

March 2024

Hong Kong's: (i) Basic Law Article 23; And (ii) Safeguarding National Security Ordinance ("Ordinance")



In this briefing note we explain the developments relating to (i) and (ii) above and in particular concerning the Ordinance which became law on Saturday, 23 March 2024 after public consultation in January and February of 2024 and it being introduced to the Legislative Council shortly thereafter on 8 March 2024.

Basic Law

The Basic Law comprises nine chapters, 160 Articles (including Article 23) and three annexes and was drafted in the late 1980s to implement Annex 1 of the Sino-British Joint Declaration of 1984 to set out the framework for the post-handover government in Hong Kong.

The Basic Law was adopted by the National People's Congress on 4 April 1990 and became law on 1 July 1997.

Article 23

Article 23 of the Basic Law states Hong Kong on its own:

*"**shall** ... enact laws ... to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."*

The Hong Kong Special Administrative Region Government ("**Government**") has therefore all along had a constitutional duty to enact its own laws concerning the seven types of acts named in Article 23.

Furthermore, Article 7 of Hong Kong's National Security Law¹ ("**NSL**") provided that the Government shall as early as possible complete its legislation as stipulated in Article 23 as well as refine relevant laws.

Hong Kong's Chief Executive has recently stated² that the Ordinance fully implements Article 23 and the Government has now complied with its duties. The Ordinance, which is divided into 29 Divisions and 181 sections, is considered below. In summary, most of the offences and the penalties provided for in the Ordinance come from earlier Hong Kong laws or the common law so we have largely seen them before.

1. General Principles Of The Ordinance

Section 8 of the Ordinance provides should any other Hong Kong law be inconsistent with it then the law concerned is to be read in a way that has the best regard to the objects and purposes of the Ordinance. **Part 1** of the Ordinance states that the highest principle of "one country two systems" is to safeguard national sovereignty, security and development and this needs to be remembered at all times.

Part 1 also provides that there is to be active prevention of activities endangering national security showing the obvious seriousness of these matters.

Encouragingly the Ordinance also states that human rights are to be protected and respected (see also Article 4 of the NSL) and a person is to be presumed innocent until convicted by a judicial authority.

2. Offences

Treason And Related Acts

Various wrongdoing such as treason³, misprision of treason⁴, treasonable offences⁵ and unlawful drilling⁶ already exist under the Crimes Ordinance or common law. These existing offences have been incorporated into the Ordinance.

The following acts of treason are targeted by **section 10** of the Ordinance: (i) joining an external armed force that is at war with China; (ii) with an intent to prejudice the situation of China in a war, assisting an enemy; (iii) levying war against China; (iv) instigating a foreign country to invade China; or (v) with intent to endanger the sovereignty, unity or territorial integrity of China, using force or threatening to use force.

Citizens owe a duty of allegiance to their country and should not endanger its national security. Accordingly the section 10 offence of treason can **only** be committed by Chinese citizens in Hong Kong and Hong Kong residents (permanent and non-permanent) who are Chinese citizens outside of Hong Kong.

Like the Crimes Ordinance offence of treason, the section 10 offence is punishable with life imprisonment.

Section 12 of the Ordinance requires a Chinese citizen who knows someone has committed, is committing or is about to commit treason under section 10 to report the material facts about it to a Police officer as soon as is

¹ The NSL is both a People's Republic of China national law and Hong Kong regional law, has been in force since 30 June 2020 and is the subject of our Briefing Note published in July 2020 which is available [here](#).

² See the Government's press release dated 22 March 2024 entitled '*CE signs Safeguarding National Security Ordinance.*'

³ Which is an offence under section 2 of the Crimes Ordinance to depose Hong Kong or the People's Republic of China, levy war or to intimidate or to overawe and/or to instigate a person with force to invade Hong Kong or the People's Republic of China. Treason carries a maximum penalty of life imprisonment.

⁴ Which is an offence contrary to the common law which is committed on failing to report to the proper authorities within a reasonable time when it is known another person has committed treason. This is punishable with imprisonment for 7 years and a fine.

⁵ Treasonable offences exist when there is an intention manifested by overt acts, any writing or published material to commit treason. This carries a maximum penalty of life imprisonment.

⁶ Which is an offence under section 18 of the Crimes Ordinance to unlawfully train in the use of arms or military exercises. This carries a maximum penalty of 2 years imprisonment.

reasonably practicable. Should that positive reporting obligation be breached, it is punishable with 14 years' imprisonment. But the reporting obligation won't be engaged if the offence is already in the public domain.

Misprision of treason is codified in **section 11** of the Ordinance and is committed when any Chinese citizen who intends to commit treason under section 10 publicly manifests their intention to do so. This is punishable with 14 years' imprisonment.

The following acts of unlawful drilling are targeted by **section 13** of the Ordinance: (i) providing to another training, drilling in the use of arms or practice of military exercises (punishable with 7 years' imprisonment); (ii) receiving (i) (3 years); (iii) receiving or participating in specified drilling planned/led by external forces (5 years); or (iv) providing specified drilling in collaboration with external forces (10 years). The section 13 offences described in (iii) and (iv) above can be committed outside of Hong Kong by any Hong Kong permanent resident and/or any company or partnership formed, registered or that has a place of business in Hong Kong.

Various acts of drilling for legitimate purposes are exempt from prosecution pursuant to **section 13(5)** of the Ordinance.

Any ongoing drilling or lawful agreement to drill made before the Ordinance became law need to cease within 6 months of the law becoming effective pursuant to **section 13(6)** of the Ordinance.

Insurrection And Seditious Intent

Various wrongdoing such as incitement to mutiny⁷, incitement to disaffection⁸ and offences relating to seditious intention⁹ already exist under the Crimes Ordinance and have been incorporated into the Ordinance.

Section 17 of the Ordinance expands the offence of incitement to mutiny to cover all members of the armed forces of the People's Republic of China¹⁰. The wrongdoing (punishable with life imprisonment) is to knowingly incite the foregoing to abandon their duties and allegiance to China or incite them to organize or participate in a mutiny¹¹.

Section 18 of the Ordinance creates offences of: (i) assisting a member of the Chinese armed forces to desert (7 years' imprisonment); (ii) doing (i) with an external force (10 years); (iii) concealing or assisting to conceal a member of the Chinese armed forces who has deserted (7 years); and (iv) doing (iii) with an external force (10 years).

Sections 19 and 20 of the Ordinance expand the offence of incitement to disaffection to include: (i) Hong Kong public officers¹² and to incite them to abandon upholding the Basic Law or their allegiance to Hong Kong; and (ii) members of the Central People's Government in Hong Kong to incite them to abandon their duties or allegiance to the People's Republic of China. (i) and (ii) are punishable to 7 years' imprisonment.

⁷ Which is an offence under section 6 of the Crimes Ordinance to knowingly attempt to seduce a member of the Chinese People's Liberation Army from their duties or to commit a mutiny. This carries a maximum penalty of life imprisonment.

⁸ Which is an offence under section 7(1) of the Crimes Ordinance to seduce any member of the Government Flying Service, Police or Auxiliary Police from their duty of allegiance to Hong Kong. This is punishable with 2 years' imprisonment.

⁹ A seditious intention is to cause hatred, contempt, disaffection or ill will against the Government, the administration of Justice in Hong Kong, to incite violence or disobedience of the law. Acts doing the foregoing such as uttering words with a seditious intention, publishing, importing or possessing such materials are contrary to section 10 of the Crimes Ordinance and punishable with 1 to 3 years' imprisonment.

¹⁰ Which includes the Chinese People's Liberation Army, Chinese People's Armed Police Force and Militia.

¹¹ Mutiny is clearly defined in the Ordinance as acts by 2 or more members of a Chinese armed force to resist or overthrow the lawful authority of a Chinese armed force or a foreign army or force of a government cooperating with a Chinese armed force.

¹² Public officers are widely defined in the Ordinance as: (i) all paid employees of the Government; (ii) officials of the Government; (iii) staff of the Monetary Authority and Independent Commission Against Corruption; (iv) staff of the Judiciary or a judicial officer; and (v) members of the Executive Council, Legislative Council, District Council and Election Committee.

Possession of a document or article with intent to commit the offences under sections 17, 19 or 20 is an offence under **section 21** of the Ordinance and punishable with 3 years' imprisonment.

Acts with seditious intentions are covered by **sections 22 to 27** of the Ordinance. The wrongful intentions are¹³: (i) to bring a Chinese citizen, permanent Hong Kong resident or person in Hong Kong into hatred or contempt or have disaffection against: (a) the fundamental system of the State established by the Constitution; (b) a State institution or the Central People's Government in Hong Kong; or (c) Hong Kong's constitutional order, Executive, Legislative or Judicial authorities; (ii) to incite a person to unlawfully attempt to alter a matter established in accordance with the law of Hong Kong; (iii) to induce hatred among the residents of Hong Kong or different parts of China; and (iv) to incite another to do a violent act, break the law or disobey an order given under the law of Hong Kong.

There is no wrongdoing when the intentions are within **section 22(4)** of the Ordinance, namely: (i) to give an opinion on the abovementioned system or constitutional order with a view to improving them; (ii) to point out an issue on a matter with respect of the abovementioned institution or authority with a view to giving an opinion on the improvement of them; (iii) to persuade any person to attempt to procure the lawful alteration of any matter established in accordance with the law of Hong Kong; or (iv) to point out that there is hatred amongst the residents of Hong Kong and/or different parts of China with a view to resolving this.

Section 23 of the Ordinance states: (i) any act or uttering words with seditious intent, or printing, publishing, selling, distributing, displaying or reproducing a publication knowing it has seditious intentions or importing such a publication is punishable with 7 years' imprisonment; (ii) doing (i) with an external force (10 years); and (iii) possession without reasonable excuse of a publication which has seditious intent (3 years). **Section 25** of the Ordinance provides that it is a defence to importing a publication that has seditious intent if you did not know of the wrongful intention.

Section 26 of the Ordinance gives the Police or any duly authorized law enforcement agency the powers to enter, search and seize publications with seditious intent without a warrant if the publication is visible from a public place and if not, to do so with a Magistrate's warrant.

A new offence of insurrection is provided for in **section 15** of the Ordinance which targets acts more serious than that of a general riot, namely: (i) 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; (ii) with intent to prejudice the situation of the armed forces, assisting an armed force that is in an armed conflict with the armed forces of the People's Republic of China; (iii) with intent to endanger the sovereignty, unity or territorial integrity of the People's Republic of China or public safety in Hong Kong (or being reckless as to whether these are endangered) doing a violent act in Hong Kong. All the foregoing are punishable with life imprisonment.

Insurrection, incitement to mutiny, section 18 offences, incitement to disaffection and acts with seditious intentions all have extra-territorial effect if committed outside of Hong Kong by any Hong Kong resident who is a Chinese citizen and/or any company or partnership formed, registered or that has a place of business in Hong Kong.

Theft of State Secrets And Espionage

Various offences of espionage and unlawful disclosure of protected information already exist under the Official Secrets Ordinance and have been incorporated within the Ordinance.

Section 28 of the Ordinance defines state secrets widely as those concerning: (i) major policy decisions on the affairs of China or Hong Kong; (ii) national defence or the armed forces; (iii) diplomatic or foreign affairs of China or secrets about the external affairs of Hong Kong; (iv) economic and social development of China and/or Hong Kong; (v) technological development or scientific technology of China or Hong Kong; (vi) activities for safeguarding national security, the security of Hong Kong or the investigation of offences; or (vii) the relationship between the Central Authorities and Hong Kong. (i) to (vii) above **only** comprise a state secret if disclosure endangers national security.

Sections 30 to 35 of the Ordinance create offences about: (i) unlawful acquisition of state secrets (5 years' imprisonment which is increased to 7 years when there is an intention or recklessness to endanger national security); (ii) unlawful possession of state secrets (3 years' imprisonment which is increased to 5 years when there is an intention or recklessness to endanger national security); (iii) unlawful possession of state secrets by a current/former public officer when leaving Hong Kong (7 years); (iv) unlawful disclosure of state secrets by a current or former public officer or Government contractor (7 years increased to 10 years when there is an intention or recklessness to

¹³ See **section 22(2)** of the Ordinance.

endanger national security); (v) unlawful disclosure of information acquired by espionage (10 years); and (vi) unlawful disclosure by a current or former public officer or Government contractor of a confidential matter prejudicial to the interests of the Central Authorities or Government (5 years which is increased to 7 years when there is an intention or recklessness to endanger national security). Aside of (iii) above, these offences have extra-territorial reach if committed by any Hong Kong resident and/or any company or partnership formed, registered or that has a place of business in Hong Kong.

The following acts of espionage are targeted by **section 41** of the Ordinance: (i) to endanger national security by approaching, inspecting, passing over or under, entering or accessing a prohibited place¹⁴, or being in its vicinity, or obtaining (including by interception) any information useful to an external force (20 years' imprisonment); and (ii) colluding with an external force to publish a statement that is known to be false or misleading with intention or recklessness as to the engendering of national security thereby (10 years).

Section 45 of the Ordinance criminalizes joining an external intelligence organization or offering them substantial support (financial, information or recruits) or receiving a substantial advantage from it (gifts, loans, employment or payments). These are punishable with 10 or 14 years' imprisonment.

Both sections 41 and 45 have extra-territorial effect if committed outside of Hong Kong by any Hong Kong resident who is a Chinese citizen and/or any company or partnership formed, registered or that has a place of business in Hong Kong.

Sabotage

Acts of sabotage or the impairment of public infrastructure will obviously pose a high risk to national security therefore, **section 47** of the Ordinance creates a new offence of sabotage which endangers national security and comprises of the damaging or weakening of public infrastructure¹⁵ (which is punishable with 20 years' imprisonment enhanced to life imprisonment when there is collusion with an external force).

Section 48 of the Ordinance creates a new offence of knowingly doing an unlawful act in relation to a computer or electronic system to endanger national security (20 years' imprisonment).

External Interference

The Ordinance also deals with external interference by improper means which exceeds acceptable limits of genuine criticisms against government policies, legitimate lobbying, policy research, normal exchanges with overseas organizations, day-to-day commercial activities and therefore contravenes the principle of non-interference under international law. Such interference targets: (i) influencing the Central People's Government or the executive authorities of Hong Kong concerning policy or decisions; (ii) interference with elections in Hong Kong or the Legislative Council or the Courts; (iii) prejudicing the relationship between the Central Authorities and Hong Kong and any foreign country.

Collaborating with an external force covers: (i) participating in an activity planned or otherwise led by an external force; (ii) engaging in conduct on behalf of or in cooperation with an external force; (iii) engaging in conduct with financial contributions or other support of an external force.

Improper means covers: (i) knowingly making a material misrepresentation; (ii) using or threatening to use violence; (iii) destroying, damaging or threatening to damage property; (iv) causing or threatening financial loss; (v) damaging or threatening to damage a person's reputation; or (vi) conduct constituting an offence.

¹⁴ Prohibited place means in Hong Kong: (i) a defence, arsenal, military or national defence establishment; (ii) a military restricted zone; (iii) station, factory, dockyard, mine, minefield, camp, vessel or aircraft belonging to the Central Authorities or Government; (iv) radiocommunications installation, telecommunications installation, system, network, line or server; or (v) places used for storing munitions, vessels, aircraft or arms.

¹⁵ Public infrastructure are the facilities of the Central Authorities or Government (whether in Hong Kong or not), public transport facilities (including Hong Kong International Airport and the like) and public services like water, drainage, energy, fuel, communications and the internet.

Section 50 of the Ordinance criminalizes acts carried out with improper means to bring about interference in collaboration with an external force. This is punishable with 14 years' imprisonment and has extra-territorial effect if committed outside of Hong Kong by any Hong Kong resident who is a Chinese citizen and/or any company or partnership formed, registered or that has a place of business in Hong Kong.

New powers are given by the Ordinance to the Secretary for Security to prohibit the operation in Hong Kong of an organization if to do so is necessary for safeguarding national security or if a local political body is connected to an external political organization. The right to prohibit such operations is not unilateral, the organization has in general the right to be heard first. However, once prohibited then related criminal offences include: (i) participating in the activities of a prohibited organization (punishable with a HK\$1 million fine and 14 years' imprisonment); (ii) allowing meetings on your premises by the prohibited organization; (iii) inciting others to become member of the prohibited organization; and (iv) procuring subscriptions for it. (ii) to (iv) are punishable with a HK\$250,000 fine and 7 years' imprisonment.

To assist the Secretary for Security to exercise the above powers, by way of written notice to an organization's office bearer information may be sought about the income, source of income and expenditure of the organization.

3. Enhanced Powers

When the Police have been investigating complex national security offences they often do not have sufficient time to complete their investigations within the 48 hour limit under the existing law. Accordingly the Ordinance's **sections 72 to 75** allow the Police to apply to a Magistrate for permission to extend the period of detention from 48 hours for a further 14 days. The accused is entitled to be in attendance when such application is heard, with legal representation.

At the hearing the Police must explain the nature of the offence, the evidence, what inquiries have been performed and why a longer detention is needed. The Magistrate may allow longer detention if there are reasonable grounds to believe it is needed. The involvement of a Magistrate interposes a neutral body between the rights of the Government and the individual.

In limited circumstances, for example when perverting or obstructing the course of justice is a concern, under **section 77** of the Ordinance the Police with approval of a Magistrate may deny a person legal representation for 48 hours.

Police bail under the Ordinance may include movement restrictions orders granted by a Magistrate lasting 3 months.

Absconders charged under the Ordinance may in due course find their passport is cancelled and assets in Hong Kong are restrained with offences committed by those who assist the absconder to deal with them or make available to them funds or economic benefits.

Finally, cases in connection with the Ordinance shall be subject to the same jurisdiction, law and procedural regime that exists under the NSL.

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