

立法會
Legislative Council

Ref : CB2/PL/AJLS+SE

LC Paper No. CB(2) 1601/02-03
(These minutes have been seen
by the Administration)

**Panel on Security
and
Panel on Administration of Justice and Legal Services**

**Minutes of joint meeting held on Tuesday, 17 January 2003
at 8:30 am in the Chamber of the Legislative Council Building**

Members present : Panel on Security

- Hon LAU Kong-wah (Chairman)
- * Hon James TO Kun-sun (Deputy Chairman)
- * Hon Albert HO Chun-yan
- Hon CHEUNG Man-kwong
- Hon Howard YOUNG, JP
- Hon Michael MAK Kwok-fung
- Hon IP Kwok-him, JP
- * Hon Audrey EU Yuet-mee, SC, JP

Panel on Administration of Justice and Legal Services

- ◆ Hon Margaret NG (Chairman)
- Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman)
- Hon Martin LEE Chu-ming, SC, JP
- Hon CHAN Kam-lam, JP
- Hon Miriam LAU Kin-yee, JP
- Hon Emily LAU Wai-hing, JP
- Hon TAM Yiu-chung, GBS, JP

Members absent : Panel on Security

- Dr Hon LUI Ming-wah, JP
- Hon Mrs Selina CHOW LIANG Shuk-yee, GBS, JP
- Hon Andrew WONG Wang-fat, JP
- Hon WONG Yung-kan
- * Hon Ambrose LAU Hon-chuen, GBS, JP

- * Also a member of Panel on Administration of Justice and Legal Services
- ◆ Also a member of Panel on Security

Public Officers : Mr Timothy TONG, JP
attending Permanent Secretary for Security (Acting)

Mr Bob ALLCOCK, BBS, JP
Solicitor General

Mr Sidney CHAU
Senior Assistant Commissioner of Police

Mr Victor LO
Assistant Commissioner of Police

Mr Johann WONG
Principal Assistant Secretary for Security

Miss Adeline WAN
Senior Government Counsel

Clerk in : Mrs Sharon TONG
attendance Chief Assistant Secretary (2)1

Staff in : Mr Jimmy MA, JP
attendance Legal Adviser

Ms Bernice WONG
Assistant Legal Adviser 1

Mr Raymond LAM
Senior Assistant Secretary (2)5

Action

I. Election of Chairman

Miss Margaret NG was elected Chairman of the joint meeting.

Action

II. Consultation Document on Proposals to implement Article 23 of the Basic Law

(Consultation Document on Proposals to implement Article 23 of the Basic Law, LC Paper No. LS 6/02-03)

2. Members noted the third batch of the Administration's response, which was tabled at the meeting, to questions raised by Hon James TO on 4 December 2002.

(Post-meeting note : The paper tabled at the meeting was issued to members vide LC Paper No. CB(2) 962/02-03 on 20 January 2003.)

3. Members agreed to continue using the paper entitled "Existing legislation relevant to the Proposals to implement Article 23 of the Basic Law" prepared by the Legal Service Division of the Legislative Council Secretariat (LSD's paper) as a basis for discussion.

4. The Chairman asked about the coverage of "foreigner" referred to in the proposals relating to treason and whether it included armed forces based in Taiwan.

5. Principal Assistant Secretary for Security (PAS(S)) responded that "foreigner" was proposed in paragraph 2.9 of the Consultation Document to be defined along the lines of "armed forces which are under the direction and control of a foreign government or which are not based in the PRC".

6. Solicitor General (SG) added that the term "foreigner" would not include armed forces based in Taiwan. He said that besides the proposal in paragraph 2.9 of the Consultation Document, the concept of "foreigner" was also found in the Consultation Document in relation to levying war by joining forces with a foreigner with one of the intents set out in paragraph 2.8 of the Consultation Document. In this connection, the Administration was examining the question raised by some people whether the term "foreigner" in paragraph 2.8 of the Consultation Document would be defined in the same way as that proposed in paragraph 2.9 of the Consultation Document.

7. The Chairman asked whether "public enemy" referred to a country in a state of war with the People's Republic of China (PRC) or citizens of such a country. She also asked whether "assisting a public enemy at war" covered providing assistance to citizens of a country on humanitarian ground.

8. SG responded that the expression "public enemy" would be interpreted in accordance with the common law. He said that the Administration was examining the question of whether "assisting a public enemy at war" covered providing assistance to citizens of a country on humanitarian ground, although there was no common law authority to such effect.

9. Mr James TO asked whether calling for military officers of the troops of the United States (US) to observe a military exercise of the armed forces of Taiwan in

Action

order to examine their defence ability or urging a US warship to approach Taiwan waters amounted to "instigation of foreigner to invade the country".

10. PAS(S) responded that in determining whether an act amounted to an offence, the relevant legislation and case law would usually be examined. As explained by the Secretary for Security at the last joint meeting, the term "foreigner" did not include armed forces based in Taiwan. He said that there was no element of invasion in the situations referred to by Mr James TO. Thus, the acts would not amount to "instigation of foreigner to invade the country".

11. SG added that while US troops would be regarded as foreign armed forces, there must be encouragement of an invasion before an act could constitute "instigation of foreigner to invade the country". He pointed out that open hostilities to which sufficient publicity had been given could amount to a state of war. Assisting the enemy under such circumstances would therefore amount to an offence of "assisting a public enemy at war". However, armed forces based in Taiwan would not be regarded as a foreign enemy.

12. Mr James TO asked what would constitute invasion. He said that a number of Hong Kong Special Administrative Region (HKSAR) permanent residents were living in Taiwan. He asked whether such persons would commit "instigation of foreigner to invade the country", if they urged foreign troops to station in Taiwan.

13. SG undertook to provide a paper explaining the meaning of "invade". He considered that the situations referred to by Mr James TO would not constitute an invasion. Legal Adviser (LA) said that the meaning of "instigation" should also be examined. The Chairman requested the Administration to also provide a written response on the meaning of "instigation".

Adm

14. Mr LAU Kong-wah asked about the meaning of "In most cases, a foreign invader is the armed forces of a foreign country" in paragraph 2.9 of the Consultation Document.

15. PAS(S) responded that the sentence sought to explain that while a foreign invader would be the armed forces of a foreign country in most cases, there might be cases where the invaders were not armed forces of a foreign country but consisted of militias or mercenaries.

16. Mr LAU Kong-wah asked why the expression "entire territory of the state" was used in the last sentence of paragraph 2.9 of the Consultation Document.

17. PAS(S) responded that the expression sought to clarify that the territory of the state included the HKSAR, the Macau SAR and Taiwan.

18. The Chairman considered that the term "entire territory" might lead to the confusion that foreign armed forces had to invade the "entire" territory before

Action

constituting an invasion. SG responded that the Administration would take note of this point in the law drafting process.

Adm

19. PS for S(Atg) said that the major issue was what constituted "levying war". In this connection, SG undertook to provide a paper explaining the meaning of "levying war".

20. Mr LAU Kong-wah asked whether the Administration would consider listing out the activities that amounted to "levying war".

21. SG responded that "levying war" was an element in one of the three main categories of offences proposed under treason in the Consultation Document. As explained by the Administration at the last joint meeting on 7 January 2003, the meaning of "levying war" under the common law was not limited to the true "war" of international law. Quoting the explanations given in some law books on the meaning of levying war, he said that there were certain activities that amounted to levying war but were not "war" in the general sense. Treason could encompass acts which were serious threats to the state. Joining forces with a foreigner to levy war would be one of those acts.

22. Ms Audrey EU asked whether "assisting a public enemy at war" referred to assisting a country in a state of war with the PRC or the citizens of that country. She also asked whether a HKSAR permanent resident married to a foreign national of a country in a state of war with the PRC would be caught by the offence of assisting a public enemy at war, if he or she provided money to maintain the living of his or her spouse. The Chairman added that the meaning of "assisting a public enemy at war" was very broad. The Administration should explain its policy intent in respect of "assisting a public enemy at war" and the meaning of "assisting".

23. PS for S (Atg) responded that an act would count as assistance if it strengthened the enemy or weakened the state's capability to resist the enemy.

24. SG added that under the common law, providing assistance to a public enemy referred to acts which would assist the enemy action. Marrying a national of an enemy country would not strengthen the enemy action and thus would not amount to "assisting a public enemy at war". He however pointed out that after a state of war was declared by a country, trading with an enemy would usually be declared illegal by statute by the country.

25. The Chairman and Ms Audrey EU asked about the acts that would constitute "assisting" and therefore would be prohibited. SG responded that it was not possible to list out all acts amounting to "assisting". Nevertheless, the Administration would provide a paper explaining the term "assisting". The Chairman requested the Administration to also explain in the paper whether it would be an offence to trade with a country when there was no declaration of war and trading with the enemy country was not declared illegal by statute.

Adm

Action

26. Mr Albert HO considered that the meaning of "assisting a public enemy at war" was very broad. He asked whether a HKSAR permanent resident of foreign nationality and whose country was at war with the state might commit the offence of performing an act to strengthen the enemy when paying tax to his own country.

27. PAS(S) responded that the offence of "assisting a public enemy at war" was generally found in many other common law jurisdictions. He said that the Administration welcomed suggestions on the acts that should be excluded from the proposed offence.

28. Mr Albert HO and Mr CHEUNG Man-kwong considered that the Administration should inform Members of its policy intent and the acts to be prohibited rather than asking Members to suggest acts that should be excluded from the proposal. PS for S(Atg) reiterated that an act would amount to "assistance" if it strengthened the enemy or weakened the State's capability to resist the enemy.

29. SG responded that the Administration's proposal was intended for dealing with acts commonly regarded as directly assisting the war effort of the public enemy. He considered that the payment of tax by a foreign national to his own country was only a fulfilment of his obligations to his own country. This would not amount to "assisting a public enemy at war". He undertook to explain in the Administration's paper the common law authority regarding how the line was drawn between activities that assisted the enemy's war effort and other activities.

Adm

30. Referring to paragraph 2.10 of the Consultation Document, LA commented that there appeared to be a discrepancy in the English and Chinese versions of the last sentence in that while the English version referred to the purpose of an act, the Chinese version referred to the act itself. The Chairman requested the Administration to also clarify its policy intent in its paper to be provided.

Adm

31. Mr CHEUNG Man-kwong said that since the proposed definition of war was very broad and open hostilities referred to in paragraph 2.10 of the Consultation Document could last for a very long period of time, the proposal might have an impact on acts found in the daily life of an ordinary person, such as the payment of tax. He considered that the Administration should pay attention to this point in the enactment of legislation.

32. PS for S(Atg) responded that the proposal was not directed at acts found in the daily life of an ordinary person.

33. Referring to paragraph 2.9 of the Consultation Document, Mr TSANG Yok-sing asked whether the term "foreigner" could be simply defined as armed forces not based in the PRC. He also asked whether invaders only referred to armed forces.

Action

34. PAS(S) replied in the affirmative. He said that the Administration would have regard to this point in the law drafting process.

35. Ms Emily LAU said that there were reports that the Secretary for Home Affairs (SHA) had, in his recent visit to the United Kingdom (UK), gauged the views of HKSAR permanent residents living in UK on the Village Representatives (VR) Election Bill. She asked whether the Security Bureau would consult overseas HKSAR permanent residents on its proposals to implement BL23. She also asked whether an assessment had been made on the number of HKSAR permanent residents living overseas who would be affected by the proposals to implement BL23.

36. PS for S(Atg) responded that the proposals to implement BL23 and those in the VR Election Bill were not comparable. He stressed that proposals to implement BL23 would not affect the daily life of an ordinary person. Marrying a foreigner would not amount to treason. He said that there were no statistics on HKSAR permanent residents living overseas who would be affected by the proposals to implement BL23. However, the Administration believed that overseas residents would be less affected by the proposed legislation to implement BL23 than the VR Election Bill. Ms Emily LAU considered that the Administration should provide an estimate of the number of such persons affected.

37. Mr Martin LEE considered that the effect of the proposals to implement BL23 on the life of persons were more serious than those in the VR Election Bill. He said that a person could be sentenced to life imprisonment for treason offences while the VR Election Bill would only affect a person's chance of being elected as a VR. PS for S(Atg) responded that getting married to a foreigner or paying tax to a foreign country would not amount to a treason offence. He said that it might be more appropriate to discuss the issue when the draft legislative provisions were available. Mr LEE said that the major issue was the lack of a white bill. The Chairman said that if a piece of proposed legislation was suggested to have extra-territorial effect, the Administration should assess the number of overseas residents affected and consult these persons. PS for S(Atg) undertook to provide a written response.

Adm

38. Ms Emily LAU asked whether the Administration would consider withdrawing the proposal to create the offence of assisting a public enemy at war.

39. SG noted the concerns of Ms LAU. He asked whether Members considered that the proposal to prohibit the serious offence of assisting a public enemy at war should be dropped. Ms LAU said that the proposal should be dropped, if it was difficult for one to understand.

40. Referring to paragraph 2.9 of the Consultation Document, Mr LAU Kong-wah requested the Administration to clarify whether "foreign invader" only referred to armed forces not based in the PRC. Referring to paragraph 2.10 of the Consultation Document, he said that the general concern was whether acts found in the daily life of an ordinary person would be affected by the proposals at a time of war. He asked

Action

whether the expression "協助公敵" in the last sentence of the paragraph should be amended as "協助敵對國家". Ms Audrey EU concurred with Mr LAU's view regarding the amendment of the expression "協助公敵".

41. PAS(S) responded that a foreign invader included not only the armed forces of a foreign country, but also militias or mercenaries engaged by a hostile foreign entity. Thus, the Administration proposed that the term "foreigner" should be defined along the lines of armed forces which were under the direction and control of a foreign government or which were not based in the PRC. He said that the Administration would seek to reflect its policy intent in the draft legislative provisions.

42. Ms Audrey EU asked whether treason offences were set out in paragraph 2.8 of the Consultation Document while instigation of foreigner to invade the country, assisting a public enemy at war and non-violent threats were other proposed offences relating to treason.

43. SG responded that the proposed treason offences could be classified into three main categories, namely, levying war against the state, instigation of foreigner to invade the country and assisting a public enemy at war.

44. Referring to paragraph 2.12 of the Consultation Document, Ms Audrey EU asked whether the term "non-violent threats" appearing in the heading of the paragraph was the same as "non-violent attack". She also asked whether the term "invasion" covered invasion by electronic means and whether the Administration would consider the suggestion that electronic sabotage should be dealt with separately instead of under treason.

45. PAS(S) responded that paragraph 2.12 of the Consultation Document sought to explain that in so far as a non-violent attack such as electronic sabotage was part of a larger planned operation by which foreign forces levied war or invaded the territory of the state, it would be caught by the proposed treason offences. The Administration had no intention to include electronic sabotage under treason offences.

46. The Chairman said that the Administration had stated during the meeting that it intended to codify the case law. She considered that the Administration should clarify whether it intended to codify the case law or enact its proposals into statute.

47. SG responded that the principle adopted by the Administration was to use common law concepts as far as possible because they were part of the legal system in Hong Kong, familiar to Hong Kong and well respected. Generally speaking, the Administration was not proposing to codify the concepts in the case law in statutory form. The Administration's approach was to use statutory terminology which was fairly common throughout the common law world. This would allow the courts and others to refer to precedents built up on that terminology in the common law.

Action

48. Ms Emily LAU requested the Administration to inform Members of the number of the Consultation Documents distributed overseas and the number of submissions received therefrom. She also requested the Administration to provide the views received from overseas Hong Kong residents on the proposals to implement BL23 during SHA's trip to UK. PS for S(Atg) agreed to provide a written response.

Adm

49. Mr James TO said that many HKSAR permanent residents living overseas were not aware of the proposed extra-territorial effect of legislation to implement BL23. He considered that if the Administration had consulted overseas HKSAR permanent residents on the VR Election Bill, there was no reason why it should not consult such persons on the proposals to implement BL23. He added that there were many HKSAR permanent residents living in Taiwan. In this connection, he asked whether expressing support for the territory of Taiwan to be covered under the missile defence system of the US would amount to "assisting a public enemy at war".

50. Mr Albert HO asked about the meaning of "joining forces" in paragraph 2.8 of the Consultation Document.

51. The Chairman requested the Administration to clarify the permanent residency status of HKSAR residents who had settled abroad.

Adm

52. The Chairman requested the Administration to provide a written response to outstanding issues raised by Members at the meeting. She asked the Clerk to draw up a list of the issues for the Administration's response.

Clerk

III. Date of next meeting

53. Members noted that the Administration would publish a compendium of submissions received during the public consultation period by the end of January 2003. As most of the members present indicated that they would not be available to attend the proposed meeting slots on 27, 28 and 29 January 2003, members agreed that the next joint meeting be scheduled for Thursday, 6 February 2003 at 10:45 am to discuss the compendium.

54. The meeting ended at 10:40 am.