

《國家安全(立法條文)條例草案》：  
《官方機密條例》第 II 部

本文討論 -

- (1) 條例草案對《官方機密條例》(“條例”)第 II 部的法律影響；
- (2) 條例第 3(2)條的效力；以及
- (3) 條例第 6 條所涵蓋的範圍。

## 第 II 部

2. 條例第 II 部是關於間諜活動的。有議員要求政府解釋，條例草案的制定，是否會被當作立法會確認或贊同第 II 部的條文。基於以下理由，政府不認為會有這個情況。

3. 《實施基本法第二十三條諮詢文件》討論了有關竊取國家機密的事項(見第六章)。就諜報活動而言，諮詢文件(第 6.21 段)說明：“現行條例給予的保護已經足夠，因為條例已涵蓋取得、轉傳、處理和披露從諜報活動取得的資料”。政府沒有建議修訂條例的第 II 部。

4. 條例草案沒有建議修訂、廢除或重新制定第 II 部的任何條文，因而也沒有要求立法會審議第 II 部的任何條文。若立法會議決通過條例第 III 部的修訂，這並不表示立法會確認第 II 部的條文。如關乎某條例的條例草案並沒有包含任何與該條例某部有關的條文，則該條例中該部的某條文不作修改，不能被視作立法機關贊同有關條文。

5. 我們可透過以下的問題來驗證上文所述：如有人要求法庭詮釋有關條文或要求法庭對有關條文是否有效作出裁決，法庭會如何處理？在詮釋該條文時，法庭會應用既定的法例釋義原則來確定該條文的法律涵義，其中一項原則是應留意法例的制定史。至於有說法指上文所述及的立法機關不作修訂的情況也會使條文涵義改變，這說法是沒有法律典據支持的。即使有關條文以綜合方式重新制定而條文沒有作出修訂，有關條文的法律涵義亦沒有改變(見 Bennion 著的《法例釋義》(第 3 版)第 464 頁)。

6. 若有人質疑某一相關條文不符合《基本法》保障人權的規定，這可能引出保障個人權益的需要與保障(舉例說)國家安全的需要兩者之間是否已取得合理平衡的問題。在這個情況下，法院須適當地考慮立法機關就如何才是恰當的平衡所作出的決定(見終審法院在 *Lau Cheong v HKSAR* [2002] 2 HKLRD 612 一案的判決)。

7. 條例第 II 部的條文，反映前立法局於 1997 年 6 月通過條例時就該部事宜所作的決定。政府沒有要求今天的立法會審定前立法局於 1997 年 6 月所作的平衡是否恰當。即使現時的條例草案獲得通過，法庭亦須參考立法機關於 1997 年就條例第 II 部所作的決定。

### 第 3(2)條

8. 政府曾在 42 號文件中討論條例第 3(2)條的法律效力，並在討論過程中，提到澳大利亞聯邦刑事法檢討委員會(Australian Commonwealth Criminal Law Review Committee)曾經表示，澳大利亞法律中的相若條文，看來沒有重大改變有關控方舉證的一般規則。

9. 現應法案委員會的要求，把檢討委員會報告的相關部分，連同有關的澳大利亞法例條文(即《1914 年刑事罪行法令》(第 78(2)(a)條)載於附件。

10. 檢討委員會在第 42.40 段提到，*假如*(與檢討委員會在第 42.36 段所論述的相反)該條文容許以不會獲接納的證據來推論被告人的目的，便可能出現人權問題。政府擬於此指出，在澳大利亞，人權沒有得到憲法的保障。但在香港，由於《基本法》第三十九條的緣故，法院是不會在違反《公民權利和政治權利國際公約》適用於香港的規定的情況下，執行條例第 3(2)條。

11. 在擬備 42 號文件後，政府獲悉澳大利亞的《1914 年刑事罪行法令》第 78 條已被廢除，並由在 2002 年 10 月 31 日獲得皇室批准的法例所取代。新的罪行並沒有與條例第 3(2)條相若的條文。

12. 基於 42 號文件所述的理由，政府認為第 3(2)條符合保障人權的規定。再者，由於條例草案沒有建議修訂條例的第 II 部，政府不認為法案委員會的審議範圍應涵蓋第 3(2)條。

## 第 6 條

### 13. 條例第 6(1)條訂明：

“任何人作出以下作為或有以下不作為，即屬犯罪 -

- (1) 在沒有保留官方文件(不論是否已完成或已為供使用而發出)的權利之時或在保留該等文件屬違反其責任之時，為任何有損聯合王國或香港的安全或利益的目的而保留該等文件；或沒有遵從由聯合王國政府任何部門、香港政府任何部門或獲該等部門授權的任何人就交回或處置該等文件而發出的任何指示；
- (2) 容許另一人管有任何僅為供他一人使用而發出的官方文件；或傳達任何如此發出的機密的官方代碼或通行碼；或在沒有合法權限或辯解的情況下，管有任何為供任何其他人士使用而發出的官方文件或機密的官方代碼或通行碼；或在藉拾獲或以其他方式而取得由某人或某主管當局發出或為供某人或某主管當局使用而發出的任何官方文件的管有後，忽略或沒有將該文件歸還該人、該主管當局或警務人員；或
- (3) 在沒有合法權限或辯解的情況下，製造、售賣或為售賣而管有第 5(1)(e)或(f)條所述的任何印模、印章或印戳。”

14. 條例並沒有對第 6(1)條的“官方文件”一詞下定義。因此，第 6 條所涵蓋的範圍看來甚廣。因而或許有需要界定“官方文件”一詞，把該條文所涵蓋的文件範圍收窄，專指那些若未獲授權而使用(等)便會對中華人民共和國或香港的安全或利益尤具損害性的文件(比較第 5 條)。

15. 由於條例草案並沒有修訂條例第 II 部，政府現時不擬考慮修訂第 6 條，但會建議把此事轉交立法會保安事務委員會詳細考慮。

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Paragraph 78(2)(a)

42.35 Paragraph 78(2)(a) is modelled on sub-section 1(2) of the Official Secrets Act 1911 (U.K.), but there is no equivalent in the New Zealand provision. The present provisions of paragraph 78(2)(a) would require some adaption to fit in with the equivalent of sub-section 78(1) rewritten as proposed above, but whether a provision broadly corresponding to paragraph 78(2)(a) should be included must now be considered.

42.36 Discussing paragraph 78(2)(a), the Discussion Paper said that, except in so far as it provides that the court may conclude from "the known character as proved" of the defendant that his or her purpose was a purpose intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions, it did not appear to change significantly the ordinary rules as to proof by the prosecution. Apart from that paragraph, it would not be necessary to prove the defendant guilty of a particular act tending to show such a purpose and in any event the existence of the purpose could be established by the circumstances of the case and from the defendant's conduct.

42.37 The Discussion Paper said that what was intended to be achieved by reference to "known character as proved" was far from clear. There was of course the general rule that the prosecution may only call evidence as to the bad character of the defendant when he or she has put his or her character in issue: Cross on Evidence<sup>(4)</sup>. Another general rule was that the prosecution may not adduce evidence of the character or of the misconduct of the accused on other occasions if that evidence shows he or she has a propensity to commit crime or a crime of a particular kind, or that he or she is the sort of person likely to have committed the crime with which he or she is charged unless the evidence is highly probative of a fact in issue: Cross on Evidence<sup>(5)</sup>, Perry v. The Queen<sup>(6)</sup>, Sutton v. The Queen<sup>(7)</sup> and Noch v. The Queen<sup>(8)</sup>.

42.38 Reading paragraph 78(2)(a) alone, the Discussion Paper said it was arguable that it was directed to inferences that may be drawn from evidence duly admitted, rather than to making admissible what was not otherwise admissible. Sub-section 78(3) (which did not appear in the original Act), however, appears to assume that evidence may be made admissible by virtue of paragraph (2)(a). Nevertheless, it is open to debate whether a sufficiently clear implication can be drawn from the words of the section that it was intended to overrule or vary the general rules governing the admission of evidence of the character or disposition of the defendant: compare Sorby v. The Commonwealth<sup>(9)</sup>.

42.39 It should also be observed that motive must be distinguished from character and, even in the absence of paragraph 78(2)(a), it would be open to the prosecution to adduce evidence of the motive of the defendant, for instance, that he or she owed allegiance or loyalty to the enemy or foreign power to be benefited or that he or she wished to harm this country: see Plomp v. The Queen<sup>(10)</sup> and R. v. Murphy<sup>(11)</sup>.

42.40 In the result, the Discussion Paper said, the intention and effect of paragraph 78(2)(a) was far from clear and there was a possible view that it did not significantly facilitate the task of the prosecution. Further, if the effect was that it made admissible evidence of the general character of the defendant, including unrelated past misconduct on other occasions, although that evidence would be inadmissible under general rules, and allowed the defendant's purpose to be inferred from that evidence, a question would arise (as noted in paragraph 3.53 of Discussion Paper No. 15 (Human Rights in Relation to the Commonwealth Criminal Law) in relation to section 24AB) of inconsistency with Article 14(2) of the International Covenant on Civil and Political Rights (presumption of innocence). The Human Rights Commission established under the Human Rights Commission Act 1981 in its 1983 Report on its review of the Crimes Act considered that paragraph 78(2)(a) "considerably erodes the principle contained in Article 14(2) and should be omitted".

42.41 It was doubtful that the provision had ever been applied in Australia; certainly not in any reported case. Having regard to all these considerations, the Review Committee said in the Discussion Paper that it was disposed to think that paragraph 78(2)(a) should not be enacted in the future consolidating law. Submissions on this issue were invited.

#### Views expressed in submissions

42.42 Submissions addressing this issue, other than that of the A.F.P., favoured repeal of this provision. The A.F.P. said that greater clarity needed to be given to the matters covered by paragraph 78(2)(a), but thought that its thrust should be retained in the future consolidating law.

#### The Review Committee's conclusions

42.43 For the reasons indicated in the Discussion Paper, the Review Committee recommends that no equivalents of paragraph 78(2)(a) or of the associated provisions, sub-sections 78(3) and (4), appear in the future consolidating law.

#### Paragraph 78(2)(b)

42.44 Paragraph 78(2)(b) did not appear in the original Act being inserted in 1960. No equivalent appears in the proposed New Zealand provision. Proof by the prosecution that a sketch, plan, photograph, model, cipher, note, document, article or information relating to or used in a prohibited place or anything in such a place was made, collected, recorded, used, possessed or communicated by a person not acting under lawful authority would in effect place the onus on the defendant to prove that he or she had not made the sketch or other things for a purpose intended to be prejudicial to the safety or defence of the Commonwealth.



## CRIMES ACT 1914 SECT 78

### 78 Espionage and similar activities

- (1) If a person with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen's dominions:
- (a) makes a sketch, plan, photograph, model, cipher, note, document or article that is likely to be, might be or is intended to be directly or indirectly useful to an enemy or a foreign power;
  - (b) obtains, collects, records, uses, has in his possession or communicates to another person a sketch, plan, photograph, model, cipher, note, document, article or information that is likely to be, might be or is intended to be directly or indirectly useful to an enemy or a foreign power; or
  - (c) approaches, is in the neighbourhood of, is in, enters, inspects or passes over a prohibited place;
- he shall be guilty of an indictable offence.

Penalty: Imprisonment for 7 years.

- (2) On a prosecution under this section:
- (a) it is not necessary to show that the accused person was guilty of a particular act tending to show an intention to prejudice the safety or defence of the Commonwealth or a part of the Queen's dominions and, notwithstanding that such an act is not proved against him, he may be convicted if, from the circumstances of the case, from his conduct or from his known character as proved, it appears that his intention was to prejudice the safety or defence of the Commonwealth or a part of the Queen's dominions; and
  - (b) if any sketch, plan, photograph, model, cipher, note, document, article or information relating to or used in a prohibited place, or anything in such a place, was made, obtained, collected, recorded, used, possessed or communicated by any person other than a person acting under lawful authority, it shall, unless the contrary is proved, be deemed to have been made, obtained, collected, recorded, used, possessed or communicated with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen's dominions.
- (3) On a prosecution under this section, evidence is not admissible by virtue of paragraph (2)(a) if the magistrate exercising jurisdiction with respect to the examination and commitment for trial of the defendant, or the judge presiding at the trial, as the case may be, is of the opinion that that evidence, if admitted:
- (a) would not tend to show that the defendant intended to prejudice the safety or defence of the Commonwealth or a part of the Queen's dominions; or
  - (b) would, having regard to all the circumstances of the case and notwithstanding subsection (4), prejudice the fair trial of the defendant.
- (4) If evidence referred to in subsection (3) is admitted at the trial, the judge shall direct the jury that the evidence may be taken into account by the jury only on the question whether the defendant intended to prejudice the

safety or defence of the Commonwealth or a part of the Queen's dominions and must be disregarded by the jury in relation to any other question.

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