



Basic Law Article 23 Legislation The Law Society Submission





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1. The Law Society provides this submission to respond to the Public Consultation on the Basic Law Article 23 Legislation launched by the Government on 30 January 2024¹.
2. The Government's current consultation is on principles for Article 23 legislation. The comments we provide in this submission are on those principles. We await the bill of the intended legislation for an in-depth review.
3. We set out in this submission also our observations on a proposal to include in the new Safeguarding National Security Ordinance ("the proposed Ordinance")² a Public Interest Defence, a matter which has recently been brought up in the media.

COMMENTS ON THE PRINCIPLES OF THE CONSULTATION

Constitutional Duty

4. Protection of national security is fundamental. We agree that enactment of legislation on Article 23 is a necessity.
5. The enactment of legislation on Article 23 should be given priority and be completed as soon as possible. In enacting the legislation on

¹ See https://www.sb.gov.hk/eng/bl23/doc/Consultation%20Paper_EN.pdf for the full consultation paper.

² The Government proposes to introduce a new Safeguarding National Security Ordinance ("the proposed Ordinance") to comprehensively address the national security risks at present and may possibly arise in the future in the HKSAR (see § 2.28 of the Paper).

Article 23, the HKSAR Government is duty-bound to fully implement its constitutional duty and obligations to establish a comprehensive and effective legal system for safeguarding national security in the HKSAR.

6. We agree to the legislative principles and considerations in the enactment as put forward in the consultation paper of this Public Consultation (the “Paper”) (§§ 2.19 and 2.20 of the Paper). In the course of legislation of Article 23, those rights and duties enjoyed by HKSAR residents and other persons in the HKSAR 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 Hong Kong, must continue to be protected under the proposed Ordinance (§ 2.21).

The Legal Profession

7. The Government rightly recognises the vital importance of legal professional privilege in the context of enactment of legislation on Article 23 - it has been stated in the Paper that in the event that the particulars relating to the commission of an offence of misprision of treason are protected by legal professional privilege, non-disclosure on the part of the lawyer concerned does not constitute an offence (§ 3.7). The above is welcomed.
8. We also support the initiative to protect the legal profession from unlawful disclosure of personal data and harassment of lawyers in their handling of national security. The following paragraph is fully endorsed.

“[The safety of barristers or solicitors handling cases concerning national security or other work for safeguarding national security], as well as the safety of their family members, should be appropriately protected so as to enable them to handle or participate in cases concerning national security and other work for safeguarding national security without worries, thereby buttressing and strengthening the enforcement forces for safeguarding national security.” (§ 9.26)

Offences proposed – General Observations

9. The Paper recommends to introduce the proposed Ordinance to address national security risks (§ 2.28 of the Paper) and puts forward various offences.
10. With respect to those proposed offences, we anticipate that in the proposed Ordinance, definitions, meanings of terms, as well as the intended scope of application of these offences, would be laid out in details and unambiguously.
11. We consider that discussions on levels of sentences of those proposed offences would be more meaningful when we could review the elements of these offences in the bill for the proposed Ordinance.
12. Throughout the Paper, references have been made to “*document*”³. It would assist if the Government could make it clear in the proposed Ordinance that “document” would cover both physical (i.e. paper) copy as well as electronic copy of the document in question.
13. As for the specific offences put forward in the Paper, we set out in the following paragraphs our comments thereon.

Chapter 4 of the Paper: Insurrection, incitement to mutiny and disaffection, and acts with seditious intention

14. In respect of the offence of “incitement to disaffection”, the Government recommends to target acts which, among other things, would knowingly incite a public officer to abandon upholding the Basic Law or allegiance to the HKSAR (§ 4.5). The Government explains that the current Crimes Ordinance Cap 200 also provides

³ The following are some examples

- “*A person with intent to commit the offence of “incitement to mutiny” or the offence of “incitement to disaffection” possessing a document ...*” (§ 4.7).
- “*... [the Government] recommend prohibiting any person from acquiring information, document ...that is or contains state secrets unlawfully...*” (§ 5.12(1)).
- “*... [the Government] recommend prohibiting any person from disclosing, without lawful authority, information, document ... that is or contains state secrets ...*” (§ 5.12(3)).

for this offence but only targets at acts of a few classes of officers. The Government suggests to extend the coverage of the offence to other *public officers*.

15. There is however not a definition of “public officer” in this Chapter of the Paper. It is at the moment not clear whether a definition set out in another chapter⁴ on this term would be applied and be applicable to this incitement offence. A clarification is helpful.

16. On the offences relating to “seditious intention”, the Government in the Paper points out that (§ 4.8)

“an act, word or publication does not have seditious intention by reason only that it has any of the following intention –

(i) the intention to give an opinion on the abovementioned system or constitutional order, with a view to improving the system or constitutional order;

(ii) the intention to point out an issue on a matter in respect of the abovementioned institution or authority with a view to giving an opinion on the improvement of the matter...”

17. The Government adds that the current section 9(2) of the Crimes Ordinance Cap 200 already lists out circumstances that do not constitute seditious intention. It recommends that these provisions be retained in the proposed Ordinance after suitable amendments. The Government states that the current and improved offences relating to “seditious intention” will not affect legitimate expression of opinions (such as making reasonable and genuine criticism of government policies based on objective facts, or pointing out issues, offering views for improvement, etc.) (§ 4.12).

18. Whether a particular act or behaviour which is critical of the Government would constitute an offence of sedition depends on the factual matrix of a particular case. It is not possible for the proposed Ordinance to list out all the scenarios for the offence of seditious intention. That said, if the proposed Ordinance could be specific in

⁴ See the definition in Chapter 5 of the Paper viz. “Theft of State Secrets and Espionage” (§ 5.10).

defining and delineating the elements of the offence so that it would not be used to target political speeches or other forms of expression, that would be helpful.

Chapter 5: Theft of state secrets and espionage

19. The Government proposes the following in defining what “state secrets” are, i.e. (§ 5.8):

“If any of the following secrets, the disclosure of which without lawful authority would likely endanger national security, the secret amounts to a state secret:

[7 classes of secrets are listed out in sub-para (a) – (g)]”

20. Under the above formulation, the Prosecution would need to prove all these elements in order to establish that the matter in question is a state secret, i.e. the disclosure of that matter (i) is without lawful authority, *and* (ii) would likely endanger national security, *and* (iii) that matter belongs to one or more of the 7 classes as identified in the Paper. We anticipate this formulation in the bill of the proposed Ordinance.

21. The Paper puts forward the offences on unlawful acquisition, possession and disclosure etc. of state secrets (§ 5.12). The formulation of these offences is similar and is as follows.

“(a) knowing that any information, document or other article is or contains a state secret; or

(b) having reasonable ground to believe any information, document or other article is or contains a state secret, and with intent to endanger national security,

and without lawful authority, [acquiring/possessing/disclosing] the information, document or article.” (emphasis supplied).

22. It is not clear to us as to whether the element “*with intent to endanger national security*” as highlighted in the above is restricted to and is applicable to only limb (b) in paragraph 21 above, or whether it should be applicable to both limbs (a) and (b) in which case it should therefore be placed on the same separate line as “*and without lawful*

authority". This is relevant as a matter of construction. It is also important to the understanding of (i) the offence, in particular the "possession" offence, and (ii) those matters to be proved by the Prosecution (as we raise in paragraph 20 in the above). A clarification on the above is helpful.

23. One of the 7 classes of secrets as identified in the Paper for the purpose of the proposed offence is

"(d) secrets concerning the economic and social development of our country or the HKSAR;" (emphasis supplied).

The term "*social development*" in the above is not clear. Some examples would assist the public in understanding this part of the proposal.

24. Another class of secrets as identified by the Government involves scientific and technological developments, viz.

"(e) secrets concerning the technological development or scientific technology of our country or the HKSAR;" (emphasis supplied).

The above could involve technological and scientific innovations taken up and pioneered by commercial entities. These innovations could start off as commercial secrets but, as the research progresses, might be developed and be adopted for national interest. A fictitious example could be a research by a private company into booster fuels for road vehicles. The research data and information canvassed are confidential and are commercial secrets owned by that private company. When the company continues with the research, it turns out that the booster fuel could be adopted for use of rockets and missiles. For the purpose of this illustration, these booster fuels have become a matter of national interest and potentially a concern of national security, and the private company knows that. It would face the following questions: what should it do? Should it continue to *possess* these secrets, *knowing* that unlawful possession of state secrets is an offence under the proposed Ordinance? From whom should it seek the requisite "lawful authority" if it chooses to continue to possess these secrets and intends to

carry on with its research, *without prejudice to its intellectual property rights including any patents' rights?* These questions are legitimate.

25. In order to provide more certainty to the public, in particular the commercial sector, in the drafting the proposed Ordinance, it is important to ensure that the legitimate commercial secrets of a business, including those generated by the commercial operations of a government owned or invested business, will not inadvertently fall within the ambit of the offences. Commercial sector requires certainty in the business environment it is operating in.
26. We have no disagreement that the Official Secrets Ordinance Cap 521 is outdated, and needs to be modernized to particularly address national security risks (§ 5.3). Among other things, the Official Secrets Ordinance does not prohibit public servants or government contractors from publishing or disclosing confidential information alleged to have been obtained by virtue of their position, with a view to endangering national security (e.g. publishing so-called “inside information” to mislead the public and induce the hatred of the HKSAR residents against the HKSAR Government) (§ 5.11(d))⁵.
27. The national security risks mentioned in the above alludes to *government contractors*. Yet the Paper does not give too much details as to whether the “government contractor” would include, in the case of a government contractor being a firm or a private company, its employee(s). We note the Official Secrets Ordinance has set out what the “government contractor” means for the purpose of the Ordinance⁶. A definition of this term in the proposed Ordinance, which could be updated from the one in the Official Secrets Ordinance, would assist the public to understand what the Government intends to include in the above offence.
28. As for the offence of “espionage”, the Government asks to improve the definition of “prohibited place” (§ 5.17) in order to modernize the offence to cover the following espionage activities:

⁵ Compared to section 14(1) of the Official Secrets Ordinance Cap 521

⁶ See section 12(2) of the Ordinance, *ibid.*

“(a) Doing the following act with intent to endanger national security

–

(i) approaching, inspecting, passing over or under, entering or accessing a prohibited place, or being in the neighbourhood of a prohibited place (including doing such act by electronic or remote means) ...” (§ 5.20) (emphasis supplied).

29. “Prohibited place” has been defined extensively in the Official Secrets Ordinance⁷. We look forward to a similar but updated definition for this term in the proposed Ordinance, preferably by a non-exhaustive list.

Chapter 6: Sabotage endangering national security and related activities

30. In this Chapter of the Paper, the Government proposes several offences on sabotage and related activities. Among other things, it suggests to criminalize the following act, i.e.

“With intent to endanger national security and without lawful authority, and knowing that he or she has no lawful authority, doing an act in relation to a computer or electronic system thereby endangering (or likely endangering) national security.” (§ 6.7) (emphasis supplied).

31. While we in principle agree to the above proposal, the prescription (“doing an act in relation to a computer”) in the proposal is too general and simplistic. In our views, the proposed Ordinance would be more certain and there would be much clarity, if such phrase (or other similar phrases) could be avoided.
32. We suggest that reference could be made to an earlier consultation paper on *Cyber-Dependent Crimes and Jurisdictional Issues* published by the Cybercrime Sub-committee of the Law Reform Commission of Hong Kong (“LRC”) in 2022⁸. The LRC in that consultation proposed law reforms to address the challenges to protection of individuals’ rights caused by the rapid developments

⁷ See section 2 of the Ordinance, *ibid*.

⁸ See the consultation paper: https://www.hkreform.gov.hk/en/docs/cybercrime_e.pdf

associated with information technology, the computer and internet, and the potential for them to be exploited for carrying out criminal activities. The various proposals set out in that consultation paper on computer-related offences could be of referential value, when the Government is to do the drafting for the above offence.

Chapter 7: External interference and organisations engaging in activities endangering national security

33. The Government points out that there are local organisations willingly acting as agents of foreign political or intelligence organisations to engage in acts and activities endangering national security (§ 7.8). It claims that at present the regulatory mechanisms generally do not contain provisions for prohibiting the operation of these organisations on the ground that it is necessary in the interest of national security. The Government therefore recommends to standardise the handling of matters such as prohibition of operation of organisations in the interests of national security, dissolution of organisations, through a unified mechanism under the proposed Ordinance (§ 7.10).
34. In setting out the above, the Government has made references to organisations such as incorporated management committees in relation to a school or incorporated owners, which are alleged to be capable to be established by external forces or individuals endangering national security (§ 7.10).
35. While we agree in principle what has been set out in the above proposal, we are not aware of any “incorporated management committees in relation to a school or incorporated owners” which have been established with a view to endangering national security. Examples other than the above may be more helpful to the public in their understanding of the underlying rationale.
36. From what have been set out in the Paper, there may be a degree of overlap between the *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (中華人民共和國香港特別行政區維護國家安全法) (“NSL”) and the proposed Ordinance, with regard to some of

those offences to be embodied in the proposed Ordinance (e.g. the offence of “collusion” under the NSL may, conceptually or otherwise, overlap with offences of state secrets and/or external interference under the proposed Ordinance). Whether or not there will be an overlap depends among other things on the drafting, but it would be useful if the above is taken into consideration in the drafting of the proposed Ordinance.

37. By way of a further remark, it would also be helpful if the public could be given an explanation and a clarification in due course on the overlap(s) (if any) of the offences in the proposed Ordinance with the NSL and if so how the overlap(s) is intended to be handled.

Chapter 8: Extra-territorial application of the proposed Ordinance

38. We agree that, when enacting local legislation for safeguarding national security, appropriate extra-territorial effect should be stipulated in respect of offences endangering national security (§§ 8.6 and 8.7) and, in particular, there should be proportionate and reasonable extra-territorial effect based on the national security threats which the offences are designed to address, as well as the circumstances in which different individuals or organisations may commit such relevant acts outside the HKSAR (§ 8.6, see also § 8.7).
39. There are however questions as to how the extra-territorial jurisdictions of the proposed Ordinance could be given effect and also how prosecution could be brought in the HKSAR. These questions are relevant and should be considered carefully in the drafting of the legislation.

Chapter 9: Other matters relating to improving the legal system and enforcement mechanisms for safeguarding national security

40. The Government asks to improve some procedural matters in this legislative exercise, including *eliminating* certain procedures, so that cases concerning national security can be scheduled for trial as

soon as possible (§ 9.19)⁹. We ask for more information on those procedures which are proposed to be “eliminated”.

41. By reference to the UK (Terrorist Offenders (Restriction of Early Release) Act 2020 that tightens the threshold for eligibility for the parole of offenders convicted of terrorist offences¹⁰, the Government hints that “similar” provisions could be considered for the proposed Ordinance (§ 9.22). More details about these “similar” provisions would be helpful.
42. The Government in the Paper states that after the occurrence of large-scale riots, the Police may encounter grave difficulties in gathering evidence and require relatively more time to complete preliminary investigation on all the persons arrested (§ 9.10). We are in agreement with the suggestion that for national security offences, the law enforcement agencies should have sufficient time to carry out all the necessary preliminary investigation on the arrested persons and the case, and prevent any circumstances that may jeopardise the investigation and prevent the risks of arrested persons further endangering national security (§ 9.13). That said the rights of the accused pending investigation, including their rights to bail, as well as proactive case management on the part of the Prosecution¹¹ should be given due consideration in the proposed Ordinance. A balance needs to be struck.

⁹ This idea of “elimination” may be taken from the *obiter* of the judgment of the Court of Final Appeal in *HKSAR v Ng Hau Yi Sidney* (2021) 24 HKCFAR 417, § 34, in which the Court commented upon different ways of improving court case management including but not limited to eliminating prescribed procedural steps. The Court was saying that “The court should set and enforce strict timetables and should critically consider whether any prescribed procedural steps, properly construed, can be eliminated, re-sequenced, modified, split up or made to run concurrently to avoid delay and wasted effort, consistent always with a fair trial”.

¹⁰ Under the above-quoted UK Act, the relevant authority must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined before an early release may be granted to the prisoner.

¹¹ In the Court of Final Appeal in *HKSAR v Ng Hau Yi Sidney* (*supra*), the Court said that “With the full cooperation of the parties, magistrates and judges should proactively seek ways to bring NSL-related matters to trial expeditiously, consistently of course with the interests of justice. There should be proactive case management and a monitoring of progress by the court rather than leaving all initiatives to the parties while the person remanded remains in pre-trial custody for lengthy periods.” The above *obiter* should apply *mutatis mutandis* to the Article 23 legislation.

PUBLIC INTEREST DEFENCE

43. In respect of “theft of state secrets and espionage” set out in the Paper, the Government proposes that a secret will only constitute a “state secret” if, among other things, the conditions that disclosure of such secret (of those categories it has identified) is *without lawful authority* and would *likely endanger national security* are met (§ 5.8).
44. In the Legislative Council (“LegCo”) briefing session on 30 January 2024¹², a few LegCo members suggested that the public, in particular journalists, should be able to rely on public interest as a defence, if they revealed classified materials involving significant public interest. It was suggested that the Government should offer an exemption if the information disclosed was in the public interest, with detailed guidelines outlining under which circumstances exemptions may be issued.
45. There were however public views to the contrary, i.e. that public interest should not be a valid exemption when it came to leakage of state secrets. It was argued that national security and public interest do not overlap, and claiming otherwise would be self-contradictory. Furthermore, any actions that undermine national security cannot be considered a matter of public interest, while information can flow freely as long as it poses no harm to national security.
46. The Secretary for Justice (“SJ”) on a radio program of 3 February 2024 said the Government was looking at the possibility of including public interest defence to the proposed Ordinance to protect state secrets in the proposed legislation. SJ said the defence would only apply in circumstances that were urgent and overriding, for example when public safety was at stake. “Maintaining national security is an important matter of public interest. If you want to leak state secrets, you must have a reason that is more significant than keeping this confidentiality. It should be something overriding, very clear, and very urgent, with no other way to inform the public that they may face threats to their lives,” SJ said.¹³

¹² <https://news.rthk.hk/rthk/ch/component/k2/1738451-20240130.htm>

¹³ <https://gbcodes.rthk.hk/TuniS/news.rthk.hk/rthk/en/component/k2/1739025-20240203.htm>

See also: <https://shorturl.at/zBPRZ>

47. In our views, the proposal to have a public interest defence in the proposed Ordinance merits a thorough policy consideration as well as an in-depth legal analysis, including the legal burden and/or the evidential burden to be discharged before a defendant is in a position to adduce such defence.
48. If the Government is seriously considering to introduce a public interest defence to the proposed legislation, we suggest the Government could have a look into the Canadian model.
49. In Canada, the *Security of Information Act*¹⁴ introduces the public interest defence that allows a defendant who discloses classified or protected information to avoid criminal or civil liability. This is possible if the defendant can establish that the public interest in disclosure of the information outweighs the public interest in nondisclosure, and the defendant's purpose in making the disclosure is to reveal an offence committed by another person in their official duties.
50. However, the application of the defence is limited to situations in which the defendant has followed a series of steps of prior disclosure to authorities necessary before making the public disclosure, which include (i) the person has reported their concern and all relevant information to their deputy head or the Deputy Attorney General of Canada before disclosing the information; and (ii) if no response is received within a reasonable time, the person has reported their concern and all relevant information to the National Security and Intelligence Review Agency of Canada. This applies if the concern relates to an alleged offence committed by another person in the performance of their duties for the Government of Canada and no response is received from the Agency within a reasonable time.

¹⁴ <https://laws-lois.justice.gc.ca/eng/acts/o-5/section-15.html>. See section 15 thereof.

CONCLUSION

51. We have provided comments on the principles set out in the Paper. As to how these principles are to be applied and how the various legislative proposals set out in the Paper are to be embodied in the legislation, that would be contingent upon how the relevant law is to be drafted. We look forward to further engagement with the Security Bureau and/or the Department of Justice in the legislation exercise.

**The Law Society of Hong Kong
26 February 2024**