

**National Security (Legislative Provisions) Bill :
Part II of the Official Secrets Ordinance**

This paper discusses –

- (1) the legal implications of the Bill for Part II of the Official Secrets Ordinance (“the Ordinance”);
- (2) the effect of section 3(2) of the Ordinance; and
- (3) the coverage of section 6 of the Ordinance.

Part II

2. Part II of the Ordinance relates to espionage. The Administration has been asked to explain whether the enactment of the Bill would be taken to be an affirmation or endorsement of Part II by the Legislative Council. For the reasons set out below, the Administration does not consider that to be the case.

3. The Consultation Document on Proposals to Implement Article 23 of the Basic Law discussed the theft of state secrets (see Chapter 6). So far as spying is concerned, it stated (in paragraph 6.21) that “the present protection under the Ordinance is adequate as it covers access to, transmission of, dealing with and disclosure of information resulting from spying”. No amendments were proposed to Part II of the Ordinance.

4. Accordingly, the Bill does not propose to amend, repeal or re-enact any of the provisions of Part II. As a result, the Legislative Council is not being called upon to consider any of the provisions in Part II. If it decides to enact amendments to Part III of the Ordinance, that would not therefore indicate approval of Part II. A failure to amend a statutory provision in a Part of an Ordinance, when a Bill relating to that Ordinance does not contain any provision relating to that Part, cannot be regarded as a legislative endorsement of that provision.

5. A way to test the above proposition is to ask how a court would proceed if asked to interpret, or to determine a challenge to the validity of, such a provision. In interpreting the provision, the court would ascertain the legal meaning of the provision by applying established principles of statutory interpretation. One of these principles is that due attention should be paid to the legislative history of the enactment. However, there is no authority for the proposition that legislative inaction of the kind referred to above alters the

meaning of a provision. Even where provisions are re-enacted, without amendment, by way of consolidation, this makes no difference to the legal meaning (see Bennion's *Statutory Interpretation* (3rd ed) p. 464).

6. If a relevant provision were challenged as being inconsistent with human rights guarantees in the Basic Law, an issue might arise as to whether a fair balance had been struck between the need to protect the rights of individuals and the need to protect (for example) national security. In such a situation, proper weight should be given to the decision of the legislature as to what the proper balance should be (see the Court of Final Appeal's decision in *Lau Cheong v HKSAR* [2002] 2 HKLRD 612).

7. The provisions in Part II of the Ordinance reflect the decision of the Legislative Council on that issue when the Ordinance was enacted in June 1997. The current Legislative Council is not being asked to decide whether the balance struck in June 1997 was the right one. Even after the current Bill is enacted, therefore, a court would need to refer to the legislative decision in respect of Part II taken in 1997.

Section 3(2)

8. In Paper No. 42, the Administration discussed the legal effect of section 3(2) of the Ordinance. In doing so, it referred to the fact that the Australian Commonwealth Criminal Review Committee had indicated that a similar provision in Australia did not appear to change significantly the ordinary rules as to proof by the prosecution.

9. At the request of the Bills Committee, the relevant part of that
— Review Committee's report is annexed, together with a copy of the Australian
— provision (i.e. s.78(2)(a) of the Crimes Act 1914).

10. In paragraph 42.40, the Review Committee discussed a possible human rights problem that might exist *if* (contrary to what it states in paragraph 42.36) the provision allowed the defendant's purpose to be inferred from evidence that would otherwise be inadmissible. The Administration wishes to point out that Australia does not have any constitutional protection of human rights. However, in Hong Kong, as a result of Article 39 of the Basic Law, the court would not give effect to section 3(2) of the Ordinance in a manner that would contravene the ICCPR as applied to Hong Kong.

11. Since preparing Paper No. 42, the Administration has learnt that section 78 of the Australian Crimes Act 1914 was repealed and replaced by legislation that received the Royal Assent on 31 October 2002. The new offence does not contain a provision similar to section 3(2) of the Ordinance.

12. For the reasons set out in Paper No. 42, the Administration considers that section 3(2) is consistent with human rights guarantees. Moreover, since the Bill does not propose to amend Part II of the Ordinance, it does not consider section 3(2) should be within the scope of the Bills Committee's deliberations.

Section 6

13. Section 6(1) of the Ordinance provides as follows.

“A person commits an offence if he –

- (a) retains for any purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong any official document, whether or not completed or issued for use, when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any directions issued by any department of the Government of the United Kingdom or Hong Kong or any person authorized by such department with regard to the return or disposal thereof;
- (b) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code word or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or pass word issued for the use of any person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police officer; or
- (c) without lawful authority or excuse, manufactures or sells, or has in his possession for sale any die, seal or stamp mentioned in section 5(1)(e) or (f).”

14. The term “official document” in section 6(1) is not defined. As a result, it would appear that section 6 has a broad coverage. There is, perhaps, a case for providing a definition of “official document” that would restrict the section to a narrower band of documents, the unauthorized use (etc) of which would be particularly damaging to the safety or interests of the PRC or Hong Kong (cf. section 5).

15. Since the Bill does not amend Part II of the Ordinance, it is not proposed to consider a possible amendment of section 6 in the current exercise. Instead, the Administration proposes that the matter be referred to the Security Panel of the Legislative Council, for detailed consideration.

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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⁽⁴⁾. 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⁽⁵⁾, Perry v. The Queen⁽⁶⁾, Sutton v. The Queen⁽⁷⁾ and Noch v. The Queen⁽⁸⁾.

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⁽⁹⁾.

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⁽¹⁰⁾ and R. v. Murphy⁽¹¹⁾.

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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