

Speech by Deputy Solicitor General (Constitutional)

Following is the speech by the Deputy Solicitor General (Constitutional), Mr James O'Neil, at a Conference on the National Security (Legislative Provisions) Bill today (June 14):

This weekend's conference is a welcome opportunity for a rational and intellectual debate of the National Security (Legislative Provisions) Bill. The University of Hong Kong is a fitting venue for a critical discussion - not only of the government's proposals but also of some of the arguments raised against those proposals.

The role of lawyers

We have just heard from Mr Timothy Tong of Security Bureau, which has policy responsibility for this legislation. I am here as a representative of the Department of Justice, which has provided legal advice and legal policy advice to the Bureau.

Since many of the participants at this conference are lawyers, it is perhaps appropriate to ask what contribution can lawyers usefully make to this discussion and to the legislative exercise. A clarification of this issue may also help the community, which may well be confused by the sharply conflicting views expressed by different lawyers over this Bill.

I would like to draw a distinction between legal advice that is either right or wrong, and advice that cannot be so classified. The first category includes legal advice as to whether the legislative proposals are consistent with the human rights guarantees in the Basic Law. The Department of Justice has advised that the Bill is consistent with those guarantees. That view is supported by the opinion of a leading human rights expert, Mr David Pannick QC, who considered that the proposals set out in the Consultation Document were consistent with the International Covenant on Civil and Political Rights.

The second category of advice relates to opinions that cannot be classified as right or wrong, but that involve judgments on policy issues. Provided the Basic Law is complied with, how one balances the competing interests of personal liberty and

national security is an issue on which views may legitimately differ. No one can claim that they are right and others wrong.

For the most part, the issues on which lawyers have expressed differing opinions fall into this second category. Whether one should fully comply with the Johannesburg Principles, or should introduce a public interest defence to the Official Secrets Ordinance, are matters of policy and personal judgment. Those individuals or organizations who actively promote human rights may well wish to see additional safeguards introduced. They are entitled to their views. But the fact that their wishes may not be fully satisfied does not mean that fundamental human rights are under threat. The Bill guarantees full protection of those rights.

The changes being made

In order for members of the community to understand the effect of the proposed legislation, it is helpful to consider the changes that it would make to current laws. As Professor Albert Chen has said, "scholars of Hong Kong law owe a duty to the community to provide an objective assessment of the state of our existing law and the extent to which it will be changed by the proposed legislation implementing BL 23".

Such an assessment falls into the first category of advice I referred to - since it is either legally right or wrong. I hope this conference can help to explain clearly, and correctly, what the changes will be. With such clarification, one can decide whether the criticisms commonly levelled at the Bill are justified.

Treason

The offence of treason already exists in our laws. It is to be found in Section 2 of the Crimes Ordinance. The section is cast in antiquated language.

Once the offences against the monarch are removed three distinct offences remain. A person commits treason if he -

* levies war against the sovereign with the intention to depose the sovereign or to impose policies on the government by force;

* instigates a foreigner to invade with force; or

* assists a public enemy at war.

The offence is not restricted in applicability by the nationality or citizenship status of those who can offend. Only the last two legs are restricted to an external threat such as war or invasion. "Levying war" in the first leg includes internal rebellion and civil war. It is a broad ranging offence. The phrase "depose her majesty" is wide enough to encompass what is commonly understood by secession and subversion.

There is a second statutory treason offence to be taken into account - Treasonable Offences under section 3 is cast in the same out of date wide ranging terms as the section 2 treason offence. There is a significant difference. To commit the section 3 offence one merely has to form the intention and then manifest that treasonous intention by any overt act or by publishing any written or printed word.

The Bill will repeal and replace the statutory treason offences. It will abolish the common law offences of misprision of treason and compounding treason.

The proposed new offence of treason is considerably restricted in scope. It applies only to external threats to the nation. It has, in effect, been altered to a wartime offence or to an offence involving armed invasion with force. It can only be committed by Chinese Nationals.

The terms "foreign armed forces", "public enemy at war" and "at war" are clearly defined.

Subversion and secession

Two new offences of subversion and secession, narrowly focused on activities, have been carved out of the existing treason offences.

Under the Bill a person commits subversion if he -

- (a) disestablishes the basic system of the People's Republic of China as established by the Constitution of the People's Republic of China;
- (b) overthrows the Central People's Government; or

(c) intimidates the Central People's Government,

by using force or serious criminal means that seriously endangers the stability of the People's Republic of China or by engaging in war.

There is a high threshold of force violence or other serious criminal activity required for the commission of the offence.

For a person to be guilty of the substantive offence of subversion, it would need to be proved beyond reasonable doubt that the results referred to in (a), (b) or (c) of the section were achieved by use of force or serious criminal means that endangers the stability of the PRC or by engaging in war. For a person to be guilty of conspiring or attempting to commit an offence of subversion, it would have to be proved beyond reasonable doubt that he intended to achieve such result by use of force or serious criminal means that would seriously endanger the stability of the PRC, or by engaging in war.

For an accomplice offence to be committed, it would need to be proved that an offence of subversion was actually committed.

"War" and "serious criminal means" are defined terms. For conduct to amount to serious criminal means it would need to satisfy one of the given criteria under section 2A(4)(b) and be committed in a way that amounted to an offence under Hong Kong law.

A new narrow offence of secession is proposed under the Bill.

A person commits secession if he withdraws any part of the People's Republic of China from its sovereignty by -

(a) using force or serious criminal means that seriously endangers the territorial integrity of the People's Republic of China; or

(b) engaging in war.

The terms "serious criminal means" and "engaging in war" are defined as previously mentioned. As with subversion, for a person to be guilty of the substantive offence, it would have to be proved beyond reasonable doubt that the

result of withdrawing a part of the PRC from its sovereignty had been achieved by the use of force or serious criminal means that seriously endangers the territorial integrity of the PRC or by engaging in war.

Sedition

Sedition is an existing crime and is very broad. A person commits the offence merely by attempting to do or doing any act with a seditious intention or uttering or publishing any seditious word.

Seditious intention is defined in extremely broad terms. It includes an intention

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- * to excite disaffection against the Government of Hong Kong or the PRC;
- * to excite disaffection against the administration of justice in Hong Kong;
- * to raise discontent amongst the inhabitants of Hong Kong; and
- * to counsel disobedience to any law or any lawful order.

On the face of it, there is no requirement that violence or public disorder is required to be incited.

The Bill proposes to liberalize the law in this area in five ways.

(1) Sedition will be confined to situations where there is incitement to commit treason, secession or subversion, or incitement to "engage in violent public disorder that would seriously endanger the stability of the People's Republic of China".

(2) The Government announced last week that it plans to amend the Bill so that a likelihood test as in principle 6 of the Johannesburg Principles will apply to the offence of sedition.

(3) The offence of possession of seditious publications will be repealed.

(4) The offence of "handling seditious publications" will be restricted to situations where the accused actually intends to incite treason, subversion or secession.

(5) The definition of "seditious publications" will include the "likelihood" test in principle 6 of the Johannesburg Principles so that "seditious publications" are those that are "likely to induce the commission of" the offence of treason, subversion or secession.

Official secrets

The current Official Secrets Ordinance was enacted in 1997. It was based on the reformed UK legislation and will remain largely unchanged. Most of the changes do not extend the law. Some of the changes significantly narrow the effect of the law.

There are at present four defined categories of protected information -

- * security and intelligence;
- * defence;
- * international relations; and
- * the commission of offences and criminal investigations.

The Bill will add a fifth category but this is not exactly an extension of the scope. The relationship between Hong Kong and the Mainland before the transition and, by adaptation, after the transition fell into the category of "international relations". It will now form a separate category of protected information. The information protected is limited to that relating to affairs concerning HKSAR which under the Basic Law are within the responsibility of the Central Authorities.

For disclosure of such information to be caught by the offence provision, it must endanger national security or be likely to endanger national security. "National security" is defined as meaning the safeguarding of the territorial integrity and the independence of the People's Republic of China. This is arguably narrower than the existing damage test of endangering "the interests of the PRC or Hong Kong elsewhere".

The definition of "public servant" is to be amended so that it no longer extends to

mainland officials or members of the armed forces. This has the effect of significantly reducing the scope of all the unauthorized disclosure offences since they will no longer apply to information leaked by Mainland officials even if the information falls into the protected categories.

However, the Bill will extend the scope of the unauthorized disclosure offence so that it applies to protected information which has been obtained by illegal access as well as to protected information that has been leaked by a civil servant. Illegal access is narrowly defined in terms of the existing offences of hacking, theft, robbery and burglary, and bribery. To amount to "illegal access", the conduct must be an offence under Hong Kong, not Mainland Law.

Proscription

The Bill proposes to amend the Societies Ordinance to make provision for proscription of organisations. There is an existing power to proscribe societies which endanger national security under section 8 of the Societies Ordinance. As far as societies are concerned, the proposal does not extend that power to proscribe. The effect will be to make those organization which are not societies subject to proscription where they endanger national security.

The government proposes to restrict the scope of the law on proscription in four ways -

- * It plans to amend the Bill so that the existing power to proscribe a society on grounds of endangering national security under section 8 will be repealed.
- * The new power to proscribe will be restricted to local organizations which fall into one of three categories i.e. organizations -
 - (a) the objective, or one of the objectives, of which is to engage in treason, subversion, secession or sedition or commit an offence of spying;
 - (b) which has committed or is attempting to commit treason, subversion, secession or sedition or an offence of spying; or
 - (c) which is subordinate to a mainland organization the operation of which has been prohibited on the ground of protecting the security of the People's Republic of China,

as officially proclaimed by means of an open decree, by the Central Authorities under the law of the People's Republic of China.

* An organization can only be proscribed where the Secretary for Security reasonably believes that the proscription is necessary in the interests of national security and is a proportionate response to the risk.

* A new avenue of appeal to the Court of First Instance is provided with a further appeal on a point of law to the Court of Appeal. Appeal to the court is not available in respect of the existing power to proscribe a society, which allows an appeal to the Executive Council only.

The new appeal will require the court to conduct an overall review of the decision reached by the executive in a manner that would not be available in the judicial review process. The court should have access to all or at least the essential documents which may be of a sensitive security nature. Special procedures are required for those rare occasions when it may be necessary to protect the national security interest whilst maintaining the substantial fairness for the affected party to a hearing. It is intended to follow Canadian and UK precedents and to provide for regulations to be made which enable part of the proceedings to take place in the absence of a party and his lawyer. The UK model is to be adopted whereby a special advocate can be appointed to represent the interests of the excluded party at such a hearing with power to cross examine and test the evidence. The thinking is that provision will be made for the party to choose his special advocate from a panel of suitably qualified lawyers. This model is arguably the best way to balance the human rights requirements for procedural fairness with the need to protect national security.

Overall impact

This brief survey of the effect of the Bill indicates that, by and large, it is a liberalizing measure. That is an objective assessment that can be demonstrated to be correct. It may be noted in the passing that for every BL23 offence there will be a right to a trial by jury.

Of course, some will say that the Bill does not go far enough in liberalizing the law. They are entitled to their views. But, as I said earlier, such views represent policy choices, not legal advice of the right or wrong type.

Criticism of the current law

It is interesting to note that many of the remaining criticisms of the Bill do not relate to changes being proposed, but to aspects of existing laws. Those laws have not stifled freedom in Hong Kong. On the contrary, freedom of speech, press freedom and freedoms of assembly and association are fully enjoyed in Hong Kong. Yet, various media groups have recently expressed concern about the following areas -

- (1) the offence of unauthorized and damaging disclosure of protected information;
- (2) the protection of certain types of information concerning relations between the Hong Kong SAR and the Central Authorities;
- (3) the offence of handling seditious publications; and
- (4) the absence of any defence of public interest in respect of the unauthorized disclosure of protected information.

Each of these matters is an aspect of the current law, and is not something being introduced by the Bill. How then can the Bill be said to threaten press freedom or encourage self-censorship?

Rational debate

A proper understanding of the existing law, and of the changes proposed by the Administration will, I believe, demonstrate that there is no cause to fear that human rights will be eroded, that the legislation will have a "chilling effect" on the media, that June 4 protests will be banned in the future, and so on.

If any further guarantee is needed on this, you will find it in the Bill. Repeated no fewer than three times in the Bill is a provision to the effect that its provisions are to be interpreted, applied and enforced in a manner that is consistent with the human rights guarantees in the Basic Law. The "category one" legal advice that must, I believe, be given, is that the Bill will not permit any contravention of fundamental rights and freedoms.

End/Saturday, June 14, 2003