Paper No. 20

National Security (Legislative Provisions) Bill : unauthorized disclosure of protected information and the public interest

This paper explains why the Administration does not consider it appropriate to introduce a public interest defence in respect of the offence of unauthorized disclosure of protected information.

UK Background

2. Hong Kong's law in this area is based on legislation enacted in the UK in 1989, which does not include such a defence. The UK legislation followed a White Paper, published in 1988, which expressly considered and rejected the idea of a public interest defence (see annex 1).

3. There were two reasons given for rejecting such a defence. First, a central objective of the reforms was to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the intention was to apply criminal sanctions only where this was clearly required in the public interest. No person should be allowed to disclose information which he knows may, for example, lead to loss of life simply because he has a general reason of a public character for doing so.

4. The issue was also discussed during the Parlimentary debates preceding the enactment of the English legislation. Some of the reasons why such a defence was rejected by Parliament are set out in annex 2.

Hong Kong law

5. Hong Kong's laws on this subject were enacted in 1997. The question whether a public interest defence should be provided was discussed in the Bills Committee and in the debates in the full Council. Eventually, no such defence was provided. Some of the reasons given for rejecting the defence are set out in annex 3.

Human rights

6. In the UK, following the enactment of the Human Rights Act in 1998, questions were raised as to whether offences relating to unauthorized disclosure could be reconciled with the guarantee of freedom of

expression. The concern was focused, in particular, on the restrictions that applied to security personnel, who can commit an offence of unauthorized disclosure even if the disclosure is not damaging. It was also focused on the perceived need to allow "whistleblowers" to reveal public wrongdoing.

Whistleblowers

7. Those concerns were answered by the House of Lords in its recent decision in *Shayler*. The relevant offence was held to be consistent with the Human Rights Act. The judgment contained a very detailed account of the need to balance freedom of expression and national security. The court considered that the law provides sufficient protection for a "whistleblower" to reveal wrongdoings in appropriate cases.

8. It is considered that a similar result would be achieved if Hong Kong legislation were challenged on human rights grounds. As a result, it is not considered that even a limited form of "whistleblower" defence is needed.

9. Some commentators have recommended a limited form of defence along the lines of section 30(3) of the Prevention of Bribery Ordinance (Cap 201). Section 30(1) makes it an offence for someone, "without lawful authority or reasonable excuse", to disclose the identity of a person who is being investigated in respect of an offence alleged or suspected to have been committed under Part II of Cap 201. Subsection (3) provides that –

> "Without affecting the generality of the expression 'reasonable excuse' in subsection (1) a person has a reasonable excuse as regards disclosure of any of the descriptions mentioned in that subsection if, but only to the extent that, the disclosure reveals –
>
> (a) any unlawful activity, abuse of power, serious neglect of duty, or other serious misconduct by the Commissioner, the Deputy Commissioner or any officer of the Commission; or
>
> (b) a serious threat to public order or to the security of Hong Kong or to the health or safety of the public."

10. The offence under section 30 of Cap 201 differs from offences of unauthorized disclosure under the Official Secrets Ordinance in that an offence under section 30 can be committed even if it has no damaging effect. In those circumstances, it may be reasonable to allow a "whistleblower" defence to mitigate the strictness of the offence.

However, offences of unauthorized disclosure generally involve a damaging test which ensures that an offence is only committed where the public interest is harmed. Even in a case like *Shayler*, where an unauthorized disclosure by a member of the security and intelligence services can be an offence even if it is not damaging, the courts have held that the law provides sufficient protection for whistleblowers.

Proposed amendments

11. It is proposed to leave the Official Secrets Ordinance largely as it is. The two material changes in respect of unauthorized disclosures are –

    (1) to plug the loophole in respect of the unauthorized disclosure of protected information acquired by means of illegal access; and

    (2) to narrow the type of information relating to the relationship between Hong Kong and the Central Authorities that is protected from unauthorized disclosure.

12. Neither amendment would create justifications for a public interest defence that were not previously considered and rejected.

13. It is emphasized that a person who makes an unauthorized disclosure of protected information would only commit an offence if he knows, or has reasonable grounds to believe, that –

    (1) it is protected information;

    (2) it has been acquired by means of illegal access or had been the subject of an unauthorized disclosure; and

    (3) the disclosure by him is "damaging" as defined.

14. In the case of information relating to Hong Kong affairs that is within the responsibility of the Central Authorities, a disclosure is only damaging if it endangers, or would be likely to endanger "national security" i.e. the safeguarding of the territorial integrity and the independence of the PRC.

15. The Administration does not believe that it can ever be in the public interest to make a disclosure that is damaging in that way.

Department of Justice
April 2003

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Annex 1

Extract from

Reform of Section 2 of the Official Secrets Act 1911

Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
June 1988

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Cm.408

Cm 408

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A Public Interest Defence

58. Suggestions have been made that the law should provide a general defence that disclosure was in the public interest. The object would be to enable the courts to consider the benefit of the unauthorised disclosure of particular information, and the motives of the person disclosing it, as well as the harm which it was likely to cause. It is suggested, in particular, that such a defence is necessary in order to enable suggestions of misconduct or malpractice to be properly investigated or brought to public attention.

59. The Government recognises that some people who make unauthorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle which the law follows is that the criminality of what people do ought not to depend on their ultimate motives—though these may be a factor to be taken into account in sentencing—but on the nature and degree of the harm which their acts may cause.

60. In the Government's view, there are good grounds for not departing from the general model in this context; and two features of the present proposals particularly reinforce this conclusion. First, a central objective of reform is to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the proposals in this White Paper are designed to concentrate the protection of the criminal law on information which demonstrably requires its protection in the public interest. It cannot be acceptable that a person can lawfully disclose information which he knows may, for example, lead to loss of life simply because he conceives that he has a general reason of a public character for doing so.

61. So far as the criminal law relating to the protection of official information is concerned, therefore, the Government is of the mind that there should be no general public interest defence and that any argument as to the effect of disclosure on the public interest should take place within the context of the proposed damage tests where applicable.

Annex 2

Reasons for rejecting a public interest defence

UK Hansard

1. "The Bill provides that the jury shall consider whether such public interest tests have been met in respect of an individual case. The public interest will be at the heart of the case. The defendant will be able to argue that his disclosure either did not satisfy any relevant harm test or that he had no reason to know that it did. ... Many supporters of a public interest defence have argued that a person may make a disclosure which does good and not harm, or that any harm done may be so modest as not to merit a criminal sanction. The Bill invites Parliament to establish the few areas and the few cases in which a disclosure always causes harm and, in all the other areas, provides a harm test which allows the defendant to make precisely these points. That is what a harm test is all about and that is why we have included it in the Bill. ... If people think that such arguments should be allowed, that the court should be left to balance some sort of competing interest, that it is all right that lives should be lost, or the national interest endangered, so long as one public servant's perception of maladministration, wrongdoing or misconduct can be aired in the press, we are close to saying that these are not matters which can be regulated by the criminal law. We would be close to saying that it is more properly a matter of dispute between the Government and one of their employees whether a disclosure is in the public interest and that it is a matter that should be settled by a civil court on the balance of probabilities."

2. "In the area of defence, because of the harm test, the prosecution would have to prove that the disclosure was likely to prejudice the capability of the armed forces and that the defendant knew that that was likely. ... I believe that no responsible person should argue that, while he knew that his disclosure would prejudice the capabilities of the armed forces to defend us, it was justified on other grounds - that he believed, for example, that it was in the public interest that the misconduct of a Minister should be exposed or that the Government's defence policy should be reversed. That is the nature of the overarching public interest defence which some people propose."

3. "Does the right hon. and learned Gentleman agree that one major problem with the public interest defence is that a defendant can agree that he has caused positive harm to the national interest, but claim that he has done so in the public interest? He may argue that the harm he has done should be considered in the light of the good that he has achieved.

However, if positive harm is done to the public interest, the public interest is not being served."

4. "However, a defendant could not argue that, although his disclosure did cause a degree of harm, because it also did some good the harm did not matter. That has never been a principle of English criminal law, so the Bill is consistent with legal history. ... On the question of prior publication, under the harm test a defendant could argue that he had caused no harm beyond that created by the earlier publication. It would be for the prosecution to prove otherwise, and the standard of proof would have to be such that a jury was certain that an offence had been committed. The prosecution must overcome these hurdles."

5. "No one could be convicted of repeating information on security, intelligence, defence or international relations unless the prosecution could prove that the disclosure was likely to cause specified harm to the public interest and that the defendant knew it. It is a formidable test that the prosecution has to overcome. ... Similarly, no one could be convicted for disclosing information that would be useful to criminals unless the prosecution could show that the information was still likely - this is important - to be useful despite its prior publication. The defence of prior publication is therefore subsumed within the test of harm."

6. "There is a genuinely held view that disclosure in the public interest is a valid argument and that the Bill falls short of a public interest defence. I do not agree. There are two important matters to be considered on the question of the public interest. The first is where the greater public interest lies and the second is the burden of proof when cases are brought to court. The greater public interest is best served by discouraging through criminal sanctions a disclosure that may be damaging or is likely to be damaging. The Bill puts the onus of proof the right way round, so that Crown servants are discouraged from disclosing information for fear that damage or harm may occur, rather than encouraged to disclose it by a public interest defence."

7. "The burden of proof in such a public interest defence would be on the prosecution which would have to establish, first, that no crime, fraud, abuse of authority, neglect of official duty or other misconduct had occurred and, secondly, that the discloser had acted unreasonably. It might well be impossible to prove that misconduct had not taken place without releasing other important, confidential information which the public interest might require to be kept secret. The prosecution or the Crown would be on the horns of a dilemma. A Crown servant may have

made an allegation of misconduct which on the face of it looks convincing. Public opinion, perhaps reacting to a front-page headline in one of the daily newspapers, would demand that record be put straight. But to do that, the Crown might have to reveal information which ought to be kept secret. That is the real reason why it would not be valid to include in the Bill a public interest defence. The alternative approach is the one in the Bill. The discloser can reveal information provided that he does not cause harm and there is no reasonable likelihood of damage. The burden of proof is on the prosecution to prove harm. Equally, the discloser knows that, however altruistic his motives, if he causes damage he will be guilty of an offence. Therefore, there is a general discouragement. The right balance must be to err on the side of caution. A public interest defence runs the risk of causing more damage to the national interest than the discloser may be seeking to protect. He may be acting only on a narrow appreciation or knowledge of the matters abut which he makes his disclosures. An actual harm requirement, such as that in the Bill, reduces the risk of accidental disclosure. At the end of the day, it cannot be said to be in the public or national interest to disclose information which damages the national interest or is reckless as to whether such damage might occur."

8. "That agent betrays the special trust which has been placed in him or her and undermines confidence in the ability of the services to carry out their vital work. ... It is not just the confidence of the public which is damaged but, equally important, the confidence of those who provide or may provide information to the services, and the confidence of others who necessarily co-operate with them. When a member of the service breaks the necessary silence in which we believe and assert the services must work, he also undermines the confidence of his colleagues in each other."

9. "In the light of the relevant harm tests, the defendant is free to introduce such evidence as he chooses to support his argument that the disclosure was not likely to cause that harm or that he had no reasonable cause to know that it would. He can argue that the prosecution's application of the test of harm is mistaken and that on a proper application of the test his disclosure was not likely, for example, to damage the capability of the armed forces. He may say, on the contrary, that as he was revealing deficiencies his disclosure could not possibly have harmed the forces and could only have enhanced their capability."

10. "Many hon. Members have ignored the pillar of the Bill, which is the harm test. The prosecution must prove that harm has come from disclosure. It is a defence for a Government official who made a

disclosure to show that it caused no harm to the public interest. He can also argue in court that the result of his disclosure was beneficial and that, therefore, there was no harm. ... The public interest decision is taken by the person making the disclosure. He has to decide whether something is worthy of disclosure. If he is wrong, untold harm will be done to the public interest purely and simply on the subjective judgment of that individual."

11. "There is one stark, glaring and serious problem with such a specific defence, which appears to have been missed in all the discussions that I have heard. If the defence fails and the jury says that the accused is culpable, that what he did was not in the public interest, it is too late - the harm has been done and nothing can correct it. The secret is unjustifiably out. The agents are dead. There is no hauling back. That is what is wrong with a specific public interest defence. By having such a defence, we will encourage the unsuitable person to leak. We will encourage the person who wants to make money out of his book to leak and then to claim that what he did was in the public interest. What is wrong with such a defence is that it encourages leaks and there is no going back, if the jury should say that it is an unwarranted defence, because the harm has been done."

12. "The main principle which we are trying to adhere to in the Bill involves harm and whether disclosure was harmful. That principle runs through all our arguments, even when we argue that there is an absolute offence because all forms of disclosure in that category would be harmful. It is not a matter of great principle whether the information has been published before. The central issue is whether the disclosure was harmful. It may well be that in many cases, perhaps even in most cases, the question whether there has been prior publication is relevant in assessing harm. No one denies that. The question is whether it must always be the governing consideration, whatever other arguments might be produced about harm or likely harm."

13. "To return to the main point, which is extremely important, in many examples second publication would do no harm because, if there was any harm, it had been caused by the first publication. In the unlikely event that the prosecuting authorities decided to mount a case, the defence would argue precisely that: it would argue that no damage had been done. Moreover, the prosecution would have to prove that the defendant knew or had reasonable cause to know that such damage would be caused. That is a very high hurdle for a prosecution which was trying to show that, although something had been published elsewhere, there had been

damage on secondary publication which met the test of harm. ... There is no question of there being no prior publication defence. The question is whether that defence should be absolute and should sweep the board in all circumstances, and whether it should trump all other arguments before they are made."

14. "Therefore, it should be open to the prosecution not to make any assumptions but to argue before a jury that the second publication had caused the harm. As I said, it will be a high hurdle that it will have to pass. It will have to prove not only that harm had been done but that those who published it knew that harm was likely to be done. They are two high hurdles."

15. The Bill protects, quite properly, information that needs to be protected from disclosure. If that protection fails, or anyone is given cause or encouragement to believe that the protection is in some way a paper tiger, the Bill would fail in one of its two main purposes. It would give a signal of encouragement, not of deterrence. It would say that as long as some allegedly serious misconduct, or any neglect at all, in the performance of official duties can be identified and can be argued to have been reported to no effect, it is all right to disclose that information whatever damage has been done."

16. "The argument of the Opposition and the proponents of a public interest defence - ... is that it should be allowable for somebody to make a disclosure, however great the damage that might result from that, provided that the information disclosed gave him reasonable cause to believe that it showed some form of serious misconduct or any neglect of official duty."

Annex 3

Reasons for rejecting a public interest defence

HK Hansard

1. "Given the nature of the information concerned, any unauthorized disclosure would of itself be likely to harm the public interest. To provide statutorily for a "public interest" defence for disclosing information relating to matters under one of these areas set out in the legislation would be contradictory."

2. "Evidence of prior disclosure will be relevant in deciding whether a particular disclosure does, in fact, cause harm of a kind specified in the legislation. Where there has been a prior disclosure it will be open for a defendant to argue that the disclosure, which is the subject of the prosecution, has done no further harm. This may not always be the case, however, as there may be circumstances in which the timing and placing of a fresh disclosure may cause harm which an earlier disclosure had not."

3. "We have deliberately defined these areas [of protected information] in narrow terms, so that the unlawful disclosure of information concerning one of these areas would, in itself, cause or be likely to cause substantial harm to the public interest."

4. "We also do not accept that there is any justification for the proposed public interest and prior disclosure defences. The six areas of protected information prescribed under the Bill are narrowly defined on the basis that any disclosure of such information would, of itself, be damaging to the public interest. To therefore include a defence allowing that such a damaging disclosure is in the public interest is self-contradictory. Similarly, we consider the proposed prior disclosure defence to be unjustified. Any disclosure, in its particular circumstances, of the prescribed types of information could have the potential of damaging the public interest. Consequently, every such disclosure should be judged by the Courts within its own circumstances, and not by whether or not there has been prior disclosure."

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