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MEMO

To : Clerk to the Panel on AJLS

From : Legal Adviser

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Public Interest Defence in Criminal Law

Background

At the AJLS Panel meeting held on 19 January 1999, members requested a research into the topic of public interest defence in criminal law. There is no general definition of "public interest defence". For the purpose of this note, the expression is taken to refer to a defence which would relieve an accused of criminal liability if the proscribed act was done in the public interest. This note seeks to identify criminal provisions for which defences considered as public interest defence have been provided.

Public interest defence as a general defence in criminal law

2. Where the defendant has caused an actus reus with the appropriate mens rea, he will generally be held liable. But this is not invariably so for there are certain defences which may still be available even in this situation. As well as special defences which may apply in the case of particular crimes, there are certain defences which may apply in the case of crimes generally. The following categories of defences are recognised to be general defences in criminal law, namely, infancy, insanity, diminished responsibility, mistake, intoxication, duress and coercion, necessity, public and private defence, superior orders and impossibility. There is no category of public interest defence as a general defence in criminal law. Public defence, on the face of it, may suggest similarity to public interest defence, means the law allows such force to be used as is reasonable in the circumstances by a person to save another person's life or property.

Public interest defence as a defence to offences created by statute

3. The following are examples which may be considered as public interest defence to offences covered by statute:

(a) Section 30 of the Prevention of Bribery Ordinance (Cap. 201)[1]

Section 30(1) of the Ordinance makes it an offence for a person, without lawful authority or reasonable excuse, to disclose the identity and relevant particulars of a person under the investigation of the ICAC to such person or the public. Subsections (2) and (3) provide for certain exceptions to the prohibition on disclosure. Subsection (3) is relevant to our discussion and is produced verbatim as follows:

"(3) 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."

This subsection was added to the Ordinance in 1996 by way of an amendment. The intention was to provide for a public interest defence in the terms specified in paragraphs (a) and (b) so that the court would be provided with specific criteria for determining whether there was reasonable excuse for the proscribed disclosure.

(b) Section 28 of the Control of Obscene and Indecent Articles Ordinance (Cap. 390)[2]

Part IV of the Ordinance provides for a number of offences relating to publishing obscene and indecent articles. Section 28 under the same part of the Ordinance provides that -

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[1] Annex 1.
[2] Annex 2.

> "It shall be a defence to a charge under this Part in respect of the publication of an article or the public display of matter if that publication or display, as the case may be, is found by a Tribunal to have been intended for the public good on the ground that such publication or display was in the interests of science, literature, art or learning, or any other object of general concern."

Where a defence is raised under section 28, the Tribunal should only consider the question of public good after it has come to the conclusion that the article is obscene. It must then consider, on the one hand, the number of readers it believes would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt and the nature of the depravity or corruption. On the other hand, it should assess the strength of the literary, sociological or ethical merit which it considers the book to possess. It should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good[3]. It seems clear that the onus is on the accused to establish the defence on a balance of probabilities[4].

(c) Section 180 of the UK Financial Services Act 1986[5]

Section 179 of the Act makes it an offence for specified persons to disclose information relates to business or other affairs of any persons received in the discharge of the specified persons' functions under the Act. Section 180 (2) provides that section 179 will not preclude the disclosure of information to the Secretary of State or to the Treasury if the disclosure is made in the interests of investors or in the public interest. But there has not been any case on the provision nor any definition of public interest provided for in the Act.

(Jimmy Ma)
Legal Adviser

Encl.

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[3] R. v. Calder and Boyars Ltd [1969] 1 Q.B. 151 at Annex 3.

[4] Ibid.

[5] Annex 4.