

# Safeguarding National Security Bill 2024

## Comments on the Bill

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On 26 February 2024, I submitted [Comments on the Legislative Proposals](#) (February Comments) to the Security Bureau in relation to the Consultation Document.<sup>2</sup> While some of the concerns raised in my [February Comments](#) have been addressed, others have not. The comments made below are in relation to the Safeguarding National Security Bill. They attempt to raise interpretative and other issues for the attention of legislators and the Administration. Practical suggestions are made to further amend the Bill. It is hoped that these amendments will improve the Bill by making the law clearer and more in line with the principles of the Ordinance (see clause 2). Such improvements will hopefully lead to less legal argument and concern with the application of the law in the future.

### Clause 8(3) (duty to safeguard national security)

1. By this clause, any decision-maker conferred a function by law<sup>3</sup> has a duty to safeguard national security and “must regard national security as the most important factor” in “making any decision”. This is a sweeping provision that would affect all courts, judges, administrative tribunals, and other persons exercising a statutory function.

2. I understand the legal basis for this clause is the general constitutional duty to safeguard national security and, specifically, HK National Security Law, Article 3. However, I am concerned about the practical implication of this clause and its invocation in contentious litigation when national security is of little relevance to the dispute. I fear parties might invoke clause 8(3), even if national security is of only tenuous or tangential relevance, in order to try to sway the decision-maker. This could lead to unnecessary confusion, delay and costs in litigation. **My suggestion is to qualify the words, “must regard national security as the most important factor” in clause 8(3)(b), by adding the following words “if it is relevant” immediately after “factor”.** This will hopefully signal to decision-makers the need to rule out specious arguments based on national security and avoid allowing clause 8(3) to become the source of an abuse of process.

### Clause 10 (Treason)

3. I still believe the new limb (e) of treason in clause 10(1)(e) is too wide and overlaps too much with the principal offences in the HK National Security Law (see Articles 20, 22, 24, and 29). With no definition of “uses force or threatens to use force”, one might be drawn to interpret this having the legal meaning of common assault (i.e. applying force of any degree on a person’s body). Such a low threshold would make limb (e) out of sync with the other limbs of treason in (a) to (d) which are concerned with war, an armed conflict or invasion of the state.

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<sup>2</sup> A Chinese translation of the February Comments was prepared and [published by HK01](#) on 8 March 2024.

<sup>3</sup> By section 54A(4) of the Interpretation and General Clauses Ordinance (Cap 1), a statutory function “includes powers and duties”.

**To make limb (e) more in line with the severity of conduct in the other limbs of clause 10(1) and to warrant the punishment and social stigma of a treason conviction, my suggestion is to amend the word “force” in clause 10(1)(e) to that of “armed force”.**

#### **Clause 12 (Disclosure of offence of treason)**

4. I expressed my reservations with this offence in the [February Comments](#) (Box 3) and reiterate them here.

#### **Clause 13 (Unlawful drilling and exceptions)**

5. The new offence of unlawful drilling is defined very broadly, especially in clauses 13(3) and 13(4). A person who receives training in the use of a firearm, bow, knife or other offensive weapon (i.e. anything suitable for causing personal injury, e.g. martial arts instruments) from an external force commits an offence. A person who provides such training in cooperation with an external force (or with the support of an external force) also commits an offence. If the person is a Hong Kong permanent resident, they will commit the offence irrespective of whether the training takes place in or outside of Hong Kong. In effect, any Hong Kong permanent resident will need to think twice about an overseas career in law enforcement or the military.

6. While the list of exceptions in clause 13(5) is welcome, they do not go far enough. The exception for service “in an armed force of a government of the foreign country” or “as a law enforcement officer of a government of the foreign country” (clause 13(5)(c)) only applies to foreign nationals who are “not a Chinese citizen”. It is unclear why the exception is so restricted, especially since many Hong Kong permanent residents have both a Chinese and foreign nationality. The exception open to such permanent residents in clause 13(5)(d) only applies if the person has to undergo mandatory military service. Thus it seems anomalous and arbitrary that Hong Kong permanent residents with foreign nationality cannot pursue an overseas career in law enforcement if they are a Chinese national but can so pursue if they are not. I can see no reason why having Chinese nationality makes one a greater risk to national security, compared to one without such nationality but has permanent residency in Hong Kong. **To confer the same treatment on all Hong Kong permanent residents, I recommend deleting the words “is not a Chinese citizen and” in clause 13(5)(c).**

7. There is still a problem with young people joining overseas cadet programmes, which are often not part of a course or extra-curricular activity arranged by an educational establishment. The cadets can be joined entirely on one’s own initiative independent of any educational establishment. While such young persons might benefit from the “leisure purpose” exemption in paragraph (b) of the definition of “specified drilling” in clause 13(8), this exemption only applies to training in the use of an offensive weapon and not to the practice of military exercises, which is something that cadets may receive training in. **I recommend that “the practice of military exercise” conducted for a leisure purpose should also be carved out of the definition of “specified drilling”.**

#### **Clause 15 (Insurrection)**

8. **Correct the typo in clause 15(a). It should read “a person joins an armed force, or is a part of an armed force...”** Or, the word “becomes” may be more suitable.

9. I reiterate the concerns I expressed in the [February Comments](#) (Box 12) with the terms “Chinese armed force”, “public safety of the HKSAR as a whole”, and “violent act”.

#### **Clause 21 (Possession of documents or articles of incitement nature)**

10. It is unclear from clause 21(1) if the person needs to know the nature of the document or other article which he possesses. Does the offence intend to impose strict or absolute liability in relation to the nature of the document or article? **If not, it is advisable to add the word “knowingly” before “possesses”. If strict or absolute liability is intended, it would be better to say so explicitly to avoid doubt and legal uncertainty.** My view is given the maximum punishment of 3 years’ imprisonment, it should be a full *mens rea* offence.

#### **Clause 22 (Seditious intention)**

11. I reiterate the concerns I expressed in the [February Comments](#) (Box 10) with the scope, clarity, and low threshold of the definition of seditious intention, now seen in clause 22. It is good to see the double seditious intention requirement for the offence in clause 23(1)(a) as this addresses my concern that the *actus reus* must manifest the intention (see my Box 10, point (d)).

12. For the offence in clause 23(3), it is unclear if the person must know the publication he or she possesses has a seditious intention. This will attract an unnecessary *Hin Lin Yee* analysis in the courts.<sup>4</sup> **I recommend the issue be explicitly addressed in the legislation, as is the case with the offence of importing a publication that has a seditious intention; see clause 25.** My view is that knowledge should be required to be proven given the maximum sentence of 3 years’ imprisonment.

#### **Clause 26 (Power to remove publications)**

13. The police power to enter and remove seditious publications in any premise or place can only be exercised if the publication is visible from a public place, otherwise “a warrant issued by a magistrate for such purpose” is needed (clause 26(3)(b)). However, clause 26(3)(b) does not actually provide for a warrant power with the usual requirements, i.e. information on oath and reasonable grounds to suspect required grounds. If the intention is for clause 26(3)(b) to confer a warrant power on magistrates then these requirements should be specified; otherwise, it will be assumed that the power must be sought elsewhere, e.g. HK National Security Law, Article 43 and Implementation Rules, Police Force Ordinance, etc.

#### **Clause 35 (Unlawful disclosure of information that appears to be confidential)**

14. There could be greater clarity with the various offences in clause 35. Where it refers to “if it were true” (in clauses 35(1)(b), 35(2)(b), it is not clear what “it” refers to? Is it the fact that the information was actually acquired or possessed by the person by virtue of the person’s specified capacity, or is it referring to the truth of the contents of the information, document or article? The words “whether the information, document or article is true or not” suggests the

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<sup>4</sup> *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142.

answer is the latter, but it would be better to clarify this. **I suggest inserting the wording, “if its contents were true”.**

#### **Clause 37(6) (Safeguarding of information)**

15. Why is the offence in clause 37(6) an indictable offence if the maximum punishment is only a fine of level 4 and imprisonment for 3 months?

#### **Clause 41 (Espionage)**

16. I remain concerned with the breadth of the limb (2)(c) form of espionage (see [February Comments](#), Box 20). It will have the practical effect of chilling most contact and communication with external forces, especially foreign consulates. **I recommend that the *actus reus* elements in clause 41(2)(c) be confined to only “information, document or other article concerning any aspect of a prohibited place that is calculated to be, or it intended to be, directly or indirectly useful to an external force”.** This ensures greater coherence between all three limbs of espionage (limbs (2)(a) to (c)).

17. I repeat my concern (see [February Comments](#), Box 20) that “being in the neighbourhood” in clause 41(2)(a) and (b) is too vague and a precise distance from the building perimeter should be used instead.

18. **It should also be made clear that the person must “knowingly” do an act specified in subsection (2) of clause 41(1) to be guilty, especially since the maximum penalty is 20 years’ imprisonment.**

#### **Clause 42 (Entering prohibited places)**

19. **Again, it should be made clear that the person must “knowingly” do the acts in clause 42(a)(i) and (ii) to be guilty.**

20. I wonder if the maximum punishment of 2 years’ imprisonment is appropriate for this offence, where there would be actual entry or access to a prohibited place without reasonable excuse or lawful authority.

#### **Clause 45 (External intelligence organizations)**

21. **Correct typo in clause 45(1): “knowingly does a prohibited”.**

#### **Clause 50 (External interference)**

22. **To avoid any question whether strict liability is being introduced in clause 50(a), insert the word “knowingly” before “collaborates with an external force to do an act” in clause 50(a).**

#### **Clauses 76 and 77 (Restricting consultation with lawyer)**

23. Serious consideration should be given to whether these restrictive measures which run counter to the individual’s constitutional right to legal assistance are really needed. If the

measures remain, my view is that insufficient protection has been afforded to protect the individual's right of silence.

24. A person denied access to a lawyer in the critical 48 hours after arrest is vulnerable to self-incrimination, as he or she will not likely know that they have a right of silence, which when exercised cannot be used against them in any way. In principle it would be unfair to extract a confession from someone who has been denied access to a lawyer and then to use that confession against them at their trial. **To better protect the right of silence, I recommend that a 'use immunity' protection be inserted to disallow the use of any confession statement obtained from the defendant whilst a restriction has been imposed pursuant to clauses 76 or 77.**

#### **Clause 102 (Translation)**

25. **Correct typo in clause 102(2): "the magistrate, on application by the accused, orders, for the..."**

#### **Clause 140 (Excepted offences)**

26. The effect of clause 140 is to make all offences endangering national security an "excepted offence", meaning no court may order a suspended sentence of imprisonment in such cases, however exceptional the circumstances of the case. My view is the matter should be left to the judge to decide in his or her discretion.<sup>5</sup> The excepted offence category should only be reserved for very serious cases. **I recommend amending item 11, which is to be added to Schedule 3 of the Criminal Procedure Ordinance (Cap 221), to read as follows: "11. An offence endangering national security punishable by imprisonment of 14 years or more."**

#### **Clause 144 (Remission of sentence)**

27. Clause 144 has the effect of denying any remission to persons convicted of an offence endangering national security unless "the Commissioner is satisfied that the prisoner's being granted remission will not be contrary to the interests of national security". As I commented in the [February Comments](#) (Box 31), I believe this restrictive measure should be reconsidered as it would be treating national security prisoners drastically different from all other prisoners. A similar concern applies to clauses 155, 168 and 169.

28. **If the proposal(s) go ahead, I would recommend consideration be given to reversing the presumption, i.e. treat national security prisoners in the same way as other prisoners in that they will be entitled to remission based on good behaviour and discipline unless the Commissioner can demonstrate that the person's release would be contrary to the interests of national security.** This presumption in favour of freedom would be fairer to the individual and have greater faith in the rehabilitative effects of our correctional services.

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<sup>5</sup> The reasons for doing so are well explained in this [report](#) of the Law Reform Commission of Hong Kong published in February 2014.

**Other (Secretary for Justice's consent)**

29. For many existing national security offences, the consent of the Secretary for Justice is needed before proceedings may be instituted. This is an important safeguard against potentially abusive prosecutions. The Bill has not included any consent safeguard, though the existing safeguards in sections 7(6) and 11(2) of the Crimes Ordinance (Cap 200) and section 9(1) of the Official Secrets Ordinance (Cap 521) are to be repealed (see clauses 131 and 157). Should the consent safeguard be added to the Bill for certain offences?