricular activity held or arranged by an educational establishment for the students receiving full-time education at the educational establishment, then it does not fall under unlawful drilling which is subject to regulation.

49. Members are concerned that the extra-territorial effect for the offence of "unlawful drilling" under clause 13(3) and (4) of the Bill does not apply to non-Hong Kong permanent residents living in Hong Kong. The Administration has advised that an appropriate balance has been struck in setting Hong Kong permanent residents as persons to whom the extra-territorial effect applies. In addition, if substantiated intelligence or evidence has been grasped, showing that there are non-permanent residents receiving unlawful drilling outside the territory, posing risks endangering national security, the Administration can deal with it by invoking the powers under the Immigration Ordinance (Cap. 115) as appropriate. The Legal Adviser to the Bills Committee has queried that participation in activities or military drilling of the International Committee of the Red Cross on humanitarian grounds does not seem to fall under the exceptions in clause 13(5). The Administration has advised that such activities should be excluded from the definition of "specified drilling", and the Ordinance allows the person concerned to apply to the Secretary for Security or the Commissioner of Police for permission in relation to a particular case.

Offences relating to insurrection, incitement to mutiny and disaffection, and acts with seditious intention

Proposals of the Bill

50. Clause 15 of the Bill proposes to introduce the offence of "insurrection": A person commits an offence if the person does an act set out in that section (such as initiating armed conflict against a Chinese armed force), the maximum penalty for which is life imprisonment.

51. Regarding the offence of incitement to mutiny, clause 17 of the Bill provides that a person commits an offence if the person knowingly incites a member of a Chinese armed force to abandon the duties and abandon the allegiance to China, or to participate in a mutiny, the maximum penalty for which is life imprisonment. Clause 18 of the Bill provides that a person commits an offence if the person knowingly assists a member of a Chinese armed force to abandon the duties or absent himself or herself without leave, the maximum penalty for which is imprisonment for seven years. Regarding the offence of incitement to disaffection, clauses 19 and 20 of the Bill respectively provide that a person commits an offence if the person knowingly incites a public officer to abandon upholding the Basic Law and abandon the allegiance to the HKSAR; or incites any of the personnel of an office of the Central Authorities in Hong Kong (other than the Hong Kong Garrison) to abandon the duties and abandon the allegiance to the People's Republic of China, the maximum penalty for which is imprisonment for seven years. Higher penalties will be applicable if the three aforementioned offences involve collusion with external forces. Under clause 21 of the Bill, a person commits an offence if the person, with intent to commit an offence under clause 17, 19 or 20, possesses a document or other article of incitement nature, the maximum penalty for which is imprisonment for three years.

52. Clauses 22 to 25 of the Bill set out the elements of the offences in connection with seditious intention, and stipulate that the maximum penalty for these offences is imprisonment for seven years. Higher penalties will be applicable if collusion with external forces is involved.

Offence of "insurrection"

53. Members are concerned about how to distinguish between the offence of "insurrection" under clause 15 and the offence of "treason" under clause 10 of the Bill. The Administration has advised that clause 10 mainly targets external threats to national security, i.e. from places outside the state, whereas the offence of "insurrection" under clause 15 of the Bill targets

threats within China (including the HKSAR). Besides, the offence of "treason" applies to Chinese citizens of Chinese descent, whereas the applicability of the offence of "insurrection" is not limited to Chinese citizens. In addition, in reply to the enquiry of the Legal Adviser to the Bills Committee about the adoption of "being reckless" as an element of offence in clause 15 of the Bill, the Administration has advised that the threshold for conviction with "being reckless" as an offence element is very high and is similar to that of "with intent", and it is a completely different concept from "being careless" or "being negligent". The Administration has also pointed out that there is similar legislation in Australia.

54. Members have asked which types of body constitutes "body corporate" as referred to in clause 16(1)(a)(ii) of the Bill, and who should be held accountable if the body corporate concerned has contravened the law. In response, the Administration has cited companies as an example, pointing out that under the criminal law, a company is liable to a fine if it commits an offence. Such an approach is consistent with Article 31 of the HK National Security Law. As regards company directors, they will not automatically be criminally liable solely for an offence committed by their company, but under section 101E of the Criminal Procedure Ordinance (Cap. 221), if a company commits an offence and the offence was committed with the consent or connivance of a director, the director shall be held criminally liable.

Offence of "incitement to mutiny" and "disaffection"

55. Clause 17(1)(a) of the Bill provides that a person who knowingly incites a member of a Chinese armed force to abandon the duties and abandon the allegiance to China commits an offence. Considering that the intent of incitement is already quite obvious, members have asked why it is necessary to add the element of "knowingly". The Administration has advised that this provision means that to constitute an offence, the person in question must be aware of the identity of the target of incitement, i.e. knowing that the person being incited is a member of a Chinese armed force.

56. Members have expressed concern about the scope of coverage of "public officer" under clause 19(3) of the Bill. Members are of the view that this provision should cover prominent public officers such as Chairman and Chief Executive Officer of the Securities and Futures Commission, Chairman of the Airport Authority, Chairman of the Hospital Authority, and Chairman of the Hong Kong Exchanges and Clearing Limited ("HKEx"), since these public officers who are in charge of the financial, economic or healthcare system in the HKSAR occupy a very important position in the governance and operation of the Government. Members have enquired

about the factors of consideration in determining the scope of coverage of public officer under this provision, including whether being paid is adopted as a criterion. The Administration has advised that the most important consideration is the risk posed to the overall security of the HKSAR if the public officer concerned is incited to abandon upholding the Basic Law and abandon the allegiance to the HKSAR. Members have suggested that the Administration can set the scope of coverage of public officer by way of subsidiary legislation so that it can be revised as and when necessary. After consideration, the Administration has agreed to take on board members' suggestion to amend the Bill to empower the Chief Executive in Council, by order published in the Gazette, to specify a class of persons as public officers. Such order will have legislative effect and will be subsidiary legislation subject to negative vetting by LegCo under section 34 of the Interpretation and General Clauses Ordinance. The Administration considers that the Ordinance can be enforced in a more effective manner under this forward-looking mechanism.

57. Members have asked whether possession of documents or articles of incitement nature without distribution will constitute an offence under clause 21 of the Bill. As members of the public often receive messages and emails from unknown sources on their mobile phones and computers, members are concerned whether the situation will contravene the law if the messages and emails are of incitement nature and members of the public forget to delete them. The Administration has advised that whether there is mens rea is of prime importance. The relevant offence is not committed if there is no mens rea.

Seditious intention and related offences

58. Clause 22 of the Bill provides for the definition of "seditious intention". Members have noted that under clause 22(2)(a) to (c), an intention to bring a Chinese citizen, Hong Kong permanent resident or a person in the HKSAR into hatred or contempt against the fundamental system of the state, a state institution under the Constitution, the offices of the Central Authorities in Hong Kong, and the constitutional order, executive, legislative or judicial authority of the HKSAR constitutes seditious intention. Members have expressed concern that some members of the public and business and professional organizations are worried about whether they will be regarded as having a "seditious intention" if they express opposing views or made criticisms on government policies.

59. The Administration has emphasized that the offence of "seditious intention" absolutely will not impede anyone from expressing different or opposing views on government policies. Under clause 22(4)(a) and (b) of

the Bill, if the organization or person concerned gives an opinion only with a view to improving the system or constitutional order, or proposing improvement to a matter in respect of such authorities as the Government, such an opinion will not be regarded as having a seditious intention. Clause 22(4) of the Bill has made reference to the definition of "seditious intention" in section 9 of the existing Crimes Ordinance and, through the adaptation amendments made in the Bill, specified circumstances that do not constitute "seditious intention".

60. Clause 24 of the Bill provides that for the purpose of "seditious intention", proof of intention to incite public disorder or to incite violence is not necessary. Members have enquired about the purpose of this provision. The Administration has advised that there were legal disputes in the past over whether an additional proof of intention to incite public disorder or to incite violence is required to establish a "seditious intention". Therefore, in order to avoid unnecessary disputes in the future, it is necessary to provide for the relevant matters in the statute law through enactment of the Bill. The Administration has pointed out that there is also a practical need for clause 24 of the Bill because many publications, words and acts in the past, though not directly inciting the use of violence or inciting others to disrupt public order, have had a seditious effect. The cumulative effect of leaving such acts unchecked is that the community will be overrun by violence and unlawful acts, and that the community will experience prolonged social unrest and instability. Clause 24 of the Bill seeks to address this situation.

61. In response to the Legal Adviser to the Bills Committee, the Administration has confirmed that under clause 24(1)(b) of the Bill, unless the intention to incite others to do a violent act constitutes an element of the offence of "seditious intention", it is not necessary to prove in proceedings for the offence that the person concerned does the act or utters the word with such an intention. In the judgement handed down on 7 March 2024 in the case *HKSAR v Tam Tak Chi (CACC 62/2022)* ("Tam Tak Chi case"), the Court of Appeal also established that an intention to incite violence was not a necessary ingredient of the offence of sedition, unless the seditious intention involved violence.

62. In response to the enquiry of the Legal Adviser to the Bills Committee on how a "seditious intention" will be determined, the Administration has advised that with reference to the judgement handed down by the Court of Appeal in the Tam Tak Chi case, the Court will take an overview of the relevant circumstances and make interpretations in context in determining whether or not a particular word or act has a "seditious intention". Besides, the Legal Adviser to the Bills Committee has enquired, in relation to clause 26(3) of the Bill, about the handling of and law

enforcement in a case where a publication that has a seditious intention is inside private premises but is visible from a public place. The Administration has advised that if a publication that has a seditious intention is visible from a public place, it may constitute national security risks, and given that the power conferred by the provision is confined to the removal of the publication and does not involve the powers of search or criminal investigation, the Administration has, therefore, considered that this should be in compliance with the provision of Article 29 of the Basic Law.

63. Clause 23 of the Bill provides for the offences in connection with "seditious intention" and the penalties thereof. Members have asked whether, if a person publishes a seditious publication through an online social platform, the administrator of the platform will be held legally liable under clause 23 of the Bill, and whether the administrator will be required to censor the contents uploaded by users and remove seditious contents from the platform. The Administration has explained that the administrator of the platform does not commit the relevant offence if he does not publish the publication knowing that the publication has a seditious intention. If the relevant content is to be taken down, the authorities may request the platform to remove the content in accordance with Schedule 4 to the Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("the Implementation Rules").

64. Members have enquired whether it will constitute an offence of possessing a publication that has a seditious intention without reasonable excuse under clause 23(3) of the Bill if a university or research institute collects or handles a seditious publication in the course of conducting academic researches or studies. Noting that clause 23(1)(c) and (2)(c) of the Bill provides that a person who "imports a publication that has a seditious intention" commits an offence, members are concerned about whether a person will commit an offence if he imports such a publication from outside Hong Kong or possesses it without knowing that its content has a seditious intention.

65. The Administration has advised that if a university or research institute obtains a publication that has a seditious intention through normal research or information collection activities, this can be regarded as a reasonable excuse under clause 23(3) of the Bill. In addition, clause 25 of the Bill provides a defence for the offence of "importing a publication that has a seditious intention" under clause 23(1)(c) and (2)(c); while the relevant evidential burden rests on the defendant, the burden of proof remains with the prosecution. Therefore, there is no cause for undue public concern.

66. Members have expressed concern about whether the definition of "publication" in clause 23 of the Bill includes articles that do not consist of any words (such as sculptures), as well as videos, songs, and so on. The Administration has advised that according to the Interpretation and General Clauses Ordinance, "publication" may include printed matter, contrivance or anything by means of which any words or ideas may be represented or conveyed. If someone displays with a seditious intention a seditious article that does not consist of words, this may be regarded as an act done with a seditious intention under clause 23(1)(a)(i).

Offences in connection with state secrets

Proposals in the Bill

67. Clauses 30, 31 and 33 of the Bill provide for the offences relating to the acquisition, possession and disclosure of state secrets without lawful authority. The offences of "acquiring, possessing or disclosing a state secret without lawful authority while knowing that any information, document or other article is or contains a state secret with intent to endanger national security (or being reckless as to whether national security would be endangered)" where higher penalties will apply are also introduced therein.

68. For the offence of "disclosure of state secrets without lawful authority", given that public officers or government contractors have easier access to state secrets and they should have clear understanding of the sensitivity of such information, it is recommended under clause 33 of the Bill that higher penalties should apply if a person who is or was a public officer or government contractor discloses any information that is a "specified state secret" and that is (or was) acquired or possessed by the person by virtue of the person's capacity above; higher penalties will also apply if a public officer or government contractor, without lawful authority, discloses other state secrets that are not "specified state secrets". In addition, clause 35 of the Bill proposes to provide for the offence of disclosing information, etc. that appears to be confidential matter with intent to endanger national security and without lawful authority. For this offence, higher penalties will also apply if collusion with external forces is involved.

69. Clauses 36 and 37 of the Bill are related to authorized disclosures and safeguarding of information, which provide for the types of disclosures that are made with lawful authority and the requirements for the handling of state secrets and information acquired by espionage by public officers, government contractors and other persons.

Related offences

70. Members have noted that clause 28 of the Bill provides detailed definition of "state secrets": a secret is a state secret if it is one of the items of secrets referred to in paragraphs (a) to (g)[9] under that clause, and the disclosure, without lawful authority, of which would likely endanger national security. Members have pointed out that the proposed definition of "state secret" in clause 28 of the Bill is very clear compared with that in many overseas jurisdictions. For example, the term "protected information" in the recently passed National Security Act 2023 of the United Kingdom is loosely defined and has a wide coverage.[10]

71. Members have noted that the definition of "disclose" under clause 28 of the Bill includes "parting with possession of the document or article". Members are concerned about whether "loss" is covered in the definition. The Administration has responded that the motive behind the act will have to be examined on a case-by-case basis. In general, accidental loss will not be regarded as unlawful disclosure of state secrets. The Administration has added that public officers or staff of government contractors are subject to more stringent data protection rules and requirements.

72. Members are concerned about whether "government contractor" in the provision covers Government-funded tertiary institutions, academic

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[9] The seven items are:

(a) a secret concerning major policy decision on affairs of China or the HKSAR;
(b) a secret concerning the construction of national defence of China or concerning a Chinese armed force;
(c) a secret concerning diplomatic or foreign affair activities of China, a secret concerning external affairs of the HKSAR, or a secret that China or the HKSAR is under an external obligation to preserve secrecy;
(d) a secret concerning the economic or social development of China or the HKSAR;
(e) a secret concerning the technological development or scientific technology of China or the HKSAR;
(f) a secret concerning activities for safeguarding national security or the security of the HKSAR or for the investigation of offences; and
(g) a secret concerning the relationship between the Central Authorities and the HKSAR (including information on affairs relating to the HKSAR for which the Central Authorities are responsible under the Basic Law).

[10] In the offence of "obtaining or disclosing protected information" under section 1 of the National Security Act 2023 of the United Kingdom, "protected information" is defined as "any information, document or other article where, for the purpose of protecting the safety or interests of the United Kingdom, access to the information, document or other article is restricted in any way, or it is reasonable to expect that access to the information, document or other article would be restricted in any way".

institutions and private research institutes, and whether these institutions are subject to the provisions relating to "government contractor" under the Bill.

73. The Administration has advised that whether a person is a "government contractor" depends on whether he falls within the definition in clause 28 of the Bill. Generally speaking, the Government will enter into contracts with its contractors to clearly define the responsibilities of both parties, and confidentiality clauses are usually included in the contracts. The Administration has stressed that the relevant requirements on state secrets under the Bill will still apply to any organization or person even if it/he is not a government contractor. However, a higher penalty will apply if a government contractor is involved in the relevant offences.

74. Members have also expressed concern that the staff of certain public organizations may have a greater chance to gain access to state secrets, but the Bill does not include the staff of these organizations in the definition of "public officer" under the offences in connection with state secrets. After consideration, the Administration has taken on board members' suggestion and agreed to propose amendments to empower the Chief Executive in Council to expand the scope of public officers under the relevant proposed offences by means of subsidiary legislation.

75. Members have enquired whether the Administration will consider making reference to the Law of the People's Republic of China on Guarding State Secrets and stipulating the duration of classification, classification levels (top secret, secret and confidential), mark, etc. of state secrets. The Administration has explained that at present, confidential information is classified into four categories, namely "Top Secret", "Secret", "Confidential" and "Restricted", in accordance with the Records Management Manual in the Security Regulations and restrictions are imposed on the authority for disclosure of such information. The Administration has further advised that the Bill has provided a detailed definition of "state secret" with reference to relevant national laws. In addition, where necessary, the Chief Executive may exercise his power conferred under clause 109 of the Bill to issue a certificate in relation to the question of whether state secret is involved, regardless of whether any proceedings have commenced. The Legal Adviser to the Bills Committee has advised that there is currently no definition of "secret" in the Bill. Citing the example of the National Security Act 2023 of the United Kingdom in which "trade secret" is defined, the Legal Adviser to the Bills Committee has suggested to the Administration to consider making reference to this approach, so that the public would have a clearer understanding of the concepts if both "secret" and "state secret" are defined in the Bill.

Specified disclosure

76. Clause 29 of the Bill seeks to provide for a defence based on "public interest" for offences relating to state secrets. Members note that if a defendant raises the defence of "specified disclosure", the defendant must prove that the disclosure meets the definition of "specified disclosure" under clause 29(1) of the Bill and satisfies the conditions for consideration in making "specified disclosure" under clause 29(2) of the Bill. The Administration has stressed that the protection of state secrets is a public interest of importance on its own merit, and any such defence would have to satisfy a very high threshold and stringent conditions. Moreover, as only the defendant himself/herself knows the reasons for disclosing state secrets, the burden of proof of the defence concerned should rest on the defendant to prevent the defence from being abused.

77. The Administration has added that in individual circumstances where the HKSAR Government's performance of its functions in accordance with the law is seriously affected or a serious threat is posed to public order, public safety or public health, national security may also be threatened. Having considered the above factors and the views received during public consultation, the Administration has therefore proposed the inclusion of a defence based on "public interest".

78. Regarding "whether the person has reasonable grounds to believe that the disclosure is in the public interest" as referred to in clause 29(2)(c) of the Bill, members have expressed concern about what constitutes "reasonable grounds". The Administration has advised that the person raising the defence should bear the burden of proof to show that he/she made the disclosure in the bona fide belief that there were reasonable grounds to do so; and the reasonableness of the ground has to be judged by the objective standard of an ordinary person.

Unlawful disclosure and related offences

79. Clause 30 of the Bill sets out the offence elements, corresponding penalties and applicable defences for the proposed new offence of "unlawful acquisition of state secrets". Under clause 30(4)(b) of the Bill, a reference to a person acquiring any information, document or other article does not include (i) the information, document or article coming into the person's physical possession without the person's knowledge; or (ii) the information, document or article coming into the person's possession or knowledge without the person taking any step. The Legal Adviser to the Bills Committee has enquired about "the criminal intent of the person concerned to endanger national security" and "recklessness as to whether he or she will

endanger national security" in clauses 30(1)(b) and 30(3)(b) of the Bill, as well as how the proportionate criminal liability would be determined. The Administration has advised that the high threshold for proving "recklessness" is comparable to the threshold for proving the existence of "intent", and has pointed out that reference has been drawn from the case law in Australia and the United Kingdom in designing the provisions. Besides, the Administration considers that the offence under clause 30(3)(b) is more serious than that under clause 30(1)(b), and this has been reflected in the proposed penalties.

80. Members are concerned about the onus of proof if a member of the public receives a state secret unknowingly or passively. The Administration has advised that clause 30(4)(b) of the Bill seeks to deal with the situation, and the burden of proof is on the prosecution. The Administration has, however, pointed out that a member of the public who has accidentally acquired or found any information, document or article which is a state secret should surrender the information, document or article concerned to a police officer as soon as possible or dispose of it in accordance with the direction of a police officer.

81. Members have asked whether a person who has acquired a state secret without lawful authority will also commit the proposed new offence of "unlawful possession of state secrets" under clause 31 of the Bill. The Administration has explained that any person who, without lawful authority, acquires any information, document or article which is a state secret and chooses to continue to possess the information, document or article may commit both the offences of "unlawful acquisition of state secrets" and "unlawful possession of state secrets". However, if that person has taken all reasonable steps to surrender the information, document or article to a police officer or dispose of it in accordance with the direction of a police officer, the person may still raise the defence against the offence of "unlawful possession of state secrets" in accordance with clause 31(4) of the Bill.

82. Noting that clause 32 of the Bill (Unlawful possession of state secrets when leaving HKSAR) only covers public officers, members have enquired about the rationale for that. The Administration has advised that it is because public officers or persons who were public officers have a greater chance of acquiring state secrets by virtue of their capacity. The provision aims to address the situation by preventing such persons from possessing state secrets without lawful authority when leaving the HKSAR.

83. Given that some persons may acquire information, documents or articles which are state secrets because of their work or their holding of public office, members have suggested that the Administration should provide clear guidelines on the handling and return of such secrets, so as to allay the concern about inadvertent breach of the law by the persons concerned. The Administration has advised that its prevailing internal Security Regulations already provide for the handling of classified information. The Administration will review the regulations in due course and remind the officers concerned again that they should strictly comply with the requirements when handling classified information or even state secrets.

Offence of "unlawful disclosure of information which appears to be confidential"

84. Clause 35 of the Bill seeks to provide for the offence of disclosing, with intent to endanger national security and without lawful authority, information, etc. that appears to be a confidential matter, and the defence for the offence. Specifically, if a person who is (or was) a public officer or a government contractor (i.e. a specified person under subsection (5)), with intent to endanger national security, and without lawful authority, discloses any information, document or other article and, in making the disclosure, represents or holds out that the information, etc. is (or was) acquired or possessed by virtue of the person's capacity as (or having been) a public officer or government contractor, and the information, etc. would be (or likely to be) a confidential matter if it were true, the specified person commits an offence regardless of whether the information, etc. is true or not.

85. Members have advised that an offence of "unlawful disclosure of state secrets" has been proposed under the Bill, and have requested the Administration to explain the purpose of providing for the offence and the acts to be targeted. They are also concerned about whether the specified person, during the course of an investigation, has the duty to account for the source of the relevant information to facilitate the investigation. The Administration has advised that public officers or government contractors have greater access to state secrets or other confidential information, and the public may easily believe that the information they claim to have obtained is true. If public officers or government contractors publish or disclose confidential information alleged to have been obtained or possessed by virtue of their capacity, with a view to endangering national security, such as publishing so-called "inside information" (be it true or not) to mislead the public and induce the hatred of HKSAR residents against the HKSAR Government, it will pose threats to national security. As the information disclosed may not be true (but it would be a confidential matter if it were

true) and may not necessarily be state secrets, and the existing provisions dealing with official secrets or the proposed provisions to deal with state secrets are ineffective in preventing, suppressing and punishing such acts that endanger national security in a targeted manner, it is necessary to introduce the proposed offence. As in the case of other criminal offences, the prosecution has to discharge the burden of proof beyond reasonable doubt for the conviction of the accused person. If a specified person alleged to have committed the proposed offence wishes to invoke the defence under clause 35(3), the relevant evidential burden is on the party invoking the defence.

86. Members have pointed out that for criminal offences, the prosecution has to prove beyond reasonable doubt before the defendant is convicted by the Court, and for this proposed offence, according to clause 35(1)(b) or (2)(b) of the Bill, even if the information is only likely to be a confidential matter if it were true, the specified person who makes the disclosure may still commit the offence. They have requested the Administration to provide information on the tests for the relevant element of the offence. The Administration has advised that the term "likely" is very common in defining the elements of a criminal offence and its meaning can be read in the ordinary sense of the word, i.e. the exclusion of remote probability.

87. The Legal Adviser to the Bills Committee has enquired about the relationship between the offence and the common law offence of "misconduct in public office", including whether they are alternative charges. The Administration has advised that the offence of "misconduct in public office" mainly targets situations involving serious conflict of interest or abuse of authority, which differs from the offence under clause 35 of the Bill in that it does not necessarily cover government contractors and does not involve an intention to endanger national security. Where circumstances of individual cases warrant, the Department of Justice will make appropriate prosecution decisions in accordance with the Prosecution Code and the evidence collected.

Safeguarding of information

88. Clause 37 of the Bill seeks to provide for the duty of public officers and government contractors to properly keep and dispose of state secrets and certain sensitive information, and to provide for certain offences and the defence for some of the proposed offences. Clause 37(2) of the Bill provides that a specified person commits an offence and is liable to a fine at level 4 and to imprisonment for 3 months if that person fails to take such care to prevent the unauthorized disclosure of the proposed protected information

as a person in the specified person's position may reasonably be expected to take. Members have referred to a number of past incidents in which public officers failed to keep USB flash drives as instructed and expressed concern that the above proposed maximum penalty cannot reflect the gravity of the misconduct involved. The Administration's elaboration has been sought on the reasons for introducing the above maximum penalty. Members have also suggested that the Administration should formulate clear guidelines (e.g. what devices should be used for storing the relevant information) so that the persons concerned will be aware of their responsibilities.

89. The Administration has advised that although the acts targeted in the above proposed offences pose a certain degree of risk to national security, the persons concerned do not intend to commit acts endangering national security and, therefore, a less severe penalty is proposed. However, the Administration cannot rule out the possibility that the accused person may have committed other offences at the same time, and an appropriate prosecution decision will be made according to the circumstances of individual cases. Contracts between the Administration and government contractors, in general, contain clauses setting out the contractors' responsibilities in handling confidential information, and public officers are also required to comply with the relevant internal code of conduct on confidential information issued by the Administration, such as the requirements under the Security Regulations for the handling of relevant confidential documents, including the specifications for the storage of devices and the security requirements.

90. Clause 38 of the Bill seeks to provide for the extra-territorial effect of the proposed offences relating to "state secrets". Members have referred to the offences in clause 38(2) which only covered specified persons, and have suggested that the Administration should replace "a person" in the proposed provision with "a specified person under section 33(1), (4) or (5) or 35(1) or (2)" so that the public can have a clear understanding of the scope of the proposed offences. The Administration has advised that although clause 38(2) refers to "a person", each offence provision will specify the specific persons to be covered, and "a person" refers to any of the specific persons to be covered, and both clauses need to be read together. The Administration considers that this is the clearest expression in law and therefore does not intend to amend clause 38(2).

91. Members are advised that the reference to clause 33(7) in clause 38(1)(b) should instead read clause 33(8), and the Administration will propose an amendment to the provision. In addition, members have also expressed concern that the proposed offences under clause 37(5) and (7) of the Bill do not have extra-territorial effect. The Administration has advised

that the offences under clause 37(5) and (7) are relatively minor offences in the context of the Bill as a whole, and those provisions of the Bill to which the extra-territorial effect is applicable are generally more serious offences. Having regard to the principles of rationality and proportionality, the Administration considers that it is not necessary for clause 37(5) and (7) to have extra-territorial effect.

Offences in connection with espionage

Proposals of the Bill

92. Clause 41 of the Bill proposes to create an offence of "espionage". Under the clause, espionage includes certain acts relating to prohibited places, certain acts relating to information, etc. useful to an external force, and colluding with an external force to publish to the public a statement of fact that is false or misleading.

93. Clause 42 of the Bill proposes to provide for offences of "entering prohibited places without lawful authority etc." to prohibit acts of a person entering a prohibited place, etc. without reasonable excuse or lawful authority if the person knows (or has reasonable grounds to believe) that he has no lawful authority to do so. Clause 43 of the Bill provides that it is an offence for a person to contravene an order made by a police officer or a guard, etc. with powers exercisable in relation to prohibited places. Clause 44 of the Bill also provides for the offence of "obstruction, etc. in the vicinity of prohibited places" to prohibit a person from wilfully obstructing, misleading, or otherwise wilfully interfering with or impeding a police officer or a guard, etc. in discharging duty in respect of a prohibited place.

94. Clause 45 of the Bill proposes to introduce the new offence of "participating in or supporting external intelligence organizations, or accepting advantages offered by them, etc." in order to prohibit a person from, with intent to endanger national security (or being reckless as to whether national security would be endangered), knowingly (or being reckless about) doing certain acts.[11]

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[11] The acts are: becoming a member of an external intelligence organization; accepting a task or training from the organization (or a person acting on behalf of the organization); offering substantial support (including providing financial support or information and recruiting members for the organization) to the organization (or a person acting on behalf of the organization); or accepting substantial advantage offered by an external intelligence organization (or a person acting on behalf of the organization).

Definition of "prohibited place"

95. Clause 39 of the Bill seeks to improve the definition of "prohibited place" in respect of the offence of "espionage", which covers military or national defence establishment; places designed for placing radiocommunications installations, telecommunications systems, telecommunications installations, telecommunications networks, servers, etc. occupied by the Central Authorities or the HKSAR Government ("relevant Authority") or on behalf of a relevant Authority, and the expression "place" means any place, including any conveyance, tent or structure.

96. Members are concerned about whether the proposed definition of "prohibited place" under the Bill is sufficient to cover the relevant places in order to respond to present and future national security risks. Members are also concerned about whether the proposed definition covers data centres and places with super-computers, etc. which handle data/communication related to national security. The Administration has advised that the definition of "prohibited place" under clause 39 of the Bill, which sets out the facilities designed for placing a number of communication-related facilities (e.g. servers), may cover data centres and places with super-computers about which members are concerned. In addition, clause 40(1) of the Bill also seeks to empower the Chief Executive to declare a particular place or a description of place in the HKSAR as a prohibited place. This will ensure that the definition of prohibited place can effectively respond to present and future national security risks.

Provisions relating to prohibited place

97. Noting that the Chief Executive may declare a place as a prohibited place under clause 40(1) of the Bill, members are concerned about the ways in which the declaration will be made and how members of the public learn of the places that have been designated as prohibited places. The Administration has advised that a place will be declared as a prohibited place by way of press release and gazettal, and signs will be erected at the prohibited place to inform the public. In response to members' views, the Administration will propose an amendment to state clearly in clause 40(1) that the Chief Executive will declare a place as a prohibited place by order published in the Gazette. The Administration has confirmed that such declaration order is subsidiary legislation, which is subject to the negative vetting procedure of LegCo under section 34 of the Interpretation and General Clauses Ordinance.

98. Members have asked whether the Administration will resume the private places declared as prohibited places by invoking the Lands

Resumption Ordinance (Cap. 124). The Administration has emphasized that land resumption and the declaration of a place as a prohibited place under clause 40 of the Bill are different concepts, i.e. the declaration of prohibited places will not result in resumption of title to a place. One of the matters that the Chief Executive must have regard to in deciding whether a place should be declared as a prohibited place is "the owner or occupier of the place" (clause 40(2)(b) of the Bill).

99. In response to members' concern about different scenarios, the Administration has advised that if a person is invited to visit a prohibited place (such as a barrack), the person will have the lawful authority to enter the prohibited place. If a person inadvertently enters a prohibited place and the person does not know (and has no reasonable ground to believe) that he is entering the prohibited place without lawful authority, this will not constitute an offence under clause 42 of the Bill; but if a person who has inadvertently entered a prohibited place is ordered by a specified officer referred to in clause 43 to leave the prohibited place but continues to stay, this may constitute an offence under clause 43. The Administration has stressed that both mens rea and actus reus must be present at the same time in order to establish a person's breach of law. Furthermore, clause 43(3) provides that a specified officer may exercise his power under the provision only for the purpose of safeguarding national security, so members of the public need not be overly worried.

100. Members have enquired why the order to be made by a specified officer under clause 43 of the Bill does not include a requirement for a person entering a prohibited place to produce the information obtained. The Administration has explained that a police officer is also a "specified officer" for the purposes of the provision, and may search for evidence in accordance with the enforcement powers under the existing legislation where necessary.

101. There was a suggestion that consideration should be given to introducing heavier penalties for the offence of unauthorized entry into prohibited places occupied by the Central Authorities, so as to reflect the seriousness of the offence. The Administration has advised that the offence of "insurrection" under the Bill and the offence of "subversion" under Article 22 of the HK National Security Law, which carry heavier penalties, may deal with acts of unauthorized entry into prohibited places occupied by the Central Authorities to endanger national security (as the case may be) .

Espionage

102. Pointing out that the Counterespionage Law of the People's Republic of China has defined six types of espionage acts, members have enquired whether reference was made to these definitions in the drafting of clause 41 of the Bill. The Administration has advised that other parts of the Bill have provided for related matters, including clause 45 on participating in or supporting external intelligence organizations, or accepting advantages offered by them, etc..

103. Members have enquired about the reasons for the different penalties for offences under clause 41(1) and (3) of the Bill. The Administration has advised that as the offence under clause 41(1) is of a more serious nature and may involve information seriously affecting national security and information that may be useful to external force, the proposed maximum penalty is therefore imprisonment for 20 years. As for the offence under clause 41(3), although it involves collusion with external force, it only involves publishing a statement of fact that is false or misleading and is of a different nature, and therefore the proposed maximum penalty is imprisonment for 10 years.

104. Members have enquired whether it is an offence under clause 41(1) of the Bill if a person collects information such as pictures and videos of a prohibited place at the instruction of another person with the acceptance of advantages. Members have also expressed concern about the meaning of "in the neighbourhood of a prohibited place" in clause 41(2) of the Bill, and whether the interpretation will arouse public concern that the scope is unclear or too wide.

105. The Administration has stressed that if a member of the public performs certain acts in a prohibited place or "in the neighbourhood of a prohibited place" without an intent to endanger national security, this will not constitute an offence under clause 41(1) of the Bill and members of the public need not worry that they will be caught by the law inadvertently as a result of day-to-day activities. The Administration has pointed out that the expression "in the neighbourhood of a prohibited place" should be interpreted in common sense such that the offence under clause 41(1) covers relevant acts done by electronic or remote means (such as the use of unmanned aerial vehicles to capture images of the situation of a prohibited place with intent to endanger national security). In addition, if a person knows that another person intends to endanger national security and does an act referred to in clause 41(2) at the instruction of that other person, the

former may be prosecuted for offences such as aiding, abetting, conspiracy, etc. under existing legislation.

106. In response to members' further enquiries, the Administration has confirmed that if the information, documents or other article referred to in clause 41(2)(c) of the Bill are state secrets, such act may also involve the proposed offence relating to state secret in Division 1 of Part 4 of the Bill. In addition, after the enactment of the Bill, the Administration will update the internal guidelines for law enforcement officers as appropriate in order to ensure that they comply with the confidentiality requirements when they come into contact with sensitive information relating to national security in the course of law enforcement.

107. In response to the question raised by the Legal Adviser to the Bills Committee on the standard of proof for the offence under clause 41(3) of the Bill, the Administration has confirmed that a statement of fact that is false or misleading for the purposes of the offence need not relate to national security. Endangering national security or being reckless as to whether national security will be endangered is the mens rea of the offence, not the actus reus.

108. Clause 41(4)(c) of the Bill defines a misleading statement of fact. Members are concerned that clause 41(4)(c)(i) to (iii) may not fully cover all possible circumstances. They are concerned that clause 41(4)(c), as currently drafted, may render a person's act not an offence if that person makes a misleading statement in collusion with an external force with intent to endanger national security and the statement does not fall under any of the circumstances mentioned in clause 41(4)(c)(i) to (iii). Members are of the view that whether a statement is misleading can be understood in common sense and no definition is required. In the light of members' concerns, after consideration, the Administration agrees that it is not necessary to provide a definition for misleading statements, and an amendment will be proposed to delete clause 41(4)(c).

Participating in or supporting external intelligence organizations, or accepting advantages offered by them, etc.

109. Clause 45(4) of the Bill provides that "external intelligence organization" means an organization established by an external force and engaging in intelligence work; or subversion or sabotage of other countries or places. Members have expressed concern about the proposed definition. They have enquired why, in addition to intelligence work, the proposed definition only lists "subversion" and "sabotage", while other acts and activities endangering national security are not included. In addition, as many overseas organizations or think tanks provide consultancy and

information analysis reports for their clients, members have queried whether they will be regarded as "external intelligence organizations"; and whether it will constitute an illegal act if members of the public purchase reports from these organizations or think tanks or engage them in daily social activities.

110. According to the Administration, in finalizing the proposed definition, it has taken into account the work and activities generally carried out by intelligence organizations which endanger national security. Given the nature of intelligence organizations, there is no specific definition of "external intelligence organization" in the comparable offences in both the United Kingdom and Australia. A think tank engaging in policy research cannot be confused with an "external intelligence organization". Members of the public need not worry about committing an offence under clause 45 of the Bill if they do not knowingly do a prohibited act (or are not reckless as to whether the act would constitute the prohibited act) set out in clause 45(4) in relation to an "external intelligence organization" without intent to endanger or being reckless as to national security.

111. Members have also enquired about the meaning of "intelligence work" in the proposed definition. The Administration has advised that "intelligence work" needs to be related to national security, and the espionage as referred to in clause 41(2)(c) of the Bill (i.e. collecting information useful to an external force, etc.) is a common type of intelligence work. At members' request, the Administration has advised that it will review the proposed definition of "external intelligence organization" with a view to dispelling any possible misunderstanding of the definition by the public.

112. Members have expressed concern as to how the public will be able to know whether an overseas organization is an "external intelligence organization" and have enquired about whether the Administration will provide a list in this regard. The Administration has advised that many "external intelligence organizations" are highly insidious, making it difficult to compile such a list. If necessary, the Chief Executive may issue a certifying document under clause 45(3) of the Bill to certify an organization as an "external intelligence organization".

Extra-territorial effect

113. Clause 46 of the Bill sets out the extra-territorial effect of offences relating to espionage. Members have expressed concern that clause 46(2)(a)(i) refers to "HKSAR resident who is a Chinese citizen" while clause 46(3)(a)(i) refers only to "HKSAR resident", and have enquired about the intention behind the difference. The Administration has explained that the

acts specified in clause 41(2)(c) or the prohibited acts under clause 45 carried out by foreign citizens in external places may possibly be part of their ordinary duties in their home countries. Having considered the reasonableness and practicability of the extra-territorial effect, the Administration proposes to provide in clause 46(2)(a)(i) that the extra-territorial effect does not apply to such circumstances.

Offence of "sabotage endangering national security"

Proposals in the Bill

114. Clause 47 of the Bill proposes to create an offence of "sabotage endangering national security" to prohibit a person from damaging or weakening a public infrastructure with intent to endanger national security or being reckless as to whether national security would be endangered. The public infrastructure covered includes a facility that belongs to the Central Authorities or the Government or is occupied by or on behalf of the Central Authorities or the Government, public means of transport or transport facility that is situated in the HKSAR, and public facility providing public services (such as water, electricity, energy, fuel, drainage, communication, the Internet) that is situated in the HKSAR, as well as computer or electronic system providing or managing the said services.

115. In addition, clause 48 of the Bill proposes to create an offence of "doing acts endangering national security in relation to computers or electronic systems" to prohibit a person from doing an act in relation to a computer or electronic system that endangers (or is likely to endanger) national security with the intent to endanger national security and knowing that the person has no lawful authority. The maximum penalty for the offences of "sabotage endangering national security" and "doing acts endangering national security in relation to computers or electronic systems" is imprisonment for 20 years. In the former case, the maximum penalty is life imprisonment if collusion with an external force is involved.

Relevant definitions

116. Clause 47 of the Bill seeks to introduce a new offence of "sabotage endangering national security" to prohibit a person from damaging or weakening a public infrastructure with intent to endanger national security or being reckless as to whether national security would be endangered. Members are concerned that the term "public infrastructure" in clause 47(4) does not appear to cover other important public transport infrastructure and logistics infrastructure (e.g. cargo terminal) or infrastructure for financial services (e.g. HKEx's Central Clearing and Settlement System) situated in the HKSAR.

117. In the light of members' views, the Administration proposes to amend clause 47(4)(b) and (c) of the Bill to clarify the scope of "public infrastructure" to cover public transport infrastructure and logistics infrastructure situated in the HKSAR, and to further add non-exhaustive examples of "public services" to illustrate the wide scope of "public service".

118. Members have enquired whether the provisions in clause 47 of the Bill cover the situation where staff are prevented from going to a public infrastructure to work, and the difference between the terms "equipment" and "facility" in the provision. The Administration has pointed out that clause 47(3)(c) provides that an act is weakening a public infrastructure if the act "caus[es] the infrastructure not to be able to function as it should in whole or in part", which is an offence under clause 47(1) if the person does the act with intent to endanger national security or being reckless as to whether national security would be endangered. As regards the difference between equipment and facility, the Administration is of the view that a facility has a wider scope while an equipment can be part of a facility, and that the two overlap but are not interchangeable.

119. Clause 47 of the Bill provides a definition for the term "weaken" but not for "damage". In response to the enquiry of the Legal Adviser to the Bills Committee, the Administration has advised that "damage" is a commonly used term and therefore does not require a specific definition. On the contrary, as "weakening" of public infrastructure is a relatively new concept, the Administration has defined "weaken" in clause 47(3).

<u>External interference endangering national security</u>

Proposals in the Bill

120. Clause 50 of the Bill proposes to create an offence of "external interference". The offence consists of three parts: with intent to bring about an interference effect; collaborating with an external force to do an act; and using improper means when so doing the act. Clause 54 provides that a person charged with the offence of "external interference" is to be presumed to have done the relevant act on behalf of an external force (and therefore to have collaborated with an external force in doing the act) if the conditions set out in that clause are met. The maximum penalty for the offence of "external interference" is imprisonment for 14 years.

Elements of the offence

121. Members have pointed out that clause 50 sets a high threshold for external interference and requires collaboration with an external force to do an act with intent to bring about an interference effect, and involves the use of improper means when so doing the act. Members have pointed out that while similar provisions can be found in the National Security Act 2023 of the United Kingdom, only the intent itself, without bringing about an actual interference effect, falls within the scope of the provision.

122. Members have advised that there are frequent exchanges and cooperation as well as day-to-day business activities between Hong Kong institutions and their overseas counterparts. For instance, local businesses may seek assistance from overseas institutions in order to provide advice to the HKSAR Government, and Hong Kong think tanks may collaborate and exchange with foreign think tanks, or receive financial support from foreign sources. Members are concerned about whether these activities would constitute "collaborat[ion] with an external force" under clause 50(a) of the Bill, thereby committing the offence of "external interference".

123. The Administration has pointed out that if a person collaborates with an external force to use improper means to influence the executive, legislative and judicial authorities of the HKSAR in performing their functions or interfere with any election, it would prejudice the sovereignty and political independence of our country, thereby endanger national security. Such acts are apparently different from normal international exchanges (including exchanges in areas such as commerce, academics and culture) conducted in line with the principles of sovereign equality and non-interference under international law. To highlight the nature of endangering national security of the offence of external interference and upon review of the name of the offence, the Administration proposes to rename the offence as the offence of "external interference endangering national security", with the elements of the offence remaining unchanged. The Administration has stressed that cooperation between an institution and its foreign counterpart alone does not constitute an offence of external interference, and that the other two elements, i.e. the intent to bring about an interference effect and the use of improper means, must also be involved in committing the offence. Moreover, in response to the enquiry of the Legal Adviser to the Bills Committee, the Administration has advised that the offence of external interference (including collusion and collaboration) must also involve the actual knowledge that the individual or entity concerned is an external force and, in the absence of a presumption provision, the knowledge of the defendant could not be presumed and the burden of proof would be on the prosecution.

124. Clause 53 of the Bill provides that for the purposes of section 50, the person mentioned in that section uses improper means when doing the act mentioned in that section if the person falls within at least one of the descriptions in paragraphs (a), (b) and (c). Members have enquired about the meaning of "causing mental injury to, or placing undue mental pressure on, a person" in clause 53(1)(b)(v) and consider it unclear.

125. The Administration has explained that this provision relating to "improper means" is originally modelled on "spiritual injury" under section 15(2)(e) of the National Security Act 2023 of the United Kingdom. Taking into account members' views, and upon further research, the Administration notes that in the United Kingdom, the term "spiritual injury" is intended to cover the potential harmful impacts on an individual's spiritual or religious well-being that could be directly caused by another individual, for example, excluding a person from the membership of an organized belief system or banning them from attending a place of worship. This is not in line with the Government's intention. Clause 113(4) of the Bill (offence of "unlawful harassment of persons handling cases or work concerning national security") has used the term "psychological harm". For the sake of consistency, the Administration will propose an amendment to change the relevant limb of the definition of "improper means" to "causing psychological harm to, or placing undue psychological pressure on, a person", which is more in line with the HKSAR Government's policy intent.

126. Members appreciate that the adoption of the "presumption of doing acts on behalf of external force" in clause 54 of the Bill would assist the prosecution in adducing evidence, having regard to the fact that external interferences involving collaboration with an external force involves a certain degree of concealment and is extremely difficult for the law enforcement agencies to detect. At the same time, the defendant may provide evidence to raise an issue under clause 54(2) that the defendant does not do the act on behalf of the external force. Members have asked whether the above arrangement is in line with the principle of "presumption of innocence". The Administration has advised that it is in line with the presumption of innocence for the defendant to provide evidence to raise an issue. The defendant is only required to adduce relevant evidence to raise doubt, and the prosecution still has to prove beyond reasonable doubt before the defendant can be convicted.

Organizations engaging in activities endangering national security

Proposals in the Bill

127. Clause 58 of the Bill proposes to empower the Secretary for Security to prohibit the operation or continued operation of certain organizations ("prohibited organizations") in the HKSAR if certain conditions[12] are met. Clauses 60 to 63 of the Bill provide for offences in connection with prohibited organizations. These offences are: (a) the offence of participating in activities of prohibited organizations; (b) the offence of allowing meetings of prohibited organizations to be held on premises; (c) the offence of inciting others to become members of or assist in the management of prohibited organizations; and (d) the offence of procuring from others any subscription or aid for prohibited organizations.

Prohibition of operation of organizations engaging in activities endangering national security in the HKSAR

128. Clause 56 of the Bill provides for the interpretation of certain terms in relation to organizations engaging in activities endangering national security. Members have enquired about the meaning of "a government of a foreign country or a political subdivision of the government" in the definition of the term "political organization of an external place". The Administration has advised that a political subdivision refers to the government of a state, a province or a county etc., excluding parliaments and foundations established with the funds provided by parliaments.

129. Under clause 58 of the Bill, the Secretary for Security may prohibit certain organizations engaging in activities endangering national security from operating in the HKSAR. The Legal Adviser to the Bills Committee has enquired whether the Administration would consider setting out in a non-exhaustive manner the factors that the Secretary for Security would take into account in making such decisions so that the public would be well informed thereof.

130. The Administration has advised that as national security risks are complex and vary frequently, it would not be appropriate to set out the

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[12] The conditions are: (a) if the Secretary for Security reasonably believes that it is necessary for safeguarding national security to prohibit the operation or continued operation of any local organization in the HKSAR, the Secretary for Security may, by order published in the Gazette, prohibit the operation or continued operation of the organization in the HKSAR; (b) if a local organization is a political body and has a connection with a political organization of an external place, the Secretary for Security may, by order published in the Gazette, prohibit the operation or continued operation of the local organization in the HKSAR.

relevant factors to be considered by the Secretary for Security. However, the Administration has assured members that relevant matters such as freedom of association and freedom of expression under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383) would certainly be taken into consideration.

131. Members have enquired how the connection between a political body and a political organization of an external place under clause 58(2) of the Bill is defined, and whether it includes, among others, acceptance of financial sponsorships and other support, or direct/indirect affiliations. The Administration has advised that in relation to an organization that is a political body, the term "connection" is already defined in clause 56, which covers four circumstances, and if it does not fall within those four circumstances, clause 58(2) does not apply.

132. Members have pointed out that the National Security Act 2023 passed by the United Kingdom last year has introduced a strict registration scheme for organizations of foreign powers, requiring every organization falling within the definition of a "foreign power" to register with the authorities any activity carried out in the United Kingdom, with a maximum penalty of five years' imprisonment for failure to do so. In contrast to the practice of the United Kingdom, the HKSAR Government will only prohibit the operation of an organization if it reasonably believes that the organization will endanger national security, members consider this approach more appropriate as it can address the relevant issues in a reasonable and targeted manner.

133. In response to members' enquiry, the Administration has advised that unlike the Societies Ordinance, the Bill does not provide for an appeal mechanism to the Chief Executive in Council. Prohibited organizations may only apply for judicial review of the relevant decisions. The Administration will also correspondingly amend the Societies Ordinance to transfer the mechanism for prohibiting the operation of societies on the grounds of national security to be dealt with under the Bill.

Matters following prohibition of operation of local organizations

134. Regarding clause 59 of the Bill which provides for the matters following prohibition of operation of local organizations, members note that the expression "winding-up provisions" appears several times therein and they are concerned whether it, rather than being confined to winding up, can represent all possible scenarios that may arise for disposal of assets following the prohibition. The Administration has responded that the expression "winding-up provisions" is adopted precisely to cover the provisions in

relation to dissolution or winding up in the memoranda of associations of different organizations. In response to members' concern and upon review, the Administration believes that some specified Ordinances may not use the expression "winding up" in the relevant provisions. For the sake of clarity, the Administration will propose amendments to clauses 59(5)(b) and (6)(b) to ensure that any other provision that has the same effect will be covered.

135. Members are concerned that while some members of a dissolved prohibited organization may participate in the course of the winding up of the organization for legitimate reasons, they may commit an offence of acting as a member of the prohibited organization as a result. In response to members' concern, the Administration proposes to amend clause 60(3) of the Bill to include the mechanism of written permission by the Secretary for Security to provide flexibility so that each case can be dealt with according to the specific circumstances.

136. Members are also concerned that since an organization is dissolved if the operation of it is prohibited (clause 59(1) of the Bill), there may be queries about whether there will still be "office-bearers" or "members" of a dissolved organization in respect of offences in connection with prohibited organizations under clauses 60 to 63 of the Bill. To avoid future disputes, the Administration proposes to add a new clause 63A to clearly specify that the "prohibited organization" under clauses 60 to 63 (including "the organization" in clause 60) should include the "shadow organization" of the organization (i.e. the organization which holds itself out to be the prohibited organization) so that the offences in connection with "prohibited organization" under clauses 60 to 63 would also apply to its shadow organization.

Prohibition of participation in activities of prohibited organizations

137. Clause 60 of the Bill provides for various offences and penalties to prohibit participation in activities of prohibited organizations. In response to members' enquiries, the Administration has confirmed that the purpose of clause 60 is to punish different acts that result in the continued operation of a prohibited organization after its operation has been prohibited, including the acts endangering national security engaged by its "shadow organization". Regarding penalties, as the continued operation of a prohibited organization is a serious offence, the Administration, after making reference to the relevant legislation in Australia, Canada and the United Kingdom, has set a term of imprisonment of 14 years under clause 60(1) of the Bill.

Allowing meetings of prohibited organizations to be held on premises

138. Regarding the offence of "allowing meetings of prohibited organizations to be held on premises" under clause 61 of the Bill, members have expressed concern about whether restaurant operators who unknowingly allow a meeting of a prohibited organization or its members to be held on premises will breach the law. The Administration has advised that clause 61 of the Bill provides that a person only commits an offence when knowingly allowing a meeting of a prohibited organization, or of members of a prohibited organization, to be held in or on any place or premises belonging to or occupied by the person, or over which the person has control. Pursuant to clause 58(6) of the Bill, the Administration will publish information on the relevant prohibited organizations in the Gazette, in a Chinese language newspaper and an English language newspaper as well as on an internet website. In response to members' enquiry, the Administration has advised that the definition of "meeting" under clause 61 is not limited to the "meeting" governed by the Public Order Ordinance.

Amendments to the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

139. Upon review, the Administration has proposed amendments to clauses 119 and 122 of the Bill which propose to amend sections 360C and 360N of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) respectively, in order to deal with the situation where a member of a company which has become an "unlawful society" or a "prohibited organization" after its registration is cancelled by order made by the Chief Executive in Council due to non-national security reasons such as public safety may need to participate in the course of the winding up of the company (such as attending the general meeting) in the capacity of a member of the company for legitimate reasons, but the member may be subject to criminal liability in connection with "unlawful society" or "prohibited organization" under the Societies Ordinance. The amendments to clauses 119 and 122 seek to provide that a person shall not be held criminally liable only because the person so acts.

<u>Enforcement powers, and other matters in connection with investigation</u>

Applications may be made to Court for extension of detention *period for investigation of offences endangering national security*

140. Clauses 72 to 75 of the Bill provide for a proposed mechanism for making applications to the Court for an extension of the detention period of an arrested person for investigation of offences endangering national

security. These provisions empower the police to extend the detention period of a person arrested for being reasonably suspected of having committed an offence endangering national security ("the arrested person") in police custody without charge, with the period of extension not causing the total period of detention of the arrested person to exceed 14 days after the expiry of the period of 48 hours after the person's arrest. Members have enquired how the proposed mechanism can embody the principle of respecting and protecting the rights of an arrested person. The Administration has stressed that the proposed mechanism for extending the detention period does not change the existing practice, i.e. an arrested person has the right to be brought promptly before a judge and should be entitled to trial within a reasonable time or to release. This practice is in line with the requirement under Article 5(3) of the Hong Kong Bill of Rights ("HKBOR") as set out in Part II of the Hong Kong Bill of Rights Ordinance, which provides that an arrested person should be tried or released within a reasonable time, and also embodies the important role of the Court in the process of deciding whether or not to extend the detention period. Clause 75(2) of the Bill explicitly sets out the circumstances under which the Court may grant an extension of the detention period, including the requirements for the police to satisfy the magistrate that the investigation is being diligently and expeditiously conducted and cannot be completed before an application is made; and that the detention of the arrested person without charge is necessary for securing, preserving or obtaining the evidence.

141. Members have noted that under clause 74(1)(a) of the Bill, one of the conditions for a magistrate to hear an application for an extension of the detention period is that "the arrested person has been given a copy of the application (the information in support of the application need not be given to the arrested person)". Members have enquired about the intention of this proposed arrangement and whether the arrested person's right of defence will be undermined by not having access to the information in support of the application.

142. The Administration has explained that the information in question contains important information and intelligence obtained during the police's preliminary investigation. Premature disclosure of such information may jeopardize the investigation or allow the arrested person to pass the information to other persons involved in the case. Therefore, the information will not be given to the arrested person before the hearing. This important information is protected by the principle of public interest immunity and this practice is supported by an earlier case. The Administration has pointed out that if the arrested person is subsequently charged, the Court may decide whether the content of the information can be disclosed, having regard to its relevance to the case and whether it is

protected by public interest immunity. The Administration has emphasized that clause 74(1)(a) of the Bill meets the requirement of Article 10 of HKBOR, i.e. "Equality before Courts and right to fair and public hearing".

143. In addition, members are concerned that members of the public may misunderstand the Chinese term "告發" ("information") referred to in clauses 73(2) and 74(1)(a) of the Bill. The Administration has explained that the Chinese term "告發" in the above clauses is a noun meaning a document made on oath and this Chinese term is also used in various existing laws. The Administration has advised that it will carefully consider members' concern about the Chinese term "告發" when it conducts a full review of existing legislation in the future.

144. Members have noted that under clause 74(2)(a) and (b) of the Bill, a magistrate may adjourn the hearing of the application for a reasonable period to enable the arrested person to be represented by a solicitor or counsel, and that the arrested person may be delivered to the police for detention in their custody during the adjournment. Members have expressed concern about whether there is room for the arrested person to use this adjournment mechanism to delay the trial. They have enquired how the magistrate determines whether it is a "reasonable period". The Administration has advised that pursuant to the relevant provisions of the Bill, the detention mechanism is designed in such a way that starting from the first detention period of 48 hours after arrest, an extension of detention for a period not exceeding 7 days may be applied for, and thereafter, if necessary, a further extension for a period not exceeding 7 days may be applied for. The total period of detention (i.e. not more than 14 days in total) is an important consideration for the magistrate in determining what is a "reasonable period", so that the hearing can be resumed as soon as possible without delay. The arrested person should also be able to seek representation by a solicitor or counsel within that reasonable period, but the "reasonable period" will not exceed 14 days from the expiry of the first detention period. The Administration has pointed out that the detention mechanism strikes a good balance between the arrested person's right to be represented by a solicitor or counsel and the principle of not interfering with the continuation of the police's investigation. Nevertheless, in order to address members' concerns, the Administration will propose amendments to clearly stipulate in clause 74(2)(a) of the Bill what is meant by a "reasonable period".

145. Members are concerned that the word "may" in clause 74(2)(b) of the Bill, which reads "the arrested person may be delivered to the police for detention in their custody during the adjournment", can be interpreted to mean that the magistrate has the power to deliver the arrested person to the

custody of other authorities (e.g. the Correctional Services Department), thereby interfering with the police's investigation during the person's detention. Members have suggested that the Administration should consider whether the word "may" in the provision should be changed to "shall" to ensure that an arrested person can only be held in police custody. The Administration has pointed out that clause 74(2)(b) is an empowering provision for the police to detain an arrested person during the adjournment of a hearing, which is why the word "may" is used in this clause. However, in the light of members' comments, the Administration will propose an amendment to delete the word "may" in clause 74(2)(b) to make it explicit that an arrested person is detained in police custody during the adjournment of a hearing.

146. Members have pointed out that under clause 75(1) of the Bill, the period of detention of the arrested person without charge can be extended upon application for a period not exceeding 7 days, and where necessary, further extended upon application for a period not exceeding 7 days, with a maximum of 14 days in total. Members have expressed concern about whether extension of detention period allows sufficient time for the Police to conduct relevant criminal investigation and prevent a person suspected of endangering national security from absconding.

147. The Administration has advised that it is confident that extension of detention for a period up to 14 days will allow sufficient time for the Police to decide whether there is sufficient evidence to institute a prosecution. The Court will decide on applications for extension of detention period to ensure that the period of detention of the arrested person can only be extended on sufficient and reasonable grounds, and that the Administration will not impose unreasonable restriction on the freedom of the arrested person in police custody, while balancing the need for the Police to conduct investigations. The Administration has pointed out that such arrangement is similar to the practice in the United Kingdom, while in Singapore, arrested persons may be detained for a period not exceeding 2 years through administrative measures without Court approval.

148. Members have further enquired whether the Administration has made reference to similar legislation in the United Kingdom, to allow the authorities to extend the maximum detention period for those arrested persons to 28 days through emergency legislation in extreme and exceptional circumstances. The Administration has reiterated that the current proposal to extend the detention period of the arrested person to a maximum of 14 days strikes a proper balance between protecting the rights of the arrested person and safeguarding national security, and has pointed out that the existing legislation has already empowered the Administration to make

regulations on an occasion of emergency under specific circumstances. In addition, under clauses 80 and 81 of the Bill, the authorities may apply to the Court for movement restriction order for the person on bail during the period of bail as appropriate.

149. In response to members' enquiry about clause 75(6) of the Bill, the Administration has advised that clause 75(6) provides that upon completion of investigation and in circumstances where the arrested person is not charged, the Police shall discharge the person immediately to protect the rights of the arrested person.

150. Regarding clause 75(6) of the Bill, the Legal Adviser to the Bills Committee has enquired whether the Administration will consider introducing additional provisions to clarify how to deal with the applications for further extension of detention period that cannot be made within the relevant time limit. The Administration has advised that there is no practical situation in which a Court sitting cannot be conducted for an extended period of time, nor is it appropriate for the law enforcement agency to keep the arrested person in custody without a hearing. Therefore, there is no need for a separate provision in this regard.

Consultation with relevant particular lawyers may be restricted in view of circumstances endangering national security

151. Clause 76 of the Bill provides that the Police may, in specified circumstances, apply to the Court for a warrant authorizing the Police to restrict an arrested person, during the person's detention in police custody, from consulting the particular lawyer, or any lawyer in the practice of the law in the firm, but the person may consult any other lawyer of the person's choosing. The purpose of this restriction is to prevent the circumstances in which the arrested person's consultation with a lawyer may endanger national security or cause bodily harm to another person, hinder the recovery of the benefit from the offence by the authorities, or obstruct the course of justice (for example, by interfering with witnesses). In response to members' enquiry, the Administration has advised that the restriction on consultation with a lawyer provided for in clause 76 of the Bill applies only to the arrested person detained in police custody, and does not affect the person's right to consult a lawyer if he/she is charged.

152. Members are concerned about whether the reputation of a lawyer will be affected if an arrested person is restricted from consulting a particular lawyer under clause 76 of the Bill, and whether the lawyer can file an appeal against or seek a review of the relevant Court warrant. Members have also pointed out that the "solicitors' firm" referred to in clause 76(3)(a)(ii) of the Bill may be a limited liability partnership and have expressed concern as to why all lawyers in a solicitors' firm are to be included in clause 76(3)(a)(ii).

153. The Administration has advised that pursuant to clause 84 of the Bill, applications to restrict consultation with lawyers under clause 76 will be heard in closed Court. The restriction will therefore not affect the reputation of the lawyers concerned and is not necessarily related to the lawyers' professional conduct. In addition, a magistrate will issue a warrant authorizing the Police to restrict an arrested person's consultation with a particular lawyer or any lawyer in a certain solicitors' firm only if the magistrate is satisfied that one of the circumstances specified in clause 76(4)(a) to (c) of the Bill exists. Clause 76(3)(b) of the Bill also balances the right of an arrested person to consult a lawyer by providing that the person may consult any other lawyer of the person's choosing in such circumstances. The Administration has pointed out that as many lawyers in solicitors' firms provide their services as a team and share responsibilities, there may be situations where all lawyers in a solicitors' firm would need to be restricted from consultation. The Administration has stressed that the Court will only authorize the Police to restrict an arrested person's consultation with any lawyer in a certain solicitors' firm if it is satisfied with the relevant justifications. The Administration has also pointed out that the reference to "solicitors' firm" in clause 76(3)(a)(ii) of the Bill does not include chambers as barristers do not practise in partnership.

154. The Legal Adviser to the Bills Committee has enquired whether clause 84(2) of the Bill applies to applications to restrict consultation with lawyers under clause 76, i.e. whether the Court can order an application to be heard in open Court and whether the hearing would involve more than one party (i.e. including the arrested person) to the application. The Administration has advised that while clause 84(2) of the Bill applies to Division 1, including clause 76 (and clause 77) of the Bill, the relevant application is to be made ex parte and the procedure does not allow the arrested person to apply for an inter partes hearing in open Court. On the other hand, an application by an arrested person to a magistrate to vary or discharge a movement restriction order under clause 81(7) of the Bill is to be heard inter partes and an application may be made under clause 84(2) for it to be heard in open Court.

155. Regarding the English equivalent of the term "律師" as "lawyer" in the Chinese text of clauses 76 and 77 of the Bill, members are concerned that as the term "lawyer" is not defined in the existing Legal Practitioners Ordinance (Cap. 159), whether the term "lawyer" (律師) in clauses 76 and 77 of the Bill means "solicitor" (律師), "barrister" (大律師) or both. Members have also enquired whether the term "lawyer" (律師) in the above provisions includes legal executives and foreign registered lawyers. The Administration has pointed out that it is the legislative intent that the term

"lawyer" (律師) in clauses 76 and 77 refers to solicitors and barristers who are qualified to practise in Hong Kong. Moreover, the term "solicitor" does not cover legal executives who are not qualified to practise as a solicitor given that an arrested person cannot consult them alone during detention. At the request of members, the Administration will propose amendments to replace the term "lawyer" (律師) with "legal representative" (法律代表) in clauses 76 and 77 and to provide for a definition in subsection (7) of clauses 76 and 77.

156. Clause 77 of the Bill empowers a magistrate to authorize the Police to restrict a person investigated for being reasonably suspected of having committed an offence endangering national security from consulting any lawyer during the first 48 hours after the person's arrest (i.e. "specified period"). The specified period cannot be extended. Members have pointed out that clause 76 of the Bill also empowers a magistrate to restrict an arrested person from consulting a particular lawyer while detained in police custody, and that clause 73 of the Bill allows the period of detention in police custody to be extended and further extended by application to a magistrate. In view of the relatively short duration of the restrictions imposed by clause 77 of the Bill as compared to the duration of the above-mentioned restrictions, members have expressed concern about the adequacy of the proposed specified period to effectively prevent damage to investigations and the risk of further endangerment of national security by such persons. They have also requested the Administration to provide information on the time limits set for the imposition of similar restrictions in other jurisdictions.

157. The Administration has advised that under the proposed restriction in clause 76 of the Bill, a person subject to the restriction may still consult a lawyer other than particular lawyers. However, the proposed imposition of restrictions under clause 77 of the Bill would prohibit the person from consulting any lawyer, which is more restrictive of the right in question. In this connection, a time limit is proposed with reference to the provisions of the National Security Act 2023 of the United Kingdom. It is worth noting that in some other jurisdictions, the limit on the imposition of similar restrictions is not explicitly stated, and the current proposed limit on the specified period in clause 77 of the Bill would help allay public concerns.

158. On human rights protection, the Administration has also been requested to advise on the vetting and approval procedures for the imposition of similar restrictions under the National Security Act 2023 of the United Kingdom, and whether the person subject to the restrictions has the right to remain silent during the specified period when the restrictions are in force. The Administration has advised that the said legislation of the United

Kingdom empowers police officers of at least the rank of superintendent to impose restrictions relating to legal advice. However, the Bill proposes to require a police officer of the rank of Chief Superintendent or above (or a police officer authorized by that officer) to make an application, and impose such restrictions only upon obtaining the approval of a magistrate. The Administration has also advised that the right to silence and the presumption of innocence are important legal rights and principles which must be protected by law.

Applications may be made to Court for imposition of appropriate restrictions in relation to persons on bail for prevention or investigation of offences endangering national security

159. Clauses 80 and 81 of the Bill empower a magistrate to make an order (viz. "movement restriction order") directing that a person on bail must comply with certain requirements restricting the person's movement. For example, the person must reside in the specified place, must not enter the specified area and must not, by any means or through any person, associate or communicate with the specified person during the specified period. The Administration has been requested to advise on the reasons and justifications for the proposed introduction of such restrictions, the acts endangering national security to be targeted, and the procedures in other jurisdictions for granting approval for the imposition of similar restrictions.

160. The Administration has advised that, as revealed by the experience in dealing with relevant cases, an arrested person may still pose considerable national security risks while on bail and pending further investigation. For example, the person may associate or communicate with persons involved in the case at large and disclose details about the investigation, and make arrangements for himself or herself or other persons involved in the case to abscond. Under the existing law, the Police are only empowered under Schedule 2 of the Implementation Rules to make an application to a magistrate requiring a person who is the subject of an investigation to surrender any travel document and restricting the person from leaving Hong Kong, and do not have other power to restrict acts of a person under investigation, which is ineffective in controlling the associated national security risks. It is worth noting that a movement restriction order is a practice that has a relatively low impact on personal liberty. The Administration considers the proposed movement restriction an effective and proportionate measure to prevent the associated national security risks. It is also noteworthy that while the UK National Security Act 2023 allows the Secretary of State to impose the relevant restrictive measures without the approval of the Court in an emergency, the Bill seeks to strengthen the

relevant safeguards by providing that only the Court can make a movement restriction order.

161. Members have also expressed concern about how the Administration will ensure compliance with movement restriction orders. Noting that the proposed maximum penalty for contravention of the proposed movement restriction order is only an imprisonment term of one year, members have suggested that more stringent measures, such as prohibiting all persons from communicating with the restricted person and mandating the wearing of electronic fetters with a monitoring function, should be adopted to ensure that the relevant requirements are complied with. Members have also suggested that the Administration may make reference to the requirement under the UK National Security Act 2023 to impose restrictions on the possession or use of electronic communication devices by the individual in question, so as to prevent the restricted person from associating or communicating with a specified person during the specified period by such means as through open groups of social media or instant messaging applications.

162. The Administration has reiterated that in drafting the Bill, it has taken into account the actual situation in Hong Kong and finalized the proposed restrictive measures under the Bill, which are reasonable, necessary and proportionate, having regard to the protection of human rights and the associated national security risks. The Police will take reasonable and necessary actions to ensure compliance with the movement restriction order, but it is not appropriate to disclose the specific operational details so as not to undermine the effectiveness of such actions. In response to members' concern that a restricted person may associate or communicate with a specified person through public groups, the Administration has explained that clause 80(2)(c) of the Bill prohibits a restricted person from associating or communicating with a specified person by "any means", which includes associating or communicating with a specified person with intent by means of, for example, a public group.

163. On criminal liability, in response to members' enquiries, the Administration has confirmed that if a restricted person associates or communicates with a specified person during a specified period, the specified person shall not be held criminally liable. The Legal Adviser to the Bills Committee has also requested the Administration to clarify the criminal liability of other persons (e.g. the person who also resides in the place and has been reported to the Police) for assisting a restricted person in associating or communicating with a specified person. The Administration has advised that under section 89 of the Criminal Procedure Ordinance, any person who aids, abets, counsels or procures the commission by another

person of any offence shall be guilty of the like offence. The aforesaid provision also applies to the relevant offences in relation to contravention of a movement restriction order.

164. Under clause 81 of the Bill, the Court may, on application by the Police, make a movement restriction order in relation to a person on bail requiring the person to remain in the specified place during the specified period, not to associate or communicate with the specified person during the specified period, etc. In response to members' enquiries, the Administration has stated that there is no appeal mechanism under the Bill if the magistrate refuses such an application, but a person on bail can apply to the Court to vary or discharge a movement restriction order, which has aroused concerns among members.

165. The Administration has explained that since a movement restriction order imposes restrictions on a person on bail in terms of time and place, etc., and in recognition of the fact that a person on bail may not be able to comply with the specified requirements due to, for example, a change of employment, the Bill allows a person on bail to apply to the Court for a variation or discharge of the movement restriction order. On the other hand, the Police may apply for a judicial review of the Court's decision to refuse their application.

166. Members have enquired about the reason for setting the validity period of a movement restriction order at three months under clause 81(4) of the Bill. The Administration has responded that the validity period is set after balancing factors such as the human rights of a person on bail, as well as the actual needs and operational efficiency of the law enforcement agencies. The Administration considers it reasonable to set the validity period of a movement restriction order at three months, and then extend it by one month each time as necessary. Concern has been raised about the impracticality of the requirement under clause 81(5) of the Bill that a movement restriction order must be served personally on the person on bail. In response, the Administration has pointed out that as contravention of a movement restriction order is a criminal offence, it will be more appropriate for the order to be served on the person personally. In practice, as movement restriction orders are mostly served on persons who are about to be discharged by the Police, there should not be much difficulty in serving the orders on persons on bail personally.

167. Members are concerned that clause 81 of the Bill is unable to minimize the risk of a person on bail absconding as it does not specify that a movement restriction order will prohibit the person on bail from leaving the territory or require him or her to surrender travel documents. The

Administration has responded that under Article 43(2) of HK National Security Law and Schedule 2 of the Implementation Rules, a person on bail may be required to surrender his or her travel documents. As for movement restriction orders, they are used to impose additional restrictions, such as specifying when and where the person on bail must show up, that the person on bail must not associate or communicate with the specified person, and so on. There is a view that the Administration should consider stipulating the requirements for travel restrictions or surrender of travel documents in the relevant provisions of the Bill.

No prejudicing of investigation of offences endangering national security

168. Clause 85 of the Bill proposes the introduction of a new offence of "no prejudicing of investigation of offences endangering national security", which provides that a person commits an offence and is liable on conviction to imprisonment for seven years if the person prejudices the investigation of offences endangering national security, including the concealment of relevant material. A member has requested the Administration to provide the penalties for other relevant offences for comparison, and asked whether a person who commits such an offence will also be charged with perverting the course of justice.

169. The Administration has advised that the penalty for the aforesaid new offence is in line with that for the offence of obstructing an investigation under the Organized and Serious Crimes Ordinance (Cap. 455). If the person concerned commits more than one offence in the same case, the Department of Justice will select the most appropriate offence for prosecution. The Administration has added that any person who commits the offence of perverting the course of justice, which is a common law offence, shall be liable to be sentenced at the discretion of the Court to imprisonment for any term and a fine of any amount.

<u>Absconders in respect of offences endangering national security</u>

Power of Secretary for Security to specify an absconder for application of certain measures against the absconder

170. Under clause 86(1) of the Bill, if the Secretary for Security reasonably believes that it is necessary for safeguarding national security to specify a person to which the subsection applies for the purposes of section 86(4), the Secretary for Security may, by notice published in the Gazette, specify the person for the purposes of that subsection. Clause 86(2) sets out five conditions under which clause 86(1) applies to the person.

171. A number of members have pointed out that in the past, some absconders continued to engage in acts and activities endangering national security after leaving Hong Kong. Members consider it unreasonable to impose restrictions on an absconder only after the warrant of arrest has been issued for six months. They have suggested that the Administration should delete the condition in clause 86(2)(c) and that restrictive measures can be implemented if the other four conditions are met, so as to allow maximum flexibility for the Secretary for Security to deal with the absconders and prevent circumvention from the relevant measures. The Administration has explained that the six-month period is set to ensure that before implementing the restrictive measures, the persons involved have genuinely left Hong Kong and have no intention to return. Taking into account members' concerns, the Administration has agreed with members' views and proposed to delete clause 86(2)(c). In addition, upon review of clause 86(2)(a), the Administration considers that the person may abscond at any stage of criminal proceedings, but not limited to the stage at the Magistrates' Court. Thus, the Administration has proposed to amend the scope of clause 86 to make it clear that it applies to the subject of warrant of arrest issued by a Court in relation to an offence endangering national security.

Prohibition against making available funds etc. or dealing with funds etc.

172. Clause 87(6)(b) of the Bill provides that payment due under contracts, agreements or obligations that arose before the date on which an absconder became the absconder can be continued to be credited to an account belonging to a relevant absconder, and a person is not to be regarded as having contravened section 87(2) by reason only of that act. Members are concerned that absconders can still deal with their funds and assets overseas through the banking system.

173. According to the Administration, clause 87(2)(b) of the Bill provides that a person must not deal with, directly or indirectly, any funds or other financial assets or economic resources belonging to, or owned or controlled by, a relevant absconder. As absconders will certainly need a medium to deal with their funds or other financial assets or economic resources, the above provision should be able to address members' concerns.

174. Pointing out that many absconders rely on their relatives and friends to support their living overseas, members have asked whether the Administration will prosecute those who support the absconders or freeze their funds, etc., so as to prevent the relatives and friends of absconders from continuing to support them. The Administration has advised that law enforcement agencies can, having regard to the actual circumstances, charge

those who support the absconders for assisting in and abetting the relevant absconders for the commission of an offence endangering national security under the HK National Security Law.

175. Given that crowdfunding platforms can make available funds to or deal with funds for the absconders, members have enquired whether the Bill covers crowdfunding platforms as one of the media through which funds can be made available to or dealt with for the absconders. Members have also noted that virtual currencies may be one of the currencies in circulation in places overseas where the absconders are located, and they have asked whether the Administration will consider covering virtual currencies in the definition of funds. The Administration has advised that the legislation is not intended to regulate just a single platform, and an offence is committed as long as the funds or financial assets, etc. of the absconders have been dealt with. As regards virtual currencies, the definition of "economic resources" under clause 87(7) of the Bill has already covered all kinds of tangible or intangible assets.

176. Members have expressed concern that the defence provided under clause 87(4) of the Bill may be abused by lawbreakers to evade justice. The Administration has advised that the defence provided under clause 87(4) is commonly found at common law and its purpose is to ensure that the defendant has knowingly committed the offence. The Administration has stressed that law enforcement agencies will gather evidence through investigation to prove that the person has knowingly committed the offence, and will not believe that the person "did not know and had no reason to believe" based on the concerned person's one-sided statement. Law enforcement agencies will act on the basis of evidence.

177. Members have enquired whether persons assisting absconders who have fled overseas commit the offence of making available funds or other financial assets or economic resources to absconders under clause 87(2) of the Bill if the absconders are provided with jobs, tuition fees or even business opportunities. The Administration has advised that the Bill is intended to regulate local circumstances and has no extra-territorial effect. The Administration has pointed out that the provision of extra-territorial effect for such offence to cover acts of other persons outside Hong Kong may not align with the principles of international law, and the issue must be dealt with carefully.

178. Members are concerned about how the Administration can deal with the situation where an absconder has made certain financial arrangement before absconding with a view to transferring his/her assets and evading criminal liabilities. The Administration has advised that apart from

instituting prosecution under the offence of assisting and abetting, clause 87(2) of the Bill provides that a person must not make available, directly or indirectly, any funds or other financial assets or economic resources to a relevant absconder, or deal with, directly or indirectly, any funds or other financial assets or economic resources belonging to a relevant absconder. Prosecution may be instituted under the relevant provision.

179. Some members are concerned about the possible impact of clause 87(2)(b) of the Bill on the third parties. For instance, some absconders still have outstanding loans with banks, or there are persons having a joint venture or co-owning assets with absconders, etc. The Administration has advised that the legislative intent of clause 87 of the Bill is to prevent the flow of funds to absconders and it is not intended to affect innocent third parties. Under clause 94 of the Bill, the Secretary for Security may, on application, grant a licence for doing an act prohibited by section 87, 88 or 89. Affected third parties may apply to the Secretary for Security for granting licences, and the Secretary for Security will make a decision according to different circumstances of individual cases.

180. Regarding clause 87 of the Bill, the Legal Adviser to the Bills Committee has enquired whether the handling of an absconder's MPF investments by an MPF trustee will be regarded as "dealing with" under clause 87(7) of the Bill. The Administration has advised that the above scenario is an exception specified under clause 87(6)(a) and it is not regarded as "dealing with" under clause 87(7).

Prohibition against certain activities in connection with immovable property

181. Clause 88(2)(a) of the Bill provides that "except under the authority of a licence granted under section 94, a person must not lease, or otherwise make available, immovable property, directly or indirectly, to a relevant absconder". Members have asked why it is necessary to make such a provision, considering the absconder has already absconded overseas. By way of illustration, the Administration has pointed out that if the property in question is located overseas, whether the leasing of the property to the absconder concerned is in contravention of this clause will depend on the specific circumstances of individual cases, including whether a certain part of the act is taken place within the HKSAR, which may not be conclusive.

182. Clause 88(2)(b) of the Bill provides that "except under the authority of a licence granted under section 94, a person must not lease immovable property, directly or indirectly, from a relevant absconder". Members have pointed out that assuming that a flat owner has become an absconder, the tenant will have to move out of the flat immediately and find alternative

accommodation; otherwise the tenant concerned will instantly commit an offence. Members are of the view that such a situation will affect the innocent third-party tenant and have requested the Administration to consider how to address the issue.

183. The Administration has pointed out that while the Secretary for Security may address this issue by granting a licence, it has proposed to amend the Bill by adding clause 88(6) to clearly exclude the situation. The Administration has also pointed out that according to clause 87(2)(b) of the Bill, the rent paid by the tenant must not be dealt with directly or indirectly after being deposited into the account of the absconder. As such, the proposed arrangement will not benefit the absconder in practice.

Prohibition in connection with joint ventures or partnerships with relevant absconders

184. Members are concerned that even if an enterprise has completed due diligence on the enterprise with which it intends to establish a joint venture or partnership, an absconder may establish a joint venture or partnership with the enterprise in the form of a secret trust, and the enterprise concerned may not know that the underlying joint venturer or investor is an absconder, thereby contravening clause 89(2) of the Bill.

185. Members refer to a hypothetical case in which a joint venture has been formed and, after a few years, one of the joint venturers becomes an absconder. There is an enquiry as to how the relevant business, funds invested, profits earned, dividends and staff arrangements, etc. may be handled. The Administration has advised that the legislative intent of clause 89 is that the provision will only apply to the joint ventures, partnerships, etc. established or invested in after a person has been specified by the Secretary for Security as an absconder under clause 86(4).

186. In response to members' views, the Administration proposes to amend clause 89 of the Bill to stipulate that a person is not to be regarded as having contravened clause 89(2) by reason only of entering into any contract, agreement or obligation with a person before the date on which the person becomes a relevant absconder, so as to minimize the impact on third parties including those who have previously established or invested in a joint venture, partnership or any like relationship with a relevant absconder. Members welcome the Administration's amendment proposal and consider that it will help allay the concerns of the business sector. In addition, after specifying a person as an absconder, the Secretary for Security, taking into account all the relevant circumstances of the case and the impact on third

parties, may in his discretion decide to apply one or more of the measures under clauses 87 to 93, as well as the time of application.

187. The Administration has added that clause 94 of the Bill provides a mechanism for an affected individual or organization to apply to the Secretary for Security for a grant of a licence. The Secretary for Security may, on the premise that national security would not be compromised, grant a licence to the affected individual or organization according to the actual needs in respect of clauses 87, 88 and 89.

Suspension of qualification to practise

188. Clause 90 of the Bill seeks to provide for the suspension of a qualification to practise in a profession held under any Ordinance by a person specified as an absconder at the material time. Members has enquired about the interpretation of "material time" under clause 90(2). The Administration has responded by giving the following example: an absconder has been specified and during the period within which the specification is in force, the absconder may obtain the qualification previously applied for some time after the expiry of the specification period. The period between the absconder obtaining the qualification to practise and the expiry of the specification period is the "material time".

189. Members have enquired when the relevant professional body can reinstate an absconder's suspended qualification to practise. The Administration has responded that under clause 86(3) of the Bill, "the warrant…in respect of the person has been revoked" or "the person has been brought before a magistrate", i.e. the absconder's qualification to practise may be reinstated if the absconder ceases to be an absconder upon returning to Hong Kong and surrenders. The subsequent development of the case will not affect how the professional body deals with the absconder's professional qualification. Moreover, the person cannot seek review or appeal under any provision of the legislation governing the absconder's qualification to practise against the suspension of the absconder's qualification to practise under clause 90. Some members have suggested that depending on actual needs, local professional bodies may amend their articles of association to comply with the statutory requirements after the passage of the Bill.

190. In response to members' enquiries, the Administration has pointed out that clause 90 of the Bill applies only to the qualification to practise obtained under any Ordinance in Hong Kong. Once the Secretary for Security has completed the process of specifying a person as an absconder and specified the application of this measure against the absconder, the

absconder's qualification to practise will be automatically suspended. The Security Bureau will also notify the relevant professional bodies in the HKSAR and even relevant overseas organizations. Where a register is kept in relation to the qualification to practise, it is the responsibility of the professional bodies in the HKSAR to update the register.

191. Some members are of the view that certain persons may, after absconding, obtain a qualification to practise overseas by virtue of their qualification to practise in Hong Kong being recognized overseas, and opine that the phrase "from time to time" (不時) in clause 90(3) of the Bill should be amended to "within a reasonable time" (在合理時間內) or "as soon as reasonably practicable" (在合理及可行的情況下) to cause professional bodies to update the register in a timely manner and to notify the overseas organizations that recognize the qualification to practise in Hong Kong.

192. The Administration has responded that an absconder's qualification to practise is suspended in response to the direction of the Secretary for Security, which is not affected by the fact that the absconder's name is still on the register. The phrase "from time to time" describes the need for professional bodies to update the register both at the beginning and at the end of the period within which the specification is in force. The Administration has pointed out that, in theory, the professional qualification granted under the laws of some countries should be suspended if such qualification is granted on the basis of Hong Kong Ordinances. If, for some political reasons, certain external forces continue to grant a person a qualification to practise, knowing that the person has already been disqualified from practice, the credibility of the countries concerned will also be called into question.

Permission or registration for carrying on business or for employment not in effect temporarily

193. Clause 91 of the Bill seeks to set out that a permission or registration under any Ordinance which is necessary for the relevant absconder to carry on any or to be employed for any work is not in effect temporarily during the period within which the specification is in force. Members have enquired whether a permission or registration obtained by an absconder together with another person in carrying on a business would be not in effect temporarily as a result of the specification of the absconder. The Administration has responded that, under clause 91(2), a permission or registration held jointly by the absconder and the absconder's partner(s) would not be made not in effect temporarily by virtue of the clause if the permission or registration is in effect in relation to the relevant absconder together with any other person. While members have raised the possibility that it may de facto have little effect on the absconders, the Administration has stated its legislative intent

that innocent members of the public would not be implicated as a result. As the funds of the absconders would be subject to the restriction imposed by other provisions, the relevant clauses are deemed sufficiently effective from its point of view.

194. Members have enquired whether clause 91 of the Bill will apply to all permissions or registrations issued by the Government. The Administration has responded that the permission or registration referred to in the provision must be related to any business carried on by the relevant absconder or the work for which the absconder is employed. For example, if an absconder holds a driving licence and works as a taxi driver, the driving licence will be not in effect temporarily under this clause. However, if the absconder is engaged in a business or occupation that is unrelated to the driving licence, such as being a lawyer, the temporary suspension of the driving licence will not be applicable in this case.

Temporary removal from office of director

195. Clause 92 of the Bill seeks to set out that the relevant absconder will be temporarily removed from the office of director of any company during the period within which the specification is in force. Responding to members, the Administration has clarified that the legislative intent of this clause is to encourage absconders' return to Hong Kong to surrender, and hence both clause 92 and other mechanisms regarding absconders are mostly temporary. Once an absconder has returned to Hong Kong and surrendered, such temporary arrangements will be automatically removed. The interpretation of "director" in the clause, i.e. "directly or indirectly take part or be concerned in the management of the company", is relatively broad, meaning that absconders shall not take part in any business.

196. There has been a suggestion that the Government should consider "removing" rather than "temporarily removing" an absconder from the office of director. In reply, the Administration has advised that an absconder remains a suspect until he/she is tried and, therefore, cannot be assumed to be a convicted person until he/she has returned to Hong Kong and surrendered. The Administration has stressed that the clause is only a means, not penalties, to procure the absconders' return to Hong Kong to surrender.

197. In response to members' enquiry, the Administration has pointed out that clause 92 of the Bill does not affect other legislation, the internal operation of a company or an organization, and the powers exercisable within a company or by its shareholders under the Companies Ordinance (Cap. 622). It has also been pointed out that, while the Secretary for

Security, by virtue of this clause, temporarily removes an absconder from the office of director, it is up to each company to decide whether or not to permanently remove an absconder from the office of director in accordance with the Companies Ordinance or its other mechanism in the light of its own circumstances or operational needs.

198. Considering that a company and its shareholders are entitled to certain powers exercisable against certain shareholders under the common law and in accordance with its documents such as the articles of association, members are of the view that the scope of clause 92(4) of the Bill should be expanded to enable the relevant company and shareholders to exercise such powers against the relevant absconder. The Administration has accepted the suggestion and proposed to make amendments accordingly.

199. There is an enquiry about the availability of an appeal mechanism against the decision of the Secretary for Security and whether clause 92 of the Bill applies to an office of director held overseas by an absconder. In reply, the Administration has advised that there is no appeal mechanism against the decision of the Secretary for Security. Moreover, the clause will not be able to regulate absconders holding the office of director of any company overseas.

200. Members have asked whether the Administration will consider expanding the scope of clause 92 of the Bill to cover non-company statutory bodies, such as social welfare organizations or charities incorporated under other legislation. In reply, the Administration has responded that the legislative intent of clause 92 is to prevent absconders from acting as directors and obtaining advantages from managing or taking part in the business of a company, whereas the office of director of social welfare organizations or non-governmental organizations, which generally does not carry personal interests, is not covered in this clause. Such organizations may decide whether or not to permanently remove absconders from the office of director in the light of their own operational needs. The Administration will consider members' views as to whether or not to likewise apply the clause to other non-company statutory bodies.

Cancellation of HKSAR passports

201. Clause 93 of the Bill empowers the Secretary for Security to cancel the HKSAR passport of an absconder who has been specified under clause 86, and the Director of Immigration may take possession of the passport by virtue of this clause. Under clause 93(3), a person must not appeal against the cancellation or taking of possession under section 10(1) of the Hong Kong Special Administrative Region Passports Ordinance (Cap. 539). There is also no appeal mechanism under this clause.

202. The Administration has confirmed members' view that this clause does not require any decision by the Director of Immigration under the Hong Kong Special Administrative Region Passports Ordinance. The cancellation of an absconder's HKSAR passport will take effect as soon as the specification of the absconder has been made by the Secretary for Security.

203. Some members are of the view that the statutory appeal mechanism under the Hong Kong Special Administrative Region Passports Ordinance is obviously not applicable to the cancellation under clause 93 of the Bill, and the inclusion of the original clause 93(3) may instead cause confusion. Agreeing with members' views after consideration, the Administration has proposed to delete the original clause 93(3). Separately, there is a suggestion that provisions should be added to prohibit absconders from re-applying for another HKSAR passport after the cancellation of their original ones, and to prohibit any appeals in such cases. Agreeing to the suggestion, the Administration proposes to add another amendment to clause 93 to deal with the situation where an application for an HKSAR passport is made by a relevant absconder. The proposed new clause 93(3) provides that an application for a passport made by an absconder is to be regarded as invalid for the purpose of section 3(1) of the Hong Kong Special Administrative Region Passports Ordinance (provisions relating to the issue of passports by the Director of Immigration) and all other purposes. The effect of this amendment is that the Director of Immigration is not required to process the application and the applicant cannot lodge an appeal either.

204. Members consider that the cancellation of HKSAR passports is a strong and powerful measure to oblige absconders to return to Hong Kong to surrender while deterring other offenders from intending to abscond. The Administration has stressed that clause 93 of the Bill differs from other measures against absconders in the sense that, having regard to the nature of the passports, the cancellation of HKSAR passports is not temporary but permanent. Once the HKSAR passports of absconders are cancelled, the Immigration Department ("ImmD") will then notify the immigration authorities of foreign countries, and airlines will also be informed accordingly. However, an absconder, once having returned to Hong Kong to surrender and the specification revoked, can re-apply for an HKSAR passport.

205. Members have pointed out that in practice, an absconder will not return his/her HKSAR passport to ImmD as he/she is already overseas, members asked the Administration how the Director of Immigration will

take possession of the passport in execution of clause 93(2) of the Bill. In reply, the Administration has advised that clause 93(2) is drafted with reference to section 9 of the Hong Kong Special Administrative Region Passports Ordinance: "The Director may cancel a passport and may take possession". In reality, any cancelled HKSAR passport must be returned to ImmD with a corner of it cut off as proof. The Administration has added that, under certain special circumstances, such as a valid foreign visa still contained in the cancelled passport, the passport holder may continue to hold the passport concerned and use it together with the other newly issued passport.

206. There is an enquiry about the channels through which an absconder outside Hong Kong whose HKSAR passport has been cancelled can return to Hong Kong to surrender. The Administration has replied that in such a case, an entry permit may be issued to the absconder for use on a single entry and confirmation may be given to the airline that the absconder is admissible to Hong Kong. Members have asked why clause 93 of the Bill does not also confer the power to cancel an HKSAR Document of Identity for Visa Purposes ("Doc/I"). The Administration has responded that there is no need to include it in clause 93 as the power to readily cancel a Doc/I is already provided under the existing legislation.

Grant of licences

207. Members have noted that clause 94 of the Bill empowers the Secretary for Security to grant, on application, a licence for doing an act prohibited by clause 87, 88 or 89. They are prohibition against making available funds etc. or dealing with funds etc. (clause 87), prohibition against certain activities in connection with immovable property (clause 88) and prohibition in connection with joint ventures or partnerships with relevant absconders (clause 89). Under clause 94(2), the Secretary for Security must not grant a licence under section 94(1) unless the Secretary for Security is satisfied that, in all the circumstances of the case, it is reasonable and necessary, and would not be contrary to the interests of national security, to do so.

208. Members have enquired about the procedures for the implementation of clause 94 of the Bill. The Administration has advised that at the time of application, the applicant is required to propose by written representation the details of the proposed act for the consideration by the Secretary for Security. Members are of the view that the purpose of clause 94 of the Bill is to ensure that the prohibitions in connection with absconders will not have a significant impact on the lives or businesses of the related persons. Thus, it is proposed to stipulate that an application for

such licence should be processed as soon as possible or within a certain period of time.

209. In response, the Administration has pointed out that it is axiomatic under the principles of the administrative law that a licence application should be processed as soon as reasonably practicable, and the preamble of the Bill has also established the legal principle that it is a must for the legislation for safeguarding national security to protect the lawful rights and interests of the residents of the HKSAR and other people in the HKSAR and ensure that the property and investment in the HKSAR are protected by the law. However, it is difficult to stipulate a specific period of time for processing an application in the light of the different scenarios which may arise.

Provision of false or misleading information or documents for the purpose of obtaining licences

210. Clause 95 of the Bill provides for offences and penalties for the provision of false or misleading information or document for the purpose of obtaining licences under clause 94. In response to members' enquiry about the rationale for the imprisonment sentence of three years as provided for in this clause, the Administration has explained that in determining the imprisonment term, reference has been made to Schedule 3 of the Implementation Rules, which provides that the imprisonment term for similar offences is three years. If the person concerned has also committed other offences (e.g. using a false instrument), the Department of Justice will, where appropriate, lay appropriate charges in accordance with the Prosecution Code for the relevant act.

211. Members have expressed concern about whether clause 95 of the Bill covers the situation where a person intentionally conceals some material issues in his application. The Administration has responded that at the time of submitting an application, the applicant may be requested to make a declaration that the information submitted is true and complete. In the event of concealment, the person concerned may have made a misrepresentation which can also be dealt with under this clause.

<u>Human right guarantees for relevant enforcement powers and procedure in legal actions</u>

212. In respect of Part 7 of the Bill which proposes to introduce a series of measures to strengthen enforcement powers and other measures in connection with investigation, the Legal Adviser to the Bills Committee has sought the Administration's explanation on how the proposed enforcement

powers and measures comply with the provisions on protection of human rights in both the Basic Law and the Hong Kong Bill of Rights Ordinance.

213. The Administration has advised that it is stated in detail in Annex F to the Legislative Council Brief (File Ref.: SBG/3/101/2024) entitled "The relationship between safeguarding national security and protecting human rights" how, on the premise of safeguarding national security, human rights are fully respected and protected in the Bill.

214. The Administration has also advised that the considerations are threefold, with the first one being the grounds for the relevant restrictions. Taking the extension of detention of a person suspected of having committed an offence endangering national security as an example, the practice to extend the detention period seeks to respond to actual national security risks, i.e. the person concerned, if not detained, may do acts of destroying evidence or tipping off, thereby endangering national security. The grounds for extension of detention must therefore be related to safeguarding national security.

215. The second consideration is the extent of restrictions. On the extent of restrictions imposed on a person suspected of having committed an offence endangering national security, for example, the Administration has pointed out that while the grounds for imposing restrictions must be directly related to safeguarding national security, the relevant restrictions should not be imposed to an extent more than necessary for safeguarding national security.

216. The third consideration is gatekeeping. The measures in connection with enforcement and investigation under the Bill will, as far as practicable, be subject to a gatekeeping mechanism through independent adjudication by judicial authorities, i.e. for restrictions intended to be imposed on a person, the Court must be satisfied that there are relevant factual basis and practical needs with evidential support and that the conditions under the Bill are met, so as to ensure the reasonableness and objectivity of the extent of and grounds for the relevant restrictions. The restrictions imposed also need to be reviewed from time to time to assess whether they should be continued. Discretion must also be exercised on the merits of each case and must be reasonable and proportionate . The Administration is confident that the relevant restrictions are in conformity with international standards of human rights.

Criminal procedure for cases in connection with offences endangering national security

217. Members have enquired how a magistrate may set a reasonable period of remand for defendants in national security cases ("NS cases") under clause 100 of the Bill. The Administration has advised that a magistrate is required to take into account all relevant circumstances in setting the remand, such as whether there is further investigation by the police, whether the prosecution's documents are available, or whether the defence needs more time to consider the documents provided by the prosecution. The Administration has emphasized that while clause 100 of the Bill dispenses with the requirement of a remand of not exceeding 8 clear days for committal proceedings under section 79(1) of the Magistrates Ordinance (Cap. 227), the defendant has the right to apply for a bail every time being brought before the Court under sections 9D and 9J of the Criminal Procedure Ordinance; and in the event of the magistrate's refusal of bail, the defendant may apply to the Court of First Instance. Therefore, the provision does not undermine the defendant's right to apply for a bail at any time.

218. Members have noted that clause 101 of the Bill provides for NS cases a deadline for the return day that is earlier than that for other types of cases, and the return day must not, unless both the prosecutor and the accused consent or the magistrate, on reasonable cause being shown, determines otherwise, be less than 10 days nor more than 28 days from the day on which the return day is appointed. In response to members' enquiries, the Administration has advised that clause 101 of the Bill seeks to fully implement Article 42 of the HK National Security Law, which stipulates that when applying the laws in force concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner. In this connection, the Administration should remove barriers and restrictions in some of the existing rigid procedural requirements as far as possible, provided that NS cases can be dealt with expeditiously without affecting the lawful rights of the defendants.

219. The Legal Adviser to the Bills Committee has enquired how the removal of the requirement for remand not to exceed eight days and the shortening of the appointment of return day respectively under clauses 100 and 101 of the Bill will not disproportionately deprive the accused of their right. The Administration has advised that the Court will be the gate-keeper of these two clauses, and in making the above decisions, the magistrate will take into account the right of personal freedom under the Basic Law and the

Hong Kong Bill of Rights Ordinance, and will not unreasonably deprive the person concerned of his freedom.

220. Clause 103 of the Bill seeks to dispense for NS cases the procedure for preliminary inquiries, so as to expedite the handling of such cases. Members have enquired about the intention of clause 103. The Administration has explained that the legislature has made a legislative amendment to stipulate that not all criminal cases committed to the Court of First Instance must undergo preliminary inquiries, while preserving the defendant's right to require a preliminary inquiry, thereby reducing the burden on judicial resources. The Administration has advised that, for NS cases, if a case involves a large number of witnesses, it will take a considerable amount of time (possibly more than one month) to schedule a preliminary inquiry and summon witnesses. By dispensing with preliminary inquiries and immediately committing the case to the Court of First Instance, much time can be saved in dealing with the procedure for preliminary inquiries so that the Court of First Instance can hear the trial and examine the evidence as soon as possible. The Administration has emphasized that when a case is committed to the Court of First Instance, the defendant still has the right to apply for "discharge without hearing" under section 16 of the Criminal Procedure Ordinance before trial if the Secretary for Justice has not issued a certificate under Article 46 of the HK National Security Law. If such a certificate is issued, the case should be set down for trial by the Court of First Instance constituted by a panel of three professional judges as soon as possible. If there is no prima facie case, the defendant will be discharged immediately with no case to answer. This demonstrates that dispensing with the procedure for preliminary inquiries can expedite the handling of a case without compromising the fairness of the trial, and this is in line with Article 87 of the Basic Law, which provides that anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay.

221. Under clause 104 of the Bill, if a certificate is issued in relation to a NS case under Article 46 of the HK National Security Law, the accused in the case who is committed for trial must not apply for "discharge without hearing" in accordance with section 16 of the Criminal Procedure Ordinance. In response to members' enquiries about the background to clause 104, the Administration has explained that in cases tried with a jury, there is a procedural safeguard of "discharge without hearing" to preclude the risk that the jury may return a guilty verdict based on very weak evidence (for which the jury is not required to give reasons). On the other hand, as NS cases issued with certificates are tried by three professional judges without a jury, the judges are bound to analyze and consider the cases carefully and in great detail, and will give detailed reasons for their verdicts, which enables the accused to know clearly why they have been convicted and lodge appeal

against their convictions in the light of those reasons. The Administration has emphasized that although applications for "discharge without hearing" in cases tried by three judges are dispensed with, two important rights of the accused, namely the right to make a "no case to answer" submission in the middle of a trial and the right to apply for a permanent stay of proceedings on the basis of denial of a fair trial or an abuse of process, are still retained in order to ensure a fair trial for the accused.

222. Under section 87A of the Magistrates Ordinance, no person shall publish a written report, or broadcast a report, of committal proceedings (other than essential matters such as case summaries and the names of the accused). However, on application by the defendant, the magistrate is required to lift restriction on the report. It is proposed in clause 105 that, for NS cases, the magistrate should have discretion to decide whether or not to grant the prosecution's or the defendant's application for lifting restriction on the report of committal proceedings.

223. Members have expressed concerns that for NS cases, publication of the reports of committal proceedings may be contrary to the interests of national security. In response to members' enquiries, the Administration has advised that under the existing section 87A of the Magistrates Ordinance, where a case involves more than one defendant, the magistrate must, without discretion, lift restrictions on reports of committal proceedings as long as only one defendant applies for such a lifting, even without the consent of other defendants. In view of the fact that this situation may cause injustice to another defendant in the same case, or even affect the overall fairness of subsequent formal trials or prejudice national security due to premature disclosure of evidence, the Administration considers that the magistrate should be given the discretion to decide whether or not to grant the lifting of restrictions on reports of committal proceedings.

224. Clause 133 of the Bill amends section 9G of the Criminal Procedure Ordinance to remove the requirement that an accused person charged with treason shall be admitted to bail only upon the order of a judge of the Court of First Instance (i.e. the magistrate will have the power to deal with an application for bail from a defendant charged with treason). Members have enquired how the threshold for granting bail to defendants in NS cases is reflected in the Bill. The Administration has advised that clause 96 of the Bill sets out that any case in connection with an offence under the Bill is a case mentioned in Article 41 of the HK National Security Law, and the procedure under Chapter IV of the HK National Security Law applies to such a case. Article 42 of Chapter IV of the HK National Security Law already provides for bail in cases concerning offence endangering national security.

225. Clause 136 of the Bill proposes to amend section 79I of the Criminal Procedure Ordinance to provide that in cases relating to safeguarding national security, giving evidence to the Court by way of a live television link from a place outside Hong Kong is not allowed. Members have enquired about the purpose of the amendment and how witnesses who are not in Hong Kong may give evidence. The Administration has advised that the arrangement is to preclude the risk of national security arising from harassment against witnesses giving evidence outside Hong Kong or tampering with evidence in the interest of upholding due administration of justice. The Administration has further pointed out that witnesses who are outside Hong Kong may give evidence in person in Hong Kong.

226. Clause 139 of the Bill seeks to amend section 123 of the Criminal Procedure Ordinance to provide that criminal proceedings may be held in camera and provide for non-disclosure of identity of witnesses in certain cases for the purposes of (a) safeguarding national security, including preventing the disclosure of state secret; (b) safeguarding public order; (c) safeguarding justice; or (d) any other proper purpose. Members have enquired about the meaning of "any other proper purpose". The Administration has explained that this is to reflect the provision in Article 41(4) of the HK National Security Law, and it is for the judge to consider what constitutes "any other proper purpose", having regard to the relevant requirements of the Hong Kong Bill of Rights Ordinance for an open trial.

227. Clause 140 of the Bill seeks to amend Schedule 3 to the Criminal Procedure Ordinance in relation to excepted offences to add an offence endangering national security. Members have considered the excepted offences set out in Schedule 3 to be relatively serious and have enquired about its application. The Administration has advised that for the excepted offences set out in Schedule 3, if the judge imposes a sentence of imprisonment, the sentence should be served immediately and no suspended sentence may be imposed. The Administration has further pointed out that under section 109A of the Criminal Procedure Ordinance, where a defendant between 16 and 21 years of age is convicted of an offence, the Court should give preference to non-custodial sentences, except for the excepted offences under Schedule 3. The Administration is of the view that this requirement should be dispensed with in light of the relative seriousness of the national security offences. It has pointed out that the Court may still take into account the rehabilitative needs of young defendants, and that the excepted offences do not preclude alternative custodial sentences for juveniles, such as a sentence to a training centre or a rehabilitation centre.

228. Clause 141 of the Bill seeks to amend rule 13 of the Legal Aid in Criminal Cases Rules (Cap. 221D), which defines specified offences. Noting that the specified offences include offences endangering national security with a maximum penalty of life imprisonment, members have enquired whether legal aid is equally available for other offences endangering national security.

229. The Administration has explained that in considering an application for legal aid, the Director of Legal Aid will normally take into account the financial resources of the accused and the likelihood of success of the case. However, for the most serious criminal cases such as murder, rule 13 of the Legal Aid in Criminal Cases Rules provides that the Director of Legal Aid may, having considered the financial resources of the accused person or appellant, grant him a legal aid certificate or an appeal aid certificate, without regard to the likelihood of success of the case. The Administration is of the view that, for the most serious offences endangering national security, the defendant should be granted legal aid regardless of the likelihood of success of the case, provided that he passes the means test.

Mechanisms for safeguarding national security and relevant protections

230. Members have expressed concerns whether the Bill is detailed enough to cope with situations arising in the future, and suggested, with reference to other Ordinances, empowering the Chief Executive in Council to make subsidiary legislation for safeguarding national security, so as to further provide for the specific implementation issues in respect of laws relevant to safeguarding national security (i.e. the HK National Security Law and its relevant Interpretation, and the Safeguarding National Security Ordinance after its enactment) and deal with unforeseen circumstances. The Administration has agreed with members' views, and proposed to add new clause 106A of the Bill to make relevant provisions.

Administrative instructions in connection with safeguarding national security

231. Clause 107 of the Bill provides that the Chief Executive may issue an administrative instruction to any public servant of the HKSAR to give directions in relation to the work on safeguarding national security. Members have enquired whether the term "public servant" covers "public officer", including non-civil service positions such as Commissioner of the Independent Commission Against Corruption, Chief Executive of the Hong Kong Monetary Authority, Executive Council Members, LegCo Members and District Council members, and about the consequence of deliberate flouting of the relevant administrative instructions by any public servant.

The Administration has advised that administrative instructions only cover public servants. Public servants who fail to comply with the instructions will be penalized with follow-up in accordance with the relevant civil service regulations.

232. In light of members' concern, the Administration has proposed to make amendments to clause 107 of the Bill to, in addition to stipulating that the Chief Executive can issue administrative instructions to any public servant, also stipulate that relevant administrative instructions can be issued to any department or agency of the HKSAR Government, and any department or agency of the HKSAR Government must also comply with the relevant administrative instructions.

233. Pointing out that the Chief Executive is also the Chairman of the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region ("the National Security Committee") and the role of the National Security Committee in safeguarding national security is very important, members are concerned that the role, positioning and functions of the National Security Committee are not mentioned in the Bill. Members are of the view that one of the purposes of enacting a new "Safeguarding National Security Ordinance" is to fully implement the constitutional responsibilities and obligations stipulated in the 5.28 Decision and the HK National Security Law. The Interpretation of Article 14 and Article 47 of the HK National Security Law was adopted by the Standing Committee of the National People's Congress on 30 December 2022, but the Interpretation was not fully reflected in local legislation. Therefore, members consider that the relevant requirements should be clearly included in the Bill to ensure that if the law of the HKSAR confers any function on a person, any person, in making any decision in the performance of the function, must respect and execute the judgements and decisions of the National Security Committee in accordance with the law. The Administration agrees with the view and proposes to amend the Bill by adding a new clause 107A on the judgements and decisions of the National Security Committee.

234. Members have suggested that in order to ensure the requirements related to taking forward national security education under the HK National Security Law are better implemented, a clause should be added to the Bill to implement the contents of national security education and to specify the relevant administrative responsibilities, and that the wording should read: "The Chief Secretary for Administration may provide advice, or give any direction, to any person whom the Chief Secretary for Administration considers appropriate, for promoting national security education, raising the awareness of residents of the HKSAR of national security and of the obligation to abide by the law, or strengthening public communication,

guidance, supervision and regulation of the work on safeguarding national security and prevention of terrorist activities". In response, the Administration has advised that the Chief Secretary for Administration is the Chairman of the Constitution and Basic Law Promotion Steering Committee, which is tasked, among other things, to promote national security education. In the light of the members' view, the Administration proposes to add a new clause 107B to empower the Chief Secretary for Administration to give direction to any person whom the Chief Secretary for Administration considers appropriate, for the public communication, guidance, supervision and regulation of national security education, etc.

235. Members have pointed out that the existing Civil Service Code has provided for matters relating to safeguarding national security by civil servants and set out the relevant penalties, and enquired about the intent of introducing clause 107 of the Bill. The Administration has advised that clause 107 under Part 8 seeks to provide for enforcement mechanisms for safeguarding national security, and achieve convergence, compatibility and complementarity with the 5.28 Decision and the HK National Security Law.

236. The Administration has advised that notwithstanding the difference in nature between the administrative instructions issued by the Chief Executive under clause 107 of the Bill and the Civil Service Code, the Administration will stipulate in the Civil Service Code the penalties for contravention of the administrative instructions by public servants. In response to members' enquiry, the Administration has advised that as the relevant administrative instructions might involve enforcement details, it might not be appropriate to issue them in an open manner.

237. Clause 108 of the Bill provides that "A public servant must provide all such assistance that is necessary for the work on safeguarding national security". Some members are of the view that that although the provision already stipulates that any public servant must provide all such assistance that is necessary for the work on safeguarding national security, the relevant provision should be further improved to provide specific responsibilities relating thereto. Taking into account members' views, the Administration proposes to amend clause 108 of the Bill to stipulate that a public servant must provide any department or agency that is responsible for the work on safeguarding national security, and its personnel, in the HKSAR, with all reasonable facilitation, support, backing and protection in a timely manner, including providing the necessary manpower and other necessary resources in a timely manner, and that a public servant must exercise all powers and discretions that the public servant has (including any power and discretion concerning the giving of any exemption) to discharge his or her duty in providing assistance in the work on safeguarding national security.

Chief Executive to issue certificate in relation to question of whether national security or state secret is involved

238. Clause 109 of the Bill seeks to empower the Chief Executive to issue a certificate in relation to question of whether national security or state secret is involved, whether or not any proceedings have been commenced. The Administration has explained that such a certificate may certify whether an act or matter is related to national security and whether a material involves state secret. In response to members' enquiry, the Administration has pointed out that unlike Article 47 of the HK National Security Law which only applies to circumstances in which cases are adjudicated by Court, clause 109 of the Bill also applies to circumstances other than proceedings, thereby achieving compatibility and complementarity with Article 47 of the HK National Security Law.

239. In response to members' enquiry, the Administration has advised that the certificate issued by the Chief Executive under clause 109(1) of the Bill will be relevant to a particular case, and therefore the specific content of each certificate and the form in which it is issued will vary. The proposed mechanism for the issuance of a certificate has drawn on Article 47 of the HK National Security Law to deal with contentious cases and is consistent with the practice of the executive authorities determining whether an issue involves national security under common law. Clause 109(2) of the Bill also provides that the relevant certificate may be issued whether or not any proceedings have been commenced, and may be issued by the Chief Executive on the Chief Executive's own motion, in order to provide flexibility in the issuance of the relevant certificate.

240. Members have expressed concerns as to whether the certificate will specify the persons authorized to handle information relating to national security or state secrets in the relevant cases. The Administration has advised that it will regulate this matter through other legislation. In addition, the Administration has clarified that if a material is certified as a state secret by the above certificate, it does not mean that the person to whom the material relates has committed an offence. Whether it constitutes an offence relating to state secrets under the Bill will depend on factors such as whether there is lawful authority, whether there is possession of knowledge, and whether there is an intent to endanger national security.

241. Members have enquired about the definition of "material" in clause 109(1) of the Bill. The Administration has advised that the term "material" is broadly defined to include information, documents and other articles. In drafting the relevant provisions, reference has been made to

Article 47 of the HK National Security Law, which also uses the term "material".

242. Clause 110 of the Bill seeks to require the Administration to take measures to ensure that the personal safety, and the safety of the property and the place of residence of persons handling cases concerning national security or responsible for the work on safeguarding national security, as well as informers or witnesses in such cases, are subject to protection.

243. Members have raised concerns about the meaning of the phrase "any of the personnel of any department or agency" referred to in paragraph (a) of the proposed definition of "specified person" in clause 110(4) of the Bill. Members have also expressed concerns that in the same proposed definition, the phrase "a judicial officer, staff member of the Judiciary, counsel or solicitor, who handles a case concerning national security" in paragraph (b) does not include staff members of counsel or solicitors. The Administration has advised that the scope of "any of the personnel of any department or agency" in paragraph (a) is quite extensive, covering government departments and other authorities (such as non-governmental organizations). As regards the scope of paragraph (b), the Administration has undertaken to further examine the need to include staff members of counsel or solicitors.

Signing or certification of legal documents in respect of cases concerning national security etc.

244. Clause 111 of the Bill seeks to allow a public servant, counsel or solicitor to sign a legal document in respect of a case concerning national security in the name of the department, agency or solicitors' firm represented by the public servant, counsel or solicitor, or to state in the document the name of the department, agency or solicitors' firm, without signing in or stating his or her own name. The Administration has explained that the purpose of this provision is to prevent doxxing of the relevant officers by not disclosing the names of the responsible officers in public legal documents of the case.

245. Some members are of the view that under certain circumstances, there is a possibility that officers handling cases not related to national security may also be doxxed. Although those cases are not cases concerning national security, a party to the case may be a defendant of a case concerning national security, and hence there is a need to provide greater protection to persons handling non-NS cases that involve defendants of NS cases. In response to members' views, the Administration has proposed to amend clause 111 of the Bill to expand the scope of the mechanism under

clause 111 by stipulating that "specified cases" cover, in addition to cases concerning national security, a case in which a party to the case is also a party to proceedings instituted for the party's offence concerning national security.

Unlawful disclosure of personal data of persons handling cases or work concerning national security

246. Clause 112 of the Bill seeks to prohibit any unlawful disclosure of personal data of the personnel that handles cases concerning national security or is responsible for the work on safeguarding national security, the informer of, or the witness in such cases, as well as the family members of the above persons. Members have enquired about evidential requirements for the proposed offences under clause 112(1) and (2).

247. The Administration has advised that the elements of the aforesaid offences include: committing the elements of the offences under section 64(3A) or (3C) of the Personal Data (Privacy) Ordinance (Cap. 486); the relevant data subject being a person mentioned in clause 112(1)(a) or (2)(a) of the Bill; and the person commiting the offence with the intent mentioned in clause 112(1)(b)(i) or (2)(b)(i) of the Bill, or in consequence of a thing done by the relevant data subject for his or her functions or in providing assistance in relation to a case concerning national security.

248. Members have asked whether the conviction for an offence under section 64(3A) or (3C) of the Personal Data (Privacy) Ordinance is required before prosecution for the proposed offence under clause 112(1) or (2) would be made. The Administration has replied in the negative. The Administration has also pointed out that the conviction thresholds for the above proposed offences are higher, and the relevant penalties heavier, than those under section 64(3A) or (3C) of the Personal Data (Privacy) Ordinance.

249. Members have asked whether "a family member" in clause 112(1)(a) and (2)(a) includes a person residing together. The Administration has advised that the definition of "family member" is given with reference to the definition under the Personal Data (Privacy) Ordinance, i.e. "in relation to a person, means a person who is related to the person by blood, marriage, adoption or affinity". In response to members' concern, the Administration has undertaken to consider reviewing the adequacy of the scope of data subjects in clause 112(1)(a) and (2)(a), and consider whether or not to cover persons residing with the specified person or the aider and other relevant persons for more effective protection of them.

250. Clause 112(3) of the Bill gives extra-territorial effect in respect of the proposed offences in clause 112(1) and (2). Members have expressed concerns about the considerable difficulty in overseas enforcement of the doxxing offences and the Administration's counter-measures. The Administration has advised that the Police will endeavour to enforce the relevant offences and, if necessary, request the relevant platforms to remove "doxxing" messages by means of the Implementation Rules.

Unlawful harassment of persons handling cases or work concerning national security

251. Clause 113 of the Bill seeks to prohibit a person from doing intimidating, abusive or offensive act towards the specified person for the purpose of preventing or deterring personnel who handles cases concerning national security or is responsible for the work on safeguarding national security, informers of or witnesses in the above case, and family members of the above persons, in the performance of functions or provision of assistance. The Administration has pointed out that the elements of the proposed offence under clause 113(1) include objectively, whether a reasonable person would have been alarmed or distressed, or specified harm would have been caused to the subject, and factually whether alarm or distress or specified harm was caused to the subject.

252. Members and the Legal Adviser to the Bills Committee have asked how the objective test and factual elements of offence can be proved. The Administration has advised that the Court often uses the concept of "a reasonable man" to consider the facts of the cases, and determines whether an act would cause alarm or distress or specified harm to the subject using an objective standard. In respect of proof of the facts, the Administration has advised that the Court may consider whether it is satisfied that alarm or distress or specified harm has in fact been caused to the subject by relying on evidence such as the testimony of the subject, and expert witnesses may not necessarily be summoned.

253. Some members are worried that the higher threshold of conviction for the proposed new offence may weaken its deterrent effect. It is also suggested that the Administration should consider introducing a two-tier penalty system, targeting separately acts of harassment that do not cause specified harm and those that do cause specified harm. The Administration has noted members' views and indicated that their views would be considered.

254. Members are concerned that if a law enforcement officer is verbally abused during law enforcement, whether the person making the abuse has committed the proposed offence under clause 113(1) of the Bill. The Administration has advised that, for example, a suspect became agitated during the course of arrest and abused a law enforcement officer with abusive language; under this circumstance, whether or not the suspect has committed the proposed offence under clause 113(1) depends on whether he intends to cause alarm or distress or specified harm to the law enforcement officer. All in all, there is no need for the general public to worry about being caught by the law inadvertently.

255. Members have asked how prosecution would be instituted if a person commits the proposed offence under section 113(1) of the Bill by doing an intimidating, abusive or offensive act, and such act has also constituted an offence of wounding or inflicting grievous bodily harm under the Offences Against the Person Ordinance (Cap. 212). The Administration has advised that in this case, the Department of Justice will select charges that reflect adequately the relevant culpability in accordance with the Prosecution Code.

256. Given that some harassment acts against relevant personnel can be done overseas by means of making communication, etc., members have enquired why the Administration has not provided extra-territorial effect for the proposed new offence. The Administration has advised that according to common law principles, while the harassment act partially takes place outside Hong Kong, but if the communication is made to the relevant personnel situated in Hong Kong and causes specified harm, some elements of the offence have been formed in Hong Kong and the Judiciary can exercise its jurisdiction. Therefore, it is not necessary to provide extra-territorial effect for the proposed new offence.

257. Members are concerned whether members of the public would be inadvertently caught by the law if they have done harassment act against the relevant personnel unintentionally as a result of a failure to identify them. The Administration has advised that clause 113(2) of the Bill provides that it is a defence if the Court considers that it is reasonable in the circumstances for the person charged with the proposed new offence to use the words, make the communication or do the act.

258. In response to members' concern that personnel handling cases not related to national security may also be doxxed, the Administration has proposed to add new clauses 113A and 113B to the Bill to empower that a specified Court may on application take anonymity measures (regardless of

whether the relevant case is a case concerning national security), and to provide for the offences and penalties for contravening order prohibiting disclosure of identity.

Related amendments to other enactments

Pensions cancelled under relevant regimes on convictions of offences endangering national security

259. Members have noted that clauses 123, 125 and 153 of the Bill respectively propose amendments to the Pensions Ordinance (Cap. 89), the Pension Benefits Ordinance (Cap. 99) and the Pension Benefits (Judicial Officers) Ordinance (Cap. 401) by deleting references relating to "treason" under section 2 of the Crimes Ordinance in the relevant Ordinances, and substituting by "any offence endangering national security". In doing so, the pension, gratuity or allowance ("relevant benefits") payable to an officer convicted of an offence endangering national security may be cancelled, suspended or reduced under the relevant regimes.

260. In the case of a public officer suspected of having committed an offence endangering national security, members are concerned about whether the officers concerned can still receive the relevant benefits in the course of judicial proceedings. The Administration has advised that under the existing mechanism, an officer may be interdicted (i.e. suspended from duty) prior to the completion of judicial proceedings if it is considered not in the public interest for him/her to remain in office before he/she is cleared of the charge against him/her. During the period of suspension, the relevant benefits of the officers concerned may be reduced accordingly. If the officer has absconded, the proposed new clause 87 of the Bill may be invoked to restrict the officers concerned from dealing with their funds or other financial assets or economic resources.

261. Members have also noted that for public officers who have retired and are receiving relevant benefits, if an officer is convicted of an offence endangering national security, the portion of the relevant benefits not yet paid to the officer concerned may be cancelled, suspended or reduced as the case may be.

262. In response to members' enquiries, the Administration has advised that arrangements for cancelling, suspending or reducing the relevant benefits will be commensurate with the seriousness of the offences endangering national security committed by the relevant officers. Relevant departments will conduct reviews in a timely manner in the future.

Provisions relating to the early release of prisoners who serve sentences in respect of conviction of offences endangering national security

263. Clause 144 of the Bill proposes to amend the Prison Rules (Cap. 234A), providing that if a prisoner serves a sentence in respect of the prisoner's conviction of an offence endangering national security, the prisoner must not be granted remission under rule 69(1) of those Rules unless the Commissioner of Correctional Services is satisfied that the prisoner's being granted remission will not be contrary to the interests of national security.

264. Members have noted that the proposed new rule 69(1C) of the Prison Rules provides that if a prisoner convicted of an offence endangering national security is not granted remission because of a decision made by the Commissioner of Correctional Services, the Commissioner must review the decision annually. Some members have suggested that the Administration should consider reviewing the relevant decisions every six months, so as to provide incentives for industrious prisoners with good conduct to turn over a new leaf.

265. According to the Administration, the early release of a prisoner depends on a number of factors, including whether there is a change in the mindset and behaviour of the prisoner concerned, and whether the early release of the prisoner concerned will pose a threat to national security.

266. Clauses 155, 168 and 169 of the Bill respectively propose to amend the Post-Release Supervision of Prisoners Ordinance (Cap. 475) and the Long-term Prison Sentences Review Ordinance (Cap. 524), providing that if a prisoner serves a sentence in respect of the prisoner's conviction of an offence endangering national security, the Commissioner of Correctional Services must not refer to the relevant Boards for review the sentence of the prisoner under the relevant sections of the above Ordinances unless the Commissioner of Correctional Services is satisfied that an early release of the prisoner will not be contrary to the interests of national security. Clause 156 of the Bill proposes to amend Schedule 1 to the Post-Release Supervision of Prisoners Regulation (Cap. 475A) by adding an offence endangering national security to the list of specified offences.

267. Some members are concerned about whether the above related amendments are consistent with the principle of protecting the human rights of prisoners. The Administration has explained that the granting of early release is never a necessary right to prisoners, and the granting of remission by the Commissioner of Correctional Services is only an administrative arrangement to encourage industry and good conduct. The above proposed

provisions are applicable to all prisoners serving their sentences in respect of their convictions of offences endangering national security, irrespective of whether they are sentenced before or after the commencement of the Bill. The relevant provisions are not punitive measures, and they do not increase the length of sentence of the prisoners and are not applicable to prisoners already granted with early release; hence, there is no issue of "retrospectivity" and does not engage the requirements under Article 12 of the Hong Kong Bill of Rights on no retrospective criminal offences or penalties.

A person convicted of an offence endangering national security disqualified under various election-related legislation

268. Members have noted that the Bill seeks to amend the Legislative Council Ordinance (Cap. 542), the District Councils Ordinance (Cap. 547), the Chief Executive Election Ordinance (Cap. 569) and the Rural Representative Election Ordinance (Cap. 576) by stipulating that a person convicted of any offence endangering national security will be disqualified from holding any office under the above Ordinances or from being nominated as a candidate in related elections ("relevant qualifications").

269. In response to members' enquiries, the Administration has advised that a person convicted of any offence endangering national security shall be immediately disqualified from relevant qualifications irrespective of the penalty for the offence. While Article 35 of the HK National Security Law also has similar provisions, it does not include the eligibility for being a rural representative and a relevant candidate. The Administration considers that disqualifying a rural representative or a relevant candidate convicted of an offence endangering national security is a reasonable arrangement that is in line with the other arrangements mentioned above.

Amending references relating to "sedition" in other legislation

270. Clause 124 of the Bill seeks to make consequential amendments to section 32 of the Post Office Ordinance (Cap. 98) (prohibited articles). In relation to prohibited articles, the clause seeks to substitute the reference to "any seditious publication within the meaning of any enactment relating to sedition" in existing section 32 by "anything the publication of which would constitute an offence endangering national security". Members are concerned about whether the word "anything" in the proposed provision should be changed to "articles" to accurately reflect the nature of the articles to be prohibited. In addition, members have pointed out that the term "發布" in the Chinese text may include publishing related matters through means other than a publication. However, its English equivalent

"publication" focuses more on the publishing of a publication. They are concerned that the coverage of the above two references may be different. It has also been suggested that the Administration may consider defining the word "publication" to avoid misunderstanding.

271. According to the Administration, the term "thing" is also used to describe the prohibited articles in the relevant provision under the existing Post Office Ordinance. The proposed expression in the Bill can clearly specify the articles to be prohibited and achieve consistency in language use. The Administration has also confirmed that there is no inconsistency between the Chinese and English texts of the provision concerned in respect of the articles to be prohibited due to textual and terminological factors.

272. Clause 147 of the Bill seeks to propose adaptation and consequential amendments to section 48 of the Trade Unions Ordinance (Cap. 332) (conspiracy in relation to trade disputes). The Administration has proposed that the reference relating to "sedition" in that section be substituted by "offence endangering national security", and that to "sedition or any offence against the State or the Sovereign" be substituted by "any offence endangering national security".

273. Members are concerned about whether the proposed amendments will undermine the capability of the HKSAR to deal with acts and activities endangering national security involving the head of the state. According to the Administration, the relevant references are mainly related to Part I (Treason) and Part II (Other Offences Against the Crown) of the existing Crimes Ordinance. The provisions in Part 2 of the Bill have also improved the relevant offences. In response to members, the Administration has confirmed that the Bill has amended the national security-related provisions in existing legislation in respect of which adaptation amendments have not yet been made.

Explanation, education and publicity work

274. Members have expressed strong dissatisfaction with the persistent smearing of the legislative exercise by people with ulterior motives, as including the media's erroneous reports about the Administration's purported intention to ban the operation of certain social media, video-sharing platforms or streaming platforms in Hong Kong under the legislative proposal after the Administration had announced the outcome of the consultation exercise. They have called on the Administration to take robust measures to refute all false statements and to sustain its explanation, education and publicity work for the public and the international community

(e.g. by setting up a webpage containing all national security-related information).

275. The Administration has assured members that it will sustain its publicity efforts and will continue to refute false statements. After the completion of the legislative exercise, it will further enhance its dedicated webpage for Basic Law Article 23 legislation. The dedicated webpage will also provide links to the relevant websites of various bureaux/departments, so as to provide the public with national security-related information in a holistic and structured manner.

Proposed amendments to the Bill

276. The Bills Committee supports the Administration's proposed amendments, which are explained in paragraphs 26, 56, 74, 97, 108, 117, 123, 125, 134 to 136, 139, 144 and 145, 155, 171, 183, 186, 198, 203, 230, 232 to 234, 237, 245 and 258. The Administration has also proposed a number of textual and technical amendments to the Bill. The Bills Committee will not propose any amendments to the Bill.

Resumption of Second Reading debate on the Bill

277. The Bills Committee supports the resumption of the Second Reading debate on the Bill at a meeting of LegCo at the earliest opportunity.

Consultation with the House Committee

278. The Bills Committee reported its deliberations to the House Committee on 15 March 2024.

Council Business Division 2
Legislative Council Secretariat
18 March 2024

Appendix 1

Subcommittee to Study Matters Relating to Basic Law Article 23 Legislation

Membership list

Chairman	Hon Martin LIAO Cheung-kong, GBS, JP
Deputy Chairman	Hon CHAN Hak-kan, SBS, JP
Members	Hon Tommy CHEUNG Yu-yan, GBM, GBS, JP Hon Jeffrey LAM Kin-fung, GBM, GBS, JP Hon Mrs Regina IP LAU Suk-yee, GBM, GBS, JP Ir Dr Hon LO Wai-kwok, GBS, MH, JP Hon Holden CHOW Ho-ding, JP Hon Tony TSE Wai-chuen, BBS, JP Hon Stanley NG Chau-pei, SBS, JP Ir Hon CHAN Siu-hung, JP Dr Hon Kennedy WONG Ying-ho, BBS, JP Hon YANG Wing-kit Revd Canon Hon Peter Douglas KOON Ho-ming, BBS, JP Hon LAI Tung-kwok, GBS, IDSM, JP Hon Carmen KAN Wai-mun Total: 15 members
Clerk	Ms Maisie LAM Mr Lemuel WOO
Legal Adviser	Miss Joyce CHAN Mr Timothy WU

Appendix 2

Bills Committee on Safeguarding National Security Bill

Membership list

Chairman	Hon Martin LIAO Cheung-kong, GBS, JP
Deputy Chairman	Hon CHAN Hak-kan, SBS, JP
Members	Hon Tommy CHEUNG Yu-yan, GBM, GBS, JP Hon Jeffrey LAM Kin-fung, GBM, GBS, JP Hon Mrs Regina IP LAU Suk-yee, GBM, GBS, JP Ir Dr Hon LO Wai-kwok, GBS, MH, JP Hon Holden CHOW Ho-ding, JP Hon Tony TSE Wai-chuen, BBS, JP Hon Stanley NG Chau-pei, SBS, JP Ir Hon CHAN Siu-hung, JP Dr Hon Kennedy WONG Ying-ho, BBS, JP Hon YANG Wing-kit Revd Canon Hon Peter Douglas KOON Ho-ming, BBS, JP Hon LAI Tung-kwok, GBS, IDSM, JP Hon Carmen KAN Wai-mun Total: 15 members
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