

**National Security (Legislative Provisions) Bill:
Section 3(2) of the Official Secrets Ordinance**

This paper explains:

- (1) whether section 3(2) of the Official Secrets Ordinance (Cap 521) (“OSO”) is subject to Article 39 of the Basic Law; and
- (2) whether the section is in contravention of human rights and the common law principle of presumption of innocence.

2. Article 8 of the Basic Law provides that the laws previously in force in Hong Kong, such as the OSO, shall be maintained, except for any that contravene the Basic Law. Article 160 further provides that, if any laws are discovered to be in contravention of the Basic Law, they shall be amended or cease to have force in accordance with the procedure as prescribed in the Basic Law. It is therefore clear that section 3(2) of the OSO is subject to Article 39 of the Basic Law and the ICCPR as applied to Hong Kong.

3. The issue as to whether section 3(2) of OSO was consistent with the presumption of innocence was well canvassed when the Official Secrets Bill was examined by the Bill Committee in early 1997. The provision reads:-

“In any proceedings against a person for an offence under this section, it shall not be necessary to show that he was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong.”

4. This provision is modeled on the first part of section 1(2) of the Official Secrets Act 1911 in the UK. Virtually identical provisions also exist in the official secrets legislation of Australia¹ and Singapore².

¹ Section 78(2)(a) of the Crimes Act 1914.

² Section 3(6) of the Official Secrets Act.

5. Both the common law principle of presumption of innocence and Article 14(2) of the ICCPR require, in general, that the prosecution should prove the guilt of the accused beyond reasonable doubt. Whether an exception to this general rule (e.g. a reverse onus provision) is consistent with ICCPR Article 14(2) will depend on whether the substantive effect of a legislative provision is that it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed³.

6. Section 3(2) of the OSO does not create any presumption and it does not impose any burden of proof (not even an evidential burden) on the accused. This provision is just a re-statement of laws about circumstantial evidence. It states that in proving the accused's prejudicial purpose, there is no need to prove a particular act and it could be established circumstantially. The burden of proving, beyond reasonable doubt, that the accused committed all elements of the offence of spying, including the element of acting "for a purpose prejudicial to the safety or interests of the [PRC] or Hong Kong" rests with the prosecution.

7. The Australian Commonwealth Criminal Law Review Committee, when examining the Australian equivalent of section 3(2), also indicated that the provision did not appear to change significantly the ordinary rules as to proof by the prosecution. Even without the provision, it would not be necessary to prove the defendant guilty of a particular act tending to show such a prejudicial purpose and in any event the existence of the purpose could be established by the circumstances of the case and from the defendant's conduct⁴. There is nothing unusual about a prosecution based on circumstantial evidence.

8. As to the reference to the defendant's "known character as proved" in section 3(2), it is strongly arguable that "as proved" means as proved in accordance with the ordinary common law rules. The reference is not intended to overrule or vary the general rules governing the admission of evidence of character of the defendant⁵. The effect of these rules in the present context would be that the prosecution could not adduce evidence of the character of the defendant to show that he or she is the sort of person to commit an offence

³ *AG v Lee Kwong Kut* (1993) AC 951.

⁴ Para 42.36 of the *Review of Commonwealth Criminal Law – Fifth Interim Report* (June 1991).

⁵ The Australian Review also adopted similar analysis, see *ibid*, at para 42.38.

under section 3(1) unless the evidence was highly probative. The question of admissibility is a matter for the court to decide in accordance with ordinary principles.

9. It is an established rule of construction that legislation is presumed not to alter common law principles except by express words or necessary implication. There is another rule of construction to the effect that a statutory provision creating a serious criminal offence must be construed strictly and that any ambiguity must be resolved in favour of the defendant. Given these rules, we believe that section 3(2) of OSO would be interpreted consistently with ordinary common law principles and on that basis is consistent with Article 14(2) of the ICCPR.

Department of Justice
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