

Safeguarding National Security: Basic Law Article 23 Legislation: Public Consultation Document

Comments on the Legislative Proposals

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Summary of Recommendations

Recommendations of Chapters 1 to 9 of this Consultation Document are listed below to facilitate members of the public to give their views. Other views on this legislative exercise are also welcomed.

Legislative principles (Chapters 1 to 2)

1. Considering that the decision of the National People's Congress on safeguarding national security in the HKSAR (the "5.28 Decision") and the HKNSL contain clear provisions on the HKSAR's constitutional duty and system for safeguarding national security, we recommend that the legislation for Article 23 of the Basic Law should fully implement the relevant requirements and seek convergence, compatibility and complementarity with the HKNSL, so as to form an improved and effective legal system for safeguarding national security. We propose **to introduce a new "Safeguarding National Security Ordinance"** to comprehensively address risks endangering national security that the HKSAR is facing at present and may face in the future, as well as to fully implement the constitutional duty and obligation of the HKSAR under the 5.28 Decision and the HKNSL.

Box 1 (New Ordinance)

I agree there should be a single ordinance that collects and consolidates all of the relevant local national security laws. This will enhance legal certainty and public access to the law. It is unfortunate the consultation document did not list out which provisions of the existing law would be retained (though amended) and which would be repealed. For example, the Crimes Ordinance (Cap 200) has several provisions (e.g. sections 8, 13, 14) providing for special police powers for national security offences; it is not clear if they are to be repealed. We will need to wait for the draft bill to see these details. It is also regrettable that proposals relating to sentencing were left out.

2. Considering that the HKNSL has already created offences and provided for two types of acts, namely secession and subversion, we recommend that it is not necessary for the HKSAR to legislate on the offences of succession and subversion again.

Legislation against acts and activities endangering national security (Chapters 3 to 8)

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Chapter 3: Treason and related acts

3. Having taken into account the relevant laws of foreign countries cited in the Consultation Document, existing laws applicable to the HKSAR and HKSAR's actual situation, we recommend to improve "treason" (「叛逆」) and related offences under the existing Crimes Ordinance, to effectively prevent acts in the nature of treason and to protect the territory of our country from invasion, including :

(a) introduce the offence of "treason" (「叛國」罪) modelled on the existing offence of "treason" (「叛逆」罪), covering the use or threat of force with the intention to endanger national sovereignty, unity or territorial integrity;

(a) joining an external armed force that is at war with China;

(b) with intent to prejudice the situation of China in a war, assisting an enemy at war with China in a war;

(c) levying war against China;

(d) instigating a foreign country to invade China with force; or

(e) with intent to endanger the sovereignty, unity or territorial integrity of China, using force or threatening to use force.

Box 2 (Treason)

The proposal is fine, except limb (e) should specify that the force must be directed at a person, place, or thing. A person alone flexing his muscles in the mirror with the requisite intent should not constitute the offence of treason.

(b) codify the existing offence of "misprision of treason" under common law;

If a person knows that another person has committed, is committing or is about to commit the offence of "treason", the person must disclose the commission of offence to a police officer as soon as reasonably practicable, unless the commission of offence has been in the public domain, otherwise the person commits an offence.

Box 3 (Misprision of treason)

I have some misgivings about this offence, though I understand its rationale. The 2003 Bill had proposed to abolish it. Our legal system rarely imposes criminal liability for omitting to report a crime. To offer rewards for information is one thing (the carrot), this offence could turn out to be a heavy stick used against otherwise innocent friends and family members of wanted persons. It is also anomalous to have such a reporting offence only for the crime of treason. Ordinary people will not know the precise differences between treason and other national security offences and mistakenly believe there will be a general legal duty to report on others vis-à-vis national security offences. This could have wide implications for society and social cohesion. The Implementation Rules

(Schedule 7) already provides powers to obtain information and materials in national security investigations. Is there still a need to criminalise the failure to provide information? I note that legislators have been debating whether to impose a legal duty to report child abuse since July 2023 without any clear direction. This proposed offence might also raise concerns with legislators.

(c) retain existing “treasonable offences” and make amendments in accordance with the provisions on the offence of “treason”, so as to deal with the overt manifestation of the intention to commit “treason”;

If a person intends to commit the offence of “treason”, and publicly manifests such intention.

Box 4 (Treasonable offence)

Again, the 2003 Bill proposed to abolish treasonable offences. As limb (e) is potentially quite broad, a treasonable offence in relation to limb (e) could capture conduct markedly removed from the treason offence. Any act that publicly manifests an intention to endanger the sovereignty, unity or territorial integrity of China would constitute a treasonable offence, e.g. the facts in Tong Ying Kit’s case, the acts of Sixtus Leung and Yau Wai-ching when taking the oath and so on. If treasonable offences are to be retained, they should be closely tied to acts more traditionally regarded as treason (see existing section 3(1) of Crimes Ordinance). To that end, I would advise excluding limb (e) of treason from the definition of treasonable offences, i.e. criminalise only the public manifestation of an intention to commit treason in the form of limbs (a), (b), (c) or (d).

(d) improve the existing offence of “unlawful drilling” to prohibit receipt of or participation in training in the use of arms or the practice of military exercises or evolutions involving external forces, and prohibit the provision of the same in collaboration with external forces.

Without the permission of the Secretary for Security or the Commissioner of Police -

(a) providing specified drilling (including training or drilling in the use of arms, practice of military exercises, or practice of evolutions) to any other person;

(b) receiving specified drilling;

(c) receiving or participating in specified drilling planned or otherwise led by external forces; or

(d) providing specified drilling in collaboration with external forces.

Box 5 (Unlawful drilling)

In Hong Kong, there are many Chinese citizens with foreign nationalities, i.e. holding foreign passports. This offence would effectively bar them from serving in the armed forces or performing military service in the country for which they have foreign nationality. This could be quite harsh, as places such as Singapore, South Korea, and Taiwan have compulsory military service. Even if the individual voluntarily chooses to serve in the military of their foreign nationality, it does not necessarily mean the person is unpatriotic to his/her Chinese nationality and a threat to Chinese national security. Yet this offence would effectively mean such persons could never return to Hong Kong, unless permission from the Secretary for Security or Commissioner of Police was obtained. I would recommend widening the proposed exceptions for legitimate purposes to include both Chinese and non-Chinese citizens with foreign nationality.

There are two other concerns with this proposal. First, does ‘specified drilling’ include serving in the cadets, whether that be army, air, navy, etc. Many young people will do this out of interest (and may receive scholarships for entering). My understanding is these cadets will train members in drilling and may also have links to the military service in the country. My view is that the offence should define ‘specified drilling’ to not include membership in the cadets. Second, the existing offence in section 18 of the Crimes Ordinance was only meant to apply territorially. For example, the offence refers to a ‘meeting of persons’, and it would seem this means a meeting taking place in Hong Kong. We should seriously consider retaining this territorial condition of the offence. If made extraterritorial, we then will have the problems I have alluded to above for persons holding foreign nationalities, which is one of the defining qualities of the one country, two systems idea.

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

4. Having taken into account the relevant laws of foreign countries cited in the Consultation Document, existing laws applicable to the HKSAR and HKSAR’s actual situation, we recommend to improve the offences relating to “sedition” under the existing Crimes Ordinance, with a view to curbing acts that endanger national security, such as incitement to mutiny, incitement to disaffection, and incitement to hatred, including :

- (a) improve the existing offence of “incitement to mutiny”, including providing a clear definition of the term “mutiny”;

Knowingly inciting a member of a Chinese armed force –

*(a) to abandon the duties and to abandon the allegiance to China;
or*

(b) to participate in a mutiny.

Box 6 (Incitement to mutiny)

This proposal is fine. Limb (a) is clumsy in its drafting. Make sure it is clear that the offender needs to incite the member to abandon his/her duties and abandon his/her allegiance to China before the offender can be convicted under this limb.

(b) model on the existing offence of “incitement to disaffection” and adjust its coverage such that any person who knowingly incites a public officer to abandon upholding the Basic Law or allegiance to the HKSAR, or incites members of the offices of the Central People’s Government in the HKSAR (other than the Hong Kong Garrison) to abandon their duties or allegiance to the People’s Republic of China, is guilty of an offence;

Knowingly –

(a) inciting a public officer to abandon upholding the Basic Law or allegiance to the HKSAR; or

(b) inciting a member of the offices of the CPG in the HKSAR (other than the Hong Kong Garrison) to abandon the duties or allegiance to the People’s Republic of China.

Box 7 (Incitement to disaffection)

No precise definition is provided of “public officer” for this offence. It is unclear how wide the category “responsible for upholding of due administration of justice” will be drawn (e.g. only judges and judicial officers, all court staff, solicitors and barristers?). My view is that this category should only cover judges and judicial officers and for the other categories, only those public officers who exercise a public power or duty.

Limb (a) is ambiguous (i.e. what does it mean to abandon upholding the Basic Law and allegiance to the HKSAR), and consideration should be given to drafting it more closely to the aim of the provision, i.e. “inciting a public officer to commit an act likely to endanger national security”.

Limb (b) is also unclear. To make it consistent with the previous proposal, should it not read: “...to abandon the duties and allegiance to the People’s Republic of China”?

(a) knowing that a member of a Chinese armed force is about to abandon the duties or absent himself without leave, assisting the member in so doing; or

(b) knowing that a member of a Chinese armed force has abandoned the duties or has absented himself without leave, concealing the member, or assisting the member in concealing himself or escaping from lawful custody.

Box 8 (Incitement to disaffection – Chinese armed force)

These proposals are fine.

A person with intent to commit the offence of “incitement to mutiny” or the offence of “incitement to disaffection” possessing a document or article of the following nature:

a document or article, if distributed to a relevant officer (namely a member of a Chinese armed force, a public officer or a member of a CPG office in Hong Kong), would constitute the offence of “incitement to mutiny” or the offence of “incitement to disaffection”.

Box 9 (Possessing a document – incitement to mutiny or disaffection)

The person should ‘knowingly’ possess such a document/article. These days incitement is most likely to be done via electronic communication. Make sure the definitions cater to such form of communication in its many guises.

(c) improve the existing offences relating to “seditious intention” to deal with incitement of hatred against the fundamental system of the State, Central Authorities and the executive authorities, legislature and judiciary of the HKSAR.

(i) the intention to bring a Chinese citizen, Hong Kong permanent resident or a person in the HKSAR into hatred or contempt against, or to induce his disaffection against, the following system or institution - the fundamental system of the State established by the Constitution; a State institution under the Constitution; or a CPG office in Hong Kong;

(ii) the intention to bring a Chinese citizen, Hong Kong permanent resident or a person in the HKSAR into hatred or contempt against, or to induce his disaffection against, the constitutional order, executive, legislative or judicial authority of the HKSAR;

(iii) the intention to incite any person to attempt to procure the alteration, otherwise than by lawful means, of any matter established in accordance with the law in the HKSAR;

(iv) the intention to induce hatred or enmity amongst residents of the HKSAR or amongst residents of different regions of China;

(v) the intention to incite any other person to do a violent act in the HKSAR;

(vi) the intention to incite any other person to do an act that does not comply with the law of the HKSAR or that does not obey an order issued under the law of the HKSAR.

Box 10 (Sedition)

I make the following proposals:

(a) Delete references to “inducing disaffection” in limbs (i) and (ii). It is an emotional state of too low a threshold to be the subject of a crime. To “hate” something is a very strong emotional state (high threshold). The same is true for feelings of “contempt” for someone or something. The term “haters” is now commonly used in a pejorative sense about a person and his/her character. But “disaffection” is a common emotion. To have a lack of affection for something is disaffection. I have a disaffection for durian or spicy foods, etc. There are three very common emotional states: to like, dislike or be neutral. The emotional state of disliking something/someone is essentially disaffection. I may not like X about the fundamental system of the State. It is not a crime to simply feel this way. If you are my friend, I may want to inform and encourage you also not to like X. This also should not be a crime, yet the proposal would bring me within the net of criminal liability, subject to defences.

(b) It would be better if there was a clear definition of “fundamental system of the State established by the constitution” so we are not all guessing what it might be. The same goes with the “constitutional order of the HKSAR”.

(c) Delete limbs (v) and (vi) because they are already covered by the existing law of incitement. The term “do a violent act” is also unclear as to whether it must be a violent act towards another person. Inciting someone to flex their muscles in front of a mirror should not be sedition.

(d) The proposals say nothing about amending the existing *actus reus* of the offences in section 10 of the Crimes Ordinance. Currently the crime is one of doing “any act with a seditious intention”. There need not be any connection between the nature of the act and the intent, other than that they coincide in time. I recommend adopting the terminology used for the proposed offence of treasonable offence, that of “manifesting such intention”. Sedition would require an act that manifests the seditious intention. In this way, there would need to be some connection between the act and the intention, other than their mere coincidence in time.

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;

(iii) the intention to persuade any person to attempt to procure the alteration, by lawful means, of any matter established in accordance with the law in the HKSAR;

(iv) the intention to point out that hatred or enmity amongst residents of the HKSAR or amongst residents of different regions of China is produced or that there is a tendency for such hatred or enmity to be produced, with a view to removing the hatred or enmity.

Box 11 (Sedition – defences)

The terms “with a view to improving the system or constitutional order” and “with a view to giving an opinion on the improvement of the matter” should make clear that one can have such a view without proposing anything concrete or constructive. For example, an academic might be highly critical of a law and not make any suggestions on how it can be improved. Such a person might still have a view to improve the system/order and should be entitled to the defence. Suggest that the following additional words be added to these terms: “even though no concrete measure for improvement is proposed”.

5. We also recommend to introduce the offence of “insurrection” to effectively prevent insurrectionist acts, and protect the public from violent attacks and coercions that endanger national security.

(a) joining or being a part of an armed force that is in an armed conflict with the armed forces of the People’s Republic of China;

(b) with intent to prejudice the situation of the armed forces of the People’s Republic of China in an armed conflict, assisting an armed force that is in an armed conflict with the armed forces of the People’s Republic of China;

(c) with intent to endanger the sovereignty, unity or territorial integrity of the People’s Republic of China or the public safety of the HKSAR as a whole (or being reckless as to whether the above would be endangered), doing a violent act in the HKSAR.

Box 12 (Insurrection)

References to “armed conflict with the armed forces of the People’s Republic of China” in limbs (a) and (b) should simply be “armed conflict with the People’s Republic of China”. There can be an armed conflict with the PRC without the armed forces of the PRC being involved, e.g. if only public security officers were involved at an initial stage.

It is unclear what “public safety of the HKSAR as a whole” means. Take for example the storming of the US Capitol Building in Washington DC on 6 January 2021. One would think that at minimum the leaders of this storming should be guilty of an offence of “insurrection”, but can it be said that they intended to endanger the public safety of the United States as a whole. It would be unclear at best and most likely no. Consider using language that more closely approximates what we normally associate with insurrection, e.g. intention to rebel or revolt against the established authority of the HKSAR.

Clarify that “doing a violent act” means “doing a violent act against a person or thing in the HKSAR”. Again, flexing one’s muscles in front of the mirror should not amount to insurrection.

Chapter 5: Theft of state secrets and espionage

6. Having taken into account the relevant laws of foreign countries cited in the Consultation Document, existing laws applicable to the HKSAR and HKSAR’s actual situation, we recommend to improve the offences and provisions relating to “protection of state secrets” under the existing Official Secrets Ordinance, so as to protect secrets relating to our country or the HKSAR from theft or unlawful disclosure, including :

- (a) provide detailed definition of “state secrets” in view of the scope of “state secrets” in relevant national laws;

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:

(a) secrets concerning major policy decisions on affairs of our country or the HKSAR;

(b) secrets concerning the construction of national defence or armed forces;

(c) secrets concerning diplomatic or foreign affair activities of our country, or secrets concerning external affairs of the HKSAR, or secrets that our country or the HKSAR is under an external obligation to preserve secrecy;

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

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

*(f) secrets concerning activities for safeguarding national security or the security of the HKSAR, or for the investigation of offences;
or*

(g) secrets concerning the relationship between the Central Authorities and the HKSAR.

Therefore, the information described in items (a) to (g) above **will only constitute a “state secret” if the condition that “disclosure of the information without lawful authority would likely endanger national security” is met.**

Box 13 (State secrets definition)

No definition of “secrets” is given. I would think it means something reasonably expected to be kept confidential. Such a definition should be made explicit. If my understanding is correct, for something to amount to a “state secret” three elements must be satisfied: (a) the matter must be secret; (b) the matter, if disclosed without lawful authority, would likely endanger national security; and (c) the matter falls within at least one of limbs (a) to (g).

(b) replace the term “public servant” with “public officer”, and suitably adjusting the scope of the definition to cover officers who are more likely to have access to or possession of state secrets;

(a) a person holding an office of emolument under the Government, whether such office be permanent or temporary;

(b) any of the following person -

(i) a principal official of the Government;

(ii) the Monetary Authority and its personnel;

(iii) the Chairperson of the Public Service Commission;

(iv) a staff of the Independent Commission Against Corruption;

(v) a judicial officer or a staff of the Judiciary;

(c) a member of the Executive Council;

(d) a member of the Legislative Council;

(e) a member of a District Council; or

(f) a member of the Election Committee.

Box 14 (Public officer definition)

Previously, “public servant” included “any person employed in the civil service of the Crown in right of the United Kingdom”. Is it necessary to include a

similar scope within the definition of “public officer”, i.e. the civil servants of the Central People’s Government and Government of the Macau SAR? Maybe not if the respective laws of the Mainland and Macau confer jurisdiction on the illegal acts of their civil servants done in relation to state secrets in Hong Kong.

(c) consolidate and improve offences relating to “state secrets” under the existing Official Secrets Ordinance, so as to better protect state secrets.

Unlawful acquisition of state secrets

(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 the information, document or article.

Box 15 (Unlawful acquisition)

This new offence appears to apply not only to tangible items such as “documents” and “articles” but also to intangible information. Does one “acquire” information the moment one is told the information by another person? Or the moment one discovers it through one’s own research? If one then realises that the information heard or discovered is a state secret, has one committed the offences of unlawful acquisition or unlawful possession? It would seem rather unjust to punish A for simply having knowledge of information which B conveyed to A without any prompting by A. In my view, the offence of unlawful acquisition of information should not apply where A is told the information by B without having prompted B to disclose the information. It also should not apply if I stumble upon the state secret (by my own lawful research at a library, archive, online, etc) and know that it is a state secret. Maybe the solution is to require proof of an intention to endanger national security in all cases of unlawful acquisition, possession, and disclosure.

Unlawful possession of state secrets

(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, possessing the information, document or article.

Box 16 (Unlawful possession)

Similar concerns exist with the offence of unlawful possession of information which constitutes a state secret. If you have been told the information and you know it constitutes a state secret, have you committed both the acquisition and possession offences? How does one cease to have possession of information in one's knowledge? There needs to be further thought to the criminalisation of possessing an intangible such as information. Does it even make sense? Should this offence be confined to only tangible things which one can physically possess? Otherwise, we are reconceptualising the legal definition of possession.

Unlawful disclosure of state secrets

(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, disclosing the information, document or article.

Box 17 (Unlawful disclosure)

(a) Thought can be given to the inclusion of a public interest defence for all three offences of acquisition, possession and disclosure. It could be modelled on the wording of the defence proposed in 2003:

(5B) A person does not commit an offence under this section if—

(a) he makes a disclosure that reveals—

(i) any unlawful activity, abuse of power, serious neglect of duty or other serious misconduct by any public official; or

(ii) a serious threat to—

(A) public order;

(B) public security;

(C) the health or safety of the public;

(b) the disclosure does not exceed the extent that is necessary for revealing matter; and

(c) having regard to all the circumstances of the case, the public interest served by the disclosure outweighs the public interest served by not making disclosure.

It would need to be adapted to include the acts of acquisition and possession. Consideration might be given to requiring the “serious threat” to be an ‘imminent and serious threat’. It might also be justified to require that there be no effective means of lawfully acquiring, possessing or disclosing the information, document or article at the time.

(b) More important to including the public interest defence, in my view, is having a channel to obtain lawful authority (even on an ad hoc basis) for any contemplated disclosure. There should be an established mechanism whereby individuals can apply and obtain lawful authority to disclose the information or thing in question. At the same time, if no lawful authority is given then this would make it clear that the disclosure is not allowed. It would be somewhat analogous to the “no consent” mechanism under sections 25A and 25 of the Organized and Serious Crimes Ordinance (Cap 455) (“OSCO”). However, such applications should be allowed to be made without incurring criminal liability from the application process itself (because, unlike OSCO, making such an application might signify the applicant is already in violation of the unlawful acquisition and/or unlawful possession offences). Greater legal certainty and predictability could be achieved with such a mechanism, so long as no criminal liability is incurred from making the application.

Unlawful disclosure of information that appears to be confidential matter

(a) A person who is a public officer or government contractor, with intent to endanger national security, and without lawful authority –

(i) discloses any information, document or other article; and

(ii) in making the disclosure, represents or holds out that the relevant information, document or article is (or was) acquired or possessed by the person by virtue of the person’s capacity as a public officer or government contractor; and

(b) the relevant information, document or article would be (or likely to be) a confidential matter if it were true, regardless of whether the relevant information, document or article is true or not.

Box 18 (Unlawful disclosure of confidential matter)

(a) It would be useful to clarify if “government contractor” includes academics who are principal investigators of government funded research projects. It seems the intention is not to cover such academics.

(b) This is a convoluted offence proposal; one might even say it is bad for duplicity. Why not have one offence for public officers/government contractors disclosing confidential matters and another offence for purported communication (modelled on section 13(1) of the Security of Information Act (Canada)). The first offence is justified on the basis that it is wrong for government servants (and contractors) to disclose confidential matters with the intention to endanger national security and without lawful authority. The second offence targets public officers/government contractors who seek to use their status to disclose, pass off or sell confidential information, whether or not the information is true. The second offence may only require a *mens rea* of recklessness.

Unlawful possession of state secrets when leaving the HKSAR

Any public officer possessing, with intent to endanger national security (or being reckless as to whether national security would be endangered) and without lawful authority, any document, information or other article that he or she knows to be a state secret, when leaving the HKSAR, and the document, information or article is acquired or possessed by virtue of his or her capacity as a public officer

Box 19 (Unlawful possession when leaving HKSAR)

This offence should also cover former public officers. Consider drafting using lettered paragraphs for greater clarity.

7. We also recommend to improve the offences and provisions relating to “espionage” under the existing Official Secrets Ordinance, so as to curb acts of espionage and collusion with external elements with the intent to endanger national security, including:

(a) improve the existing offences and relevant terms relating to “espionage” in order to cover acts and activities of modern-day espionage;

(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);

(ii) obtaining (including by intercepting communication), collecting, recording, producing or possessing, or communicating to any other person, any information, document or other article that is, or is intended to be, for a purpose useful to an external force.

(b) Colluding with an external force to publish a statement of fact that is false or misleading to the public, and the person, with intent to endanger national security or being reckless as to whether national security would be endangered, so publishes the statement; and knows that the statement is false or misleading.

Box 20 (Espionage)

“Prohibited place” needs to be well-defined so people can know what places to stay well away from. “Being in the neighbourhood” is vague; why not say ‘not to be within X metres from the building perimeter’? Limb (a) would not seem to capture acts of surveillance of the prohibited place from a nearby building using a powerful telephoto lens. Should it?

I am worried the effect of limb (ii) is to chill all engagement and meetings with members of the consulate community, even if for legitimate purposes, e.g.

tell good stories about Hong Kong, clarify the law and legal situation, disabuse misconceptions, etc. Inevitably in such meetings, useful information will be conveyed to the external force, e.g. simply being better informed is useful. While such engagements would not involve an intention to endanger national security, such an issue of *mens rea* comes down to circumstantial evidence and inference drawing. Prudent behaviour would counsel avoiding the *actus reus* element entirely, meaning the avoidance any meeting with persons coming within the definition of external force for risk of providing them with useful information. Can the *actus reus* be defined more narrowly (or an exception included) to allow for “normal political activities and regular exchanges with overseas organisations” (Consultation Paper, pp 18 & 72)?

As for limb (b), is there to be a definition of collusion? Does it mean the acts included in Article 29 of the Hong Kong National Security Law (HKNSL)? Does it include the forms of “collaboration” in the new offence of “external interference”?

(b) prohibit participation in, support to or receipt of benefits from foreign intelligence organisations.

With intent to endanger national security (or being reckless as to whether national security would be endangered), knowingly doing the following act in relation to an external intelligence organisation—

(a) becoming a member of the organisation;

(b) offering substantial support (including providing financial support or information and recruiting members for the organisation) to the organisation (or a person acting on behalf of the organisation); or

(c) receiving substantial advantage offered by the organization (or a person acting on behalf of the organisation).

Box 21 (Foreign intelligence organisations)

I am fine with this proposal.

Chapter 6: Sabotage endangering national security and related activities

8. Having taken into account the relevant laws of foreign countries cited in the Consultation Document, existing laws applicable to the HKSAR and HKSAR’s actual situation, we recommend to introduce a new offence to fully protect public infrastructure from malicious damage or impairment, and to combat acts endangering national security that are done in relation to a computer or electronic system, including: (a) prohibit acts of sabotage endangering national security; (b) prohibit unauthorised acts in relation to a computer or electronic system endangering national security.

(a) With intent to endanger national security (or being reckless as to whether national security would be endangered), damaging or weakening public infrastructure.

(b) The public infrastructure to be protected may include facilities of the Central Authorities or the HKSAR Government, public transport facilities and any public facilities providing public services such as water supply, drainage, energy, fuel or communication.

(c) “weakening” may include acts causing the following effects (whenever caused) on the public infrastructure (including anything or software constituting the infrastructure) -

(i) making the infrastructure vulnerable to abuse or damage;

(ii) making the infrastructure vulnerable to be accessed or altered by persons who are not entitled to access or alter the infrastructure;

(iii) causing the infrastructure not to be able to function as it should, whether in whole or in part; or

(iv) causing the infrastructure not to operate in a way as set by its owner (or a representative of the owner).

Box 22 (Sabotage)

The reference to “(whenever caused)” suggest some retrospective effect. Is that the intention? For example, what if some act performed during the 2019 unrest caused some weakening in public infrastructure (though it might still be unknown). Could the act be the subject of a charge now (if some harm were to materialise now)? The answer is probably no because of the principle against retrospective criminality. If that is the case, why is it necessary to include the words “(whenever caused)”? It is common sense that if an act is to “cause” certain effects those effects can occur anytime thereafter; there need not be words like “(whenever caused)” to say that.

It is odd that “making the infrastructure vulnerable to be accessed or altered” is a form of weakening and is prohibited; but, the actual access or alteration of the infrastructure is not prohibited – unless the word “damaging” includes acts of access or alteration. This needs to be clarified, perhaps with reference to sections 59(1A) and 161 of the Crimes Ordinance.

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.

Box 23 (Act in relation to computer or electronic system)

No comments on this proposal at present.

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

9. Having taken into account the relevant laws of foreign countries cited in the Consultation Document, existing laws applicable to the HKSAR and HKSAR's actual situation, we recommend to legislate to prohibit any person from collaborating with external forces to influence the formulation or implementation of policies or measures by the CPG and the HKSAR Government, performance of duties by the Legislative Council and the courts, or to interfere in elections of the HKSAR, etc., through improper means, so as to prevent external forces from improperly interfering in the affairs of our country or the HKSAR.

(a) With intent to bring about an interference effect as follows, collaborating with an external force to engage in a conduct, and using improper means when engaging in the conduct –

(i) influencing the Central People's Government or the executive authorities of the HKSAR in the formulation or execution of any policy or measure, or the making or execution of any other decision;

(ii) interfering with election(s) of the HKSAR;

(iii) influencing the Legislative Council in discharging functions;

(iv) influencing a court in discharging functions; or

(v) prejudicing the relationship between the Central Authorities and HKSAR, or the relationship between China or the HKSAR and any foreign country.

(b) "Collaborating with an external force" can cover the following circumstances -

(i) participating in an activity planned or otherwise led by an external force ;

(ii) engaging in the conduct on behalf of an external force;

(iii) engaging in the conduct in cooperation with an external force;

(iv) engaging in the conduct under the control, supervision or direction of an external force or on request by an external force;

(v) engaging in the conduct with the financial contributions, or the support by other means, of an external force.

(c) “Using improper means” can cover the following circumstances --

(i) knowingly making a material misrepresentation;

(ii) using or threatening to use violence against a person;

(iii) destroying or damaging, or threatening to destroy or damage, a person’s property;

(iv) causing financial loss to a person, or threatening to cause financial loss to a person;

(v) damaging or threatening to damage a person’s reputation;

(vi) causing spiritual injury to, or placing undue spiritual pressure on, a person;

(vii) the conduct constituting an offence.

Box 24 (External interference)

It should be made clear and explicit that the acts of collaboration are done knowingly, i.e. one needs to know one is participating in an activity led by an external force or is engaging in conduct on behalf of an external force, etc.

The so-called “improper means” of “causing financial loss to a person, or threatening to cause financial loss to a person” is not always improper as it could come about via a successful lawsuit. The offence surely is not intended to capture a lawyer representing an external force to sue a defendant for damages (see limbs (a)(iv), (b)(iv) and (c)(iv)). I suggest qualifying limb (c)(iv) with the words “other than by lawful means”.

10. We also recommend, based on provisions in the existing Societies Ordinance relating to the safeguarding of national security or prohibition of a political organisation in the HKSAR from having connection with external political organisations, improvement should be made to prohibit all organisations endangering national security (including organisations established outside the HKSAR, but actually have a nexus with the HKSAR) from operating in the HKSAR, in order to effectively prevent and suppress the operation in the HKSAR of organisations that engage in activities endangering national security.

(a) If the Secretary for Security reasonably believes that prohibiting the operation or continued operation of any local organisation in the HKSAR is necessary for safeguarding national security, the Secretary for Security may, by order published in the Gazette, prohibit the operation or continued operation of the organisation in the HKSAR.

(b) If a local organisation is a political body and has a connection with an external political organisation, the Secretary for Security may, by order published in the Gazette, prohibit the operation or continued operation of the local organisation in the HKSAR.

Box 25 (Prohibiting local organisation)

This is a wide power, but it will be subject to judicial review in the usual way. I would like to see the proposed criminal offences to be associated with this power. I will reserve my comments on this proposal until I have seen those offences.

We recommend stipulating that external organisations which are affiliated with the HKSAR cover the following circumstances –

(a) the organisation conducts any activity in the HKSAR;

(b) any person in the HKSAR acts as an office-bearer or member of the organisation, or professes or claims to be an office-bearer or member of the organisation;

(c) the organisation solicits or accepts financial contributions, loans, or financial sponsorships of any kind, or aid of other kinds, directly or indirectly from any person in the HKSAR;

or

(d) the organisation provides financial contributions, loans, or financial sponsorships of any kind, or aid of other kinds, directly or indirectly to any person in the HKSAR.

Box 26 (External organisations affiliated with the HKSAR)

It would be useful to see what criminal offences are to be created in relation to this new power to prohibit external organisations affiliated with the HKSAR. I will reserve my comments on this proposal until I have seen the offences. The concern is with potentially entangling innocent family members, friends and acquaintances of those who have migrated overseas.

Chapter 8: Extra-territorial application of the proposed Ordinance

11. Taking into account the principles of international law and international practices cited in the Consultation Document, provisions on the extra-territorial effect of offences under the HKNSL, existing laws of the HKSAR, as well as the current practices of other countries, we recommend that proportionate extra-territorial effect be provided for some of the offences to be stipulated under the proposed Ordinance.

Box 27 (Extraterritoriality)

In principle, extraterritoriality consistent with the principles of territoriality, nationality and protection is acceptable so long as it is consistent with the provisions on extraterritoriality in the HKNSL (Articles 36-38). However, those colonial offences, which are to be updated and improved, may have originally been intended to apply only territorially. I have mentioned this point in relation to Misprision of Treason (see Box 3 above). There may be other examples as well. In such cases, it should be made clear that the law only applies territorially.

Improving the legal system and enforcement mechanisms to safeguard national security (Chapter 9)

12. Chapter 9 sets out the shortcomings and inadequacies revealed by the experience in handling cases concerning national security. These include the need of the Police for more time than cases generally to complete the gathering of evidence and decide whether to lay charges against complex cases concerning national security; suspects tipping off their accomplices through different channels; the possibility of arrested persons to continue to commit offences or pose national security risks while on bail; suspects absconding overseas at all costs; longer waiting time for cases to be brought to trial; prisoners engaging in acts and activities which endanger national security or even absconding overseas when under supervision upon early release; and officers handling work of safeguarding national security being “doxxed” or harassed. Members of the public may consider the relevant foreign laws cited in the Consultation Document, the existing laws applicable to the HKSAR, and HKSAR’s actual situation, and provide their views on these shortcomings and inadequacies, with a view to improving the legal system and enforcement mechanisms for safeguarding national security, in particular those mentioned in Chapter 9, including:

- (a) measures that can allow sufficient time for law enforcement agencies to investigate complex cases concerning offence endangering national security, prevent circumstances that would jeopardise the investigation such as tipping off accomplices, and avoid risks of bailed persons from further endangering national security;

Box 28 (Sufficient time to investigate)

The Consultation Paper does not provide a convincing case to introduce a new scheme of detention before charge. Such a scheme fundamentally alters our criminal justice system. It is not convincing that, since the National Security Act 2023 (UK) has it, we should have it as well. What the Consultation Paper does not mention is the practice of using holding charges to prolong a person’s detention, subject to the grant of judicial bail, if needed for further investigation. If the holding charge involves an offence endangering national security then Article 42(2) of the HKNSL will apply to make it more difficult for the person to obtain judicial bail. It is not clear why this existing practice is inadequate to address the need for urgent investigation, whilst the person is detained, after an incident.

(b) measures that can cope with, combat, deter and prevent acts of absconding, and cause the return of absconded persons to Hong Kong to participate in law enforcement and judicial proceedings;

Box 29 (Absconding and return of absconded persons)

While thought can be given to measures to help with securing the return of absconded persons, the ideas suggested may already exist under existing laws, e.g. cancellation of public benefits if they are no longer resident in Hong Kong. The idea of cancelling the person's passport (when the person is already outside of Hong Kong) will have little effect in bringing the person back. Indeed, it might mean they would be less likely to travel, including travelling to an extradition-friendly jurisdiction from where they could be extradited. Creating an extraterritorial offence to capture those harbouring/supporting wanted persons, irrespective of their nationality, would be inconsistent with the Consultation Paper's position on extraterritoriality as none of the principles of territoriality, nationality and protection would apply.

(c) measures that can better achieve the objective of handling cases concerning national security in a fair and timely manner, with a view to improving the legal proceedings of national security cases;

Box 30 (Fair and timely manner)

While it is always good to have measures to try to ensure efficient and fair procedures, it is necessary to take a more holistic view of the overall situation, especially in identifying the specific causes of the delay. Could it be that we are seeing delays now due to the backlog of cases arising from the 2019 unrest and Covid GAP closures and the major HKNSL prosecutions that arose after June 2020? How much of the delay is attributable to the shortage of judges (especially given the non-jury trials in the CFI with a panel of three judges) and courtrooms? It appears there may be many systemic factors which can be addressed to improve efficiency without necessarily prejudicing the rights and interests of the defence.

(d) measures that will allow early release of prisoners convicted of offences endangering national security only when the relevant authority has sufficient grounds to believe that the prisoners no longer pose national security threats;

Box 31 (Early release of prisoners)

I do not believe we should change our system of remission of sentence for good behaviour after serving two-thirds of the term. From my experience serving as a member of the Post-Release Supervision Board, there are many other non-national security cases, e.g. sex offenders, that would also merit consideration of prolonged detention. It would be an anomaly to introduce such a restriction only for national security cases. More fundamentally, it would be contrary to the underlying principles of rehabilitation and social integration that informs our existing system of early release and post-release supervision. We can, however,

look more closely at the types of conditions imposed during post-release supervision to better achieve aims of public security and reform.

(e) measures that can effectively protect persons handling work concerning national security from being “doxxed” or harassed

Box 32 (Doxxing and Harassment)

I agree we can consider resurrecting the proposals for introducing a stalking offence which the Law Reform Commission of Hong Kong recommended in October 2000. It would need to be updated to address online harassment and doxxing, which are the more common forms of stalking seen today.