

SCHEDULE 2
TO THE ORDER

Article 3.

OFFICIAL SECRETS ACT 1989, AS EXTENDED TO HONG KONG

Security and intelligence.

1.—(1) A person who is or has been—

- (a) a member of the security and intelligence services; or
- (b) a person notified that he is subject to the provisions of this subsection,

is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.

(2) The reference in subsection (1) above to disclosing information relating to security or intelligence includes a reference to making any statement which purports to be a disclosure of such information or is intended to be taken by those to whom it is addressed as being such a disclosure.

(3) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as such but otherwise than as mentioned in subsection (1) above.

(4) For the purposes of subsection (3) above a disclosure is damaging if—

- (a) it causes damage to the work of, or of any part of, the security and intelligence services; or
- (b) it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect.

(5) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to security or intelligence or, in the case of an offence under subsection (3), that the disclosure would be damaging within the meaning of that subsection.

(6) Notification that a person is subject to subsection (1) above shall be effected by a notice in writing served on him by the Governor; and such a notice may be served if, in the Governor's opinion, the work undertaken by the person in question is or includes work connected with the security and intelligence services and its nature is such that the interests of the security of Hong Kong or the national security of the United Kingdom require that he should be subject to the provisions of that subsection.

(7) Subject to subsection (8) below, a notification for the purposes of subsection (1) above shall be in force for the period of five years beginning with the day on which it is served but may be renewed by further notices under subsection (6) above for periods of five years at a time.

(8) A notification for the purposes of subsection (1) above may at any time be revoked by a further notice in writing served by the Governor on the person concerned; and the Governor shall serve such a further notice as soon as, in his opinion, the work undertaken by that person ceases to be such as is mentioned in subsection (6) above.

(9) In this section “security or intelligence” means the work of, or in support of, the security and intelligence services or any part of them, and references to information relating to security or intelligence include references to information held or transmitted by those services or by persons in support of, or of any part of, them.

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Defence.

2.—(1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to defence which is or has been in his possession by virtue of his position as such.

(2) For the purposes of subsection (1) above a disclosure is damaging if—

- (a) it damages the capability of, or of any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to the equipment or installations of those forces; or
- (b) otherwise than as mentioned in paragraph (a) above, it endangers the interests of Hong Kong or of the United Kingdom abroad, seriously obstructs the promotion or protection by Hong Kong or the United Kingdom of those interests or endangers the safety of British nationals or Hong Kong permanent residents abroad; or
- (c) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects.

(3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to defence or that its disclosure would be damaging within the meaning of subsection (1) above.

(4) In this section “defence” means—

- (a) the size, shape, organisation, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown;
- (b) the weapons, stores or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it;
- (c) defence policy and strategy and military planning and intelligence;
- (d) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war.

International relations.

3.—(1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of—

- (a) any information, document or other article relating to international relations; or
- (b) any confidential information, document or other article which was obtained from a territory other than Hong Kong or a State other than the United Kingdom or an international organisation,

being information or a document or article which is or has been in his possession by virtue of his position as a Crown servant or government contractor.

(2) For the purposes of subsection (1) above a disclosure is damaging if—

- (a) it endangers the interests of Hong Kong or of the United Kingdom abroad, seriously obstructs the promotion or protection by Hong Kong or the United Kingdom of those interests or endangers the safety of British nationals or Hong Kong permanent residents abroad; or
- (b) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects.

(3) In the case of information or a document or article within subsection (1)(b) above—

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- (a) the fact that it is confidential, or
- (b) its nature or contents,

may be sufficient to establish for the purposes of subsection (2)(b) above that the information, document or article is such that its unauthorised disclosure would be likely to have any of the effects there mentioned.

(4) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question was such as is mentioned in subsection (1) above or that its disclosure would be damaging within the meaning of that subsection.

(5) In this section “international relations” means the relations between States, between international organisations or between one or more States and one or more such organisations and includes—

- (a) any matter relating to a State other than the United Kingdom or to an international organisation which is capable of affecting the relations of the United Kingdom with another State or with an international organisation;
- (b) any matter relating to the relations between the United Kingdom and Hong Kong or the external relations of Hong Kong.

(6) For the purposes of this section any information, document or article obtained from a territory, State or organisation is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the territory, State or organisation to expect that it would be so held.

Crime and special investigation powers.

4.—(1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he discloses any information, document or other article to which this section applies and which is or has been in his possession by virtue of his position as such.

(2) This section applies to any information, document or other article—

- (a) the disclosure of which—
 - (i) results in the commission of an offence; or
 - (ii) facilitates an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or
 - (iii) impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or
- (b) which is such that its unauthorised disclosure would be likely to have any of those effects.

(3) This section also applies to any information obtained by reason of action taken under an order issued under section 33 of the Telecommunication Ordinance⁽¹⁾, or under a warrant issued under section 13(1) of the Post Office Ordinance⁽²⁾, any information relating to the obtaining of information by reason of such action and any document or other article which is or has been used or held for use in, or has been obtained by reason of, any such action.

(4) It is a defence for a person charged with an offence under this section in respect of a disclosure falling within subsection (2)(a) above to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the disclosure would have any of the effects there mentioned.

(1) Laws of Hong Kong, Cap. 106.

(2) Laws of Hong Kong, Cap. 98.

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(5) It is a defence for a person charged with an offence under this section in respect of any other disclosure to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question was information or a document or article to which this section applies.

(6) In this section “legal custody” includes detention in pursuance of any enactment or any instrument made under an enactment.

Information resulting from unauthorised disclosures or entrusted in confidence.

5.—(1) Subsection (2) below applies where—

- (a) any information, document or other article protected against disclosure by the foregoing provisions of this Act has come into a person’s possession as a result of having been—
 - (i) disclosed (whether to him or another) by a Crown servant or government contractor without lawful authority; or
 - (ii) entrusted to him by a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which the Crown servant or government contractor could reasonably expect that it would be so held; or
 - (iii) disclosed (whether to him or another) without lawful authority by a person to whom it was entrusted as mentioned in sub-paragraph (ii) above; and
- (b) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not an offence under any of those provisions.

(2) Subject to subsections (3) and (4) below, the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure by the foregoing provisions of this Act and that it has come into his possession as mentioned in subsection (1) above.

(3) In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless—

- (a) the disclosure by him is damaging; and
- (b) he makes it knowing, or having reasonable cause to believe, that it would be damaging;

and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or 3(1) above.

(4) A person does not commit an offence under subsection (2) above in respect of information or a document or other article which has come into his possession as a result of having been disclosed—

- (a) as mentioned in subsection (1)(a)(i) above by a government contractor; or
- (b) as mentioned in subsection (1)(a)(iii) above,

unless that disclosure was by a British national or Hong Kong permanent resident or took place in Hong Kong.

(5) For the purposes of this section information or a document or article is protected against disclosure by the foregoing provisions of this Act if—

- (a) it relates to security or intelligence, defence or international relations within the meaning of section 1, 2 or 3 above or is such as is mentioned in section 3(1)(b) above; or
- (b) it is information or a document or article to which section 4 above applies;

and information or a document or article is protected against disclosure by sections 1 to 3 above if it falls within paragraph (a) above.

(6) A person is guilty of an offence if without lawful authority he discloses any information, document or other article which he knows, or has reasonable cause to believe, to have come into his possession as a result of a contravention of section 1 of the Official Secrets Act 1911.

Information entrusted in confidence to territories, States or international organisations.

6.—(1) This section applies where—

(a) any information, document or other article which—

(i) relates to security or intelligence, defence or international relations; and

(ii) has been communicated in confidence by or on behalf of the Government of Hong Kong or by or on behalf of the United Kingdom to another territory or State or to an international organisation,

has come into a person's possession as a result of having been disclosed (whether to him or another) without the authority of that territory, State or organisation or, in the case of an organisation, of a member of it; and

(b) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not an offence under any of the foregoing provisions of this Act.

(2) Subject to subsection (3) below, the person into whose possession the information, document or article has come is guilty of an offence if he makes a damaging disclosure of it knowing, or having reasonable cause to believe, that it is such as is mentioned in subsection (1) above, that it has come into his possession as there mentioned and that its disclosure would be damaging.

(3) A person does not commit an offence under subsection (2) above if the information, document or article is disclosed by him with lawful authority or has previously been made available to the public with the authority of the territory, State or organisation concerned or, in the case of an organisation, of a member of it.

(4) For the purposes of this section “security or intelligence”, “defence” and “international relations” have the same meaning as in sections 1, 2 and 3 above and the question whether a disclosure is damaging shall be determined as it would be in relation to a disclosure of the information, document or article in question by a Crown servant in contravention of section 1(3), 2(1) and 3(1) above.

(5) For the purposes of this section information or a document or article is communicated in confidence if it is communicated on terms requiring it to be held in confidence or in circumstances in which the person communicating it could reasonably expect that it would be so held.

Authorised disclosures.

7.—(1) For the purposes of this Act a disclosure by—

(a) a Crown servant; or

(b) a person, not being a Crown servant or government contractor, in whose case a notification for the purposes of section 1(1) above is in force,

is made with lawful authority if, and only if, it is made in accordance with his official duty.

(2) For the purposes of this Act a disclosure by a government contractor is made with lawful authority if, and only if, it is made—

(a) in accordance with an official authorisation; or

(b) for the purposes of the functions by virtue of which he is a government contractor and without contravening an official restriction.

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(3) For the purposes of this Act a disclosure made by any other person is made with lawful authority if, and only if, it is made

- (a) to a Crown servant for the purposes of his functions as such; or
- (b) in accordance with an official authorisation.

(4) It is a defence for a person charged with an offence under any of the foregoing provisions of this Act to prove that at the time of the alleged offence he believed that he had lawful authority to make the disclosure in question and had no reasonable cause to believe otherwise.

(5) In this section “official authorisation” and “official restriction” mean, subject to subsection (6) below, an authorisation or restriction duly given or imposed by a Crown servant or government contractor or by or on behalf of a prescribed body or a body of a prescribed class.

(6) In relation to section 6 above “official authorisation” includes an authorisation duly given by or on behalf of the territory, State or organisation concerned or, in the case of an organisation, a member of it.

Safeguarding of information.

8.—(1) Where a Crown servant or government contractor, by virtue of his position as such, has in his possession or under his control any document or other article which it would be an offence under any of the foregoing provisions of this Act for him to disclose without lawful authority he is guilty of an offence if—

- (a) being a Crown servant, he retains the document or article contrary to his official duty; or
- (b) being a government contractor, he fails to comply with an official direction for the return or disposal of the document or article,

or if he fails to take such care to prevent the unauthorised disclosure of the document or article as a person in his position may reasonably be expected to take.

(2) It is a defence for a Crown servant charged with an offence under subsection (1)(a) above to prove that at the time of the alleged offence he believed that he was acting in accordance with his official duty and had no reasonable cause to believe otherwise.

(3) In subsections (1) and (2) above references to a Crown servant include any person, not being a Crown servant or government contractor, in whose case a notification for the purposes of section 1(1) above is in force.

(4) Where a person has in his possession or under his control any document or other article which it would be an offence under section 5 above for him to disclose without lawful authority, he is guilty of an offence if—

- (a) he fails to comply with an official direction for its return or disposal; or
- (b) where he obtained it from a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which that servant or contractor could reasonably expect that it would be so held, he fails to take such care to prevent its unauthorised disclosure as a person in his position may reasonably be expected to take.

(5) Where a person has in his possession or under his control any document or other article which it would be an offence under section 6 above for him to disclose without lawful authority, he is guilty of an offence if he fails to comply with an official direction for its return or disposal.

(6) A person is guilty of an offence if he discloses any official information, document or other article which can be used for the purpose of obtaining access to any information, document or other article protected against disclosure by the foregoing provisions of this Act and the circumstances in which it is disclosed are such that it would be reasonable to expect that it might be used for that purpose without authority.

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(7) For the purposes of subsection (6) above a person discloses information or a document or article which is official if—

- (a) he has or has had it in his possession by virtue of his position as a Crown servant or government contractor; or
- (b) he knows or has reasonable cause to believe that a Crown servant or government contractor has or has had it in his possession by virtue of his position as such.

(8) Subsection (5) of section 5 above applies for the purposes of subsection (6) above as it applies for the purposes of that section.

(9) In this section “official direction” means a direction duly given by a Crown servant or government contractor or by or on behalf of a prescribed body or a body of a prescribed class.

Prosecutions.

9. No prosecution for an offence under this Act shall be instituted except by or with the consent of the Attorney General of Hong Kong.

Penalties.

10.—(1) A person guilty of an offence under any provision of this Act other than section 8(1), (4) or (5) shall be liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine not exceeding \$500,000 or both;
- (b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding \$50,000 or both.

(2) A person guilty of an offence under section 8(1), (4) or (5) above shall be liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding \$20,000 or both.

11.—(1) Section 9(1) of the Official Secrets Act 1911 (search warrants) shall have effect as if references to offences under that Act included references to offences under any provision of this Act other than section 8(1), (4) or (5).

(2) Section 8(4) of the Official Secrets Act 1920 (exclusion of public from hearing on grounds of national safety) shall have effect as if references to offences under that Act included references to offences under any provision of this Act other than section 8(1), (4) or (5).

(3) Proceedings for an offence under this Act may be taken in the High Court in the exercise of its criminal jurisdiction, in the District Court or before a magistrate.

“Crown servant” and “government contractor”.

12.—(1) In this Act “Crown servant” means—

- (a) any person holding an office of emolument under the Crown in right of the Government of Hong Kong, whether such office be permanent or temporary;
- (b) any person employed in the civil service of the Crown in right of the United Kingdom, including Her Majesty’s Diplomatic Service and Her Majesty’s Overseas Civil Service;
- (c) any member of the naval, military or air forces of the Crown;
- (d) any person who is a member or employee of a prescribed body or a body of a prescribed class and either is prescribed for the purposes of this paragraph or belongs to a prescribed class of members or employees of any such body;

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- (e) any person who is the holder of a prescribed office or who is an employee of such a holder and either is prescribed for the purposes of this paragraph or belongs to a prescribed class of such employees.
- (2) In this Act “government contractor” means, subject to subsection (3) below, any person who is not a Crown servant but who provides, or is employed in the provision of, goods or services—
- (a) for the purposes of the Crown in right of the Government of Hong Kong, of any of the services, forces or bodies mentioned in subsection (1) above or of the holder of any office prescribed under subsection (1) above; or
 - (b) under an agreement or arrangement certified by the Governor as being one to which the government of a territory other than Hong Kong or of a State other than the United Kingdom or an international organisation is a party or which is subordinate to, or made for the purposes of implementing, any such agreement or arrangement.
- (3) Where an employee or class of employees of any body, or of any holder of an office, is prescribed by an order made for the purposes of subsection (1) above—
- (a) any employee of that body, or of the holder of that office, who is not prescribed or is not within the prescribed class; and
 - (b) any person who does not provide, or is not employed in the provision of, goods or services for the purposes of the performance of those functions of the body or the holder of the office in connection with which the employee or prescribed class of employees is engaged,
- shall not be a government contractor for the purposes of this Act.

Other interpretation provisions.

13.—(1) In this Act—

“British national” means a British citizen, a British Overseas citizen, a British Dependent Territories citizen, a British National (Overseas) or a British protected person;

“disclose” and “disclosure”, in relation to a document or other article, include parting with possession of it;

“Governor” means the Governor of Hong Kong, the acting Governor and any Deputy to the Governor, and includes any person authorised by the Governor to perform any of his functions under this Act;

“Hong Kong permanent resident” has the meaning assigned to that term by section 2(1) of the Immigration Ordinance⁽³⁾;

“international organisation” means, subject to subsections (2) and (3) below, an organisation of which only States or States and territories are members and includes a reference to any organ of such an organisation;

“prescribed” means prescribed by an order made by the Governor;

“State” includes the government of a State and any organ of its government;

“territory” means any territory, not being a State, outside Hong Kong.

(2) In section 12(2)(b) above the reference to an international organisation includes a reference to any such organisation whether or not one of which only States or States and territories are members and includes a commercial organisation.

(3) In determining for the purposes of subsection (1) above whether only States or States and territories are members of an organisation, any member which is itself an organisation of which only States are members, or which is an organ of such an organisation, shall be treated as a State.

(3) Laws of Hong Kong, Cap. 115.

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Acts done abroad.

14. Any act done by a British national or Crown servant or by a Hong Kong permanent resident shall, if it would be an offence by that person under any provision of this Act other than section 8(1), (4) or (5) when done by him in Hong Kong, be an offence under that provision.

Repeals.

15. The enactments mentioned in the Schedule to this Act are hereby repealed in their application to Hong Kong to the extent specified in the third column of that Schedule.