

**National Security (Legislative Provisions) Bill:
“Assisting public enemy”**

Introduction

This paper sets out the Administration's response in respect of the questions in relation to the offence of “assisting public enemy” under the head of treason, as raised during the meetings of the Bills Committee on 1 April 2003 and 8 April 2003.

Assisting nationals of an enemy country to leave their country

2. Paper No. 1 refers to a case which decides that assisting nationals of an enemy country to leave one's country could constitute “assisting a public enemy”. This case, *Re Schaefer*, was provided earlier (Paper No. 14).

3. The Canadian case reflects the common law position that assisting a public enemy includes assisting the nationals of the enemy country. Under the Canadian law of treason, there is also no requirement that the assistance to the public enemy needed to be given with an intention to prejudice the position of the British Empire in the war.

4. It is not considered that the facts of Schaefer would amount to an offence under the proposed section 2(1)(c) of the Crimes Ordinance, since it appears that the defendant did not -

- (a) assist the government of the enemy country; or the foreign armed forces of the enemy country; nor did he
- (b) intend to prejudice his own country's position in the war.

Both requirements are present in the Bill.

Offences against the State in Singapore

5. Singapore does not have an offence similar to the formulation of “assisting public enemy.” Nevertheless, acts of assisting public enemy with an intent to prejudice the position of the state in the war would likely to be covered by “abetting the waging of war” against the Government (section 121 of the Singaporean Penal Code).

Paying taxes or being enlisted in a foreign army

6. The question asked was “whether a Chinese national who was a HKSAR permanent resident and acquired a foreign nationality would be caught by the proposed offence of treason when he paid tax to the foreign country or was enlisted to the army of that foreign country at the time of war.”

7. At law, the mere fact that a person does a criminal act in obedience to the order of a duly constituted superior does not of itself excuse the person who does it from criminal liability. However, in some situations, a person acting under superior orders which he carries out in good faith may lack the mental element required for criminal liability.

8. Regarding the particular situations cited, whether such acts outside Hong Kong would constitute a treason offence would depend on the circumstances of the case, in particular -

- (a) whether the person is a Chinese national, in accordance with the relevant laws as discussed in Paper No. 25. Outside Hong Kong, the treason offence is only applicable to a HKSAR permanent resident who is a Chinese national; and
- (b) whether such acts themselves would constitute the offence, with the corresponding mental elements satisfied. For the offence of “assisting public enemy”, the mental element of, *inter alia*, prejudicing his own country's position in the war needs to be proved beyond reasonable doubt by the prosecution. People paying tax under compulsion and in good faith without the intent to prejudice one's own country may lack such a mental element. Similarly, those enlisted in the enemy army at times of war without the necessary intention element of treason may not be caught.

Security Bureau
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