

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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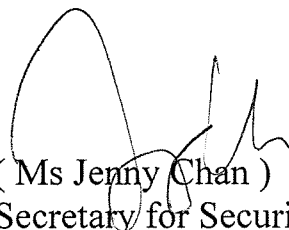
Ms Betty Ma
Clerk to Legislative Council
Panel on Security
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms Ma,

**Re: Panel on Security Meeting on 2 June 2020
Response to Criminal Jurisdiction (Amendment) Bill 2019**

I refer to your letter dated 6 May 2020 inviting the Administration's response to Hon Andrew Wan's proposed Member's Bill entitled "Criminal Jurisdiction (Amendment) Bill 2019". Our bilingual response is at Annex.

Yours sincerely,



(Ms Jenny Chan)
for Secretary for Security

Encl.

c.c. Secretary for Justice

(Attention:

Ms Linda Lam, Deputy Law Officer (Mutual Legal Assistance)

Mr Paul Ho, Deputy Director of Public Prosecutions (II)

Mr Llewellyn Mui, Deputy Solicitor General (Constitutional Affairs))

Response to Criminal Jurisdiction (Amendment) Bill 2019

A purpose of the Criminal Jurisdiction (Amendment) Bill 2019 proposed by Hon Andrew Wan is to deal with the Taiwan homicide case. Regarding the amendment proposals on criminal jurisdiction, the HKSAR Government's position is as follows –

- (a) The Taiwan homicide case cannot be dealt with by the proposed extension of the criminal jurisdiction of the courts of Hong Kong. The Taiwan homicide case occurred outside Hong Kong and did not constitute murder under the existing laws of Hong Kong. As the proposed legislative amendments in the Bill will deem homicide committed outside Hong Kong to be murder under the laws of Hong Kong, the relevant provisions can only apply to offences committed after the amended legislation comes into force; otherwise, it will be contrary to Article 12 of the Hong Kong Bills of Rights in respect of the requirement on “no retrospective criminal offences or penalties”;
- (b) Hong Kong is a common law jurisdiction adopting the “territoriality principle” in respect of criminal jurisdiction, and generally criminal jurisdiction will apply only when the whole or part of a criminal act occurred within the territory. Hong Kong courts are empowered to exercise extra-territorial jurisdiction only in special circumstances such as performing certain international obligations. For instance, Hong Kong courts are empowered to exercise extra-territorial jurisdiction under section 153P of the Crimes Ordinance to try specified sexual offences committed by Hong Kong permanent residents against children under the age of 16 outside Hong Kong. The legislative intent of the provision is to combat child sex tourism as an initiative to fulfil the requirements of the United Nations Convention on the Rights of the Child applicable to Hong Kong. In respect of the Criminal Jurisdiction Ordinance, the offences covered include theft, fraud and blackmail, as well as conspiracy and attempts to commit such offences. Even though part of these criminal acts might have taken place outside Hong Kong, if some related events have occurred within Hong Kong, our courts will also have jurisdiction, and this is in line with Hong Kong's long-standing “territoriality principle”. However, empowering Hong Kong courts to have jurisdiction over murders committed wholly outside Hong Kong by Hong Kong permanent residents is a deviation from such established principle; and

(c) The exercise of jurisdiction over crimes committed wholly outside Hong Kong involves practical issues on evidence collection and prosecutors' obligation to disclose relevant materials. First, for a crime occurred outside Hong Kong, the HKSAR Government must request mutual legal assistance for obtaining evidence from the place where the crime was committed; but whether such request will be entertained is an issue. Even if evidence is obtained, another major practical issue will be whether such evidence is admissible under the requirements of Hong Kong courts. Also, regarding prosecutors' obligation to disclose relevant materials in the legal proceedings for criminal prosecution, it will be difficult for prosecutors of Hong Kong to ensure that all relevant materials are already provided by the authorities of the place where the crime was committed, as evidence so obtained will come from outside Hong Kong and investigation will be mostly done at such place by the authorities there. Despite that there is no fault on the prosecution side in this connection, the defendant can still apply for permanent stay of proceedings on the ground of not being able to have a fair trial due to the failure of obtaining materials that should be disclosed.

2. Besides, it is stated in paragraph 4 of the Explanatory Memorandum of the Bill that the purpose of the amendment is not to create new substantive criminal offences which were not punishable under the laws of Hong Kong, but only to extend the territorial jurisdiction of the courts of Hong Kong to try offences (which have always been punishable under the laws of Hong Kong) committed wholly outside Hong Kong. We disagree with this viewpoint. Group C offences referred to in the Bill are currently applicable only to the relevant acts committed within Hong Kong. If these acts are committed outside Hong Kong, they do not constitute any offence under the laws of Hong Kong. From a technical perspective, although the Bill does not create any new independent offence, it extends the ambit of Group C offences under the laws of Hong Kong and brings a material change in the criminal law. It is by no means a mere extension of the jurisdiction of the courts of Hong Kong over Group C offences.

3. The Bill not only involves government policies but also brings about fundamental changes to the criminal law, system and policies of Hong Kong. Therefore, the HKSAR Government does not agree with the proposals of the Bill.

(Chinese translation)

回應《2019年刑事司法管轄權（修訂）條例草案》

尹兆堅議員提出《2019年刑事司法管轄權（修訂）條例草案》的其中一個目的，是用以處理台灣殺人案。就修訂刑事司法管轄權的建議，特區政府的立場是：

- (a) 擴大香港法院刑事司法管轄權的建議並不能處理台灣殺人案。台灣殺人案在香港境外發生，在現時香港法律下並不構成謀殺罪。由於《草案》的修訂法例建議將在香港境外殺人被視為香港法律下的謀殺罪，有關條文只能適用於法例生效後干犯的罪行，否則便會違反《香港人權法案》第 12 條關於「刑事罪及刑罰沒有追溯力」的規定；
- (b) 香港是個普通法法域，在刑事司法管轄權方面奉行「屬地原則」，一般只會在全體或部分犯罪行為發生在境內，才會行使司法管轄權。只有在特別情況下，例如是基於履行某些國際義務，才會賦予香港法院權力行使域外司法管轄權。譬如《刑事罪行條例》第 153P 條便賦予香港法院域外司法管轄權，審理身為香港永久性居民於境外干犯以未滿 16 歲兒童為對象的指明的性罪行。該條文的立法原意，是要打擊涉及兒童的性旅遊活動，以作為履行香港適用的聯合國《兒童權利公約》的其中一項措施。就《刑事司法管轄權條例》而言，條例訂明包括盜竊、欺詐、勒索等罪行，以及串謀企圖干犯這些罪行。即使部分犯罪行為在香港以外發生，如果某些有關事情是在香港境內發生，香港法院亦有司法管轄權，該條例亦符合香港一貫沿用的「屬地原則」。然而，若讓香港法院對香港永久性居民，就他們完全在境外干犯關乎謀殺的罪行使管轄權，便會偏離香港一貫沿用的「屬地原則」；及

(c) 就完全發生在香港境外的罪行行使管轄權，也涉及取證和檢控一方履行披露材料責任的實際問題。首先，由於犯罪行為發生在境外，特區政府必須向犯罪地的政府機關尋求司法互助，以取得證據，但能否成功是一個問題。即使拿到證據，證據材料能否符合香港法院接納證據的要求，是另一個重要的實際問題。此外，在刑事檢控的法律程序中，檢控一方有披露材料的責任。由於證據來自境外及大部份調查過程在犯罪地發生並由當地的執法機關負責，香港控方難以確保犯罪地機關會披露所有相關材料。儘管控方對此沒有過失，然而被告人可以基於沒有獲得應予披露材料引致無法得到公平審訊的理由，申請永久擱置法律程序。

2. 此外，《草案》摘要說明第 4 段提及，是次修訂的目的並非創建以往不能按香港法律懲處的實質性罪行，而只是把香港法院的地域司法管轄權擴展至完全在香港以外發生（而一向能按香港法律懲處）的罪行。我們不同意這個觀點。《草案》提述的丙類罪行，現時只適用於香港境內所作出的相關行為。如在境外作出相關行為，並不構成香港法律下的任何罪行。從技術角度而言，《草案》雖然沒有訂立新的獨立罪行，但擴展了丙類罪行在香港法律下的適用範圍，對刑法帶來實質的改變，絕非僅僅是擴展香港法院針對丙類罪行的司法管轄權。

3. 《草案》涉及政府政策，更會對香港的刑事法律、制度和政策帶來根本的改變。因此，特區政府不同意《草案》的建議。