

Hong Kong Bar Association
Safeguarding National Security: Basic Law Article 23 Legislation
Public Consultation Document 1. 2024
Press Release

(Immediately released on 29 February 2024)

1. The Hong Kong Bar Association submitted its written Position Paper regarding Basic Law Article 23 legislation to the HKSAR Government yesterday.
2. The Bar recognises that Article 23 of the Basic Law imposes a constitutional obligation on the HKSAR to enact its own laws prohibiting various offences widely recognised as major threats to national security.
3. As one of the two main legal professional bodies in Hong Kong, the Bar thinks that it has the important duty to provide technical and constructive feedback on the legislative proposal, in line with the interest and expectation of the public.
4. In expressing our views in this Position Paper, the Bar is fully conscious of the duties under Article 6 of the Hong Kong National Security Law (HKNSL) to safeguard the sovereignty, unification and territorial integrity of the nation. It is beyond doubt that, as with any sovereign territory, safeguarding national security is of critical importance.
5. The HKNSL specifies under Articles 4 and 5 that, in safeguarding national security, human rights shall be respected and safeguarded, and the principle of the rule of law shall be adhered to.
6. Accordingly, on the principles of ‘constitutional coherence’, legislation under Article 23 must be consistent with the rights protected under the Basic Law and the International Covenant on Civil and Political Rights.

7. It is of vital importance – not only to the rule of law and the administration of justice – but also to the long-term best interests of the HKSAR and the nation, and the constitutional duty under Basic Law 109 of maintaining Hong Kong’s status as an international financial centre, that a proper and careful balance be struck between the imperatives of national security and the constitutional guarantees of human rights and the rule of law.
8. The imperatives of protecting national security and fundamental rights in Hong Kong can and should be understood and pursued as complementary parts of a single constitutional vision – that of a flourishing “One Country, Two Systems”. While the consultation paper suggests strengthening certain enforcement powers, the Bar hopes that the Government will consider safeguarding the rights of the arrested persons correspondingly. The balanced co-existence of both ‘enforcement powers’ and ‘protection of rights’ will better maintain the confidence of the international community in Hong Kong’s rule of law.
9. Like the Consultation Paper, our paper contains references to legislations and case laws from other jurisdictions. Of course, since the circumstances of each jurisdiction are different, what is effective and appropriate for the HKSAR will ultimately depend on Hong Kong’s own individual circumstances.
10. After the submission of the Position Paper, the Bar will continue to pay attention to the bill to be introduced and will express our views in due course.
11. In the Position Paper, the Bar specifies the **direction and focus** in details, including:-
 - (1) **Rights and principles:** Respect and safeguard human rights, safeguard in accordance with law the rights protected under the Basic Law and the International Covenant on Civil and Political Rights, and adhere to the principle of the rule of law, as stipulated in Article 4 and 5 of the HKNSL;

- (2) **Definition:** The definition of the offences, specially those newly introduced concepts and crime, must be precise in order to prevent law abiding citizens and stakeholders from being caught inadvertently. This not only can remove misgivings of law abiding citizens abiding by the law, but also can ensure those who are genuinely endangering national security are convicted;
- (3) **Elements and conviction:** There must be clear formulation of elements of offences and criteria for conviction;
- (4) **Exemption or defence:** the laws should also provide appropriate exemptions or defences, for example, the use of public interest defence; and
- (5) **Other protection:** For example, it is important to seek the Secretary for Justice's consent for prosecuting serious offences.

12. The concrete **recommendations/comments** submitted by the Bar include:

Chapter	Content of the Consultation Paper	Recommendations/Comments
1 and 2	The definition of "national security"	Adopt the definition of the Mainland and cases to be tried based on common law principles.
3	<u>Treason</u> The definition of "levying war"	Should not include a riot or disturbance of a local nature that amount to an armed rebellion, and should consider including levying an actual war as the ingredient of offence, and not merely a conspiracy to levy it.
3	<u>Misprision of Treason</u> The Consultation Paper suggests adding the protection of "legal professional privilege"	Support.

4	<u>Incitement to mutiny, incitement to disaffection and insurrection</u>	Consider whether the concept of ‘good faith defence’ in Australia and other relevant legislations may apply; including acts done in good faith and pointing out that the government is mistaken.
4	<u>Offences relating to “seditious intention”</u> The definition of “seditious intention”	Consider narrowing down the definition of “seditious intention”, adding the requirement of an intention to incite violence, disorder or counselling others to disobey the law, and of knowledge of a likelihood that violence, disobedience to the law or breach of the peace may occur.
5	<u>Theft of state secrets</u> Offences relating to “unlawful disclosure”	Consider including a ‘public interest’ defence, covering anyone who may offend and anyone has the right to be able to invoke such a defence and not just journalists. The threshold should not be low. May consider legislations in many other countries, including the UK, Canada, Australia, Denmark, etc.
5	<u>Offences relating to “unlawful disclosure”</u> “Possession of state secrets”	Should provide guidance when formulating provisions so that a person who passively or without knowledge to possess information, a document or an article has the chance to timely and properly dispossess those information, document or article in question. This can ensure that they have legitimate way to take corresponding action without fearing of disobeying the law.
6	<u>Sabotage activities that endanger national security</u>	Should exhaustively state the definition of “public infrastructure”.

	The definition of “public infrastructure”	
6	<p><u>Doing an act in relation to a computer or electronic system without lawful authority and endangering national security</u></p> <p>Criteria for conviction</p>	<p>Recommend explicitly adding the following 4 points to the criteria of the proposed offence and should be proved by the prosecution:</p> <ol style="list-style-type: none"> the intention to endanger national security; without lawful authority; knowing that he or she has no lawful authority; and doing an act in relation to a computer or electronic system endangering (or likely endangering) national security.
7	<p><u>“External interference”</u></p> <p>The definition of “external interference” under the new offence</p>	<p>Suggest adopting the relatively narrower coverage, deleting the part about “entity or individual ‘is accustomed or under an obligation to act in accordance with the directions, instructions or wishes’ of that government, authority or organisation”</p>
7	<p><u>“External interference”</u></p> <p>The acts of collaborating with external forces</p>	<p>Suggest adding the element of “knowledge”, i.e. offenders must know or may know that an external force is involved in the acts or activities in question.</p>
8	<p><u>“Territorial principle” and/or “personality principle”</u></p> <p>Provide extra-territorial effect of the proposed offences</p>	<p>In line with international practice, and Article 37 and 38 of the Hong Kong National Security Law.</p>
8	<p><u>“Protective principle”</u></p>	<p>Legitimate acts of others such as the press or academics should not be unduly affected.</p>

	Provide extra-territorial effect of the proposed offences	
9	<p><u>The rights of arrested persons</u> Prolonged detention without charge</p>	<p>Make reference to the protection of the UK National Security Act 2023:</p> <p>a. The police can apply to a judicial authority for an extension of detention, when the police “reasonably suspects” the person “is, or has been, involved in foreign power threat activity”. There must be strict application and detention time limits.</p> <p>b. The detained person must be notified as to when the application is to be heard, and the grounds upon which the extension of detention is sought. The detained person must have the opportunity to make representation on the further detention.</p>
9.	<p><u>The rights of arrested persons</u> Access to lawyers</p>	<p>Make reference to the protection of the UK National Security Act 2023:</p> <p>a. Police officers of the rank of superintendent or above have the right to prohibit a detained person from consulting a particular solicitor, provided that there must be a reasonable ground to believe that those specified consequences will arise if the consultation were to go ahead. However, the detained person must be permitted to exercise his right to consult a</p>

		<p>solicitor before the end of the 48-hour period.</p> <p>b. The decision above must be recorded in writing and the detained person must be told of the reason for it.</p>
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