

**Proposals to implement
Article 23 of the Basic Law**

**Summary of
Consultation Document**

Security Bureau
September 2002

We welcome your views

The Government has always attached great importance to comments from the public. We have now formulated the proposals to implement Article 23 of the Basic Law as detailed in this document. A summary of the proposals is set out in the following pages for public consultation.

We sincerely invite your views on the proposals. Comments on the proposals are welcomed, by 24 December 2002, as follows —

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Any person submitting views and comments should be aware that the Government may publish

all or part of the views and comments received and disclose the identity of the source in such manner as the Government considers appropriate, unless he/she requests any part of the views and comments and/or his/her identity be treated in confidence.

Copies of this summary and the full consultation document are available at all District Offices, and can be accessed at the Security Bureau website at <http://www.info.gov.hk/sb> or the Government Information Centre website at <http://www.info.gov.hk/eindex.htm>. In an effort to reduce paper consumption, we encourage you to access the consultation document through these websites as far as possible.

For enquiries, please contact the Security Bureau at 2810 2593.

Background

Article 23 of the Basic Law stipulates that the Hong Kong Special Administrative Region (HKSAR) “shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government (CPG), or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

2. In line with the high degree of autonomy for the HKSAR as provided under Article 2 of the Basic Law, and the guarantee that the socialist system and policies shall not be practised in the HKSAR as set out in Article 5, national laws for the protection of essential interests of the state and national security have not been promulgated in Hong Kong. The HKSAR has both practical and legal obligations to implement Article 23.

3. Every nation has laws to protect its sovereignty, territorial integrity, unity and national security. It is universally accepted that a national owes allegiance to his state, in return for the

protection afforded by the state against foreign aggression, and for the provision of a stable, peaceful and orderly society within which to carry out his pursuits. The intent of Article 23 is to prohibit by law acts that would undermine the sovereignty, territorial integrity, unity and national security of our country.

4. Some of the Article 23 offences are already dealt with under existing legislation. Parts I and II of the Crimes Ordinance (Cap. 200) deal with treason and sedition respectively. Where the protection of official information is concerned, the Official Secrets Ordinance (Cap. 521) deals with spying and unlawful disclosure of official information. The Societies Ordinance (Cap. 151) regulates, *inter alia*, the activities of and ties with foreign political organizations.

Guiding Principles

5. The Basic Law provides for the continuity of the common law system of the HKSAR, and it follows that the implementation of Article 23 should be effected through making use of existing legislation as far as possible. We have also taken into account the following guiding principles —

- (a) the need to meet fully the requirements of the Basic Law, including Article 23 which stipulates the acts to be prohibited; and other relevant provisions in Chapter III, in particular Article 27 which guarantees certain fundamental rights and freedoms of Hong Kong residents, and Article 39 which stipulates, *inter alia*, that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as applied to Hong Kong shall remain in force, and shall be implemented through the laws of the HKSAR;
- (b) the need to protect adequately the State's essential interests, namely sovereignty, territorial integrity, unity and national security; and
- (c) the need to ensure that all offences encompassed by local legislation to implement Article 23 are as clearly and tightly defined as appropriate, so as to avoid uncertainty and the infringement of fundamental rights and freedoms

guaranteed by the Basic Law.

The Proposals

Treason

6. Treason means the betrayal of one's country. The interests to be protected against treason are the sovereignty, territorial integrity and security of the People's Republic of China (PRC) as a whole, and the PRC Government (PRCG). Treason offences under the Criminal Law of the PRC refer to those acts endangering the sovereignty, territorial integrity and security of the PRC committed by a PRC citizen in collusion with a foreign state, or with an organization or individual outside the territory of the PRC. Treason offences are essentially crimes of endangering state security from without and the legal interest to be protected is the external status of the country.

7. Having studied the existing offence of treason, the Criminal Law of the PRC and the relevant provisions in other jurisdictions, we propose to update and improve the treason provisions in Part I of the Crimes Ordinance by restricting the substantive offences to —

- (a) levying war by joining forces with a foreigner to —
 - (i) overturn the PRCG; or
 - (ii) compel the PRCG to change its policy or measures by force or constraint; or
 - (iii) put any force or constraint upon the PRCG; or
 - (iv) intimidate or overawe the PRCG; or
- (b) instigating a foreigner to invade the PRC; or
- (c) assisting by any means a public enemy at war with the PRC.

We also propose to codify the common law inchoate and accomplice offences of attempting, aiding and abetting, counselling and procuring the commission of substantive offences, and conspiring to commit the substantive offences; and also the offence of misprision of treason (i.e. failure to report a known offence of treason).

8. The current treasonable offences and offence of assaults on the sovereign are proposed to be repealed.

Secession

9. Preserving the territorial integrity and unity of a nation lies at the heart of the welfare of a nation. A breach of that integrity by force or other serious unlawful means will almost invariably lead to war. There is at present no offence termed “secession” in the HKSAR. To ensure the protection of territorial integrity and unity of our country, we propose to create a specific offence of secession, making it an offence to —

- (a) withdraw a part of the PRC from its sovereignty; or
- (b) resist the CPG in its exercise of sovereignty over a part of the PRC

by levying war, or by force, threat of force, or other serious unlawful means. The specific inchoate and accomplice offences of attempting, aiding and abetting, counselling and procuring the commission of the substantive secession offence, and conspiring to commit the substantive offence, are also proposed.

Sedition

10. While it is universally accepted that the freedom of expression, in particular the right to voice dissenting opinions, is a fundamental right in modern democratic societies, the ICCPR specifically provides that the freedom of expression is not absolute and carries special duties and responsibilities. It is also widely recognized that the fundamental national security interests and stability of the state may sometimes be seriously endangered by verbal or written communications, including those conveyed electronically. Examples would include a speech inciting others to commit an offence endangering national security. For this reason, the freedom of expression may under the ICCPR be restricted on certain specified grounds, such as national security. Many jurisdictions, including the most liberal and democratic societies, retain sedition as a serious criminal offence. There is therefore a continued need for sedition offences to protect the state and key institutions from stability-threatening communications.

11. We propose to narrow the existing offence of sedition so that it is an offence —

(a) to incite others to commit the

substantive offences of treason, secession or subversion; or

- (b) to incite others to violence or public disorder that seriously endangers the stability of the state or the HKSAR.

12. While the sedition offence should cover one aspect of communications threatening the security and stability of the state, there is also a need to deal with seditious publications. However, offences targeting publications are a direct restriction on the freedom of expression, and should therefore be narrowly defined in order to comply with the necessity and proportionality criteria as required under the ICCPR. If the act of dealing with seditious publications is part of an act of incitement, it may be covered by the offence proposed in paragraph 11 above. However, if someone deals with seditious publications for some other reasons such as profit, while at the same time being fully aware that the publications would incite offences that endanger national security, such dealings should also be suitably regarded as criminal acts.

13. We propose to narrow the existing definition of “seditious publication”. A publication should be regarded as seditious only if it would

incite persons to commit the substantive treason, secession and subversion offences, and that it would be an offence, with knowledge or reasonable suspicion that a publication is seditious,

- (a) to deal with that publication without reasonable excuse; or
- (b) to possess that publication without reasonable excuse.

14. The mere expression of views, or mere reports or commentaries on views or acts, will not be criminalized, unless such expressions, reports or commentaries incite others to achieve a specified purpose through levying war, force, threat of force, or serious unlawful means. This is in compliance with Article 39 of the Basic Law, which enshrines protection of the freedom of expression.

Subversion

15. In the context of the protection of state institutions, subversion is commonly understood to involve overthrowing or undermining the constitution, the constitutionally established government, or system of government by internal or domestic elements. There is no specific offence

of “subversion” in the laws of the HKSAR, although the violent overthrow of the government is covered by the existing treason offence of “levying war to depose the sovereign”.

16. The targets of protection against subversion should be the basic system of the state and the PRCG. We propose to define the offence of subversion as —

- (a) to intimidate the PRCG; or
- (b) to overthrow the PRCG, or to disestablish the basic system of the state as established by the PRC constitution,

by levying war, or by force, threat of force, or by other serious unlawful means. The related inchoate and accomplice offences of attempting, aiding and abetting, counselling and procuring the commission of substantive offences, and conspiring to commit the substantive offences, are also proposed to be codified.

Theft of State Secrets

17. While open government and a high degree of transparency of government actions encourages participation in public affairs and enhances

accountability, some information has of necessity to be kept confidential to protect the security of the country and the people, and to ensure the smooth running of government. There should therefore be legal sanctions against unauthorized access or disclosure of such information. At the same time, in order to safeguard freedom of expression and information, protection should only be afforded to truly deserving categories of information, and the means of protection should be clearly defined. We propose to retain the stipulations of the existing Official Secrets Ordinance, specifying that the targets of protection against the theft of state secrets should be —

- (a) where spying is concerned, information which is likely to be useful to an enemy, and whose obtaining or disclosure is for a purpose prejudicial to the safety or interests of the PRC or the HKSAR;
- (b) where unlawful disclosure is involved, information belonging to the following categories —
 - (i) security and intelligence information;
 - (ii) defence information;
 - (iii) information relating to

- international relations;
- (iv) information relating to relations between the Central Authorities of the PRC and the HKSAR; and
 - (v) information relating to commission of offences and criminal investigations.

18. “Spying”, which generally refers to the procurement of information useful to a foreign power and prejudicial to state security, is regarded worldwide as a serious national security offence meriting heavy punishment. In contrast, in order to preserve the balance between protecting state security and promoting open government, it is considered that unauthorized disclosure of official information should only be criminalised where the information is of a sensitive nature.

19. The Official Secrets Ordinance already provides a good foundation for protecting state secrets. Nonetheless, we propose to introduce a new offence of unauthorized and damaging disclosure of protected information obtained by unauthorized access.

Foreign Political Organizations

20. The existing provisions in the Societies Ordinance are sufficient to prohibit foreign political organizations from unduly influencing the local political process, and should be retained. On the other hand, political activities that pose genuine threats to national security are likely to be organized. Prohibition of such threatening political activities can be achieved to a large extent under the existing Societies Ordinance, which enables the Secretary for Security to declare an organization within the HKSAR unlawful where this is necessary on national security grounds.

21. To thwart organization of such activities that would genuinely endanger the state, it is proposed that an organization that endangers state security could be proscribed, but only where necessary under the standards of the ICCPR to protect national security, public safety and public order, and where one of the following circumstances exists —

- (a) the objective, or one of the objectives, of the organization is to engage in any act of treason, secession, sedition, subversion, or spying; or

- (b) the organization has committed or attempts to commit any act of treason, secession, sedition, subversion, or spying; or
- (c) the organization is affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities in accordance with national law on the ground that it endangers national security.

22. We propose to make it an offence to organise or support the activities of proscribed organizations, or to manage or to act as an office-bearer for these organizations. An organization which has a connection with a proscribed organization might also be declared as unlawful where necessary under the standards of the ICCPR.

23. The decision to proscribe and to declare an organization unlawful would be subject to an appeal procedure. To ensure fairness, this procedure should involve two levels. First, points of fact may be appealed to an independent tribunal. Secondly, points of law may be appealed to the court.

Others

24. It is necessary to ensure that sufficient account is taken of the possible implications of technological developments and the vastly increased ease of communications on extra-territorial acts. Very broadly, we propose to claim jurisdiction over an offence only where a sufficient nexus with the HKSAR is present, i.e. either the act is committed by a HKSAR permanent resident overseas, or the act has a specified “link” with the HKSAR. At present, under the Criminal Jurisdiction Ordinance (Cap. 461), HKSAR courts already have jurisdiction over various offences of fraud and dishonesty even if they do not take place in Hong Kong, provided there is a specified link with the HKSAR. Also, at common law, an attempt, conspiracy or incitement to commit an offence in Hong Kong is an offence here. We propose to adopt these common law and statutory principles in defining what constitutes a “link”.

25. Effective investigation powers are required to deal with threats to the security or interests of the State or the HKSAR. We propose to provide enhanced powers for dealing with the more serious of the Article 23 offences.