



Hong Kong Special Administrative Region  
of the People's Republic of China

# Safeguarding National Security: Basic Law Article 23 Legislation

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## Public Consultation Document

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**Safeguarding National Security :  
Basic Law Article 23 Legislation**

**Public Consultation Document**

Security Bureau  
The Government of the Hong Kong Special Administrative Region  
January 2024

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1. This consultation paper is issued by the Security Bureau (“SB”). Members of the public are welcome to provide comments on the legislative proposals for local legislation for safeguarding national security set out in this paper, with the Summary of Recommendations at **Annex 1**. Please send your comments to us on or before 28 February 2024 by one of the following means

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## **Chapter 1: Constitutional Duty to Safeguard National Security**

This chapter explains the concept of the holistic view of national security, the meaning of “national security”, the constitutional duty of the Hong Kong Special Administrative Region (“HKSAR”) to safeguard national security, and the relevant provisions of the Constitution, Article 23 of the Basic Law, the 5.28 Decision and the HKNSL.

### **National security**

- 1.1 A state is a political community comprising the fundamental elements of its people, territory, sovereignty and regime. When any of these elements are threatened, it indicates that national security is in a certain dangerous state.
- 1.2 National security is a matter of top priority for any state. It is the fundamental prerequisite for the survival and development of a state. Only with national security and social stability can reforms and developments advance continuously. As a matter of fact, with people’s security as the goal, national security safeguards the fundamental interests of each citizen, and is essential for the prosperity and stability of society as well as for its people to live and work in peace and contentment.
- 1.3 Although the understanding and expression of the concept of national security vary among countries, with the evolution of the times and society as well as economic and technological developments under an increasingly complex global situation, the trend is that the concept of national security nowadays is no longer limited to traditional security fields such as homeland security, sovereignty security and military security, but also cover other non-traditional security fields. This development is common for countries throughout the world. Besides, threats to national security keep changing as the circumstances vary. To ensure that the national security laws are adequately and reasonably flexible to effectively deal with various threats that will emerge in the future, it is noted that many common law jurisdictions have not defined “national security” in their national security laws and have adopted a broad interpretation in applying the concept of national security. Taking the United Kingdom (“UK”) as an example: it has all along been its government’s stance not to define “national security” in legislation to maintain flexibility in dealing with any new and emerging national security threats. As regards the UK National Security Act 2023 which has been passed recently, although the relevant committee of the UK Parliament

considered it necessary to define “safety or interests of the United Kingdom” which appears repeatedly in the Act, the UK Government maintained its long-standing position by rejecting the recommendation and stated that limiting this term by specifying certain conduct or including an explicit threshold would risk creating loopholes for hostile actors to exploit. According to the UK Government, “safety or interests of the United Kingdom” cover at least national security, national defence, the economic well-being of the UK and sensitive aspects of international relations.

### *Holistic view of national security*

- 1.4 On 15 April 2014, President Xi Jinping introduced at the first general meeting of the National Security Commission the holistic view of national security. The term “holistic” therein emphasises the necessity to understand and respond to security risks which are dynamic, diverse and often interrelated from a broad, macro and holistic perspective. This comprehensive concept already encompasses 20 major, traditional and non-traditional, security fields, including political security, military security, homeland security, economic security, financial security, cultural security, public security, science and technology security, cyber security, food security, ecological security, resource security, nuclear security, overseas interests security, and a number of emerging fields like outer space security, deep sea security, polar security, biosecurity, artificial intelligence security and data security.
- 1.5 Article 2 of the National Security Law of the People’s Republic of China defined “national security”. The same set of national security standards should apply throughout the country<sup>1</sup>, and the national security standards of our country should also apply to the HKSAR, which is an inalienable part of the People’s Republic of China<sup>2</sup>. Therefore, the HKSAR shall discharge its responsibility of safeguarding national security in accordance with the holistic view of national security. The definition of national security in the HKSAR’s local legislation should be consistent with that in the laws of our

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<sup>1</sup> Keynote speech at the Webinar in Commemoration of the 30th Anniversary of the Promulgation of the Basic Law: National Security Legislation: Current Status and Prospects (Mr Zhang Yong, Vice-Chairperson of the HKSAR Basic Law Committee under the Standing Committee of the National People’s Congress, 8 June 2020).

<sup>2</sup> The definition of the term “national security” in the Law on Safeguarding National Security as amended by the Macao Special Administrative Region in 2023 is the same as the definition in Article 2 of the National Security Law of the People’s Republic of China.



country, i.e. to adopt the same definition in the National Security Law of the People's Republic of China, with provision as follows:

*“National security refers to the status in which the State’s political regime, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major interests of the State are relatively free from danger and internal or external threats, and the capability to maintain a sustained status of security.”*

The specific measures to be taken to safeguard national security will depend on the actual situation in the HKSAR.

### **Constitutional duty of the HKSAR to safeguard national security**

1.6 The Constitution of the People's Republic of China (“the Constitution”) and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (“the Basic Law”) together form the constitutional basis of the HKSAR. The Constitution clearly stipulates the duty to safeguard national security, including the obligation to safeguard national unity and the solidarity of all the country's ethnic groups, the obligation to keep state secrets, the obligation to safeguard the security, honour and interests of the country, as well as the obligation to defend the country and resist aggression<sup>3</sup>. Article 1 and Article 12 of the Basic Law stipulate that the HKSAR is an inalienable part of the People's Republic of China and a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government (“CPG”). It goes without saying that the HKSAR has the constitutional duty to safeguard national security.

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<sup>3</sup> The relevant provisions of the Constitution are set out below:

Article 52 Citizens of the People's Republic of China shall have the obligation to safeguard national unity and the solidarity of all the country's ethnic groups.

Article 53 Citizens of the People's Republic of China must abide by the Constitution and the law, keep state secrets, protect public property, observe discipline in the workplace, observe public order, and respect social morality.

Article 54 Citizens of the People's Republic of China shall have the obligation to safeguard the security, honor and interests of the motherland; they must not behave in any way that endangers the motherland's security, honor or interests.

Article 55 It is the sacred duty of every citizen of the People's Republic of China to defend the motherland and resist aggression....

- 1.7 Article 23 of the Basic Law clearly stipulates that the HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the CPG, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the HKSAR, and to prohibit political organisations or bodies of the HKSAR from establishing ties with foreign political organisations or bodies.
- 1.8 However, since its return to the Motherland, the HKSAR has not been able to enact legislation in accordance with Article 23 of the Basic Law, and has not made the most of the existing law. Such plain deficiencies in the work on safeguarding national security resulted in the social chaos which took place in the past, ultimately causing the Hong Kong version of “colour revolution” in 2019 which posed national security threats to the extent that made it difficult for the HKSAR to handle on its own. To safeguard national security, sovereignty and development interests, uphold and improve the “one country, two systems” regime, safeguard the long-term prosperity and stability of Hong Kong and safeguard the legitimate rights and interests of Hong Kong residents, the National People’s Congress (“NPC”) adopted the Decision of the National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security on 28 May 2020 (“the 5.28 Decision”).
- 1.9 The 5.28 Decision states the basic principles in respect of safeguarding national security in the HKSAR and enunciates national policies and positions, namely: to fully, faithfully and resolutely implement the principle of “one country, two systems”, under which the people of Hong Kong administer Hong Kong with a high degree of autonomy; to remain committed to law-based governance in Hong Kong; to uphold the constitutional order of the HKSAR established by the Constitution and the Basic Law; takes necessary measures to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security, as well as to prevent, suppress and impose punishment in accordance with the law for any act and activity endangering national security; resolutely opposes interference in the HKSAR’s affairs by any foreign or external forces in any form, and takes necessary countermeasures to prevent, stop and punish in accordance with the law activities of secession, subversion, infiltration and sabotage carried out by foreign or external forces in Hong Kong. At the same time, the 5.28 Decision states

the overarching responsibility of the Central Authorities and the constitutional duty of the HKSAR, and provided for the establishment and improvement of systems and mechanisms on different levels and in different aspects, including: the HKSAR shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law; the executive authorities, legislature and judiciary of the HKSAR shall effectively prevent, suppress and impose punishment for any act or activity endangering national security; the HKSAR must establish and improve the relevant institutions and enforcement mechanisms for safeguarding national security; strengthen the enforcement forces for safeguarding national security, and step up enforcement to safeguard national security; relevant organs responsible for safeguarding national security of the CPG will set up agencies in the HKSAR to fulfil relevant duties; the Chief Executive must regularly submit report to the CPG on the performance of the duties of the HKSAR in safeguarding national security and to promote national security education, etc.

- 1.10 The 5.28 Decision also entrusts the Standing Committee of the National People's Congress ("NPCSC") to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for safeguarding national security in the HKSAR. The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("HKNSL") was adopted by the NPCSC on 30 June 2020 and promulgated for implementation by the HKSAR Government on the same day. As reiterated in Article 3 of the HKNSL, it is the duty of the HKSAR under the Constitution to safeguard national security and the HKSAR shall perform the duty accordingly. It is obligatory for all institutions empowered by the law in the HKSAR to regard national security as the most important factor in exercising their powers.
- 1.11 Although the Central Authorities have enacted the HKNSL on a national level, the HKSAR must still perform its constitutional duty to enact local legislation under Article 23 of the Basic Law. Both Article 3 of the 5.28 Decision and Article 7 of the HKNSL require the HKSAR to complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law and refine relevant laws.
- 1.12 In fact, even though the enactment and implementation of the HKNSL has enabled the HKSAR to "move from chaos to stability", the national security

threats posed by external forces and local terrorism remain. Among the seven types of acts which legislation should be enacted to prohibit as prescribed in Article 23 of the Basic Law, two (i.e. secession and subversion against the CPG) are directly covered by the HKNSL. The existing local legislation (e.g. the Crimes Ordinance (Cap. 200), Official Secrets Ordinance (Cap. 521) and Societies Ordinance (Cap. 151)) only covers part of the relevant acts and there are areas requiring improvement. Therefore, the HKSAR has the constitutional duty as well as a practical need to enact local legislation to safeguard national security.

- 1.13 It is noteworthy that while Article 23 of the Basic Law requires the HKSAR to enact laws on its own to prohibit seven types of acts and activities endangering national security, its fundamental purpose is to require the HKSAR to enact laws on its own to safeguard national sovereignty, security and development interests. Both the 5.28 Decision and HKNSL clearly stipulate that it is the constitutional duty of the HKSAR to safeguard national security, as well as effectively prevent, suppress and impose punishment for any act or activity endangering national security. Article 7 of the HKNSL further clearly requires the HKSAR to refine relevant laws for safeguarding national security. According to the holistic view of national security, the scope of national security risks covers a wide spectrum, including new types of risks emerging from non-traditional security fields which will keep on evolving and changing with the circumstance and situation. It is the duty of the HKSAR to enhance the legal system for safeguarding national security steadily and continuously as a constant effort to effectively prevent, suppress and impose punishment for act and activity endangering national security, including new types of risks emerging from non-traditional security fields. Therefore, in this legislative exercise, apart from comprehensively addressing past, present and foreseeable criminal acts and activities which endanger national security, consideration should also be given to the need for legislation on aspects such as enforcement powers, procedural matters and the mechanisms for safeguarding national security (including to ensure they are convergent, compatible and complementary with the HKNSL) to ensure that the HKSAR can fully discharge its responsibility for safeguarding national security.

## **Chapter 2: Addressing national security risks and improving the regime for safeguarding national security**

This chapter analyses and explains the national security risks faced by the HKSAR in recent years, the need to improve the regime for safeguarding national security, the principles and considerations, the research methodology and the legislative approach of this legislative exercise.

- 2.1 Every state will enact laws on safeguarding national security. This is an inherent right of every sovereign state, and also an international practice. The authorisation by the Central Authorities for the HKSAR to enact laws on its own for safeguarding national security has embodied the principle of “one country, two systems”, and our country’s trust in the HKSAR.
- 2.2 Enactment of legislation to safeguard national security is the basic governance strategy of countries around the world. Western countries such as the United States (“US”), UK, Canada, Australia and New Zealand have all already enacted laws for safeguarding national security and established relevant decision-making and executive bodies. In terms of the number of specific national security-related legislation, the US, for instance, has at least 21 pieces; the UK has at least 14 pieces; Australia has at least 4 pieces; Canada has at least 9 pieces; and New Zealand has at least 2 pieces; an example among Asian countries is Singapore, which also has at least 6 pieces (the laws concerned are listed in **Annex 2**).
- 2.3 Given the importance of safeguarding national security, many countries have put in place comprehensive and effective laws and taken necessary measures to safeguard national security in accordance with their own needs and in the light of the national security risks they are facing. For example:
  - (a) The **offence of treason** is provided for, with a maximum penalty of life imprisonment in general, in countries such as the UK, Australia and Canada. In the US, the maximum penalty for this offence is **death penalty**, and persons convicted of the offence of treason or offence of rebellion or insurrection shall be incapable of holding any public office in the US for life;
  - (b) The **offence of sabotage** under the National Security Act 2023 of the UK provides that the maximum penalty for a person who engages in a conduct that **results in damage to any asset in anywhere** for a purpose

that he or she knows or ought reasonably to know, is prejudicial to the safety or interests of the UK, where the foreign power condition is met, is **life imprisonment**;

- (c) The **offence of espionage** under the Criminal Code Act 1995 of Australia provides that the maximum penalty for a person who communicates or makes available to a foreign principal information or article that has a security classification or concerns Australia's national security with an intention to (or recklessness as to whether he or she will) prejudice Australia's national security or advantage the national security of a foreign country is **life imprisonment or imprisonment for 25 years respectively (depending on the intention concerned)**; and
- (d) The Internal Security Act 1960 of Singapore creates executive powers for the President to authorise **detention without charge** for a period of up to **two years** (which can be further extended) on the grounds of preventing a person from acting in any manner prejudicial to the national security of Singapore or the maintenance of public order or essential services. This also rules out bail completely and the relevant decisions taken under the Act are generally not subject to judicial review.

2.4 These countries also review the relevant situation from time to time and enact effective laws to deal with national security risks that may emerge. For example :

- (a) the Foreign Interference (Countermeasures) Act 2021 of Singapore;
- (b) the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 of Australia; and
- (c) the National Security and Investment Act 2021 and the National Security Act 2023 of the UK.
- (d) Recently, Canada is conducting a public consultation on how to amend relevant laws such as the Criminal Code, the Security of Information Act, the Canada Evidence Act and the Canadian Security Intelligence Service Act to cope with the risk of external interference and to strengthen law enforcement capabilities.

## National security risks – necessity for legislation

2.5 Since its return to the Motherland, because the HKSAR has not been able to enact legislation on Article 23 of the Basic Law, nor has it made full use of existing law, there are deficiencies in the law and enforcement mechanisms for safeguarding national security, resulting in potential risks to national security. With the aggregate development of our country, many western countries regard China as a major competitor and even adopt a completely hostile attitude. The HKSAR's unique environment and lifestyles under the principle of "one country, two systems" make it particularly easy for external forces to exploit with malicious infiltration and sabotage. Such national security risks should not be neglected.

2.6 In recent years, there have been drastic developments in the national security risks of the HKSAR, with occurrence of the illegal "Occupy Central" movement in 2014, the Mong Kok riot in 2016, the establishment of the Hong Kong National Party which advocated "Hong Kong independence" in 2016, as well as such other acts and activities that seriously undermined the rule of law and public order, and even endangered national security, thereby intensifying national security risks. The repeated episodes of social chaos which took place over the past two decades or so reached an all time high since 2019, with anti-China, destabilising elements in the territory colluding with external elements to instigate the "black-clad violence" that lasted for more than ten months in the HKSAR. During the period, they vigorously advocated acts of secession, including "Hong Kong independence", "self-determination" and "nation-building", with the objective of fomenting a Hong Kong version of "colour revolution", seizing the governance power of the HKSAR, and ultimately overthrowing the fundamental system of the People's Republic of China and subverting the State power. The details of the national security risks faced by the HKSAR in recent years are as follows:

- (a) **Territory-wide large-scale riots:** The forces plotting to endanger the security of our country and the HKSAR organised frequent large-scale demonstrations and processions in various districts to radicalize the public, instigated "mutual destruction" and territory-wide obstruction, occupied the airport, highways and tunnels to paralyse traffic, and incited large-scale riots. The months-long riots had severely endangered the overall public safety of the HKSAR, and were

of a magnitude far above usual offences such as riots and criminal damage, constituting acts of insurrection endangering national security.

- (b) **Extensive damage to public infrastructure:** During the Hong Kong version of “colour revolution” in 2019, rioters stormed different government buildings and the Legislative Council Complex. They wantonly and extensively vandalised many MTR stations and transport facilities such as traffic lights, railings and switch boxes. To prevent further destruction by rioters, the Police set up and enhanced protection facilities for some essential buildings such as the Central Government Offices, the Police Headquarters and the courts. The acts of large-scale and serious vandalism of public infrastructure had reached the level where national security was endangered.
  
- (c) **Incitement of public hatred against the fundamental system of the State, the Central Authorities and the bodies of power of the HKSAR:** Individuals who planned or participated in the riots incited the public through speeches, writing or publications carrying serious smearing allegations, tearing copies of the Basic Law, spread rumours to scandalise the fundamental system of the State, the Central Authorities and the bodies of power of the HKSAR (especially the HKSAR Government’s law enforcement officers), and provoked hatred against the fundamental system of the State, the Central Authorities and the bodies of power of the HKSAR. They also glorified violence with distorted legal viewpoints, and gradually and subtly weakened the public’s concept of the rule of law and their law-abiding awareness. These deliberate acts of incitement provided soil for the Hong Kong version of “colour revolution” to germinate, and eventually led to the proliferation of violent acts, and a long period of unrest and instability in society. Some of these acts involved using computers to engage in acts and activities endangering national security, such as “doxxing” on police officers and their family members and disclosing a large amount of their personal data on the Internet, as well as harassing and intimidating them.
  
- (d) **Promoting messages endangering national security:** The forces seeking to endanger the security of our country and the HKSAR have continued to make use of so-called artistic creations released through



media like publications, music, films, arts and culture, and online games, etc. as a disguise to disseminate messages that promote resistance against the Central Authorities and the HKSAR Government, advocating “Hong Kong independence” or subvert the State power using a “soft resistance” approach. Given the popular use of the Internet and social messaging applications, such messages can be covertly disseminated in a fast and extensive manner.

- (e) **Risk of theft of state secrets:** In order to safeguard national security and ensure the smooth operation of the government, information involving state secrets must be kept confidential or else it will pose serious risks to national security. With the development of cyber networks, there have been increasing risks of theft of state secrets through cyber networks (for example, there have been reports that the US has conducted worldwide covert surveillance through the Prism programme over a long period of time<sup>4</sup>, and that the US has hacked hundreds of computers on the Mainland and in the HKSAR<sup>5</sup>). In the face of increasingly sophisticated cyber threats, it is necessary for the HKSAR Government to prevent the theft or unlawful disclosure of state secrets through effective laws.
- (f) **Increasing threat of foreign espionage and intelligence operations:** The Hong Kong version of “colour revolution” in 2019 clearly demonstrated that there were local organisations and individuals that were willing to act as agents of external political or intelligence organisations and engaged in acts and activities endangering national security, especially acts of espionage. These acts of espionage cover not only theft of state secrets, but also other infiltration and sabotage activities. The intelligence organisations of some Western countries have also published reports one after another, stating that they should be vigilant about the “threat” posed by China and take measures to address the issue (for example, the Central Intelligence Agency of the US and the Secret Intelligence Service of the UK have stated publicly

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<sup>4</sup> According to a report by The Guardian titled “NSA Prism program taps in to user data of Apple, Google and others” on 7 June 2013.

<sup>5</sup> According to a report by Business Insider titled “Snowden Showed Evidence Of US Hacking China To Hong Kong Newspaper” on 13 June 2013 and a report by South China Morning Post titled “Edward Snowden: US government has been hacking Hong Kong and China for years” on the same day.

that they would actively increase the resources targeting China<sup>6</sup>). It is apparent that our country and the HKSAR are unavoidably subject to acts and activities endangering national security conducted by the agents or spies of external forces (including external political organisations or intelligence agencies) in the HKSAR. Considering that acts of espionage are generally conducted in a covert manner which are hard to detect, effective laws with deterrent effect should be enacted to prevent and suppress such acts.

- (g) **Barbaric and gross interference from foreign governments and politicians in China’s internal affairs:** Currently, there are unstable factors in the global situation coupled with increasingly complex geopolitics and rising unilateralism. Sovereign equality and non-interference in internal affairs are basic norms of international relations and fundamental principles of international law, which are also entrenched under the Charter of the United Nations<sup>7</sup>. However, some external forces have continuously interfered with China’s affairs (including the affairs of the HKSAR), undermining national sovereignty and political independence, and endangering national security. For example, acts of interference listed in the “Fact Sheet: US Interference in Hong Kong Affairs and Support for Anti-China, Destabilising Forces”<sup>8</sup> and the “Fact Sheet on the National Endowment for Democracy”<sup>9</sup> released earlier by the Ministry of Foreign Affairs are relevant instances. In recent years, some foreign

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<sup>6</sup> The Central Intelligence Agency of the US has indicated that it was setting up a “China Mission Centre” to “address the global challenge posed by China” as it so claimed while the Chief of the Secret Intelligence Service (also known as MI6) of the UK has publicly mentioned that MI6 would recruit clandestine agents from countries and organisations all over the world to deepen its understanding of China. In July 2022, the heads of MI5 of the UK and the Federal Bureau of Investigation of the US made a joint address, stating that the most “game-changing” challenge both countries faced came from the Communist Party of China, and that both countries needed to take actions to respond to such challenge.

<sup>7</sup> It is also clearly stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, unanimously passed by the General Assembly of the United Nations in 1970, that the elements of sovereign equality (especially national political independence) are inviolable.

<sup>8</sup> On 24 September 2021, the Ministry of Foreign Affairs released the “Fact Sheet: US Interference in Hong Kong Affairs and Support for Anti-China, Destabilising Forces”, listing US acts of interference in Hong Kong affairs and support for anti-China, destabilising forces between early 2019 and August 2021.

<sup>9</sup> On 7 May 2022, the Ministry of Foreign Affairs released the “Fact Sheet on the National Endowment for Democracy”, listing US acts such as the instigation of revolutions, subversion of target State power, interference in other countries’ political procedures, undermining of target countries’ stability and advancement of ideological infiltration around the world (including in Hong Kong) through such an organisation.

politicians even threatened to impose so-called “sanctions” on officials, judicial officers, prosecutors and law enforcement officers who deal with national security matters or cases in the HKSAR, in an attempt to blatantly and directly infringe upon the rule of law, judicial independence and officers concerned in the HKSAR, grossly interfered in the affairs of the HKSAR and China’s internal affairs, and deter officers concerned from discharging their duties of safeguarding national security in accordance with the law.

- (h) **Grooming of agents by external forces:** External forces have groomed agents through long-term infiltration in the HKSAR on all fronts. With significant influence and mobilisation capability, they have been, through their agents, instructing local organisations or individuals to engage in activities endangering national security, improperly influencing the implementation of policies by the HKSAR Government, or collecting intelligence or engaging in other activities endangering national security. Under guises such as so-called “fighting for rights” and “monitoring of human rights”, some external forces have carried out such projects in the HKSAR for a long time and subsidised local organisations to launch various kinds of so-called resistance activities, offering support to the Hong Kong version of “colour revolution”. While it is necessary for the HKSAR Government to take into account normal political activities and regular exchanges with overseas organisations, prevention of external forces from unlawfully interfering in the affairs of the State or that of the HKSAR through their agents is also essential.
  
- (i) **Organisations endangering national security:** The existing Societies Ordinance is not applicable to the organisations listed in the Schedule of that Ordinance. If these organisations actually engage in activities endangering national security in the HKSAR (such as engaging in activities endangering national security under the banner of “humanitarian support” or “assistance funds”), or if they are established outside the HKSAR or have moved their operations outside the HKSAR, the Societies Ordinance will not be able to enforce effective regulation on them. This shortcoming in effect facilitates the internal and external cultivation of anti-China,

destabilising forces by these organisations, thereby endangering national security<sup>10</sup>.

- 2.7 Although social order has been restored since the implementation of the HKNSL, some criminals still have not given up and are waiting for an opportunity to launch violent attacks or carry out terrorist activities. These activities have also tended to go underground and become increasingly clandestine, while some lawbreakers have absconded overseas, wantonly colluded with external forces and continued to engage in acts and activities endangering national security, or even conspired to form a so-called “Hong Kong Parliament”, drafted a so-called “Hong Kong Constitution” and continued to advocate “Hong Kong independence” and subversion of the State power.
- 2.8 Having regard to the above circumstances, the HKNSL and other laws in force in the HKSAR are inadequate in fully addressing acts and activities endangering national security which may emerge as cited above. Therefore, we must enact effective laws timely and as soon as practicable for better prevention.

**Strengthen enforcement forces for safeguarding national security and ensure impartial and timely handling of cases concerning offence endangering national security**

- 2.9 When handling cases concerning offence endangering national security, law enforcement authorities of the HKSAR may take measures that law enforcement authorities are allowed to apply under the laws in force in the HKSAR in investigating serious crimes, and may also take the seven types of measures prescribed under Article 43 of the HKNSL. In this regard, the Chief Executive, in conjunction with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region (“the Committee”), has exercised the power given under Article 43 of the HKNSL to make the Implementation Rules for Article 43 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong

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<sup>10</sup> For details, see Chapter 7 of this Consultation Document.

Special Administrative Region (“Implementation Rules”)<sup>11</sup>. The Implementation Rules include detailed provisions regarding the powers and procedures for carrying out the measures by relevant officers, as well as the relevant offences and penalties for the effective implementation of the measures, so as to improve the enforcement mechanisms for the HKSAR to safeguard national security and to effectively prevent, suppress and impose punishment for offences endangering national security.

- 2.10 With the implementation of the HKNSL and the Implementation Rules, law enforcement authorities have taken law enforcement actions against offences endangering national security, and carried out preventive investigations to prevent and suppress offences endangering national security taking into account the need for safeguarding national security. The courts have also conducted trials on a number of cases concerning offence endangering national security.
- 2.11 To enhance the effectiveness of law enforcement in safeguarding national security, it is necessary to review the practical experience to ensure that the law enforcement agencies have the necessary enforcement powers to take law enforcement actions against cases concerning offence endangering national security.
- 2.12 In addition, Article 41(1) of the HKNSL provides that the HKNSL and the laws of the HKSAR shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the HKSAR exercises jurisdiction. Article 42(1) of the HKNSL stipulates that when applying the laws in force in the HKSAR concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the HKSAR shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence. While procedural matters have already been provided for by the HKNSL and the local laws of the HKSAR, we should examine which provisions under the local legislation need improvement in order to meet the

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<sup>11</sup> The Chief Executive, in conjunction with the Committee, has exercised the power given under Article 43 of the HKNSL to make the 2023 Implementation Rules for Amending the Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region to amend Schedule 3 of the Implementation Rules.

relevant requirements of the HKNSL, in particular, to ensure that cases concerning offence endangering national security are handled in a fair and timely manner, and that the provisions under the local legislation are convergent with the relevant requirements of the HKNSL.

2.13 Apart from improving offences, enforcement powers and procedural matters, it is also important to provide adequate protection to personnel responsible for safeguarding national security, so as to ensure the HKSAR's capability for safeguarding national security. During the Hong Kong version of "colour revolution", some lawbreakers have unlawfully disclosed the personal information of public officers, judicial officers and law enforcement officers, as well as that of their family members, and have, among other things, intimidated, molested and threatened these officers. We must conduct a review in this regard to ensure that the safety of those responsible for handling cases concerning national security or other duties in safeguarding national security, as well as their family members, is duly protected, thereby buttressing and strengthening the enforcement forces for safeguarding national security.

### **Improving the regime for safeguarding national security**

2.14 The National People's Congress adopted the Basic Law in 1990. Under Article 23 of the Basic Law, the HKSAR is authorised and required to enact laws on its own to prohibit acts endangering national security. As it is well known, the Basic Law is a constitutional instrument that provides for various matters of principle to be specifically implemented through local legislation. Article 23 of the Basic Law carries in-principle and general provisions for seven types of acts endangering national security, but this by no means implies that there are only seven types of acts endangering national security, or that the HKSAR may prevent, suppress and impose punishment for only these seven types of acts through legislation. The fundamental purpose of Article 23 of the Basic Law is to require the HKSAR to enact laws on its own to safeguard national sovereignty, security and development interests. Therefore, enactment of laws to safeguard national security by the HKSAR should move with the times, with a view to properly addressing the traditional and non-traditional national security risks that our country is facing or may face in the future.

2.15 On the other hand, subsequent to the futile attempt to enact local laws to implement Article 23 of the Basic Law in 2003, social chaos as well as acts and activities endangering national security have emerged over the years. Through the following measures, the Central Authorities have further affirmed the HKSAR's constitutional duty to safeguard national security and laid down the overall institutional arrangement for safeguarding national security in the HKSAR:

- (a) the National People's Congress adopted the 5.28 Decision on 28 May 2020. The 5.28 Decision entrusts the NPCSC to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security, to effectively prevent, suppress and impose punishment for acts and activities endangering national security;
- (b) the HKNSL was then formulated by the NPCSC under the relevant mandate on 30 June 2020, and promulgated for implementation by the HKSAR on the same day; and
- (c) the NPCSC adopted the interpretation of Article 14 and Article 47 of the HKNSL on 30 December 2022.

2.16 The 5.28 Decision and the HKNSL have made clear provisions for the HKSAR's constitutional duty and institutional set-up for safeguarding national security. They form the master plan for establishing a comprehensive regime for safeguarding national security in the HKSAR. Relevant organs of the Central Authorities and the HKSAR have implemented the requirements of the 5.28 Decision and the HKNSL by setting up the relevant institutions and discharging their duties in a timely manner. The law enforcement and prosecution authorities of the HKSAR Government and the Judiciary of the HKSAR have commenced investigation, prosecution and adjudication of cases concerning offence endangering national security. Nevertheless, it is still at the early stage of establishing the regime for safeguarding national security in the HKSAR. There are still matters which have yet to be institutionalised or specifically implemented.

2.17 On 30 December 2022, in response to questions raised by the media concerning the interpretation by the NPCSC of Article 14 and Article 47 of the HKNSL, a responsible official of the Legislative Affairs Commission of the NPCSC indicated that Article 7 of the HKNSL should be implemented

seriously and faithfully, i.e. the HKSAR should amend and improve the relevant local legislation in a timely manner, and resolve legal issues encountered in the implementation of the HKNSL by making full use of local legislation.

2.18 The four types of offences provided for under Chapter III of the HKNSL, namely the offences of secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security, are directed at the most prominent acts and activities endangering national security in the Hong Kong version of “colour revolution” in 2019. Among these offences, the offences of secession and subversion have already specifically dealt with two types of acts endangering national security under Article 23 of the Basic Law. However, the four categories of offences under the HKNSL cannot fully cope with the national security risks faced by the HKSAR in recent years as mentioned above. Therefore, although it is not necessary for the HKSAR to enact separate local legislation on the offences of secession and subversion, the HKSAR has the constitutional duty to enact laws to prohibit those acts and activities endangering national security apart from the four types of offences provided for under the HKNSL.

### **Legislative principles and considerations**

2.19 In taking forward legislation for safeguarding national security, it must be based on the following principles:

- (a) To safeguard national sovereignty, security and development interests is the top priority of the principle of “one country, two systems”;
- (b) Human rights are to be respected and protected. The rights and freedoms, including the freedom of speech, of the press, of publication, the freedoms of association, of assembly, of procession and of demonstration, enjoyed under the Basic Law and the provisions of the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) as applied to the HKSAR, should be protected in accordance with the law; and



- (c) For acts and activities endangering national security, the principle of the rule of law should be adhered to in the active prevention and punishment in accordance with the law.

2.20 In the light of the statutory requirement to improve the regime for safeguarding national security, in enacting legislation for safeguarding national security, due consideration should be given to the full implementation of the constitutional duties and obligations of the HKSAR as stipulated under the 5.28 Decision and the HKNSL, so as to realise the principle of joint development of a legal system in the HKSAR for safeguarding national security under the 5.28 Decision, the HKNSL and Hong Kong's local legislation. In this connection, the following factors should be considered in formulating the current legislative proposals:

- (a) Safeguarding national sovereignty, unity and territorial integrity; ensuring the full and faithful implementation of the principle of “one country, two systems” under which the people of Hong Kong administer Hong Kong with a high degree of autonomy;
- (b) Implementing the requirements of the 5.28 Decision and the HKNSL, including improving the regime for safeguarding national security;
- (c) Strengthening the enforcement forces for safeguarding national security, and stepping up law enforcement to safeguard national security, including providing protection for officers engaging in work for safeguarding national security;
- (d) Preventing acts in the nature of treason or insurrection to protect the territory of our country from invasion and protect the public from violent attacks and coercions that endanger national security;
- (e) Fully protecting public infrastructure from malicious damage or impairment;
- (f) Safeguarding the lives, properties and other legitimate rights and interests of the HKSAR residents and other people in the HKSAR, with the continued maintenance of normal life and protection of the properties and investments within the HKSAR by law;

- (g) Curbing the noxious phenomenon of inciting hatred against the fundamental system of the State, the Central Authorities and the executive authorities, legislature and judiciary of the HKSAR;
- (h) Protecting the secrets relating to the State or the HKSAR from theft or unlawful disclosure;
- (i) Curbing the acts of espionage including theft of state secrets, and other infiltration and sabotage activities, and collusion with external forces with intent to endanger national security;
- (j) Preventing undue interference by the external forces with the affairs of the our country and the HKSAR, including using improper means to influence the Government's formulation or implementation of policies or measures, the performance of the duties of the Legislative Council and the courts, as well as interference with the elections in the HKSAR; and
- (k) Effectively preventing and suppressing the operation in the HKSAR of organisations that engage in activities endangering national security.

2.21 Chapter III of the Basic Law sets out a number of rights and duties enjoyed by HKSAR residents and other persons in the HKSAR. Article 4 of the HKNSL also expressly provides that human rights shall be respected and protected in safeguarding national security in the HKSAR. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the HKSAR enjoy under the Basic Law and the provisions of the ICCPR and the ICESCR as applied to Hong Kong, shall be protected in accordance with the law. Therefore, in safeguarding national security, citizens continue to enjoy the rights and freedoms guaranteed by the Basic Law in accordance with the law.

2.22 Nevertheless, according to the ICCPR and the ICESCR, the above rights and freedoms which are not absolute may be subject to restrictions as prescribed by law if it is necessary in the interests of national security, public safety, public order (*ordre public*) or the rights and freedoms of others, etc. Article 2 of the HKNSL also states that Article 1 (i.e. the HKSAR is an

inalienable part of China) and Article 12 (i.e. the HKSAR is a local administrative region which shall enjoy a high degree of autonomy and come directly under the Central People's Government) of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law, and that no institution, organisation or individual in the HKSAR shall contravene Articles 1 and 12 of the Basic Law in exercising their rights and freedoms. In fact, safeguarding national security is fundamentally consistent with the respect and protection of human rights: the efforts to effectively prevent, suppress and impose punishment for illegal acts endangering national security are, ultimately, for better protecting the fundamental rights and freedoms (including personal safety) of HKSAR residents and other persons in the HKSAR and ensuring the properties and investments in the HKSAR are protected by law.

2.23 Article 5 of the HKNSL clearly stipulates that the principle of the rule of law shall be adhered to in preventing, suppressing and imposing punishment for offences endangering national security, including the principles of conviction and punishment in accordance with the law, presumption of innocence, prohibition of double jeopardy, and protection of the right to defend oneself and other rights in judicial proceedings that a criminal suspect, defendant and other parties in judicial proceedings are entitled to under the law.

2.24 The HKSAR Government will give comprehensive and prudent consideration to the provisions of the Basic Law, including provisions relating to the protection of individual rights and freedoms, when preparing the local legislative proposals for safeguarding national security. Legislation for safeguarding national security only targets an extremely small minority of organisations and individuals endangering national security. That being said, the legislative proposals will also take into account the concerns of Hong Kong people, and the community of foreigners who live, carry on businesses or invest in Hong Kong, on the HKSAR Government's efforts to strengthen the safeguarding of national security, as well as the need to maintain Hong Kong's unique advantages and positions, and to facilitate legitimate international exchanges to continue smoothly in Hong Kong.

## Methodology for studies on the enactment of legislation

- 2.25 Studies on the enactment of legislation involve the review of past research materials, the content of the HKNSL and other related legislation on safeguarding national security, the relevant implementation experience and court verdicts, relevant laws of our country and other countries and their implementation experience of such laws, and the actual circumstances in the HKSAR in recent years, with a view to drawing up effective and pragmatic proposals. As mentioned in paragraphs 2.2 to 2.4 above, major common law jurisdictions, including Western countries like the US, UK, Canada, Australia and New Zealand, as well as Singapore, have already enacted laws on safeguarding national security. These countries will also review the relevant situation from time to time and improve their laws on safeguarding national security on all fronts, so as to deal with the national security risks at present and possibly arising in the future.
- 2.26 Apart from effectively addressing past and present national security risks and threats, the legislative proposals should also be sufficiently forward-looking to address possible risks in the future. Besides, the legislative proposals must be practicable in terms of implementation and capable of safeguarding national security effectively.
- 2.27 As national security risks and threats are complex in nature and evolve over time, it is difficult to anticipate the national security risks that the HKSAR may face in the future. In order to address national security risks that may arise in the future whenever necessary in a timely manner, the HKSAR Government has to keep in view the situation and, depending on the need, propose enacting other legislation to address relevant risks endangering national security.

## Legislative approach

- 2.28 Upon consideration, it is considered that we should **introduce a new Safeguarding National Security Ordinance** (“the proposed Ordinance”) to comprehensively address the national security risks at present and may possibly arise in the future in the HKSAR, and to fully implement the constitutional duty and obligation as stipulated under the 5.28 Decision and the HKNSL. This can let the public have a clearer picture of the scope and contents of the legislation, and the HKSAR’s local laws for safeguarding

national security can be better consolidated. The proposed Ordinance will include the offences newly added or improved under the current legislative proposals, new or improved enforcement powers, as well as supplementary provisions built upon the HKNSL for procedural matters in relation to cases concerning national security. A number of mechanisms and safeguards for safeguarding national security will be established, and certain existing legislation will be amended, so as to improve the HKSAR's regime for safeguarding national security as a whole. Considering that the HKNSL has already stipulated offences for providing for the two types of acts of secession and subversion, we recommend that the HKSAR does not need to legislate again on the crimes relating to secession and subversion.

2.29 The HKSAR Government's preliminary proposals for local legislation to safeguard national security are set out in Chapters 3 to 9, with the Summary of Recommendations at **Annex 1**. Relevant laws of foreign countries which this consultation document has cited or made reference to are at **Annex 2**.

## Chapter 3: Treason and related acts

This Chapter examines the following “treason” and related offences under the existing Crimes Ordinance, the relevant laws in foreign countries, and the recommended directions for improving the relevant offences. The relevant offences include:

- the offence of “treason”;
- the offence of “misprision of treason” under the common law;
- “Treasonable offences”; and
- the offence of “unlawful drilling”.

### Existing laws on treason and related acts

3.1 Under the existing laws, offences relating to treason are mainly set out in Parts I and II of the Crimes Ordinance (Cap. 200) and are provided under the common law, including<sup>12</sup>:

(a) **the offence of “treason”**<sup>13</sup>

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<sup>12</sup> The relevant references under the existing Crimes Ordinance include references to “Her Majesty”, “United Kingdom”, “Governor” etc. which are not consistent with the current constitutional status of the HKSAR. Such references should be adapted and amended as necessary in accordance with the principles set out in the Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and section 2A of and Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1). Pending the completion of the adaptations and amendments, the existing provisions shall be construed in accordance with the relevant principles under the aforesaid decision and the Interpretation and General Clauses Ordinance.

<sup>13</sup> The offence of “treason” under section 2 of the Crimes Ordinance (which carries a maximum penalty of life imprisonment) covers the following acts of “treason” –

- (a) killing, wounding or causing bodily harm to Her Majesty, or imprisoning or restraining Her;
- (b) forming an intention to do any such act as is mentioned in paragraph (1) and manifesting such intention by an overt act;
- (c) levying war against Her Majesty, (i) with the intent to depose Her Majesty from the style, honour and royal name of the Crown of the United Kingdom or of any other of Her Majesty’s dominions; or (ii) in order by force or constraint to compel Her Majesty to change Her measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, Parliament or the legislature of any British territory;
- (d) instigating any foreigner with force to invade the United Kingdom or any British territory;
- (e) assisting by any means whatever any public enemy at war with Her Majesty; or
- (f) conspiring with any other person to do anything mentioned in paragraph (1) or (3).

- (b) **the offence of “misprision of treason” under the common law** <sup>14</sup>
- (c) **“Treasonable offences”** <sup>15</sup>
- (d) **the offence of “unlawful drilling”** <sup>16</sup>

### Improving the existing laws

3.2 We recommend improving the existing offences relating to treason, as well as incorporating these offences into the proposed Ordinance.

#### *(A) Offence of “treason”*

3.3 At present, the offence of “treason” (「叛逆」罪) under section 2 of the Crimes Ordinance, which regards “killing or wounding Her Majesty” etc. as an act of treason, is outdated and requires legislative amendment. On the other hand, under the common law, the meaning of “levying war” in the context of the offence of “treason” is not limited to “war” in the strict sense, but includes referring to a violence or riot initiated by a considerable number of persons for some general public purpose. Therefore, the offence of “treason” in fact covers acts that do not necessarily amount to war but involve the use of force or threat to use of force with the intention of

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<sup>14</sup> This offence is committed when a person knows that another person has committed the offence of “treason” but fails to disclose this to the proper authority within a reasonable time. It is now a common law offence with no statutory penalty. Section 101I(1) of the Criminal Procedure Ordinance (Cap. 221) provides that where a person is convicted of an offence which is an indictable offence and for which no penalty is provided by any Ordinance other than section 101I(1), he shall be liable to imprisonment for 7 years and a fine.

<sup>15</sup> The “treasonable offences” under section 3 of the Crimes Ordinance (which carries a maximum penalty of life imprisonment) applies to any person who forms an intention to effect the following purposes and manifests such intention by an overt act or by publishing any printing or writing –

- (a) to depose Her Majesty from the style, honour and royal name of the Crown of the United Kingdom or of any other of Her Majesty’s dominions;
- (b) to levy war against Her Majesty within the United Kingdom or any British territory in order by force or constraint to compel Her Majesty to change Her measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, Parliament or the legislature of any British territory; or
- (c) to instigate any foreigner with force to invade the United Kingdom or any British territory.

<sup>16</sup> The offence of “unlawful drilling” under section 18 of the Crimes Ordinance provides that any person who without the permission of the Governor or the Commissioner of Police, trains or drills any other person in the use of arms or the practice of military exercises or evolutions; or is present at any meeting of persons, held without the permission of the Governor or the Commissioner of Police for the purpose of the above training, drilling or the practice of military exercises or evolutions, shall be guilty of an offence (which carries a maximum penalty of seven years’ imprisonment), and any person who at any aforementioned meeting is trained or drilled in the use of arms or the practice of military exercises or evolutions; or is present at any such meeting for the purpose of being so trained or drilled, shall be guilty of an offence (which carries a maximum penalty of two years’ imprisonment).

endangering national sovereignty, unity or territorial integrity. On the basis of the existing offence of “treason” (「叛逆」罪), we recommend renaming the offence from 「叛逆」罪 to 「叛國」罪 (with the English name remaining the same), targeting the following acts:

- (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.*

3.4 It is a universally accepted principle that a country should protect its citizens and ensure that they live in a stable, peaceful and orderly society; and therefore, its citizens owe a duty of allegiance to their country and are obliged not to engage in acts that threaten national security. Therefore, we recommend that the scope of application of the offence of “treason” shall cover: (i) Chinese citizens who have committed the offence of “treason” within the HKSAR; and (ii) HKSAR residents (including permanent and non-permanent residents) who are Chinese citizens and have committed the offence of “treason” outside the HKSAR.

***(B) Offence of “misprision of treason” under the common law***

3.5 Under the common law, the offence of “misprision of treason” is committed when a person knows that another person has committed the offence of “treason” but fails to disclose this to the proper authority within a reasonable time. “Misprision of treason” may endanger national security. In addition, law enforcement agencies may not be able to detect and suppress relevant acts of treason at once, as lawbreakers endangering national security may plan and promote acts of treason through covert means, the Internet or other electronic media. Article 6(1) of the HKNSL stipulates that it is the common responsibility of all the people of China, including the people of Hong Kong, to safeguard the sovereignty, unity and territorial integrity of the People’s Republic of China. Requiring Chinese citizens to reveal acts of treason which they know of is consistent with the HKNSL and the common law principles. We recommend that the offence of “misprision of treason” should be codified to facilitate a clearer understanding of the



elements of the offence. The offence of “misprision of treason” is also found in the legislation of other countries, such as:

- (a) Section 2382 of Chapter 115 of Title 18 of the United States Code;
- (b) Section 80.1(2)(b) of the Criminal Code of Australia;
- (c) Section 76(b) of the Crimes Act 1961 of New Zealand;
- (d) Section 50(1)(b) of the Criminal Code of Canada; and
- (e) Section 121D of the Penal Code 1871 of Singapore.

As regards penalties, the maximum penalties for similar offences in Australia, Canada, Singapore, New Zealand and the US are life imprisonment, 14 years’ imprisonment, 10 years’ imprisonment and 7 years’ imprisonment respectively (the penalties in New Zealand and the US are the same).

- 3.6 We recommend that the offence of “**misprision of treason**” be codified, covering the following circumstances:

*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.*

- 3.7 If the offence of “misprision of treason” is codified, we recommend including an exception to exclude plans or acts which are already well-known to the public (for example, a member of the public does not need to report to the Police a person’s plan to commit the offence of “treason” if such plan has already been widely reported in the media; however, a member of the public knowing of the circumstances concerning the commission of the offence still has the responsibility of reporting them to the Police if the circumstances are not well-known to the public). In the event that the particulars relating to the commission of the offence are protected by legal professional privilege, non-disclosure on the part of the lawyer concerned does not constitute an offence. As for the scope of application of the offence, based on the close relationship between the offence of “treason”

and the offence of “misprision of treason”, we recommend that the offence should only apply to Chinese citizens.

**(C) “*Treasonable offences*”**

3.8 Section 3 of the existing Crimes Ordinance sets out the “treasonable offences”. If any person intended to commit treason and publicly manifested such an intention, even if the person has not committed the act of treason, it is a must to effectively prevent others from following such acts, which may pose serious risks to national security. The concept of “treasonable offences” is not unfamiliar in common law jurisdictions. For example, Canada has similar offences (with a maximum penalty of life imprisonment)<sup>17</sup>.

3.9 We recommend that this offence should continue to be retained and be amended in accordance with the provisions of the above-mentioned offence of “treason”, targeting the following acts:

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

As for the scope of application of the offence, based on the close relationship between the offence of “treason” and the “treasonable offences”, we recommend that the offences should only apply to Chinese citizens.

**(D) *Offence of “unlawful drilling”***

3.10 The offence of “unlawful drilling” under section 18 of the existing Crimes Ordinance prohibits the following acts:

- (a) provision of drilling (including the use of arms or the practice of military exercises or evolutions) without permission;
- (b) presence at a meeting, held without permission, for the purpose of providing drilling;
- (c) acceptance of drilling at the aforementioned meeting; or
- (d) presence at any such meeting for the purpose of being so drilled.

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<sup>17</sup> Section 46(2)(d)-(e) of the Criminal Code of Canada. Section 3 of the Treason Felony Act 1848 of the UK also contains a similar offence, with a maximum penalty of life imprisonment.

3.11 In Australia, the legislation stipulates an offence in relation to military-style training involving foreign government principal or foreign political organisation<sup>18</sup>. In this regard, we recommend that the offence of “unlawful drilling” should be improved to specifically target persons who endanger national security by receiving or participating in training in the use of arms or the practice of military exercises or evolutions involving external forces, or providing the same in collaboration with external forces. The offence will target the following acts:

*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.*

3.12 If the relevant offence is to be introduced, in order not to affect drills for legitimate purposes, we recommend that exceptions should be stipulated, including exceptions for the need to perform functions and duties by persons in their capacity as public officers; non-Chinese citizens with foreign nationality to serve in an armed force of or perform military service in a government of that foreign country; or participate in drills in which the People’s Republic of China is participating or which are conducted under the law of the HKSAR.

### **Concluding remarks**

3.13 The acts of treason and unlawful drilling covered in this Chapter generally involve the use or threat of serious violence targeting national sovereignty, unity or territorial integrity, or involve related preparatory acts. Such acts are capable of posing a very serious threat to national security and must be prohibited. If the above offences are to be introduced, we will give due consideration to the importance of protecting individual rights and

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<sup>18</sup> Section 83.3 of the Criminal Code of Australia.

freedoms, and to clearly define the elements of the offences to ensure that they precisely target acts endangering national security (including the provision of exceptions for certain offences, such as the offence of “misprision of treason” and the offence of “unlawful drilling”).

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

This Chapter examines the offence of “incitement to mutiny”, the offence of “incitement to disaffection” and the offences relating to “seditious intention” under the existing Crimes Ordinance, the relevant laws in foreign countries, and the recommended directions for improving these relevant offences, mainly including:

- To improve the above-mentioned offences and incorporate them into the proposed Ordinance, with a view to further consolidating the laws on safeguarding national security;
- To amend the scope of the targeted person under the offence of “incitement to disaffection” and to improve the definition of “seditious intention” in the light of the current situation in the HKSAR;
- To introduce a new offence of “insurrection” to deal with acts of serious civil disturbance within China.

### **Existing laws on insurrection, incitement to mutiny and disaffection, and acts with seditious intention**

4.1 Under Article 23 of the Basic Law, “sedition” (“煽動叛亂”) is one of the acts required to be prohibited by the enactment of laws. Articles 21 and 23 of the HKNSL respectively prohibit a person from inciting, assisting in, abetting or providing pecuniary or other financial assistance or property for the commission by other persons of the offences under Article 20 (i.e. secession) and Article 22 (i.e. subversion), while Article 27 prohibits the advocacy of terrorism and incitement of the commission of a terrorist activity. Besides, Part II of the existing Crimes Ordinance, titled “Other Offences Against the Crown”, also covers some of the offences relating to an act of “sedition” under Article 23 of the Basic Law which include, among others:

#### **(a) the offence of “incitement to mutiny”<sup>19</sup>**

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<sup>19</sup> The offence of “incitement to mutiny” under section 6 of the Crimes Ordinance (which carries a maximum penalty of life imprisonment) refers to knowingly attempting to seduce any member of the Chinese People’s Liberation Army from his duty and allegiance to the People’s Republic of China, or knowingly attempting to incite any member of the Chinese People’s Liberation Army to commit an act of mutiny or any traitorous or mutinous act, or to make or endeavour to make a mutinous assembly.

- (b) **the offence of “incitement to disaffection”<sup>20</sup>**
- (c) **offences<sup>21</sup> relating to “seditious intention”<sup>22</sup>**

4.2 There is no offence known as “insurrection” (“叛亂”) under existing laws. The large-scale violence that occurred during the “black-clad violence” in 2019 did endanger the public safety of the HKSAR as a whole and posed threats to national security, but dealing with them by the offence of “riot”<sup>23</sup>

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<sup>20</sup> The offence of “incitement to disaffection” under section 7(1) of the Crimes Ordinance (which carries a maximum penalty of two years’ imprisonment) refers to any person who knowingly attempts to seduce any member of the Government Flying Service, any police officer or any member of the Auxiliary Police Force from his duty or allegiance to Her Majesty. The provisions concerned include references to “Her Majesty” etc. which are not consistent with the current constitutional status of the HKSAR. Such references should be adapted and amended as necessary in accordance with the principles set out in the Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and in section 2A of and Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1). Pending the completion of the adaptations and amendments, the existing provisions shall be construed in accordance with the relevant principles under the aforesaid decision and the Interpretation and General Clauses Ordinance.

<sup>21</sup> Section 10 of the Crimes Ordinance provides for offences relating to “seditious intention”, including:

- (a) doing or attempting to do, or making any preparation to do, or conspiring with any person to do, any act with a seditious intention;
- (b) uttering words having a seditious intention;
- (c) printing, publishing, selling, offering for sale, distributing, displaying or reproducing any publication having a seditious intention (“seditious publication”);
- (d) importing any seditious publication; and
- (e) without lawful excuse having possession of any seditious publication.

The offences referred to in paragraphs (a) to (d) carry a maximum penalty of imprisonment for two years (on first conviction) or three years (on subsequent conviction); and the offence referred to in paragraph (e) carries a maximum penalty of imprisonment for one year (on first conviction) or two years (on subsequent conviction).

<sup>22</sup> “Seditious intention” under section 9(1) of the Crimes Ordinance means an intention:

- (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty’s dominions or of any territory under Her Majesty’s protection as by law established;
- (b) to excite Her Majesty’s subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established;
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong;
- (d) to raise discontent or disaffection amongst Her Majesty’s subjects or inhabitants of Hong Kong;
- (e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong;
- (f) to incite persons to violence; or
- (g) to counsel disobedience to law or to any lawful order.

Besides, section 9(2) of the Crimes Ordinance also stipulates that an act, speech or publication is not seditious by reason only that it intends:

- (a) to show that Her Majesty has been misled or mistaken in any of Her measures;
- (b) to point out errors or defects in the government or constitution of Hong Kong as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects;
- (c) to persuade Her Majesty’s subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established; or
- (d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Hong Kong.

<sup>23</sup> Section 19 of the Public Order Ordinance – Riot

under the Public Order Ordinance (Cap. 245) fails to adequately reflect, both in terms of criminality or the level of penalty, the nature of such violence in endangering national security.

### **Improving the existing laws**

4.3 We recommend incorporating the offences relating to “incitement to mutiny”, “incitement to disaffection” and “seditious intention” under existing Part II of the Crimes Ordinance into the proposed Ordinance, and improving the offences.

#### ***(A) Offence of “incitement to mutiny”***

4.4 As the existing Crimes Ordinance has already stipulated the offence of “incitement to mutiny” which targets acts of inciting members of the Chinese People’s Liberation Army, we recommend that the relevant provisions should be improved by covering members of the armed forces of the People’s Republic of China<sup>24</sup>, and to clearly define “mutiny”, targeting the following acts:

##### ***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.***

#### ***(B) Offence of “incitement to disaffection”***

4.5 The existing Crimes Ordinance has already stipulated the offence of “incitement to disaffection” which targets acts of inciting police officers,

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- (1) When any person taking part in an assembly which is an unlawful assembly by virtue of section 18(1) commits a breach of the peace, the assembly is a riot and the persons assembled are riotously assembled.
  - (2) Any person who takes part in a riot shall be guilty of the offence of riot and shall be liable—
    - (a) on conviction on indictment, to imprisonment for 10 years; and
    - (b) on summary conviction, to a fine at level 2 and to imprisonment for 5 years.

<sup>24</sup> According to Article 93 of the Constitution, “the Central Military Commission of the People’s Republic of China shall lead the country’s armed forces.” According to Article 22 of the Law of the People’s Republic of China on National Defence, “the armed forces of the People’s Republic of China are composed of the Chinese People’s Liberation Army, the Chinese People’s Armed Police Force, and the Militia.”

members of the Government Flying Service and members of the Auxiliary Police Force from their duties or allegiance. However, it does not cover public officers who are responsible for the formulation and implementation of policies, the maintenance of public order, the management of public finance, the upholding of due administration of justice, and those public officers with statutory powers of investigation against government departments, etc., as well as members of the offices of the CPG in the HKSAR<sup>25</sup>, except for the Hong Kong Garrison. There is a close relationship between these personnel and the performance of duties and functions in accordance with the law by the body of power of the HKSAR. If they are incited to disaffection, this will likely lead to circumstances endangering national security. We recommend, on the basis of the existing offence of “incitement to disaffection”, targeting the following acts:

*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.*

4.6 In addition, the offence of “incitement to disaffection” under the existing Crimes Ordinance includes an offence of **assisting such persons to desert or absent himself or herself without leave**. Given the special nature of members of the armed forces of the People’s Republic of China (in particular, they are responsible for defence work and have the easiest access to firearms and military intelligence), the relevant personnel would pose the greatest national security risks by their abandonment of duties or absence without leave. We recommend that a specific offence should be introduced, targeting the following acts:

*(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*

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<sup>25</sup> Including the Liaison Office of the Central People’s Government in the HKSAR, the Office for Safeguarding National Security of the Central People’s Government in the HKSAR, and the Office of the Commissioner of the Ministry of Foreign Affairs of the People’s Republic of China in the HKSAR.



*(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.*

4.7 The existing provisions of the offence of “incitement to disaffection” also cover an offence of possession of a document of an inciting nature with intent to commit the aforementioned offence. We recommend improving the offence concerned, targeting the following acts:

*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”.*

**(C) Offences relating to “seditious intention”**

4.8 To improve the definition of “seditious intention” and the offences relating to it, the main recommendations include the following:

- (a) According to the Constitution, the socialist system led by the Communist Party of China is the fundamental system of the People’s Republic of China. The Constitution has also provided for the state institutions. The Constitution expressly prohibits any organisation or individual from damaging the socialist system. Article 22 of the HKNSL also prohibits subversion of the State power, which includes acts of organising, planning, committing or participating in acts by force or threat of force or other unlawful means to overthrow or undermine the basic system of the People’s Republic of China established by the Constitution, as well as to overthrow the body of central power of the People’s Republic of China, with a view to subverting the State power. Article 23 on the other hand prohibits acts of inciting or abetting subversion of the State power, among other things. In the light of past experiences, we also recommend that the

incitement of hatred against the fundamental system of the State, such state organs as provided for in the Constitution, the offices of the CPG in the HKSAR<sup>26</sup>, and the constitutional order of the HKSAR, be incorporated into the offences relating to “seditious intention”. “Seditious intention” can cover the following intentions:

- (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.***

At the same time, making reference to section 9(2) of the Crimes Ordinance, stipulating that ***an act, word or publication does not***

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<sup>26</sup> Namely the Liaison Office of the Central People’s Government in the HKSAR, the Office for Safeguarding National Security of the Central People’s Government in the HKSAR, the Office of the Commissioner of the Ministry of Foreign Affairs of the People’s Republic of China in the HKSAR, and the Hong Kong Garrison of the Chinese People’s Liberation Army.

*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.*
- (b) Having taken into account the seriousness of offences endangering national security, as well as the harm and damage done to the HKSAR caused by the relevant acts in the past few years, we recommend raising the penalties for the offence of “seditious intention” and the related offence of “possession of seditious publication” (the existing penalty for the former is imprisonment for two years on the first conviction or three years on a subsequent conviction, and that for the latter is imprisonment for one year on the first conviction or two years on a subsequent conviction).
- (c) Past experience demonstrates that any acts of inciting hatred against the Central Authorities or the HKSAR Government do not necessarily at the same time incite others to use violence or incite others to disrupt public order. Nevertheless, the cumulative effect of leaving such acts of incitement unchecked is that any large-scale riots once commenced will spiral out of control. We must clarify and improve the elements of the relevant offences based on past practical experience.

## **Recommending introducing new offence : offence of “insurrection”**

4.9 On the whole, concepts such as “instigating any foreign country to invade the People’s Republic of China or any of its territory with force” and “an enemy at war with the People’s Republic of China” in the context of the proposed offence of “treason” only relate to acts of treason that involve armed conflicts between the State and “foreign enemies”. There are doubts as to whether, constitutionally or legally, it is appropriate to apply these concepts to deal with a serious civil disturbance or even an armed conflict within China<sup>27</sup>. Besides, the abovementioned acts are more serious, in terms of nature and degree, than general acts of “riots”. Therefore, we recommend introducing an offence of “insurrection”, targeting the following acts:

- (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<sup>28</sup>;*
- (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.*

4.10 In fact, many countries have enacted laws that deal with similar issues in varying details. For instance:

- (a) in the US, the offence of “rebellion or insurrection” was introduced to target acts of civil disturbance. According to section 2383 (rebellion or insurrection) in Chapter 115, Title 18 of the United States Code,

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<sup>27</sup> Including the mainland of China, the HKSAR, the Macao Special Administrative Region and the Taiwan region.

<sup>28</sup> According to Article 93 of the Constitution, “[t]he Central Military Commission of the People’s Republic of China shall lead the country’s armed forces.” According to Article 22 of the Law of the People’s Republic of China on National Defence, “the armed forces of the People’s Republic of China are composed of the Chinese People’s Liberation Army, the Chinese People’s Armed Police Force and the Militia.”

whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the US or the laws thereof, or gives aid or comfort thereto, is liable to be imprisoned for not more than ten years; and shall be incapable of holding any office under the US;

- (b) similar offences in Australia (section 80.1AC (Treachery) of the Criminal Code), Canada (section 46(2)(a) (Treason) of the Criminal Code) and Singapore (section 121B (Offences against authority) of the Penal Code 1871) carry a maximum penalty of life imprisonment.

### **Concluding remarks**

4.11 What had happened in the past few years proved that acts of sedition, particularly those acts, speeches, words or publications which incited hatred against the body of power and inciting the public to disobey the law, could seriously endanger national security. Although such speeches and acts with a seditious intention would not always directly incite the use of violence or incite others to disrupt public order, they unceasingly influenced the public and provoked their hatred towards the Central Authorities and the body of power of the HKSAR, resulting in the weakening of the public's concept of the rule of law and their law-abiding awareness, and ultimately causing large-scale riots which led to a long period of unrest and instability in society. Effective laws in safeguarding national security must be those that are able to nip the problems in the bud. In order to effectively prevent and suppress acts and activities that endanger national security, it is necessary for us to retain and improve as appropriate the existing offences relating to "seditious intention".

4.12 It is worth noting that the current section 9(2) of the Crimes Ordinance (see footnote 22) lists out circumstances that do not constitute seditious intention. We recommend that the provision be retained in the proposed Ordinance after suitable amendments (see paragraph 4.8 above). Therefore, the current and improved offences relating to "seditious intention" will not affect legitimate expression of opinions (such as making reasonable and genuine criticism of government policies based on objective facts, or pointing out issues, offering views for improvement, etc.). An appropriate balance between safeguarding national security and protecting individual rights and freedoms has been struck under the current and improved offences

relating to “seditious intention”, which complies with the standards stipulated under the ICCPR and ICESCR.

## **Chapter 5: Theft of state secrets and espionage**

This Chapter examines the provisions of the existing Official Secrets Ordinance on the offences relating to “protection of state secrets” and “espionage”, the relevant laws in foreign countries, and we recommend directions for improving the relevant offences, including mainly:

(a) Regarding the “protection of state secrets”, recommendations include:

- to define “state secrets”;
- to introduce offences pertaining to the protection of state secrets (including “unlawful acquisition of state secrets”, “unlawful possession of state secrets” and “unlawful disclosure of state secrets”);
- to consolidate the offences relating to “state secrets” involving public officers and government contractors under the existing Official Secrets Ordinance, and to improve the scope of coverage by defining “public officer”;
- to prohibit public officers from doing the following acts with intent to endanger national security:
  - unlawful disclosure of information etc. which appears to be confidential; and
  - unlawful possession of state secrets when leaving the HKSAR.

(b) Theft or unlawful disclosure of state secrets is usually closely related to acts of espionage. In respect of “espionage”, we recommend improving the existing provisions on “spying” under the Official Secrets Ordinance and introduce a new offence:

- to update the provisions on the offence of “spying” and the interpretation of the related terms (“prohibited place” and “enemy”);
- in addition to the acts of espionage currently covered, to further prohibit collusion with external forces to carry out specified acts endangering national security for a purpose prejudicial to national security, so that the offence can cover acts of espionage that are now commonplace; and
- to cover modern-day modes of espionage activities by way of participating in, supporting or receiving advantages from external intelligence organisations.

### **Existing laws relating to protection of state secrets and counter-espionage**

5.1 The offence of “collusion with a foreign country or with external elements to endanger national security” as provided under **Article 29 of the HKNSL** covers, among other things, the prohibition of stealing, spying, obtaining

with payment, or unlawfully providing state secrets or intelligence concerning national security for a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People’s Republic of China.

5.2 The offences under the **Official Secrets Ordinance** are divided into two broad categories, namely offences relating to “espionage” and those relating to “unlawful disclosure of protected information”<sup>29</sup>:

(1) **Offences relating to “espionage”** and related definitions<sup>30</sup> are mainly set out in Part II of the Official Secrets Ordinance, including:

(a) **the offence of “spying”**<sup>31</sup>

(b) **the offence of “harbouring spies”**<sup>32</sup>

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<sup>29</sup> The provisions concerned include references to “United Kingdom” etc. which are not consistent with the current constitutional status of the HKSAR. Such references should be adapted and amended as necessary in accordance with the principles set out in the Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and section 2A of and Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1). Pending the completion of the adaptations and amendments, the existing provisions shall be construed in accordance with the relevant principles under the aforesaid Decision and the Interpretation and General Clauses Ordinance.

<sup>30</sup> The definition of “prohibited place” under section 2(1) of the Official Secrets Ordinance mainly includes any work of defence, arsenal, naval or air force establishment; station, factory, dockyard, mine, minefield, camp, vessel or aircraft belonging to or occupied by or on behalf of Her Majesty; any telegraph, telephone, wireless or signal station or office so belonging or occupied; and any place belonging to or occupied by or on behalf of Her Majesty and used for the purpose of building, repairing, making or storing any munitions, vessel, aircraft, arms or materials or instruments for use in time of war, etc. The term “enemy” is not defined under the Official Secrets Ordinance.

<sup>31</sup> The offence of “spying” (which carries a maximum penalty of 14 years’ imprisonment) under section 3 of the Official Secrets Ordinance covers, among other things, the prohibition of, for a purpose prejudicial to the safety or interests of the UK or Hong Kong, approaching, inspecting, passing over or entering, or being in the neighbourhood of, a prohibited place; making a sketch, plan, model or note that is useful to an enemy; as well as obtaining, collecting, recording or publishing any secret official code word or password, or any sketch, plan, model or note etc., that is useful to an enemy. Section 4 of the Official Secrets Ordinance also stipulates the offence of “harbouring spies”. Apart from these two offences, other offences relating to espionage under the Official Secrets Ordinance include: committing acts such as making of any false statement, forging of official documents or unauthorised use of uniforms for the purpose of gaining admission or assisting to gain admission to a prohibited place, or for any other purpose prejudicial to the safety or interests of the UK or Hong Kong (section 5); and acts such as unauthorised use of official documents (section 6).

<sup>32</sup> Section 4 of the Official Secrets Ordinance covers, among other things, the prohibition of knowingly harbouring a person who has committed or is about to commit the offence of “spying” (the maximum penalty for conviction on indictment is imprisonment for two years, and for summary conviction a fine at level four and imprisonment for three months).



- (c) **the offence of “unlawful disclosure of information resulting from spying”<sup>33</sup>**
- (2) **Offences relating to “unlawful disclosure of protected information”** are set out in Part III of the Official Secrets Ordinance, which primarily concerns the prohibition of unlawful disclosure of information relating to security or intelligence, defence information and information related to international relations etc. under various circumstances, including, among others:
- (a) **unlawful disclosure of “security and intelligence information”<sup>34</sup>**
- (b) **unlawful disclosure of “defence information” and “information related to international relations”<sup>35</sup>**
- (c) **unlawful disclosure of “information related to commission of offences and criminal investigations”<sup>36</sup>**

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<sup>33</sup> Section 19 of the Official Secrets Ordinance stipulates that a person commits an offence if, without lawful authority, he discloses any information, document or other article that he knows, or has reasonable cause to believe, to have come into his possession as a result of a contravention of the offence of “spying” (the maximum penalty for conviction on indictment is a fine of \$500,000 and imprisonment for two years, and for summary conviction a fine at level five and imprisonment for six months).

<sup>34</sup> Section 13 of the Official Secrets Ordinance prohibits any member of the security and intelligence services, or any person notified that he is subject to that provision, from disclosing, without lawful authority, any information, document, etc. relating to security or intelligence that is or has been in his possession by virtue of his position as such. Section 14 of the Official Secrets Ordinance prohibits any public servant or government contractor from making, without lawful authority, a damaging disclosure of any information, document, etc. relating to security or intelligence that is or has been in his possession by virtue of his position as such.

<sup>35</sup> Sections 15 and 16 of the Official Secrets Ordinance respectively prohibit any public servant or government contractor from making, without lawful authority, a damaging disclosure of any information, document, etc. relating to defence or international relations that is or has been in his possession by virtue of his position as such.

<sup>36</sup> Section 17 of the Official Secrets Ordinance prohibits any public servant or government contractor from disclosing, without lawful authority, any information, document, etc. that is or has been in his possession by virtue of his position as such, and such disclosure will actually or would be likely to result in the commission of an offence, facilitate an escape from legal custody, impede the prevention or detection of offences, or impede the apprehension or prosecution of suspected offenders.

- (d) **unlawful disclosure of “information resulting from unauthorized disclosures or information entrusted in confidence”<sup>37</sup>**
- (e) **unlawful disclosure of “information entrusted in confidence to territories, states or international organizations”<sup>38</sup>**

### **Improving the existing laws**

#### **(A) Offences relating to “protection of state secrets”**

##### ***(A)(I) Definition of “state secrets”***

- 5.3 The HKSAR has the duty to protect state secrets from theft or unlawful disclosure. However, the term “state secrets” is not used in the existing Official Secrets Ordinance, and only a few specified types of confidential information are protected by the Official Secrets Ordinance, e.g. “defence information” and “information related to international relations” etc., which is not broad enough to cover information which amounts to state secrets. Hence, it is necessary to improve the relevant provisions to effectively protect state secrets.
- 5.4 In fact, it is impossible that only defence information, information related to international relations, or information concerning other traditional security fields amount to state secrets. In the light of the common practice of various countries, sensitive information concerning other important fields of national security, or even information not concerning any specific fields, may also be regarded as “state secrets” as long as improper disclosure of

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<sup>37</sup> Section 18 of the Official Secrets Ordinance provides that any person who comes into possession of any information, document, etc. protected by sections 13 to 17 of the Ordinance as a result of it having been unlawfully disclosed or entrusted in confidence to him by a public servant or government contractor commits an offence if he knows or has reasonable cause to believe that such information is protected against disclosure by any of sections 13 to 17 of the Ordinance, and where the disclosure in the case of information protected by sections 13 to 16 where the disclosure is damaging, but still discloses such information without lawful authority.

<sup>38</sup> Section 20 of the Official Secrets Ordinance prohibits a person from making, without lawful authority, a damaging disclosure of information, document, etc. relating to security or intelligence, defence or international relations, which has been communicated in confidence by the Government of the UK or Hong Kong to a territory or state or an international organisation, and has come into a person’s possession as a result of it having been disclosed without the authority of that territory, State or organisation.

such information is likely to prejudice national security or interests. For example:

- (a) In the offence of “obtaining or disclosing protected information” under section 1 of the National Security Act 2023 of the UK, “protected information” is defined as “any information, document or other article where, for the purpose of protecting the safety or interests of the United Kingdom, access to the information, document or other article is restricted in any way, or it is reasonable to expect that access to the information, document or other article would be restricted in any way”. The Government Security Classifications Policy of the UK Government also classifies information as “secrets” where the leakage of them is likely to cause serious damage to the safety and prosperity of the UK due to the impact on the commercial, economic and financial interests of the UK;
- (b) The offence of “communicating safeguarded information” under section 16 of the Security of Information Act of Canada prohibits the communication to a foreign entity or to a terrorist group of information that the Government is taking measures to safeguard, where the person intends to (or is reckless as to whether such act of communication will) increase the capacity of a foreign entity or a terrorist group to harm Canadian interests. Section 19 of the Act also prohibits “economic espionage”, under which any person who, at the direction or for the benefit of a foreign economic entity, fraudulently communicates a trade secret to another person or organisation to the detriment of Canada’s economic interests, commits an offence;
- (c) The Executive Order 13526 on Classified National Security Information issued by the President of the US also provides that scientific, technological or economic matters relating to national security may be classified at the confidential level if the unauthorised disclosure of such matters may cause damage to national security.

5.5 The term “state secrets” (“國家秘密”) is repeatedly mentioned in the provisions of the HKNSL<sup>39</sup>. Article 23 of the Basic Law adopts the expression “state secrets” (the English term being the same but using the

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<sup>39</sup> Articles 29, 41, 46, 47 and 63 of the HKNSL all contain references to “state secrets” (“國家秘密”).

Chinese term “國家機密”): the theft of state secrets is one of the acts that the HKSAR shall enact laws to prohibit as required by Article 23 of the Basic Law. According to Article 10 of the Law of the People’s Republic of China on Guarding State Secrets, state secrets shall fall into three classifications: “top secret” (“絕密”), “secret” (“機密”) and “confidential” (“秘密”). Among them, “top secret” information refers to vital State secrets, the divulgence of which would cause extremely serious harm to State security and national interests; “secret” information refers to important State secrets, the divulgence of which would cause serious harm to State security and national interests; and “confidential” information refers to ordinary State secrets, the divulgence of which would cause harm to State security and national interests. In other words, even the divulgence of state secrets at the lowest classification of “confidential” will endanger national security.

- 5.6 Taking into account the above background, the HKSAR must enact laws on its own to prohibit the theft of “state secrets” of all levels of classification. In view of this, the expression of “state secrets” (“國家秘密”) (except for references directly quoting Article 23 of the Basic Law) will be adopted consistently in this Chapter.
- 5.7 The HKSAR Government is of the view that it is necessary to clearly define “state secrets” so that public officers, government contractors and the general public can understand what secret matters constitute “state secrets”. Protecting state secrets is particularly important to protecting national security and core interests, and is a matter within the purview of the Central Authorities. All types of state secrets should be protected in every place within one country. Otherwise, it will create a legal vacuum in which the HKSAR cannot protect state secrets in certain fields, posing risk to national security. For example, the Law of the People’s Republic of China on Guarding State Secrets also defines state secrets to cover secret matters concerning fields such as economic and social development technological development or scientific technology, the disclosure of which is likely to jeopardize State security and national interests in fields such as politics, the economy, national defence and foreign affairs (e.g. secret matters concerning the development in aerospace technology, deep-sea exploration, etc. of our country). However, the existing Official Secrets Ordinance does not protect these types of state secrets.

5.8 Therefore, in defining what “state secrets” are, reference should be made to the scope of “state secrets” under relevant national laws. Taking into account the relevant national laws and the actual circumstances of the HKSAR, we recommend that “state secrets” cover the following matters :

*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.*

5.9 It should be emphasised that the purpose of protecting state secrets is to safeguard national security. 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.**

*(A)(II) Improving the definition of “public servants”*

5.10 Certain offences and certain heavier penalties under the Official Secrets Ordinance and those described in paragraph 5.12 below only apply to persons who are or were public servants or government contractors. The definition of “public servant” under the existing Official Secrets Ordinance,

which includes “any person who holds an office of emolument under the Crown in right of the Government of Hong Kong, whether such office is permanent or temporary” and “any person employed in the civil service of the Crown in right of the United Kingdom, including Her Majesty’s Diplomatic Service and Her Majesty’s Overseas Civil Service”, needs to be amended as appropriate to suit present situation. We recommend replacing the term “public servant” with “public officer” in the proposed Ordinance, and suitably adjusting the scope of the definition to cover officers who are more likely to obtain or possess state secrets. We recommend that “public officers” cover the following personnel –

- (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.*

***(A)(III) Offences relating to “unlawful disclosure”***

5.11 Apart from the above recommendations for improvements, there are still other shortcomings in the existing Official Secrets Ordinance with regard to the protection of state secrets:

- (a) Offences under the existing Official Secrets Ordinance focus on the prohibition of “unlawful disclosure” of protected information, and do not directly target the act of theft of state secrets itself (such as spying of state secrets or obtaining state secrets with payment). The offence of “collusion with a foreign country or with external elements to

endanger national security” as provided under Article 29 of the HKNSL covers only acts of stealing, spying, obtaining with payment, or unlawfully providing state secrets concerning national security for a foreign country or external forces. The act of theft of state secrets itself, irrespective of whether foreign countries or external forces are involved, has yet to be criminalised.

- (b) Offences relating to “unlawful disclosure of protected information” in Part III of the Official Secrets Ordinance (sections 13 to 20) target specific types of information (e.g. “defence information”, “information related to international relations”, etc.), which cannot fully cover all information that constitutes state secrets, such as those state secrets concerning other fields such as major policy decisions and the economy of our country and the HKSAR.
- (c) Apart from those who have committed theft or unlawful disclosure of state secrets, it is also necessary to deal with the other criminal elements involved, e.g. intermediaries who are responsible for passing state secrets from the people who steal them to the people who disclose them and are thus in possession of state secrets. In fact, given the complex and covert nature of espionage activities and acts of theft of state secrets, it may not be possible to identify who have obtained state secrets without authorisation or unlawfully disclosed state secrets in every case. In addition, effective measures must be taken to prevent the unlawful disclosure of state secrets before such disclosure occurs.
- (d) The existing Official Secrets Ordinance does not prohibit public servants or government contractors from publishing or disclosing confidential information alleged to have been obtained by virtue of their position, with a view to endangering national security (e.g. publishing so-called “inside information” to mislead the public and induce the hatred of HKSAR residents against the HKSAR Government). As such, there is a need to stipulate specific provisions for the prohibition of the above acts.

5.12 In view of the above shortcomings, we recommend consolidating and improving the offence of “unlawful disclosure” and related offences for more comprehensive protection of state secrets:

- (1) **Unlawful acquisition of state secrets:** we recommend prohibiting any person from acquiring information, document or other article that is or contains state secrets unlawfully in order to ensure that acts of “theft” of state secrets in any form (irrespective of whether foreign countries or external forces are involved or not) are effectively prohibited. The offence can target the following acts:
- (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.*
- (2) **Unlawful possession of state secrets:** we recommend prohibiting any person from possessing information, document or other article that is or contains state secrets unlawfully. The introduction of this new offence can help prevent the risk of eventual unlawful disclosure of stolen state secrets. The offence can target the following acts:
- (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.*
- (3) **Unlawful disclosure of state secrets:** We recommend prohibiting any person from disclosing, without lawful authority, information, document or other article that is or contains state secrets, so as to fully protect state secrets from unlawful disclosure. We are of the view that the offence should cover acts of unlawful disclosure of state secrets by any person (and not limited to public officers or government contractors). In addition, since public officers or government contractors have easier access to state secrets and they should have



clear understanding of the sensitivity of such information, it should be an aggravating factor that warrants a more severe penalty if they disclose state secrets unlawfully. In this connection, if “a person who is or was a public officer or government contractor” makes a disclosure of state secrets (in particular “defence information” and “information related to international relations” as specified in the existing Official Secrets Ordinance) that are or were in his or her possession by virtue of his or her position as such, the maximum penalty should be higher than that for ordinary people. In general, however, the person can only be convicted if the prosecution can prove that the person knows the disclosed information, document or other article is or contains state secrets, or that the person has reasonable ground to believe the disclosed information, document or other article is or contains state secrets and has the intent to endanger national security. The offence can target the following acts:

*(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.*

- (4) **Unlawful disclosure of information that appears to be confidential matter:** Disclosure by any public officer or government contractor of confidential information (if such information were true) in his or her possession by virtue of his or her position as such may endanger national security. We recommend that the information covered by this offence should not be limited to state secrets but should cover any confidential information the disclosure, without lawful authority, of which would prejudice the interests of the Central Authorities or the HKSAR Government. The offence can target the following acts:

*(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.*

A similar offence can be found in foreign legislation<sup>40</sup>, to which reference can be made in determining penalties.

- (5) Unlawful possession of state secrets when leaving the HKSAR:** Public officers who have access to relatively large amount of extremely sensitive state secrets when performing their daily duties may pose serious national security risks should they defect and abscond. We recommend clearly stipulating an offence targeting the following acts:

*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.*

***(B) Offences relating to acts of “espionage”***

5.13 Theft or unlawful disclosure of state secrets is usually closely related to acts of espionage. In fact, espionage activities are also prohibited under the existing Official Secrets Ordinance, by providing for the offence of “spying”. On the other hand, present-day espionage activities are not

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<sup>40</sup> Section 13(1) (purported communication) of the Security of Information Act of Canada: the maximum penalty of this offence is imprisonment for 5 years.

limited to acts of stealing secrets and “tipping off” enemies. Intelligence organisations of certain countries are accustomed to organising acts of subversion, infiltration and sabotage in other countries<sup>41</sup>. It was a typical act of modern-day espionage that external forces instigated their agents in Hong Kong to disseminate false or misleading information during the Hong Kong version of the “colour revolution” in order to incite hatred against the Government.

5.14 In recent years, many countries have improved their laws on offences relating to acts of “espionage” to deal with the current complex international landscape and modern-day acts of espionage, for example :

- (a) Australia passed the National Security Legislation Amendment (Espionage and Foreign Interference) Act and the Foreign Influence Transparency Scheme Act in 2018. The former significantly increases the penalties for engaging in espionage and divulging state secrets. Even higher penalties will be applicable if a person colludes with foreign forces to commit some of the relevant offences. The Act also introduces the offence of supporting foreign intelligence agency and the offence of funding or being funded by foreign intelligence agency.
- (b) The National Security Act 2023 recently passed in the UK includes an array of new offences with very wide coverage, including reform of laws relating to “espionage” and an offence relating to obtaining or disclosing “protected information”, introduction of a new offence aimed at the protection of trade secrets as well as new offences targeted at acts of assisting a foreign intelligence service and obtaining material benefits from a foreign intelligence service. In addition, the Act applies the “foreign power condition” to all criminal offences, so that if the criminal act involves a foreign power, the court must treat that fact as an aggravating factor that warrants a more severe penalty in sentencing.

5.15 In enacting local legislation to safeguard national security, we may make reference to the laws related to espionage in other countries, and improve

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<sup>41</sup> A former US National Security Advisor clearly mentioned in an interview that he had assisted in the planning of coups d'état in foreign countries. This is another example of wanton interference and subversion by the country concerned in other countries.

the relevant laws to address the modern-day espionage risks. Reference can also be made to the Counterespionage Law of the People’s Republic of China (“the Counterespionage Law”) which was revised and adopted by the NPCSC on 26 April 2023 and came into effect on 1 July 2023. Article 4 of the Counterespionage Law defines what constitutes “espionage”, which includes participating in an espionage organisation or accepting assignments from an espionage organisation or its agents, in addition to typical espionage acts such as stealing, spying, obtaining with payment, or unlawfully providing state secrets or intelligence.

***(B)(I) Offence of “espionage”***

5.16 Most of the provisions relating to espionage activities under the existing Official Secrets Ordinance are inherited from the legislation of the UK in the early 20<sup>th</sup> century (the Official Secrets Act 1911 and the Official Secrets Act 1920), which have become out of line with prevailing standards of technology, the complex and ever-changing landscape, and the diverse modes of espionage activities. We recommend amending the offence to cover a more diversified range of espionage activities, including:

- (i) some of the terms used in the existing Official Secrets Ordinance are obsolete, such as “sketch, plan, model or note”/“secret official code word or password, any sketch, plan, model or note”. We recommend replacing such terms with “information, document or other article” to cover more advanced modes of data storage (e.g. fingerprints, videos, etc.), with a view to dealing with modern-day espionage risks; and
- (ii) other than the acts of espionage<sup>42</sup> prohibited under the existing Official Secrets Ordinance, we recommend introducing a new type of offence regarding collusion with “external forces” to publish false or misleading statements of fact to the public with intent to endanger national security (or being reckless as to whether national security would be endangered), in order to deal with the interference in HKSAR’s affairs by external forces through such acts.

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<sup>42</sup> See footnote 31, i.e. (1) approaching, inspecting, passing over, entering, or being in the neighbourhood of a prohibited place; (2) making a sketch, plan, model, or note that is useful to an enemy; and (3) obtaining, collecting, recording, or publishing a secret official code word or password, or a sketch, plan, model or note etc. that is useful to an enemy.

***(B)(II) Improving concepts relating to the offence of “espionage”***

(i) “Prohibited place”

5.17 The offence of “espionage” involves the acts of approaching, inspecting, passing over or entering a “prohibited place” with intent to endanger national security. The definition of a “prohibited place” under the existing Official Secrets Ordinance places greater emphasis on the protection of military or national defence facilities, and may not adequately cover other critical facilities and premises which are prone to become targets of infiltration, sabotage or theft of state secrets by spies. We recommend to improving the definition of “prohibited place” within the offence of “espionage” to provide appropriate safeguards in the light of the modern-day espionage activities.

(ii) Replacing the concept of “enemy” with “external forces”

5.18 The provisions<sup>43</sup> of the offence of “spying” under the existing Official Secrets Ordinance contain references to “enemy”.

5.19 We recommend replacing the term “enemy” with “external forces” as the expression of “enemy”<sup>44</sup> is too restrictive. “External forces” may cover any government of a foreign country, authority of a region or place of an external territory, external political organisation, etc. (including a government, authority or political organisation of a country etc. with which it is not in a state of war), as well as its associated entities and individuals. Making reference to relevant legislation of Australia and Singapore<sup>45</sup>, if the above government, authority or organisation is able to exercise a substantial degree of control over an entity or an individual, then that entity or individual may be considered an “associated entity” or “associated individual” (including an entity or individual that is accustomed or under an

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<sup>43</sup> See section 3 of the Official Secrets Ordinance (as mentioned in footnote 31).

<sup>44</sup> The concept of “enemy” is too restricted under the current context of globalisation and amid the dynamics of multilateral interaction in international relations. Notwithstanding that a country is not in a state of war with another country, it is possible that their interests may not coincide on a particular issue or there may even be unfriendly acts. However, calling that other country “enemy” may cause offence to that country at the diplomatic level. The concept of “enemy” is also no longer used in the National Security Act 2023 that was recently passed in the UK.

<sup>45</sup> With reference to the definitions of “foreign principal”, “foreign government-related individual” and “foreign public enterprise”, etc., in the Foreign Influence Transparency Scheme Act 2018 of Australia and the Foreign Interference (Countermeasures) Act 2021 of Singapore.

obligation to act in accordance with the directions, instructions or wishes of that government, authority or organisation, or an entity or individual over whom that government, authority or organisation is in a position to exercise substantial control by virtue of other factors).

5.20 We recommend that the improved offence of “espionage” targets the following acts:

*(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 engender 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.*

*(B) (III) Recommending introducing a new offence relating to acts of “espionage”: the offence of “participating in or supporting external intelligence organisations or receiving advantages from external intelligence organisations, etc.”*

5.21 Any participation in or support for, or receipt of advantages from, external intelligence organisations is extremely likely to endanger national security. Many countries have already enacted legislation to prohibit such acts, such as :

(a) Sections 92.7 to 92.11 of the Criminal Code of Australia; and

(b) Sections 3 and 17 of the National Security Act 2023 of the UK.

5.22 We recommend introducing a new offence, targeting the following acts:

*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<sup>46</sup> –*

*(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 organisation (or a person acting on behalf of the organisation).*

The above proposed offences can prevent, suppress and impose punishment for acts of supporting external intelligence organisations by individuals who endanger national security, so as to better deal with espionage and related risks.

### **Concluding remarks**

5.23 In conclusion, in order to safeguard national security and ensure the smooth operation of the Government, information concerning national security must be kept confidential. Appropriate laws must be enacted to prohibit the acquisition, possession or disclosure of such kind of information without lawful authority. In formulating the recommendations, due consideration must be given to the importance of protecting the right to freedom of speech and expression. Measures should also seek to protect only those types of information which must be kept confidential to safeguard national security, and the means of protection should be clearly prescribed, so as to strike a proper balance between the protection of state secrets and the protection of the right to freedom of speech and expression.

5.24 In addition, the enactment of appropriate laws to prohibit acts of espionage is very important in preventing external forces from endangering national

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<sup>46</sup> An external intelligence organisation means an organisation established by an external force and engaging in intelligence work, or subversion or sabotage of other countries or places.

security. In considering the recommendations, we will ensure that the modern-day diversified modes of espionage activities can be adequately dealt with, while giving due regard to the importance of protecting the rights and freedoms of individuals, particularly the right to freedom of speech and expression. The elements of the relevant offences and related concepts (e.g. “prohibited place”, “external forces”, etc.) will need to be clearly defined with sufficiently precise boundaries laid down to ensure that a proper balance is struck between the safeguarding of national security and the protection of the rights and freedoms of individuals.



## **Chapter 6: Sabotage endangering national security and related activities**

This Chapter examines relevant laws in foreign countries on sabotage activities endangering national security and on acts endangering national security done in relation to computer or electronic system. We recommend introducing new offences of such kinds in the proposed Ordinance for such acts and activities.

### **Existing laws on sabotage and related activities**

6.1 At present, destroying or damaging any property belonging to another person (including misuse of a computer)<sup>47</sup>, and access to computer with criminal or dishonest intent<sup>48</sup> are already offences in the laws of the HKSAR, and are also offences in other countries. Nevertheless, many countries have enacted offences targeting sabotage activities that endanger national security (e.g. the UK, Australia and Canada) and acts and activities endangering national security carried out with the use of computers (e.g. the UK and the US), to reflect the seriousness of such acts and for greater deterrence. Therefore, there is a need to more fully prevent, suppress and impose punishment for such kinds of acts endangering national security in the laws of the HKSAR.

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<sup>47</sup> Section 59 under Part VIII (Criminal Damage to Property) of the existing Crimes Ordinance stipulates that to destroy or damage any property in relation to a computer includes the misuse of a computer. “Misuse of a computer” means —

- (a) to cause a computer to function other than as it has been established to function by or on behalf of its owner, notwithstanding that the misuse may not impair the operation of the computer or a program held in the computer or the reliability of data held in the computer;
  - (b) to alter or erase any program or data held in a computer or in a computer storage medium;
  - (c) to add any program or data to the contents of a computer or of a computer storage medium,
- and any act which contributes towards causing the misuse of a kind referred to in paragraph (a), (b) or (c) shall be regarded as causing it.

<sup>48</sup> Section 161 under Part XIII (Miscellaneous Offences) of the existing Crimes Ordinance stipulates the offence of “access to computer with criminal or dishonest intent”:

Any person who obtains access to a computer —

- (a) with intent to commit an offence;
- (b) with a dishonest intent to deceive;
- (c) with a view to dishonest gain for himself or another; or
- (d) with a dishonest intent to cause loss to another,

whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.

## Recommending introducing new offences

### *(A) Offence of “sabotage activities which endanger national security”*

- 6.2 Acts of sabotage or impairment of public infrastructure will pose a high risk to national security. Flagrant examples of such acts include the extensive vandalism of and damage to transport facilities, MTR stations and other public facilities by rioters across large areas of Hong Kong during the Hong Kong version of “colour revolution” in 2019. The purpose of such acts was to paralyse the normal operation of society through paralysing the transport, railway systems and public services, thereby forcing the HKSAR Government to give in to and compromise with the rioters and the political forces behind them to achieve the ultimate goal of jeopardising the effective governance of the HKSAR Government or even subversion. Should critical telecommunications facilities be damaged, the ability of our country and the HKSAR to respond effectively to civil disturbance or armed conflicts will be undermined. Should critical electronic systems (e.g. the Central Clearing and Settlement System) come under cyber-attacks or intrusion by hackers, even the normal operation of the HKSAR will be paralysed or severely impeded (e.g. the stability of the financial market being seriously jeopardised), or state secrets will become prone to unlawful acquisition.
- 6.3 Many foreign countries have enacted legislation to deal with the above situations. For example –
- (a) Australia has introduced the offence of sabotage through the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018, which prohibits all forms of sabotage activities or acts of introducing vulnerability against public infrastructure, with intent to (or recklessness as to whether they will) prejudice national security<sup>49</sup>; and
  - (b) The UK has also introduced a similar type of offence in the National Security Act 2023, which prohibits any person from damaging any asset (whether located in the UK or not) for a purpose that they know

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<sup>49</sup> See sections 82.3-82.9 of the Criminal Code of Australia.

or ought reasonably to know is prejudicial to the safety or interests of the UK with the involvement of a foreign power<sup>50</sup>.

6.4 In light of the above, to deal with the situations described in paragraph 6.2 above, we recommend introducing an offence of “sabotage activities which endanger national security”, targeting the following acts:

- (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).*

Under the laws of foreign countries concerned, any person who commits a similar offence of sabotage will be liable to a penalty ranging from 20 years’

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<sup>50</sup> See section 12 of the National Security Act 2023 of the UK.

imprisonment to life imprisonment<sup>51</sup>, which can be used for reference in determining the penalties.

***(B) Offence of “doing an act in relation to a computer or electronic system without lawful authority and endangering national security”***

6.5 Generally speaking, the proposed offences discussed in this document do not essentially depend on which particular method or technology is actually used by the offender to carry out the criminal act. Therefore, the proposed offences should cover most of the acts and activities endangering national security carried out through computers. On the other hand, given the common use and rapid development of computer or electronic system technologies, with the current wide application of artificial intelligence in different areas of society being an example, the potential national security risks posed should not be overlooked, especially the risks arising from computers or electronic systems being hacked into or interfered with<sup>52</sup>. In order to address the national security risks posed by new technologies that may develop in the current cyber or digital world in the future, we recommend introducing an offence to combat acts endangering national security that are done in relation to a computer or electronic system.

6.6 Foreign countries have also enacted legislation that deals with the above situation. For example, the Computer Misuse Act 1990 of the UK prohibits any person from doing an unauthorised act in relation to a computer if the person intends to (or is reckless as to whether the act will) cause serious damage to national security, and the act will actually cause serious damage to national security (or create a significant risk of serious damage to national security)<sup>53</sup>.

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<sup>51</sup> In Australia, the offence of sabotage (not involving a foreign principal) carries a maximum penalty of 20 years' imprisonment (section 82.5 of the Criminal Code of Australia), or 25 years' imprisonment if involving a foreign principal (section 82.3 of the Criminal Code of Australia). A similar offence in the UK involving a foreign power carries a maximum penalty of life imprisonment (section 12 of the National Security Act 2023 of the UK).

<sup>52</sup> On 16 November 2023, the Ministry of State Security published an article on “How to Address the National Security Challenges Posed by Artificial Intelligence”, which mentioned five major risks that artificial intelligence may pose, including the risk of data theft, the risk of cyber attack, the risk to economic security, the risk of “data poisoning”, and the risk to military security.

<sup>53</sup> The maximum penalty for this offence in the UK is life imprisonment (section 3ZA of the Computer Misuse Act 1990 of the UK).

- 6.7 We recommend introducing a new offence of doing an act in relation to a computer or electronic system without lawful authority and endangering national security, targeting the following acts:

*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.*

### **Concluding remarks**

- 6.8 The offences covered by this Chapter involve serious acts of sabotage or weakening of public infrastructure, or acts done, without lawful authority, in relation to a computer or electronic system which endanger national security. These acts pose very serious threats to national security and must be prohibited. Building on existing offences (e.g. destroying or damaging other people's property and access to computer with criminal or dishonest intent), the above proposals are to introduce new offences targeting relevant acts endangering national security, to reflect the seriousness of such acts and to increase deterrence. The actual provisions will clearly define the elements of the relevant offences to ensure that acts endangering national security are precisely targeted and the provisions will not stifle technological innovation, but rather provide a safe environment for the development of the fields concerned.

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

This chapter examines the offence of “external interference” under the national security laws of foreign countries, which generally covers the prohibition of any person from collaborating with external forces to interfere with the affairs of a foreign state through improper means. Besides, this chapter also examines how to improve the provisions of the existing Societies Ordinance that relate to safeguarding national security or prohibiting political bodies from having a connection with external political organisations, with a view to prohibiting organisations that endanger national security from operating in the HKSAR.

7.1 Article 23 of the Basic Law requires the HKSAR to enact laws to prohibit foreign political organisations or bodies from conducting political activities in the HKSAR, and to prohibit political organisations or bodies of the HKSAR from establishing ties with foreign political organisations or bodies. Although under the existing laws, Articles 29 and 30 of the HKNSL are available to deal with criminal acts relating to collusion with external elements to endanger national security and of a relatively serious nature<sup>54</sup>, and the existing Societies Ordinance has also provided for a mechanism for the prohibition of the operation of a society on the ground that it is a political body and has a connection with an external political organisation, or that it is necessary in the interests of national security (see paragraph 7.7 below),

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<sup>54</sup> Article 29 of the HKNSL: A person who steals, spies, obtains with payment or unlawfully provides State secrets or intelligence concerning national security for a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People’s Republic of China shall be guilty of an offence; a person who requests a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People’s Republic of China, or conspires with a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People’s Republic of China, or directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People’s Republic of China, to commit any of the following acts shall be guilty of an offence:

- (a) waging a war against the People’s Republic of China, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the People’s Republic of China;
- (b) seriously disrupting the formulation and implementation of laws or policies by the Government of the HKSAR or by the Central People’s Government, which is likely to cause serious consequences;
- (c) rigging or undermining an election in the HKSAR, which is likely to cause serious consequences;
- (d) imposing sanctions or blockade, or engaging in other hostile activities against the HKSAR or the People’s Republic of China; or
- (e) provoking by unlawful means hatred among Hong Kong residents towards the Central People’s Government or the Government of the Region, which is likely to cause serious consequences.

Article 30 of the HKNSL: A person who conspires with or directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, organisation, or individual outside the mainland, Hong Kong and Macao of the People’s Republic of China to commit the offences under Article 20 or 22 of this Law shall be liable to a more severe penalty in accordance with the provisions therein respectively.

it is still necessary to be more comprehensive in the prevention, suppression and imposition of punishment for other acts of external interference from the aspect of local laws of the HKSAR.

7.2 In recent years, external forces have been using the HKSAR as a bridgehead for anti-China activities, and have been assisting and instigating local organisations or individuals to cause social instability under different pretexts, and propagating anti-China ideology through a soft approach to demonise the Central People's Government and the HKSAR Government. Although the HKSAR has been able to effectively combat acts of "black-clad violence" and thwart the plot of the Hong Kong version of "colour revolution" in accordance with the law after the promulgation and implementation of the HKNSL, there are still risks posed by external forces which, through local organisations and individuals (especially some so-called "non-governmental bodies" which are actually established by external forces or have close ties with external forces), and local organisations and individuals (including "shadow organisations" formed outside the HKSAR), continue to engage in activities endangering national security against the HKSAR. These individuals or organisations collude with external forces in an attempt to continue to interfere in or influence the affairs of our country and the HKSAR. Therefore, it is still necessary to prevent, suppress and impose punishment for acts endangering national security. These acts include, in particular:

- (a) persons who endanger national security by collaborating with external forces to interfere in the affairs of our country or the HKSAR through improper means; and
- (b) local organisations (including "shadow organisations" formed outside the HKSAR) or external elements engaging in activities endangering national security through local organisations or individuals.

7.3 As a cosmopolitan city and an international financial centre, Hong Kong welcomes exchanges between local institutions, organisations and individuals and those from all parts of the world, as well as foreign institutions or organisations to set up offices and establish operations in Hong Kong. As the policies and measures of the HKSAR Government may affect the external institutions, organisations and individuals in the HKSAR, there may be a legitimate need for these institutions, organisations and individuals (including political organisations) to express their rational views on the policies and measures of the HKSAR Government, including

lobbying through local organisations or individuals, etc. Therefore, we do not recommend adopting an across-the-board approach to impose blanket prohibition on the above exchanges. However, such political activities must be conducted by lawful and proper means and must not pose any national security risks. The HKSAR Government has the responsibility to safeguard the sovereignty and political independence of our country. In this regard, the HKSAR Government must take adequate measures to effectively prevent external forces from interfering in the normal operation of the HKSAR, and to prevent external forces from unlawfully interfering in the affairs of our country or the HKSAR through agents or agent organisations, thus undermining the sovereignty and political independence of our country, which will in turn endanger national security.

- 7.4 In order to enhance the transparency of political activities conducted by foreign forces in their countries through their agents, many foreign governments have established registration systems concerning foreign influence and provided for the relevant regulatory penalties. For example, both the US and Australia have laws that establish a system which requires a local organisation or individual who establishes an “agent-foreign principal” relationship with a foreign organisation or individual and engages in political or other specified activities, to register. As for the UK, it has recently introduced a foreign influence registration scheme by virtue of its National Security Act 2023. Canada conducted a consultation on establishing a “foreign influence transparency registry” in 2023, which has received support in general. Singapore has considered introducing a registration system which was not implemented in the end. The HKSAR Government has earlier considered whether to establish a registration system to enhance the transparency of political activities or activities involving national security carried out by external organisations through organisations and individuals in the HKSAR, but after careful consideration, has decided not to introduce a registration system of a similar nature: we consider that the existing mechanism under the Societies Ordinance for the prohibition of the operation of a society on the ground that it is necessary in the interests of national security is familiar to the society, and there is also relevant experience in the operation of the mechanism (including the experience in the prohibition of operation of the Hong Kong National Party in accordance with the law in 2018). Therefore, it is more suitable for us to deal with the issue in a targeted manner by creating an offence of “external



interference” and improving the mechanisms for regulating and prohibiting the operation of organisations endangering national security.

### **Recommending introducing new offence : offence of “external interference”**

7.5 Sovereign equality and non-interference are fundamental principles of international law. External interference by improper means have exceeded the acceptable limit in normal international practice (e.g. genuine criticisms against government policies, legitimate lobbying work, general policy research, normal exchanges with overseas organisations or day-to-day commercial activities), contravened the principle of non-interference under international law, undermined national sovereignty and political independence, and posed risks to national security. In this regard, in recent years, some countries have implemented laws that targeted at external interference, from which we can draw reference, with the following examples:

- (a) Both the National Security Act 2023<sup>55</sup> of the UK and the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018<sup>56</sup> of Australia introduced new offences to prohibit any person from collaborating with a foreign power to interfere with the affairs of their respective countries through certain specified improper conducts<sup>57</sup>. In terms of penalties, the maximum penalties are imprisonment of 20 years for Australia and 14 years for the UK;
- (b) Singapore have introduced offences relating to “clandestine foreign interference by electronic communications activity” through enactment of the Foreign Interference (Countermeasures) Act 2021 (with maximum penalties of imprisonment of 7 years (for acts of

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<sup>55</sup> Sections 13 to 15 of the National Security Act 2023 of the UK.

<sup>56</sup> Relevant amendments have already been incorporated in sections 92.2 and 92.3 of the Criminal Code of Australia.

<sup>57</sup> Improper conducts under the offence of foreign interference of Australia include acts that are covert, involve deception, the making of threats to cause serious harm or the making of demands with menaces. Improper conducts under the offence of foreign interference of the UK include those that constitute an offence and those that involve coercion of any kind, (e.g. using or threatening to use violence against a person, damaging or threatening to damage a person’s property, damaging or threatening to damage a person’s reputation, causing or threatening to cause financial loss to a person or causing spiritual injury to, or placing undue spiritual pressure on a person) or it involves making a misrepresentation.

general interference) and 14 years (for acts of interference against a targeted person))<sup>58</sup>; and

- (c) Recently, Canada is conducting a public consultation on how to amend relevant laws such as the Criminal Code, the Security of Information Act, the Canada Evidence Act and the Canadian Security Intelligence Service Act to cope with the risk of external interference and to strengthen law enforcement capabilities.

7.6 As such, we recommend introducing a new offence of “external interference”, targeting the following acts:

*(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*

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<sup>58</sup> Sections 17 and 18 of the Foreign Interference (Countermeasures) Act 2021 of Singapore.

*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.*

## **Laws on prohibition of organisations from endangering national security**

7.7 The existing statutory provisions that regulate societies which are political bodies that have a connection with a foreign political organisation or a political organisation of Taiwan are mainly set out the Societies Ordinance. The main provisions are as follows –

- (a) Make an **order prohibiting the operation of a society**: In accordance with the existing Societies Ordinance, **if a society is a political body**<sup>59</sup>

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<sup>59</sup> Under the Societies Ordinance, “political body” means -

- (a) a political party or an organization that purports to be a political party; or  
(b) an organization whose principal function or main object is to promote or prepare a candidate for an election.

that has a connection<sup>60</sup> with a foreign political organisation<sup>61</sup> or a political organisation of Taiwan<sup>62</sup>, or if it is in the interests of national security or public safety, public order or the protection of the rights and freedoms of others, the Societies Officer may recommend to the Secretary for Security to make an order prohibiting the operation or continued operation of the society.

- (b) **Scope of application of the regulatory mechanism:** The regulatory mechanism under the existing Societies Ordinance is only applicable to local societies<sup>63</sup>, and is not applicable to the local organisations set out in the Schedule to the Societies Ordinance (e.g. company, co-operative society, incorporated management committee, corporation, etc.<sup>64</sup>). The Societies Ordinance also cannot effectively deal with the establishment of “shadow organisation” outside the HKSAR by local organisation which has already been prohibited from operating, and continuing to conduct activities endangering national security against the HKSAR.

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<sup>60</sup> In relation to a political body to which the Societies Ordinance applies, “connection” includes the following circumstances —

- (a) if the society solicits or accepts financial contributions, financial sponsorships or financial support of any kind or loans from a foreign political organisation or a political organisation of Taiwan;
- (b) if the society is affiliated with a foreign political organisation or a political organisation of Taiwan;
- (c) if the society’s policies or any of them are determined by a foreign political organisation or a political organisation of Taiwan; or
- (d) if a foreign political organisation or a political organisation of Taiwan directs, dictates, controls or participates in the decision making process of the society.

<sup>61</sup> Under the Societies Ordinance, “foreign political organisation” includes —

- (a) a government of a foreign country or a political subdivision of a government of a foreign country;
- (b) an agent of a government of a foreign country or an agent of a political subdivision of the government of a foreign country; or
- (c) a political party in a foreign country or its agent.

Items (a) and b) above cover the governments of foreign countries below national level or at district level and their agents.

<sup>62</sup> Under the Societies Ordinance, “political organisation of Taiwan” includes —

- (a) the administration of Taiwan or a political subdivision of the administration;
- (b) an agent of the administration of Taiwan or an agent of a political subdivision of the administration; or
- (c) a political party in Taiwan or its agent.

<sup>63</sup> Includes organisations which are established outside Hong Kong but deemed to be a society established in Hong Kong under section 4 of the Societies Ordinance.

<sup>64</sup> These local societies are of various types and regulated by different legislation, including the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) and the Education Ordinance (Cap. 279). However, generally speaking, the existing mechanism cannot fully safeguard national security. In particular, most of the legislation have not specifically provided for the mechanism on dissolution or cancellation of registration of societies endangering national security.

- (c) **Offences associated with “unlawful society”<sup>65</sup>** include –
- (i) being an office-bearer or acting as an office-bearer;
  - (ii) being a member or acting as a member;
  - (iii) allowing a meeting of an unlawful society to be held on premises;
  - (iv) inciting a person to become a member; and
  - (v) procuring subscription or aid.

7.8 The Hong Kong version of “colour revolution” has fully demonstrated that there are local organisations willingly acting as agents of foreign political or intelligence organisations to engage in acts and activities endangering national security. There are also law-breakers who have absconded overseas unscrupulously colluding with external forces to continue engaging in acts and activities endangering national security. In view of the above, it is necessary to improve the mechanism for regulation of organisations in order to address the relevant risks. The following proposals are recommended.

***(A) Improving the scope of applicable organisations***

7.9 The mechanism for prohibiting the operation of societies under the Societies Ordinance is only applicable to societies<sup>66</sup> and not applicable to the organisations listed in the Schedule to the Ordinance, which is unsatisfactory. Organisations to which the Societies Ordinance is not applicable may be used to cultivate forces endangering national security in the HKSAR, thereby endangering national security. The existing law lacks a similar, sound mechanism to deal with these organisations which are not subject to the regulation of the existing Societies Ordinance.

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<sup>65</sup> Section 18(1)(b) of the Societies Ordinance provides that a society prohibited from operation under section 8 of the Ordinance is an “unlawful society” while sections 19 to 23 of the Societies Ordinance provide for the offences and penalties relating to “unlawful societies” prohibited from operation.

<sup>66</sup> It is worth noting that under section 360C of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), if the Chief Executive in Council is satisfied that a company would, if it were a society in respect of which the Societies Ordinance applied, be liable to have its operation or continued operation prohibited by the Secretary for Security under section 8 of the Societies Ordinance, the Chief Executive in Council may order the Registrar of Companies to strike such company off the Companies Register. This provision can help to prevent any person from establishing companies to engage in acts and activities endangering national security.

7.10 Although some of the organisations listed in the Schedule to the Societies Ordinance are regulated by other legislation<sup>67</sup>, the regulatory mechanisms concerned generally do not contain provisions for prohibiting the operation of these organisations on the ground that it is necessary in the interests of national security. As such, to better prevent and suppress external forces or individuals endangering national security from endangering national security through establishing organisations such as incorporated management committees in relation to a school or incorporated owners which are not regulated by the existing Societies Ordinance, and to ensure that all organisations prohibited from operation on the ground that it is necessary in the interests of national security are treated as the same type of prohibited organisations, we recommend standardising the handling of matters such as prohibition of operation of organisations in the interests of national security, dissolution of organisations, through a unified mechanism under the proposed Ordinance. We recommend that the Secretary for Security may order prohibition of the operation of relevant organisations in the HKSAR on the following grounds –

*(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.*

**(B) Prohibiting external organisations endangering national security which are affiliated with the HKSAR from operating in the HKSAR**

7.11 In recent years, some individuals endangering national security have fled outside the HKSAR and continued to endanger national security. For

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<sup>67</sup> For instance, incorporated management committee are regulated by the Education Ordinance (Cap. 279).

instance, some local organisations in the HKSAR have relocated outside the HKSAR and established destructive “shadow organisations” there, and continued to engage in activities against the HKSAR that endanger national security. While these organisations are established outside the HKSAR, they actually still have affiliation with the HKSAR. For example, such organisations conduct activities in the HKSAR, and individuals in the HKSAR provide such organisations with any form of aid, etc. 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.***

Also, we recommend empowering the HKSAR Government to prohibit such external organisations from operating in the HKSAR if it is necessary in the interests of national security. Once such organisations are prohibited from operating in the HKSAR, no one should conduct activities in the HKSAR on their behalf or provide them with any form of aid.

7.12 In addition, it is also a common practice in other countries to establish a mechanism for prohibiting organisations that endanger national security from operation. Take the Terrorism Act 2000 of the UK as an example, the UK Secretary of State may exercise his or her power to proscribe an organisation if he or she believes that it is engaging in terrorism<sup>68</sup>. A person commits an offence if he or she belongs or professes to belong to a

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<sup>68</sup> Section 3, Terrorism Act 2000 of the UK.

proscribed organisation, or if he or she invites support (not restricted to the provision of money or other property) for a proscribed organisation<sup>69</sup>.

### **Concluding remarks**

- 7.13 Freedom of association is protected under the Basic Law in the HKSAR. However, as mentioned in paragraph 2.22 above, according to the ICCPR, freedom of association is not absolute and may be subject to restrictions that are provided by law and necessary for pursuing legitimate aims such as the protection of national security or public order. The regulatory mechanism under the existing Societies Ordinance is in conformity with the protection for freedom of association under the Basic Law. In improving the regulatory mechanism under the existing Societies Ordinance so as to more effectively prevent, suppress and impose punishment for acts endangering national security, the protection for freedom of association under the existing mechanism will be respected.
- 7.14 Regarding the offence of “external interference”, as pointed out in this Chapter, the HKSAR Government has the responsibility to prohibit external forces from unlawfully interfering in the affairs of our country or the HKSAR through local organisations or individuals, in an attempt to undermine the sovereignty and political independence of our country, and endanger national security. In the past, there were cases in which external forces participated in political activities through local organisations or individuals to influence the implementation of policies by the HKSAR Government using improper means and interfere in the affairs of our country or the HKSAR. Therefore, we recommend introducing an offence to prohibit such interference.
- 7.15 The studies and recommendations mentioned in this Chapter will ensure that the factors conducive to the strengthening of Hong Kong’s status as a cosmopolitan city and international financial centre will not be affected, so that legitimate international exchanges will continue to take place smoothly in the HKSAR, the restrictions on the rights and freedoms of individuals will be very limited, and any limitations imposed must be reasonable, necessary and proportionate.

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<sup>69</sup> Sections 11 and 12, Terrorism Act 2000 of the UK.



## **Chapter 8: Extra-territorial application of the proposed Ordinance**

This chapter examines, in respect of the extra-territorial effect of offences, principles of international law and international practices, the existing provisions of the HKNSL and existing laws, with a view to providing directions for recommendations for the extra-territorial application of the proposed Ordinance.

- 8.1 Criminal acts endangering national security, which are different from general criminal acts, threaten the fundamental interests of a state. Given their serious nature, such acts, be they committed outside the territory or locally, should be reasonably prevented, suppressed and punished. Therefore, when enacting local legislation for safeguarding national security, we recommend stipulating appropriate extra-territorial effect in respect of offences endangering national security.

### **Principles of international law and international practices**

- 8.2 We propose making reference to the following three international law principles and international practices in stipulating the suitable scope of application for the legislative proposal on Article 23 of the Basic Law:
- (a) **“territorial principle”**: in general, the criminal law of a state only regulates acts that take place within the territory of that state. This is known as the “territorial principle” under international law and international practices. In respect of the HKSAR, the offences proposed in the legislation to implement Article 23 of the Basic Law naturally apply to acts and activities endangering national security all or parts of which take place in the HKSAR, and this conforms not only to the “territorial principle” but is also a basic common law principle and need not be otherwise provided by law.
  - (b) **“personality principle”**: under this principle, a state may exercise jurisdiction over criminal acts committed by its citizens or residents outside its territory. The offender is one whose identity has close connection with the state, rather than a foreigner who has absolutely no ties with the state. As a matter of fact, as a citizen or resident of a

state or a region, it is incumbent on him or her to abide by the laws of the respective country or region, regardless of where he or she is.

- (c) **“protective principle”**: if foreigners situated outside a sovereign territory commit criminal acts abroad against the sovereign state that endanger its security or its vital interests (such as government institutions or functions), the sovereign state can adopt laws with extra-territorial effect to exercise prescriptive criminal jurisdiction.

### **Scope of application of the HKNSL**

8.3 The scope of application of the HKNSL in respect of its specified offences is as follows:

- (a) Under Article 36 of the HKNSL, the HKNSL shall apply to offences under the HKNSL which are committed in the HKSAR by any person. An offence shall be deemed to have been committed in the HKSAR if an act constituting the offence or the consequence of the offence occurs in the HKNSL;
- (b) Under Article 37 of the HKNSL, the HKNSL shall apply to a person who is a permanent resident of the HKSAR or an incorporated or unincorporated body such as a company or an organisation which is set up in the HKSAR if the person or the body commits an offence under the HKNSL outside the HKSAR; and
- (c) Article 38 of the HKNSL provides that the HKNSL shall apply to offences under the HKNSL committed against the HKSAR from outside the HKSAR by a person who is not a permanent resident of the HKSAR.

The above scope of application of the HKNSL is also in line with the principles of international law and international practices aforementioned.

### **Other existing laws**

8.4 Apart from the offences under the HKNSL, some offences endangering national security covered by the existing laws also have extra-territorial effect. For example:

- (a) **Offence of “treason” under Part I of the Crimes Ordinance:** Under the common law, the extra-territorial effect of this offence should be interpreted in accordance with the principles established by the courts in the case law<sup>70</sup> – that is, if a foreigner who is under the protection of a host country collaborates with the enemies outside that country, he or she shall be deemed to have committed the offence of “treason”, as long as he or she has not renounced that protection; and
- (b) **Offences related to unlawful disclosure under Part III of the Official Secrets Ordinance:** Under section 23 of the Official Secrets Ordinance, any act done by a British national<sup>71</sup>, a Hong Kong permanent resident or a public servant outside Hong Kong shall, if it would be an offence by that person under any provision of Part III “Unlawful Disclosure” of the Official Secrets Ordinance (other than certain provisions) when done by him or her in Hong Kong, be an offence under that provision.

8.5 It is worth noting that although the common law has consistently adopted the “territorial principle” (i.e. statutory and common law offences are generally presumed not to have extra-territorial effect, but an offence may be conferred extra-territorial effect through clear provisions in the statute), common law case authorities have developed a wider and more pragmatic approach to determine whether an offence has been committed within jurisdiction. As long as the “substantial activities constituting the crime” of an offence occur within the HKSAR, the courts of Hong Kong have the jurisdiction to adjudicate on the offence, even if other essential elements of the offence occur outside the HKSAR<sup>72</sup>.

### **Recommended extra-territorial effect of the offences**

8.6 Taking into account altogether the above-mentioned principles of international law and international practices, the provisions of the HKNSL, the provisions of existing laws, as well as the common practices adopted by

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<sup>70</sup> “...an alien abroad holding a British passport enjoys the protection of the Crown and if he is adherent to the King’s enemies he is guilty of treason, so long as he has not renounced that protection” (See *Joyce v DPP* [1946] AC 347).

<sup>71</sup> After Hong Kong’s return to the Motherland, the term “British national” in this section should be construed as “Chinese national” according to the principles of adaptation of laws.

<sup>72</sup> *HKSAR v WONG Tak-keung* (FACC 8/2014), at paragraphs 33(b) and 45.

different countries, and in view of the nature of offences endangering national security and their possible impact on our country and the HKSAR, we recommend providing for appropriate extra-territorial effect for the various offences proposed in the legislation to implement Article 23 of the Basic Law. Nevertheless, we need to provide for proportionate and reasonable extra-territorial effect based on the national security threats which the offences are designed to address, as well as the circumstances in which different individuals or organisations may commit such relevant acts outside the HKSAR.

- 8.7 In order to ensure that the extra-territorial effect of each category of offences is in line with the nature of the category of offences concerned, and that such effect is necessary and proportionate, we will, upon formulation of the offences, examine each of them in detail before determining its scope of application.
- 8.8 As a matter of fact, the national security laws of various countries, including the US, the UK, Australia and Canada, also have extra-territorial effect under principles such as the “personality principle” and the “protective principle”:
- (a) There are also numerous overseas examples of national security laws that tackle criminal acts committed outside the sovereign territory in accordance with the “personality principle”, such as -
    - (i) the offences of treason, unlawful disclosure of classified information as well as the Logan Act (which targets activities of collusion with a foreign country or with external forces) of the US;
    - (ii) the offence of treason and the Terrorism Act 2000 of the UK;
    - (iii) the foreign interference offence of Australia; and
    - (iv) the offence of treason of Canada.
  - (b) The national security laws of other countries in which the “protective principle” is applied include -
    - (i) the terrorism offences of the US;
    - (ii) the National Security Act 2023 of the UK;
    - (iii) the offence of espionage of Australia; and

(iv) the offence of espionage of Canada.

**Concluding remarks**

- 8.9 The purpose of enacting national security legislation is to safeguard national security and to prevent, suppress and impose punishment for acts and activities endangering national security. In general, acts and activities endangering national security, regardless of whether they are carried out outside or inside the territory, are no different in nature and should be prevented, suppressed and punished. Otherwise, it will be tantamount to condoning acts and activities endangering national security carried out by ill-intentioned people outside the territory. Prescribing appropriate extra-territorial effect for offences endangering national security is an essential component of legislation for safeguarding national security, and also fully aligns with the principles of international law and international practices, and the common practices adopted in different countries and regions.
- 8.10 In view of this, we will carefully consider the actual national security risks targeted by the offences with a view to proposing a scope of application which is proportionate and necessary for safeguarding national security.

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

This chapter analyses the experience in the investigation, enforcement, prosecution and trial of cases concerning offence endangering national security and the handling of matters relating to safeguarding national security since the implementation of the HKNSL, and explores ways to improve matters relating to the legal system and enforcement mechanisms for safeguarding national security, including:

- existing provisions on law enforcement powers and procedural matters relating to safeguarding national security;
- shortcomings and deficiencies revealed by the experience in handling cases concerning offence endangering national security;
- protecting persons handling cases or work concerning national security.

9.1 The fundamental purpose of Article 23 of the Basic Law is to require the HKSAR to enact laws on its own to safeguard national sovereignty, security and development interests. Therefore, legislation of the HKSAR for safeguarding national security should move with the times, with a view to properly addressing the traditional and non-traditional national security risks that our country is facing or may face in the future. Since 2020, the Central Authorities have, through a series of measures, further affirmed the HKSAR's constitutional duty to safeguard national security, and provided for the overall institutional arrangement for safeguarding national security in the HKSAR, including the adoption of the 5.28 Decision and the promulgation and implementation of the HKNSL. The 5.28 Decision and the HKNSL have clearly provided for the HKSAR's constitutional duty and institutional setup for safeguarding national security. Pursuant to Article 4 of the 5.28 Decision, the HKSAR must establish and improve the institutions and enforcement mechanisms for safeguarding national security, strengthen the enforcement forces for safeguarding national security, and step up enforcement to safeguard national security. Article 7 of the HKNSL not only requires the HKSAR to complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law, but also requires the HKSAR to refine the relevant laws on safeguarding national security.

9.2 The implementation of the HKNSL has established the fundamental strengths for safeguarding national security in the HKSAR. However, we

must ensure that the legal system for safeguarding national security can be implemented effectively and can operate continuously to safeguard national security. In this regard, the legal system concerned should:

- (a) ensure that the institutions for safeguarding national security established under the HKNSL can operate effectively;
- (b) ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offences;
- (c) ensure that institutions, organisations and individuals responsible for safeguarding national security are provided with all appropriate support and protection in a timely manner, so as to enable them to discharge the important function of safeguarding national security;
- (d) be forward-looking, being able to address not only existing national security risks but also risks and threats that may arise in the future; and
- (e) provide a mechanism for implementing and enforcing the measures stipulated in the HKNSL and the proposed Ordinance.

9.3 In addition, the HKNSL, being a national law, has become part of the legal system of the HKSAR after its promulgation and implementation. The local laws and system of the HKSAR should achieve further convergence, compatibility and complementarity with the HKNSL. The proposed Ordinance provides an opportunity for such convergence, compatibility and complementarity.

#### **Existing provisions on enforcement powers and procedural matters for safeguarding national security**

9.4 Under Article 43 of the HKNSL, when handling cases concerning offence endangering national security, the law enforcement authorities of the HKSAR may take measures that are allowed to apply under the laws in force in the HKSAR in investigating serious crimes, and may also adopt the seven

types of measures set out in Article 43(1) of the HKNSL<sup>73</sup>. The Chief Executive, in conjunction with the Committee for Safeguarding National Security of the HKSAR, has made the Implementation Rules in accordance with the authorisation under Article 43(3). The Implementation Rules set out in detail the stringent procedural requirements to be observed by the relevant officers in taking the measures, including the conditions that need to be fulfilled when applying for the authorisation to take investigation measures.

9.5 Article 41(1) of the HKNSL stipulates that the HKNSL and the laws of the HKSAR shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the HKSAR exercises jurisdiction. Most of the provisions under the HKNSL apply not only to the handling of cases concerning offence endangering national security under the HKNSL, but also to the offences endangering national security under the existing laws of Hong Kong. Examples include HKNSL provisions under Article 35 on the disqualification of persons convicted of an offence endangering national security from holding any public office, Article 42(2) on bail, Article 43 on enforcement powers, Article 44 on the designation of judges, and Article 45 on the jurisdiction of each level of HKSAR courts to deal with cases concerning offence endangering national security<sup>74</sup>. The enforcement powers and procedural matters under the laws in force, such as the Police

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<sup>73</sup> The measures include:

- (a) search of premises, vehicles, vessels, aircraft and other relevant places and electronic devices that may contain evidence of an offence;
- (b) ordering any person suspected of having committed an offence endangering national security to surrender travel documents, or prohibiting the person concerned from leaving the Region;
- (c) freezing of, applying for restraint order, charging order and confiscation order in respect of, and forfeiture of property used or intended to be used for the commission of the offence, proceeds of crime, or other property relating to the commission of the offence;
- (d) requiring a person who published information or the relevant service provider to delete the information or provide assistance;
- (e) requiring a political organisation of a foreign country or outside the mainland, Hong Kong, and Macao of the People's Republic of China, or an agent of authorities or a political organisation of a foreign country or outside the mainland, Hong Kong, and Macao of the People's Republic of China, to provide information;
- (f) upon approval of the Chief Executive, carrying out interception of communications and conducting covert surveillance on a person who is suspected, on reasonable grounds, of having involved in the commission of an offence endangering national security; and
- (g) requiring a person, who is suspected, on reasonable grounds, of having in possession information or material relevant to investigation, to answer questions and furnish such information or produce such material.

<sup>74</sup> *HKSAR v Ng Hau Yi Sidney* (2021) 24 HKCFAR 417, [2021] HKCFA 42, paragraphs 27-31.



Force Ordinance (Cap. 232), the Criminal Procedure Ordinance (Cap. 221), the Magistrates Ordinance (Cap. 227), etc., are applicable to cases concerning national security, unless there is any inconsistency with the provisions of the HKNSL.

- 9.6 Article 42(1) of the HKNSL stipulates that when applying the laws in force in the HKSAR concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the HKSAR shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offences. We need to examine how to improve the relevant provisions on enforcement powers and procedural matters in order to meet the requirements of handling cases concerning offence endangering national security in a fair and timely manner.

### **Shortcomings and deficiencies as revealed from experience gained from handling cases concerning offence endangering national security**

- 9.7 During the “black-clad violence” where large-scale riots and situations endangering national security occurred, law enforcement agencies gained much experience in their law enforcement actions. Since the implementation of the HKNSL and Implementation Rules, law enforcement agencies have taken law enforcement actions against various cases concerning offence endangering national security, and conducted preventive investigatory work necessary for safeguarding national security, in order to prevent and suppress offences endangering national security. The courts have also tried a number of cases concerning offence endangering national security. In this connection, we have reviewed the shortcomings and deficiencies as revealed from various stages of law enforcement and examined the methods deployed by other countries in handling similar matters. The major issues concerned are outlined in the ensuing paragraphs.

#### ***(A) Existing circumstances regarding detention of and bail arrangement for arrested persons during investigation***

- 9.8 Under section 50 of the Police Force Ordinance, a police officer has the power to apprehend any person who the officer reasonably suspects of being guilty of an offence for which the person may be sentenced to imprisonment.

When a police officer makes an arrest, the officer must act according to the law and in an appropriate manner. The arrested person will then be delivered to the investigation team for conducting an inquiry. Upon completion of preliminary investigation, the Police will, having regard to the actual circumstances of individual cases, consider taking the following actions:

- (a) charging the arrested person and taking him or her into custody pending appearance in court, or discharge the arrested person on bail pending appearance in court. In general, a person will not be detained for more than 48 hours;
- (b) if the Police cannot complete investigation into the case forthwith, discharging the arrested person on bail to appear at such police station and at such time as specified; or
- (c) unconditional release of the arrested person.

9.9 The legal basis and statutory authority concerning police bail is set out in section 52 of the Police Force Ordinance. Pursuant to section 52(1) of the said Ordinance, as regards an arrested person whom the Police have decided to charge, unless the offence appears to the Police to be of a serious nature or unless the Police reasonably considers that the person ought to be detained pending appearance before a magistrate (for reasons such as that the person arrested may abscond, commit an offence whilst on bail, interfere with the witnesses, impede investigation or attempt to pervert the course of justice), the Police may discharge the arrested person on his or her entering into a recognizance. In general, an arrested person should appear before a magistrate at the time and place named in the recognizance. If such person is detained in custody, the person should be brought before a magistrate as soon as practicable. In addition, according to section 52(3) of the Police Force Ordinance, if the Police considers that inquiry into the case cannot be completed forthwith, the person arrested may be discharged on his or her entering into a recognizance to appear at such police station and at such time as is named in the recognizance.

9.10 The experience gained from handling the “black-clad violence” shows that, after the occurrence of large-scale riots, the Police may encounter grave difficulties in gathering evidence and require relatively more time to complete preliminary investigation on all the persons arrested. As to cases concerning offence endangering national security, relatively more people

could be involved in a case. Furthermore, such cases could also implicate many local and external organisations and involve huge amounts of fund flows, possibly coupled with a certain degree of interference from external anti-China forces at the same time. Most of such criminal acts would be more insidious, complex and serious in nature. Some suspects would even attempt to exchange information with external sources and other members of their syndicate related to the case through various channels after the law enforcement actions have commenced, with a view to attempting to impede investigation and even engage in other acts endangering national security. In those special circumstances, the Police require a longer time than that in other general cases to complete the gathering of evidence and decide if charges should be laid against the arrested persons.

- 9.11 An arrested person involved in an offence endangering national security may also pose considerable national security risks while on bail. For example, the person may associate or communicate with other members of his syndicate who are at large and disclose details about the investigation, tamper the evidence, interfere with the witnesses, transfer offence related property out of the HKSAR, make arrangements for himself or herself or other suspects to abscond, or even plan and commit further offences endangering national security.
- 9.12 It has come to our attention that the National Security Act 2023 of the UK has, in dealing with similar issues, conferred extensive powers upon the law enforcement authorities to take prevention and investigation measures, which include the following, so as to deal with people who are suspected to be involved in acts and activities endangering national security, thereby reducing the national security threats that they pose in the course of the investigations:
- (a) Powers conferred on the police to apply to a judicial authority for extension of detention, so that the detention period of an arrested person can be extended without charge, so as to allow the police to obtain, preserve, analyse or examine relevant evidence: in addition to Part 6 of Schedule 6 to the National Security Act 2023 of the UK, which specifies the means for the police to apply to a judicial authority for an extension of detention, other existing UK laws also give the UK police the power to apply to a judicial authority for an extension of

detention of people arrested for serious crimes (especially those involved in terrorist activities) to up to 14 days.

- (b) Sections 8 and 9 of Schedule 6 to the National Security Act 2023 of the UK empower police officers of at least the rank of superintendent to direct that a detained person may not consult a particular solicitor or to delay a detained person's consultation with a solicitor.
- (c) Section 39 of and Schedule 7 to the National Security Act 2023 of the UK stipulates that the Secretary of State may, subject to specified conditions (e.g. he or she reasonably believes that an individual is involved in foreign power threat activity), and subject to the court's permission, impose an array of measures on an individual, including –
  - (i) the requirement to reside at a specified residence;
  - (ii) the requirement not to enter a specified area or place without permission;
  - (iii) restrictions on the individual's association and communication with other persons;
  - (iv) requirements for him or her to comply with directions given by a constable in respect of his or her movements;
  - (v) not to hold any accounts without the permission of the Secretary of State;
  - (vi) impose restrictions on the transfer of property to or by the individual and/or requirements in relation to the disclosure of property;
  - (vii) impose restrictions on his or her possession or use of electronic communication devices; and
  - (viii) impose restrictions or specified conditions in connection with his/her work or studies (including training).

9.13 In this connection, we may consider introducing measures to ensure that when handling cases concerning offence endangering national security, the law enforcement agencies have sufficient time to carry out all the necessary preliminary investigation on the arrested persons and the case, and prevent any circumstances that may jeopardise the investigation and prevent the risks of arrested persons further endangering national security.

***(B) Suspects absconding overseas***

9.14 Individuals endangering national security often abscond overseas to evade criminal liability, and continue to endanger national security through various means (e.g. colluding with external forces to exert pressure on the Central Authorities and the HKSAR Government, or setting up, outside the HKSAR, organisations endangering national security, etc.). An example is the issuance of arrest warrants by the court in 2023, upon application by the National Security Department of the Hong Kong Police Force, against a total of 13 persons who had absconded overseas and were suspected to have committed offences under the HKNSL. The 13 absconders have allegedly continued to engage in certain acts and activities endangering national security after absconding overseas, including requesting foreign countries to impose “sanction” against officials and judges of the HKSAR, and inciting secession and subversion.

9.15 There are also some legal or administrative measures in foreign countries that aimed at addressing, combating, deterring and preventing acts of abscondment, and procuring the return of absconded persons to their home countries to face law enforcement and judicial proceedings, examples of which include:

- (1) Cancelling the passports of absconded persons - under the relevant law of the US (Code of Federal Regulations, Title 22, sections 51.60-65), a law enforcement agency may request the Department of State to revoke a person’s passport in accordance with the provisions of that law for any of the following reasons -
  - (a) the person is wanted on a criminal charge for which a warrant has been issued;
  - (b) a court order has been made to prohibit the person from leaving the country;
- (2) Suspending the benefits or rights of absconded persons - under the relevant law of the US listed below, benefits and entitlements (mainly social security benefits) of fugitive offenders shall be suspended and denied -
  - (a) Disqualification from participation in the Supplemental Nutrition Assistance Program (US Code Title 7 Ch. 51 §2015(k));

- (b) Not entitled to payment of Old-Age and Survivors Insurance benefits and Disability Insurance benefits (US Code Title 42 Ch. 7 §402(x)(1)(A));
- (c) Not entitled to supplemental security income for aged, blind, and disabled individuals (US Code Title 42 Ch. 7 §1382(e)(4)(A));
- (3) Providing for offences to prohibit the harbouring or concealing of fugitive offenders - under the relevant law of the US (US Code Title 18 §1071 (Concealing Person from Arrest)), it is an offence for “whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person”.

In this connection, we may consider making reference to US laws and adopting measures of sufficient strength to address, combat, deter and prevent acts of abscondment, and to procure the return of absconded persons to the HKSAR.

### ***(C) Procedural matters***

9.16 Although criminal procedural matters have already been provided for under certain local laws of the HKSAR, as far as the procedural matters of cases concerning offence endangering national security are concerned, the provisions under the local laws should be convergent with the relevant requirements of the HKNSL, and should be improved as appropriate in order to meet the said requirements. For instance, the HKSAR Government introduced amendments to the Criminal Procedure Ordinance in 2023 to provide for statutory appeal procedures for the prosecution to appeal against a verdict or order of acquittal given by the Court of First Instance constituted by a panel of three judges without a jury under Article 46 of the HKNSL. The amendments aimed to address lacunae in the criminal appeal system due to the prosecution’s inability to appeal against any acquittals by professional judges of the Court of First Instance in cases concerning offence endangering national security that were erroneous, so as to prevent possible miscarriage of justice.

9.17 It should be noted in particular the provisions of Article 42 of the HKNSL relating to the handling of cases concerning offence endangering national

security “in a fair and timely manner”. When handling cases concerning offence endangering national security, both the Police and the Department of Justice strictly comply with the provisions of Article 42 of the HKNSL and the relevant law. However, as cases concerning national security are often complex in nature and involve a large number of defendants, the legal procedures involved take time and often entail a longer period of time before the case can proceed to trial. While the court always proactively accords priority to the handling of cases related to the HKNSL and endeavours to fix an earliest possible trial date for each of those more complex cases involving a large number of defendants, the time taken between the institution of prosecution and the trial of each case would depend on a multitude of factors, such as whether further investigation is required, whether the defendant requires time to seek legal advice for consideration of his or her plea, whether the defence requires the court’s certification of translated documents or exercises entitlements under the law to make any pre-trial application.

9.18 According to the judgment of the Court of Final Appeal in the case of *HKSAR v Ng Hau Yi Sidney*, with the full cooperation of the parties, judges should proactively seek ways to bring cases concerning national security to trial expeditiously, consistently with the interests of justice. There should be proactive case management and a monitoring of progress by the court rather than leaving all initiatives to the parties. The courts should set and enforce strict timetables and should consider whether any prescribed procedural steps can be eliminated, modified, etc. to avoid delay and wasted effort, consistent always with a fair trial<sup>75</sup>.

9.19 In this connection, we can consider improving some procedural matters in this legislative exercise, including eliminating certain procedures, so that cases concerning national security can be scheduled for trial as soon as possible, with an aim to enable the fulfilment of the goal for cases concerning offence endangering national security to be handled in a timely manner on the premise of maintaining fair trials.

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<sup>75</sup> *HKSAR v Ng Hau Yi Sidney* (2021) 24 HKCFAR 417, [2021] HKCFA 42, paragraph 34.

***(D) Arrangements on the serving of sentences of convicted persons***

9.20 Under rule 69 of the Prison Rules (Cap. 234A), a prisoner serving a sentence of imprisonment for an actual term of more than one month may, on the ground of industry and good conduct, be granted remission of sentence, and the remission shall not exceed one-third of the total of the actual term and any period spent in custody. The requirements for early release of prisoners under supervision are set down in various Ordinances including the Post-Release Supervision of Prisoners Ordinance (Cap. 475) and the Long-term Prison Sentences Review Ordinance (Cap. 524). However, there have been cases in which prisoners convicted of offence endangering national security absconded or continued to carry out acts and activities endangering national security when they were granted early release under supervision.

9.21 In this regard, we note that there are provisions in law relating to terrorist offenders in the UK (Terrorist Offenders (Restriction of Early Release) Act 2020) that address the issue concerned. It tightens the threshold for eligibility for the parole of offenders convicted of terrorist offences such that the relevant authority must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined before an early release may be granted to the prisoner.

9.22 In this regard, consideration may be given to whether similar provisions should be introduced. For example, the relevant authority must have sufficient grounds to believe that the offender no longer poses risks to national security before considering his or her early release.

**Protecting persons handling cases or work involving national security**

9.23 During the “black-clad violence”, the court, upon applications by the Department of Justice, granted interim injunctions to prohibit any person from unlawfully disclosing the personal data of any police officers, judicial officers and their family members; and prohibit any person from engaging in acts such as intimidation, harassment, or threats against any police



officers, judicial officers and their family members<sup>76</sup>. Notwithstanding this, since the implementation of the HKNSL, incidents of unlawful disclosure of the personal data of public officers handling work relating to safeguarding national security continue to occur from time to time. There have also been cases of “doxxing” against officers in charge of such work.

9.24 In 2021, the Personal Data (Privacy) Ordinance (Cap. 486) underwent major amendments, which aim to combat “doxxing” acts that are intrusive to personal data privacy, through the criminalisation of “doxxing” acts, and conferring on the Privacy Commissioner for Personal Data power to conduct criminal investigation and institute prosecution for “doxxing” cases. However, the penalties for the relevant offences fail to reflect the seriousness of acts of “doxxing” against persons handling cases or work involving national security.

9.25 As for acts of harassment, there is currently no specific law prohibiting acts of harassment. While section 24 of the existing Crimes Ordinance prohibits certain acts of intimidation<sup>77</sup> and section 160 of the same Ordinance also prohibits loitering in a public place, there is no specific law prohibiting the act of harassment. Existing offences are insufficient in covering all forms of harassment of a certain level of severity that target at

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<sup>76</sup> The High Court granted an interim injunction order (HCA 1957/2019) in October 2019 to restrain any person from disclosing the personal data of any police officers and their family members without the consent of the person concerned to intimidate or harass the police officers and their family members. The said injunction order also prohibits any person from intimidating or harassing any police officers and their family members, as well as assisting, inciting or abetting others to commit any of the aforesaid acts. The interim injunction order is still effective as at today. Moreover, the High Court granted an interim injunction order (HCA 1847/2020) in October 2020 to restrain any person from disclosing the personal data of any judicial officers and their family members without the consent of the person concerned to intimidate or harass the judicial officers and their family members. The said injunction order also prohibits any person from intimidating or harassing any judicial officers and their family members, as well as assisting, inciting or abetting others to commit any of the aforesaid acts. The interim injunction order is still effective as at today.

<sup>77</sup> Any person who threatens any other person –

- (a) with any injury to the person, reputation or property of such other person; or
- (b) with any injury to the person, reputation or property of any third person, or to the reputation or estate of any deceased person; or
- (c) with any illegal act,

with intent in any such case –

- (i) to alarm the person so threatened or any other person; or
- (ii) to cause the person so threatened or any other person to do any act which he is not legally bound to do; or
- (iii) to cause the person so threatened or any other person to omit to do any act which he is legally entitled to do,

shall be guilty of an offence, with a maximum penalty of five years of imprisonment.

the aforesaid officers. Therefore, we may consider introducing new offences in this regard.

9.26 In the light of the current situation, any public officers, barristers or solicitors handling cases concerning national security or other work for safeguarding national security, and informers and witnesses of national security cases face risks of unlawful disclosure of personal data and harassment no less than judicial officers and police officers. Their safety, as well as the safety of their family members, should be appropriately protected so as to enable them to handle or participate in cases concerning national security and other work for safeguarding national security without worries, thereby buttressing and strengthening the enforcement forces for safeguarding national security.

### **Concluding remarks**

9.27 This Chapter 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 this Chapter, 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;

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

## 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.
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 secession and subversion again.

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

#### *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;

- (b) codify the existing offence of “misprision of treason” under common law;
- (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”;
- (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.

#### ***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”;
  - (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;
  - (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.
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.

### ***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;
  - (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;
  - (c) consolidate and improve offences relating to "state secrets" under the existing Official Secrets Ordinance, so as to better protect state secrets.
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;
  - (b) prohibit participation in, support to or receipt of benefits from foreign intelligence organisations.

### ***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.

## ***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.
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.

## ***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.

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



**Laws of foreign countries relevant to national security**

Listed below are the laws of foreign countries concerning national security mentioned in paragraph 2.2 of this Consultation Document; this Consultation Document has cited and made reference to 22 items of them (as denoted with \*).

**UK**

Treason Act 1351

\* Treason Felony Act 1848

\* Official Secrets Act 1911 [repealed in 2023]

\* Official Secrets Act 1920 [repealed in 2023]

Incitement to Disaffection Act 1934

Official Secrets Act 1989

Security Service Act 1989

\* Computer Misuse Act 1990

Political Parties, Elections and Referendums Act 2000

\* Terrorism Act 2000

Anti-terrorism, Crime and Security Act 2001

Terrorism Act 2006

Terrorism Prevention and Investigation Measures Act 2011

\* Terrorist Offenders (Restriction of Early Release) Act 2020

\* National Security and Investment Act 2021

\* National Security Act 2023

## US

### The United States Code

- Title 8 Ch.12 Immigration and Nationality
  - Title 18 Ch.37 Espionage and Censorship
  - Title 18 Ch.45 Foreign Relations
  - Title 18 Ch.47 Fraud and False Statements
  - Title 18 Ch.90 Protection of Trade Secrets
  - Title 18 Ch.113B Terrorism
  - \* - Title 18 Ch.115 Treason, Sedition, and Subversive Activities
  - Title 18 Ch.119 Wire and Electronic Communications Interception and Interception of Oral Communications
  - Title 50 Ch.23 Internal Security
- \* Logan Act
- Foreign Agents Registration Act of 1938
- National Security Act of 1947
- Central Intelligence Agency Act of 1949
- National Security Agency Act of 1959
- Foreign Intelligence Surveillance Act of 1978
- Foreign Missions Act
- USA PATRIOT Act of 2001
- Homeland Security Act of 2002
- Intelligence Reform and Terrorism Prevention Act of 2004
- Cybersecurity Information Sharing Act of 2015
- \* The Code of Federal Regulations

## Australia

Crimes Act 1914

- \* Criminal Code Act 1995

- \* Foreign Influence Transparency Scheme Act 2018
- \* National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018

### **Canada**

- \* Criminal Code
- \* Security of Information Act
- \* Canada Evidence Act
- National Defence Act
- \* Canadian Security Intelligence Service Act
- Access to Information Act
- Canada Elections Act
- Secure Air Travel Act
- National Security Act, 2017

### **New Zealand**

- \* Crimes Act 1961
- Intelligence and Security Act 2017

### **Singapore**

- \* Penal Code 1871
- Official Secrets Act 1935
- \* Internal Security Act 1960
- Societies Act 1966
- Computer Misuse Act 1993
- \* Foreign Interference (Countermeasures) Act 2021

**List of Abbreviations**

HKSAR	The Hong Kong Special Administrative Region
UK	The United Kingdom
The Constitution	Constitution of the People’s Republic of China
The Basic Law	The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China
CPG	The Central People’s Government
NPC	The National People’s Congress
The 5.28 Decision	The National People’s Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security on 28 May 2020
NPCSC	The Standing Committee of the National People’s Congress
HKNSL	The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region
US	The United States
The Committee	The Committee for Safeguarding National Security of the Hong Kong Special Administrative Region
Implementation Rules	The Implementation Rules for Article 43 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
The proposed Ordinance	A new Safeguarding National Security Ordinance

The Counterespionage Law of the People's Republic  
of China

